Retail compass

Issue 8 October 2022

YOUR QUICK REFERENCE GUIDE TO LEGAL DEVELOPMENTS IN RETAIL

Omnichannel and the Metaverse – how can retail and consumer brands harness their potential?

Welcome to this edition

Welcome to this bumper Autumn 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.

The sector is facing obvious market challenges and there is also a growing trend of the regulatory climate in the UK hardening. This has been particularly noticeable with an increased use of criminal summonses to promote regulatory compliance.

We look at several new regulations affecting Retail and Consumer Brands including those around greenwashing, oncoming restrictions on promotion of HFSS products, how to prepare for Extended Producer responsibilities for packaging, and actions taken against Resale Price Maintenance practices. We also cover an array of topics about other matters affecting the sector including the proposed Online Sales Tax; where next for Buy Now Pay Later; achieving net-zero aspirations; and much more besides. We also take an in-depth look at some of the challenges and opportunities for Retail and Consumer Brands arising from omnichannel offerings and the Metaverse.

Alongside our horizon scanning pieces and other developments, we have guest contributions from Kris Hamer, Director of Insight at the British Retail Consortium, who reflects on some of the headwinds faced by the Retail industry over the past few years and the creative and innovative opportunities they create and from Jade Macpepple-Jaja and Nicole Russell who discuss the role of influencers in social commerce.

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
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JEREMY DREW

Retail Compass is edited by Georgia Davis (Of Counsel) and a team from RPC Retail. Thanks go to Nicole Clerk, Ellie Gelder, Abigail Gim, Noonie Holmes, Beth Thorne, James Whelan and Samuel Wood for their additional contributions.

THANKS FOR READING OUR LATEST ISSUE OF RETAIL COMPASS

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> "The ones who emerge most successful after the recession will be those who use their muscle memory of the pandemic – working nimbly and decisively."

Foreword by Kris Hamer, Director of Insight

British Retail Consortium

The retail industry has faced extraordinary challenges over the past few years – from Brexit, and a pandemic, to the cost of living crunch. These headings belie the scale of the disruption thrown in retailers' paths – from ensuring goods continue to flow between the EU and the UK, an alien trading environment during the pandemic including three lockdowns, the 'pingdemic' and at the same time, the exponential scale-up of online.

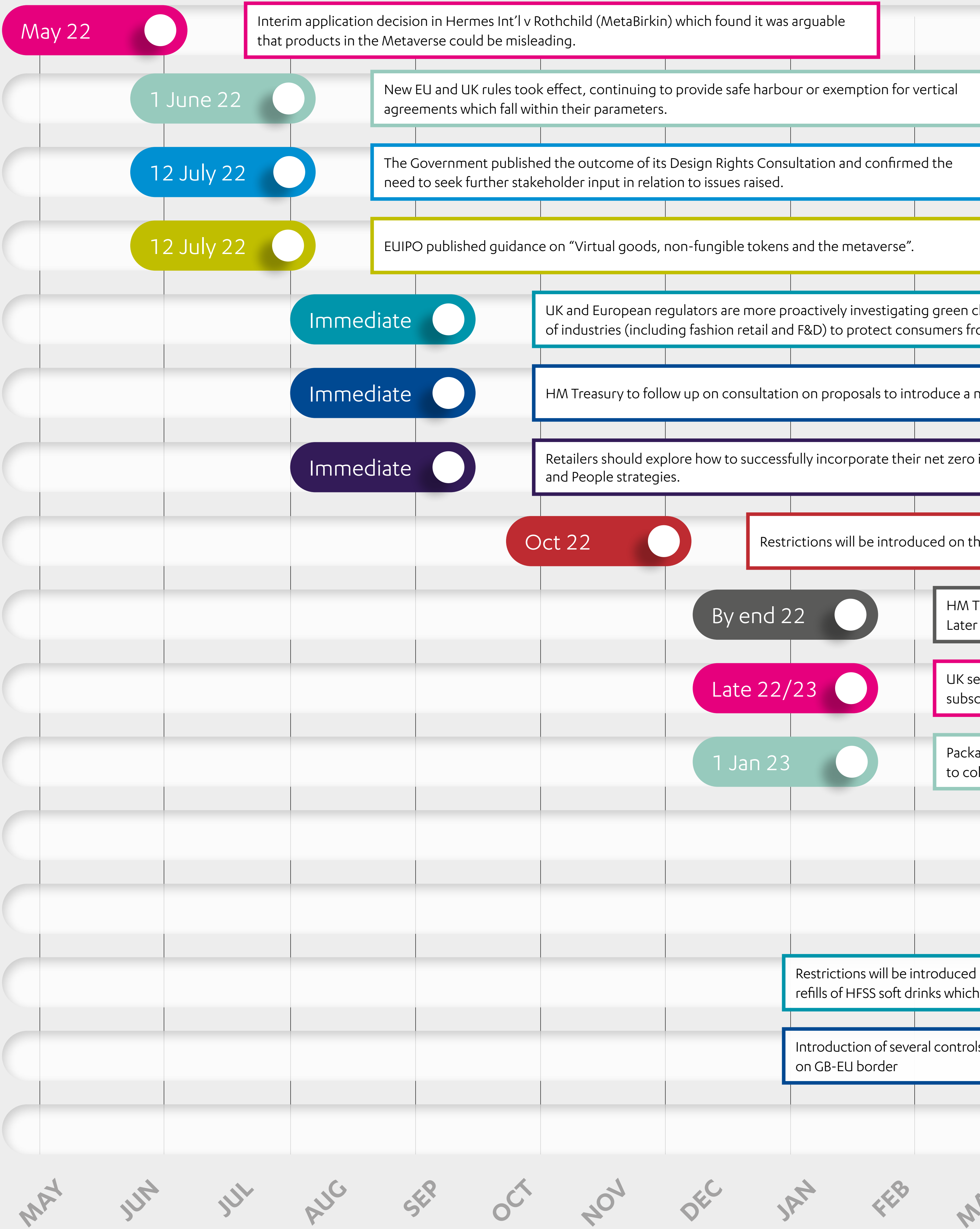
As the UK emerged from the pandemic, challenges from further afield took their toll. Firstly there were lockdowns in China, stopping production, and shortages of shipping containers threatened the supply of goods to our shelves. At the same time, UK retailers experienced the 'new normal' of consumer behaviour, with working practices changing footfall patterns, a rapidly changing demand online, and difficulty recruiting as the labour pool shrank because of ill-health, early retirement and industry switching. A new war in Europe brought fear of a world war, spiking prices in essential commodities, including fuel, caused by reduced supply due to the conflict or sanctions. Unsurprisingly, consumer confidence about the future plummeted and remained depressed as the inflationary pressures began to bite.

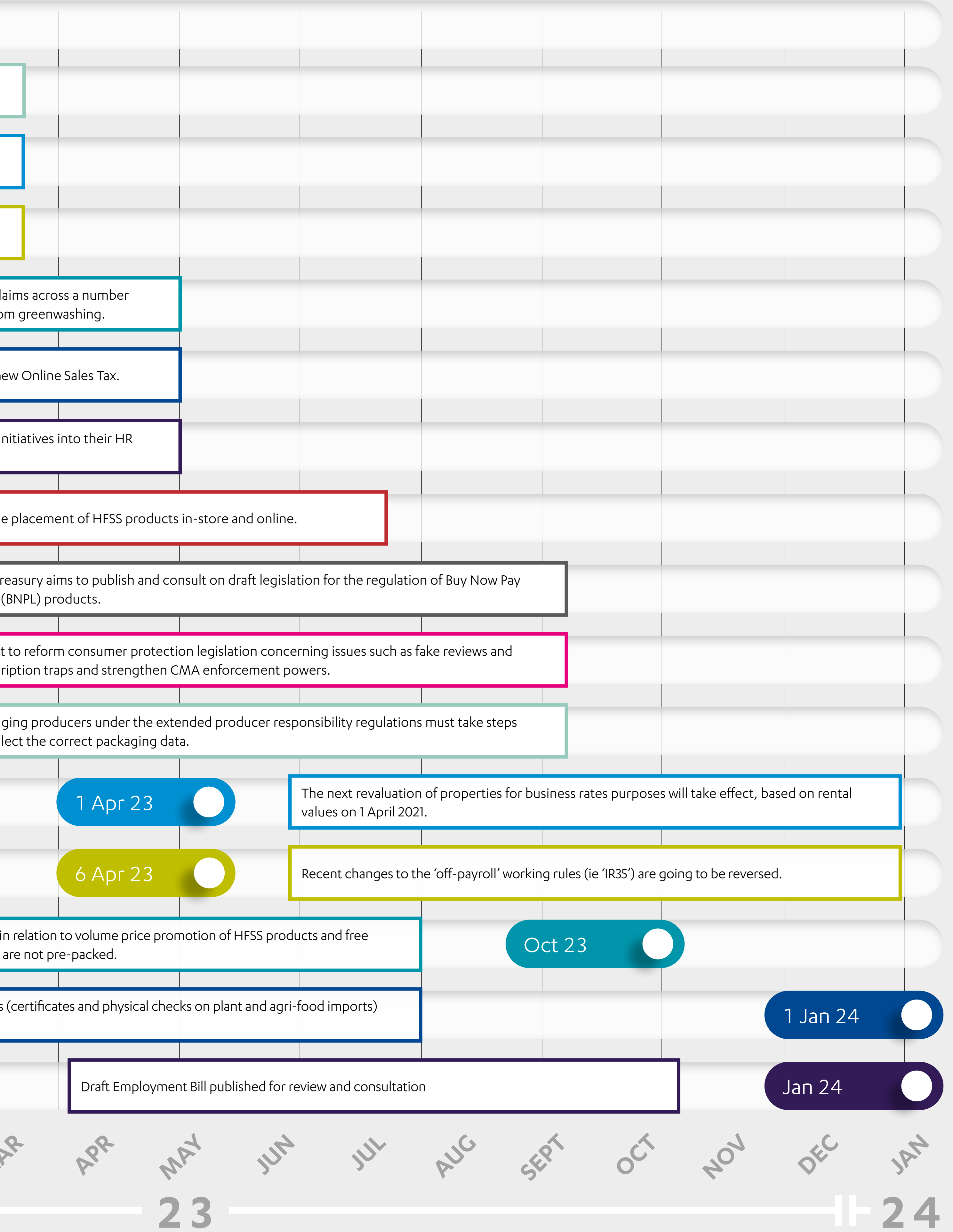
All these issues created an unenviable challenge for retailers from all segments, who have to navigate the operational realities of their businesses. Each set of challenges required retailers to take steps to mitigate risks and, where possible, seize the opportunity. That was not enough; they also had to be ready to reverse their plans as the situation changed. The most notable example of this operational challenge is the scaling up and reversal of e-commerce demand. Online now accounts for 24% of all UK retail sales, up 7.6 percentage points versus pre-pandemic, but peaked at 80% during March 2020. The retailer showed incredible agility to flex their operations, and these skills are now required for the next phase of economic change.

We are now in a new phase of change. Consumers have been facing the biggest squeeze in their disposable income for over 40 years. Consumers' wages cannot keep up with inflation, and retailers cannot price their way out of the devaluation of money. The effect of inflation eats into the buying power of consumers and businesses alike. The phrase 'necessity is the mother of invention' came about from times like these. Seismic changes in the political and economic environment mean retailers must adapt to survive, just like they so capably demonstrated in the pandemic and before.

But we can also be encouraged by the opportunity that change creates. The adaptation process presents a chance for retailers to outcompete one another – to innovate – to adapt their offers, make decisions about the products and markets they trade, and to double down on operational efficiency. The ones who emerge most successful after the recession will be those who use their muscle memory of the pandemic – working nimbly and decisively. How they will do it is through better insight into the new and evolving reality, adapting and communicating effectively their offer to consumers, by taking first mover advantage wherever possible. This period creates the opportunity to innovate – to create IP and protect it – that will see retailers well beyond the economic turmoil. There's no doubt it will be tough, but as a fiercely competitive industry, with unparalleled leadership experience of turbulent operating environments, there is no doubt that the industry will emerge thriving into a period of economic recovery.

Retail and consumer timeline 2022–24

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initiatives into their HR
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reasury aims to publish and consult on draft legislation for the regulation of Buy Now Pay
(BNPL) products.
t to reform consumer protection legislation concerning issues such as fake reviews and
ription traps and strengthen CMA enforcement powers.
ging producers under the extended producer responsibility regulations must take steps
lect the correct packaging data.
1 Apr 23
The next revaluation of properties for business rates purposes will take effect, based on rental values on 1 April 2021.
6 Apr 23
Recent changes to the 'off-payroll' working rules (ie 'IR35') are going to be reversed.
in relation to volume price promotion of HFSS products and free
are not pre-packed.
Oct 23
s (certificates and physical checks on plant and agri-food imports)
1 Jan 24
Draft Employment Bill published for review and consultation
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Horizon scanning

In this section we consider the key legal, regulatory and policy changes being faced by Retail and Consumer Brands and what steps to consider taking in light of these. We cover both purely domestic aspects and some which tie closely to European Union law and, as such, may impact upon retailers' European operations.

Strictly, when discussing these changes, we may not always be talking about the jurisdictions in which we advise as a firm. Therefore, whilst the following is intended to offer a helpful flag, we recommend tailoring your consideration of the changes to your own specific circumstances as there may be other local law considerations which affect you (and taking local advice where necessary).

Greenwashing: UK regulators set their sights on misleading green claims with an increasing focus on sectors such as fashion retail and F&D by Ciara Cullen and Sophie Tuson

2022 ONWARDS

WHAT IS HAPPENING?

UK consumer regulators, the Competition and Markets Authority (CMA) and Advertising Standards Authority (ASA), are ramping up their enforcement of green claims to protect consumers from 'greenwashing'.

Following the publication of the Green Claims Code (Code) in September 2021, the CMA is now proactively investigating green claims with a specific focus on the fashion retail sector. The CMA recently announced it is investigating green claims made by ASOS, Boohoo and George at Asda. Recent research also suggests that almost 25% of the complaints received by the CMA since the introduction of the Code relate to the fashion sector.

The ASA is also actively enforcing the green claims rules under the CAP and BCAP Codes, resolving 435 green claims cases in 2021 alone. In line with the ASA's current focus on 'recycled'/'recyclable' claims and food sustainability claims, there have been a number of recent high-profile cases relating to green claims made by retailers and consumer brands including complaints upheld against Tesco, Oatly, Alpro, Aqua Pura and Pepsi Lipton. These kinds of public rulings risk damaging brand loyalty for retailers and consumer brands and diverting sales to competitors as consumers are increasingly willing to switch allegiance where a brand doesn't live up to its purported environmental credentials.

We're also seeing this trend for increasing regulatory and legal action on green claims in other jurisdictions. In France, a new law was recently passed banning the use of terms such as 'biodegradable' and 'environmentally friendly' on product packaging. In Denmark and the Netherlands, there has been a recent flurry of private litigation against companies accused of greenwashing (see Danish Crown and KLM) and the Dutch consumer authority (the NCA) has recently waded into the debate around substantiation of green claims, warning fashion retailers not to use the Higg Material Sustainability Index (MSI) to substantiate green claims due to shortcomings in its lifecycle assessment for different materials.

WHY DOES IT MATTER?

The risk for retailers of getting green claims wrong can be significant. Not only do retailers risk enforcement action from regulators but they also risk damage to reputation and brand loyalty. These risks look set to increase following the UK Government's recent proposals to enhance the CMA's enforcement powers to include the ability to fine companies up to 10% of global annual turnover for breaches of consumer protection law. This approach follows recent changes in the EU where such 'GDPR-style' fines are already in place under the Omnibus Directive. Following similar proposals by the European Commission, the CMA is also calling on the UK Government to add greenwashing to the list of 'blacklisted' practices in the Consumer Protection from Unfair Trading Regulations 2008 (**CPRs**), which would make it much easier for the CMA to take enforcement action against companies found to be making misleading green claims. Taken together, these changes would make the green claims regulatory landscape much more difficult to navigate and the risks of getting green claims wrong much more severe. In the meantime, retailers face a patchwork of different green claims rules/enforcement depending on the jurisdiction in which they are operating, making it increasingly difficult for marketing teams to plan green claims campaigns (and for legal teams to advise on them).

25%

of complaints to the CMA since the introduction of the Green Claims Code relate to green claims made by fashion brands (see here).

The ASA resolved 435 cases relating to green claims in 2021 (see here).

WHAT ACTION SHOULD YOU CONSIDER?

It's advisable for retailers and brands to review their green claims now to ensure they comply with relevant consumer protection laws. Retailers and brands may want to consider taking the following steps to help ensure compliance and to reduce the risk of enforcement action:

- **be specific and avoid vague terms such as "green", "sustainable", "environmentally-friendly", "eco"**: claims should be as specific as possible – avoid making broad, absolute claims unless you clearly explain what they mean. Marketing & Comm teams should steer clear of these vague/unclear terms (or anything similar) which both the CMA and ASA consider to be misleading unless they can be substantiated across the full product lifecycle
- **consider the full lifecycle of the product**: you might wish to consider the effect of the full life cycle of a product on the accuracy of an environmental claim. If an environmental claim relates to a product as a whole (eg "environmentally-friendly cheese" on a cheese label) it will be more likely to mislead if it doesn't account for the full product lifecycle. If a claim relates to a specific part of a product, such as the packaging only (eg "40% less plastic than [X product]"), it will be less likely to mislead
- **make qualifying information clear to consumers**: if a claim is only accurate where a qualification/caveat is applied, ensure that such qualifying information is clear, prominent and close enough to the main claim to be easily seen by consumers before they make any purchasing decision. If this is challenging due to space limitations, consider other ways to provide this information to consumers (eg using a QR code or linking out to a website)
- **ensure comparisons are fair and meaningful**: make sure any comparative claims compare 'like with like' – ie products intended for the same purpose and using the same measures/metrics. Ensure the basis of any comparison is clear
- **keep a dossier of substantiating evidence for all claims**: ensure all environmental claims are supported by robust, credible and up-to-date evidence. Internal data/records can be sufficient for this, however independent verification/certification will make environmental claims more robust
- **be transparent about the use of carbon offsetting/carbon credits**: where carbon neutrality claims are based on the use of carbon offsetting/ carbon credits, ensure that this is made clear to consumers and provide details of the credits purchased/ scheme used. Failure to do so risks misleading consumers into thinking that a product/business doesn't generate any emissions
- **ensure claims about future goals are backed-up**: make sure that any claims relating to the business' future environmental goals are supported by a clear, verifiable and internally documented strategy to deliver them. Statements of intent should be in proportion to the business' actual efforts. They will be less likely to mislead if they are based on specific, short term and measurable commitments.

Horizon scanning (continued)

Responses to the IPO's Design Rights Consultation are in, but what's next?

by Jeremy Drew and Ellie Ward

12 JULY 2022: CONSULTATION OUTCOME PUBLISHED

WHAT IS HAPPENING?

Following the UK's departure from the EU, the IPO launched a consultation (which ran from 25 January 2022 to 25 March 2022) to improve the designs regime and ensure that it encourages creativity and innovation and gives the UK a competitive edge. The Government has now published its responses to the call for views.

WHY DOES IT MATTER?

The consultation sought views on several broad areas affecting design issues, including the overlapping nature of the current system, future technologies and improving regulation.

A simpler system

Four different types of design protection currently overlap in the UK: registered design, supplementary unregistered design, continuing unregistered design and UK unregistered design right. In addition, a product capable of being protected by design right may also benefit from copyright protection. The general consensus from respondents to the consultation was that the UK system was complex and should be simplified. In response, the Government will consider ways in which the designs regime can be simplified and will also consider whether the relationship between design and copyright law requires reform or guidance.

Future technologies

The Government has acknowledged that as new technologies are introduced and adopted by consumers, there is likely to be an impact on the design sector. Some respondents raised concerns that the current system did not adequately protect against infringement assisted by 3D and 4D printing, while others said that design protection should extend to virtual designs. Consequently, the Government has recognised that the designs framework must be sufficiently flexible to support the rapid nature of developments in technology.

Better regulation

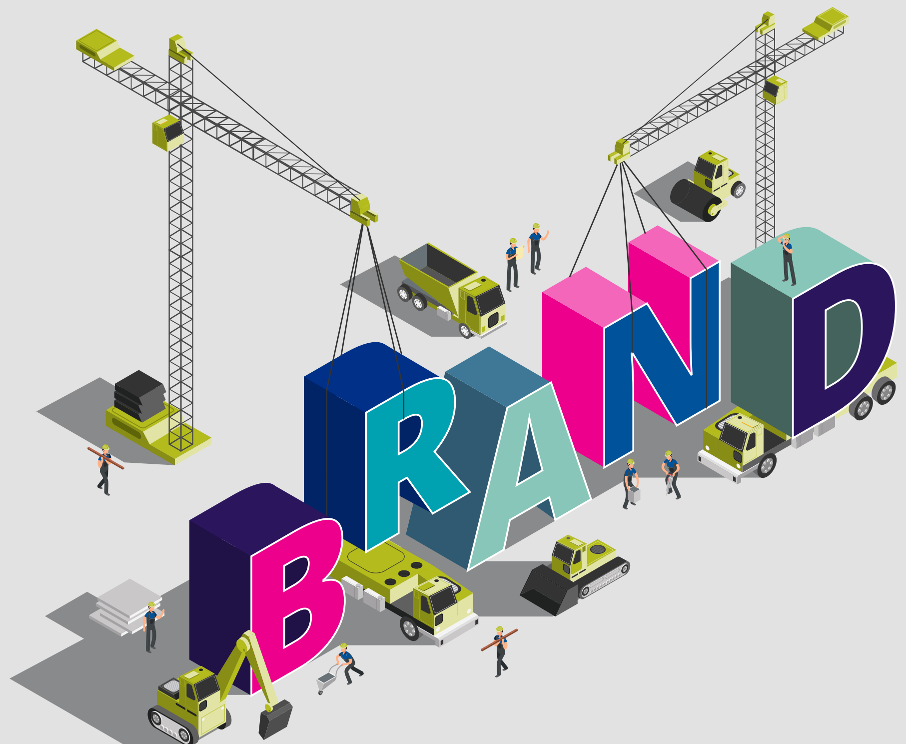
Under the current regime, an applicant can defer publication of their design registration for up to 12 months. The IPO sought industry views on whether this period should be made longer or whether it should be removed completely. The consensus was that a deferment period is desirable but varying periods were suggested; the Government will consider options and seek stakeholder views.

The consultation also raised questions around the effectiveness of the UK's enforcement framework and how this could be improved. Many respondents commented that the system was expensive, and the Government recognised that the costs and complexities of bringing legal actions may be problematic for smaller design companies. It will, therefore, consider if any measures can be introduced which would effectively make enforcement easier for rights owners.

WHAT ACTION SHOULD YOU CONSIDER?

The Government has confirmed that it will seek further stakeholder input in relation to the issues raised. It is, therefore, unclear at this stage what final proposals will result from the consultation and the extent, if any, to which such proposals will diverge from the designs regime in place in the EU.

While it is unclear when the proposals will be finalised, the eventual outcome may result in a new legislative designs framework. Designers in the retail industry ought, therefore, ensure they remain well-informed of any consequential changes to the legislative framework. For updates, please see our Design Rights Tracker here.



The design sector was "worth **£97.4bn** gross value added (GVA) in 2019, up from **£85.2bn** in 2016. In 2020 the sector employed 1.97m people, 1.62m of whom were professional designers." (see here).

Horizon scanning (continued)

UK set to reform consumer protection legislation and its competition regime

by Melanie Musgrave, Joe Lippitt and Hettie Homewood

LATE 2022/2023

WHAT IS HAPPENING?

The UK is set to introduce a wide array of changes to its consumer protection legislation and competition regime. The focus of the changes revolves around giving greater protection to consumers over subscription traps, tackling fake reviews and improving enforcement. The latter is likely to bring in GDPR/competition law-level fines for breaches of consumer protection legislation or non-compliance with the CMA's investigations or remedies, with maximum fines of up to 10% of global annual turnover.

62%

of consumers questioned believe that they saw at least one fake online review in 2021 (The Local Consumer Review Survey, BrightLocal SEO platform) (see here).

WHY DOES IT MATTER?

Following a Green Paper published in 2018, the UK Government launched a consultation into potential reforms of its consumer protection laws and its competition regime. The Government recently published its response to the consultation's findings on 20 April 2022 (the Response), which sets out its legislative agenda.

The Response sets out a very comprehensive set of reforms across four main focus areas.

Reform of subscription rules

The Government has identified that 'subscription traps' (ie subscriptions that automatically renew) are of concern, so new rules will:

- clarify and enhance existing pre-contract information requirements for subscription contracts
- introduce a specific requirement on traders to send reminders to consumers before a contract rolls over or auto-renews onto a new term
- create a specific obligation requiring traders to remind consumers that a free trial or low-cost introductory offer is coming to an end, and
- create a specific requirement for traders to ensure their consumers are able to exit a contract in a straightforward and timely way.

Combatting fake reviews

Fake reviews have been on the Government's radar for some time, so the Response looks to introduce further commercial practices to its list of automatically unfair business practices in Schedule 1 of the Consumer Protection from Unfair Trading Regulations 2008. These include:

- commissioning or incentivising any person to write and/or submit a fake consumer review of goods or services
- hosting consumer reviews without taking reasonable and proportionate steps to check they are genuine, and
- offering or advertising to submit, commission or facilitate fake reviews.

Consumer law enforcement powers

The Response outlines a new enforcement regime and how the CMA is set to take on the role of direct enforcer going forward in relation to consumer protection legislation, allowing the CMA to independently decide on infringements, actions, or remedies

without having to seek a court order (as is the position currently). The new legislation will also introduce new GDPR+/competition law level fines for breaches of consumer protection legislation or non-compliance with the CMA's investigations or remedies. The CMA will have the power to:

- determine whether there have been breaches of consumer protection legislation and to issue fines of up to 10% of businesses' global annual turnover for any breaches, which aligns with the CMA's powers under the competition regime
- impose penalties of up to 5% of businesses' global annual turnover for non-compliance with undertakings made to, or directions ordered by the CMA, and an additional daily penalty of 5% of daily global turnover if any non-compliance continues, and
- issue penalties of up to 1% of businesses' annual global turnover for any failure, without proper reasons, to comply with a statutory information request, or if any false or misleading information has been provided, an additional daily penalty of 5% of daily global turnover if any non-compliance continues.

Reform of the competition regime

The Government's view is that the current competition regime could be more effective, so the Response looks to address this through a number of changes, including:

- **more flexibility for the CMA in market investigations** – this includes in relation to defining the scope of market investigations, accepting binding commitments at any stage in market studies and investigations, requiring businesses to trial remedies and also amending remedies in the ten years following an adverse effect on competition finding
- **changes to the CMA's jurisdiction over mergers** – a new threshold will be introduced to help protect against 'killer acquisitions' by enabling the CMA to review acquisitions where the acquirer has: (i) an existing share of supply of goods or services of 33% in the UK or a substantial part of it; and (ii) a UK turnover of £350m. The current financial threshold of £70m UK turnover of the target is to be increased to £100m. For small mergers, there will be an exemption from review by the CMA where each of the parties has UK turnover of less than £10m
- **expanding and strengthening the CMA's investigation and enforcement powers under the competition regime** – the Government is also set to introduce changes to the CMA's evidence gathering and enforcement powers for failure to comply with the CMA's investigative measures and for breach of commitments, undertakings and other obligations and changes to the currently under-utilised interim measures regime. The jurisdictional reach of the UK's prohibition on anti-competitive agreements will also be clarified to cover those with an effect in the UK but implemented in another jurisdiction.

The Queen's Speech in May 2022 set out the Government's intention to publish a draft Digital Markets, Competition and Consumer Bill in the current Parliamentary session and the Government has subsequently reconfirmed its intention to then legislate when parliamentary time allows.

WHAT ACTION SHOULD YOU CONSIDER?

Compliance with consumer regulation has never seemed to be more important in light of the proposed changes. The new regime puts the onus on retailers to ensure compliance with the new regulations, which will be more onerous than previously. Therefore, retailers may want to consider:

- ensuring that you are taking all the steps you can to comply with the new subscription rules if you offer any subscription services to consumers
- taking any requisite steps (i) to ensure that all reviews hosted on your websites/networks are legitimate, (ii) not to incentivise or commission fake reviews from other parties, and
- ensuring compliance with the new consumer regulations generally, as the new teeth that are set to be given to the CMA will be sharp and potentially bite hard in the event of breaches of the regulations or non-compliance with the CMA's investigations or remedies.

Horizon scanning (continued)

It's a supermarket sweep as HFSS products face sweeping promotion and placement restrictions

by Ben Mark and Harpreet Kaur

FROM OCTOBER 2022

WHAT IS HAPPENING?

In an attempt to tackle obesity in the UK, in particular childhood obesity, a swathe of restrictions on the placement and promotion of HFSS products in-store and online will be introduced in phases from October 2022 to January 2024.

Subject to certain specific exemptions, 'qualifying businesses' ie those with 50 or more employees that sell pre-packaged HFSS products direct to consumers in-store or online, must comply with the new restrictions.

Although, it has recently been reported that the Government has launched a review of England's anti-obesity strategy as part of a wider deregulation initiative which could lead to delays to, or even a complete abandonment of, the upcoming HFSS restrictions. However, the government is yet to confirm whether the review is taking place and there may well be legal obstacles to being able to reverse the restrictions at this late stage, therefore the current position is that upcoming HFSS restrictions will come into force as expected and retailers should prepare accordingly.

WHY DOES IT MATTER?

Most medium to large retailers are likely to fall within the definition of qualifying businesses and therefore be prohibited from:

- displaying HFSS products in-store at aisle ends, store entrances, near checkouts and queuing areas
- displaying HFSS products online on home pages, landing pages for non-HFSS food categories that appear whilst the customer is searching for other items, pop-up pages, shopping baskets or payment pages
- offering HFSS products as part of volume price promotions and providing free refills for HFSS soft drinks which are not pre-packed, and/or
- running TV and paid-for online ads in relation to HFSS products before 21.00.

For retailers, compliance with the new rules is only one piece in the puzzle, albeit a crucial piece given that failure to adhere to the new rules may result in the issuing of improvement notices, fixed penalty notices and criminal prosecution. Retailers must also consider how the restrictions may impact sales and how best to re-invent product placement in order to mitigate any potential losses in this regard.

WHAT ACTION SHOULD YOU CONSIDER?

To minimise any consequences the restrictions may have on businesses' profit, the following preparatory steps should be considered before the new rules come into force:

- identify which products will fall within the scope of the restrictions and assess the potential impact on the sales of those products. One way of assessing sales impact might be to run HFSS product placement trials in certain stores. An assessment of the impact on seasonal sales should also feed into this analysis where possible
- consult with key brands and suppliers on, (i) the re-formulation of recipes to prevent certain products from being captured by the restrictions, and (ii) on opportunities for new, healthier products
- embrace the changes in order to promote and help customers make healthier lifestyle choices by emphasising non-HFSS products. Consider which brands might benefit from the newly available promotion space, for example non-HFSS products in the alcohol (particularly the lo/no category) and health and beauty space
- try implementing changes incrementally to prevent customer confusion
- this isn't the end for HFSS products – the strategy for the category just needs some re-examination. HFSS products could be placed in the middle of aisles, or single items could be moved to food-to-go areas and these new locations can be signposted to guide customers.

IRI analysis suggests that the new rules will have a £1.7bn impact across grocery and convenience channels (see here).

Actions to take when the new rules are in force:

- education is key – ensure employees are up to speed with changes to product placement and why such changes have been made so they can educate customers on the rationale behind the changes and, where necessary, guide shoppers to the new location of HFSS products
- monitor the effects of the restrictions: how is the newly available promotional space being used; how do brands perform in aisle or on the back wall; how have buying habits changed in relation to HFSS products eg frequency, basket size, switching brands. This kind of analysis will be key to ensuring that the restrictions don't impinge on the bottom line going forwards
- maintain an ongoing dialogue with customers – how do they view the changes, are there any areas for improvement and what have been the main adjustments in their view?

A recent GS1 article provided that:

- **43%** of businesses feel unprepared for the new legislation
- **33%** of businesses have assessed their products to see how they are affected. 20% are unaware of the changes
- over a **quarter** of businesses in the food and drink industry say that they will be negatively impacted
- **50%** of shoppers buy HFSS products regularly
- almost **66%** of shoppers say that the position of HFSS products impacts their decision to purchase
- **68%** of shoppers agree that regulations to tackle obesity should be introduced
- a **quarter** of shoppers would buy fewer HFSS products if they were only available at full price.

Horizon scanning (continued)

The EU's new Digital Services Act: new rules for digital businesses in the EU

by Olly Bray and Joseph Akwaboa

LATE 2023/EARLY 2024

WHAT IS HAPPENING?

The DSA is set to come into force and reduce illegal content online and create a safe digital space. The EU is also introducing the DMA in conjunction, which focuses on the regulation of the market power of large online players.

Who does it apply to?

The DSA will apply to intermediary services (eg internet access providers), hosting services (eg cloud computing and web hosting services) and online platforms (eg online marketplaces, and social media platforms) regardless of their place of establishment or residence, as long as they offer goods or services in the EU or their services have a "substantial connection" to the EU.

WHY DOES IT MATTER?

Many organisations in the retail sector face a lack of a level playing field when competing with third country traders selling non-compliant products in the marketplace. The DSA aims to provide a framework for those trading in the retail industry to incentivise growth, investment and omnichannel opportunities by combatting the circulation of counterfeit and dangerous goods in ecommerce, whilst also tackling online hate and misinformation.

New obligations will be placed on e-marketplaces relating to pre-contractual and product safety information, the identification and traceability of third-party vendors, random checks will also be required to ensure product compliance with EU rules. The new obligations are based on the following principles:

- **transparency**: digital service providers must publish annual reports on content moderation and platforms must ensure that traders provide sufficient verifiable information, display trader information to users and provide transparency on ads and the algorithms used to display them
- **empowering users**: digital service providers will need to include information on content restrictions imposed in their terms and conditions. Users need to be able to notify providers of allegedly illegal content
- **risk management**: online platforms now need to guard their systems against misuse and will need to remove illegal goods, services or online content and suspend services for users who frequently misuse them. They will need to report suspected serious criminal offences involving a threat to the life or safety of persons to the relevant authorities and will need to conduct annual risk assessments, risk mitigation measures, annual independent audits, providing information/data to Digital Services Coordinators or the Commission and appointing compliance officers
- **industry cooperation**: the development of codes of conduct, voluntary industry standards and crisis protocols on aspects of online businesses.

Caught in breach?

Fines for non-compliance are very steep, up to 6% of an organisation's annual global turnover. There are specific sanctions for non-compliance with information requests of up to 1% of the annual worldwide turnover. There are also periodic penalties in the case of non-compliance with decisions, binding commitments or information requests of up to up to 5% of the average daily worldwide turnover.

WHAT ACTION SHOULD YOU CONSIDER?

Retailers should consider how to adapt their operations to ensure a smooth implementation ahead of the prospective deadlines. We have identified the following as key considerations:

- **identify the team**: designate points of contact (eg professional compliance officer)
- **T&Cs**: Prepare to update existing terms and conditions and create new public-facing databases to meet the transparency requirements
- **processes**: update your complaint handling processes regarding decisions on illegal content
- **notifications**: build notification systems to meet the 'notice and take down' requirements.

Businesses in scope will need to ensure compliance with the DSA, particularly regarding the suitability of terms and conditions, information gathering and reporting, displaying or providing information under transparency obligations or the notice and action mechanism. Additional resource and advice may be needed to ensure the requirements of the DSA are met.

More than **50%** of counterfeit goods seized at the EU borders stem from online commerce.

Over **75%** of seized counterfeit goods from e-commerce come from China.

Perfumery and cosmetics, pharmaceutical products and sunglasses are the main counterfeited products sold online.

EUIPO Press Release dated 25 October 2021 (see here).

Horizon scanning (continued)

Online Sales Tax: the right way forward?

by Robert Waterson and Constantine Christofi

IMMEDIATE – AT POST-CONSULTATION STAGE

WHAT IS HAPPENING?

On 25 February 2022, HM Treasury launched a consultation exploring the possible introduction of an online sales tax (**OST**) to address the imbalance resulting from the higher business rates applying to in store retailers, compared to online businesses. The consultation closed on 20 May 2022.

WHY DOES IT MATTER?

The global coronavirus pandemic served to accelerate the popularity of online retail and reduce footfall in the high street as customers were subject to lockdown. The obvious disparity between rates for bricks and mortar and online retailers came into sharp focus. The intention behind the novel OST is to raise revenue from online retail in the UK and fund a reduction in business rates for retail properties.

However, the proposal is not without its complications. The first being, what exactly constitutes an online sale? Transactions made and paid for through a website clearly fall within the ambit of what can be termed an online sale. However, a grey area exists for orders made via social media or through mail-order. The consultation focuses specifically on whether 'click and collect' should be exempt from OST. Proponents of OST argue these sales should be exempted on the basis that where the collection point is a physical shop, they continue to generate footfall in physical shops. However, not all 'click and collect' locations are physical stores and so the position is more nuanced.

Another problematic issue is which transactions should be subject to OST. Should OST apply to just goods or both goods and services? It seems obvious that OST should apply to goods. However, where goods are bundled together with services (for example, takeaway orders), how should those transactions be treated? The answer may lie in splitting the goods from the services (ie the food from the delivery) though practically this may prove complicated. The same question remains on how digital equivalents of physical goods should be treated and whether those goods should be exempt from OST.

The next difficulty is who collects and accounts for OST? The consultation proposes that OST will be levied and collected by online vendors. However, what is unclear is whether online marketplaces are in scope and how cross border transactions are to be treated.

How OST is calculated is also considered in the consultation. Two options are suggested. The first is a revenue model, potentially 1–2% of revenue generated by online sales. The second is a flat-fee model based on the number of online sales made.

There have been calls in the industry for a rethink on how to implement OST, including from the Chartered Institute of Taxation, which has noted that introducing an OST to fund new business rates reliefs may lead to higher commercial rents, meaning that only landlords benefit, rather than retailers.

WHAT ACTION SHOULD YOU CONSIDER?

You can keep up to date with developments on OST implementation, including the Treasury's follow up on the consultation findings. Sign up to our mailing list here to ensure you're fully up to date.

According to The British Retail Consortium's Retail, Rates and Recovery: How business rates reform can maximise retail's role in levelling up report, published last September, 83% of retailers said it is 'likely', 'very likely' or 'certain' that they will close shops if business rates are not reduced.

For every £100 earned by large retailers, £2.91 is owed to local councils in business rates, compared to just 34p by online-only retailers.

(see here)

Horizon scanning (continued)

Extended producer responsibility for packaging: How to prepare by Rathi Thiagamoorthy, Harpreet Kaur and Jani Ihalainen

1 JANUARY 2023

WHAT IS HAPPENING?

In the Spring 2022 edition of Retail Compass, we reported on the Government's consultation on regulations covering extended producer responsibility (EPR) which places the financial burden of dealing with packaging once it becomes waste on producers as opposed to taxpayers.

From 1 January 2023, depending on whether you are classified as a small or large organisation, EPR requires producers to:

- collect and submit data on the packaging they handle and supply
- pay a waste management fee, and
- buy packaging waste recycling notes (**PRNs**) or packaging waste export recycling notes (**PERNs**) to meet their recycling obligations.

WHY DOES IT MATTER?

As set out in our previous article, EPR is not confined to packaging manufacturers as might be the initial impression.

Government guidance published on 7 June 2022 confirms that EPR applies to UK organisations (excluding charities) which have an annual turnover of £1m or more, are responsible for over 25 tonnes of packaging in a calendar year and carry out "packaging activities".

Retailers and brand owners are brought within the scope of EPR regulations as "packaging activities" includes:

- packaging own-brand products to sell to UK consumers
- using a third party to package and sell own-brand goods to UK consumers
- importing own-brand and third-party packaged products into the UK to sell to consumers, unless doing so on behalf of a third party (such as a supermarket); and Allowing third parties based outside the UK to sell packaged products or empty packaging through an online marketplace that you own.

EPR regulations impose differing requirements for 'small' and 'large' organisations as set out in the table below. Small organisations are those with either: (i) an annual turnover of £1-2m that handle and supply more than 25 tonnes of empty packaging or packaged goods in the UK, or (ii) an annual turnover of over £1m that handle and supply between 25-50 tonnes of empty packaging or packaged goods in the UK. Large organisations are those with an annual turnover of £2m or more that handle and supply over 50 tonnes of empty packaging or packaged goods in the UK.

The world is producing twice as much plastic waste as it did two decades ago, of which only **9%** is currently successfully recycled.

Source: OECD Global Plastics Outlook Report

Small organisations

- Record data about empty packaging and packaged goods you handle and supply in the UK from 1 January 2023.
- Once registration opens in 2024, register for the EPR for packaging online service.
- Pay an annual fee to the environmental regulator from 2024.
- Between 1 January and 1 April 2024, submit data about empty packaging and packaged goods you handled or supplied in the UK throughout 2023.

Large organisations

- Record data about empty packaging and packaged goods you handle and supply in the UK from 1 January 2023.
- Register for the EPR for packaging online service from April 2023.
- Pay an annual fee to the environmental regulator.
- Buy PRNs or PERNs to meet your recycling obligations.
- Submit data about empty packaging and packaged goods you handled or supplied in the UK every six months ie for the January to June 2023 period, data should be submitted between 1 July and 1 October 2023. For the July to December 2023 period, data should be submitted between 1 January and 1 April 2024.

WHAT ACTION SHOULD YOU CONSIDER?

With data collection requirements under the EPR fast approaching, retailers that meet the criteria outlined above may, if they have not already, consider taking steps to prepare for the data reporting aspect of EPR by:

- considering whether they are a small or large organisation and which EPR requirements will apply to them
- putting the necessary processes in place to ensure that they are able to accurately collect and record the data required
- identifying the relevant deadlines for data submission and ensuring that the most appropriate individuals and teams in the organisation are aware of these
- considering how suppliers may be able to assist with data collection requirements, and
- if you are a group company, consider whether to register under the EPR as one organisation or on behalf of their entire group of companies. If registering as one organisation, subsidiary companies should register individually if they meet the above listed requirements.

Horizon scanning (continued)

Casting your net zero ambitions: eight key steps for retailers
by Patrick Brodie, Kelly Thomson and Ellie Gelder

ONGOING AND INCREASINGLY IMPORTANT PRIORITY FOR RETAILERS

WHAT IS HAPPENING?

In our Autumn 2021 edition of Retail Compass, we explained how retailers can avoid falling foul of the CMA's greenwashing guidance on protecting consumers from misleading environmental claims (see page 7 to 8 here).

Looking ahead, ESG strategies in the retail sector will be coming into even sharper focus – not only for consumers but also existing and prospective employees.

With climate change at the forefront of the ESG agenda, the employment relationship, and the opportunities to engage with the workforce on this subject, are crucial ingredients in the quest to becoming a truly green retailer.

WHY DOES IT MATTER?

Many retailers are now striving for net zero status, where their carbon emissions are reduced as far as possible. With eco-anxiety now at an all-time high among the gen Z population, the steps you take in aiming for net zero status can significantly impact your ability to recruit, engage and retain the right people, which in turn affects productivity, brand reputation and staff morale.

On the flip side, failing to comply with environmental obligations risks costly whistleblowing and discrimination claims, as well as disruptive industrial action – not to mention serious damage to your brand.

However, action taken now to encourage employees to take collective responsibility for sustainability, as well as preparing for potential risk areas, will be invaluable in the long term.

WHAT ACTION SHOULD YOU CONSIDER?

1. Educate your workforce on climate change so that every employee can make environmentally responsible choices, both at work and in their personal lives. Collective action can deliver meaningful results more swiftly and can help boost morale and workplace positivity.
2. Formalise your climate-related expectations of staff by embedding sustainability into job descriptions and competencies. You may even consider going a step further by adopting aspirational clauses in contracts of employment to impose a positive obligation on employees to take environmentally friendly decisions. Examples include requiring employees to spend time volunteering on sustainability projects, and offering paid sabbaticals where the leave is spent on climate change initiatives.
3. Assess the sustainability of home working and consider implementing seasonal hybrid working to mitigate the negative carbon impact of working from home, for example where more energy is required to heat individual homes in the winter versus heating one office.
4. Reinvent your reward package to incentivise greener behaviours, for example by:
   - rewarding sustainable ways of commuting, such as offering season ticket loans for public transport or access to bikes at a reduced cost
   - celebrating and praising teams and individuals for their sustainability initiatives, and
   - inviting ideas for green projects and providing funding for the winning submissions.

5. Be aware that an employee's climate-related beliefs may be protected by discrimination legislation. Case law has established that an asserted belief "that mankind is heading towards catastrophic climate change and we are under a moral duty to act to mitigate" may constitute a philosophical belief (Grainger plc and others v Nicholson EAT/0219/09). It is therefore imperative that employees are respectful of each other's views on climate change and that your DEI and anti-bullying and harassment policies account for this.
6. Bear in mind that a failure to comply with a legal obligation, for example by greenwashing and misleading consumers about your environmental claims, is more likely to be called out by workers, as opposed to consumers, and may amount to a protected disclosure for whistleblowing purposes.
7. Note that the whistleblowing legislation lists environmental damage as one of the breaches that a worker can blow the whistle on and there is, as yet, no statutory threshold to determine what type or level of environmental damage will qualify. For example, arguably, a retailer's failure to provide adequate recycling facilities could qualify. Retailers will therefore need to keep a close eye on how the case law develops in this area.
8. Be alive to the increasing risk of industrial action, where employees may strike in response to the employer's position on the environment, although for such action to be lawful it must meet the specific criteria laid down in s.244 of the Trade Union and Labour Relations (Consolidation) Act 1992.

Net Zero ambitions:

UK retail industry ambition to reach Net Zero by 2040, with stores and warehouses powered by net zero electricity by 2030.

Source: BRC

Eco-anxiety amongst Gen Z:

Global survey found that 59% of respondents aged between 16 and 25 were "very or extremely worried" about climate change, while 84% were "at least moderately worried".

Source: The Lancet Planetary Health, Vol 5, Issue 12, Dec 2021

Snapshot of retail statistics – UK

OMNICHANNEL

CLICK AND COLLECT

Click and collect turnover in the UK in 2013 was estimated to be worth **€3.2bn**. The data forecasted that click and collect turnover in the UK will continue to soar, reaching **€11.9bn** by 2023.

Source: Statista

CLOTHING STORES

Clothing stores sales volumes in the UK fell by **4.7%** in June from an increase of **2.2%** in May, new figures show.

Source: ONS

APPS

60% of UK consumers have between 1-5 shopping apps installed on their device.

Source: Klarna insights

63% of mobile shoppers in the UK use apps for purchasing.

Source: Internet Retailing

ONLINE

30% of UK retail shoppers decide what they are going to buy in store by browsing online before they get to the shop.

Source: 365 Retail

ECOMMERCE

In 2022, the UK is expected to have nearly **60m** e-commerce users.

Source: Statista

RETAIL SALES

Overall retail sales volumes fell by **0.1%** in June following a fall of **0.8%** in May 2022.

Source: ONS

The proportion of retail sales online fell to 25.3% in June, its lowest proportion since March 2020.

Source: ONS

FASHION

In 2021, the fashion segment accounted for **31%** of the UK e-commerce market, making it the leading online shopping segment in the country.

Source: Statista

COST OF LIVING

FOOD

44% of adults said they were buying less food – up from **18%** at the start of 2022.

Source: ONS

BRANDS

41% of retail consumers in 2022 have tried a new brand in the last six months.

Source: 365 Retail

HOUSEHOLD

9 in 10 UK consumers say they are concerned about the impact rising household bills are having on their personal finances.

Source: Barclaycard

DATA PRIVACY

ONLINE

In 2022, 69% of UK consumers stated high levels of online privacy concerns, compared to 84% in 2012.

Source: Data and Marketing Association

PERSONALISATION

In 2022, 82% of UK consumers claim that they expect companies to keep improving the levels of personalisation they provide without having to provide more personal information.

Source: Data and Marketing Association

USE OF PERSONAL INFORMATION

The number of UK consumers who view the exchange of personal information as essential for the smooth running of modern society has grown dramatically over the previous decade, rising from 38% in 2012 to 60% in 2022.

Source: Data and Marketing Association

INFORMATION AS AN ASSET

In 2022, 61% of UK consumers viewed their personal information as an asset that can be used to negotiate better prices and offers with companies, up from 40% in 2021.

Source: Data and Marketing Association

Snapshot of retail statistics – Global #1

ESG

VALUES

83% of millennials expect brands to align with them on values.

Source: 5WPR's 2020 Consumer Report

PRICING

In 2021 over a third of surveyed shoppers said, if the price of a sustainable item was comparable to other products and/or trends, they would buy more of these goods. Quality and product availability also remain very important to consumers.

Source: Statista

SOCIAL IMPACT

In the last year, 41% of consumers said brands that made it easy to understand the actions they're taking to achieve their environmental and/or social impact goals had a significant influence on their purchasing decisions.

Source: Shopify eCommerce Market Credibility Study

SUSTAINABILITY

In 2021, 44% of customers chose to buy from brands that have a clear commitment to sustainability.

Source: Shopify eCommerce Market Credibility Study

ONLINE TRENDS

FOOD AND DRINK

Grocery Delivery apps represented 1 in 4 of all Food & Drink app downloads globally in Q1 2022.

Source: Data ai

Global time spent in Food & Drink apps grew 65% in the past year.

Source: Data ai

FASHION

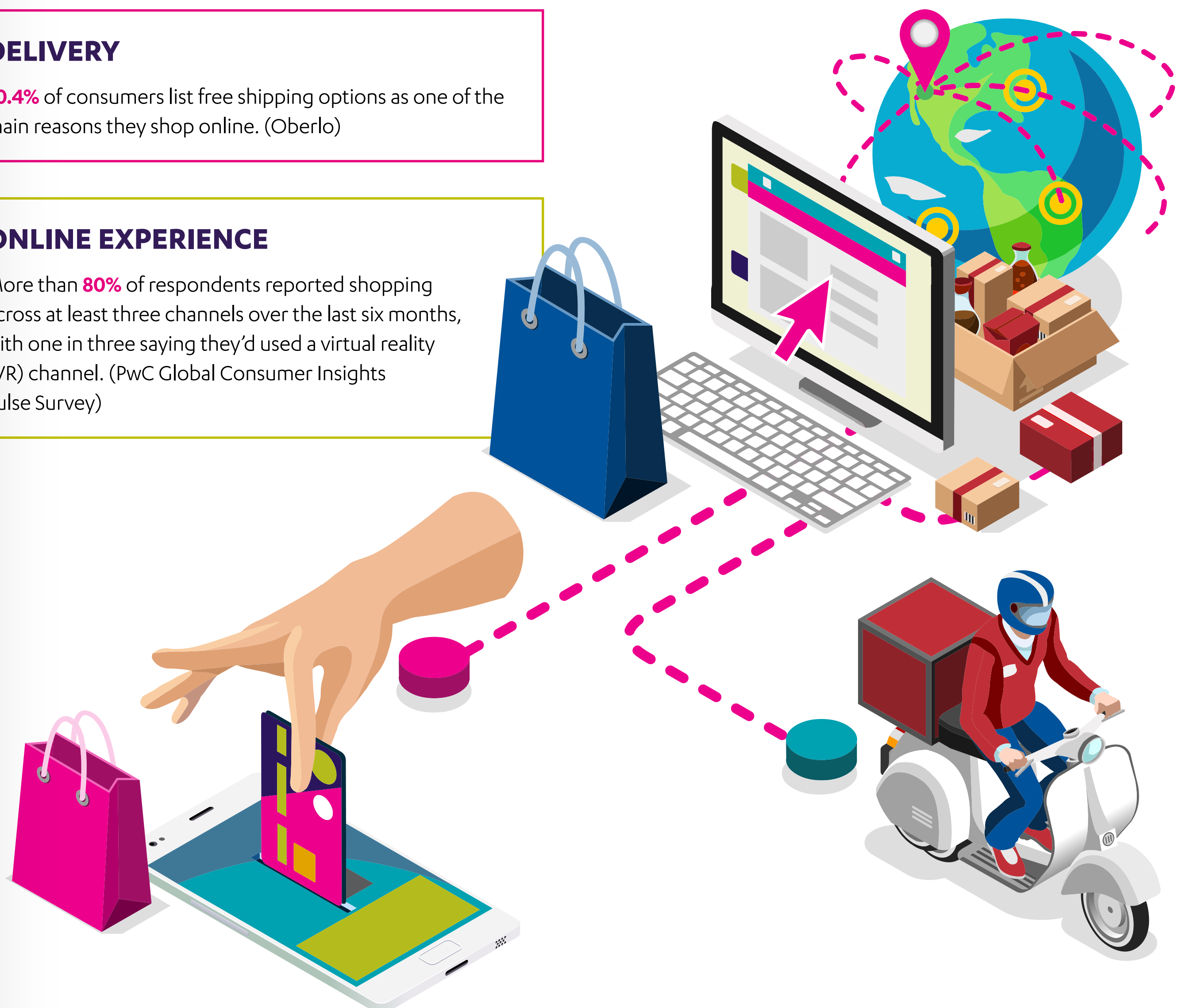
In 2020, **67%** of global online retail traffic was generated via mobile. In the fashion industry, the mobile share of traffic was even higher, amounting to **76%**. (Statista)

DELIVERY

50.4% of consumers list free shipping options as one of the main reasons they shop online. (Oberlo)

ONLINE EXPERIENCE

More than **80%** of respondents reported shopping across at least three channels over the last six months, with one in three saying they'd used a virtual reality (VR) channel. (PwC Global Consumer Insights Pulse Survey)



Snapshot of retail statistics – Global #2

USA: The livestream market is forecast to be worth **$35bn** in the US by 2024 (fitsmallbusiness).

USA: YouTube is the most popular livestream shopping platform among US retailers, with **30.2%** of businesses using the platform in 2021 (Coresight Research).

USA: **17%** of US consumers frequently watch influencer shopping livestreams (fitsmallbusiness).

USA: In the US, **81%** of Gen Z consumers liked to purchase in-store, **73%** said they used in-store for discovering products and **65%** liked in-store for trial. **58%** of Gen Z agreed that shopping in-store allows them to disconnect from social media and the digital world (Kearney).

Latin America: First-time lockdown buyers continue to shop online despite the reopening of bricks-and-mortar stores. In the first three months of 2022, online sale grew **13%** year on year in Brazil, valued at around 40bn reais. (Neotrust)

GLOBAL

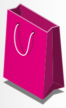
28% of global consumers think additional livestream shopping opportunities would encourage them to buy through social channels. (fitsmallbusiness)

55% of brands say that winning foot traffic will be a top challenge and **40%** say offering experiential retail will be a top priority for them in the next year. (Shopify eCommerce Market Credibility Study)

Around **20%** of buyers who return an online purchase in-store make an additional purchase. (Synchrony Financial)

53% of shoppers are likely to look at a product in-store and buy it online. **55%** of consumers want to browse products online and check what's available in local stores. **47%** of consumers want the option to check out online and return in-store. (Shopify eCommerce Market Credibility Study)

EU



In the EU online shopping demographics, most shoppers belong to the age groups 16–24 and 25–54. (Eurostat)

Overall, the share of e-shoppers among internet users is growing, with the highest proportions found in the age groups 16–24 (**78%**) and 25–54 (**76%**). (Eurostat)

59% of Gen Z (18-24) say they shop at brick-and-mortar stores at least once a week. (PwC)

Germany: The number of retail stores with stationary self-checkout systems in Germany has almost doubled since August 2019 and increased tenfold for mobile self-scanning systems. (EHI Retail Institute)

India: The e-commerce industry in India is forecast to reach **US$350bn** in 2030 – an exponential growth rate from **US$21.9bn** in 2018. (Statista)

India: E-commerce represented just **7.8%** of total retail sales in India in 2021. It is expected to surpass **10%** of total Indian retail sales in 2025. (Insider Intelligence)

China: China's livestream selling market grew from **$3bn** to **$171bn** between 2017 and 2020 and Chinese sales are expected to reach **$423bn** by 2022. (McKinsey & Company)

China: Apparel and fashion accounts for **36%** of livestream shopping events. (McKinsey & Company)

Australia: One in four Australians say that they purchase a product on a daily basis through an online channel. (PwC Australia)

Horizon scanning – Focus on: Omnichannel and the Metaverse

Virtual worlds meet real life copyright considerations

by Sarah Mountain and Sam Coppard

ONGOING

WHAT IS HAPPENING?

The relatively recent rise of virtual worlds presents both opportunities and challenges for businesses wishing to create and/or use content within them. On the one hand, they offer a platform for connecting with potential consumers like never before. On the other, and given that existing legislation was drafted well before such worlds were even contemplated, there are question marks over the copyright issues that will arise. Whilst engaging with consumers via their avatars within a virtual world may seem like a logical addition to the omnichannel experience, retailers should adopt a considered approach for the reasons explained below.

WHY DOES IT MATTER?

There is currently no specific UK legislation or case law concerning the creation of content or broadcasting of footage from within virtual worlds. Instead, existing copyright law will (no doubt somewhat imperfectly) apply, at least for now. In the UK, the applicable legislation is the Copyright, Designs and Patents Act 1988 (**CDPA**).

What would be protected?

Virtual worlds are composite works made up of various component parts. As such, the copyright works that exist within them come in many forms and belong to a range of rights holders. The platform operator (and any third party that they engaged to assist with its development) will likely own the rights in the fabric of that world but an array of user generated content (**UGC**) will also be present. Third party branding (including that of direct competitors) may also become prevalent, as we see the emergence of virtual stores and high streets.

Certain content may have been created by AI or computer programs. At present, computer generated works (**CGW**) are owned by the person (or entity) that put in place the arrangements necessary for the computer to generate them.

Earlier this year, the Government launched a consultation into whether that law had become outdated, particularly in the context of AI generated works, where there is limited or even no human input. Whilst that consultation concluded that "there will be no changes to the law" on the basis that "there is no evidence at present that protection for CGWs is harmful, and the use of AI is still in its early stages", it also confirmed that the IPO would "keep the law under review and could amend, replace or remove protection in future if the evidence supports it". Time will tell but it seems inevitable that change will be on the horizon sooner or later.

Infringement risk

When creating content within or broadcasting from a virtual world, retailers should be mindful of the fact that they are working within a world that is 100% created by someone or something. On that basis, the 'incidental inclusion' defence under s31 CDPA is likely to be of more limited assistance than when creating content in the real world.

Of the infringing acts, copying (s17 CDPA) and communicating works to the public (s20 CDPA) will be the most common pitfalls and all extant third party rights should be carefully considered and cleared to avoid the unauthorised use of copyright works.

The terms of use of the platform in question will likely address rights ownership, permissions (including in relation to creating content) and liability for any infringement that arises. Retailers should therefore ensure that they have undertaken a thorough review of those terms before commencing any broadcast or content creation within the virtual world.

WHAT ACTION SHOULD YOU CONSIDER?

Whilst this remains a nascent and undeveloped area of law at present, it is never desirable to be the guinea pig when it comes to novel infringement claims. To avoid this, retailers may wish to:

- consider the various third party IPR that it may encounter when creating content within a virtual world
- carefully review platform terms of use to determine the position on IPR ownership, permissions (or lack thereof) to undertake certain activities within the world and liability for infringement
- seek to clear the rights of any third parties whose copyright works may appear within content that retailers create (noting that the mere storage of footage on a server can amount to copying), and
- to the extent possible in a virtual world context, consider geoblocking content to remove jurisdictions that are not considered 'core' or 'key' to avoid unnecessary exposure to infringement risks.

Horizon scanning – Focus on: Omnichannel and the Metaverse (continued)

Artificial Intelligence – what you need to know to procure AI successfully by Tania Williams

ONGOING

WHAT IS HAPPENING?

Artificial intelligence (AI) is a term used to describe a range of technologies that enable machines to perform tasks that typically require human intelligence, such as the ability to comprehend, act and learn.

There are some clear benefits of using AI. It can be used to collect and analyse data to create insights to improve the customer experience (and in turn revenues), streamline processes and predict issues before they arise. The retail industry has already started to embrace AI with a number of successful use cases, such as:

- improving demand forecasting
- increasing accuracy in inventory management
- automating CRM marketing activities
- customising promotions and product recommendations, and
- optimising product placement.

WHY DOES IT MATTER?

It is important to understand the broader landscape in which AI is developed, and also its specific intended use. There are potential implications that retailers may take into account when deciding whether AI is appropriate in a given context, and a number of points to consider in any contract for procuring AI.

WHAT ACTION SHOULD YOU CONSIDER?

Ethical use of AI

The ethical use of AI has been raised as a potential obstacle. Retailers can take a number of steps to limit risk in this area by ensuring that data which is used to train AI is not biased itself and does not contain gaps that might produce unintended results, in order to maintain fairness. Also make sure that you understand the algorithms your AI uses so that you can explain them, or have them successfully audited and verified, if required.

Legislative backdrop

Legislation continues to struggle to keep pace with the rapid development and deployment of AI. In the UK, the Government has been reluctant to consider any overarching AI regulation and has deferred to sector-specific regulators to consider the impact of AI.

Consider whether the intended use of the AI may fall foul of the legislative framework which applies in the circumstances, and where you are licensing or procuring AI from a third party, allocate responsibility for legal and regulatory compliance in respect of the various AI components. Bear in mind that the underlying driver of AI is data, much of which might also of

Current usage of AI is limited in the UK; around 15% of all businesses have adopted at least 1 AI technology. The retail sector has one of the lower rates of adoption at 11.5%.

Source: Research commissioned by the Department for Digital, Culture, Media and Sport (DCMS).

course be personal data in the context of retail. Ensure that you have in place the systems and processes required in order to process data and personal data lawfully and in accordance with any other relevant contracts.

Licensing AI

When procuring AI from a vendor, AI can be accessed via an on-premises licence, where the user of the AI usually installs, trains and operates the AI solution on their own systems. It can also be accessed via software-as-a-service platforms, where the user accesses the AI solution in the cloud via the internet. There are nuances to consider with a licence for AI. AI is not static like traditional software. It learns, based on the data it uses, and the training provided by potentially both the provider and the user. Bear in mind how the licence provisions apply not only as at Day 1, but also further down the line once various iterations of the system might be created, and outputs are generated. Scrutinise the following provisions in your agreement:

IPR

Always include express terms on ownership, assignment and licensing of both the system itself, and the inputs and outputs of any AI. The vendor of the AI solution typically is the owner of it and provides a licence to use the AI. Be mindful that the vendor may put in place restrictions as to how (and perhaps where) the AI can be used to avoid risk, legal or ethical concerns. Who will own the IP in any evolution of the AI, as between the parties, especially where you as the licensee may have contributed to those evolutions? At the very least confirm that your licence clearly covers such evolutions. In terms of output, be very clear about what you own, and what you might be required to licence on to third parties (including the AI provider). If there is any IP infringement caused by the output of a system, do you have sufficient coverage by way of warranties and indemnities, in view of the fact that the output is created by the vendor's AI yet using your own production data?

Data

Your licence should cater for which party will be required to provide, and which party will own, any data used to train the AI, and the production data. If the vendor needs to use a subset of your data, ensure that you have the rights to grant such use in the intended manner (for example, pursuant to data protection legislation and in accordance with any relevant third party rights and restrictions). In a cloud-based AI solution, the vendor may require that training and production data be aggregated across a number of users. Be clear about whether your organisation's data can be used to benefit the provider's other users, or for your benefit only, noting that AI's accuracy and proficiency may be improved by access to, and training with, a broader data set than that solely of your own.

Warranties and indemnities

Traditional software is usually tied to a performance warranty that the software will operate in accordance with certain agreed specifications. Given that AI adapts, can you link the warranty offered by the provider to the intended outcomes of the AI, if those outcomes are able to be defined clearly? Many exceptions to IP indemnities provided in relation to traditional software (eg exclusions where the software is used in conjunction with other systems, or is modified) are not appropriate in an AI environment. Given the training that AI undergoes, and the adaptations which occur as a result, consider how your indemnities will provide you with adequate coverage over time.

Horizon scanning – Focus on: Omnichannel and the Metaverse (continued)

Branded NFTs – protecting your trademark in the Metaverse

by Henry Priestley and Emma Dunnill

MAY 2022 ONWARDS

WHAT IS HAPPENING?

As the race to create the ultimate omnichannel experience continues, consumers' appetite for virtual goods to enjoy in this parallel world is also on the rise, creating new opportunities for retailers to engage with different types of customers.

Brand owners have already started establishing a Metaverse presence through the sale of NFTs, and it's proving to be an extremely profitable new market, with the likes of Dolce & Gabbana, Gucci, Givenchy, Louis Vuitton and Puma recently getting in on the action.

There are also opportunities for retailers, brands and artists to collaborate in the design and sale of NFTs, as is the case with high-end department store, Selfridges, fashion brand, Paco Rabanne and optical artist Victor Vasarely. The NFT collections launched in April 2022 include; (i) "12 Unwearable Dresses", digital versions of 12 dresses from the Paco Rabanne design archives, and (ii) 12 unique token forms of Vasarely's artwork. The collections offer a new way for all parties to connect with new and existing customers via technology, whilst also celebrating the heritage of the brand and the works of art. The NFTs are being offered for sale via a website "powered by Selfridges" but also via immersive screens, in a dedicated space within Selfridges' flagship store in London. While this may be the first example of a retailer selling fixed price NFTs over the counter, it's unlikely to be the last!

But where there is rapid development of new technologies and significant money to be made, there is an increased risk of disputes. A recent high profile example is that of the "MetaBirkin".

WHY DOES IT MATTER?

Hermès Int'l v Rothschild (MetaBirkin)

French luxury goods brand, Hermès, recently filed a trademark infringement claim in the US against artist Mason Rothschild – for creating 100 "furry" digital versions of the brand's famous 'Birkin' handbags dubbed the "MetaBirkins", as well as registering the domain name www.metaberkin.com and using the social media tag @metabirkins to promote the NTFs. By early January 2022, Rothschild had sold in excess of $1m in "MetaBirkin" NFTs.

In May, Rothschild applied to dismiss Hermès' complaint but the application was denied by the court on the basis that it was at least arguable that the use of "MetaBirkin" was misleading.

Although the court is yet to consider the questions of infringement, and this is a case governed by US, not English, law, the dispute demonstrates the growing interest in NFTs and the willingness of courts to consider trade mark infringement issues arising in NFTs.

Dolce & Gabbana and RTFKT (recently acquired by Nike) recently brought in more than $6m and $3m respectively from hybrid NFT sales, where customers received both a physical fashion item together with an NFT-version of the goods.

In the first half of 2020, NFT sales totalled $13.7m, according to CoinDesk. In the first half of 2021, those sales reached $2.47bn, and those sales figures show no signs of slowing down.

WHAT ACTION SHOULD YOU CONSIDER?

As the law races to keep up with NFTs, in the meantime retailers should consider the following:

- **contracts**: when creating or commissioning NFTs, ensuring contracts with third parties include terms relating to minting, royalty rights and intellectual property ownership will help to mitigate some of the risks involved
- **protecting key brands**: the EUIPO recently issued guidance clarifying that NFTs will be covered in class 9 of the Nice Classification for trade mark filings. However, "NFT" on its own will not be sufficient and applicants will be required to designate the specific type of virtual goods to be protected, such as virtual clothing. EUIPO records indicate that filings are already being made in relation to NFTs (1,277 in 2021 and 1,157 so far in 2022) and the metaverse (205 so far in 2022). While there remains questions relating to how existing trade mark laws will apply to virtual goods, it is likely that filing numbers relating to the metaverse and NFTs will only continue to increase. Brands should therefore take prompt action to avoid being left behind. While trade mark registrations will not in themselves prevent infringement, they may act as a deterrent and may make taking swift action easier, so should be used to protect a retailer's key brand(s)
- **consider all forms of IP rights**: while Hermès relied on trade mark infringement in the "MetaBirkin" case, other IP rights such as copyright and design rights may also prove useful in taking action against infringers. Therefore retailers may want to consider maintaining a varied IP portfolio
- **enforcement**: while blockchain makes identifying individual infringers more difficult (because cryptowallets used in transactions provide anonymity to the individuals behind them), there may be other options for restricting access to the infringing works. If the infringing NFTs are being sold through an online marketplace, the marketplace may be liable or required to remove the infringing content, similar to the existing rules governing e-commerce platforms in many jurisdictions. In the above example, OpenSea removed the MetaBirkins following a complaint from Hermès. Retailers ought therefore to closely monitor and take swift action against any infringement of its IP.

Horizon scanning – Focus on: Omnichannel and the Metaverse (continued)

Ten tips for retailers entering the metaverse

by Paul Joukador and Hettie Homewood

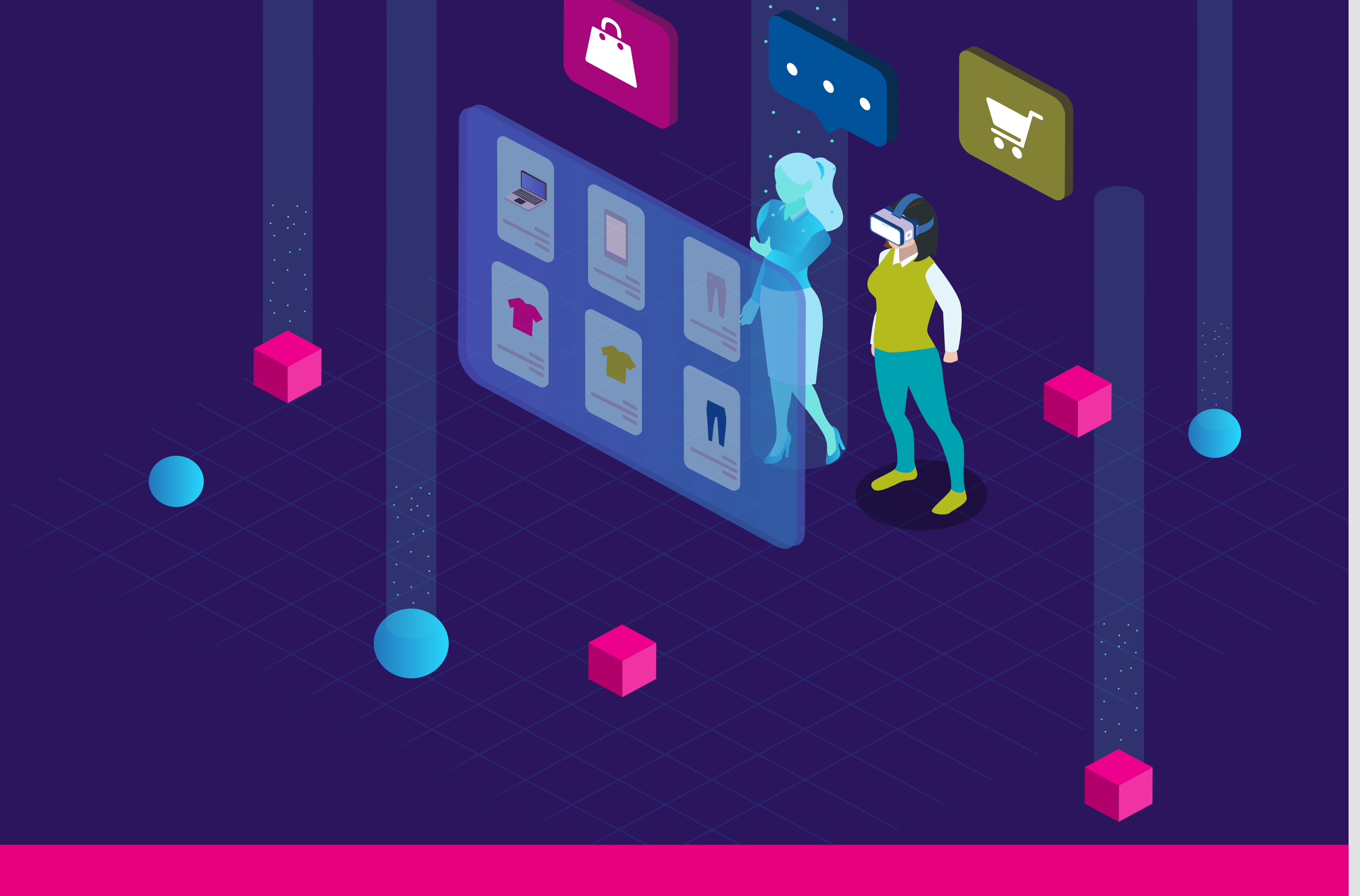
ONGOING

WHAT IS HAPPENING/ WHY DOES IT MATTER?

Once the province of online gaming and social media, the metaverse is the new hot topic in retail. Over the past couple of years, many retailers and brands have dipped their toes into the metaverse. With the growing interest and investment in the metaverse, this is creating new opportunities for connecting with customers. It might not happen overnight, but it's only a 'meta' of time before we are likely to see mainstream entry to the metaverse by retail businesses wanting to ride the omnichannel wave from virtual engagement to real-world success. For businesses looking to step into the metaverse, we've compiled a list of ten key things you should have in mind.

WHAT ACTION SHOULD YOU CONSIDER?

- **Develop your strategy**: The number of metaverses and possibilities within them are potentially infinite. Ensuring you have the right focus for your omnichannel offering is crucial, such as understanding which metaverse you want to be involved in, what the active demographic within that metaverse is, and what you are trying to achieve within that landscape (eg create a community for brand engagement, offer complimentary services to the real world experience, or develop a new revenue channel).
- **Budget accordingly**: The costs of being in the metaverse should not be underestimated. Prices can fluctuate dramatically and investing in virtual property might set you back a fair amount, especially if you want Snoop Dogg as your virtual neighbour. On top of that you will need to think about the costs of transacting and meeting legal requirements in multiple jurisdictions, depending on your plans.
- **Set up your data to work for you**: The metaverse may allow for the collection of vast amounts of customer data. Whilst this has massive potential from a customer reach and insights perspective, it also presents a significant compliance challenge on a global scale.
- **Get your IP in order**: Where possible, ensure your existing IP is properly registered (including in the correct virtual/digital classes and/or adding classes to existing trade mark registrations), and register any new designs for existing/new digital goods. You should also ensure your contracts are clear as to who owns any new IP created in the metaverse, and that you have the necessary licences for any third-party content.
- **Ensure your contract matrix works**: You will have a host of contractual partners supporting your presence and activities within the metaverse (platforms/providers, consumers,



content creators, tech partners etc). Whilst negotiations often focus on individual contracts, just like any tech stack, you need to consider how your contracts interact, and in particular, that you have the rights to share outputs as needed to create and maintain your presence in the metaverse.

- **Listen to your regulators**: Regulators have indicated that existing rules that are applicable to the digital and online world apply equally in the metaverse. Don't assume that your approach to compliance in the real world will operate in the same way in the metaverse, as in the metaverse the rules are being applied in a novel context. You may find there are additional regulators to engage with, eg the FCA for cryptocurrencies, the ASA for advertising regulations, the CMA in relation to consumer protection, and tax authorities for issues such as VAT treatment.
- **Follow the customer**: Keep track of your customers and predict their needs and desires. Depending on your sector and products or services, your customers might be early adopters in the metaverse space, or they might be brand new to the omnichannel experience and the ways it can meet their changing demands and expectations.
- **Consider your workforce**: Your activities in the metaverse may require additional talent investment, with digital product and marketing teams needing to be expanded, restructured or outsourced in order to build out your metaverse skill set.
- **Keep experimenting**: Explore, and where possible try out the tech currently available to see what will work for your business. Could AI bolster and target your customer service offering? Or could you experiment with NFTs to enhance consumer experience? Or could gamification be, erm, the name of the game?!
- **Watch and learn**: Keep an eye on your competitors' metaverse activities. What are they trying and on which platforms? What appears to be working well for them and what doesn't?

Horizon scanning – Focus on: Omnichannel and the Metaverse (continued)

Swimming in the data lake: tech-driven uses of consumer data

by Jon Bartley and Amy Blackburn

ONGOING

WHAT IS HAPPENING?

Digital transformation technologies increasingly drive retailers to collect consumer data and monitor consumer activities, both online and in-store. Whilst retailers aim to maximise growth and compensate for lost revenue in a post-Covid world, these data-intensive technologies may present considerable risks in view of the heavily regulated data privacy landscape.

WHY DOES IT MATTER?

The possibilities for retailers to implement innovative technologies that use consumer data are vast. One variety of technologies adopted in the market is those impacting the shop floor, including proximity marketing using Bluetooth, body worn cameras for staff and footfall analytics. These can be accompanied by back-end, "big data" projects, like those that profile customers across multiple touchpoints.

It is vital that retailers consider the heavily regulated data landscape when deploying these technologies, particularly in the UK and EU, although privacy laws are increasingly being enacted by governments globally. Data protection regulators are already starting to wake up to the use of more innovative data uses in a consumer-facing context and impose penalties where these do not comply with data protection laws, such as the EUR 650,000 fine levied against Budapest Bank for multiple GDPR breaches in deploying speech analytics to identify the emotional state of customers.

In recent weeks, we have also seen two retailers in Australia and one in the UK being investigated over the collection of customer "faceprints" as a deterrent to theft in-store.

The risk for retailers is exacerbated by the challenges in complying with key data protection principles when processing large volumes of personal data in this way. Where personal data is processed at scale, it is vital for organisations to ensure that they have a lawful basis for the processing, that personal data is not stored for longer than is necessary and is not used for purposes other than those for which it was collected.

If the technology is in any way "hidden" or imperceptible to the data subject, like the use of beacon technology in stores, transparency can be a particular challenge. If a technology cannot be explained to the customer in terms they will understand, it is unlikely to meet the transparency requirements under applicable data protection laws.

52%

of retailers are prioritising their spending on customer-facing technologies (see here).

WHAT ACTION SHOULD YOU CONSIDER?

As digital transformation programmes accelerate, organisations might consider implementing measures to identify and mitigate any potential data privacy risks created by the large-scale processing of consumer personal data.

Retailers may also wish to implement appropriate guardrails within their organisation and ensure these are adhered to. In particular, personal data should be secured internally by restricting access as far as possible and setting up processes to delete personal data when it is no longer needed for the relevant purpose.

A privacy champion or early warning system may also be useful to embed data protection compliance within the organisation. In any event, clear escalation routes to the DPO or in-house counsel will be invaluable.

It may be necessary to think creatively around complying with transparency obligations, such as verbal notices or in-store signage. Accountability will also be paramount; adopting a “privacy by design” approach is essential and formal impact assessments may also be mandatory.

Embedding processes to identify at an early stage potential risks and taking steps in response can ensure the deployment of compliant innovations and avoid costly delays or rework, let alone regulatory scrutiny.

Horizon scanning – Focus on: Omnichannel and the Metaverse (continued)

Maximising "clicks" – top tips for media buying

by Marlon Cohen

Advertising is a key driver of sales for brands across all industries. As a result, many brands turn to third party agencies to pull together advertising campaigns, although they should be careful to consider some key issues when doing so.

Media buyers should consider whether they are comfortable with an agency acting for their competitors, given that agency personnel will have access to brand strategy customer targeting plans. Prior to engaging an agency, it is advisable to ensure that suitable legal protections are in place, such as restrictions on acting for competitors, or ethical walls to cover any conflict issues.

Buying agencies often 'bulk buy' advertising space across different media channels so that they can offer competitive prices and retailers will want to get best value from a buying agency by seeking transparency as to the discount being offered compared to the price that could be obtained from media owners directly. It's also advisable for brands to understand what guaranteed rebates they will receive from the agency and to include robust audit and reporting obligations in the agreement.

When a media placement does not go ahead, agencies should be expected to refund any amounts paid to the agency that have not in turn been paid to the relevant media owner, although retailers may also want to consider the applicable process to the agency, what happens if the media owner subsequently runs the campaign, and how payments will be handled after termination of the agreement.

Additional tips:

- Understand what remuneration structure is going to be put in place with the agency, and how the performance of the agency will be incentivised through remuneration.
- Clarify what specific advertising, brand safety or anti-fraud requirements the agency needs to comply with.
- Confirm whether the agency is going to be engaged exclusively in specific territories or for specific channels.

Sourcing new technologies ethically

by Nigel Wilson and Praveeta Thayalan

The aftermath of the Covid-19 pandemic has seen many retailers leaning on new technologies to maintain customer engagement, meet consumer demand and generally streamline their operations across all channels. At the same time, retailers are facing increased pressure to prove their ESG credentials on a holistic basis. A recent focus is on the reduction of Scope 3 emissions – greenhouse gas emissions that indirectly occur in a company's value chain including due to any procured services. The upshot of this is that retailers looking to source new tech would do well to build their ESG goals into each step of the sourcing process.

Tips:

Pre-contracting phase:

- Run the procurement for solutions that are sustainable by design, rather than those that operate as a green 'bolt-on' to otherwise energy-intensive tech.
- Use technology to source ethically eg blockchain networks to track responsible sourcing or online marketplaces that connect ethical suppliers with customers.
- Use an ESG 'scorecard' that assesses a potential supplier using a range of metrics (eg Scope 3 emissions) and take due account of this in your procurement process.
- Perform 'Know Your Supply Chain' due diligence on each potential supplier, focusing on high-risk areas eg modern slavery risk in sourcing cobalt used in lithium-ion batteries.

Contracting phase:

- Include clear ethical standards and reporting requirements in the supply contract that evolve to capture new regulations (for example, those promoted by the Chancery Lane Project).
- Set ESG KPIs and retain rights to audit the supply chain and benchmark the supplier's ESG performance against comparable suppliers.

During the life of the contract:

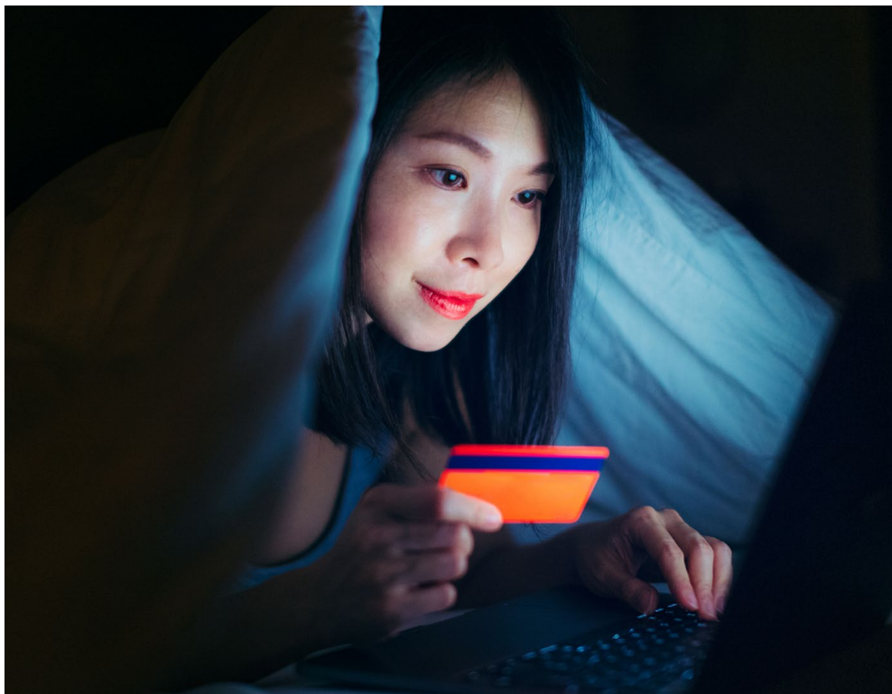
- Exercise your contractual rights to reporting, performance measurement, audit and benchmarking where appropriate.
- Establish a whistleblowing hotline for supplier personnel to report unethical practice.
- Engage with industry associations to share lessons learnt and develop industry-wide standards and partnerships that promote ethical sourcing practices.

Other developments | UK and Europe

Here we round up some other developments which have occurred since our last publication of Retail Compass (in April 2022). 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.

Where to next for Buy Now Pay Later?

by Whitney Simpson and Charles Buckworth



On Monday 20 June 2022, HM Treasury responded to its consultation on proposals to extend regulation to unregulated Buy Now Pay Later (BNPL) products. This consultation closed in January 2022. The Treasury's response confirmed the scope of regulation will cover BNPL products and short-term interest free credit (STIFC) provided by third-party lenders.

As well as confirming the scope of regulation for BNPL and STIFC products, the Treasury has also provided clarification on arrangements that will remain exempt from regulation eg charge cards, trade credit and invoicing finance.

Further feedback is now being sought as to whether or not the scope is extended to BNPL and STIFC provided by merchants. The deadline for stakeholders to provide further information was Monday 1 August.

As part of its response, the government has provided its views on the proposed regulatory controls it intends to apply to BNPL and STIFC credit agreements, covering areas such as, advertising and promotions, pre-contractual information and creditworthiness.

What happens next?

- Towards the end of the year, HM Treasury aims to publish and consult on draft legislation.
- By mid-2023 following the second consultation, the aim is to lay secondary legislation before Parliament. The FCA at this point, will be able to consult on its approach and the extended regime, after having worked closely with the government.

Business rates – changes to Transitional Arrangements

by Elizabeth Alibhai and Mike Kilner

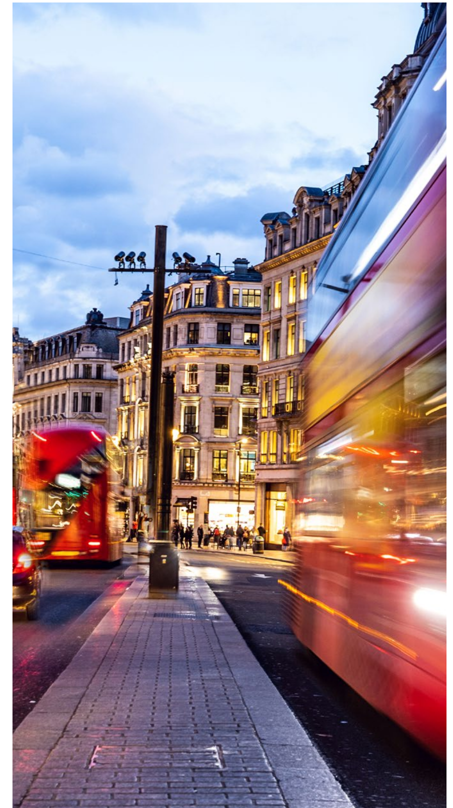
The next revaluation of properties for business rates purposes will take effect from 1 April 2023 based on rental values on 1 April 2021. Subsequent revaluations will then take place every three years. The move to three-yearly valuations is intended to make the system fairer and more responsive.

The government has recently consulted on whether or not the change to three-yearly valuations reduces the need for and/or the scope of future transitional arrangements. The government will decide in the Autumn upon the additional transitional arrangements to be adopted once the revaluation figures are available. Transitional arrangements are intended to cushion the impact of changes in the rates payable so that changes to rates bills following a revaluation are gradual and phased over time. Whilst a gradual phasing may assist retailers funding any increases, it will also result in delays for retailers in benefitting from a reduction. In addition, transitional relief has previously been available to cap the percentage increase of rates liability in any single year.

In the consultation the government sought views concerning how the balance should be struck in relation to setting transitional arrangements and any reliefs available. The government also sought views on how this should be funded. The consultation closed on 25 July 2022.

Tips:

As well as monitoring any changes in rateable values, retailers will need to keep a careful eye on the transitional arrangements to be introduced in the autumn in order to ensure they can properly budget for their business rates liabilities going forward.



A slow start to the new moratorium procedure

by Tim Moynihan and Harriet Ainsworth

Since the new moratorium procedure was introduced under the Corporate Insolvency and Governance Act 2020 (CIGA) in June 2020, there have been only 39 moratoriums; and only three since the temporary protections afforded by CIGA fell away in March 2022.

In summary, the moratorium procedure protects a company from creditor action for a period of time (initially 20 business days) to pursue a rescue or a restructuring.

The reasons for the slow uptake are:

- lack of familiarity with the process (although contrast that with uptake of the restructuring plan)
- companies still have to pay certain debts as they fall due during the moratorium (which can include lenders)
- a perception that the moratorium is not intended to be used by larger companies (with a variety of companies specifically excluded from using it), and
- the supervisory role of the monitor is limited with little guidance on the role provided by the legislation.

That said, as other measures under CIGA protecting debtors from winding up petitions continue to fall away, it can be expected that the use of moratoriums will grow and similarly familiarity with the process increases.

Tips:

The moratorium procedure remains relatively uncharted ground but is expected to become an attractive, cheaper option for companies needing protection from creditors particularly once there are more practical examples of its success and clarity around the role of a monitor.

Other developments | UK and Europe (cont.)

A tightening regulatory environment for corporate and financial reporting by Karen Hendy and Richard Martin

The Government is progressing various regulatory reforms in corporate and financial reporting. Some of this is driven by a desire for the UK to remain a trusted and attractive place to invest, but attention has also been sharpened by the current global political climate. Here we consider two areas that will affect companies in the retail and consumer sectors and beyond.

Companies House describes upcoming reforms to the registry as "the biggest transformation since 1844". The bill to implement the reforms has now been introduced to Parliament and includes:

- expanding the role and powers of Companies House
- identity verification for directors and people with significant control
- increased data sharing with law enforcement and other bodies
- protection of personal information held by companies and provided to Companies House
- Amending accounts filing requirements for small companies.

Legislation to implement the reforms is expected in the coming months.

Separately, the Government has published proposals for strengthening audit, corporate reporting and corporate governance systems. Large private companies with both 750+ employees and an annual turnover of £750m+ (the 750:750 test) will be treated as public interest entities (PIEs).

Key proposals for in-scope companies include disclosures around distributable reserves and directors being required to make statements confirming the legality of dividends. Companies will be required to report on matters considered a material challenge to resilience of the company over the short and medium term (a "resilience statement"). They will also need to publish an "audit and assurance policy" describing the company's approach to seeking assurance of its reported information.

Tips:

- Consider whether the 750:750 test applies.
- Liaise with accountants in readiness for additional disclosures.

Be prepared for more ESG activism by Connor Cahalane

Campaigns by activist investors involving public companies in Europe reached record levels in the first half of 2022, up 67% from the same period in 2021, according to recent research by investment bank Lazard.

UK companies are the most likely to face shareholder activism, making up over one third of the new campaigns launched this year. For example, in January 2022, activist Trian Partners made headlines by taking a 1.5% stake in Unilever. This resulted in the hedge fund's founder, Nelson Peltz, joining the Unilever board in July, demonstrating that activists can make their voice heard with relatively small stakes.

While in previous years campaigns by activist investors tended to focus on a company's strategy and operations, recently an increasing number of shareholder requisitioned resolutions at annual general meetings relate to environmental, social and governance (ESG) issues. Climate related resolutions have, for now, mainly targeted energy and other high carbon emitters as institutional investors and climate activist groups drive "Say on Climate" campaigns to force companies to implement net zero targets. However, broader ESG issues are also being raised by investors. In July 2022, J Sainsbury plc was the target of the UK's first ever "Living Wage" resolution at its AGM. Although two major proxy advisors, Glass Lewis and ISS, as well as the Sainsbury's board, recommended that investors vote against the resolution, which was ultimately voted down, Share Action, the activist group which tabled the resolution, secured the support of 17% of Sainsbury's shareholders in favour of the resolution which called on Sainsbury's to pay a Living Wage to all its workers.

Tips:

Public company retailers and consumer sector businesses should keep alert to the possibility that activist investors may target the company. Key to this is understanding the main issues activists are focused on and recognising an activist investor as soon as they appear on the shareholder register.

Resale Price Maintenance (RPM) in the spotlight again

by Melanie Musgrave

The illegal practice of RPM remains a focus area for the Competition and Markets Authority (the CMA). The CMA has published a blog reiterating how "everyone loses out with" RPM and the importance of retailers determining independently their own retail prices. Brands and suppliers must not, either directly or indirectly, force retailers to sell, or advertise online, their products at or above a minimum price and retailers should not agree to such pricing restrictions. The blog follows the CMA's publication of another RPM infringement decision and case study, this time involving Dar Lighting, a supplier of domestic lighting products. Dar Lighting was fined £1.5m for restricting its authorised retailers in its selective distribution network from offering online discounts.

The CMA has warned that, whilst selective distribution agreements are a legitimate way of doing business, they "can make it easier for suppliers to control pricing or carry out RPM" so care needs to be taken to ensure that such arrangements do not breach competition law.

The Dar Lighting case is also noteworthy as the company's fine was increased by 35% due to an aggravating factor, namely the company having previously received two warning letters about restricting retailers' ability to discount their prices and RPM and having then failed to take adequate steps to ensure competition law compliance.

The CMA issues warning and advisory letters to businesses where there are concerns that they may be infringing competition law, but where the suspected conduct is not a current priority for investigation. Receipt of such a letter should be taken very seriously. Almost all of the CMA's warning letters issued last year related to potential RPM conduct involving suppliers seeking retailers' adherence to recommended retail prices (RRPs) or other minimum pricing levels (including restrictions on discounting).

Tips:

Retailers, as well as suppliers, must refrain from involvement in RPM. Any business receiving a CMA warning or advisory letter must not ignore it and should seek legal advice and check compliance with competition law. If illegal conduct is uncovered, the business should end this promptly in conjunction with careful consideration as to whether to make a leniency application to the CMA.

A new era for Vertical Agreements in the UK and EU

by Melanie Musgrave

On 1 June 2022, new EU and UK competition rules took effect, continuing to provide a safe harbour or exemption from the application of EU and UK competition law respectively for vertical agreements which fall within their parameters. Compliance with these safe harbours avoids the need for businesses to conduct an individual competition law compliance assessment with the cost and uncertainty which this entails.

The previous EU vertical agreements block exemption had been retained in UK law following the UK's departure from the EU. The European Commission has now implemented a new vertical agreements block exemption (Regulation 2022/720/EU), which will expire in twelve years' time. However, the UK decided to adopt its own rules in the form of The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022, which will expire in six years' time.

The new EU and UK regimes are not fundamentally different from each other, but there are areas of divergence which may well increase over time, given the UK's earlier opportunity to revise the scope of the UK rules. Both regimes provide a transition period of one year for agreements already in place before 1 June and which benefit from the old EU block exemption.

It is advisable for businesses to review their existing vertical agreements to ensure that they will continue to benefit from the safe harbour under the new regimes. For businesses operating in the UK and the EU, it is important to be aware of the differences between the regimes and, thereby, avoid any compliance risks.

Any new agreements will, of course, need to comply with the new rules in any event.

For a more in-depth review of this topic, please see our article here.

Tips:

Businesses should not wait until the end of the transition period before reviewing their existing supply and other vertical agreements. The new regimes do offer more flexibility for certain vertical arrangements and also more clarity and take into account e-commerce and online platform developments. Detailed guidance has been published in respect of the EU Regulation and the UK Order.

Other developments | UK and Europe (cont.)

"Mini-Budget" scraps planned hikes in Corporation Tax, Diverted Profits Tax and Off-Payroll Reforms, while also establishing "Investment Zones"

by Adam Craggs and Adam Williamson

In the 2021 Budget (set out in March 2022), the Treasury announced that the main rate of Corporation Tax applicable to companies with profits exceeding £250,000 would increase from 19% to 25% from 1 April 2023. However, six months is a long time in politics these days. Among a raft of other changes, the Corporation Tax hike was scrapped by new Chancellor Kwasi Kwarteng in September's 'mini-budget'. This means that the UK rate of Corporation Tax will remain at 19%, keeping it well below the likes of France (26.5%) and Germany (30%).

The Chancellor has also cancelled the planned increase in the rate of Diverted Profits Tax (**DPT**) from 25% to 31%, from 1 April 2023. Introduced by Finance Act 2015, DPT is targeted at contrived arrangements whereby multinational groups seek to divert profits earned in the UK to other jurisdictions where they pay less or no tax. Pending any further unexpected changes in fiscal policy, DPT will now remain the same.

The Chancellor also outlined plans for a group of "investment zones" around the UK. The Treasury has earmarked 24 different sites around the country as possible locations. These zones are set to benefit from the abolition of stamp duty along with sweeping cuts to employment taxes.

Additionally, the Chancellor announced that the recent changes to the 'off-payroll' working rules (commonly referred to as 'IR35') are going to be reversed, from 6 April 2023.This change will be welcomed by a number of businesses that have struggled to grapple with the requirement to make employment status assessments, particularly at a time when labour supply chains are already under pressure as a result of the pandemic. Contractors will also no doubt welcome the changes, given the general view that their status as independent third parties (without employment-type rights) should be rewarded with more favourable tax treatment. Importantly, however, this change does not mean that the employment status question goes away. What it does mean is that, if a contractor engages with a company (an 'end user') through a personal services company (**PSC**), it will be the responsibility of that PSC to make an assessment as to the employment status of the contractor (for tax purposes). Failure to operate the rules properly will leave PSCs/contractors exposed. Whilst the end user is no longer exposed to PAYE or NICs if the employment status assessment is incorrect, companies should also not take this as an opportunity to encourage workers to engage with them through PSCs as HMRC will still challenge arrangements it considers to be artificial, and companies may fall foul of other legislation and powers at HMRC's disposal.

Employee rights – "fire and re-hire" – new statutory code of practice coming by Patrick Brodie, Rachel Lord and Ellie Gelder

In response to the public backlash following the P&O scandal earlier this year – where 800 workers were dismissed without any consultation and replaced by cheaper agency workers – the Government proposes to introduce more clarity around employers' obligations when proposing changes to employment terms.

In March 2022, the Government announced that it would be introducing a new statutory code on the practice of dismissal and re-engagement, also known as "fire and rehire", in a bid to clamp down on employers who use the threat of dismissal, with neither proper discussion nor engagement, to impose detrimental changes on employees.

The code will set out practical steps that employers should follow when proposing changes to terms of employment, including the requirement to hold "fair, transparent and meaningful consultations" on such proposals. This reflects the existing law and many retail employers are already au fait with these obligations so it remains to be seen what the code will add.

It is not known when the code will be published. However, when it is, tribunals will take the code into account in relevant claims, such as unfair dismissal. If an employer unreasonably fails to comply with the code, tribunals will have the power to apply an uplift of up to 25% to an employee's compensation.

Tips:

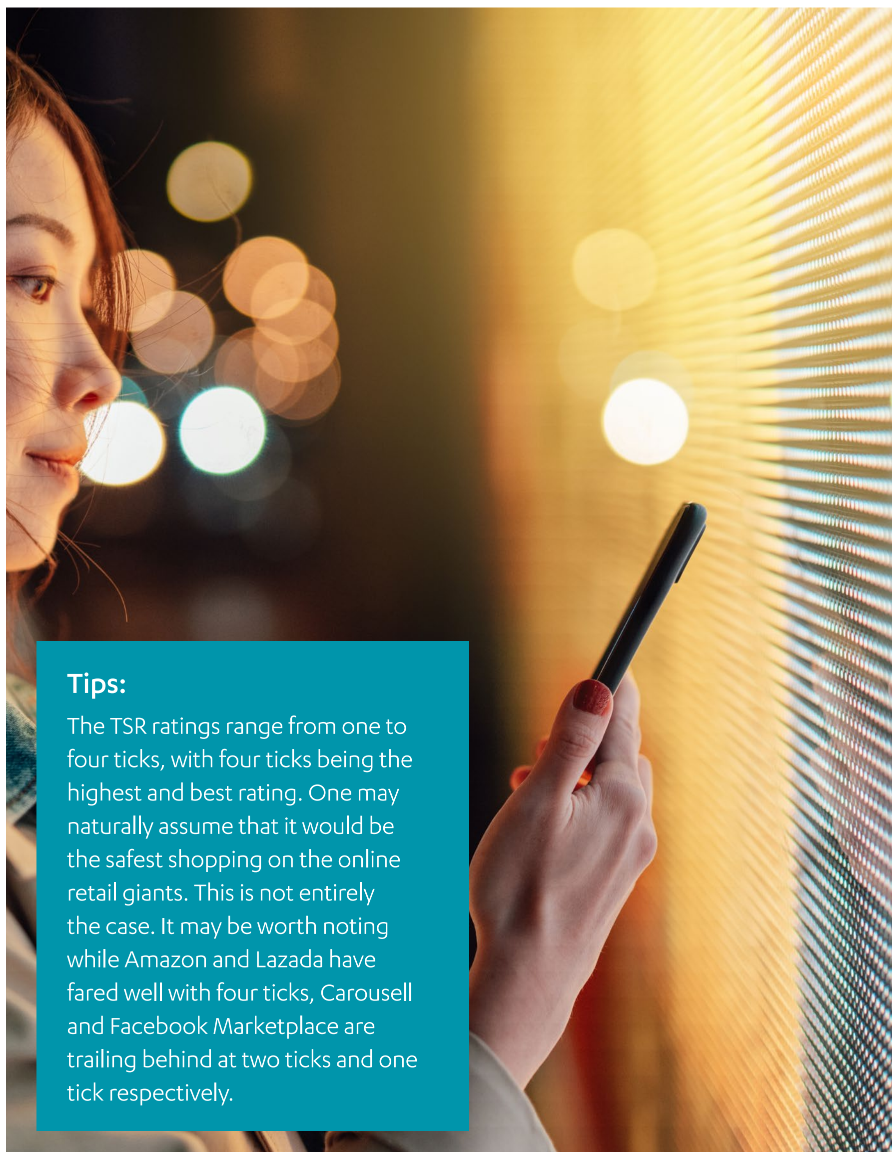
Retailers should look out for publication of the new code and review and, if necessary, consider revising their change management policies and procedures. Training for managers, and those responsible for organisational changes, on any new requirements is also advisable.

Although the option of dismissal and re-engagement remains a potential measure for employers, this is the case only where such action is the very last resort, and only where voluntary agreement to proposed – and necessary – changes is not possible. Firing and re-hiring continues to carry not only legal risks, but can, if mismanaged, also cause real damage to employee relations and a retailer's brand and consumer reputation.

Other developments | Focus on Asia

In this section we consider some key legal, regulatory and policy changes being faced by Retail and Consumer Brands in Asia. When discussing these changes, we may not always be talking about the jurisdictions in which we advise as a firm. Therefore, whilst the following is intended to offer a helpful flag, we recommend tailoring your consideration of the changes to your own specific circumstances as there may be other local law considerations which affect you (and taking local advice where necessary).

(Singapore): Oh, scam it! Singapore rolls out initiatives against e-commerce scams by Lin Yuankai and Selina Toh



Tips:

The TSR ratings range from one to four ticks, with four ticks being the highest and best rating. One may naturally assume that it would be the safest shopping on the online retail giants. This is not entirely the case. It may be worth noting while Amazon and Lazada have fared well with four ticks, Carousell and Facebook Marketplace are trailing behind at two ticks and one tick respectively.

Singapore has set up a new inter-ministry committee (also known as the Inter-Ministry Committee on Scams (**IMCS**)) to implement strategies to combat the growing scourge of online scams in the country. According to Singapore's Ministry of Home Affairs, there were more than 2,700 number of e-commerce scams reported, with losses of about S$5.8m (approximately £3.5m), in 2021 alone.

The IMCS has launched two initiatives: (1) E-commerce Marketplace Transaction Safety Ratings (**TSR**); and (2) Revised Technical Reference 76 on Guidelines for Electronic Commerce Transactions (**TR 76**).

Under the TSR initiative, e-commerce marketplaces, such as Amazon and Lazada, are assigned an overall safety rating which indicates the extent to which they have implemented anti-scam measures that ensure (a) user authenticity, (b) transaction safety, (c) availability of loss remediation channels for consumers, and (d) the effectiveness of their anti-scam measures. These ratings will be reviewed annually.

The TR-76, being the national standard for e-commerce transactions, have also been revised to include additional anti-scam guidelines for e-retailers and e-commerce marketplaces, which set out best practices to secure different areas of transactions, such as customer support and merchant verification.

(China): New rules on the import and export food safety in China

by Davina Turnbull and Heidi Ng

With the aim to manage and mitigate food safety risks, China's customs authority has promulgated stricter regulatory measures (**New Regulations**) on food import and export.

Under the New Regulations, which came into effect on 1 January 2022, overseas establishments that manufacture, process and store any food products for export to China will need to comply with a broad range of requirements, including:

- registration with the General Administration of Customs of China (GACC) – the registration procedure will vary depending on the product category
- product labelling and packaging requirements – for example, displaying the registration number approved by the GACC or the exporting country's competent authorities on the interior and exterior packaging of the food for GACC's examination and verification
- eEstablishing a complete and traceable control system for food safety and sanitation and ensuring that export food is produced, processed and stored in compliance with applicable Chinese laws, regulations and requirements.

Non-compliance with the New Regulations and Chinese law or non-conformity of the products may not only result in fines up to RMB 10,000 but also suspension of imports or withdrawal of the overseas food establishment's registration in China.

Tips:

- Overseas establishments looking to export food into China should carefully consider the requirements of the New Regulations, as well as the applicable Chinese law, regulations, and national food safety standards of China to avoid non-compliance which may, in turn, cause disruption to the overall supply chain.
- Review and update (if necessary) existing internal procedures/ policies with respect to those matters that fall within the ambit of the New Regulations.
- Any international treaty or agreement entered into or acceded to by China should also be taken into account as these will be applicable.

Other developments | Focus on Asia

(Hong Kong): New recommended model contractual clauses for cross-border transfers of personal data by Davina Turnbull and Heidi Ng

Building on the Guidance on Personal Data Protection in Cross-border Data Transfer published in 2014, Hong Kong's Privacy Commissioner for Personal Data (**PCPD**) has released new guidance for cross-border transfer of personal data. The new guidance includes "free-standing" recommended model contractual clauses (**RMCs**) for two cross-border data transfer scenarios: (i) transfers from a data user to another data user, and (ii) transfers from a data user to a data processor (eg an outsourced service provider). The key points to note are:

- it is not mandatory for data users to adopt the RMCs
- data users can use alternative wording that is in substance consistent with the requirements of the Personal Data (Privacy) Ordinance (PDPO) and/or incorporate the RMCs into more general commercial contracts
- the RMCs are also applicable in contracts between two entities both of which are outside Hong Kong when the transfer is controlled by a Hong Kong data user
- for contracts with complex contractual obligations for a long period of time, the data users can consider incorporating the additional contractual measures which include (i) report, audit and inspection rights, (ii) notification of data security breaches and (iii) compliance support and co-operation obligations.

While the cross-border data transfer control regime (s.33, PDPO) has yet to come into force, data users are still recommended to comply with the practices recommended in the new guidance as part of their data governance responsibility to protect and respect the personal data privacy of data subjects.

Tips:

- Carefully review and assess your current data processing contracts to confirm compliance with the PDPO.
- Consider incorporating the RMCs (or adapted equivalents) and the "additional contractual measures" in commercial contracts when a cross-border data transfer of personal data is required – this will assist the data user to demonstrate that the risks associated with such transfer have been considered and that adequate steps have been taken to ensure compliance with the PDPO.
- As data processors do not automatically fall within the ambit of the PDPO, data users must ensure that an adequate level of protection be provided for cross-border data transfers to avoid any potential liability.
- The adoption of the RMCs should not (of themselves) be taken as automatic compliance with the applicable local data privacy laws when personal data is being transferred to/from another jurisdiction outside Hong Kong.

RPC are holding a joint event with the British Retail Consortium on 16 March 2023.

The BRC aspires for UK Retailers to be diversity & inclusion leaders and last year launched its D&I Charter to support members on this journey. RPC have partnered with the BRC and we work with them to help members to translate the Charter commitments into real life tangible actions to move the dial across the sector. As the BRC D&I Charter enters its second-year huge progress has been made helping retailers challenge biases, embed DEI into every aspect of their businesses and sustain inclusive cultures but so much more needs to be done. The event we are hosting on 16th March 2023 is about looking forward to the next phase and the sector challenging itself to do even more.

The afternoon will provide thought-provoking content with a focus on leadership view, the stakeholder voice and employee concerns. We will look at how some companies have been able to move more rapidly than others to overcome and adapt to the challenges. And we'll think about, as we move forward into the next year, how we engage with the dissident voices and what are the uncomfortable conversations we need to have if we want to make progress?

14.30 – coffee start
15.00-16.00 – sessions
18.00 – drinks reception

RPC, Tower Bridge House,
St Katharine's Way, London
E1W 1AA

For more information, contact
seminars@rpc.co.uk

Retail Compass Live!

30 November 2022

Join us on 30 November 2022 for our first Retail Compass Live! event where legal and industry experts will bring the Autumn edition of RPC's Retail Compass to life, taking you through some of the 'must know' legal and policy changes impacting retail and consumer businesses, including:

- Selling in the metaverse.
- Customer data – extracting value and staying compliant.
- The shifting consumer protection landscape.
- The sustainability paradox – tackling the regulatory, legal and societal pressures to be greener whilst returning a profit and meeting insatiable consumer demand.

Location:

Tower Bridge House
St Katharine's Way
London
E1W 1AA

Timings:

15.30 – registration
16.00-17.30 – main event
17.30 – drinks reception and networking

#RetailCompass

Register here

Insights and opinions

Social commerce: influencer marketing – what's next for the industry?

An interview with Jade Macpepple-Jaja and Nicole Russell

Nicole: As a content creator immersed in the industry, have you seen changes in the way influencers are being used by retailers?

Jade: According to the Digital 2021: Global Overview, over the pandemic social media users grew at the fastest rate in three years to 4.2b. Since the pandemic, retailers have seen the increasing value of investing and collaborating with micro and nano influencers. The rise of apps like TikTok has allowed users with smaller followings to post and potentially get their content in front of thousands and even millions of users. Smaller creators with specific niches that align with retailers' products have proved to be a better fit as they can share their views with an audience genuinely interested in that niche. Brands are establishing long-term and ongoing relationships with these creators, allowing the sponsored content to be integrated naturally through their pages.

Jade: Have you noticed any changes in the type of content influencers and brands create to engage audiences across social media following the pandemic?

Nicole: During the summer of 2020 (in the middle of the pandemic), Instagram launched the reel video feature. Unknowingly to content creators at the time, reels were set to become the new way we create content on Instagram, moving away from the traditional photo posts. The purpose of a reel video is to provide short, entertaining, and creative content made by users for users. The launch of reels was one of the most significant changes to the type of content influencers and brands were creating, and in 2022 it is now the dominant form of content creation.

In addition to this, there was also the emergence of a new form of online shopping – live shopping on Instagram. Think of this feature as the modern-day version of QVC – influencers collaborating with brands to visit their store and film themselves selling their products live on the app. This e-commerce feature provides a new, contextualised way to shop on the app. Brands would feature products at the bottom of the live broadcast screen, so viewers can easily tap to purchase. This experience changed how brands used content to drive sales by making it easier for viewers to shop featured products.

Nicole: As a retail paralegal, what are the legal issues that you think can arise from this type of content?

Jade: Retailers that are using current trends that include popular music to promote products or for sponsored content may be vulnerable to copyright infringement claims if they fail to first obtain a licence from copyright owners. These licences do not tend to extend to commercial uses. Therefore, those not willing to pay to licence popular music can avoid any potential claims by using (albeit less recognisable) royalty-free music available through libraries such as Facebook's Sound Collection.

With live streaming, just as with Instagram advertising, retailers must ensure that the stream complies with guidance from the Advertising Standards Authority and the Competition and Markets Authority, including the BCAP Code, where the overarching principle is that advertisements should not mislead or cause serious or widespread offence or harm. It is good to note that particular care will need to be given if you are marketing to children or advertising food products high in fat, salt and sugar.

Jade: I know you do a lot of content creation for brands and retailers. How has this come about, and what do you think the benefits are for both parties?

Nicole: In the past year or so, I have seen an increase in brands reaching out to me to collaborate on a content creation basis. Content creation means that brands look to the influencer to create the content for their social media, website, e-marketing, etc. to drive brand awareness and sales. You may be thinking, why are brands starting to opt for this, and why don't they do it the traditional way in a studio with professional models? Well, content creators like myself have built their following by creating the type of content that a brand would want to use to attract and engage with their target audience

Jade Macpepple-Jaja is the Retail Paralegal for RPC and a content creator, creating engagement and informative content across social media surrounding her legal studies, passion for sneakers and regular travels. As a micro-influencer, she has collaborated with renowned brands such as Nike, who she collaborated with to design her own sneaker as a part of the NikebyYou project and participated in several international campaigns. This, alongside her previous work as a marketing executive, has given her a deep understanding of the influencer industry and how it has transformed over the years.

Nicole Russell is the Marketing and Analytics Executive at RPC and a social media content creator on Instagram. As a social media influencer, Nicole regularly creates fashion, food, and travel content to her engaged audience of 60,000 followers. She has collaborated with many high-street fashion brands, restaurants, and hotels to raise awareness of their brands. Nicole is also part of the Chartered Institute of Marketing and recently received a qualification in digital marketing.

Insights and opinions (cont.)

successfully. Therefore, to save on massive production and advertisement costs, brands are turning to influencer-generated content to tap into their target audience, increase brand awareness, and attract new leads. "An influencer has their own unique tone plus the skills and equipment at home. This can cut production costs by 50%", said Candice Green, creative lead at The Fifth. There are loads of benefits for a brand using this type of method; according to Obviously, there's been a 33% increase in the number of businesses hiring influencers for content creation.

This form of work is also beneficial for an influencer or content creator as it adds a new strategic skill to their job role by offering a more diverse form of work. In addition to this, they are rewarded via money or gifting.

Jade: Looking ahead to the industry's future, where do you think we are heading, and how can retailers shift their strategies?

Nicole: The influencer industry is moving fast as it tries to keep up with the ever-changing developments on the major social media apps. According to Media Kix data, the global influencer market is expected to reach $15bn by 2022, up from $8bn in 2019.

The recent announcement that Instagram users will soon be able to subscribe to a small number of influencers and creators to access exclusive features and content with Instagram Subscriptions is set to be the next transformation for content creators and app users. Subscriptions are a way for creators to secure a continuous income stream through their platform and content by monetising exclusive content to their most engaged followers by charging them a monthly fee through an in-app purchase on their mobile device. Subscriptions will mean that content creators will rely less on brand sponsorships as their primary source of income. We are already seeing the rise of subscription-based modelling on other apps such as Patreon and OnlyFans.

Many social media apps continue to move towards video content and favour this over traditional photos. Retailers will need to shift their strategies to focus more time and effort on creating short-form video content and put this at the centre of their content strategy to boost engagement.

There's a long list of trends set to impact the industry in the future, and retailers will need to be aware of them. Retailers must ensure they work with authentic influencers by utilising AI, promoting long-term partnerships with them, and running regular reports on their influencer campaigns to ensure ROI.

Nicole: What changes have you started to see in the industry?

Jade: The idea of the metaverse is gaining lots of interest from retailers and influencers alike. Six of the largest public companies in the world – Amazon, Apple, Google, Microsoft, Nvidia, and Tencent – have commenced their preparation for the metaverse. In January, Microsoft announced the largest acquisition in Big Tech history, paying $75bn for gaming giant Activision Blizzard, which would "provide building blocks for the metaverse". Facebook rebranding as Meta is also a strong indication of how they see the future. It will be interesting to see how this impacts the social media experience for retailers and influencers going forward. For society, however, precisely what the metaverse means remains unclear.

Tying in with this idea of the metaverse, we are also witnessing the emergence of virtual influencers. Virtual influencers are characters created through AI technologies. They mimic the way real influencers or creators use social media. A 2019 study from HypeAuditor revealed that "virtual influencers have almost three times the engagement rate of real influencers". Virtual influencers allow the creators of these influencers to give these influencers their own unique story and look, whatever may get them more followers—these virtual influencers or "digital humans" post just like regular human influencers. Whether checking in at their local coffee shop or sponsored Instagram posts, virtual influencers act just like we do on social media. With three million followers on Instagram, virtual influencer il Miquela made a reported $11.7m in 2020. This is just one example of virtual influencers' potential and the value they could bring to retailers.

Jade: With a lot of talk around sustainability in the retail sector, how do you think brands can weave this into their influencer marketing strategies going forwards?

Brands need to hold sustainability as a core value going forward. Big moves are happening in the fashion industry now, notably the rise of rental services. In the past, rental services were for special occasions, but now they are an alternative to fast fashion. There is a massive environmental advantage of a rental model compared to the modern form of immediate consumption, and this is something brands need to consider. Popular rental sites that have recently risen to prominence include the likes of Rent the Runway, By Rotation, My Wardrobe HQ, Hurr, OnLoan, and Rotaro.

This summer, we also saw Love Island switch their main fashion sponsor from fast fashion brands such as Pretty Little Thing to eBay in a bid to promote circular fashion. eBay has since launched its first collaboration with one of the Love Island stars to encourage buyers to change how they shop for clothes and wear more second-hand fashion.

Suggested dos and don'ts for retailers when working with influencers:

- **Choose the right influencers to reach out to.** You want to make sure their following is part of your market. That way, your message gets conveyed to people who will have an interest in what you're promoting.
- **Do** include clear contractual commitments in your contracts with influencers.
- **Don't** overlook micro-influencers.
- **Don't** limit yourself to one platform.
- **Do** embrace video content.

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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Contact details for RPC's contributors to Retail Compass, and our other Retail lawyers, can be found using this code:

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 and Consumer 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 and 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

Twenty of our lawyers have been quoted or mentioned across 58 publications, including FT, The 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 2023

"The team are consistently accessible, dynamic in their thinking and open to new approaches."

"Excellent sector experience and knowledge – I am consistently impressed by their know how in all things retail and consumer."

"Their engagement has made a material difference to companies across the retail industry."

Retail clients quoted in Chambers and Partners 2023

"The lawyers are very skilled and commercially astute, with good retail sector knowledge."

"The team are able to embed a deep commercial understanding in the advice and support provided."

"The team have great attention to detail."

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