RPC

Retail compass

Issue 9 April 2023

YOUR QUICK REFERENCE GUIDE TO LEGAL DEVELOPMENTS IN RETAIL

Navigating the changing regulatory landscape: what lies ahead?

Welcome to this edition

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

We are delighted to have guest contributions from Helen Dickinson, CEO of the British Retail Consortium reflecting on the ambitious objectives of the Retained EU Law (Revocation and Reform) Bill and the practical challenges its implementation will bring for businesses and from Emily Doe, Brand Warrior for Beyond Bamboo, discussing ESG strategy and the impact that sharing stories from your supply chain can have. We also take a look at the then and now of Influencer marketing and consider where it may go next.

With businesses and retailers experiencing increasing regulation and scrutiny across a variety of areas, we take a closer look at what's in store (including the much-publicised and wide-ranging Retained EU Law (Revocation and Reform) Bill), and the likely impact of those regulations on Retail and Consumer Brands, as well as developments concerning Product Liability and Artificial Intelligence; EU Sustainability Reporting Standards; the impact of revised data transfer provisions; Extended Producer Responsibility legislation; incoming Corporate Sustainability Due Diligence requirements; the ban on single-use plastics and much more.

Many of our clients are feeling an enhanced focus from authorities. To help guide you through some of these challenges, our Regulatory team also published their Regulatory update recently, which pulls together recent developments across the spectrum of the UK's regulators and is well worth a read.

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

FROM TOP
KAREN HENDY
JEREMY DREW

THANKS FOR READING OUR LATEST ISSUE OF RETAIL COMPASS

If you would like to receive a hard copy of this guide, please get in touch with us at publications@rpc.co.uk or your usual RPC contact.

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Retail Compass is edited by Georgia Davis (Of Counsel), Harpreet Kaur (Associate) and a team from RPC Retail. Thanks go to Kiran Dhoot, Tom James, Kate Langley, Jade MacPepple-Jaja, Beth Thorne, Adam Williamson and Daniel Williams for their additional contributions. Designed by Jenni Lungley-Down.

Contents

"The Government's objectives for this process are clearly extremely ambitious."

Foreword by Helen Dickinson

British Retail Consortium

Joining the EU in 1973 was a major economic and regulatory shift for the UK. Yet leaving it, after 47 years of new legislation and ever-closer economic ties, is an infinitely bigger job. The UK may have jumped the most important political hurdles by January 2020, but some aspects of leaving are still ongoing.

One such area is the effort to revoke, retain or modify most of the existing EU law that remains on UK statute books. This is the mission of the Government's Retained EU Law (Revocation and Reform) Bill and the accompanying review of around 4000 pieces of legislation whose future will be determined by the end of 2023.

The future of the Bill remains uncertain with the Report Stage in the Lords at least temporarily delayed. However, at the time of writing, the Government is indicating the delay is temporary – and therefore, we have to assume that it is.

Whether it is this Bill or any similar Bill, it goes without saying that the introduction of any new regulation or legislation requires very careful development to ensure that it is effective, proportionate, and that unintended consequences are avoided. A rushed or uncoordinated approach to changing existing regulation has the potential to have serious adverse impacts for businesses and their customers.

The Government's objectives for this process are clearly extremely ambitious. In effect, they have said that they will automatically revoke most retained EU law at the end of 2023, as part of a 'sunset clause', unless it has been designated to be kept.

Looking across the range of regulations in scope, the implications for retailers are potentially extremely far-reaching. Everything from consumer protection, data protection and product safety, to employment, finance and food technical specifications are lined up before the chopping block.

What retailers need now is certainty. They need to know how changes will affect them as early as possible. We've been clear in our engagement with Government that if the objective is a full assessment of all regulation, then the process should take place over a much longer time period. It is also essential that an evidence-based approach is adopted, accompanied by an impact assessment and subject to proper consultation with all key stakeholders.

Unfortunately, any lack of Parliamentary scrutiny increases the risk that some of the longer-term impacts of changes to EU retained law will be overlooked. This is why the BRC believes that full Parliamentary scrutiny should be incorporated into the Bill.

There may be opportunities as well, with the chance for some existing regulations to be amended and improved through the process. The BRC have put forward a range of areas in which there is scope for the Government to revisit regulations to improve their clarity and effectiveness. These include E-Commerce, ensuring consumer information requirements online are not excessive; Unit Pricing, to identify and address areas of uncertainty in price information; and Interchange Fee Regulation, to make it relevant to the UK Market.

At this stage it's still not clear how the Government will proceed. Our hope is that they take a prioritised and measured approach, which recognises the importance of evidence and effective process, rather than a bonfire of regulation. We will be working closely with all our members to ensure the practical challenges are understood, and the retail case is put forward.

Retail and consumer timeline 2023 and beyond

Ongoing	Lawmakers and courts around the world are seeking to define the Metaverse and its implications, including as to whether tax is chargeable on transactions.
Ongoing	Retailers should act now to remove barriers to accessibility for customers and staff who live with disabilities, as well as the wider community.
2023	The EU will introduce legislation to implement new directives in relation to product liability and Artificial Intelligence.
2023	The EU is planning to introduce a new Supply Chain Directive aimed at enhancing the protection of the environment and human rights in the EU and beyond.
2023	With a renewed focus on getting post-Brexit data protection laws through Parliament, the ICO has set out its outlook and strategy, providing some insight to help businesses plan and prioritise their compliance.
1 Jan 23	China passes amendment to Law on the Protection of Women's Rights and Interests, preventing discrimination against women in the workplace.
Feb 23	Singapore introduced regulations requiring social media operators to disable local access to "egregious" content (regardless of where it is hosted or initiated)
Spring 23	The Employment (Allocation of Tips) Bill due to receive royal assent.
Spring 23	The Protect Duty Bill, which aims to make the consideration and application of security processes consistent across all publicly accessible locations, due to have its first reading.
Spring 23	The draft Digital Markets Competition and Consumers (DMCC) Bill is due to be published, which will give the Competition and Markets Authority stronger powers to take direct enforcement action on consumer protection matters, as well as bolstering its competition investigative and enforcement powers.
1 Apr 23	National Living Wage (NLW) and National Minimum Wage (NMW) increase almost in line with UK inflation rate.
1 Apr 23	Minimum Energy Efficiency Standards tighten, making it unlawful for landlords to continue letting commercial properties with an EPC grading below "E" unless a valid exemption applies.
1 Apr 23	Changes to Research and Development (R&D) tax reliefs due to come into force.
1 Apr 23	Scope of the Soft Drinks Industry Levy (SDIL) expanded to include packaged concentrates which are mixed with sugar at the point they are dispensed from a fountain machine.
Jun 23	The EU Sustainability Reporting Standards (ESRS) is expected to be finalised, setting out detailed sustainability reporting requirements for EU and non-EU companies.
30 Sept 23	First payment of the annual Economic Crime Levy charge to be made by this date by anti-money laundering regulated entities with annual UK revenue in excess of £10.2m
Oct 23	Single-use plastic plates, trays, bowls, cutlery, balloon sticks and certain types of polystyrene cups and food containers (including those made from bio-based, biodegradable, or compostable plastic) will be banned in England.

JAN FEB MAR APR MAY JUN JUL AUG SEPT OCT

23

Retail and consumer timeline 2023 and beyond (continued)

- **Late 23** – Singapore expected to issue supplementary regulations for harmful content on social media.
- **Late 23** – Ban on single-use plastic products due to come into effect in Wales.
- **Late 23** – Anticipated that the Corporate Sustainability Due Diligence Directive will be finalised, following which EU and UK retailers will have between three and five years to comply.
- **Late 23** – Ordinance introducing ban on disposable plasticware and other plastic products due to come into force in Hong Kong.
- **31 Dec 23** – Mandatory requirements for listed companies and financial firms to publish transition plans to a net zero economy will be introduced by this date.
- **31 Dec 23** – Retained EU Law may be revoked by 31 December 2023 by way of the proposed sunset clause in the Retained EU Law (Revocation and Reform) Bill. This could impact around 2,400 regulations and will potentially have a significant impact on UK businesses.
- **2024** – Extended Producer Responsibility (EPR) will be implemented from 2024 to reduce hard-to-recycle packaging entering the market.
- **Jan 24** – First requirements of the EU Sustainability Reporting Standards (ESRS) enter into force.
- **Early 24** – The EU Artificial Intelligence (AI) Act, which regulates how AI systems are developed and operated, will likely become law in early 2024.
- **1 Mar 24** – Deposit Return Scheme comes into force in Scotland.
- **21 Mar 24** – Contracts entered into after 21 September 2022 which concern international transfers of Personal Data must incorporate the UK SCCs.
- **2025** – Key restrictions on the advertising of HFSS products due to be introduced (delayed from January 2023).
- **2025** – Deposit Return Scheme due to be introduced in England, Wales and Northern Ireland.
- **2025** – Second phase of Ordinance banning single-use takeaway containers due to come into force in Hong Kong.
- **31 Mar 26** – All packaging must be labelled recycle/do not recycle as appropriate by this date.
- **2027** – A cross-party committee is demanding a blanket ban on plastic waste exports by 2027.

OCT NOV DEC 23 | JAN FEB MAR APR MAY JUN JUL AUG SEPT OCT NOV DEC 24 | 2025 | 2026 | 2027

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).

How will the Retained EU Law (Revocation and Reform) Bill affect UK businesses? by Nicole Clerk, Paul Joukador and Patrick Brodie

31 DECEMBER 2023 (DATE OF REVOCATION OF RETAINED EU LAW)

WHAT IS HAPPENING?

When the Brexit transition period ended, so did the alignment of EU law with UK domestic law. New EU laws being made were no longer applicable to the UK and a category of legislation called Retained EU Law (**REUL**) remained. REUL includes directly applicable EU law, EU-derived legislation and directly effective provisions of EU law which were in effect before the end of the transition period.

The Retained EU Law (Revocation and Reform) Bill (**REUL Bill**) was subsequently introduced to Parliament on 22 September 2022 to allow the government to amend, repeal and replace EU laws easily. The REUL Bill contains a sunset clause which means that the majority of REUL could be (unless alternative arrangements for their preservation, restatement or replacement are adopted) repealed automatically on 31 December 2023. Government ministers can preserve laws by exempting them from the sunset clause or can extend the sunset to 23 June 2026.

WHY DOES IT MATTER?

The Bill is set to impact at least 2400 pieces of legislation across 21 Government departments (although there have been reports that ministers with National Archives may have found an additional 1400 laws that could be affected) and will potentially have a significant impact on UK businesses operating in the retail industry as key protections for consumers and businesses could be removed. Although the UK's Consumer Rights Act 2015 will be unaffected, notable pieces of retained EU law that could be at risk of lapsing under the REUL Bill include the following:

- Consumer Protection from Unfair Trading Regulations 2008 (**CPRs**)
- Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (**CCRs**)
- Business Protection from Misleading Marketing 2008
- Weights and Measures (Packaged Goods) Regulations 2006
- Commercial Agents (Council Directive) Regulations 1993

The CPRs and the CCRS particularly contribute significantly to the UK's current consumer protection framework. It is currently unclear as to whether the government will restate these rights through domestic law.

Given the timeline of the Bill, it is highly unlikely that it will result in greater consumer regulation and the Government's aim will likely be to maintain the effect of the current framework. Business may experience greater flexibility when working with suppliers but a lack of consistency in approach could also come with a cost implication. If consumer protections do become less onerous, businesses may still wish to continue to take the same approach when protecting consumers to remain competitive. Where the same goods are being sold within the EU as well as domestically, continued compliance with EU laws and UK laws deriving from EU laws may be the best option for those businesses.

The Bill is set to impact at least

2,400

pieces of legislation across

21

Government departments

Employment laws, and, therefore, labour rights might also be affected. The more obvious statutory protections that may be changed are those deriving from secondary legislation adopted from EU legislation. By way of example, these include the Working Time Regulations, the Transfer of Undertakings (Protection of Employment) Regulations and Agency Workers Regulations. There are others, but this list highlights three EU derived statutory protections that had, during their passage into our legislation and afterwards, garnered political criticism. This is not to say that these laws will be amended or repealed – indeed, there are good reasons why they should not face wholesale or significant change – but that possible outcome remains open to Parliament.

WHAT ACTION SHOU

It's safe to say the Bill has n universally popular. Earlier this year, a number of ministers formed a cross-party revolt against the Bill, which also attracted the support of some Conservative peers. In addition, the Government pushed the Report Stage of the Bill back, hint at a potential delay in the Bill coming into force – unsurprising given the controversy surrounding it. There are also suggestions that the Government could potentially repeal the Bill altogether.

If the Bill passes, it will cause great uncertainty for consumers, businesses and regulatory authorities. Until the legislative landscape is clearer, the lack of clarity may also affect the appetite of international investors looking to the UK. Also, whilst the Bill is subject to parliamentary scrutiny,

decisions connected with any future change with caution. Indeed, the absence of current clarity is hugely unsettling for long-term strategic decision making and investment.

Businesses should also continue to monitor the progress of the Bill for further indications from the government (see the government's REUL Dashboard, which contains a list of REUL and their current status).

If the Bill is passed, and given the volume of the affected legislation, businesses should identify and prioritise the laws that require immediate action.

CLICK TO REVEAL PAGE >

Speed read

How will the Retained EU Law (Revocation and Reform) Bill affect UK businesses?

- The sunset clause in the Retained EU Law (Revocation and Reform) Bill will enable Retained EU Law in the UK to be repealed automatically on 31 December 2023.
- This could impact at least 2400 pieces of legislation and will potentially have a significant impact on UK businesses.
- Businesses operating in the UK are advised to assess how the Bill is likely to impact operations and activities and should continue to monitor the progress of the Bill for further indications from the government.

<< Home >>

Horizon scanning (continued)

New EU directives for Product Liability and Artificial Intelligence are coming by Mamata Dutta and Gavin Reese

2023

WHAT IS HAPPENING?

In an effort to modernise the existing product liability regime, the European Commission has published proposals for a new "Directive on adapting non-contractual civil liability rules to AI" (**AILD**) and a new Product Liability Directive (**PLD**).

The feedback on both proposals was due by the end of 2022. It will be interesting to see whether the proposals are introduced as drafted or if there are any changes made.

WHY DOES IT MATTER?

As technology continues to develop at a rapid pace with products becoming more complex and reliant on AI, it was necessary for product liability legislation to be updated to reflect these changes.

If adopted in their current form the EU directives will have the following impacts:

Product Liability Directive

- The term "producer" will be replaced with "manufacturer" with the definition being expanded to include providers of software, digital services and online marketplaces which could increase the number of retailers that have to comply with the directives on product liability.
- Whilst the 10-year longstop will remain in place there is a proposal for a 15-year longstop in relation to some latent personal injuries with the limitation period to be restarted if a product is substantially modified.
- Manufacturers will be liable for defects caused as a result of changes they make to products already placed on the market, ie software updates or machine learning.
- Introduction of strict product liability claims for defective products that cause "loss or corruption of data."

Directive on adapting non-contractual civil liability rules to AI

- Creation of a rebuttable presumption of the causal link between the Defendant's fault and the output or failure of the AI system will be created, such that those who are harmed by an AI system output or failure do not necessarily need to prove how the Defendant's fault led to the AI output or failure (given the difficulty of proving the workings of an AI system).
- Introduction of a right for injured parties to request relevant information about a harmful AI system through the national Courts making it easier for Claimant's to pursue claims.
- Courts may also order manufacturers to preserve relevant evidence as long as deemed necessary in an effort to increase transparency.

The AILD could potentially increase the litigation risk for companies that design and/or deploy AI within their products by making it easier for Claimants pursue these claims.

WHAT ACTION SHOULD YOU CONSIDER?

The UK government has acknowledged the EU proposals but has confirmed, via a memorandum in October 2022, that no changes are currently proposed to the UK regime on either Product Liability (including AI product liability).

Despite Brexit, the relationship between the UK and EU from a retail perspective is still vitally important. Particularly for retailers that trade across Europe. In anticipation of potential changes to legislation surrounding product liability and AI within the UK, retailers should consider the following:

- how they currently com… relevant directives if the… into force and what cha… would need to make to… the directives
- how they provide digita… whether these platform… updated to ensure they… proposed directives
- how they use AI system… business, whether they… purpose and what chan… be made to those syste… any potential liability un… new directive

CLICK TO REVEAL PAGE >

Speed read

New EU directives for Product Liability and Artificial Intelligence are coming

In 2023 the EU will introduce legislation to implement new directives in relation to product liability and Artificial Intelligence (AI).

The UK government has acknowledged the EU proposals but has confirmed, via a memorandum in October 2022, that no changes are currently proposed to the UK regime in either Product Liability (including AI product liability). Although the regulatory landscape for AI generally is set to change – as discussed elsewhere. However, the relationship between the UK and EU remains vitally important for Retail and Consumer brands.

Horizon scanning (continued)

New EU and UK AI Regulation on the horizon by Helen Armstrong and Ricky Cella

CLICK TO REVEAL PAGE >

Speed read

New EU and UK AI Regulation on the horizon

- The EU AI Act is due to become law in early 2024 and, when it does, will establish a raft of regulatory obligations that developers and deployers of AI must comply with.
- In addition, the UK Government has published a White Paper setting out a more light touch approach to regulation of AI – allowing each sector regulator to take into stipulated key principles when setting guidance for regulated entities, with no single AI regulator or new legislation as such.

2024

WHAT IS HAPPENING AND WHY DOES IT MATTER?

The EU's Artificial Intelligence Act (the AI Act)

In December 2022, the EU reached agreement on a draft version of the AI Act which will now be debated and discussed by EU governments, the Commission and European Parliament, following agreement by the European Parliament of its common position. The AI Act aims to provide AI developers, deployers and users with clear requirements and obligations regarding specific uses of AI, robotics and related technologies.

The regulatory obligations imposed will depend on the risk profile of the AI system: certain AI practices will simply be prohibited (such as exploitation of human vulnerabilities); high-risk AI systems will need to comply with various key obligations to ensure risk management in respect of proposed AI systems (from data governance, transparency and human oversight) and low-risk AI systems will have limited obligations.

The proposed rules will also deal with enforcement after AI systems are placed on the market and provide a governance structure at European and national level. Once an AI system is on the market, designated authorities will provide market surveillance while providers will be subject to a post-market monitoring system and will have to report serious incidents and malfunctioning.

There have, however, been disagreements between key political groups, in particular as to how the law classifies AI systems as 'high risk – many groups are keen to ensure that only truly high risk cases are included in the list of high risk scenarios. They are also seeking contractual freedom to allocate responsibility to various operators along the value chain and no overlap or competing obligations with existing legislation. The result of these disagreements is that the full parliamentary vote is unlikely to take place until April 2023 at the earliest.

UK framework

The UK government's approach to AI regulation is still being developed, but it has indicated that any regulation will be "light-touch" and pro-innovation. The government has also confirmed that there will not be a single piece of legislation governing the use of AI, nor a single specialist regulator. Instead, each sector regulator will be responsible for ensuring potential harm from AI within their area of specialism is properly addressed.

In a White Paper published on 29 March 2023, the government established a "new national blueprint" for regulators to adopt in order to drive "responsible innovation".

The White Paper sets out five principles that will guide the use of AI in the UK:

- safety security and robustness – applications of AI should function in a secure, safe and robust way where risks are carefully managed
- transparency and explainability – organisations developing and deploying AI should be able to communicate when and how it is used and explain a system's decision-making process in an appropriate level of detail that matches the risks posed by the use of AI
- fairness – AI should be used in a way that complies with the UK's existing laws (such as the Equality Act 2010 or UK GDPR) and must not discriminate against individuals or create unfair commercial outcomes
- accountability and governance – measures are needed to ensure there is appropriate oversight of the way AI is being used and clear accountability for the outcomes, and
- contestability and redress – people need to have clear routes to dispute harmful outcomes or decisions generated by AI.

By applying these broad principles to each sector, the government aims to create an adaptable and context-driven framework of regulation. A new consultation on the proposals is open until 21 June, which will inform how the framework is developed in the months ahead.

WHAT ACTION SHOULD YOU CONSIDER?

The reality for UK businesses using AI is that the UK's less centralised approach will mean that they will need to deal with multiple regulators including: Ofcom, the Competition and Markets Authority, the Information Commissioner's Office, the Financial Conduct Authority and the Medicine and Healthcare Products Regulatory Agency. The Data Protection and Digital Information Bill also includes measures on AI.

In addition, retailers will ne whether any customers in impacted by the AI system and, if so, whether the far obligations under the AI A complied with to the exter

Horizon scanning (continued)

CSRD: The EU's new sustainability reporting regime

by Sophie Tuson, Sarah Mountain and Connor Cahlane

JANUARY 2023 ONWARDS

WHAT IS HAPPENING?

The EU's new Corporate Sustainability Reporting Directive (**CSRD**) entered into force on 5 January 2023. It will require certain EU and non-EU companies to report on a wide range of sustainability matters in line with detailed EU Sustainability Reporting Standards (**ESRS**). Those are currently being drafted and are expected to be finalised in **June 2023**. Reporting will be phased in with large and listed EU companies required to report from FY 2024, and certain non-EU companies (including certain UK companies) required to report from FY 2028. The reporting requirements are likely to be extensive, spanning a wide range of environmental issues including 'scope 3' greenhouse gas emissions across companies' full value chain. This move echoes similar developments in the UK where more extensive sustainability reporting is likely to become mandatory. Businesses should take stock now to ensure they are ready to report when required (either directly to regulators or indirectly to others in their supply chains).

WHY DOES IT MATTER?

The CSRD sustainability reporting requirements

The CSRD builds on the EU's existing sustainability reporting regime under the Non-Financial Reporting Directive, introducing more detailed reporting requirements for in-scope companies. The CSRD requires companies to disclose information based on a 'double-materiality' principle: disclosures must explain *both* how sustainability matters (eg climate change) impact the company, and also how the company's activities impact sustainability matters (eg pollution and plastic waste).

Under the CSRD companies will also need to disclose information about: (1) how sustainability considerations are implemented into the business; (2) how material sustainability risks and opportunities are identified and managed; (3) the resilience of the company's business model and strategy towards sustainability risks; and (4) the company's due diligence processes (including those relating to its supply chain) for assessing sustainability matters.

Companies will need to provide information about their net zero strategies (which must ensure their business model is aligned with the 1.5°c target under the Paris Agreement 2015) as well as any other sustainability targets.

EU Sustainability Reporting Standards (ESRS)

The final ESRS (expected in June 2023) will set out further detail about the sustainability disclosures required under the CSRD. According to the draft ESRS, which were submitted to the European Commission last November, disclosures will be required across a very broad range of ESG issues. These include climate change, pollution, biodiversity loss, waste/resource use, workers, consumers, affected communities and general business conduct. Significantly, in-scope companies will also need to report on 'scope 3' greenhouse gas emissions across their full value chains.

The final ESRS are expected to be published in June 2023. Sector-specific standards requiring additional disclosures by companies in 'high impact' sectors (such as food/ beverages and textiles) are due in the coming months.

A *modified* set of reporting standards will apply to non-EU companies that are caught by the CSRD (see below), with the exception of non-EU companies listed on an EU-regulated market (which will be expected to comply with the full standards). The modified standards are expected to be finalised in June 2024.

Which companies will be caught?

The CSRD will apply to large EU companies (whether listed or not) and listed EU SMEs. In due course, it will also apply to non-EU companies (including UK companies) with substantial revenues in the EU *and* an EU branch or subsidiary. Specifically, non-EU companies will be caught if they have: (1) an annual turnover (in the EU) in excess of €150m for each of the last two financial years; and (2) at least one EU branch (with an annual turnover of more than €40m), one large EU subsidiary, or one subsidiary listed on EU-regulated markets. The CSRD reporting requirements are expected to apply to non-EU companies in respect of financial years on or after 1 January 2028.

Direction of travel

The CSRD is part of a wider package of regulatory initiatives being proposed in the EU as part of the European Green Deal. Together, these initiatives will introduce significant new due diligence, compliance and disclosure requirements on companies operating in, or trading with, the EU. In particular, the CSRD has close synergies with the EU's proposed Corporate Sustainability Due Diligence Directive (**CSDD**) which, once enacted, is expected to introduce mandatory due diligence requirements on certain EU and non-EU companies requiring them to identify, prevent and mitigate adverse environmental and human rights impacts in their supply chains. In effect, the due diligence obligations under the CSDD are intended to strengthen companies' reporting under CSRD.

These initiatives also reflect similar developments in the UK under the Government's proposed 'Sustainability Disclosure Requirements' (**SDR**) regime. Under this regime, certain UK companies will be required to make sustainability disclosures (including in relation to scope 3 emissions) in line with standards currently being finalised by the International Sustainability Standards Board (**ISSB**). The ISSB's first two standards are expected to be finalised imminently – the Government will then likely consult on their adoption in the UK.

WHAT ACTION SHOU

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Businesses that are not dire
the CSRD, but that trade wit
that are, should also get familiar with the requirements as they are likely to see an uptick in sustainability reporting/ audit requests from these trading partners in the near future.

Even where businesses are not caught by the directive, there are *significant benefits* of tracking and reporting sustainability information. First, getting a clear picture of the climate and sustainability risks to the business will give it time to adapt its strategy and implement measures to manage those risks. This is crucial to ensuring the long-term viability of the business. Second, it will win the business favour with both shareholders and consumers by showing that it takes its sustainability and climate responsibilities seriously. This may also help the business attract equity investment and expand into the rapidly growing 'green' consumer market in the short and medium term.

- understanding the business' existing technologies to assist with data collation and segmentation. Think about the most intelligent use of those systems before introducing any new technologies
- mapping the business' supply chain and identifying key actors from whom you will need to request sustainability data
- setting up initial conversations with suppliers to understand what data they have access to, how it is stored, how it can be transferred to you and in what format etc
- reviewing the business' supply contracts to ensure they include relevant reporting requirements, standards and enforcement mechanisms, and
- considering what additional, specialist support (eg technical and legal) might be required to support the business to comply with its obligations under CSRD.

CLICK TO REVEAL PAGE >

Speed read

CSRD: The EU's new sustainability reporting regime

- The Corporate Sustainability Reporting Directive (CSRD) entered into force on 5 January 2023.
- Under the CSRD, in-scope companies will need to report on a range of sustainability matters (such as climate change, pollution, waste and biodiversity loss), with these reporting requirements being phased in from 1 January 2024 onwards.
- This is part of a broader package of regulatory initiatives in the EU which, collectively, will introduce various new due diligence, compliance and disclosure requirements. Those requirements will apply to certain companies operating in, or trading with, the EU.
- Even where businesses are not directly in-scope of the CSRD, there are significant benefits of tracking and reporting sustainability information.

Horizon scanning (continued)

Deposit Return Scheme: key considerations for drinks producers and retailers in the UK by Noonie Holmes and Jeremy Drew

2025 (OR 1 MARCH 2024 FOR THE SCOTTISH SCHEME)

WHAT IS HAPPENING?

Defra has now responded to its consultation on the introduction of a DRS in England, Wales and NI. The DRS will require retailers to charge a small fee on certain drinks containers sold, which consumers can reclaim if they return the container to a designated return point.

It is estimated that every year UK consumers use around

14 bn

plastic drinks bottles and nine billion drinks cans (gov.uk).

WHY DOES IT MATTER?

The DRS will have cost and production implications for producers and retailers of drinks. Crucially, the introduction of the separate Scottish DRS (currently due to be introduced in March 2024) may result in trade and competition issues within the UK.

The England, Wales and NI scheme

According to Defra, any brand owner (including an importer) that sells drinks in Scheme Articles on the market in England, Wales or NI will be considered a producer under the scheme.

Producers will be required to place a deposit on all Scheme Articles (value to be determined) when they are sold to wholesalers or retailers, and to pay a producer registration fee to help fund the DRS. They will also be required to register with and report data to the Deposit Management Organisation (**DMO**). The DRS is also likely to include the mandatory labelling of Scheme Articles with ID markers so that they can be recognised when they are returned to the point of sale.

The value of the deposit will be added to a Scheme Article's sales price by retailers, who will also need to operate a return point for the empty bottles and cans (unless exempt). Consumers will be reimbursed for their deposit when they return a Scheme Article to the retailer, and the cost of the reimbursement will then be passed back up the supply chain.

The most recent consultation response produced by Defra indicates that PET bottles and steel/aluminium cans will be within scope of the DRS in England and NI, and that PET *and* glass bottles, as well as steel and aluminium cans will be within scope in Wales.

Producers and retailers that do not comply with the scheme will be subject to sanctions, although the level has not yet been determined.

The Scottish scheme

Initially set to launch in August of this year, the implementation of the Scottish DRS has recently been delayed and is now due to be introduced on 1 March 2024. The Scottish First Minister has confirmed that the additional time will allow the Scottish Government to work with business and Circularity Scotland to ensure the Scottish DRS launches successfully next year.

Whilst the principles of the Scottish DRS are similar, but not identical, to the scheme for the rest of the UK, they are not identical. A key difference is that glass bottles will be considered Scheme Articles in Scotland, meaning there will be a divergence between Scotland and Wales, and England and NI.

Each time an in-scope product is sold along the entire supply chain, the deposit is charged and paid by the buyer at that stage in the chain, with the money being reimbursed back to the seller. Customers pay 20p to Retailers, who will have paid 20p to their wholesaler or direct to a Producer, who will have paid the 20p to the Scheme Administrator. For example, where a producer places 100,000 Scheme Articles onto the market, they would need to pay £20,000 to the Scheme Administrator, the cost of which they would pass on when those products are sold to wholesalers or retailers.

Producers will have to register with Scottish Environmental Protection Agency (**SEPA**), pay their fee and charge the deposit on each Scheme Article they sell. They will also be responsible for arranging the collection of empty containers and paying handling fees to retailers.

Retailers will have to decide how to accommodate the impact that the additional 20p will have. They will also need to operate a return point (unless exempt) and ensure they have space to store empty containers in a safe way. The Scottish Government has made clear that the deposit should not be subject to VAT, but the position has not yet been settled with the UK Government or with HMRC.

WHAT ACTION SHOU

In preparation for the intro
the DRS, retailers and proc
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producers, and the UK Gov
expressed an intention to follow suit with the England, Wales and NI Scheme.

Separately – and assuming its introduction is not delayed further – from 1 March 2024, under the Scottish DRS it will be an offence to sell Scheme Articles in Scotland that have not been designated for sale in Scotland. Producers and retailers that import and sell Scheme Articles from outside Scotland will in effect be required to ring-fence those drinks through specific packaging so that they can be identified as designated for sale in Scotland.

Scotland and the rest of the UK could be seen as an additional burden on businesses, arising at a time when retailers are already grappling with the impact of trade friction following the UK's exit from the European Union.

58%

of the British public suggest they would be very likely to use a DRS if introduced (Statista).

CLICK TO REVEAL PAGE >

Speed read

Deposit Return Scheme: key considerations for drinks producers and retailers in the UK

- Defra has released its response to its consultation on the proposed Deposit Return Scheme (DRS) for drinks containers. The scheme is aimed at reducing environmental pollution from drinks containers.
- The DRS will require producers and retailers of in-scope drinks (Scheme Articles) to ensure, among other things, that a deposit is paid by consumers on every Scheme Article sold.
- Separate schemes are being introduced in Scotland and the rest of the UK, which may have an impact on trade.

Horizon scanning (continued)

EU proposes new supply chain directive to advance the green transition and protect human rights by Luke Stewart and Simon Edwards

2023

WHAT IS HAPPENING?

The European Commission has proposed a new supply chain Directive aimed at enhancing the protection of the environment and human rights.

Companies in scope of the Directive will be required to adopt effective due diligence practices and take steps to identify and prevent actual and potential adverse human rights and environmental impacts.

The directive is still being negotiated by the EU, however the European Council has recently issued a "negotiating position" which helps to inform what the final Directive may look like. In particular, the negotiating position gives clarity on the likely scope and obligations of the Directive, as well as the consequences for failing to comply.

WHY DOES IT MATTER?

Scope

Although the new Directive is a piece of EU legislation, its scope is extra-territorial and so UK business operating in the EU may fall within its remit.

EU registered businesses will need to comply with the Directive if:

- Group 1 – They have a net worldwide turnover of more than €150m and more than 500 employees, or
- Group 2 – They have a net worldwide turnover of more than €40m, more than 250 employees, and operate in a 'high impact' sector (the definition of which includes eg the manufacture of food, drinks and textiles).

Whereas, businesses registered outside the EU will be caught by the Directive if:

- Group 1 – They have a net EU turnover of more than €150m, or
- Group 2 – They have a net EU turnover of more than €40m and operate in a 'high impact' sector.

When will the Directive apply?

The Directive is still passing through the EU legislative process, and so it is not yet clear when it will take effect.

That said, the European Council's 'negotiating position' does set out the timeframes that will apply once the Directive comes into force:

- three years from the point the Directive enters into force, the obligations it imposes will apply to very large companies only (being EU registered companies with more than 1000 employees and at least €300m net worldwide turnover, and non-EU registered companies with an EU net turnover of at least €300m)
- four years from the point the Directive enters into force, the obligations it imposes will apply to Group 1 companies
- five years from the point the Directive enters into force, the obligations it imposes will apply to Group 2 companies.

Requirements

If caught by the Directive, Companies will be required to conduct human rights and environmental due diligence by carrying out the following actions:

- creating a stand alone due diligence policy and integrating sound due diligence procedures into other policies and risk management systems
- identifying actual or potential adverse impacts on the environment and human rights caused by the company, its wider group and its 'chain of activities'. 'Chain of activities' is broadly defined as a company's upstream business relationships related to the production of goods and provision of services, and certain aspects of its downstream business relationships related to eg distribution, transport and waste management
- preventing and mitigating potential adverse impacts on the environment and human rights, bringing actual adverse impacts to an end and minimising their extent
- establishing and maintaining a complaints procedure for people and organisations who are affected by adverse impacts caused by a company, its group companies or its chain of activities
- publicly communicating on due diligence, usually by publishing an annual statement.

Additionally, Group 1 Companies will be required to adopt a plan to ensure that their business model and strategy are compatible with limiting global warming to 1.5°C in line with the Paris Agreement, and the objective of achieving carbon neutrality by 2050.

UK businesses caught by t
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Consequences of nor

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related to non-compliance
Directive. Further, supervisory authorities will have the power to:

- order companies to stop infringements of the Directive
- order companies to avoid repeating the relevant conduct
- order companies to provide remediation proportionate to the infringement
- impose financial penalties. The level of penalties is not specified in the Directive, and will be determined individually by each Member State when implementing the Directive into national law. The potential exposure to fines is therefore unclear, however the Directive does specify that financial penalties should be "commensurate with the company's worldwide net turnover" suggesting that fines will scale up by reference to the size of a business.

In addition to the powers granted to the supervisory authorities, the Directive sets out circumstances in which people and organisations can bring civil claims for full compensation for damages resulting from a company's failure to comply with certain of its due diligence obligations.

addressing environmental and human rights concerns

- reviewing and amending existing policies to ensure these do enough to address environmental and human rights issues
- which persons or entities are likely to comprise its "chain of activities"
- reviewing or conducting a risk analysis in respect of existing supply chains/chains of activities to identify any potential environmental or human rights issues
- taking steps to remedy any environmental or human rights issues identified
- developing supply chain resilience to ensure that if a supplier fails, a replacement does not need to be found on short notice without time to carry out proper due diligence
- whether any new technology or infrastructure is needed to streamline and ensure the accuracy of due diligence exercises.

CLICK TO REVEAL PAGE >

Speed read

EU proposes new supply chain directive to advance the green transition and protect human rights

- The EU is planning to introduce a new Supply Chain Directive aimed at enhancing the protection of the environment and human rights.
- Although the new Directive is a piece of EU legislation, its scope is extra-territorial and so UK business operating in the EU may fall within its remit.
- The Directive will require Companies to conduct human rights and environmental due diligence, with the potential for fines and civil liability if the requirements of the Directive are not met.

Horizon scanning (continued)

Transferring data out of the UK: What's changed?
by Joe Byrne and Mark Crichard

21 MARCH 2024

WHAT IS HAPPENING?

The new UK SCCs were introduced following Brexit to ensure that international transfers of Personal Data are compliant with the requirements of the UK GDPR. After 21 September 2022, businesses need to ensure that they have these in place for any new arrangements that involve restricted transfers from the UK.

WHY DOES IT MATTER?

With different types of SCCs in play, it can be confusing how to implement these. It is important that businesses ensure that they are exporting data compliantly under the UK GDPR or face potential regulatory action.

The UK SCCs comprises two documents which can be used in different scenarios:

- An "add-on" addendum to the new EU SCCs, aimed at businesses making restricted transfers subject to both UK and EU GDPR. Businesses with an international presence or with a reliance on vendors based overseas will likely have transitioned to using the EU SCCs. As such the addendum is the simplest means to ensure continuing compliance of their data flows out of the UK.
- However, companies that are only UK-based and wish to transfer data only subject to UK GDPR are likely best placed entering into the IDTA. The IDTA is a standalone agreement that is intended to be used for restricted transfers without the need to also enter in the EU SCCs.

Importantly, under both the UK addendum and the IDTA, organisations will need to ensure a transfer risk assessment (TIA) is conducted before any transfer is made. This will need to be documented and retained.

WHAT ACTION SHOULD YOU CONSIDER?

- UK businesses should check that relevant contracts concluded after 21 September 2022 included the UK SCCs. For legacy contracts that were concluded before 21 September 2022 businesses should start to take steps to plan for the March 2024 deadline to implement the UK SCCs. Utilising a unilateral amendment to update contracts with vendors may be the quickest means of achieving large scale compliance.
- Organisations that have international supply chains or utilise international vendors must perform TIAs for each transfer of personal data under the UK SCCs. Businesses should work this into their existing data compliance processes, bearing in mind that as TIAs are also a requirement under EU GDPR, a single assessment may be possible for many vendors.
- Businesses should take steps to ensure that the new UK SCCs flow down their supply chain. Any sub-processors engaged by vendors must also be bound by the new SCCs.

CLICK TO HIDE PAGE >

"Importantly, under both the UK addendum and the IDTA, organisations will need to ensure a transfer risk assessment (TIA) is conducted before any transfer is made. This will need to be documented and retained."

<< Home >>

Horizon scanning (continued)

UK Government addresses risks of PRN/PERN fraud at recycler level through reforms including Extended Producer Responsibility by Sophie Parkinson and Ciara Cullen

2024 AND BEYOND

WHAT IS HAPPENING?

Between 2018 and 2020, various investigations uncovered the illegal dumping of recyclable packaging abroad. The BBC, Unearthed and the Environment Agency headed up these investigations. The Government has since sought industry views to reform packaging recycling schemes that were at risk of fraud. Here we review the results of the Government's recent consultation and plans for Extended Producer Responsibility (**EPR**) to be implemented from 2024.

WHY DOES IT MATTER?

Panorama-esque discoveries of illegal dumping of "recycled" waste abroad has raised concerns of fraud at recycler level.

Packaging Export Recovery Notes (**PERN**) and Packaging Recovery Notes (**PRN**) are credits purchased and submitted by companies to indicate compliance with the Producer Responsibility Obligations (Packaging Waste) Regulations 2007. PERN credits are issued when packaging waste is exported outside of the EU and indicate regulatory compliance with UK recovery/recycling regulations. Exporting plastic packaging under the PERN system can fetch around £60 a tonne in subsidies. PRN credits are issued when packaging waste has been recovered/recycled in the UK. They certify packaging waste has been recovered and reprocessed/exported and enable businesses to finance the recovery and recycling of packaging materials (proportionate to the amount they placed on the market).

Extended Producer Responsibility (**EPR**) Regulations will revoke the current Producer Responsibility Obligations (Packaging Waste) Regulations 2007. EPR aims to address the potential for fraud in PERN/PRN issuing, the lack of transparency and unpredictability and volatility of PERN/PRN prices by holding producers accountable for the waste generated by their products. Producers will have to report on the amount/type of packaging placed on the market, report on packaging information and labelling and pay the costs of managing household packaging waste.

EPR will be introduced in phases from next year and the PERN/PRN system will continue to be used to show recycling obligations are met. The threshold for producer recycling obligations and disposal cost payments will remain at £2m turnover and 50 tonnes of packaging handled a year. Producers will have to report packaging placed on the market if they reach the new threshold of £1m turnover and 25 tonnes of packaging handled a year. Producers should consider whether they fall into this lower threshold.

Businesses who package goods and place them on the market under their brand name (**Brand Owners**) and businesses who sell unfilled packaging to producers who fall below the minimum threshold to take responsibility for packaging obligations, will be required to pay waste management costs. Brand Owners will have the most influence over, and information on, their products' packaging. Under EPR regulations, producers will be required to report on six months of packaging data in April and October of each year.

Annual packaging waste recycling targets up to 2030 will also be introduced. All packaging must be labelled recycle/do not recycle by 31 March 2026. This mandatory "Recycle Now" label will be required as appropriate, and businesses purchasing unfilled packaging for their products will need to consider the recyclability of any alterations made before the label is applied, eg, considering the impact of ink-labelling.

A mandatory takeback system for collecting and recycling disposable coffee cups will be rolled out. Sellers with 10 or more full time employees must provide a dedicated bin for cup collection from 2024. Sellers will need to report the weight of the cups placed on the market and collected and recycled each year. Retailers should prepare by considering cups made of alternative materials, introducing appropriate bins and ensuring staff are trained accordingly.

A mandatory takeback system for collecting and recycling disposable coffee cups will be rolled out. Sellers with 10 or more full time employees must provide a dedicated bin for cup collection from 2024. Sellers will need to report the weight of the cups placed on the market and collected and recycled each year. Retailers should prepare by considering cups made of alternative materials, introducing appropriate bins and ensuring staff are trained accordingly.

WHAT ACTION SHOU YOU CONSIDER?

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With increasing pressure o commitments coming top the Government and bott consumers, retailers and c brands would do well to in requirements early and co the change(s) as part of a c

Prep

In line with EPR, retailers and consumer brands should start to implement information management systems to monitor (recyclable) waste and to hit the ground running when annual packaging waste recycling targets under the EPR Regulations are implemented from 2024.

Plan

Use of comprehensive management systems which provide for tracking and data analysis, will enable retailers to estimate PERN/PRN requirements and, for this market-based system where PRN prices fluctuate based on supply/demand, may provide opportunities for retailers to use the system to stock up on PRNs at reduced price points.

The UK exports over **60%** of its plastic packaging waste, with the concern that plastic waste continues to be illegally dumped and burned abroad. A cross-party committee is demanding a blanket ban on plastic waste exports by 2027.

Click here.

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Speed read

UK Government addresses risks of PRN/PERN fraud at recycler level through reforms including Extended Producer Responsibility

- "Recycled waste" ending up in illegal dumps or discarded by roadsides is no new phenomenon.
- Industry concern that packaging certification is open to fraud at recycler level prompts reform of the Government's system.
- Government's response to the consultation and plans for Extended Producer Responsibility will be explored.

Horizon scanning (continued)

A shifting landscape? The outlook for data regulation in 2023

by Jon Bartley and Amy Blackburn

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Speed read

A shifting landscape? The outlook for data regulation in 2023

- The UK's new(ish) data protection regulator has set out his vision for the future of enforcement for UK businesses.
- The ICO is keen to reduce costs and burdens to businesses, including retailers, by issuing binding rulings, publishing guidance and prioritising combatting real and immediate harm over strict technical compliance with UK GDPR.
- Based on what we have heard so far, retailers can likely prioritise investment in practical safeguards of personal data and data subjects' rights to demonstrate accountability and reduce the most significant enforcement risks.

ONGOING

WHAT IS HAPPENING?

With a relatively new Information Commissioner in the UK and a renewed focus on getting post-Brexit data protection laws through Parliament, attention is turning to the ICO's priorities and how they fit into this new landscape.

Although the government is keen to loosen GDPR requirements to reduce the burden on business, retailers should remember that the ICO still has a range of different enforcement powers and new approaches may even come to the fore. What does this mean for retail businesses processing large volumes of consumer data?

WHY DOES IT MATTER?

The ICO's published outlook and strategy provides some insight to help businesses plan and prioritise their compliance. During an evening with the Information Commissioner John Edwards organised by the City of London Law Society in January 2023, Edwards set out the priorities for enforcement and his aim to reduce uncertainty for businesses in the UK. His views are of particular relevance to retailers, whose large consumer datasets and marketing and personalisation activities put them in a higher risk category for enforcement.

WHAT ACTION SHOULD YOU CONSIDER?

During a Q&A with RPC partner Jon Bartley, the Commissioner noted that one of the problems facing UK businesses is uncertainty in how data protection law applies to novel technologies. The ICO will be stepping up its innovation advice service with a focus on consumer health tech (such as smartwatches with health monitoring capabilities), immersive technology (such as virtual reality headsets), decentralised finance (such as cryptocurrency), and next generation Internet of Things (such as smart home appliances).

In line with the ICO25 strategic plan, the Commissioner confirmed that much more information about the ICO's work would be published in future, including making the new database of reprimands searchable, so that they are more useful for businesses seeking guidance on what good looks like. The Commissioner also suggested he'd like to introduce a system of issuing binding rulings, which also marks a move away from after the fact enforcement such as fines. Businesses would be able to apply to the ICO for preliminary judgments on the application of data protection law to specific commercial issues.

In the retail sector, the leading cause of data breaches was phishing, with **458** phishing breaches reported since GDPR came into force. Ransomware breaches accounted for **387** cases and unauthorised access for **376**.
(Source: click here)

The introduction of the GDPR regime in 2018 has brought data protection compliance into the boardroom as a priority for many retailers. A potential consequence of this however is an over-emphasis on technical compliance and checking all the right boxes, rather than pragmatically assessing risk. The ICO is keen to avoid this, challenging businesses to give consideration to the real human impact of their data processing and clarifying that the ICO is most concerned with clear and immediate harm. While it is key for retailers to maintain a robust privacy programme and comply with the law as it stands, they should take the Commissioner's comments as a vote of confidence in prioritising investment in security measures, "privacy by design" processing and respecting data subjects' rights.

Looking to the future, the Commissioner gave a positive indication that the Government reforms, in the form of the redrafted Data Protection and Digital Information Bill that has been moving through Parliament since March 2023, would not stray too far from the standards of the GDPR. In large part, this is because the Government is keen to avoid losing EU adequacy for data transfers originating in the UK, due to

the practical restrictions th on UK businesses. The Gov also confirmed, through c events by representatives businesses will be able to c EU GDPR-based complian so retailers can take comfo unlikely they will need to s sums to come into compli new UK data protection re there is no intention to run compliance process.

While the ICO's comments insight into future priorities, a look into current and recent enforcement actions can be just as valuable. The ICO has trebled the value of total fines issued from 2021 to 2022, with the caveat that this increase was comprised of two large multi-million pound fines to a software company and a construction firm. A key component of this is that the value of fines imposed on businesses specifically relating to personal data being compromised through a cyber-attack have almost quadrupled, from £1,285,000 in late 2021 to £4,998,000 in 2022. Whilst the ICO has expressed an intention to try different forms of enforcement going forward, retailers should remember that the regulator can of course still issue fines for breaches of the UK data protection law.

Horizon scanning (continued)

Across the Metaverse: VAT questions raised for lawmakers and regulators by Liam McKay and Harry Smith

ONGOING

WHAT IS HAPPENING?

Since Facebook became "Meta", the metaverse has become a ubiquitous term in tech circles. While there is a great deal of excitement and interest in the metaverse, this new and rapidly changing space does pose some difficult issues for legislators and regulators alike.

WHY DOES IT MATTER?

It has been suggested that by 2026, 30% of the companies in the world will have an active sales presence in the metaverse. Of course, businesses and consumers should be mindful of the fallibility of predictions. But it seems certain that the metaverse is set to have a huge impact on retail and business more widely in the years to come. Meta is leading the way here. The company has already spent a huge amount on Research and Development in the space, ploughing over $100bn into its metaverse projects.

All of this suggests that everyone is going to have to adjust to presence of the metaverse in our collective lives. Business will need to consider the tax implications of any and all transactions that take place in the metaverse. At present, there is no one approach to VAT in the metaverse. Indeed, it varies from jurisdiction to jurisdiction.

In late 2021, the German Federal Tax Court found that where revenue had been generated within the game "Second Life", this revenue was *not* subject to VAT. In this case, the Claimant provided services within the game "Second Life" by providing virtual land to rent. The Claimant would then receive income in the currency of the game, known as "Linden dollars". These Linden dollars could then be exchanged for US dollars on the platform.

While the Cologne Tax Court found that VAT was chargeable on the in-game transactions, the German Federal Tax Court disagreed and overturned the decision of the lower Court. This was because it found the Claimant was not providing a "consumable benefit" as currently defined under EU Law to any of the recipients of its services. In this case, this was a victory for the taxpayer.

WHAT ACTION SHOULD YOU CONSIDER?

While the above case resulted in a victory for the taxpayer, it should still act as a cautionary tale to businesses and taxpayers alike. The metaverse is not quite the 21st century Wild West (with that dubious honour more likely to go to the world of crypto), but it is in a state of high-speed development. Regulators are struggling to keep pace. The above judgment was determined on EU law as it is at present. However, as the popularity and utility of the metaverse increases, the law is likely to evolve. Businesses should follow any developments with interest as they look to develop their own presence in the metaverse. In the meantime, businesses may consider it prudent to keep records of the location and nature of their customers (ie business or consumer) as this can be relevant in determining the place of supply for VAT purposes under the existing legislative framework.

Gartner predi... one hour per ... shopping, edu...

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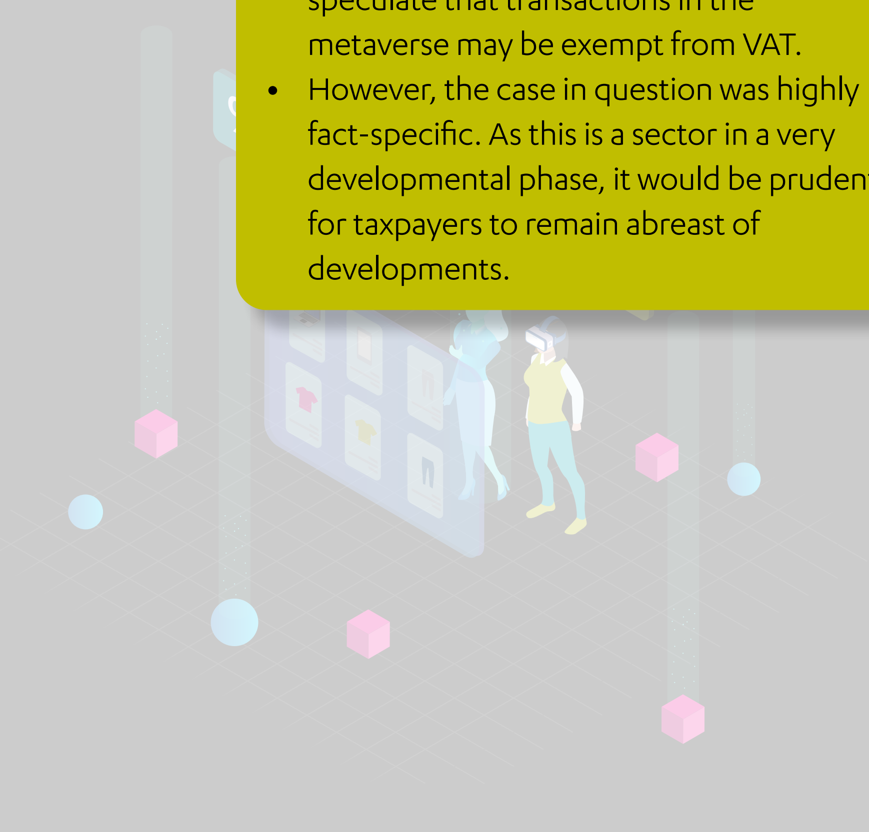

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Speed read

Across the metaverse: VAT questions raised for lawmakers and regulators

- Lawmakers in jurisdictions around the world are grappling with the issues posed by the inception of the metaverse. Tax is a particularly challenging area.
- The Federal Tax Court in Germany found that no VAT was payable on the rental income derived from a virtual loan in the game Second Life. This led some to speculate that transactions in the metaverse may be exempt from VAT.
- However, the case in question was highly fact-specific. As this is a sector in a very developmental phase, it would be prudent for taxpayers to remain abreast of developments.

Horizon scanning (continued)

Stores of the future: six ways to improve accessibility in your business by Ellie Gelder and Kelly Thomson

ONGOING AND INCREASINGLY IMPORTANT PRIORITY FOR RETAILERS

WHAT IS HAPPENING?

Accessibility is about accessing retail environments and products easily and without limitation.

Rather than a regulatory headache or an extra cost to bear, accessibility is increasingly seen as a positive opportunity to create an environment where *everyone* can thrive – regardless of their particular attributes and differences, including any disabilities they may have.

With the focus on personalisation, digitisation, automation and convenience and the move to a meta channel presence, retailers are looking at how to improve accessibility at the outset of their metaverse journeys to get ahead of the curve.

WHY DOES IT MATTER?

Poor accessibility undoubtedly leads to adverse commercial consequences. There are currently 14.6m disabled people in the UK – a significant consumer base that retailers risk losing if their stores and products are inaccessible.

According to disability equality group We are Purple, the total spending power of families with at least one disabled person is estimated at £274bn a year, while high street shops lose an estimated £267m each month due to inaccessibility.

Turning to the physical shop environment, research by the Office of National Statistics (ONS) has found that 41% of people with disabilities were more likely to report finding access to products (eg clothes or groceries) in person difficult compared with 15.8% of non-disabled people.

Barriers to online accessibility include poor product descriptions (eg failing to indicate if a product is suitable for people with texture issues or allergies, or if a garment has buttons that are tricky to reach), difficulty navigating websites and a lack of assistive technology. Research by Nucleus has found that two-thirds of users with visual impairments abandon their transactions when faced with accessibility blockers and go on to buy elsewhere from accessible sites.

WHAT ACTION SHOULD YOU CONSIDER?

Identify the accessibility blockers in your business

To identify your accessibility blockers, talk to your staff who will, often, also be your customers. Listen to their experiences and take on board their suggestions.

Involve communities in designing accessibility solutions

Consult with your disability communities before designing solutions to assess the effectiveness of well-meaning initiatives. For example, some customers have criticised retail "quiet hours" for neurodivergent customers, when lights are dimmed and noise reduced, on the basis that these are not at convenient times and that shops should be accessible to people all the time, not just when it suits the business.

Synchronise your accessibility strategy

Accessibility is an internal and external DEIB issue. Therefore, avoid a silo mentality and adopt a cross-functional approach across all relevant functions, including customer service, people teams, disability communities, property management and so on. Ensure all perspectives are taken into account when formulating solutions and implement initiatives consistently throughout the organisation.

Communicate your accessibility strategy

Research by Forbes has found that retailers are losing out on billions of revenue by failing to signpost product accessibility so remember to clearly communicate your accessibility measures to customers, suppliers and your whole workforce.

Focus on inclusive design to drive innovation

Inclusive design, where accessibility is front and centre, can ultimately drive impactful innovation and commercial gains.

There are many accessibility initiatives which have helped the wider population. For example, wider aisles and accessible facilities benefit parents with pushchairs as well as wheelchair users, while digital accessibility is better for all consumers.

Be alive to accessibility challenges in stores of the future

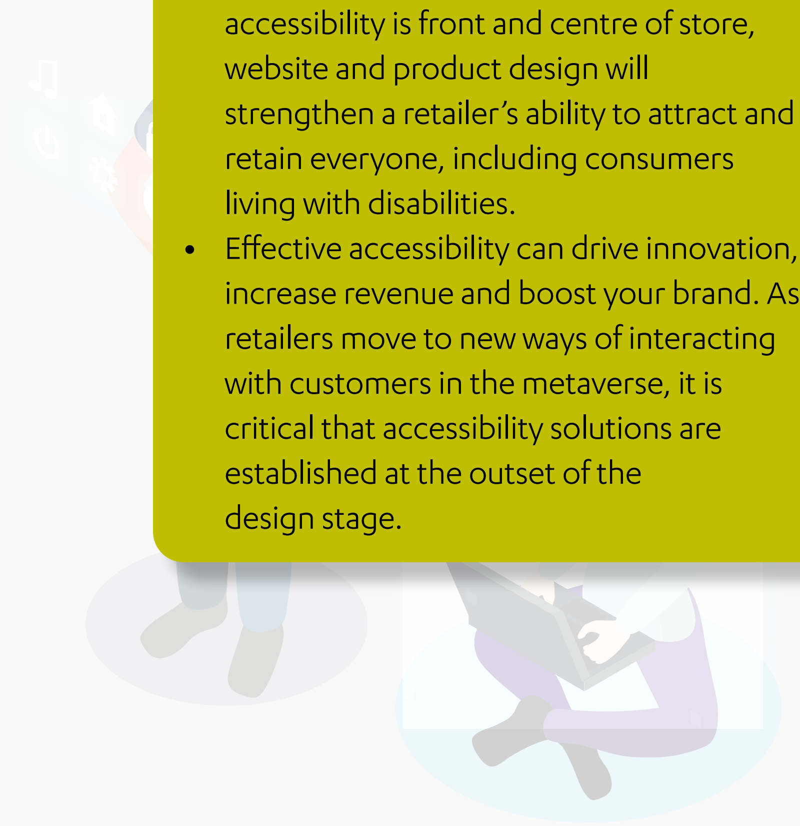
The visually rich metaverse may not be accessible to vision impaired people; there are concerns the use of avatars may affect a person's disability identity; and the sensory overload of the metaverse may not be suitable for those with sensory processing disorders.

CLICK TO REVEAL PAGE >

Speed read

Stores of the future: six ways to improve accessibility in your business

- Retailers should adopt a cross-function approach to engage all relevant functions as well as the disability community to remove accessibility barriers.
- Consumers living with disabilities will look elsewhere when they encounter accessibility blockers. Ensuring accessibility is front and centre of store, website and product design will strengthen a retailer's ability to attract and retain everyone, including consumers living with disabilities.
- Effective accessibility can drive innovation, increase revenue and boost your brand. As retailers move to new ways of interacting with customers in the metaverse, it is critical that accessibility solutions are established at the outset of the design stage.



Horizon scanning (continued)

Transitioning to a net zero economy by Rosamund Akayan and Connor Cahalane

EXPECTED BY THE END OF 2023

WHAT IS HAPPENING?

The TPT has published a draft disclosure framework and implementation guidance for private sector entities to transition to a net zero economy, making recommendations for companies and financial institutions to develop gold-standard transition plans.

The TPT also intends to publish a range of "sector-specific" guidance in 2023.

WHY DOES IT MATTER?

Climate change poses risks to companies, financial institutions and individuals alike, and the retail sector is already taking steps to address the challenge.

Over 80 leading retailers have committed to following the *BRC Climate Action Roadmap*, which aims to bring the CO2 emissions of the industry and its supply chains down to net zero by 2040. The Roadmap has three key decarbonisation milestones: stores by 2030, deliveries by 2035 and products by 2040.

The government has also introduced rules to encourage the transition to net zero. Mandatory climate-related financial disclosure requirements were initially introduced for premium listed companies in 2020 following recommendations of the Task Force on Climate-related Financial Disclosures. The requirements were then extended to standard listed companies in 2021 and to large private companies and LLPs in 2022.

By the end of this year, the UK government expects to consult on requiring large UK private companies,including retailers that meet the yet-to-be confirmed size requirements, to disclose how they will cut their climate emissions to net zero by 2050, in what are known as transition plans.

Transition plans will show investors how an organisation will reach net zero by 2050 across the organisation's operations and value chains. HM Treasury set up the TPT to make sure that these are the 'gold standard', leaving no room for greenwashing.

WHAT ACTION SHOULD YOU CONSIDER?

Listed retailers should already be working on their transition plans. The FCA has urged companies not to wait for the introduction of formal rules but to use the TPT's draft guidance to write draft plans which can be submitted for feedback.

In anticipation of the extension of the requirement to disclose transition plans to large UK private companies, non-listed retailers may also benefit from putting together transition plans since:

- mandatory requirements for non-listed companies to publish transition plans are expected to closely follow the existing requirements for listed companies
- companies publishing transition plans will be required to consider the carbon emissions of their suppliers and other companies in their value chains (whether listed or not)
- consumers are increasingly looking to reduce the environmental impact of their purchases.

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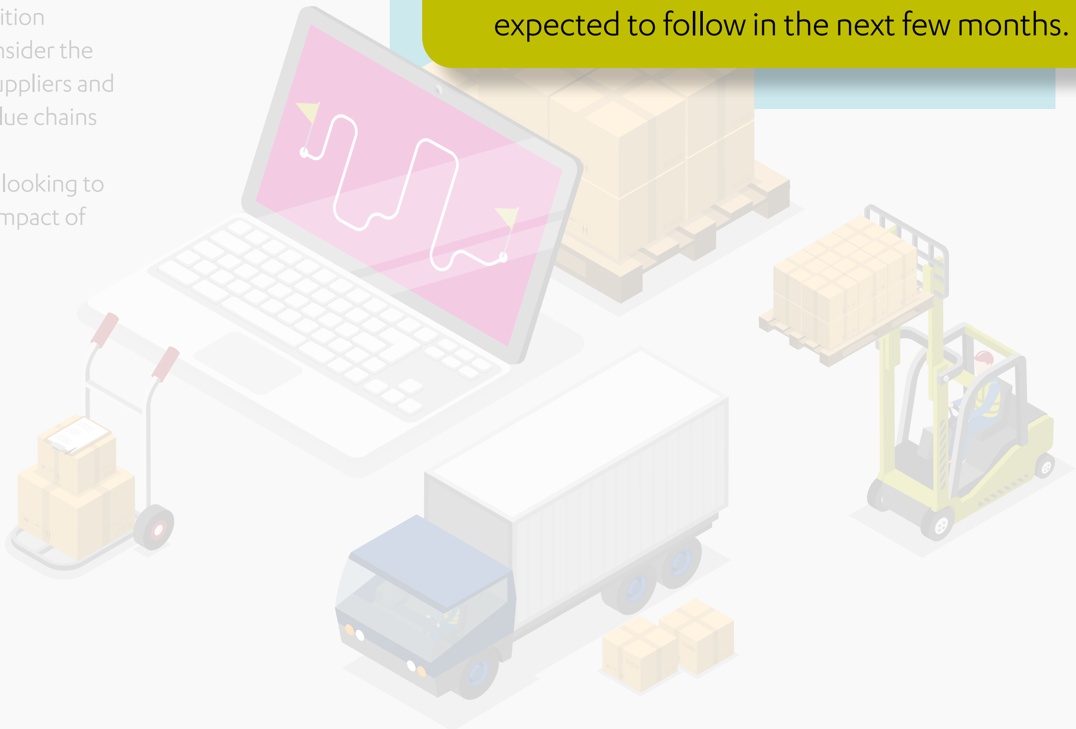
Speed read

Transitioning to a net zero economy

- At COP26, the government announced plans to make the UK the world's first net zero aligned financial centre. To achieve this, mandatory requirements for listed companies and financial firms to publish transition plans to net zero were introduced in 2022 and the government has recently confirmed its intention to introduce requirements for large UK private companies to also disclose their transition plans.
- Transition plans will supplement existing climate-related financial disclosure requirements, which were initially introduced in 2020.
- The Transition Plan Taskforce (TPT) has consulted on a disclosure framework and implementation guidance for transition plans, with the public consultation closing on 28 February. Detailed guidance is expected to follow in the next few months.



Horizon scanning (continued)

Corporate sustainability due diligence: it's time to prepare

by Nicholas Iles, Tom Jenkins and Sam Tate

LATE 2023

WHAT IS HAPPENING?

The EU Corporate Sustainability Due Diligence Directive (CSDDD) will allow Member State supervisory authorities to fine larger EU and non-EU companies for failing to detect and prevent adverse human rights and environmental impacts.

Addressing these CSDDD requirements will also be an important additional tool for companies in the steps they already take to manage and mitigate financial crime risk.

WHY DOES IT MATTER?

Corporate sustainability due diligence is intended to reduce human rights violations and improve environmental protections, for example in tackling worker exploitation and climate change.

Who does it apply to?

The CSDDD will apply to:

- UK-incorporated companies generating €40-150m annual turnover within the EU where at least 50% of turnover comes from "high-impact" sectors, such as clothing, food or drink
- UK-incorporated companies generating over €150m annual turnover within the EU
- EU-incorporated companies with over 250 employees generating over €40m annual worldwide turnover where at least 50% of turnover comes from "high-impact" sectors, and
- EU-incorporated companies with over 500 employees generating over €150m annual worldwide turnover.

Companies in scope must also include EU and non-EU subsidiaries and business partners in their due diligence.

What does it require?

As currently drafted, in-scope companies must identify actual and potential adverse human rights and environmental impacts. They must also prevent and mitigate potential impacts, stop actual impacts and establish ongoing monitoring.

Due diligence must cover a company's *'chain of activities'*, which includes production, supply chain and distribution of goods, and/or provision of services.

These companies must produce a sustainability due diligence policy (updated annually) and an adverse impact complaints process. They must also publish on their website an annual corporate sustainability due diligence statement, similar to the requirement for certain companies to publish an annual Modern Slavery statement.

When will this take effect?

Once the CSDDD is finalised, EU Member States will have two years to adopt into domestic law. There will be a further one to three year period for companies in scope to comply, depending on revenue. It will be prudent for affected companies to start the process of preparing for the changes now, to best take advantage of this lead time.

Failure to comply?

EU Member State supervisory authorities may investigate companies for alleged breach and can impose various measures, including fines based on turnover. Non-EU companies satisfying the EU revenue criteria can also face investigation, even if they have no presence or subsidiary in the EU. Where a company has negligently or intentionally failed to prevent or end adverse human rights or environmental impacts and these have caused damage, the company can also face civil liability (with victims receiving the right to full compensation).

Relevance to financial crime

Indicators of breaches of human rights and environmental protections are often linked to bribery, tax evasion, money laundering and/or terrorist financing. These indicators are also often found in countries at higher risk of financial crime. For example, a UK company employs an intermediary to source foreign clothing suppliers and in order to secure a contract, they bribe a manufacturer who uses slave labour. That UK company could face liability both for failure to prevent bribery and for money laundering, as well as significant reputational damage. Adding corporate sustainability to existing anti-financial crime controls in advance of the CSDDD could help reduce these risks.

WHAT ACTION SHOU[LD] YOU CONSIDER?

Retailers could consider s[...] following ways to prepare [...] and also strengthen their a[...] crime measures:

- risk assessments – inco[...] environmental, modern [...] human trafficking risks into your financial crime risk assessments
- third party due diligence – ensuring corporate sustainability track record is included in due diligence on new and existing third parties
- risk mitigations – considering a broader range of mitigations, for example consultations or site visits for higher risk suppliers
- preparing now – taking advantage of the lead in period to adapt to the future CSDDD, for example establishing an adverse impact complaints procedure and determining the makeup of the annual statement.

In **2022** there were an estimated

27.6m

people in forced labour across the world. Click here.

In **2021** it was estimated that modern slavery accounted for

c40%

of global deforestation. Click here.

CLICK TO REVEAL PAGE >

Speed read

Corporate sustainability due diligence: it's time to prepare

In the next two to three years larger EU and UK retailers will have to perform corporate sustainability due diligence.

This includes detecting, preventing and mitigating adverse human rights and environmental impacts.

Addressing these impacts now can help reduce financial crime risk, as one often signals the other.

<< Home >>

Snapshot of retail statistics – UK

RETAIL TECHNOLOGY

Convenience – **41%** of consumers surveyed would pay more for a product if they could purchase it more quickly and conveniently.

Source: PwC

Convenience – **1 in 2** shoppers surveyed would switch to a frictionless retail store and **3 in 4** shoppers below the age of 45 would do so.

Source: PwC

Personalisation – **4 in 5** consumers surveyed were willing to share some form of personal data for a better experience.

Source: PwC

Social media – the average consumer makes **10** purchases per year on TikTok.

Source: Retail Technology Show

ONLINE

27% of retail sales were made online in 2022 and this figure is expected to increase to **29%** by 2026.

Source: Retail Economics

Sales volumes for non-store retailing (predominantly online only retailers, but also market stalls) rose by **2%** in January 2023.

Source: ONS

SUSTAINABLE FASHION

Green claims – 5 out of 21 complaints made to the CMA since the Green Claims Code was introduced in September 2021 related to the fashion industry.

Source: RPC

Green claims – **45%** of consumers surveyed thought UK brands and retailers should lead the way on improving fashion sustainability, but **71%** did not necessarily trust brands claiming to be sustainable.

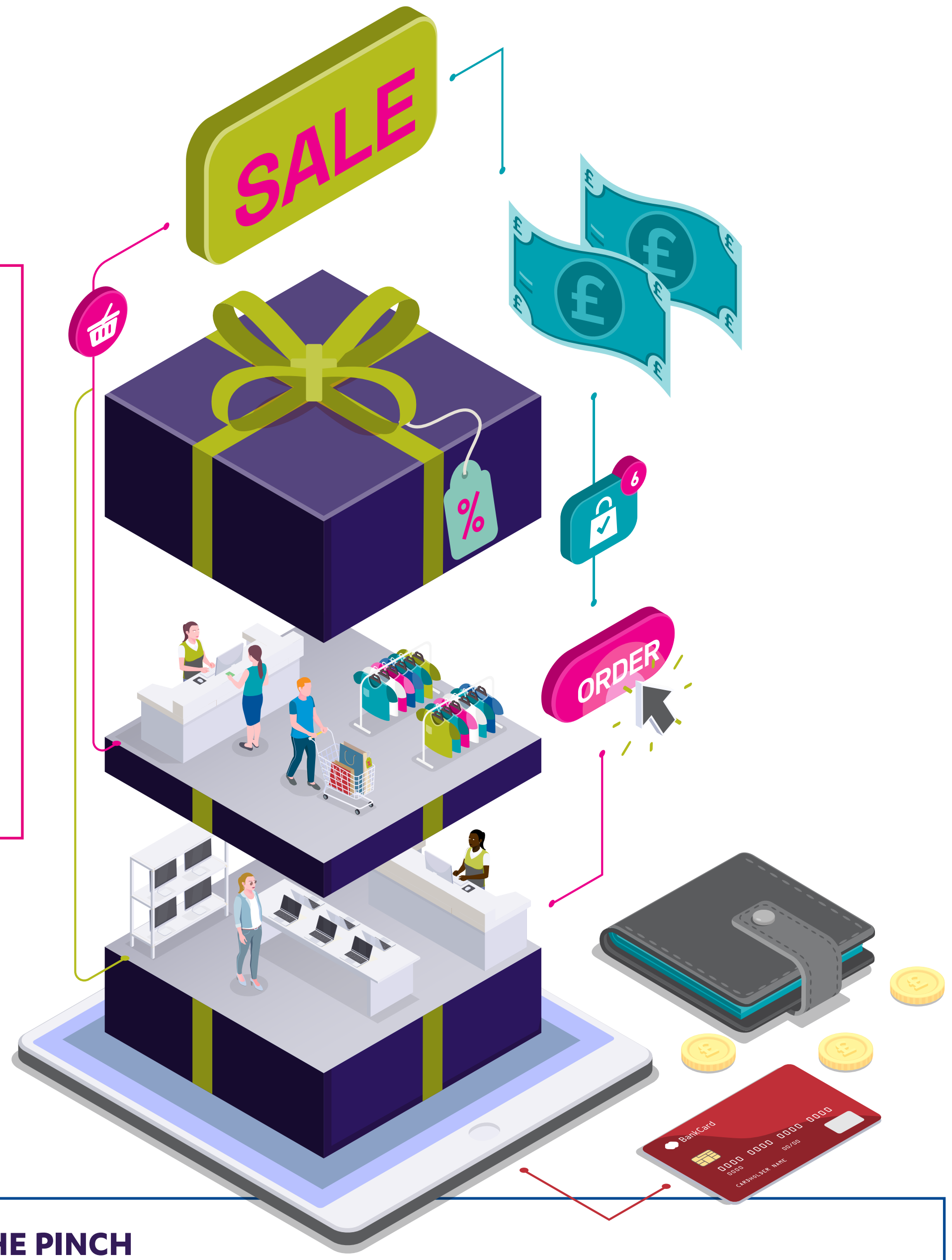
Source: Drapers

Priorities – **78%** of consumers surveyed rated quality and **74%** rated price as important purchasing factors, compared with a **42%** priority rating for sustainability.

Source: Drapers

Age matters – **66.5%** of 18 to 24 year olds surveyed were willing to pay more for ethical fashion, compared with **35%** of 55 to 60 year olds.

Source: Drapers



RETAIL SALES

The total value of UK retail sales was **£441 bn** in 2022 showing **4.7%** growth.

Source: Retail Economics

Retail sales volumes are estimated to have increased by **0.5%** in January 2023.

Source: ONS

Consumer card spending grew **4.4%** year-on-year in December 2022.

Source: Barclays

CONSUMERS FEELING THE PINCH

In December 2022 **91%** of Brits were concerned about rising food prices with **49%** buying budget or own-brand goods over branded goods.

Source: Barclaycard

59% of consumers plan to cut spending on non-essential products.

Source: Voucher Codes Survey

35.8% of consumers plan to look for discount codes and **23.7%** are content to wait until products are discounted before buying them.

Source: Voucher Codes Survey

More than a fifth of consumers are expected to buy more second-hand items (including from charity shops, marketplaces, or resale apps).

Source: Voucher Codes Survey

<< Home >>

Snapshot of retail statistics – Global

ONLINE VS IN-STORE

43% of consumers surveyed plan to increase online shopping in the next six months.

Source: PwC

40% of consumers surveyed who opt to shop in-store do so to avoid high delivery costs.

Source: PwC

The global e-commerce market is expected to total **$6.3tn** in 2023.

Source: Insider Intelligence

The online shopping cart abandonment rate on mobile devices is **84%**.

Source: Oberlo

87.2m people shopped online for Black Friday in 2022.

Source: NRF

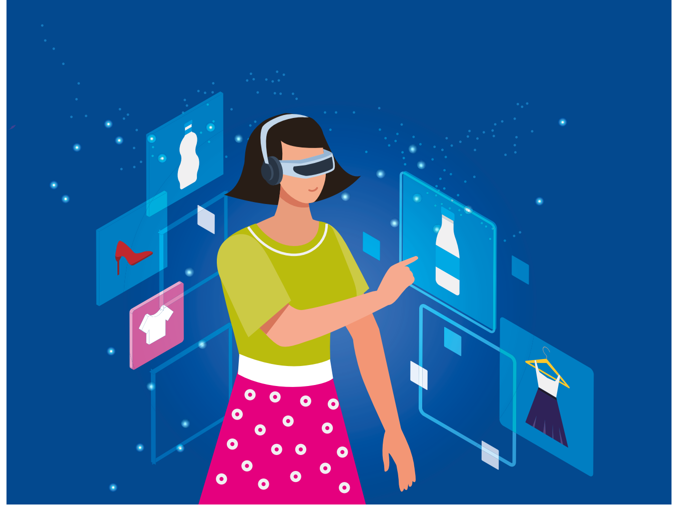
METAVERSE

26% of consumers surveyed have participated in metaverse-related activities in the last six months.

Source: PwC

The countries with the highest percentage of metaverse users have young populations and growing middle classes.

Source: PwC



COST IS KING

96% of consumers surveyed intend to adopt cost-saving behaviours over the next six months.

Source: PwC

SOCIAL MEDIA

Nearly **60%** of worldwide social network users will be based in Asia-Pacific in 2023.

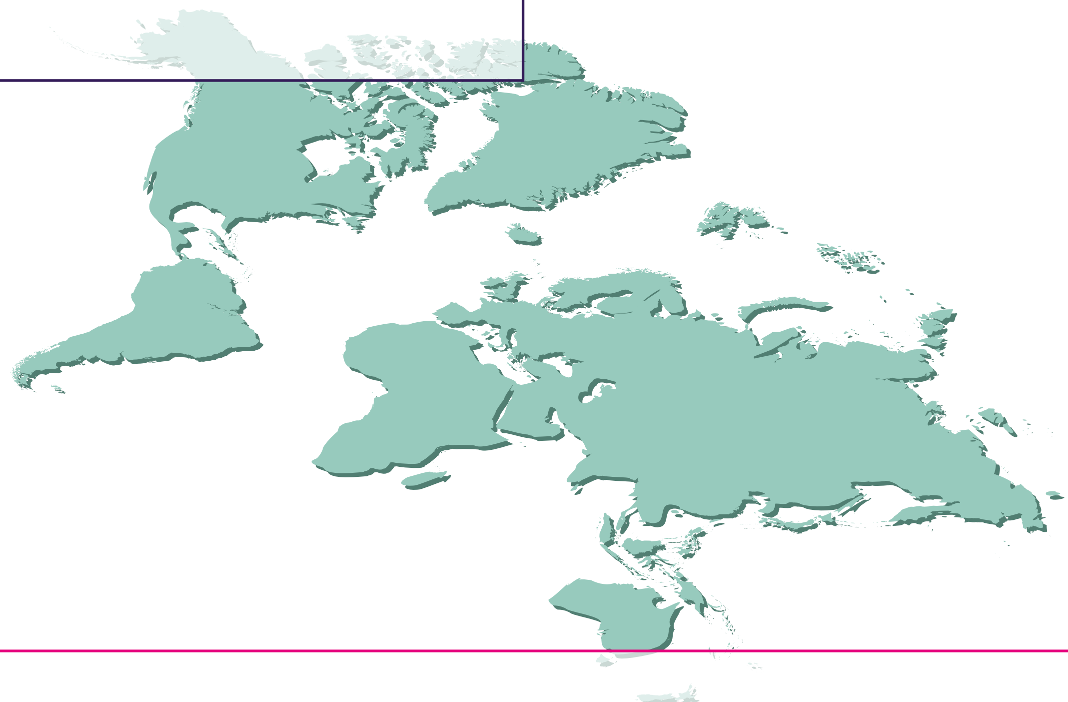
Source: Insider Intelligence

USA

- **58%** of adults are less loyal to a brand due to rising costs. Dynata June 2022
- By 2026, nearly **40%** of internet users will have used a BNPL solution. Insider Intelligence June 2022
- **69%** of consumer industry CEOs saw the "changing regulatory environment" as an issue influencing their business' actions on sustainability over the past year. Deloitte
- For the first time, ecommerce sales passed 1 trillion reaching **$1.03tn** in 2022. US Dept of Commerce
- **96.9m** people shop on social media. Statista

EU

- UK, France and Germany will see retail spending moderating towards 2026 – JLL
- Ireland, Spain, Italy and Poland's markets are expected to see resilience and growth towards 2026 – JLL
- Consumers are returning to physical stores causing a steady decline in online retail spending in most European countries – JLL
- Paris, Zurich and London are the top destinations for luxury retailers and the most expensive for international retailers in Europe – JLL



ASIA

- **China**: Social commerce retail sales are worth nearly ten times that of the USA – Statista
- **Hong Kong**: Retail sales are expected to rise by **13%** year-on-year to approximately **HK$395bn ($50.3bn)** in 2023 – PwC
- **Hong Kong**: The e-commerce market is set to grow at a compound annual growth rate of **17.6%** from **$1.2tn** in 2016 to **$3.6tn** in 2023 – RetailAsia
- Asia is expected to have the highest total retail e-commerce revenue in 2023, with more than **£2tn** – Statista
- **Thailand, India, and China**: Over 80 percent of the online population are social buyers – Statista
- **India and Vietnam**: Had the highest percentage of respondents who said they had used the metaverse in the past six months – **48%** for India and **43%** for Vietnam – PwC

Other developments | UK and Europe

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

The Protect Duty and what is means for retailers

by Andrew Martin and Gavin Reese

Following the heart-breaking events that occurred at the Manchester Arena in 2017, there were calls for the Government to take steps to reduce the risk of terrorism in public places. The result is the Protect Duty ("the Duty"), otherwise known as Martyn's Law (in tribute of Martyn Hett, who was killed alongside 21 others in the Manchester Arena terrorist attack), which aims to make the consideration and application of security processes consistent across all publicly accessible locations.

Over the past 24 months the Government has set down the groundwork for the Duty within draft Protect Duty Bill, which is due to have its first reading in Spring 2023. The legislation will impose a duty on the owners and operators of publicly accessible locations to take proportionate steps to increase their preparedness for and protection from a terrorist attack. Three criteria must be met:

- the premises is eligible – a building will fall within this category
- a qualifying activity takes place at the site – the definition includes retail and food and drink
- the maximum occupancy of the site with different tiers of requirements being applicable.

The 'standard' tier will likely affect most large retail sites as it applies to locations with a maximum capacity of 100. The measures to be undertaken by these sites are expected to be low cost following a risk assessment, and include training, information sharing and completion of a preparedness plan so that appropriate measures are put in place.

The 'enhanced tier' will apply to locations with a capacity over 800 and will most likely apply to larger shopping centres and department stores. Along with the measures that apply to the standard tier, these locations will also be required to undertake a risk assessment to assess the potential risk of a terror attack and to put in place measures to mitigate those risks via the development of a thorough security plan. The appropriate measures are expected to include the need to inform and train staff how to deal with these types of incidents, including a suitable evacuation procedure for both staff and members of the public.

The precise enforcement regime for the Protect Duty has yet to be confirmed. The consultations refer to site owners being encouraged to take steps to comply but with substantial penalties to be considered where there is repeated non compliance. The indications are that locations falling within the standard tier will be subject to a maximum penalty of £10,000; whilst those within the enhanced tier could face a maximum penalty of up to £18m or 5% of worldwide turnover.

Tips:

- Consider what tier your retail location may fall into to better understand what you are expected to do to comply with the Duty.
- Carefully review any current risk assessments and see how they may comply with the proposed Duty.
- Consider what changes could be made to your current security plans. Review the training currently provided to employees in relation to security evacuation procedures.
- For large organisations with multiple retail locations consider investing in a third party partner to provide advice on the necessary plans required to comply with the Duty.

HFSS restrictions clogged up

by Ben Powell and Rathi Thiagamoorthy

The UK Government has delayed proposed restrictions on the advertising of HFSS products to 2025.

In 2018 the UK government set a target to halve childhood obesity by 2030. As part of measures to achieve this aim, the government developed restrictions on the advertising of products that are high in fat, salt or sugar. In June 2021, following a consultation period, it published a formal consultation response on policy, and proposed a series of restrictions. These included a 9pm TV watershed for the advertising of HFSS products, on TV and on-demand programme services (**ODPS**) between 5.30am and 9pm, as well as a complete prohibition on paid-for online advertising of HFSS products, restrictions on the placement of HFSS products in stores at aisle ends, store entrances, near checkouts, and at queuing areas, and restrictions on the volume price promotion of HFSS products.

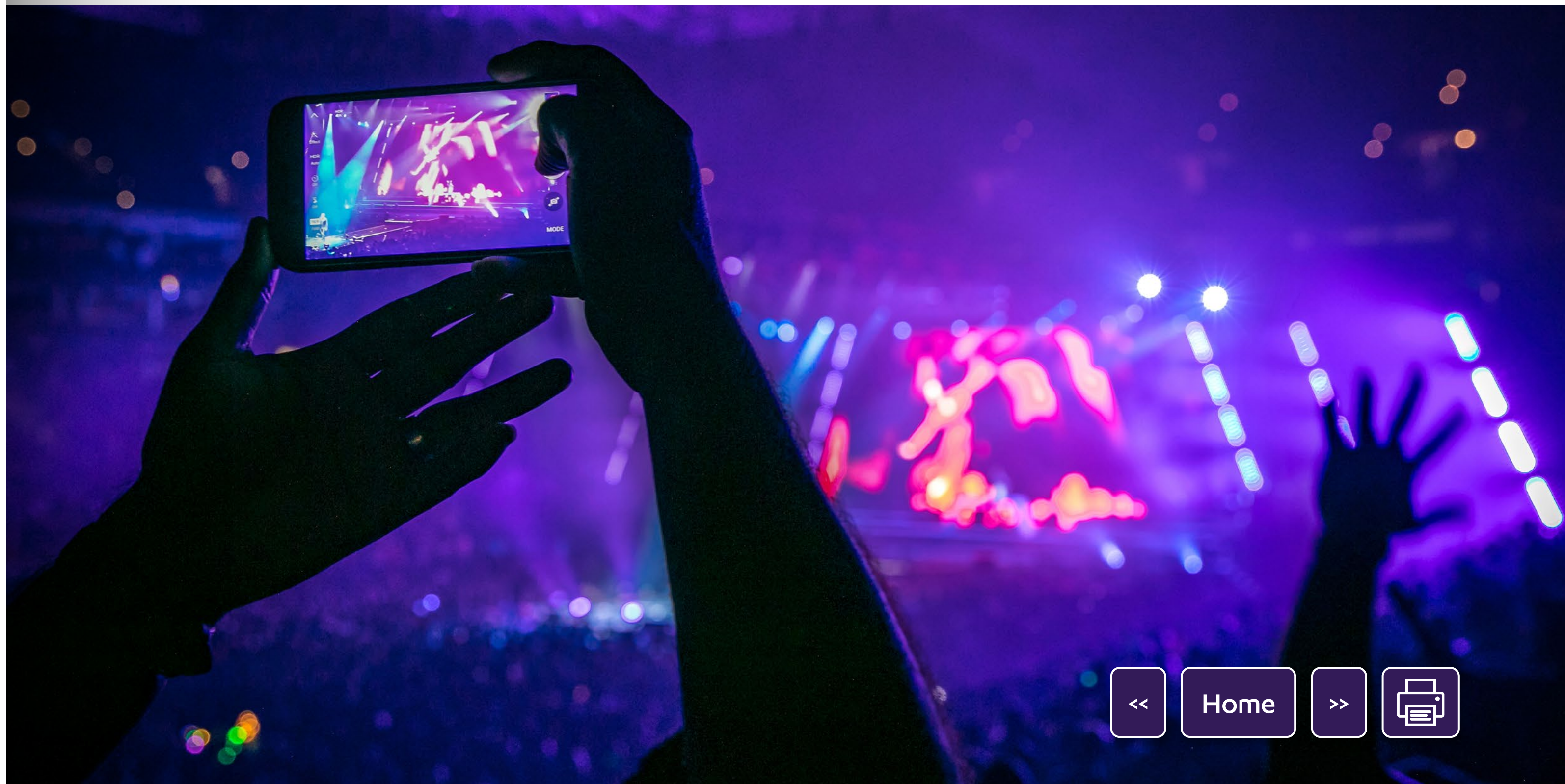
The placement restrictions came into force in October 2022 and while the volume price promotion restrictions were also due to be implemented at the same time, in the face of the growing cost of living crisis, these restrictions were subject to a last minute delay by the government and are now set to come into force in October 2023. The Government has also delayed the introduction of the watershed for the advertising of HFSS products on TV and ODPS, as well as the prohibition on paid-for online advertising of HFSS products (as set out in further detail in our blog here) from January 2023 to October 2025.

The Government's consultation seeking views on draft secondary regulations (the Advertising (Less Healthy Food Definitions and Exemptions) Regulations) closed on 31 March 2023 and is expected to influence the scope of the restrictions and possible exemptions.

In a separate process, Ofcom launched its own consultation on 21 February on its proposed approach to implementing the new advertising restrictions in practice (which is set to close on 21 April 2023). Once the Government publishes its responses to these consultations, we expect to see more clarity for brands about the boundaries and scope of the new advertising restrictions. As matters stand, the proposed advertising restrictions will apply to most businesses selling HFSS products and are therefore likely to impact a wide range of businesses.

Tips:

Although the delays to HFSS advertising restrictions have not been well received by those who are in the healthcare sector or otherwise at the sharp end of the health implications of rising rates of obesity, businesses should engage with the consultation to provide views on the proposals. They should also make use of this period of delay can also be an opportunity to assess their marketing of HFSS products, and the steps required to comply with the proposed restrictions. and whether there may be value in developing alternative non-HFSS product lines in order to bypass the proposed restrictions.



Other developments | UK and Europe (cont.)

The war on plastic continues: further ban on single use plastics in England by Harpreet Kaur and Ciara Cullen

Single-use plastic plates, trays, bowls, cutlery, balloon sticks and certain types of polystyrene cups and food containers (including those made from bio-based, biodegradable, or compostable plastic) will be banned in England from October 2023. A similar ban was put in place in Scotland in 2021 and comparable changes are due to come into effect in Wales in late 2023.

From October 2023, selling these single-use plastic products to individuals will be prohibited for all businesses including retailers, takeaways, food vendors and the hospitality industry in general and those that do not comply may face civil sanctions such as fixed monetary penalties and stop notices.

However, the ban will not apply to single-use plastic plates, trays, and bowls that are used as packaging in shelf-ready pre-packaged food items (such as food for sale in supermarkets and pre-filled food bowls at a takeaway counter), as these will be covered by the Extended Producer Responsibility Scheme from 2024. As such, businesses will still be permitted to purchase empty single-use plastic plates, trays, and bowls for use in food packaging. This is distinct from the position in Scotland, whereby manufacture and supply (even without charge) of any of the aforementioned single-use plastic items is completely banned.

The government is also considering the introduction of further measures around other "commonly littered and problematic" plastic items, including wet wipes, tobacco filters and sachets. Future legislation may seek to ban plastic in these items and/or enforce mandatory labelling on packaging to help consumers dispose of these items correctly.

Tips:

- **Prepare for the ban**: businesses should not wait for the ban to take effect before moving away from single-use plastics. To the extent that they are not already, retailers can encourage customers to utilise their own reusable items (coffee cups for example) and begin to explore alternative sustainable packaging (and any resulting supply chain changes) now. However, remember – Bio-based, biodegradable and compostable plastics fall within the scope of the ban – and ideally you'd use up single-use plastic stock first to avoid unnecessary waste.
- **Prepare for the war on plastic to continue**: to get ahead of the game, retailers may want to review their use of single-use plastics generally and in particular, those which the Government have indicated may be covered by future legislation ie, wet wipes, tobacco filters and sachets. Displaying clear and consistent recycling information across all packaging should also help consumers dispose of packaging properly and allow retailers to get on the foot front in relation to the requirements for mandatory recyclability labelling on packaging from March 2026. To get behind the sentiment, retailers may also want to consider other ways to encourage consumers to recycle and reuse, such as through buy back or money off schemes.

EDPB provides new guidelines for cookie banners

by Jon Bartley and Amy Blackburn

The European Data Protection Board (EDPB), the EU's guidance body on data protection issues, has assembled a 'Cookie Banner Taskforce' to conduct a legal analysis of complaints that EU data protection regulators have received about cookies.

The Taskforce produced a report that was adopted by the EDPB on 17 January 2023. The report effectively represents a new, common position of the EU data protection regulators on cookie banners. The report clarifies that retailers should avoid the following pitfalls when using cookie banners:

- cookie banners that have a consent button but no refuse/reject/no consent button
- pre-ticked boxes
- deceptive links that suggest that a user must give consent to access the website
- deceptive button colours or contrast that mean that the reject button is not clear.

The use of cookie banners is regulated in the UK by the UK GDPR, Data Protection Act 2018 and laws around privacy in electronic communications. These provide that users must consent to the use of cookies unless such use is 'strictly necessary' to providing the service. Consent is defined in accordance with the UK GDPR and therefore must be freely given, specific, informed and unambiguous and conveyed by statement or clear affirmative action.

On 10 August 2021, Max Schrems's campaigning organisation NYOB filed 422 complaints with several data protection regulators against companies who it alleged were not complying with this regulation. Cookie enforcement is a hot topic for regulators as a result, in particular as the new post-Brexit data protection laws in the UK may increase the fines for breaches of laws on electronic communications to align with those under the UK GDPR.

While the EDPB's guidance no longer applies directly in the UK, the Taskforce's recommendations are still relevant to UK retailers and will directly catch those who also sell into the EU.

Tips:

Retailers should consider reviewing their cookie banners in line with the EDPB's advice to ensure that any consent that customers give based on the banner is valid. Additionally, once consent has been given, it's recommended that website owners provide an easily accessible button which allows users to withdraw that consent.

FRC prioritises retail and personal goods

by Rosamund Akayan and Karen Hendy

The Financial Reporting Council (FRC) has announced that Retail and Personal Goods is one of four sectors which it will prioritise for the 2023/24 financial year when selecting both corporate reports and audits for review (alongside Travel, Hospitality and Leisure; Construction and Materials; and Industrial Transportation). These sectors are considered by the FRC to be higher risk, for corporate reporting and audit, by virtue of economic or other pressures.

Given the difficult economic conditions that are currently being experienced, the FRC recognises that many companies, in many different sectors, are currently under particular commercial and financial pressure. The FRC will therefore be especially careful over the coming year in monitoring where these pressures are being felt most acutely, and tailor the selection of company reports for review and audits for inspection accordingly.

In light of this additional scrutiny, retailers are advised to take particular care to ensure that their corporate reports and audits are complete and accurate.

Tips:

- When preparing corporate reports, bear in mind the increased likelihood that the reports will be subject to regulatory review.
- Ensure that your company has robust internal systems for reviewing audits.

<< Home >>

Other developments | UK and Europe (cont.)

Government focusses R&D tax reliefs more closely on the UK

by Keziah Mastin and Robert Waterson

The Government is rolling out a series of changes to Research and Development (R&D) tax reliefs. R&D tax reliefs are intended to encourage and increase investment in R&D. In the March 2022 Budget, the Government announced plans to increase investment in R&D in the UK to 2.4% of GDP by 2027. Certain changes to the rate came into force on 1 April 2023. Further changes are awaited and are intended to focus the benefits of the relief more closely on UK businesses. This follows calls from the House of Lords to tackle certain abuse of the relief which currently cost the Exchequer over £450m per annum.

The new draft measures are contained within the Finance (No.2) Bill 2023. One major change inserted by the Finance Bill 2023, is that where any R&D work is subcontracted, tax relief is only available for expenditure incurred in the UK, or for 'qualifying' overseas expenditure. The qualifying expenditure must relate to R&D in circumstances where it would be wholly unreasonable to undertake the R&D in the UK due to geographical, environmental or social factors (eg deep ocean research), or, where legal or regulatory requirements require activity to take place in specific territories (eg clinical trials). This measure is now set to come into effect from 1 April 2024.

Other measures taken within the draft legislation also include an extension of the scope of R&D relief to allow data and cloud computing expenditure, as well as a development of the definition to include pure mathematics.

Tips:

HMRC has published draft guidance here on the reforms. The consultation on the draft guidance closed on 28 February 2023 but it is still a useful document and will enable retailers engaged in R&D work to prepare the ground for the upcoming legislative changes.

Scope of soft drinks industry levy expanded

by Alexis Armitage and Adam Craggs

The Soft Drinks Industry Levy (SDIL) has been in force since April 2018. The SDIL applies to packaged soft drinks that contain at least 5 grams of sugar per 100 millilitres of drink. There are two rates – 18p per litre for those drinks that contain 5g of sugar or more per 100 ml and 24p per litre for those drinks that contain 8g or more of sugar per 100 ml. There are various exemptions for alcoholic and milk-based drinks.

Some have hailed the SDIL as a success as its introduction has coincided with a sharp drop in the total sugar content of soft drinks. Indeed, from 2015 to 2019, the total sugar in soft drinks decreased by over 35%. The scope of the SDIL is now being expanded to include packaged concentrates which are mixed with sugar at the point they are dispensed from a fountain machine. Such drinks will be subject to SDIL from 1 April 2023.

Tips:

Retailers who deal in packaged concentrates that fall within scope of the new provisions should be mindful of the change and prepare to register with HMRC. The Government note here provides useful guidance on how to do so.

Are you ready for the Economic Crime Levy? by Michelle Sloane

On 28 February 2023, HM Treasury published draft regulations, together with an explanatory memorandum, that revise and make further provision for assessment, payment, collection, and enforcement of the Economic Crime Levy (ECL).

The ECL is an annual fixed charge payable by 30 September by anti-money laundering regulated entities with annual UK revenue in excess of £10.2m. ECL applies to individuals, partnerships as well as companies. ECL is expected to raise in the region of £100m a year to help tackle money laundering.

The ECL will be collected by the three anti-money laundering statutory supervisors: HMRC, the Financial Conduct Authority (FCA) and the Gambling Commission (GC). HMRC have published guidance on the ECL which is relevant to organisations they supervise.

The ECL fixed fee is based on UK revenue in the accounting period ending in the previous financial year.

SIZE	UK REVENUE	LEVY
Small	Under £10.2m	nil
Medium	£10.2m to £36m	£10,000
Large	£36m to £1bn	£36,000
Very large	Over £1bn	£250,000

The first payment for the ECL will be due on 30 September 2023, with reference to the financial year to 31 March 2023.

The regulations cover:

- Assessments by HMRC and the GC when the relevant entity has failed to file an ECL return, keep the required records, has submitted an inaccurate or incomplete return or obtained a repayment that was not due. Assessments must be made within four years of the submission of a return or 20 years from the due date when no return was submitted.
- Financial penalties payable for a range of failures, including failure to file a return or pay the levy by the due date. Penalty amounts can be fixed, starting at £250, or 5% of the amount owed but not paid. These cannot be imposed if a reasonable excuse is established.
- Reviews by HMRC and appeals to the First-tier Tribunal in relation to amounts collected by HMRC or the GC. Amounts collected by the FCA are subject to challenge by way of judicial review only.

The regulations permit the FCA to amend, replace or withdraw a notice of liability to pay the levy. In addition, following criticism by the House of Commons Select Committee on Statutory Instruments, entities supervised by the GC will be able to amend their ECL returns at any time up to 12 months after the filing date and the GC will not be able to publish information in a public register.

The regulations also cover liability for payment of the ECL in cases of insolvency, the procedure for submitting repayment claims and the records that must be maintained.

HMRC will publish further guidance on how to register for, and payment of, the ECL, later this year.

Other developments | UK and Europe (cont.)

Retailers left exposed to sky-high service charges

by Catherine Young and Jon Ely

Popular with developers and planners nationwide, mixed-use residential developments – of which retail units often form part (think retail space on the ground floor of a residential high rise) – are starting to feel the impact the Building Safety Act 2022.

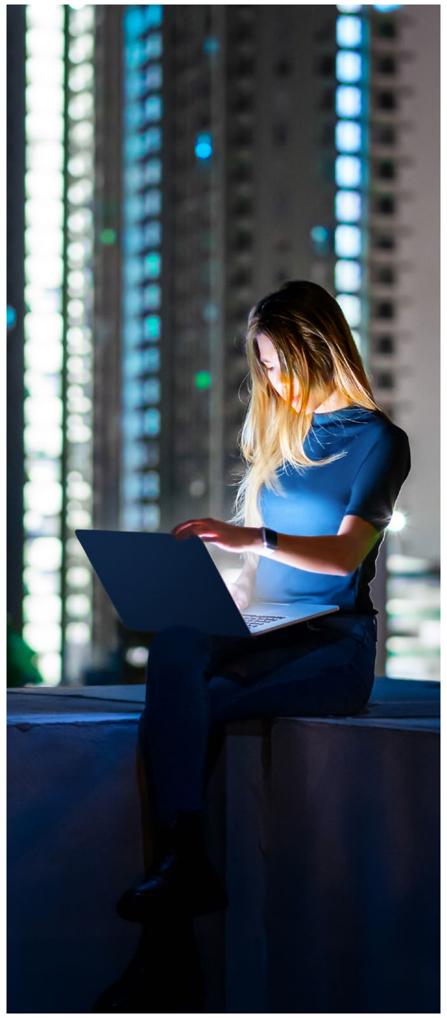
Much of the recent commentary on the Act has understandably focused on the plight of residential tenants potentially facing spiralling service charges from landlords seeking to recover cladding replacement and other building safety outlay – and on statutory protections afforded to certain flat owners. However, commercial tenants are not similarly shielded from these types of charges, and draft supplemental legislation suggests this won't change.

A landlord of any commercial premises generally wants to ensure fullest recovery of building expenditure, regardless of the length of tenant lease or the type of expense. In the absence of service charge caps, limits or exclusions, retail tenants could be liable to pay a share of cladding removal and replacement expenditure and other 'statutory compliance' costs – and this could even extend to cost of remediation of other historic defects. A bitter pill to swallow for any retailer, particularly if the works are noisy, messy, require scaffolding, or threaten other business disruption.

The upshot is that retailers will be carefully checking the terms in their leases for any limits on landlord charges – and, as ever, when taking on new retail space careful analysis and (for new leases) drafting of service charge provisions in leases remains vital.

Tips:

Always pay careful attention to service charge provisions when taking a retail lease in a mixed-use high rise development, and otherwise.



Don't MEES this new restriction

by Lola Akinloye and Elizabeth Alibhai

Minimum Energy Efficiency Standards (**MEES**) tightened from 1 April 2023, making it unlawful for landlords to continue letting commercial properties with an EPC grading below "E" unless a valid exemption applies. The E grade requirement has been in place for new leases since April 2018 but will now extend to existing leases. It will be an offence to let a non-compliant property and landlords can be fined up to a maximum of £50,000 and named and shamed on the PRS Exemptions Register if they proceed regardless.

If you are a tenant under a non-compliant lease, the lease will remain valid, and this will not affect any 1954 Act security of tenure that you may enjoy. However watch that your landlord cannot pass on the cost of energy-efficiency improvements to you via the service charge, nor negatively impact your business while carrying them out. The installation of new insulation, windows or heating/cooling systems is typically very disruptive. Bear in mind also that this could impact on any prospective sublettings of your space in the future, when a tenant will become a landlord.

The expectation is that the standard will be raised to grade C from 2027 and grade B from 2030 and so many more properties will be drawn within scope.

Low-paid workers entitled to significant wage increase

by Macaela Joyes and Kelly Thomson

The Government has adopted the Low Pay Commission's recommendations meaning that in this year's review the National Living Wage (NLW) and National Minimum Wage (NMW) will increase almost in line with the UK inflation rate. This year's increase in NLW will be the largest increase since its introduction.

Employers need to prepare ahead of time, from 1 April 2023 employees and workers will be entitled to at least the following amounts for each hour worked:

- for those aged 23 and over (NLW) – £10.42 per hour
- for those aged 21 and 22 (NMW) – £10.18 per hour
- for those aged 18 – 20 (NMW) – £7.49 per hour
- for those under 18 (NMW) – £5.28 per hour
- apprentices (Apprentice Rate) – £5.28 per hour.

The accommodation offset rates (the maximum amount an employer can deduct per day or week from an individual earning NMW or NLW's wages in recognition of provision of accommodation) will also increase to £9.10 per day or £63.70 per week.

From 2 April 2023 a new weekly statutory rate of £172.48 will apply for maternity, paternity, adoption, shared parental and parental bereavement pay.

From 6 April 2023 Statutory Sick Pay will increase to £109.40 per week.

Tips:

Detailed and accurate time records help to protect against potential NLW and NMW issues.

It is recommended that lower paid workers hours in particular are carefully monitored as even a small amount of overtime can result in a compliance issue. It is important to remember that averaging between pay periods is not permitted, a worker must receive at least NMW or NLW for every hour worked in any given pay period.

Commentary on industrial action in the UK and the Government's proposals to reduce the impact of strikes

by Charlotte Bray and Patrick Brodie

In response to industrial unrest across multiple industries, the government has introduced the Strikes (Minimum Services Levels) Bill.

If enacted, the Bill would give the Secretary of State the power to make mandatory provision for minimum service levels during strikes within these 'relevant services': health, fire and rescue, education, transport, nuclear decommissioning and border security. The detail of the minimum service levels themselves would be outlined in further regulations following consultation.

If minimum service levels are mandated, relevant employers would be able to issue a 'work notice' (at least seven days before the strike) to: (i) identify those workers that are required to work during the strike; and (ii) specify the work to be carried out to meet the minimum service level. The employer must first consult the union/s about the number of workers it requires and the work it requires them to perform.

Any workers who have been issued with a work notice but take part in the strike regardless would no longer have the right to automatic protection from unfair dismissal. If a union fails to take reasonable steps to ensure that the members identified in the work notice comply, it could be faced with a potential claim.

Tips:

Though retail is not a sector covered in the proposed Bill, disruption in the relevant services (in particular transport and education) impacts retail workers and customers alike and so it is advised that retailers and consumer businesses keep a close eye on the progress of this legislation.

Other developments | UK and Europe (cont.)

Allocation of worker tips: new legal obligations expected soon

by Ellie Gelder and Patrick Brodie

The Employment (Allocation of Tips) Bill, which was introduced in the House of Lords on 23 January 2023, is expected to receive royal assent in Spring 2023.

The Bill's purpose is to create a legal obligation on employers to allocate the total amount of "qualifying tips, gratuities and service charges" to workers, and to ensure that such tips are distributed fairly between workers, including agency workers.

"Qualifying tips, gratuities and service charges" includes those received by the employer or by a worker that are subject to employer control or significant influence.

The Bill enables the government to introduce a statutory code of practice, which employers should have regard to when determining what a fair allocation of qualifying tips will be. It is expected that the code will be published alongside the Bill, when enacted.

Workers may bring a claim in the employment tribunal where their employer has failed to comply with the provisions on how and when to deal with tips. As currently written, such a claim would need to be brought within 12 months of the breach. Where a claim succeeds, the employment tribunal would be required to make a declaration to that effect and may order the employer to pay the worker compensation.

Tips:

Businesses should prepare for the new rules now, including drafting a written policy on how qualifying tips, gratuities and service charges are allocated, as well as introducing record-keeping procedures as required by the Bill. For further details on the Bill's provisions, the current Bill can be viewed here. Look out for further updates from RPC on the Bill, including the anticipated statutory code of practice.

Russian sanctions and luxury goods – where do we stand now?

by Nicholas Iles and Sam Tate

12 months have passed since the UK announced a ban on the export or sale of "luxury goods" to Russia or sanctioned Russian individuals and entities. Recent data produced by the Office for National Statistics showing a dramatic drop in the value of these exports suggests strong compliance with the regulations by the luxury goods retailers.

Since February 2022, total UK exports to Russia have fallen by 77.4% to £57m. Data for 2022 shows that luxury goods were particularly affected. Exports of travel goods including handbags were down by 83%, clothing sales reduced by 80% and footwear exports dropped by 86%.

To date, no fines have been levied in relation to luxury goods exports. However, monitoring of and compliance with Russia sanctions remains a key issue for luxury goods retailers.

Ensuring an understanding of the interconnecting sanctions framework is key. The US and EU have enacted similar export bans which impact UK companies with EU or US-based subsidiaries or group entities. Luxury goods importers are also affected by a 35% tariff imposed on many imports from Russia.

It is also important to stay on top of the specific goods covered. The regulations define "luxury goods" broadly, covering items above specified values, ranging from clothing, alcoholic beverages and watches valued over £250, domestic appliances over £630, and cars valued above £42,000. Raised import tariffs apply to, amongst others, luxury items such as artwork, jewellery, furs and vodka.

Tips:

- Industry compliance with sanctions has been strong, but remains no less important after 12 months.
- Continue to monitor developments in the sanctions framework, including the goods covered.
- Consider refresher training for relevant staff on the export ban value thresholds.
- Review suitability of due diligence checks on Russian customers.
- Consider additional levels of oversight, approval or audit for luxury goods exports to Russia.

Register of overseas entities: new considerations for property transactions

by Harriet Ainsworth and Tim Moynihan

From 5 September 2022, any overseas entities wishing to deal with property or land in the UK must be registered on the Register of Overseas Entities (ROE) at Companies House before the Land Registry will register the transaction.

If you are an overseas entity, have overseas entities within your group or are looking to transact with an overseas entity, there are additional considerations which you should be mindful of when dealing with land or property in the UK, which may be of particularly significant consequence in the context of a restructuring or insolvency. For example:

- any disposition of a "qualifying estate" by an overseas entity will only be registered if that overseas entity is on the ROE
- a purchase of a "qualifying estate" by an overseas entity that is not on the ROE will be contractually binding but will not transfer legal title to it because the transaction will not be registered by the Land Registry
- security granted by an overseas entity over land or property in the UK, will only be registered if that overseas entity is on the ROE. This has the potential to increase risks of unenforceability/non-perfection of security interests and leave them open to challenge.

Tips:

It is sensible to take advice on what steps need to be taken to enable the property or land to be dealt with before entering into a property transaction involving an overseas entity and be prepared to undertake enhanced due diligence on it.

Going green – CMA competition law guidance for environmental sustainability agreements

by Melanie Musgrave

As part of its public commitment to promoting environmental sustainability and helping the UK's transition to a net zero economy, the CMA is keen to ensure that competition law is not an unnecessary barrier to businesses seeking to collaborate legitimately on environmental sustainability initiatives.

To this end, the CMA is looking to publish guidance on the application of UK competition law to environmental sustainability agreements (**ESAs**), ie, agreements and initiatives between those at the same level of the supply chain which aim to prevent, reduce or mitigate the adverse impact of their activities on environmental sustainability, or to assess their impact (the consultation on the draft guidance closed on 11 April 2023). The guidance sets out the principles and provides examples to assist businesses with their competition law assessment, as well as the more permissive approach for climate change agreements.

In addition to the guidance, the CMA is introducing an 'open door' policy and encouraging businesses to seek informal guidance, if needed, at an early stage. This does not replace the need for the parties to carry out their own initial competition law self-assessment first.

The CMA intends to update or supplement its guidance as its understanding develops in this constantly evolving landscape. It is also looking to publish, subject to confidentiality considerations and following consultation with the parties, summaries of the initiatives on which informal guidance has been sought, along with an assessment of the risks identified and proposed solutions.

In relation to enforcement, the CMA has said that it will not issue fines against parties to an ESA where they have sought informal guidance in advance (and have addressed any concerns, if raised by the CMA) and, at a later stage, the ESA is considered to have an appreciable adverse effect on competition. The CMA will consult with the parties to agree necessary adjustments to the ESA. The CMA has also confirmed that it will not take enforcement action against ESAs which 'clearly correspond' to the examples and are consistent with the principles, as set out in the guidance.

These are welcome developments for businesses seeking to 'do the right thing'.

For more details on the draft guidance and the CMA's proposed approach, please see our Retail Therapy blog on this topic here.

A look at the Designated Standards process

Designated Standards have been around since January 2021 and were introduced to help manufacturers demonstrate that their products comply with GB law. They are co-ordinated by the Office for Product Safety and Standards (OPSS) who are increasing their scrutiny of retailers in respect of their use of Designated Standards.

At present, there is real concern amongst retailers that they may be forced to comply with Designated Standards and rules which are applied unilaterally without significant industry input (as shown by the objections raised by (amongst others) the British Toy and Hobby Association in respect of the proposed designated standard relating to Toy Safety). The flowchart below provides a high-level overview of the process and highlight some key issues. Please see here for the Government's list of designated standards and here for the British Standard's Institution's page for more information.

The basics

What is a designated standard?

- A standard developed by standardisation bodies, recognised by the government.
- Regulatory and conformity purposes.
- Do not replace the essential requirements, but manufacturers who meet designated standards can claim 'presumption of conformity' with corresponding essential requirements. This can be countered with evidence.
- Manufacturers retain full responsibility for ensuring GB law is met.
- UK stakeholders can get involved in developing standards by commenting on proposals/drafts or becoming a member of the British Standards Institution (BSI) committee.

Issues facing retail and consumer

- It can be difficult to track updates to designated standards.
- They can be changed with little industry consultation.
- The commonly-used 28 day timeframe from proposal to implementation gives little to no lead time for manufacturers and retailers to prepare.
- Suppliers may not always know about the changes, which could impact the retailer and consumer sector.

Suggestions that would benefit the retail and consumer sector

- Changes to the implementation timeframe.
- Lobbying action/industry discussion with OPSS to influence the OPSS's approach to designated standards.
- Alignment across the EU/Europe would benefit international retailers and consumers.

Sectors

- Chemicals
- Toy safety
- Cosmetics
- Construction
- PPE
- General product safety
- Energy efficiency
- Mechanical technology
- Healthcare engineering
- Consumers and workers protection

The designation process

Proposal stage

1. Stakeholders wishing to propose a standard for designation approach the BSI
2. BSI updates the Office for Product Safety and Standards (OPSS) – OPSS coordinates process across government
3. BSI's relevant technical committee assesses standard for the extent to which relevant legislation is covered, quality, and technical adequacy
4. Clarifications requested by the government are clarified by BSI
5. Proposals are published online – publicly available for 28 days to allow objections if it doesn't meet GB essential requirements

Designation stage

6. If valid objections are made, standard will be re-assessed and re-drafted
7. The relevant Secretary of State will either:
   - Designate a standard in full
   - Designate with restrictions
   - Not designate
8. References will be published to designate standards on 29th day (assuming no objections have been made)
9. The standard and any restrictions will be published on GOV.UK
10. If the new standard is replacing an existing designated standards, there is a transitional period in which both give presumption of conformity

<< Home >>

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: 8% is a rest stop on GST hike by Abel George

On 1 January 2023, Singapore increased its Goods and Services Tax (GST). The GST is charged by all GST-registered businesses, ie businesses with taxable turnovers of S$1m or more.

However, this is only the first of a two-step increase – with the rate rising again to 9% on 1 January 2024.

Concurrently, GST will now be applied on "low-value goods" bought from overseas; for example, items bought via e-commerce. Previously, such low-value goods (retail value less than S$400 (approx. USD300)) were exempt from GST.

According to the Inland Revenue Authority of Singapore (IRAS), there are transitional rules that apply to transactions that straddle the rate change. The transitional rules will apply where one or more of the following events straddles 1 January 2023: (a) date of issuance of invoice, (b) date of full payment, and/or (c) date of receipt of goods/services.

If, for example, you pay for something in instalments over 2022 and 2023, then two separate GST rates should be charged (and possibly three if the instalments are set to continue into 2024).

Tips:

Review and update your invoicing, procurement and accounting systems to incorporate the new 8% GST rate; review and ascertain if contracts need to be revised to incorporate the transitional rules on which GST rate will apply and to specify the party responsible for bearing the GST; and update price displays and website notices (where applicable).

Singapore: Pressure on social media sites – remove harmful content or pay the price by Suchitra Kumar

In February 2023, Singapore introduced changes to its existing Broadcasting Act by implementing the Online Safety (Miscellaneous Amendments) Act. The new law empowers the Infocomm Media Development Authority ("IMDA"), Singapore's media industry regulator, to issue directives to social media operators to curtail local access to 'egregious' content.

Social media operators must now disable local access to 'egregious' content (regardless of where it is hosted or initiated) upon receiving an order from IMDA. Non-compliance can attract fines of up to S$1m, and IMDA may also compel internet service providers to cut local access to that platform.

Content which undermines racial and religious harmony and/or advocates terrorism, child sexual exploitation, etc. is considered 'egregious'. Recognising that certain content may fall under grey areas, lawmakers have avoided adopting an exhaustive definition. Instead, IMDA will follow an objective approach when considering the context in which questionable content is presented.

To preserve freedom of expression and recognising privacy concerns, the latest restrictions are not aimed at private communication and messaging services, though IMDA has jurisdiction over open forums that can be easily accessed by the public.

Tips:

Through public consultations held in 2022, IMDA signalled its intention to issue codes of practice to complement the latest measures to enhance online safety and tackle harmful content. Social media operators should stay alert to the issuance of the new codes and look out for supplementary regulations which are expected in the second half of 2023.

<< Home >>

Other developments | Focus on Asia (cont.)

Hong Kong: A tale of two cities – new law governing international trade in Hong Kong by Davina Turnbull

From 1 December 2022, the United Nations Convention on Contracts for the International Sale of Goods (CISG) will apply to Hong Kong (pursuant to the passing of the Sale of Goods (United Nations Convention) Ordinance (Cap. 641) back in September 2021).

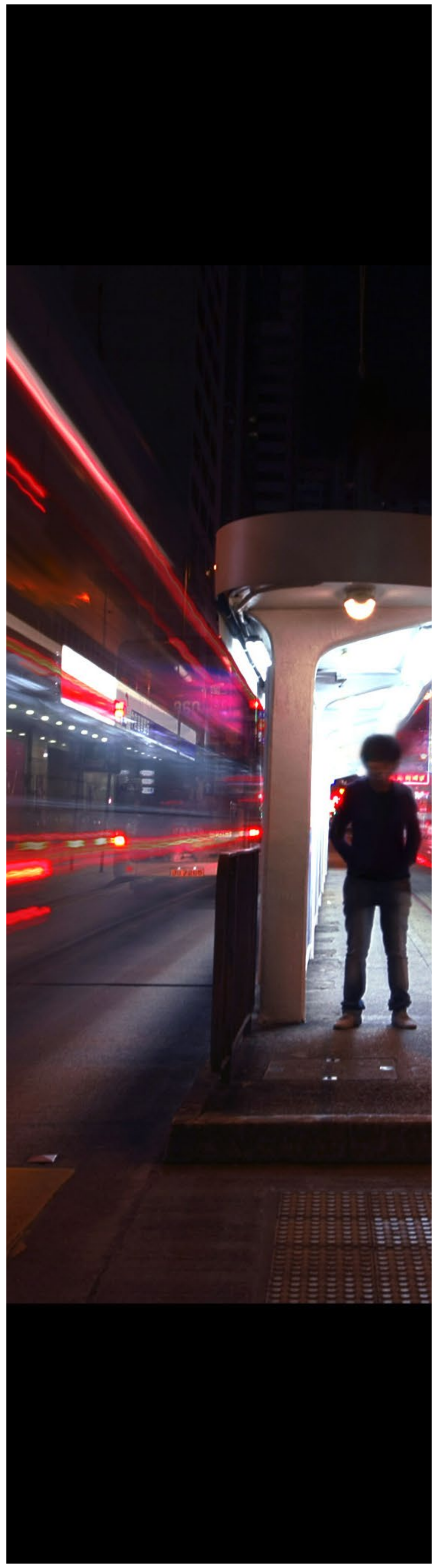
The CISG will automatically apply to contracts for the sale of goods concluded on or after 1 December 2022 where:

- the contract is concluded between parties whose places of business are in different Contracting States (ie countries that have adopted CISG), or
- neither or only one of the parties to the contract has its place of business in a Contracting State, but the contract itself is governed by the law of a Contracting State.

It does not however apply to all contracts – those relating to the sale of consumer goods and mixed contracts (where the predominant obligations on the part of the seller concern the supply of labour or other services) are excluded. Equally it will not apply to contracts where the parties have expressly excluded its application.

Generally, CISG adopts a more pro-contract approach than local Hong Kong law. Specifically, it establishes a more stringent standard to termination. It also offers the buyer with more choices of remedy, such as the right to request a reduction in price for non-conforming goods, and the right to request substitute goods. Sellers are also afforded an opportunity to remedy defects both before and after delivery, so long as this can be done without expense or inconvenience to the buyer.

For Hong Kong businesses that trade with international partners, CISG offers an ability to do business on a unified set of rules which are arguably more neutral than the national laws of their trading partners.



Tips:

- If parties do not wish for CISG to apply, an opt-out clause, with clear and unambiguous wording, should be incorporated into the contract for sale.
- As CISG admits pre-contractual negotiations and post-contract conduct, parties should be cautious in their dealings, or if possible, should consider including a comprehensive "entire-agreement" clause within their contracts.
- Parties should carefully review existing standard terms of business in any relevant sale of goods contract to consider whether it is appropriate for CISG to apply and, if so, whether they need to vary any CISG provision.
- Parties should also stay alert to legal authorities relating to CISG to ensure that their contractual terms accurately reflect their intentions.
- It should also be noted that, at present, CISG does not currently automatically apply to Mainland China–Hong Kong sales transactions, but a mutual arrangement is under discussion to achieve this effect in due course.

Hong Kong: Bidding farewell to disposable plasticware in Hong Kong? by Heidi Ng

The Hong Kong legislatures are currently pressing forward with the proposed amendments to the Product Eco-Responsibility Ordinance, Cap 603 (the Amendment), with the aim of implementing the first of two phases as early as the fourth quarter of 2023 (some two years ahead of schedule).

The Ordinance addresses the regulation of disposable plasticware and other plastic products in Hong Kong. Once the Amendment comes into effect, the first phase shall see the ban on the provision of plastic chopsticks, forks, knives, spoons, straws and plates for eat-in diners and takeaway customers.

A second phase is also tentatively envisaged to take place in 2025 and will require single-use takeaway containers to be eliminated.

Pre-packaged food and beverages will not at this stage be prohibited (eg disposable plastic straws attached to beverage cartons).

A breach of the Ordinance currently carries a maximum fine of HK$100,000. To enhance law enforcement efficiency, the Amendment seeks to also impose a fixed penalty notice, attracting a fine of HK$2,000.

The speeding up of the implementation of the ban, together with the recent implementation of an increased plastic shopping bag levy (from HK$0.5 to HK$1), highlight Hong Kong's accelerated efforts to reduce the use of plastic.

Tips:

Restaurants that are currently providing disposable plastic tableware and other retailers that might be affected by the proposed ban will need to be prepared for its implementation and aim to replace their plasticware with eco-friendlier options by the fourth quarter of 2023.

As the details of the ban have yet to be finalised, restaurants and other stakeholders are encouraged to look out for any further guidance from the Hong Kong authorities.

Other developments | Focus on Asia (cont.)

China: See it, name it, stop it – say no to workplace discrimination against female employees by Angel Leung

China's legislative body has updated its decades-old law on women's rights by passing an amendment to the Law on the Protection of Women's Rights and Interests (the Amendment) which came into force on 1 January 2023.

The Amendment adds new provisions to better safeguard the interests of women in the workplace and in society more generally.

Specifically, it targets discrimination against women by, for example, prohibiting employers from reducing welfare and other benefits available to female employees, or limiting their career promotion prospects by reason of, for example, their marital status or pregnancy, and by mandating that gender discrimination in job recruitment, promotion and dismissal processes be reviewed by the labour authority.

Additionally, the Amendment now makes it clear that it is the legal obligation of employers to take measures to prevent sexual harassment.

Employers failing to fulfil the new legal requirements set out in the Amendment risk potential administrative and civil liability.

Tips:

- Employers must review and update (if necessary) their existing internal procedures, policies and labour contracts to ensure they in compliance with the provisions of the Amendment.
- Employers should always seek professional advice from duly qualified Chinese counsel on the implications and effects on their business of the Amendment and any ancillary regulations and guidelines which may be issued and implemented.

China: Are you ready for the security assessment measures of cross-border data transfer? by Jason Carmichael

On 1 September 2022, the Cyberspace Administration of China (CAC)'s Security Assessment Measures of Cross-Border Data Transfer (Measures) took effect.

Under the Measures, data processors who carry out cross-border transfers of data will be subject to a mandatory data security assessment if they:

- export "important" data (ie data which when leaked or tampered with may endanger national security, public health and safety etc)
- are also critical information infrastructure operators
- export or process personal information of over one million persons, or
- have exported personal information of over one million persons or sensitive information of ten thousand persons since January 1 of the previous year.

Pursuant to the catch-all provision, the assessment equally applies to "other situations provided for by the CAC".

The security assessment procedure is a combination of a self-assessment of security and the security assessment by the CAC, non-compliance of which can result in suspension of the cross-border data transfer activities of the relevant data processors alongside other civil and criminal penalties.

Tips:

- As it can take around three months to complete the security assessment process, entities are advised to plan ahead and to start bringing their practices in line with the Measures to prevent any interruption to business operations.
- For further information on the implication of the Measures for your business advice from qualified PRC legal counsel should be sought.

RPC@LONDONTECHWEEK2023

We are delighted to announce that we will once again be hosting several in-person events around London Tech Week in June.

Wednesday, 14 June: Consumer Technology

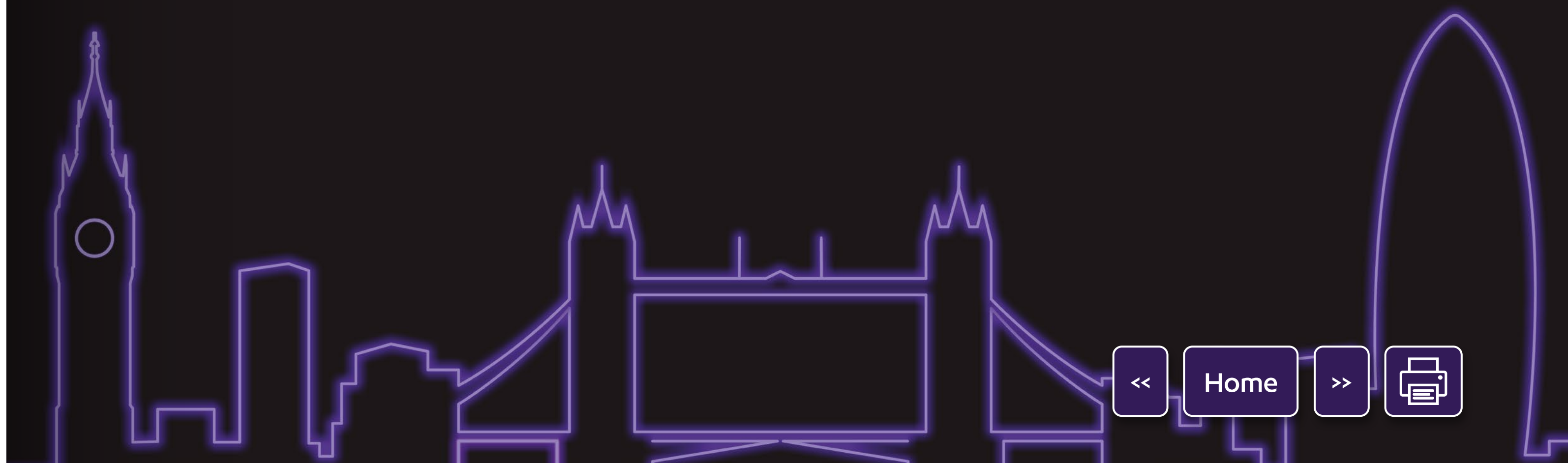
Join us as we explore the future of consumer tech with a fantastic group of industry experts, including the opportunities and challenges for the UK tech sector, content consumption and gamification in the metaverse, and innovative tech in digital retail and merchandising.

Thursday, 15 June: Technology in Insurance and Financial Services

There is lots of commentary on how tech is reshaping insurance and financial services. Please join us as our speakers and panel of market experts discuss the changes they are witnessing.

#LTW #RPC@LTW

Register here



<< Home >>

Insights and opinions

Sharing the stories from your supply chain

Emily Doe, Brand Warrior, Beyond Bamboo

Businesses and the corporate world are going through a huge mindset shift and are beginning to understand that ESG strategy (Environmental, Social, Governance) represents a big part of creating change for a better world. This is creating the space to develop new models of economic and social responsibilities in which societal and environmental processes in business improve not only its financial performance but also its longevity and impact.

Investing in ESG can improve your top-line growth but also, fosters innovation, can result in better operational performance and enhances the culture of the business or sector. Sustainability strategies can help to inform and connect all aspects of a business which promotes authenticity, and highlights where business strategies and processes may not align but will also ensure resilience to avoid convictions and fines for greenwashing. When creating your ESG strategy it is important to consider your culture, your core business strategy, your brand, and your operations in the whole picture to create a sustainable business in every sense or aspect.

There are science-based targets and requirements, set by the Paris climate agreement, to limit global temperature rise to 1.5 degrees. To meet these requirements businesses must:

- 50% reduce emissions by 2030
- 90% reduce emissions no later than 2050
- use removal offsets – and can only offset unavoidable emissions
- include Scope 1, Scope 2, and all material Scope 3 emissions which include supply chain emissions.

How can procurement help guide and inform your ESG strategy?

> *"Purpose doesn't just motivate, it inspires."*
>
> Simon Sinek

Your business and the way it tells stories can have a huge impact. We all know that the best way to achieve targets is to work together. The above requirements for carbon reduction are by no means impossible when you start to understand where your business can make impactful changes. Of course, those emissions which fall within scopes 1 and 2 – company facilities, company vehicles, and energy consumption can be defined and measured easily. It's an important albeit potentially time-consuming piece of work that will significantly inform and advise your carbon reduction plan. However, the scope 3 emissions include many indirect and much harder-to-measure factors (not limited to):

- purchased goods and services
- transportation, distribution, and packaging
- waste generation
- business travel and employee commuting
- processing and use of sold products
- end-of-life treatment of sold products
- franchises
- investments.

Procurement and your supply chain are so important. Procurement and the products you buy and sell have such a huge impact on your business's Scope 3 emissions, however, it can be the hardest to understand and measure. Knowing the brands that you are buying from and how they produce their goods and services to not only fulfil your business requirements but also make a positive impact on the environment and society as well as comply with greenwashing governance takes a lot of time and research.

Beyond Bamboo, a next-generation sustainability procurement platform and consultancy aiming to transform the hospitality industry to one that is more planet-conscious, has designed and operates a rigorous quality assurance system that seeks to help transform businesses worldwide into "beyond" sustainable ones by ensuring supply chains are as ethical and sustainable as possible.

Beyond Bamboo has long valued the importance of brand stories from sellers of sustainable and ethical products, with 'Behind The Label' and 'Meet The Seller' website pages intended to inform and promote as well as inspire the audience and bring them on the journey of change. three top tips for sustainable storytelling are:

- acknowledge we are all on the same journey, working together towards a more environmentally and socially just world
- communicate your plans and be transparent about where your company is today on its journey and where you intend to be tomorrow
- consult with and bring your team on the journey with you. If your team doesn't agree with your message – you shouldn't be communicating it!

Telling the stories of your suppliers and why you have decided to provide that product or service creates an experience that transforms listeners or readers, whether they are your customers, team, or other stakeholders. It can educate and demonstrate how a change in their behaviour and consumption of goods and services can lead to meaningful results. It inspires! They will often include great vision-in-action which reinforces the values that you want your audience to think about. These stories can provide examples of the great return on investment for all involved. Through this focus on the planet, people, and profit in equal importance there will be an attraction to your business from Gen Z in terms of custom and future workforce.

Sharing stories from your supply chain will bring your people on the journey with you. No matter what story you tell:

- be truthful and accurate – you must live up to your claims about products, services, brands, and activities
- be clear – there must be alignment between the meaning the customer will likely take from a message and the credentials of the product or service
- never omit or hide important information – customers always like to make informed decisions
- consider the full life-cycle of the products you use and promote – understanding the total impact is an important responsibility
- know your supply chain and be able to back up their claims with reliable, robust, and credible up-to-date evidence.

> *"It is possible to do the right thing and make money at the same time."*
>
> Harvard Business School (2020)

<< Home >>

Influencer marketing: then, now and next

Hettie Homewood and **Ela Broderick-Basar** take us on a journey through time, exploring the origins and rise of influencer marketing, charting its development over the last two decades, and looking ahead to what we might expect in the future.

A right royal influencer?

British potter, Josiah Wedgwood, is often retrospectively cited as the first "influencer" after he earned the approval of Queen Charlotte in 1765 and leveraged his status, promoting his pottery as "Queen's Ware".

A Wise woman once said...

Brownie Wise takes the Tupperware brand to widespread success in the US with Tupperware Home Parties – a social networking marketing system based on peer-to-peer parties, demonstrations and sales. Within a few decades, this sales and marketing format is rolled out by a number of brands internationally, including Ann Summers and The Body Shop in the UK.

The birth of affiliate marketing

The rise of the internet in the 80s brought with it opportunities for new peer-to-peer digital marketing strategies. By the mid-90s, and thanks in no small part to the invention of the tracking cookie to allow sales generated by affiliates to be attributed and compensated, the online affiliate marketing segment was established and here to stay. Amazon subsequently launched its own affiliate program in 1996 and by the time the millennium arrived, large affiliate networks were establishing themselves as the link between brands and their potential affiliate marketers.

Here comes the legal bit... concentrate

The issue with the Tweets in question, and also with influencer marketing generally, is that content is published (whether by celebrities or otherwise) in a context where it may not be obvious that it is paid-for advertising. When you watch a L'Oreal shampoo ad on TV featuring Jennifer Aniston singing the product's praises, you know that she will have been paid a fee to appear in the ad.

However, when a content creator posts about a brand or product from their own social media account (on which they may also post general everyday life content), it may not be clear when a post has, in some way, been solicited by the brand through either a payment or some other kind of benefit or advantage for the creator. Therefore, a disclosure must be made against the content, so that viewers are not mislead into believing that the creator spontaneously posted about that brand or product just because they love it unconditionally. Enter stage left, the star of the show: #ad.

#ad

Here's looking at YouTube, kid

Launched in 2005, and then bought by Google in 2006, video sharing platform YouTube quickly became one of the fastest growing platforms on the Internet. By 2007, YouTube was giving video creators a cut of its advertising revenue through its YouTube Partner Program – and suddenly content creation on YouTube became a viable source of income (depending on your subscriber figures and views, of course). The next few years saw a number of key YouTubers create and shape "influencer marketing" as we know it today, collaborating together on videos to share and build views and cross-pollinate audiences. They generated large followings, and could make a living through a blend of YouTube ad revenue, earnings from affiliate links provided within the description of each video, and even direct sponsorship of videos by brands looking for exposure via this novel platform.

Picture this!

In 2010, Stanford University graduates Kevin Systrom and Mike Krieger launched photo-sharing social media app, Instagram, racking up 25,000 users in one day. Purchased in 2012 by Facebook (now, Meta), users flocked to the app for its minimalistic design (its primary function was to share photographs, specifically those taken on mobile devices).

Instagram quickly began to dominate as a platform for users to share visual snippets of their lives and interests. The original cohort of YouTube influencers saw the opportunities and began to set up and grow followings on Instagram too, and a new breed of home-grown Instagram influencers was also born.

Since its launch, Instagram has had several shifts in direction and has introduced new formats for creating and sharing photos and then also video content, over the years. It still stands as the most popular photo-sharing app globally, but now faces stiff competition from the relative "new kid on the block", TikTok, as well as increased regulatory pressure to keep its influencers on the right side of the law when it comes to mandatory disclosures of advertising content.

Hidden advertising – influencer marketing and the requirement to "disclose"...

Whilst Twitter has never been the top platform used by influencers, it gave us the first warning shot in what would become an ongoing campaign by the UK regulators to enforce the rules regulating the practices of influencers when they advertise products or brands in their content. In 2012, the ASA investigated and handed down its first ruling on influencer advertising against Nike for Tweets made by Wayne Rooney and Jack Wilshere as part of its "Make It Count" campaign, which did not contain disclosures to indicate the Tweets were commercial content.

<< Home >>

2018

2019-2021

2021

2022-2023

The Love Island effect and stormy seas

In the wake of the success of popular reality tv shows such as Love Island, a new generation of influencers began to make waves, often entering reality shows completely unknown and leaving them having amassed enormous social media followings. Understandably keen to cash in on their newfound status, these influencers attract a multitude of brands in various sectors who want to work with them. However, on many occasions they have fallen short of the regulatory requirements for disclosing their relationships and featuring the all-important "#ad".

By the end of summer 2018, the Competition and Markets Authority (CMA) had launched an investigation into a number of the biggest social media influencers, due to concerns that they may not be disclosing when they had been paid to endorse products or services.

In January 2019, 16 influencers provided undertakings to the CMA that they would improve their advertising disclosures. The CMA and Committee of Advertising Practice (CAP) also published joint guidance on how influencers could ensure compliance with the rules on disclosing ads. Since then, there has been a steady stream of guidance coming out of the CMA and CAP. In November 2022, this culminated in the CMA publishing a three-part set of influencer marketing guidance (updated influencer guidance, brand compliance guidance and a set of principles for social media platforms), firmly indicating that brands and platforms have their part to play, as well as influencers themselves. And most recently, in March 2023, the CMA and CAP have published an updated edition of their joint guidance for influencers, showing that regulatory scrutiny of influencer marketing is unlikely to die down anytime soon.

TikTok, the pandemic, and the rise of "live shopping"

Originally launched in China in 2016 and globally in 2017, video creation and sharing platform TikTok saw its popularity explode in 2019. During the series of global lockdowns in 2020, TikTok dance trends and challenge trends imbued the term "going viral" with a new meaning and benefits, allowing content creators to become overnight-influencers, often amassing thousands of followers within an extremely short space of time.

In August 2021, TikTok partnered with Shopify to create TikTok Shopping. Now TikTok users can buy products from within the app without opening a web browser to go to a separate e-commerce site. Influencers can even host live shopping events showcasing products and viewers can simply add featured items to their cart and complete their purchase, all within the TikTok app.

Naming and shaming

In June 2021, the ASA launched a new dedicated page on its website to name and shame influencers who repeatedly break advertising rules. Named influencers will be on the webpage for three months and subject to a period of enhanced monitoring spot checks. In extreme circumstances, the ASA may even launch warning campaigns in sponsored advertising slots near an influencer's content – flagging to viewers that a particular influencer has a track record for not disclosing their commercial relationships.

A return to roots for Instagram

After a big push towards video content following the launch of 'Instagram Reels' in 2020, Instagram is slowly rediscovering its roots and reshifting its focus. In January 2023, CEO Adam Mosseri, admitted that the platform had been "overfocused on video in 2022" and confirmed that Instagram will now pay attention to how often users like and comment on photos versus videos, in order to prioritise users' preferred format in their feeds. This will come as a relief to many creators who have built their Instagram profile using still photography as their preferred marketing tool.

Instagram has also just closed its 'live shopping' feature. Since 16 March, users are no longer able to tag products in live broadcasts on Instagram. Whilst this may feel like a backward step in terms of influencers' and brands' ability to earn revenue on Instagram, it represents Instagram's commitment to refocusing on what draws users and keeps them on the platform. And of course, there are plenty of other platforms investing in live on-platform shopping experiences, such as TikTok and even Amazon. This plays into the trends we are increasingly seeing where influencers have a diverse offering on multiple platforms, leveraging each in slightly different ways to maximise views, and ultimately revenues.

2023 and beyond

The rise of the virtual influencers?

In a world where AI and virtual reality technology are grabbing headlines and breaking the mainstream, it is no surprise that, in a not-so-small corner of the internet, the power of virtual influencers is already being harnessed. Virtual influencers, typically computer-generated CGI or animated digital characters that exist exclusively online represent an attractive proposition brands. They can be anywhere at any time and their personalities can be tailored to match the values of any brand they are representing.

Brands don't even need to worry about embarrassing or even criminal behaviour (past or present) coming to light and devaluing them or harming their reputation by association. This element of control that a brand can exert over a virtual influencer is of course, a double-edged sword. Whilst there is no doubt that in some places globally, virtual influencers are being deployed to great effect, in the UK there remains a certain reticence to embrace them, perhaps as they lack the authenticity of a real human being.

Keeping it real in virtual reality

Virtual influencers won't be the only ones jostling for space in an increasingly virtual world. Facebook's rebrand to "Meta" in late 2021, with its highly publicised commitment to creating a fully immersive virtual reality world, experienced through VR headsets and handsets, heralded the dawn of a new era… and a new buzzword: the metaverse. With the potential for real-life influencers to create and control metaverse avatars, we may well be set to see yet another iteration of influencer marketing playing out in augmented reality and virtual reality spaces.

There are still a multitude of uncertainties and question marks over some of the legal challenges that the growth of connected or unconnected metaverses are likely to pose, but one thing remains certain: wherever users are, brands and influencers will follow. Whilst it seems likely that we are still a few years away from the concept of one or more metaverses coming to mainstream use and popularity, it is never too early for brands and influencers alike to start thinking about the opportunities that can be created. And of course, it goes without saying that the businesses building and developing metaverses themselves, will need to consider existing laws and regulations to allow any brands and influencers using their platforms to do so in full compliance with the disclosure, content and targeting rules that are the very foundation of lawful influencer marketing.

This, in turn, means platforms and advertisers alike will need to think creatively about how to integrate advertising disclosures in a seamless yet effective way in this novel media environment.

So, what's next for influencer marketing?

The use of influencers is set to remain a core marketing strategy for businesses, with the global influencer marketing sector expected to be worth around $21.1bn in 2023, and likely to grow ever larger in future years. This, in tandem with a rapidly evolving digital landscape, may lead to some interesting evolutions in the nature and role of the traditional influencer profession, paving the way for a new kind of influencer…

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.

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An overview of RPC and TerraLex

Full service firm

RPC is an innovative law firm, providing a full service to UK and international clients. Retail 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."

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

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2021

Winner
CONSUMER & RETAIL LAW FIRM CHINA BUSINESS LAW AWARDS
2020

Winner
LUXURY DEAL OF THE YEAR – THE LUXURY LAW AWARDS
2020

Shortlisted
DIVERSITY INNOVATION – LEGAL WEEK INNOVATION AWARDS
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