Retail compass

Issue 7 April 2022

YOUR QUICK REFERENCE GUIDE TO LEGAL DEVELOPMENTS IN RETAIL

How is technology shaping retail and consumer brands?

Welcome to the 2022 Spring Edition of Retail Compass

Welcome to the Spring edition of Retail Compass, where we guide you through key upcoming legal and policy changes affecting Retail and Consumer Brands and provide our thoughts on those crucial, need-to-know issues.

We cover an array of topics about the challenges and opportunities for the sector including the digitalisation of supply chains, the online sales tax consultation, the arbitration scheme for commercial rent arrears, the NMW hourly rate rise, NFTs, the resurgence of IP copyright claims and much more besides.

Alongside our horizon scanning pieces and other developments, we have a guest contribution from techUK, on the retail revolution.

We also include key statistics and links to our legislation tracker which list all of the UK Government consultations and inquiries relevant to Retail and Consumer Brands. We hope you find this publication useful, and as always, please do not hesitate to contact us if you have any comments or queries.

FROM TOP
KAREN HENDY
JEREMY DREW

Retail Compass is edited by Georgia Davis (Of Counsel) and a team from RPC Retail.

THANKS FOR READING OUR LATEST ISSUE OF RETAIL COMPASS

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Contents

1 FOREWORD

Foreword by techUK

3 TIMELINE

Retail and consumer timeline 2022/23

5 HORIZON SCANNING

5 Digitalisation of supply chains update – how to help combat pandemics and Brexit and prepare for the unknown…

7 IP: AI and NFTs – Joining the NFT market: a checklist for retailers

9 The ASA weighs in on the marketing of "No/Lo" alcohol drinks as the category soars

11 Extended producer responsibility for packaging shifts the financial burden onto "obligated producers"

13 Update on taxes reliefs and customs and excise measures for 2022 and beyond

15 The new data regime proposals – a Brexit dividend?

17 The Omnibus Directive – consumer rights extended to "free" digital content and services

19 The Employment Bill and the extension of duties on employers

21 RETAIL STATS

Snapshot of retail statistics – UK

Snapshot of retail statistics – Global #1

Snapshot of retail statistics – Global #2

27 OTHER DEVELOPMENTS

27 Copycat goods – traditional copycat claims be-gin to show their cracks by Ben Mark, Ashleigh Fehrenbach and Sarah Mountain

28 ASA and greenwashing claims – ASA and CMA team up to tackle misleading green claims by Ciara Cullen and Sophie Tuson

28 The DSAR dilemma by Jon Bartley, Amy Blackburn and Kiran Dhoot

29 Property and business rates – business rates reform – new obligations for retailers by Elizabeth Alibhai and Mike Kilner

29 Property and sustainability developments – building regulations reform – an opportunity for retailers by Elizabeth Alibhai and Mike Kilner

30 New legislation incoming – arbitration scheme for commercial rent arrears by Tim Moynihan and Finella Fogarty

30 National minimum wage hourly rates will rise on 1 April 2022 by Patrick Brodie

30 I&D and the British Retail Consortium charter by Kelly Thomson

31 Cybercrime – ransomware in retail by Richard Brevington and Daniel Guilfoyle

31 Corporate FCA ESG reporting – gender and ethnic diversity disclosures for listed companies by Karen Hendy and Richard Martin

32 CMA's vertical block exemption consultation – UK to Introduce its own Safe Harbour for Vertical Agreements by Lambros Kilaniotis and Melanie Musgrave

33 Groceries supply code of practice: Amazon joins the £1bn grocery suppliers' club by Lambros Kilaniotis and Melanie Musgrave

33 Retail/tech startup trends soft loans – another funding option for start-ups by Sukh Ahark, Edward Colville and Sarah Snow

35 International topic (Asia): Asia Data Privacy Law Changes – changes to data protection legislation in Asia – 2022 update by Summer Montague and Stephanie Northcott

35 International topic (HK): UN Convention on Contracts for the International Sale of Goods – Hong Kong – upcoming changes to international sale of goods contracts by Andrew Carpenter and Stephanie Northcott

36 International topic (China): Virtual key opinion leader – the rise of virtual key opinion leaders in China by Jason Carmichael and Armani Cheng

Foreword by techUK

Welcome to the retail revolution

Gone are the days when we couldn't imagine all the ways technology might transform the world of retail.

From contactless payments, QR codes and virtual reality to omnichannel retail, supply chain management software and customisation, the digitalisation of the retail sector continues apace.

It's changing not only the way retailers operate or how consumers shop, but also heralding a much brighter and healthier future for high streets across the UK, as highlighted by this edition of Retail Compass.

Technology is a welcome boon for the traditional high street. More than ten years ago, the Portas Review identified the key challenges faced by UK high streets and in 2022 many of those same issues remain – rising business rates, a decline in real wages particularly outside of London, stagnant economic growth, parking and infrastructure problems, the continued rise in large shopping centres outside of towns, and the rise of online commerce.

Most recently, high street businesses were hit by the constraints on footfall during the COVID-19 pandemic and consequently adopted digital technologies to expand online operations.

Now, as the world reopens once more, technology is at the forefront of bringing new vigour to the high street and responding to the needs of local communities and economies.

This much-welcome retail revolution is at the core of techUK's latest study, Technology and the Future of the UK High Street, which explores how retailers, small businesses and local authorities are meeting the challenges of a post-Covid world through the employment of digital solutions.

techUK has identified three keys ways in which technology is transforming retail as we know it:

Building an omnichannel high street

Omnichannel retail can both revitalise the high street, as well as open new opportunities for businesses with bricks and mortar assets. Other technologies such as augmented reality, virtual reality, QR codes, blockchain, personalisation, contactless payments and supply chain management software can all contribute to improving customer experience in-store and operational efficiency.

Putting the high street at the centre of the local economy and community

Changes in the way that people live and work over the last 18 months seem set to prevail, to some extent. This creates new opportunities for local communities opened up by increased numbers of remote workers who are no longer commuting regularly, all enabled by technology. High streets can respond to these changes not only by catering for remote workers, but also by making local high streets a place to work, through better connectivity and dedicated workspaces and tech hubs. There is also an opportunity for high streets to be used as centres for arts, culture and entertainment, which can be supported by technology.

Transforming accessibility

Technology can support improved access to the high street, whether it is information on public transport, managing parking spaces, or last-mile micromobility solutions.

Looking to the wider horizon, technology almost certainly has its place in helping retailers overcome the challenges caused by regulatory reform, increased responsibilities and global crises. In this edition of Retail Compass, we highlight some of the major challenges that retailers must set sail and navigate around as we Spring into the second quarter of the year.

Plastic packaging tax

A new tax has just come into effect on plastic packaging manufactured in or imported into the UK that is not made up of at least 30 per cent recycled material. Companies that import or manufacture more than 20 tonnes of plastic packaging annually will be taxed £200 per tonne of packaging. It's likely that these costs will be passed down to the consumer. While most retailers will opt to purchase products with more recycled packaging, some may look to purchase from smaller manufacturers that do not meet the threshold for coming under the scope of the tax.

IP risks associated with Non-Fungible Tokens (NFTs)

Lack of regulation of the NFT market means that brands looking to capitalise on the growing trend face increased risks to their intellectual property. Brands are advised to take action to protect their copyright, such as including provisions within contracts that creators cannot 're-mint' the NFT, which would cause a drop in its value, as well as check whether the terms of their insurance covers losses from NFTs being stolen by hackers or server failures. It is also important to carefully review the terms of any agency 'minting' the NFT to ensure these accurately reflect the marketing claims of the NFT.

Digitalisation of supply chain

The severe disruption to supply chains, arising from Brexit, the Covid-19 pandemic and now the war in Ukraine, comes at a time when consumers are expecting increasingly speedy deliveries. Digitalisation is key to ensuring expectations are met amid these global challenges. Retailers need to use advanced analytics, smart procurement tools, planning and execution systems and

real-time reporting. Incorporating this technology will provide retailers with visibility throughout all stages of the supply chain, meaning they can quickly anticipate and deal with disruption. Another key element will be training staff members in how to interact with and utilise this technology.

Data regime

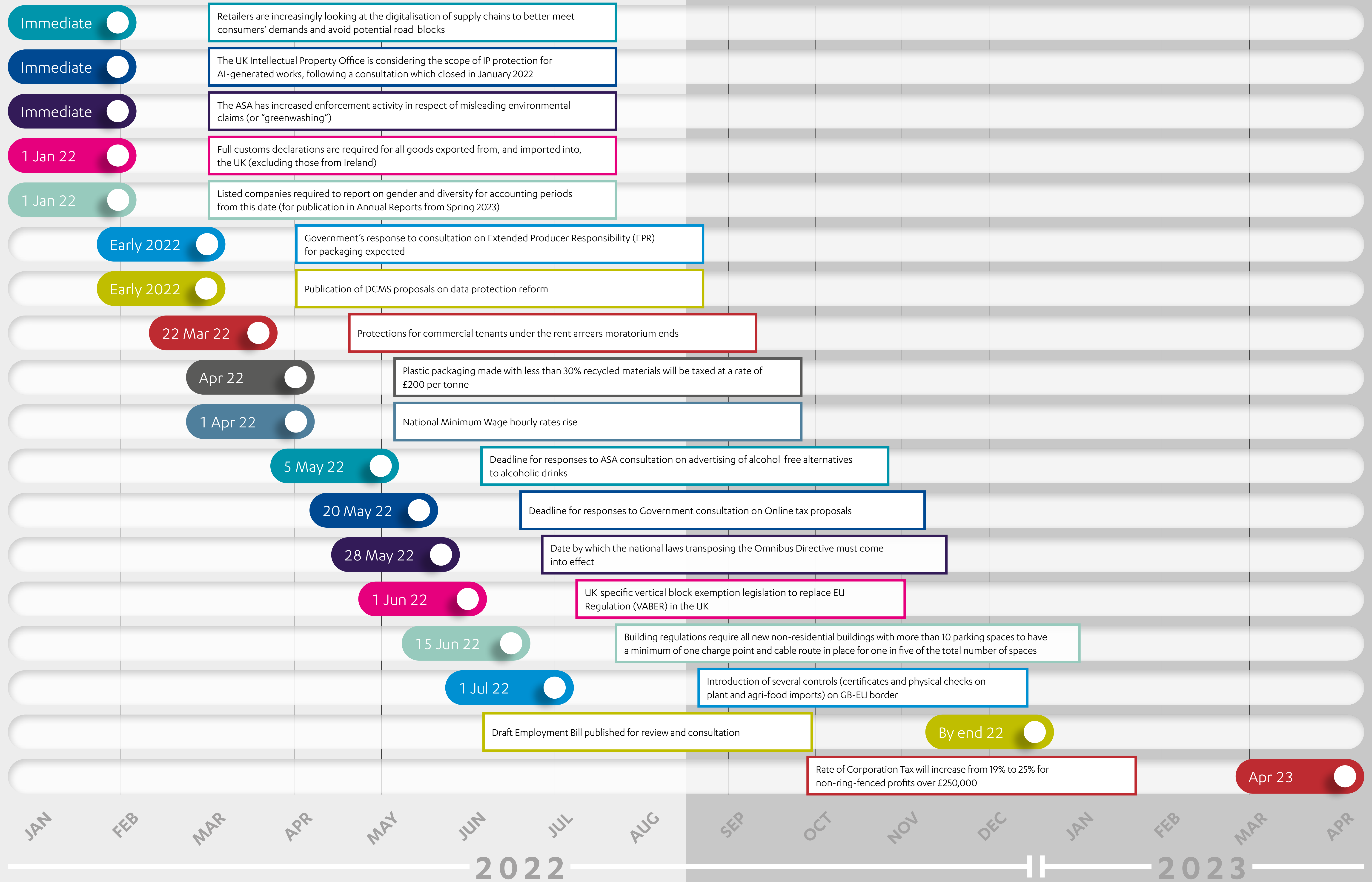
The UK's new data protection proposals are set to offer businesses an alternative to GDPR. The regime is believed to be less time and labour-intensive for businesses.

It will seek to make the e-commerce process more streamlined for customers, but businesses that operate in the EU will still need to employ GDPR, suggesting that many will need to take a twin-track approach to data compliance.

This could prove costly to retailers that need to be compliant with two different regimes. The Information Commissioner's Office has also voiced concerns that the balance between reducing the administrative burden on businesses and protecting the rights of individuals may be tipping in the wrong direction.

While the challenges ahead for retailers are already aplenty for 2022, key to overcoming these will be the adoption of technology solutions, helping businesses work smarter, faster, more efficiently and sustainably. And for consumers, technology will continue to bring a whole new experience to their homes and on the high street. The retail revolution has indeed arrived.

Retail and consumer timeline 2022/23



Digitalisation of supply chains update – how to help combat pandemics and Brexit and prepare for the unknown...

by Tom Purton, Eleanor Harley and Tom James

ONGOING

WHAT IS HAPPENING?

Whilst the demands and nature of retailers' supply chains are constantly evolving, Brexit and the Covid-19 pandemic have accelerated that evolution. The traditional supply chain, formed of a series of individual, somewhat disjointed, steps, is beginning to give way to a more holistic model brought about through the digitalisation of the supply chain. This is looking to create a more integrated and efficient route to market. The previously linear approach of a supply "chain", is now being replaced by the concept of a digital supply "network".

WHY DOES IT MATTER?

The Covid-19 pandemic and Brexit have both resulted in an increased focus on the supply chain as retailers attempt to react and adapt to changing consumer demands. Whilst strains on supply chains were already in evidence, Brexit and Covid have significantly accelerated the pace of change as retailers react to consumer behaviour and changing purchasing patterns:

- **Covid-19** – has marked a significant change in consumers' behaviour and expectations. An increasing number of consumers now transact online for goods which they may previously have purchased from bricks-and-mortar stores. Consumers expect to be able to obtain whatever goods they want or need, without delay. Retailers are also being required to enhance profitability to recoup pandemic-related losses, as well as explore new growth opportunities in post-Covid economies
- **Brexit** – has disrupted the supply chain through more demanding disclosure, form filling and compliance resulting in greater time and delay and material increased costs. UK supply chains have also suffered from a diminished workforce due to new visa requirements.

Digitalisation of the supply chain is a key method through which retailers can combat these challenges and lessen the commercial impact of a consumer-driven supply chain. Digitalisation brings together all aspects of the supply chain to create a fully integrated system that allows stakeholders to work together more efficiently.

This integration provides retailers with end-to-end visibility throughout the supply chain, facilitating rapid information sharing, thereby reducing administrative burdens and accelerating response times to blockages.

Additionally, enhanced transparency across the supply chain allows retailers to view the live status of products no matter where they are along the production/ supply journey (for example in production or in transit) which allows for data-driven decision making to ensure the timely delivery of products. Crucially, this will help empower retailers to be proactive rather than reactive to changes in circumstances or other potential supply chain disruptions, drive efficiency and manage expectations in an ever demanding market where the promise of rapid fulfilment of an order for a product is increasingly a key driver for consumers choosing to purchase it.

WHAT ACTION SHOULD YOU CONSIDER?

1. **Assess the demands** – it is sensible to keep your strategic business requirements under review allowing you to respond quickly to consumer-driven demands, to maximise the out-put from your supply chains and identify whether additional capabilities may need to be built-in to enable that (eg supplier and carrier connections, end-to-end analytics, product and stock visibility, forecasting and real-time key performance indicators).
2. **Technology investment** – many retailers are beginning to move to a digitalised supply chain through transformation of existing practices and investment in technology (eg third party integrated solutions).

   Although one huge overhaul is not necessarily required, a patchwork approach to e-commerce platforms by making modifications to legacy systems should ideally be avoided. Instead, it may be better to think holistically and continue to review the transformation of the supply chain from end-to-end on a regular basis. Key technologies to be implemented may include: advanced analytics; smart procurement; planning and execution systems; and real-time reporting. Robust business continuity plans should form a key part of any tech driven solution.
3. **Digital Education** – upskilling existing staff members rather than outsourcing digitalisation operations can have significant benefits to a retailer's business, keeping knowledge in the business and allowing for a more integrated service, as well as keeping costs down. Further investment in a culture of information sharing across the supply chain should also help to combat issues as they arise and before they become significant blockers.

Only 2%

of companies have visibility into their supply base beyond the second tier

Source: Mckinsey

Horizon scanning (continued)

IP: AI and NFTs – Joining the NFT market: a checklist for retailers

by Ben Mark and Sarah Mountain

IMMEDIATE/JANUARY 2022 (AI CONSULTATION CLOSED)

WHAT IS HAPPENING?

Whilst the uses and popularity of NFTs longer-term are open to speculation, the current excitement around NFTs presents a unique tool for retailers to drive revenues and increase customer engagement. However, the currently unregulated nature of the sector attracts certain risks that retailers should be mindful of and protect against. This is explained in more detail below.

WHY DOES IT MATTER?

An NFT is a unique data token, which allows digital content to be stored and authenticated on cryptocurrency blockchains. A smart contract within the blockchain then ensures that the data is transparent and cannot be altered.

As there is no physical copy of the digital content in question, there is a lack of control over the asset, which is problematic for those dealing in NFTs.

Without contractual restrictions, an NFT may be 're-minted' by its creator, resulting in a drop in value. In those circumstances, the purchaser's only option is to rely on the relevant smart contract, to the extent that it provides any recourse.

Further, the underlying assets are often not directly attached to, or stored in, the blockchain itself; rather the blockchain token ordinarily contains a link to the file, which is hosted on a third-party website. Any issues with this link or host server and/or page will mean that the NFT no longer links to the original article.

This uncertainty and lack of control creates an overarching risk of damage to a brand's reputation. NFT purchasers will expect a reputable brand to carry out due diligence and to protect the value of the NFT through safeguards which prevent modification or destruction.

AI-generated NFTs – the next trend?

Although the NFT market is currently dominated by cartoons and memes, a new form of artwork is emerging: AI-generated NFTs. AI-generated art is fully unique as it is created by an algorithm. This effectively allows retailers to own their own AI artist, which produces content that can be minted. This gives increased protection by eliminating the risks associated with involving a third party creator. Despite being a relatively new concept, there has been a huge increase in the volume of AI-generated art in the NFT space.

Retailers hoping to exploit this trend, or already holding IPR in AI-generated works should have in mind the UK IPO's recent consultation (which closed in January). In response to concerns that the imbalance of IP protection for AI works and human works is creating a barrier in the development of AI itself, the following issues were addressed:

- development of a specific IPR for AI-devised inventions to protect those that currently fail to qualify for patent protection
- possible expansion of the existing text and data mining exception for copyright, and
- potential reduction or removal in the copyright protection available for computer-generated works without a human author.

WHAT ACTION SHOULD YOU CONSIDER?

Retailers and brands should be aware of the following to protect against the risks associated with NFTs:

1. always carry out due diligence to ensure that the underlying asset cannot be modified
2. carefully review the T&Cs of any agency minting NFTs on your behalf and ensure that these accurately reflect the marketing claims of the NFT
3. despite the uncertainty around the legal status of 'smart contracts', agree specific contractual obligations to address certain risks. For example, a requirement that the underlying artwork must be hosted in a secure third-party server
4. if a brand is relying on third parties to pass on royalty payments to artists in the event of onward sale, agree a process for tracking this to avoid disputes, and
5. check whether insurance policies cover any losses suffered by the NFT purchaser – for example, cybersecurity policies may provide coverage in the event of hacking, theft or server failure.

In 2021, at least **$44.2bn** worth of cryptocurrency was spent on Ethereum smart contracts associated with NFT marketplaces and collections.

The vast majority of NFT transactions (more than **75%** of the market) are at retail level ie below $10,000 worth of cryptocurrency.

Horizon scanning (continued)

The ASA weighs in on the marketing of "No/Lo" alcohol drinks as the category soars

by Ciara Cullen, Harpreet Kaur and Samuel Coppard

ONGOING/5 MAY 2022 (DEADLINE FOR RESPONSES TO ASA CONSULTATION)

WHAT IS HAPPENING?

Seeking to bring the Advertising rules on No/Lo products in line with the sector's increasing prominence:

- in January 2022, the Advertising Standards Authority (ASA) amended the rules under both the UK Code of Broadcast Advertising (the BCAP Code) and Non-broadcast Advertising and Direct & Promotional Marketing (the CAP Code) on the advertising of low alcohol drinks, and
- in February 2022, the ASA opened a three month consultation on the advertising of alcohol free alternatives to alcoholic drinks.

62.5%

of 2,100 adults surveyed across the UK (two-thirds) had at least tried a low and/or no alcohol product.

Source: Portman Group survey

WHY DOES IT MATTER?

As health and wellbeing continues to permeate the nation's psyche in the aftermath of the Covid-19 pandemic, consumers have indicated a stark desire to invest in their wellbeing and shift to healthier lifestyle choices. One such choice which has taken the UK food and drink industry by storm, is the health-conscious consumer's desire to reduce their alcohol intake.

Whilst demand for traditional alcoholic products remains strong (perhaps unsurprisingly), the No/Lo market has gathered immense traction in the UK over the past couple of years, with Kantar reporting that supermarket sales of No/Lo alcohol products increased by 50.6% between 2020 and 2021.

The ASA has identified the recent uptake in the No/Lo market and recognised that raising awareness of the category through advertising could work to reduce alcohol consumption and preserve long-term health. With that in mind, the ASA reviewed the Advertising rules in relation to the marketing of no/lo alcohol drinks.

Low Alcohol

Prior to 18 January 2022, low alcohol drinks ie, products with an ABV of 0.5% to 1.2%, could only be advertised as "preferable" for their low strength if they were the only product type in the ad. They could not be promoted as "preferable" to higher strength drinks, as the mere reference to the higher strength drink was classed as its promotion, in breach of the Advertising rules. The ASA considered that this prevented the proper promotion of a category of products which consumers were increasingly vested in and thus removed the restriction from the Advertising rules, allowing retailers and brands to advertise low alcohol products alongside higher strength drinks.

No Alcohol

Alcohol free alternatives to alcoholic drinks are not currently covered by the Advertising rules, but given their increasing popularity, the ASA is currently consulting on the implementation of new rules and guidance on their marketing. The proposed rules include a definition of "alcohol alternatives" (ie products at or under 0.5% ABV) and cover the concurrent promotion of alcohol alternatives and alcoholic drinks, as well as the inclusion of ABV statements for alcohol alternatives with an ABV higher than 0%.

WHAT ACTION SHOULD YOU CONSIDER?

For retailers and brands alike, the No/Lo category is of great interest:

- retailers should consider showcasing No/Lo products alongside traditional alcoholic beverages in order to capture No/Lo converts and new audiences who may not yet have considered the No/Lo option
- to avoid getting into hot water with the ASA, it would be sensible for retailers to actively monitor the regulatory landscape in the No/Lo space to ensure that they: (i) do not mislead consumers when it comes to the marketing of No/Lo products, and (ii) comply with any applicable Advertising rules relating to the advertisement of alcoholic beverages when advertising No/Lo drinks, as there is significant overlap across the rules
- that being said, there is a balance to be struck by retailers and consumer brands between No/Lo products and traditional alcoholic products – which will no doubt continue to benefit the bottom line – particularly as consumer insights from Kantar demonstrate that the vast majority of No/Lo shoppers also purchase alcohol
- as the ASA turns its attention to the No/Lo market, we suspect it will not be long before the Government considers ways to support the category, given ongoing commitments to tackle obesity, such as tax incentives for those producing and selling No/Lo beverages.

HORIZON SCANNING

Horizon scanning (continued)

Extended producer responsibility for packaging shifts the financial burden onto "obligated producers"

by Jeremy Drew, Henry Priestley and Harpreet Kaur

FROM 2023 (CONSULTATION RESPONSE TO BE MONITORED)

WHAT IS HAPPENING?

The current UK packaging system works under a shared responsibility approach where the obligation to comply with packaging obligations covers all stages of the supply chain. In an attempt to reduce the volume of hard-to-recycle packaging on the market, and in many ways echoing new EU legislation in this space, the Government recently consulted on the introduction of the Extended Producer Responsibility Scheme (the Scheme), which shifts 100% of the cost of managing packaging once it becomes waste, to the producers.

WHY DOES IT MATTER?

Extended Producer Responsibility (EPR) is a globally established policy approach which seeks to encourage producers to make more sustainable decisions when producing products, by placing the financial burden of managing products at the end of life stage on the producers. 2022 has already brought a wave of EPR developments across the EU. In January, France introduced legislation to extend the scope of products which would be subject to the country's EPR framework and introduced new EPR obligations on producers selling online, online retailers and digital marketplaces with Germany set to follow suit in July of this year.

The Scheme in the UK seeks to shift the full net cost of dealing with packaging waste, including managing, recycling and disposing, from taxpayers to packaging producers. Six categories of "obligated producers" will be required to report on the type and quantity of packaging they place onto the UK market and/or pay fees to cover any waste management costs. A modulated fee system means that the more difficult the packaging is to recycle, the higher the cost to the producer.

At first blush, EPR appears to be a problem for packaging manufacturers. However, amongst other more obvious players in the packaging supply chain, brand owners which package their goods and place them onto the UK market under their brand name are classified as "obligated producers", as are businesses who import filled packaging into the UK market for sale (including online marketplaces).

In the United Kingdom, an estimated **4.9m metric tonnes** of plastics are placed on the market each year, of which three-quarters become waste. The recycling rate of plastic packaging waste in the UK currently stands at

43.8%.

As such, both brand owners and importers will be obliged to fund the waste management costs of their packaging. Importers will also be required to report on the type and quantity of packaging they place on the market. It is important to note that where a business acts in multiple capacities, for example, as a brand owner and importer, they will be liable for both waste management costs and reporting.

The Government's consultation also proposes the implementation of recycling targets for six packaging materials (plastic, card, steel, aluminium, glass and wood) and mandatory recyclability labelling requirements for brand owners and importers by the end of 2026/27.

The consultation indicated that phase 1 of EPR (data reporting) is due to commence in 2023 and phase 2 (modulated fees) in 2024. We expect to see the Government's response to the consultation confirming the scope of the Scheme and implementation dates imminently given their timeframe of "early 2022".

WHAT ACTION SHOULD YOU CONSIDER?

As detailed above, retailers that place packaged products on the market will be obligated to comply with EPR requirements for their 'own brand' products. Therefore, retailers should consider assessing their packaging and waste practices now so that they have sufficient time to implement any necessary changes ahead of EPR coming into force, potentially, next year.

This review is also suggested for smaller companies as it is currently unclear as to whether the de minimis threshold (currently 50 tonnes of packaging and an annual turnover of less than £2m) will be retained. If removed or reduced, it is likely to increase the number of smaller producers obligated under the EPR framework.

We set out some key considerations below:

- evaluate the recyclability of the packaging you use and consider switching to more recyclable packing or, where possible, eliminating packaging in order to minimise costs under EPR
- prepare for the data reporting aspect of EPR – consider the best means for collating and presenting the required data
- it will be imperative to establish a line of contact with suppliers in order to assess the likely cost and data challenges EPR will have on them ahead of time and to determine whether operating or design changes will be required.

The potential costs you face under EPR are likely to exceed contributions made under the current Packaging Waste Recovery Note system. According to Valpak Limited (the UK's largest packaging compliance consultancy), the overall annual costs burden for producers is set to rise from £230m under the current scheme to £2.7bn in 2024 (the anticipated first year of operation of the new system). It is therefore worth considering modelling current costs in order to gauge the potential impact of EPR, prior to its implementation.

Horizon scanning (continued)

Update on taxes reliefs and customs and excise measures for 2022 and beyond

by Robert Waterson and Constantine Christofi

APRIL 2022 ONWARDS

WHAT IS HAPPENING AND WHY DOES IT MATTER?

Packaging Tax: From April 2022, the UK Government will impose a tax on certain non-recycled packaging. The tax will apply to any plastic packaging manufactured in or imported into the UK that is not made up of at least 30% recycled material. Only companies that import or manufacture more than 20 tonnes of plastic packaging per year will have to pay the tax, which will apply at a rate of £200 per tonne of packaging.

The Government's objective is to discourage the consumption of plastic packaging by businesses and to incentivise recycling to reduce landfill and plastic incineration. The move is part of the Government's overall 'net-zero' plans.

While packaging producers will be subject to the tax, it is likely that these increased costs will be passed down the supply chain to businesses and, ultimately, consumers. This is likely to be noticed mainly in the retail sector – especially online retailers and supermarkets who use large volumes of plastic packaging. Retailers may avoid the effect of the tax if they buy from smaller manufacturers that do not meet the volume thresholds for taxation, or by purchasing products with recycled packaging.

Tax Reliefs: From April 2023, the Government will increase the rate of Corporation Tax from 19% to 25% for non-ring-fenced profits over £250,000. Reduced rates of Corporation Tax will be payable on values under this amount. The hike is intended to raise revenue whilst keeping the UK competitive with other major comparable economies. This change does nothing to change the corporate tax base which remains less competitive and ripe for reform.

Business rate multipliers will stay at the current levels for 2022/23. The Government plans to consult on a 100% improvement relief available for higher business rate bills for 2023-2028, and an exemption from business rates for eligible plant and machinery for energy generation and storage (such as solar panels and battery storage for renewables) for 2023 to 2035. A link to the consultation (that closes on 22 February 2022) can be found here.

Custom and excise: For customs and excise rules between the UK and EU, as of 1 January 2022, full customs declarations are a requirement for all goods exported from, and imported into, the UK (excluding those from Ireland) and any applicable tariffs are payable on import (although some can be deferred).

The GB-EU border timetable is available here. In summary, several controls (certificates and physical check on plant and agri-food imports) will be postponed until 1 July 2022. Sanitary and phytosanitary (**SPS**) checks on live animals and animal origin products (and some other agri-food products and plants) are required to ensure compliance with food safety and biosecurity regulations. Most products subject to SPS requirements will need health documentation and certificates by July 2022 and physical checks will start to be rolled out at border control posts. Full checks and certification will be introduced in September 2022 on all dairy products, and on the remaining regulated products of animal origin in November 2022. Meanwhile, businesses should get familiar with the new processes, including making customs declarations, ensuring goods are correctly classified and following safety and security requirements.

What else should retailers be aware of?

The Government has opened a consultation on an online sales tax, with the aim of addressing concerns that online businesses pay less in business rates than "bricks and mortar" competitors. This distorts the relationship between business rates and economic conditions, and places an unfair tax burden on retailers with physical retail premises. Online retailers tend to have lower commercial rents and correspondingly lower rates burdens; the higher costs associated with warehousing technology, delivery networks and marketing are often overlooked when making rates and rent comparisons. The objective of the online sales tax is to use additional revenue from the online sales tax to cut business rates for retailers. Small businesses with a rateable value of £12,000 or less will continue to pay no business rates in 2022-23. Retailers, such as shops, restaurants, or cinemas may be eligible for business rates relief at 66% until 31 March 2022. The Government has indicated that it does not intend to discourage consumers from shopping online under the proposal.

The Government is seeking proposals on numerous considerations, such as: which goods and services should fall within the scope of the online sales tax, how online should be defined and whether there should be a different level of tax applicable to "remote" sales, whether exemptions would be appropriate (eg for click and collect purchases) and how cross-border sales should be treated. The consultation is open for 12 weeks and closes on 20 May 2022. At this point, the responses will be assessed prior to further announcements being made regarding future policy.

WHAT ACTION SHOULD YOU CONSIDER?

- You can have your say on the Government's online tax consultation by 20 May 2022 and/or sign up to our mailing list here so that we can let you know more about the online sales tax consultation as it progresses.
- Consider the potential impact of the Packaging Tax on your business, and how you might reduce its effect when it is implemented in April 2022.
- Get ready for the additional import and export checks and certification – learn your commodities codes and consider lining up customs agents or external intermediaries to assist with submitting customs declarations if you've not already addressed this.

HORIZON SCANNING

Horizon scanning (continued)

The new data regime proposals – a Brexit dividend?
by Jon Bartley and Amy Blackburn

SPRING 2022

WHAT IS HAPPENING?

Against the backdrop of the 2020 UK National Data Strategy, the DCMS launched a public consultation on a set of data protection related proposals. These proposals are intended to set an innovation-friendly tone as the UK Government looks to create a "pro-growth and trusted data regime".

WHY DOES IT MATTER?

The public consultation on the proposed reforms ended on 19 November 2021 and the publication of proposals is anticipated in the first quarter of 2022. As the proposals progress, retailers will need to consider which of the potential changes are desirable or necessary, particularly given the large amounts of consumer data that most retailers will process and the fact that many retailers will be subject to EU GDPR from their sales activities in the EU and will not want a two-track compliance approach.

The proposals include:

- providing an exhaustive list of legitimate interests which can be relied upon by companies to process data, clarifying this area of law and reducing the risk of organisations unnecessarily relying on consent
- modification to current accountability standards including potentially revoking existing obligations to perform data protection impact assessments, maintain records for data breaches and appoint a data protection officer
- a proposal to change the test for when personal data breaches need to be reported, making fewer breaches reportable in practice
- amending the way organisations are required to manage their cookie use, including how cookie pop-up notices could be removed from websites
- making it possible for organisations to develop and self-approve their own cross-border data transfer mechanism and allowing non-UK bodies to develop accredited international certificate schemes, and
- re-introduction of a nominal fee to be paid by data subjects prior to making a data subject access request.

In response to the proposals, the ICO has issued an extensive response, which is broadly in favour of the DCMS approach. However, the data regulator expressed concerns that the balance between reducing administrative burdens for companies and protecting the rights of individuals might be tipping in what it considers to be the wrong direction. Areas of particular apprehension for the ICO include the potential reforms to cookies and the introduction of a list of activities that might constitute a legitimate interest for data controllers to process data. The ICO has asked to see more details on the nature of processing activities that might be captured by the list of legitimate interests to ensure that the rights of individuals are upheld when it comes to how their data is processed.

Whilst the proposals are not in their final form, they do give retailers a reason to be optimistic that the administrative burden of complying with data protection laws in the UK will decrease. If the impact of cookie pop-ups is reduced through legal reforms, consumers will have a more seamless experience shopping online. Furthermore, the introduction of a small fee may help to deter spurious data subject access requests.

That said, it is unlikely that the UK regime will diverge too far from the EU standard going forward. The UK's adequacy decision from the European Commission, which allows the free flow of personal data between the EEA and the UK, is based on the premise that the UK's data regime offers an equivalent level of protection for personal data to that in the EU. This adequacy decision may be at risk when it is due for review in 2025 if the proposals diverge too far from the standards set by the EU GDPR. This is a concern raised by the British Retail Consortium whose response to the consultation can be found here.

WHAT ACTION SHOULD YOU CONSIDER?

DCMS received a significant volume of responses to the consultation, and the reforms will face significant revisions before they are finalised, following the input of commentators such as the BRC and the ICO.

Continuing to comply with the existing EU GDPR standard in the longer term is likely to simultaneously ensure compliance with any revised (and more relaxed) UK rules, so in practice there may not be too much change required to an organisation's current procedures. Retailers and consumer brands with an international customer base, particularly in the EEA, may also wish to maintain their current policies and procedures for the sake of consistency within their operation.

In any event, it's suggested that retailers maintain an interest in the direction of travel and keep an eye out for the final form proposals issued by the DCMS. You may also wish to sign up to our mailing list here so that we can let you know more about the proposals as they progress.

Horizon scanning (continued)

The Omnibus Directive – consumer rights extended to "free" digital content and services

by Oliver Bray and Anna Greco

MAY 2022

WHAT IS HAPPENING?

Summary

In recognition of the value of consumers' personal data to businesses, the EU's Omnibus Directive will shortly extend the scope of consumer rights to "free" digital content and services (being those for which consumers 'pay' with personal data rather than money).

In our previous edition of the Retail Compass, we provided an overview of the Enforcement and Modernisation Directive (2019/2161/EU) (Directive) (also known as the "Omnibus Directive"), which forms part of the EU's "New Deal for Consumers". In this edition, we take a deep dive into one of the key updates brought in by the Directive that is about to come into force: the extension of consumer rights to cover "free" digital content and services.

WHY DOES IT MATTER?

Digital content and digital services are part of our daily lives – these include, for example, apps, video and audio sharing, file hosting services, mail, social media, and other website services. Previously, much of the EU consumer protection regime afforded consumer rights only in respect of "paid-for" digital content and services. The Directive now extends the scope of consumer rights to "free" digital content and services (being those for which consumers 'pay' with personal data rather than money, eg gaming apps offering free trials). In short: personal data now equates with money or digital currency as valuable consideration in the online marketplace. This will be a big change for certain businesses which, until now, have been able to avoid the reaches of consumer law.

As a consequence, businesses must now treat free digital content and services analogously to those which are paid-for. In practice, this means:

- **consumer rights**: complying with the consumer protection regime in full, including offering traditional consumer rights such as the necessary pre-contractual information, appropriate cooling off periods and rights of cancellation, and so on
- **advertising and marketing**: it will no longer be permissible to describe goods and services which are provided in exchange for personal data as "free"
- **data protection**: continued compliance with the provisions of data protection legislation (noting that the Directive does not aim to alter this) in respect of any personal data collected.

While the Directive includes some exceptions to this general concept (for example, where the personal data is provided and processed (i) exclusively for the purpose of supplying digital content; or (ii) pursuant to a legal requirement on the trader), these are fairly limited in scope.

As before, it is worth noting that as a result of Brexit, the UK will not have to transpose the Directive into law – however, the Directive does have an extraterritorial effect, meaning it is relevant for UK businesses providing digital goods or services to consumers in the EU.

The importance of compliance with the Directive cannot be overstated, as repercussions of not doing so could result in GDPR level fines, including up to 4% of annual turnover in the relevant Member State, or €2m if a calculation of turnover is not possible.

WHAT ACTION SHOULD YOU CONSIDER?

With the EU's deadline for implementation of the Directive at a Member State level expiring in May 2022, it will be worth considering whether your business offers free digital goods and services to consumers in the EU, and, if so, whether these are treated differently to those which are paid-for. If the answer is "yes", it is time to update commercial practices, advertising and marketing, as well as any terms and conditions which do not reflect the Directive.

Europe's digital content industry will **triple** in value between 2021 and 2026.

Source: Telecoming

HORIZON SCANNING

Horizon scanning (continued)

The Employment Bill and the extension of duties on employers
by Patrick Brodie and Kelly Thomson

2022 INTO 2023

WHAT IS HAPPENING?

Back in December 2019, the Government announced its plans to introduce a raft of new employment law measures, including an overhaul to family-friendly rights, in the form of a new Employment Bill.

Although the long-anticipated Bill is yet to materialise, we expect it to emerge later this year for review and consultation into 2023.

WHY DOES IT MATTER?

Measures affecting the whole retail sector include:

- **flexible working and carer's leave** – from day one of employment, employees will have a right to request flexible working, and a right to take unpaid carer's leave of up to five working days to care for a dependant with mental or physical health needs. As these rights apply from day one, they are likely to have a disproportionate impact on the retail sector compared to other industries because of high levels of staff turnover
- **single enforcement body** – HMRC national minimum wage enforcement, the Employment Agency Standards Inspectorate and the Gangmasters and Labour Abuse Authority will merge into one enforcement body. Its purpose will be to enforce various statutory protections, including the national minimum wage, statutory sick pay, holiday pay and modern slavery
- **preventing sexual harassment** – going beyond the current position, where employers are liable for harassment by employees (unless they have taken reasonable steps to prevent it), this imposes a positive obligation to prevent sexual harassment in the workplace. The Government also intends to clarify and strengthen the provisions on third-party harassment, for example by customers
- **extended redundancy protection for pregnant mothers and new parents** – the period in which mothers have a right to be offered any suitable alternative employment in a redundancy situation will be extended. The new protection period will start from the day the employee notifies the employer of the pregnancy and will end six months after she returns to work from maternity leave.
  Previously, this right applied only to employees on maternity leave so, depending on when notification happens, the extension could effectively double the length of the protection period from one year to two years. The right will also apply to employees taking adoption leave or shared parental leave. Retailers with a predominantly female workforce must prepare for the impact of the new protections.
- **neonatal leave** – employees whose babies require neonatal care will be entitled to statutory neonatal leave of up to 12 weeks. They will also have a right to statutory neonatal pay if they have at least 26 weeks' continuous service and meet the minimum earnings threshold
- **rights for workers with variable hours** – subject to consultation, workers with 26 weeks' continuous service with variable and unpredictable hours will have a right to request a "more predictable and stable contract" and "reasonable and recordable" work schedules. They may also be entitled to compensation for shifts cancelled without reasonable notice. This will particularly affect retailers who engage casual and zero hours workers. Further detail is required on when employers can turn down these requests.

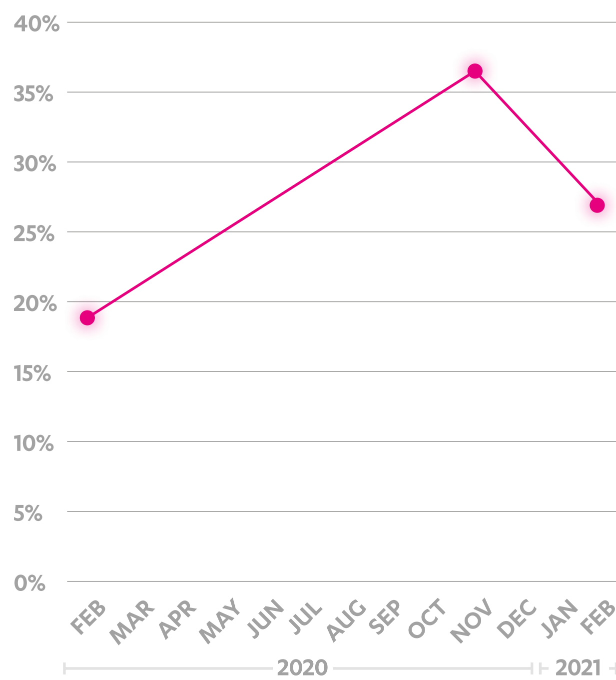
WHAT ACTION SHOULD YOU CONSIDER?

1. Keeping an eye on the progress of the bill, when these changes are coming into force and the finer detail, for example the anticipated statutory code of practice on the duty to prevent sexual harassment and the outcome of the consultation on new rights for workers with variable hours. You may also wish to sign up to our mailing list here so that we can let you know more about the bill as it progresses.
2. Preparing now by reviewing where your policies and procedures may require changes, including those relating to harassment, equal opportunities, flexible working, family-friendly leave and redundancy. Look at how shift arrangements could be tightened up and schedules planned more effectively to accommodate the new rights for workers with variable hours.
3. Training will be essential for those managers who are responsible for conducting redundancy exercises to reflect the new extended protection period for pregnant mothers and staff who have taken adoption or shared parental leave.
4. Explore the extent to which increased flexible working, carers leave and neonatal leave may affect your workforce, ways of mitigating the impact on your business and weigh up the potential reputational benefits of introducing these policies in advance of their introduction into law.
5. Ensure all staff are given robust and regular training on diversity and inclusion, including rights and responsibilities around harassment. This training should not be a "tick-box" exercise. Case law has found that relying on "stale" training as a reasonable steps defence to a claim of harassment will not be sufficient. To quote the Employment Appeal Tribunal [in the case of Allay (UK) Ltd v Gehlen decided in 2021], "If training involved no more than gathering employees together and saying "here is your harassment training, don't harass people, now everyone back to work", it is unlikely to be effective, or to last". So bear in mind that the quality of your training will come into sharper focus if a dispute ends up in the tribunal.

Snapshot of retail statistics – UK

GENERAL – POST-PANDEMIC TRENDS

ONLINE SALES AS A PERCENTAGE OF TOTAL SALES IN THE UK



Source: ONS

CEO CONFIDENCE

73% of UK CEOs are confident the domestic economy will grow in 2022.

Source: PwC

INDEPENDENT RETAILERS

The number of independent retailers on UK high streets increased for the first time in five years in 2021.

Source: FT

CONTACTLESS PAYMENTS

In 2021, over **90%** of UK card transactions were contactless.

Source: Barclaycard

FOOD AND DRINK

TAKEAWAY SPENDING

The average spend per person per year on food takeaways in the UK rose by **42%** over two years, from £452 in 2019 to £641 in 2021.

Source: KPMG

EMPLOYMENT GROWTH

There were **19,000** more jobs in the UK's food and drink sector in 2021's Q4 compared to the previous year.

Source: ONS

PANDEMIC RECOVERY

The UK restaurant market is projected to recover **94%** of its pre-pandemic value in 2022.

Source: Lumina Intelligence

FASHION

CLOTHING SALES

Clothing stores' sales volume rose **3.2%** from February 2020 to November 2021 in the UK.

Source: ONS

ONLINE FASHION

Over 10,000 fashion related searches are made every minute in the UK.

Source: Think With Google

FASHION INDUSTRY VALUE

The UK fashion industry expected be worth **£67bn** by 2026.

Source: Statista

E-COMMERCE AND DIGITAL

DIGITAL INVESTMENT

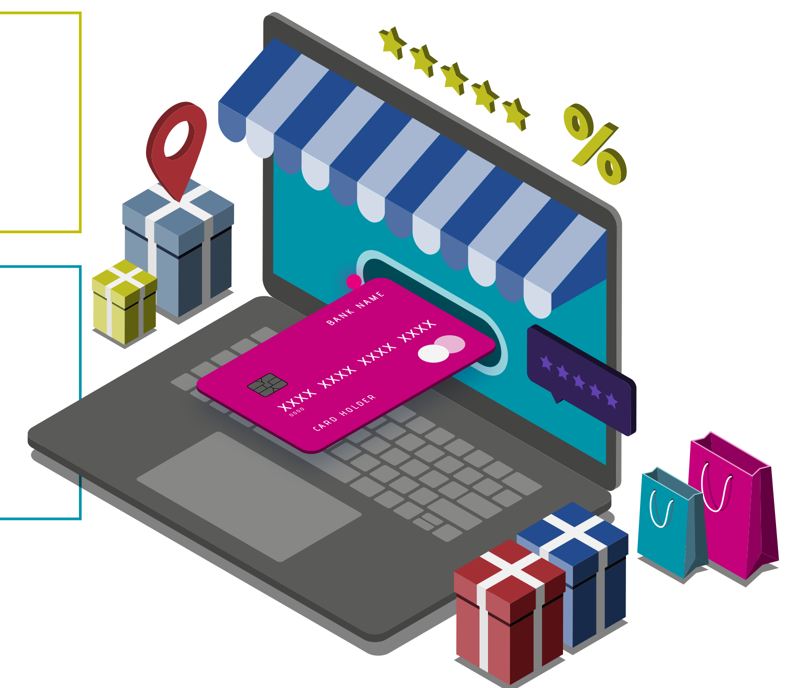
46% of retailers plan to increase their investment in digital channels over the next 12 months.

Source: Shopify

LIVESTREAMING

81% of brands plan to either maintain or increase their investment in livestream sales over the next 12 months.

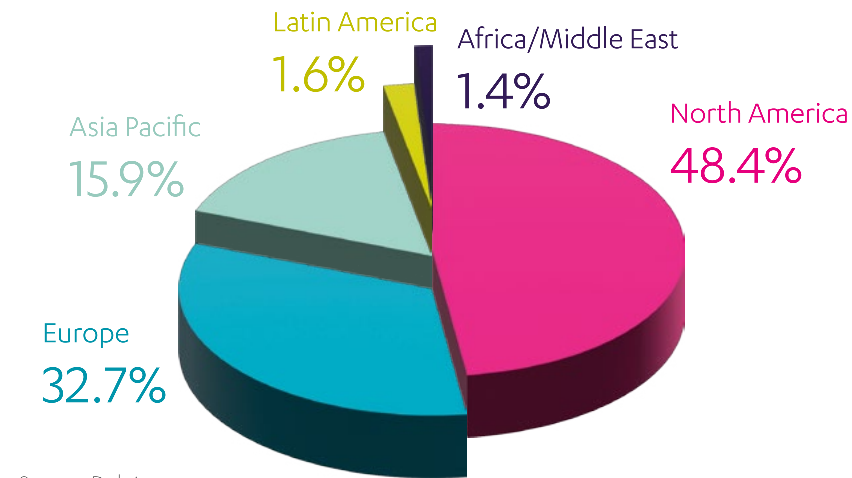
Source: Shopify



Snapshot of retail statistics – Global #1

GENERAL

WORLD REGION SHARE OF GLOBAL TOP 250 RETAILER REVENUE



Source: Deloitte

FMCG

FMCG accounts for the vast majority of top global retailers, at **66.4%** (which is increasing).

Source: Deloitte

SUSTAINABILITY

RETAILER SUSTAINABILITY

72% of consumers want their retailers to be ecologically sustainable.

Source: RetailX 2021 Sustainability Report

BRAND TRUST

69% of consumers don't trust brands and retailers when they say they are sustainable.

Source: Drapers

CONSUMER BEHAVIOUR

- **32%** of consumers have paid significantly more for a sustainable alternative.
- **19%** waited longer to obtain it.
- **16%** bought a used/upcycled product.
- **16%** accepted a lower quality product/service.
- **13%** agreed to participate in a special process to properly dispose of a product.

Source: Deloitte

MORE ON SUSTAINABILITY

- The second-hand fashion market is projected to hit a value of **$64bn** by 2024.
- "Recycled" is the most popular green claim, accounting for **51%** of sustainability claims made in the US. This is an increase from 29% in 2019.
- Gen Z account for **40%** of global consumer shopping, and **54%** of them said they would pay **10%** more for a sustainable product.

Source: The Sustainability EDIT 2021

PAYMENTS

BUY NOW, PAY LATER

Buy Now, Pay Later payments are projected to account for nearly **25%** of global e-commerce transaction by 2026 (up from 9% in 2021).

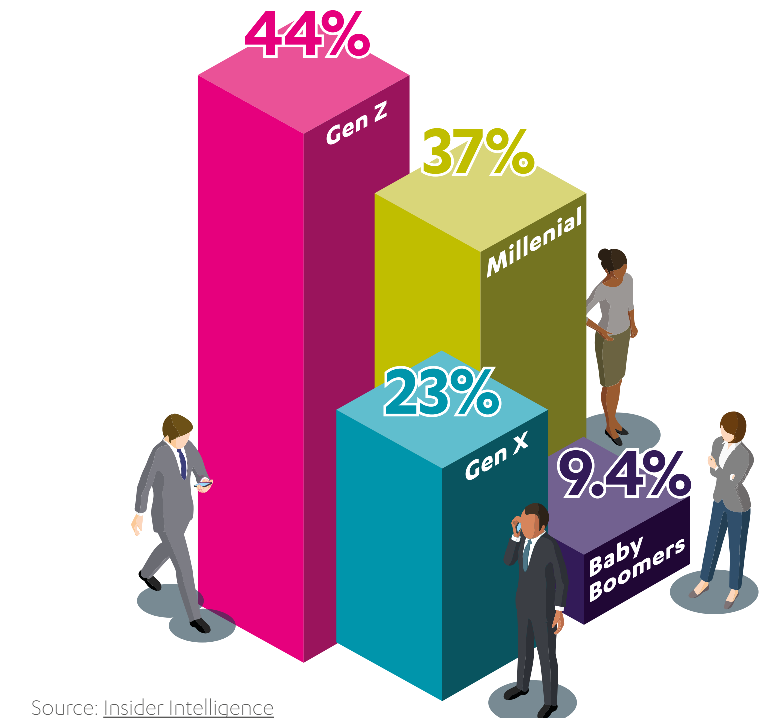
Source: Juniper Research

DIGITAL WALLETS

Digital and mobile wallets are set to account for the majority of online payment methods by 2024.

Source: Statista

BUY NOW, PAY LATER PROJECTED USAGE IN 2022 BY GENERATION



Source: Insider Intelligence

E-COMMERCE

US E-COMMERCE

US e-commerce sales will surpass **$1tn** for the first time in 2022 (two years ahead of pre-COVID projections).

Source: Insider Intelligence

GLOBAL E-COMMERCE

The global e-commerce market is expected to total **$5.5tn** in 2022.

Source: Insider Intelligence

Snapshot of retail statistics – Global #2

Canada: **55%** of Canadians are shopping less – or not at all – in-store for fashion (PwC)

USA: **104,000** new jobs have been created in the USA's retail sector between February 2020 and February 2022 (US Bureau of Labor Statistics)

Chile: **45.2%** of Chile's retail revenue comes from foreign operations (Deloitte)

Argentina: Argentina's mobile payments industry is projected to grow at a rate of **16.5%** per year until 2025 (Business Wire)

South Africa: **35%** of South African consumers have shopping apps installed on their phone (Think With Google)

Sweden: **50%** of Swedish consumers shop on their mobile phones (Business Sweden)

Georgia: Retail trade revenue in Georgia is projected to reach **$168.9bn** by 2024 (Statista)

Germany: In 2020, **22%** of German consumers made purchasing decisions based on influencers (Statista)

UAE: The UAE is home to the world's largest mall, (the Dubai Mall), at **5.9m sq ft** (The Dubai Mall)

China: Online retail is projected to reach **55.6%** of total retail in China in 2022 (eMarketer)

Philippines: The Philippines is the highest growth e-commerce country in the world, with projected growth in 2022 at **25.9%** (Statista)

New Zealand: **50-70%** of New Zealand shoppers purchase additional products when collecting orders instore (Customer Care)

Other developments

Here we round up some other developments which have occurred since our last publication of Retail Compass (in October 2021). In the first few developments, we look at hot topics for retailers and consumer brands in the UK and Europe. The final few developments should be of particular interest to retailers operating in (or considering operations in) Asia. As always, we recommend tailoring your consideration of these international topics to your own specific circumstances as there may be local law considerations which affect you.

UK and Europe

Copycat goods – traditional copycat claims be-gin to show their cracks

by Ben Mark, Ashleigh Fehrenbach and Sarah Mountain

In 2021, we saw a proliferation of disputes involving brand owners and retailers taking IP enforcement action against discount supermarkets. M&S' dispute with Aldi, over its iconic Colin the Caterpillar cake, was widely reported. The producers of Hendrick's gin took similar steps (which were ultimately unsuccessful) against Lidl and in December 2021, M&S and Aldi locked horns again, this time over the design of light-up gin bottles.

The precedent value of copycat cases cannot be overstated. With the stakes so high for retailers and discount supermarkets alike, it is perhaps unsurprising that M&S and Aldi settled the so-called 'copy-caterpillar' dispute at the start of 2022. The switching, by M&S, to a design right infringement claim in respect of the gin bottle dispute may also indicate that retailers are changing how they approach such claims.

Copycat product cases involving trade marks and/or passing off can be difficult to bring against discount supermarkets: their business models predominantly consist of selling own-brand goods, and publicising that fact widely, meaning that consumers are less likely to mistake or confuse lookalike products with genuine third party articles. Whilst unfair advantage or 'piggy-backing' claims are available, this requires claimants to show a change in consumers' economic behaviour, which can likewise prove tricky.

We may therefore see brand owners moving away from traditional claims and towards other causes of action: M&S' latest claim against Aldi is based on design right infringement and in 2019, luxury cosmetics brand Charlotte Tilbury successfully brought copyright infringement proceedings against Aldi, regarding imitation make-up palettes.

Tips:

Consider which type of IP claim provides the best cause of action, bearing in mind the business model of the would-be defendant and noting the inherent difficulties in taking trade mark infringement and/or passing off action against discount supermarkets who are well-known for selling predominately own-brand goods.

It's also worth considering possible commercial leverage and whether engaging directly with the would-be defendant and customers (eg via a PR/social media strategy similar to that used by Hotel Chocolat in its complaint against a leading supermarket), may help you achieve the desired result more quickly.

ASA and greenwashing claims – ASA and CMA team up to tackle misleading green claims by Ciara Cullen and Sophie Tuson

Although the UK's advertising self-regulator, the Advertising Standards Authority (ASA), has been ruling on environmental (or green) claims for years, 2022 promises greater regulatory focus in this area than ever before. In September 2021, the ASA committed to providing further guidance on green claims, and to undertake deep-dive investigations into specific sectors/claims, including "recyclable" and general food sustainability claims, amongst others.

It's not just talk either: guidance was published in December, and in January alone the ASA published three rulings focused on green claims in food & drink (Lipton Ice Tea, Aqua Pura, and the heavily-publicised Oatly).

What's more, the ASA is no longer alone in its scrutiny of these claims: following publication of the Green Claims Code late last year, the Competition and Markets Authority (CMA) has stepped into the ring as part of its consumer protection function. The CMA began enforcement activity in January 2022, and envisages remaining active in this space for years to come, but has signposted that its first sector focus will be in textiles & fashion.

Regulators insist their intentions are to help – not hinder – those making green claims, but their attention means sharing green credentials is a risky prospect without expert legal advice.

Tips:

1. Set up communication channels between legal and marketing teams from the outset.
2. Keep a dossier of substantiating information.
3. Record your decision making and risk analysis processes.
4. Be specific and avoid terms you know the ASA/CMA will be looking for.
5. Put yourself in the consumer's shoes to determine whether a claim is misleading.
6. Consider the full life cycle of a product.
7. Ensure comparisons are fair and meaningful.
8. Be transparent about the use of carbon offsetting/credits.
9. Ensure aspirational claims are backed up with internal strategy/documentation.

The DSAR Dilemma by Jon Bartley, Amy Blackburn and Kiran Dhoot

Retailers have been faced with a surge in data subject access requests (DSARs) from customers, due to the rise in popularity of platforms such as Rightly that can automate these requests in bulk.

Dealing with a DSAR can be time-consuming and consume significant resources for organisations as internal investigations are carried out, appropriate redactions are made to information concerning the data subject and response packs are compiled.

This must all be completed within timeframes prescribed by law, which can be as short as one month.

Tips:

There are several ways that organisations can streamline the DSAR process and reduce the compliance burden.

- If DSARs are being received more regularly, it may be worth developing a tool which allows for automated extraction of relevant information from your systems rather than having to complete this process manually. The time savings alone will help free up resources and staff time for more intensive tasks, such as the legal analysis.
- Where possible and lawful, data should be deleted after a sensible and established retention period. This reduces the amount of information which would need to be retrieved for the purpose of the DSAR and in turn reduces the time spent on collection and analysis.
- Develop an internal process with accompanying precedents. It may be worth asking your external privacy counsel to review these, to ensure that they are compliant with law. A set of template DSAR response letters can standardise your procedures allowing your team to respond quickly and efficiently.

All of the above can help ensure your responses to DSARs are compliant with law and delivered by the legal deadlines.

Other developments | UK and Europe (cont.)

Property and business rates – business rates reform – new obligations for retailers by Elizabeth Alibhai and Mike Kilner

Business rates are a key fixed overhead for retailers relying on physical stores to serve their customers but the continued growth of online sales increasingly puts these retailers at a competitive disadvantage.

Organisations such as the British Retail Consortium have therefore been lobbying to implement rates reform to ensure a fairer spread of the tax burden.

The Government will be consulting on a variety of reforms to business rates, the introduction of an online sales tax, and transitional relief. Dates for these consultations have yet to be announced.

Following the decision to move from a five to a three yearly valuation cycle from April 2023, the Government is currently consulting on various technical changes required to facilitate ratepayers sharing information on a more regular basis to provide greater transparency concerning the valuation process. However, it is clear that any reforms will transfer significant responsibilities to ratepayers and impose penalties for failure to comply.

Ratepayers will need to notify the Valuation Office Agency of changes to:

- the occupier and the physical nature of the property
- the rent and lease terms
- tenant's trading details and accounts (where relevant).

Retailers should think carefully about how to supply such information on their property portfolio to avoid being caught out.

The consultation closed on 22 February 2022 and can be accessed here.

Tips:

- Review your property portfolio and resources to see how you would be able to provide the required information.
- Consider engaging with organisations such as the British Retail Consortium to input your views and discuss the consultation and its outcomes as it progresses.

Property and sustainability developments – building regulations reform – an opportunity for retailers by Elizabeth Alibhai and Mike Kilner

The Government's ban on the sale of new petrol and diesel cars by 2030 is likely to result in an ever-increasing number of electric vehicles on our roads. Significant investment in charging infrastructure will be required to properly service this migration to electric vehicles.

This presents an opportunity for retailers to attract new customers by offering charging points to customers arriving at their stores by electric vehicle, in turn increasing arrivals (as the charge points are identified by vehicles' in-built software) and dwell times as customers charge their vehicles.

From 15 June 2022 changes to building regulations will require that all new non-residential buildings with more than 10 parking spaces have a minimum of one charge point and cable routes in place for one in five of the total number of spaces. Certain material changes or major renovations to buildings which will result in a building with more than 10 parking spaces will also need such charging points.

Retailers, their landlords, and other major stakeholders (such as Local Authorities) now have an opportunity to work together to upgrade car parking facilities to include charging points.

Retailers who manage their own parking facilities should carefully consider the terms of new leases to ensure there is a clear mechanism to allow the installation of charging points to capitalise early on the potential benefits.

Tips:

- Review your property portfolios and the car parking to target opportunities to provide charging points.
- In any lease negotiations consider that you have the right to install new charging points.

New legislation incoming – arbitration scheme for commercial rent arrears by Tim Moynihan and Finella Fogarty

Landlords and tenants dealing with remaining commercial rent debts which have accrued because of the pandemic should be aware of these key dates:

9 November 2021: New Code of Practice came into force providing landlords and tenants with a clear process for settling outstanding commercial rent debts before the new arbitration process comes into force.

25 March 2022: Protections for commercial tenants under the current moratorium end. The Commercial Rent (Coronavirus) Bill (the Bill), which has reached the Report Stage in the House of Lords as at the time of writing, will in their place establish a legally-binding arbitration process for commercial rent debts which have failed to be settled by parties following the principles in the Code of Practice.

The window to apply for arbitration will be six months from the date the Bill comes into force, with a maximum time frame to repay of 24 months.

The Bill will apply to commercial rent debts arising out of mandated closure of certain businesses such as pubs, gyms and restaurants during the pandemic. Debts accrued at other times (or which are not commercial rent) will be excluded.

Tips:

The costs of arbitrating a dispute may outweigh the benefit of the arbitration. Therefore, landlords and tenants should still consider coming to the table to reach agreement, rather than deal with matters through a more costly arbitration process.

National minimum wage hourly rates will rise on 1 April 2022 by Patrick Brodie

National minimum wage (NMW) hourly rates will increase on 1 April 2022 to: £9.50 for workers aged 23 and over (also known as the national living wage); £9.18 for workers aged 21 or 22; £6.83 for workers aged 18 to 20; £4.81 for workers aged under 18 who are no longer of compulsory school age; and £4.81 for apprentices aged under 19, or over 19 and in the first year of the apprenticeship.

You should check that your existing pay rates comply with the new statutory rates. It is important to keep records demonstrating compliance for at least six years.

Failure to comply with the NMW rates risks featuring on the Government's National Minimum Wage Naming Scheme, which was reintroduced in December 2020, as well as hefty fines from HMRC. Unfortunately, this extends to all businesses found to have been in breach regardless of the circumstances and not just to businesses that have deliberately or carelessly underpaid staff.

Tips:

To avoid the consequences above (and the potential tarnishment to reputation), ensuring there is a system in place to track the ages of employees will help payroll departments to comply with the legislation and apply the correct NMW/NLW at the relevant time.

I&D and the British Retail Consortium charter by Kelly Thomson

In navigating the macro trends facing the sector, those leading retail businesses need to nurture diverse and inclusive organisational cultures where innovation can thrive.

In early 2021, the British Retail Consortium (BRC) published the results of research into diversity and inclusion (D&I) in the UK retail sector. The research confirmed that D&I is of critical importance to UK retail employees and customers alike.

Against this backdrop, the BRC's D&I Charter [TKR1] was born, which aims to support UK retailers in taking decisive action to improve workforce equality in the sector. To support the BRC and its member signatories implement the Charter principles, RPC was brought in[TKR2] to serve as the exclusive resident expert in employment law and lead the discussions turning the Charter pledges into tangible interventions throughout the whole employment lifecycle. To date, CEOs and D&I professionals from over 50 retailers have participated in roundtables covering core topics such as audit practices, recruitment, retention and promoting inclusive values and culture.

Other developments | UK and Europe (cont.)

Cybercrime – ransomware in retail by Richard Breavington and Daniel Guilfoyle

Cybercriminals are continuing to exploit cybersecurity vulnerabilities that are associated with hybrid working and the further uptick in e-commerce experienced during the pandemic. Retailers are increasingly at risk; according to sector surveys by leading cybersecurity providers, approximately half of retailers surveyed suffered attempted ransomware attacks in 2020. Ransom payments are also increasing in number and value year-on-year. Retailers who are exploring the wild west of cryptoassets should also take note of the string of high-profile hacks of blockchain providers and NFT exchanges. There are valuable spoils on the blockchain for any hacker who spots a buggy smart contract or incorrectly executed protocol.

The impact of cybercrime, and therefore the importance of mitigating cyber risks, should not be underestimated. Although encrypted data can be at least partially recovered through segregated backups (a "must-have" for all organisations) or by paying ransom demands, the overall cost to retailers of rectifying ransomware attacks can easily exceed hundreds of thousands of pounds. Furthermore, costs to retailers are generally higher compared to other sectors due to the ease of customer switching; reputational damage because of a data breach can easily cause consumers to vote with their feet.

Tips:

- Organisations should manage cyber risk through a combination of investment in infrastructure (with essentials including secure segregated backups, regular patching and multi-factor authentication) and staff training to help them respond appropriately to increasingly sophisticated cyber threats.
- It is also important to consider cyber insurance, so that if there is a cyber incident such as a ransomware attack, at least some of the resulting losses and exposures can be recovered.

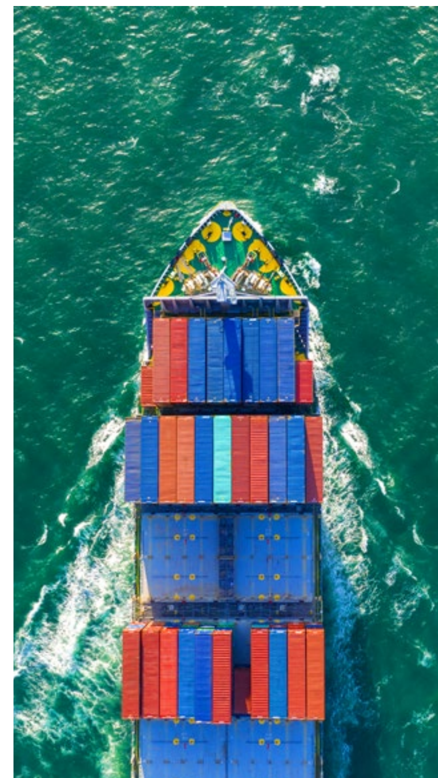
CMA's vertical block exemption consultation – UK to Introduce its own Safe Harbour for Vertical Agreements by Lambros Kilaniotis and Melanie Musgrave

Post Brexit, the UK had retained the EU Vertical Agreements Block Exemption Regulation (VABER) until its expiry on 31 May 2022. In the EU, the VABER's replacement will take effect from 1 June 2022. Following consultation, the Competition and Markets Authority (CMA) has recommended that UK-specific legislation, the UK Vertical Agreements Block Exemption Order (Order), be introduced.

The Order will operate as per the VABER and will provide a UK safe harbour from the prohibition on anti-competitive agreements for vertical agreements in respect of the sale and purchase of goods and services between businesses at different levels of the supply chain.

Whilst the CMA's proposed approach to dual distribution arrangements (eg agreements between manufacturers and retailers where the former are also selling direct to consumers) is less strict than the proposal at EU level, it is proposing a stricter approach to the treatment of most favoured nation and non-compete provisions. The CMA has proposed a one-year transitional period for business to ensure compliance with the Order in relation to their existing agreements which comply with the current VABER.

For businesses operating both in the UK and the EU, it will be important to ensure compliance with UK and EU competition law and to be alert to the differences arising from the two new sets of rules from 1 June 2022.



Corporate FCA ESG reporting – gender and ethnic diversity disclosures for listed companies by Karen Hendy and Richard Martin

Retailers and Consumer Brands that are UK listed companies will have noted the trend towards increased non-financial disclosure requirements. The FCA has proposed that listed companies be required to disclose whether their boards and senior management teams meet certain gender and ethnic diversity targets. The rules are anticipated to apply to accounting periods beginning on or after 1 January 2022 and so the disclosures would appear in annual financial reports published from spring 2023.

The proposed minimum targets are:

- 40% of the board are women
- one senior board position (Chair, CEO, CFO or Senior Independent Director) is held by a woman
- one member of the board is from a non-white ethnic minority background.

The Listing Rules would be amended to require the following disclosures:

- a 'comply or explain' statement as to whether the company meets the targets
- changes to the board that materially affect the ability to meet one or more targets
- details of the gender and ethnic diversity of individuals on the board, senior board positions and executive management team (ie the most senior executive or managerial body below the board or most senior level of managers reporting to the CEO)
- as part of the corporate governance statement, a description of how diversity policies apply to board committees as well as to the board itself.

The FCA's consultation on the rules has closed and the finalised rules are expected imminently.

Separately, BEIS has issued a press release launching The FTSE Women Leaders Review – a five-year independent review monitoring the representation of women among leaders of FTSE 350 companies.

This follows other Government-backed reviews, such as the Hampton-Alexander Review into increasing the number of women in senior positions and the Parker Review into the ethnic diversity of UK boards.

Tips:

- HR teams should consider whether they are capturing relevant data on the diversity of the board and executive management.
- Obviously that data must be collected in accordance with UK GDPR.
- Retailers with establishments outside the UK should also consider the relevant jurisdiction's data privacy regime and any international data transfer restrictions.

Other developments | UK and Europe (cont.)

Groceries supply code of practice: Amazon joins the £1bn grocery suppliers' club by Lambros Kilaniotis and Melanie Musgrave

Following the CMA's announcement to designate Amazon as a grocery retailer under the Groceries Market Investigation Order, with effect from 1 March 2022, Amazon is required to comply with the Groceries Supply Code of Practice ("**GSCOP**"). The purpose of GSCOP is to ensure that the largest grocery retailers in the UK (with retail sales of groceries in excess of £1 billion) treat their suppliers fairly and do not transfer excessive risks and unexpected costs onto them.

The CMA has taken the decision to designate the US parent company, Amazon.com, Inc., along with its two UK subsidiaries, Amazon EU Sarl, and Fresh & Wild Limited. Amazon EU Sarl sells grocery and household products through the Amazon.co.uk website and the app, as well as through the 'Amazon Fresh' home delivery service and physical stores. Fresh & Wild has physical stores in London.

Amazon joins the original ten designated retailers (Aldi, Asda, Co-op, Iceland, Lidl, Marks & Spencer, Morrisons, Sainsbury's, Tesco and Waitrose) and the more recent additions (Ocado, B&M and Home Bargains) in being bound by GSCOP. Given Amazon's stature in the retail sector – according to its own financial reports, its UK sales reached £23.6bn in 2021 – this designation is important to retailers and consumer brands alike. Under GSCOP, in addition to complying with the overarching principle of fair dealings, the designated grocery retailers are required to give suppliers appropriate notice of, as well as reasons for, terminating their supply arrangement and are restricted in their ability to make changes to supply contracts. They are also obligated to pay their suppliers within a reasonable time of the invoice date. GSCOP also covers potential payment contributions by suppliers, including in connection with promotions, and compensating them for costs incurred as a result of forecasting errors attributable to the grocery retailer.

Retail/tech startup trends soft loans – another funding option for start-ups by Sukh Ahark, Edward Colville and Sarah Snow

Start-ups in the retail sector looking for funding have more than just traditional bank lending to turn to, with increasing Government support in the start-up space resulting in grants and investment opportunities for borrowers across different sectors. One funding option available to a start-up is a 'soft loan'.

The Start-Up Loans Company, a subsidiary of the Government-owned British Business Bank, offers 'soft loans'; these are Government backed loans to start-ups (or businesses looking to scale up) that are provided on favourable terms. The Start-Up Loan is unsecured, up to £25,000 and at a fixed interest rate of 6%. Alongside the loan, borrowers also receive business mentoring and planning assistance, including help with writing business plans and cash flow forecasts, which can be an invaluable support during the start-up phase.

The loans are available to a wide range of borrowers, including borrowers in the technology/IT and retail sectors. An interesting example of a tech retail borrower that received start-up support under the programme is Rockflower; a company that created a cloud-based florist vending machine that started as a single unit at Blackfriars station, and now sells its technology and retail vending machines worldwide.

Tips:

Start-ups can head to https://www.startuploans.co.uk/ to directly apply for funding. Other start-up funding options can be found at the Government website.

RPC@London**Tech**Week
JUNE 2022

We are delighted to announce that we will be hosting a series of in-person events and experiences around London Tech Week this June.

Join us for our digital retail day on 15 June 2022.

For more information and to register, please contact seminars@rpc.co.uk.

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Other developments | Focus on Asia

International topic (Asia): Asia Data Privacy Law Changes – changes to data protection legislation in Asia – 2022 update by Summer Montague and Stephanie Northcott

In the same way that data protection regulation is stringent in the EU market, the Asia market is fast becoming an environment in which data is protected with greater care, and mandatory breach notification obligations have been introduced in many jurisdictions.

Over the last 24 months, the data privacy laws of several Asian jurisdictions have been updated to incorporate stronger protections for individuals' personal data. Many have made wholescale changes which represent a shakeup of the data protection regime, with both intra and extra-territorial effects. For example, the Personal Information Protection Law in China, which came into effect on 1 November 2021, appears to reflect the European GDPR in its commitments to data protection and introduces a new standard for data protection.

RPC has published two articles summarising some of these changes which may be of interest:

- our first article, which can be found here, highlighted some of the changes anticipated in 2021 in Hong Kong, Singapore, Japan and Taiwan
- our second article ([here]), provides an update on the main changes we have either seen or expect to see in Hong Kong, Singapore, Japan, Taiwan and China. This includes new provisions regarding 'doxxing' in Hong Kong and the far-reaching implications of the new data protection law in China.

Tips:

Consideration should be given to the impact of these changes on businesses operating in Asia markets and what steps may be required to ensure compliance. Failure to follow the updated requirements could result in substantial penalties and reputational damage for retailers and consumer brands alike.

International topic (HK): UN Convention on Contracts for the International Sale of Goods – Hong Kong – upcoming changes to international sale of goods contracts by Andrew Carpenter and Stephanie Northcott

The Legislative Council of Hong Kong recently passed the Sale of Goods (United Nations Convention) Ordinance (Cap. 641) (the Ordinance) which implements the United Nations Convention on Contracts for International Sale of Goods (CISG) in full in Hong Kong. This is projected to come into force in the second half of 2022 and will bring Hong Kong in line with 94 contracting states, including most European countries, the USA and Australia (although the UK is not a signatory).

The CISG applies to contracts for the sale of goods between parties whose places of business are in different countries, and either both of those countries are parties to the CISG, or the rules of private international law applies the law of a contracting state to the treaty.

It provides neutral legal rules for two main issues:

- whether and when a contract has been concluded, and
- the rights and obligations of the seller and the buyer under that contract, and their contractual remedies.

This can bring greater contract certainty for the parties and avoid the selection of unfavourable or underdeveloped local laws.

The CISG does not apply to:

- transactions between local Hong Kong businesses, nor between Hong Kong and Mainland Chinese businesses
- direct-to-consumer sales or sales by auction
- certain goods, such as shares, ships or aircraft, or
- contracts where the parties have agreed to opt out of the CISG.

When the CISG is not applicable, the governing law of the contract will apply to the two issues addressed by the CISG.

Tips:

Retailers involved in international sale of goods should ensure their contracts take into account the CISG, and opt-out or vary any of the provisions where necessary, as the CISG will prevail over domestic law.

International topic (China): Virtual key opinion leader – the rise of virtual key opinion leaders in China by Jason Carmichael and Armani Cheng

Virtual key opinion leaders (KOLs), or virtual influencers, are not a new concept – in 2018, The Times listed Lil Miquela, a virtual influencer with over three million followers on Instagram, as one of the 'Most Influential People on the Internet'. For more background on virtual influencers, please see our related article "Welcome to the age of the virtual influencer".

In China, popular celebrity KOLs such as Kris Wu and Zheng Shuang have amassed cult-like followings, allowing them to set trends and influence purchase decisions. Brands are now going further, experimenting with digitally-created KOLs – fully AI-developed characters that bear striking similarities with human beings. The advantages of using KOLs include greater control and less reputational risk.

The Chinese virtual idol-related market is experiencing significant year-on-year growth, from RMB 65 bn (US$10bn) in 2020 to RMB 100 bn (US$16.9 bn) in 2021, and is expected to triple by 2023. Alibaba, the e-commerce giant, is already tapping into this. It launched a virtual art exhibition featuring NFT artwork from brand sponsors like Burberry and Alienware, with AYAYI, a virtual influencer, acting as a tour guide for Singles' Day last year, has created the virtual model Aimee for campaigns with Prada and Miu Miu, and has been using Dong Dong, a virtual idol, to sell 2022 Winter Olympics merchandise and host livestreams.

Research also suggests that the majority of KOLs' followers in China are from middle and high-income groups, and therefore generally have a high willingness to pay. However, there are some downsides that brands should be aware of, including high upfront costs and a lack of authenticity for consumers.

Tips:

Brands should consider any potential legal exposure with any advertising, in particular when using virtual influencers. This applies particularly in China, where non-compliance with new regulations could have financial and reputational repercussions, for example:

1. **False Advertisement**: China's Advertising Law aims to protect consumers, requiring adverts to be clearly recognisable by the public as advertisements, and strictly prohibits false advertisement. Retailers need to be aware of this for posts by a virtual influencer on social media.
2. **Personal Data**: The newly enacted Personal Information Protection Law (PIPL) governs processing of the personal information of people located within China and applies to companies regardless of their presence in China. If items are promoted and sold by virtual influencers, retailers should ensure that their data processing policies are up to date to reflect these new requirements.

Key UK consultations and inquiries tracker

There are numerous ongoing Government consultations and inquiries affecting retailers. You can view all of the up-to-date information here.

Legislative bills tracker

We maintain a list of bills, currently in the UK Parliament, which are relevant to the retail sector. These bills are not yet in force as law, but they give a flavour of developments to come.

RPC contacts

If you would like to get in touch, please contact our heads of Retail, Karen Hendy and Jeremy Drew, or your usual RPC contact.

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An overview of RPC and TerraLex

Full service firm

RPC is an innovative law firm, providing a full service to UK and international clients. Retail is one of five key focus areas for RPC – and serviced by every single practice area of the firm. We have a fantastic retail practice – ranked Tier 1 for Retail & Consumer by Legal 500 – which provides expert sectoral focus and transparent and honest advice.

Retail through and through

We have over 70 retail lawyers (30+ of those partners) engaged on retail issues across our four offices (London, Bristol, Singapore and Hong Kong). More broadly, with over 300 lawyers across offices – and as a founder-member of global network TerraLex and co-chair of its Retail Sector group – RPC offers a seamless service in more than 100 jurisdictions across the world.

We are recognised as a leading voice on retail issues

20 of our lawyers have been quoted or mentioned across 55 publications, including the FT, Telegraph, The Times, The New York Times, The Business of Fashion, Luxury Law Alliance, The Grocer, Drapers and Retail Gazette in the last 12 months.

What others say about us

Retail clients quoted in Legal 500 2020

"An excellent team with a good strategic overview."

"Clever, hardworking and willing to roll up their sleeves to get things done."

"Extremely business orientated and extremely tactically astute. On top of that a real pleasure to work with."

Retail clients quoted in Chambers and Partners 2020

"They have been very good at stepping up to meet our demands and proactive at providing legal updates."

"They were brilliant and helpful at getting us what we wanted."

"They are practical, very personable and have a good work ethic."

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