2019 Retail and Consumer Horizon Scanner – The year ahead at a glance

ADDLESHAW GODDARD

2019 Retail and Consumer Horizon Scanner: The year ahead at a glance

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Modern Slavery (Transparency in Supply Chains) Bill

What's happening?

The Bill extends the reach of s54 of the Modern Slavery Act 2015 by making further provision for transparency in supply chains for slavery and human trafficking by including organisations and public authorities. The content of the statement required under s54 is made to be mandatory rather than voluntary.

The Bill also requires the Secretary of State to publish a list of all commercial organisations that need to publish a statement under s54. This list must be published in an easily accessible place and format.

Please find a link to the Bill here.

The date of the second reading has not yet been announced.

In November 2018, the Business and Human Rights Resource Centre 2018 review of FTSE 100 Modern Slavery Act statements was released, it can be found here

From 31 March 2019 the Home Office will begin to audit companies with the aim of 'naming and shaming' companies whom are in breach.

So what?

Consumer businesses, in particular food, tobacco and clothing companies are more exposed to the risk of modern slavery due to the risks from the countries they source their raw materials from.

The review of FTSE 100 Modern Slavery Act statements suggests that companies show how they have carried out their due diligence and disclose the risks they have identified in their operations and supply chains.

Companies reporting they have zero tolerance for modern slavery, or that they are aligned with the UN Guiding Principles with no evidence of how they have investigated their supply chains are not doing enough.

Sunday Trading: Protection for Shop Workers

What's happening?

There will be an extension of rights of shop workers in respect of Sunday working:

- They will be given the right to opt out of working compulsory additional hours (in excess of normal working hours) on a Sunday.
- The duties on employers to notify workers of their rights about Sunday working will be extended.

These changes will be introduced when a Commencement Order brings Schedule 5 to the EA 2016 into force, amending the Employment Rights Act 1996. No date has yet been set for implementation.

So what?

When this change comes into force it will restrict their ability to require staff to work on a Sunday.

Clients should continue to track this development and consider the risk of colleagues opting out of working additional hours on a Sunday and how they will manage a potential shortfall in staff willing to work on a Sunday.

The new rights could impact on the number of employees required, especially as the notice period for those wishing to opt out of Sunday working will fall from one month to just seven days for large shops and from three months to one month for small stores.

Grandparents' Leave

What's happening?

Shared parental leave: extension of leave and pay to working grandparents. In 2015, the Government announced plans to extend shared parental leave and pay to working grandparents by **2018**. A public consultation on this proposal was due to commence in May 2016, but was postponed until after the EU referendum. It is not yet clear when the consultation will commence.

Given that there has been no further mention of this proposal by the Government since 2015, this appears to have been put on the 'back-burner' for the time being. However, employers should consider how they might look to future-proof their businesses against this potential change whenever the Government decides to look at it again.

The Government announcement can be found here.

Separately, on **20 March 2018**, the Women and Equalities Committee recommended as part of their "Fathers and workplace" report that the government should consider the costs and benefits of introducing a new policy of 12 weeks' standalone fathers' leave in a child's first year, as an alternative to shared parental leave and paid at 90% of salary for of the first four weeks (with a cap for higher earners), with the remaining eight weeks paid at statutory levels. The government responded to this report however, saying that it is "committed to shared parental leave", and that the policy is still relatively new and has had little time to bed in."

Accountancy Rules

What’s happening?

The International Accounting Standards Board has created new accounting Standard IFRS 16—Leases, which revises the way in which companies account for leases. This change will affect listed groups in the UK because they are required to prepare their consolidated accounts using the IFRS standards. Where a company is bound by the IFRS standards, all leases (with some exceptions, such as leases for less than 12 months) will have to be included as assets and liabilities on the balance sheet - the previous distinction between "finance leases" (which are shown on the balance sheet) and "operating leases" (which are merely disclosed in the notes to the accounts) will disappear.

So what?

This could have a big impact on clients whom lease large assets such as retail stores. Although the accounting will remain largely unchanged, there could be an impact to their business model, potentially leading to a re-evaluation of decisions over whether to lease or buy assets.

IFRS 16 is effective as of **1 January 2019**.

New e-Privacy Regulation

What's happening?

In January, the European Commission published a draft E-Privacy Regulation intended to replace the current E-Privacy Directive (2002/58/EC) with the intention of increasing the protection of people's private lives and opening up new opportunities for businesses. The Regulation would be directly applicable in all member states.

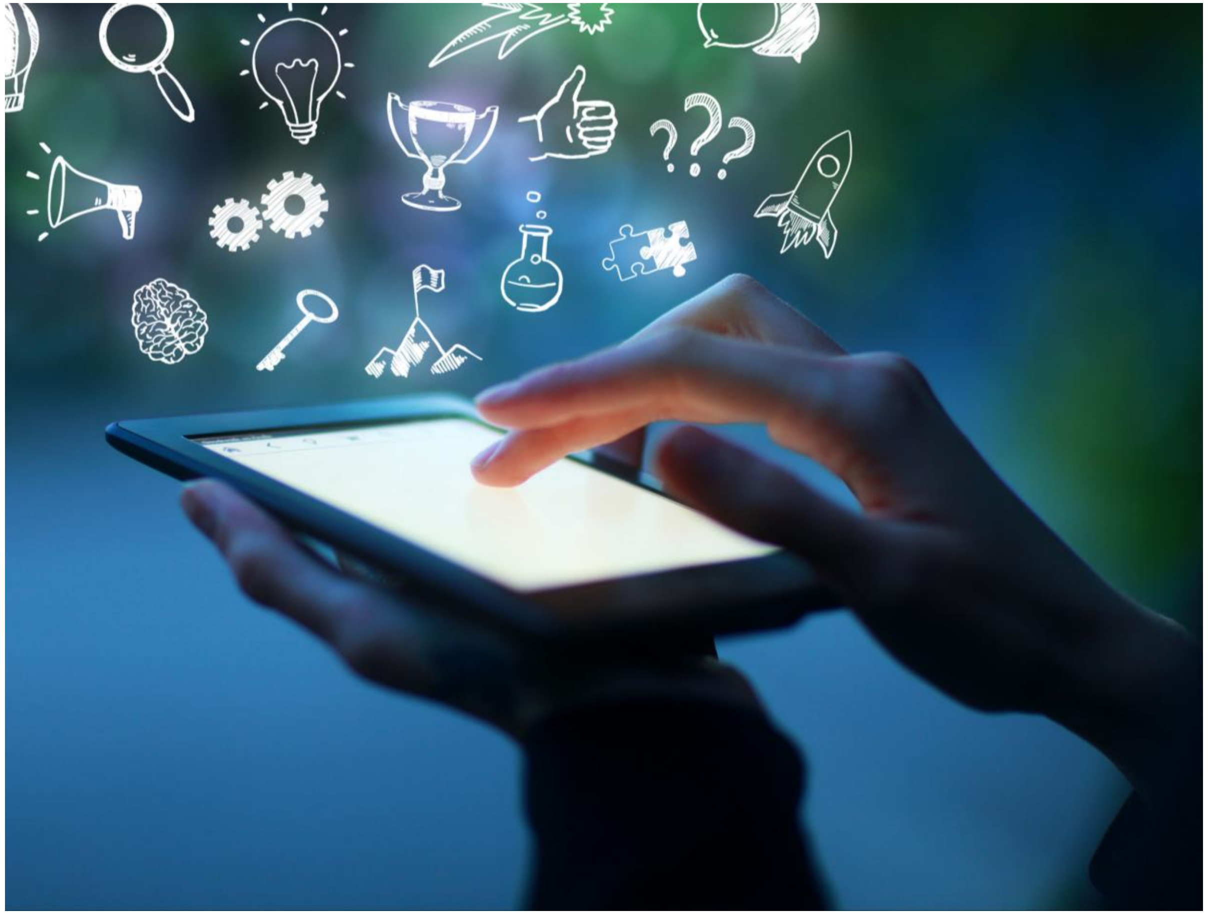
Both the European Data Protection Board, the European Data Protection Supervisor and the LIBE Committee have all recommended substantial amendments to the draft E-Privacy Regulation to be consistent with GDPR.

The Information Commissioner's Office intends to release "initial" E-Privacy guidelines later in the year.

It covers all electronic communications and technologies that process data and applies to both personal and non personal data (unlike GDPR which only applies to personal data).

So what?

Fines up to €20 million up to 4 percent of worldwide annual turnover, whichever is the highest, can be assessed for non-compliance



Junk Food Advertising Ban on TfL Network

What's happening?

There is to be a junk food advertising ban on the Transport for London network from 25 February 2019 following a consultation in 2018.

The ban extends to TfL controlled modes of transport, including the Underground, Overground, London buses, TfL Rail, trams and river services.

Examples of products that would not be accepted are sugary drinks, cheeseburgers, chocolate bars and salted nuts, while unsalted nuts, raisins and sugar free drinks would be accepted. Food and drink brands, restaurants, takeaways and delivery services will only be able to place adverts which promote their healthier products, rather than simply publicising brands.

What should clients do next?

Clients operating in the food and drink sector need to consider their marketing strategy & promotions/advertising advice where advertising on TfL Network is a regular element of their marketing.

Unitary Patent (UP) Scheme

What's happening?

The UP will allow uniform patent protection for inventions throughout the Europe. It is an EU-wide single patent granted centrally by the European Patent Office (EPO), effective in all EU member states except Spain, Poland and Croatia. The Unified Patent Court enables, for the first time, pan -European court decisions on the infringement and validity of the new UP and European bundle patents granted by the EPO. At present the cost of applying for and maintaining a European patent across the EU is around €159,000 over 20 years. This will fall to €35,500 under the new plans.

The UK ratified the Agreement on 26 April 2018, which is a vital step towards creating the Unified Patent Court.

So what?

Businesses with existing patent portfolios or inventions in the pipeline should be considering a review of their patent strategy. Advantages of the UP include a reduction in the overall patent application cost, and enforcement through a single court rather than litigation in separate national Courts. Disadvantages are possible exposure to a pan European injunction, and the fact that an invalidity decision could lead to revocation of the patent in 28 countries.

New National Minimum Wage Rates

What's happening?

The Government has announced that the following hourly national minimum wage rates will apply from 6 April 2019:

- **Workers aged 25+:** increase from £7.83 to £8.21
- **Workers aged 21 – 25:** increase from £7.38 to £7.70
- **Workers aged 18 – 20:** increase from £5.90 to £6.15
- **Workers aged 16 – 17:** increase from £4.20 to £4.25
- **Apprentice rate:** increase from £3.70 to £3.90

So what?

The new rates will increase employers' wage bills. For example, a full time worker aged 25+ will receive an annual pay increase of £690. A rise in pay will have knock-on effects on other areas such as increasing employer and employee pension contributions and increasing the apprenticeship levy amount payable by the employer.

Companies should ensure the new rates are applied (and communicated) to any affected workers from 6 April 2019. Companies should also ensure pension contributions are adjusted. Consideration should be given to how the additional wages cost (and knock on costs) will be met i.e. absorb the costs and/or seek to make reductions on other employment benefits to offset the increase.

These rate increases are of particular importance to clients as in 2017 the Low Pay Commission estimated that half of all jobs paying at or below the minimum wage are in retail, hospitality and cleaning & maintenance occupations. It further found that of people aged 25+, 304,000 in Retail (19%) were paid at or below the National Living Wage.

There is an ongoing consultation regarding some of the technicalities of implementation which closes on **1 March 2019**. The consultation is available here.

Itemised Pay Statements

What's happening?

New regulations are coming into force requiring employers to give itemised pay statements to employees and workers (not just employees as is currently the case). The associate enforcement provisions will also apply to both groups. In addition, where an employee's or worker's pay varies according to the number of hours worked, then the itemised pay statement must also specify the number of hours worked by the worker/employee for which they are being paid.

So what?

This reform will result in an increased administrative burden on employers who will need to provide statements to an additional cohort of people and also ensure information regarding hours worked is specified on the statement.

What should clients do next?

Clients should audit their workforces to consider whether they engage any workers who are not employees. If so, companies should ensure that these employees receive itemised pay statements from 6 April 2019. Companies should also review the format of its pay statements to ensure it complies with the new requirement to specify the number of paid working hours.

New rule to ban harmful gender stereotyping in advertising

What's happening?

CAP has introduced a new rule into the UK Advertising Codes which bans some harmful gender stereotypes in ads appearing in broadcast and non-broadcast media (including online and on social media). The new rule will come into force on 14 June 2019.

So what?

From 14 June 2019, it will potentially be a breach of the CAP code to use ads that use scenarios which depict harmful gender stereotypes. In particular, ads should avoid suggesting that particular roles or characteristics are uniquely associated with one gender, or are the only options available to one gender.

What should clients do next?

Clients should ensure that its marketing teams and the agencies they use are up to speed with the new rule, as well as the guidance on it that CAP has produced. CAP have produced guidance to help advertisers stick to the new rule by providing examples of scenarios likely to be problematic in ads.

For example:

"An ad that depicts a man with his feet up and family members creating mess around a home while a woman is solely responsible for cleaning up the mess.

- An ad that depicts a man or a woman failing to achieve a task specifically because of their gender e.g. a man's inability to change nappies; a woman's inability to park a car.
- Where an ad features a person with a physique that does not match an ideal stereotypically associated with their gender, the ad should not imply that their physique is a significant reason for them not being successful, for example in their romantic or social lives.
- An ad that seeks to emphasise the contrast between a boy's stereotypical personality (e.g. daring) with a girl's stereotypical personality (e.g. caring) needs to be handled with care.
- An ad aimed at new mums which suggests that looking attractive or keeping a home pristine is a priority over other factors such as their emotional wellbeing.
- An ad that belittles a man for carrying out stereotypically 'female' roles or tasks."
- Source: *Addleshaw Goddard website*

For further information, read our article here.

Manufactured Goods (Trade) Bill

What's happening?

The Manufactured Goods (Trade) Bill, presented to Parliament on the 5 September 2017, is to put remove certain restrictions on the production and sale of goods manufactured in the UK which are for use in the UK. This Bill has been prepared in connection with the withdrawal of the UK from the EU.

The Bill had its Second reading in the House of Commons on **23 November 2018**.

What should clients do next?

As this Bill is very contingent on Brexit it is not yet clear what the impacts to clients will be. Clients should keep monitoring the progress of the Bill in conjunction with the Brexit process.

For a link to the Bill, please click here.

Geo-blocking Regulation

What's happening?

The EU Geo-Blocking Regulation came into force on 3 December 2018 requiring traders not to discriminate in their treatment of customers from different EU member states. It covers business to consumer sales, and business to business sales where the business customer purchases the goods or services for its own end-use. It prohibits traders from, in particular:

- blocking or limiting customer access to, or redirecting customers away from, a website on the basis of the customer's nationality or place of residence within the EU
- discriminating between customers, on the basis of nationality or place of residence within the EU, in their general terms and conditions for the supply of (i) goods online, (ii) electronically supplied services (such as web hosting or cloud storage, but not copyright protected material such as e-books and streamed movies), or (iii) services provided in a specific physical location (such as car hire or theme parks)

discriminating against a means of payment solely on the basis of where it was issued within the EU.

Price differentiation, where a trader targets certain groups of customers in specific territories is not prohibited. Moreover, traders are not obliged to deliver goods to member states outside their normal delivery area (but cannot prevent customers from collecting goods from one of the trader's usual collection points). Nor are they required to accept payment in a currency they do not normally accept.

What should clients do next?

Businesses should already be complying with the Geo-Blocking Regulation, however those that have not yet reviewed their terms & conditions for compliance should do so.

HM Government has advised that, in the event of a no-deal Brexit, the UK version of the Geo-Blocking Regulation would be repealed, with the consequence that traders would no longer be required not to discriminate as between customers in the EU and those in the UK. However UK traders offering goods and services to customers in the EU would still need to comply with the original EU Geo-Blocking Regulation in their treatment of customers from different EU member states, even though they would be able to apply different general terms and conditions to UK customers.

Pensions: New Master Trust Authorisation Regime

What's happening?

On 1 October 2018 the new master trust authorisation regime came into force, requiring a master trust (broadly, an occupational pension scheme for unconnected employers providing money purchase benefits) to be authorised by the Pensions Regulator. Existing master trust schemes will have 6 months to apply for authorisation.

The Occupational Pension Schemes (Master Trusts) Regulations 2018 set out the detail of the authorisation and supervisory regime applicable to master trusts under the Pension Schemes Act 2017. The Pensions Regulator has produced a Code of Practice setting out how an application for authorisation of master trusts in made.

What should clients do next?

Clients who operate schemes that will fall within the Master Trust authorisation scheme should be making arrangements for applying for authorisations or for managing this issue by winding up the scheme and transferring benefits out of the scheme to another one.

New Sentencing Guidelines for Gross Negligence Manslaughter

What's happening?

The guideline came into force on 1 November 2018.

So what?

The increased sentencing powers should be viewed by businesses as a stark reminder that individuals within organisations are vulnerable to a prosecution and a potentially lengthy imprisonment if convicted of gross negligence manslaughter. Under the guidelines, anyone convicted of manslaughter by gross negligence could face a prison sentence of up to 18 years.

There have been previous examples which show the susceptibility of businesses and individuals in the sector to Gross Negligence Manslaughter, such as the case of Mohammed Zaman. Mr Zaman ran an Indian restaurant in North Yorkshire. In January 2014, a customer visited the restaurant and ordered food; of which he was assured did not contain any nuts as he had an allergy. This led to a fatal anaphylactic shock, leading for Mr Zaman to be charged with gross negligence manslaughter in 2016. He was sentenced to 6 years in prison.

What should clients do next?

Directors and Senior Managers within organisations should ensure that there is effective leadership of health and safety under the four headings: Plan, Do, Check and Act. The Plan, Do, Check and Act approach helps organisations to consider health and safety management as an integral part of management as a whole rather than looking at it separately.

The new guidelines promotes the need for organisations to identify where they are and where they want to be in terms of health and safety, ensuring that they check and review performance and implement plans to address any issues.

Trade Mark Directive

What's happening?

The Trade Mark Directive 2015, published in the OJEU on the 23 December 2015, hopes to minimise the differences between national and EU trade mark systems.

The UK Government launched a consultation seeking views on proposed changes to UK law as a result of the Trade Mark Directive 2015. The IPO has published responses to the consultation which were overall supportive of the approach to implementing the Directive.

On 10 July 2018, the Trade Mark Regulations 2018 were laid before Parliament. These came into force on **14 January 2019**.

What should clients do next?

In September 2018, the Government published guidance on the implementation of the EU Trade Mark Directive 2015, which covers topics such as applying for a trade mark, collective trade marks and procedures associated with infringement.

New Energy & Carbon Reporting Framework

What's happening?

The Order in Council to close the Carbon Reduction Commitment (CRC) UK-wide after the current phase came into force on 1 October 2018, and the regulations to implement a new streamlined energy and carbon reporting (SECR) framework for financial years beginning on or after 1 April 2019 were passed on 6 November 2018.

Detailed guidance on how to comply with the new obligations to disclose emissions, energy consumption and energy efficiency action in directors' reports or energy and carbon reports, as applicable, is expected to be published by the government in January 2019.

So what?

UK quoted companies will continue to report annually on their global GHG emissions and may also have to disclose total global energy use across all energy types.

Certain UK unquoted companies ("large" as defined in the Companies Act 2006 or in ESOS, OR using over 6GWh of electricity per year, or a different energy use threshold) will have to report certain emissions and energy use via their annual reports.

Government proposes tougher powers for Pensions Regulator

What’s happening?

On **26 June 2018**, the Department for Work and Pensions published a consultation paper ‘Protecting defined benefit pension schemes—a stronger Pensions Regulator’, which sets out proposals to strengthen the powers of the Pensions Regulator (TPR).

The consultation, which closed on the 21 August 2018, fleshes out the proposals contained in the White Paper on Defined Benefit Pension Schemes published in March 2018. It includes proposals to extend TPR’s powers to impose fines, create new criminal sanctions, extend the notifiable events regime and bring forward the deadline by which such events have to be notified to TPR, require some corporate transactions to be notified in advance to the scheme trustees, and overhaul TPR's "moral hazard" powers which allow it to force employers and connected persons to make additional pension contributions or put in place additional financial support for a defined benefit scheme where certain tests are met.

No timetable has been announced yet in respect of the implementation of the changes. Where the change requires an Act of Parliament, this is unlikely to be before the 2019-20 parliamentary session. However, some changes could be made more quickly where it is legally possible to make the change via regulations under an existing power, and it is possible that some changes could be given retrospective effect.

The consultation closed on the **21 August 2018**. Response is awaited.

So what?

The proposed changes would amount to a significant broadening of the Regulator's powers, giving it a very broad discretion to impose significant liability on persons associated with a defined benefit pension scheme. In many cases, liability can be imposed without any need to prove deliberate wrongdoing.

The proposed changes could cause buyers and funders in corporate transactions to become more wary of defined benefit liabilities, but even where no corporate transaction is contemplated, the proposals may give board directors pause for thought when making decisions that could potentially impact the scheme. It may be that the changes will provide greater impetus for companies to fully fund or buy out pension liabilities.

The consultation maid included reference to plans to introduce a new civil penalty of up to £1m. The proposal followed a series of business failures, such as at BHS, which precipitated tens of thousands of pension scheme members seeing reductions to their pensions.

Please find our briefing here.

Termination Payments: Changes to the National Insurance Treatment of Termination Payments

What's happening?

Employer NICs will become payable on all termination payments above £30,000 (which are currently only subject to income tax).

The first £30,000 of any termination payment will remain exempt from income tax and the entirety of the payment will remain exempt from employee NICs. The change had been due to come into force on 6 April 2019 but has been delayed until **6 April 2020**.

So what?

The proposed changes will increase the cost of making termination payments of more than £30,000. The employer NIC rate is 13.8%.

What should clients do next?

Clients should ensure that employer NICs are applied to termination payments in excess of £30,000 from 6 April 2020. This additional cost to the business should be factored into any settlement offers.

Pensions Auto-enrolment: Increase in Minimum Contribution Rates

What's happening?

From **6 April 2019** the minimum contribution rates for defined contribution schemes will increase to 3% for employers (previously 2% as of 6 April 2018) and an overall total of 8% (previously 5% as of 6 April 2018) of the jobholder's qualifying earnings.

A link to the announcement from the Pensions Regulator can be found here.

So what?

Clients may need to increase the rate at which they make pension contributions from 6 April 2019 to comply with the increased statutory minimum. If an employer currently contributes at the statutory minimum rate only, increased member contributions will also be required from 6 April 2019.

This change will need to be effectively communicated to all affected staff members.

Energy Savings - Energy Savings Opportunities Regulations 2014

What's happening?

These regulations which came into force on 17 July 2014 implement in the UK article 8 of the EU's Energy Efficiency Directive. They require large organisations (either balance sheet of at least 43m euros and turnover of at least 50m euros or at least 250 employees) to measure and record at least 90 per cent of their UK energy use in buildings, on transport and in industrial activities and either to identify energy saving opportunities or to implement an approved energy management system such as ISO50001. There is no obligation on affected organisations to implement such opportunities.

The regulations require affected organisations to identify energy supplied to a building whether it is consumed by the landlord or the tenant unless the landlord supplies energy to a tenant under an agreement and that the amount of energy is measured. It appears that a key aspiration of government is the facilitation of dialogue between landlords and tenants on energy efficiency. The first audit period ended on **5 December 2015**. The second audit period began on **6 December 2015** and ends on **5 December 2019**.

ESOS is administered by the Environment Agency which can impose financial penalties and "name and shame" qualifiers who fail to comply with the regime.

What should clients do next?

Clients should be aware of record-keeping obligations, and be aware of the consequences of failure to do so. The regulator may issue civil sanctions including financial penalties if an organisation does not meet the scheme's obligations. Further, companies would face reputational risk if they do not comply.

There could also be an additional administrative burden of recording energy use across your real estate portfolio, logistics and distribution network and warehouses.

Proposed Directive on unfair trading practices in food supply chain

What's happening?

The EU proposes to ban what it considers to be the more damaging unfair trading practices in the food supply chain to ensure fairer treatment for small and medium sized food and farming businesses. National authorities would have the ability to impose sanctions on non-compliant businesses.

The proposed new law, in the form of Directive, would establish a minimum list of prohibited unfair trading practices, including

i) late payments for perishables;

ii) last minute order cancellations; and

iii) forcing suppliers to pay for wasted products.

There has not yet been a date set for the Directive, the earliest implementation would be at some point **2019**. The outcome of Brexit will affect with this becomes law in the UK or not.

What should clients do next?

Clients should be monitoring the progress of this proposal and considering their current trading practices and if any would be considered unfair under this proposal.

Smart Meters

What's happening?

By the **end of 2020**, all homes and small businesses are to be fitted with Smart Meters.

This will involve an estimated 53 million devices being installed in 30 million homes and small businesses.

All meters will need to be changed over, which will be funded by the Government and **carried out by providers**.

So what?

This move should help clients in drives for increased energy efficiency and sustainability.

Please find our briefing on this development here.

Parental Bereavement Leave and Pay

What's happening?

From 2020, employed parents who lose a child below the age of 18 (including a still birth after 24 weeks) to 2 weeks' statutory leave to be taken within 56 days of the child's death. Employees who have at least 26 weeks' service at the time will also be entitled to receive 2 weeks' statutory pay at the lower of either the prescribed rate or 90% of their average earnings. Employers will be able to recover some or all of this payment from the Government.

You can read our full report on the proposal when it was at Bill stage here.

The Act received Royal Assent on 13 September 2018. Supporting regulations have yet to be published. The Act and Regulations are expected to come into force by **April 2020**.

So what?

For most employers, this is unlikely to represent much of a change, with the majority being sympathetic to employees who lose a child and willing to give them all the compassion and grieving time they can afford. However, employers are best advised to review any current policies on bereavement and compassionate leave to consider whether any amendment (or even a separate parental bereavement leave policy) will be necessary to prevent any confusion arising between the terms and conditions that will apply to parental bereavement leave and bereavement leave.

Please find our briefing on this here.

Proposed Ban of Energy Drink Sales to Children

What's happening?

The Government has consulted on whether the sale of energy drinks to children should be banned following strong calls from parents, health professionals, teachers and some industry bodies and retailers. The consultation closed on 21 November 2018. Response from the Government is awaited.

So what?

Should this ban be introduced following Government review, retailers of energy drinks need to consider enforcement of this ban across their stores. Some retailers are already enforcing a voluntary ban.

Voluntary Agreement to Prevent Underage Sale of Knives

What's happening?

The Home Office is working with the British Retail Consortium to extend the voluntary agreement on measures to prevent the underage sale of knives in store and online to other retailers. Currently Tesco, Lidl UK, Amazon UK, Wilko, Argos, Morrisons, Asda, Poundland, Sainsbury's, John Lewis, Waitrose, Boots, Aldi, Co-Op, B&Q, TK Maxx and Debenhams have all agreed to adhere to the voluntary agreement.

Current legislation dictates that it is illegal to sell a knife to anyone under the age of 18, unless it has a folding blade 3 inches long or less.

These retailers have agreed to adhere to the following principles:

- Apply their policies for age-restricted sales such as think 21 or challenge 25 to ensure age verification checks take place and knives will only be sold once they are satisfied the customer is 18 or over.
- Action will be taken in-store and online to remind customers and staff that knives are age-restricted products
- Retailers will ensure knives are displayed and packaged securely as appropriate to minimise risk
- All staff selling or approving sales of knives will be provided with training, with that training being refreshed at least once every year.
- EBay is committed to a safe online marketplace and currently prohibits the sale of all knives on ebay.co.uk
- Amazon requires that all third-party sellers on its marketplace comply with the law on the sale of knives, including clearly listing products as for over 18s and requiring age verification on delivery. Those who do not are subject to action including potential suspension.

Guaranteed Minimum Pension Equalisation

What's happening?

On 26 October 2018, the landmark judgment in Lloyds Banking Group Pensions Trustees Limited v Lloyds Bank plc established beyond doubt that scheme trustees must adjust scheme benefits to equalise for the effect of GMP ("guaranteed minimum pension") legislation that treats men and women unequally.

The judge heard arguments on the question of whether schemes retain liability for equalisation when the relevant benefits have since been transferred out of the scheme. The parties subsequently agreed that the judge should proceed to judgment without ruling on this issue, but it is possible that this issue could be brought back before the court.

So what?

It has now been firmly established that trustees must adjust scheme benefits to equalise for the effect of GMP legislation which treats men and women unequally, so "parking" the issue indefinitely is no longer an option. However, it seems likely that we will see further clarification of some of the surrounding issues during the coming year, particularly regarding the tax consequences of equalisation measures.

At this stage we think it makes sense for trustees to have an equalisation plan which distinguishes between issues requiring an urgent decision (eg approach to current transfer value requests) and issues in relation to which a "wait and see" approach still makes sense in the short-term. The prime duty to equalise benefits falls on scheme trustees, but the cost will ultimately be borne by schemes' sponsoring employers, so employers should liaise closely with their scheme trustees on this issue.

Court Cases on RPI/CPI

What's happening?

Eight years on from the government's decision to change the statutory basis for pension increases from RPI to CPI, questions relating to this issue continue to occupy the courts. In Barnardo's v Buckinghamshire, the Supreme Court concluded that a reference in the scheme rules to "replacement" of RPI referred to it being replaced as an official index, not the scheme trustees choosing to replace it. In British Telecommunications plc v BT Pension Scheme Trustees Limited, the Court of Appeal held that RPI had not "become inappropriate" for the purposes of calculating pension increases.

In the coming year, we expect to see a Supreme Court ruling in the case of British Airways plc v Airways Pension Scheme Trustee Ltd, a case which stems from the RPI/CPI change, but which may well have wider implications regarding extent to which scheme trustees are allowed to use their powers to increase scheme liabilities without employer consent.

What should clients do next?

Whether these cases are significant for individual schemes depends on the precise wording of a scheme's rules. Clients who are unsure of the implications of the cases for their own scheme should seek legal advice.

Restricting Promotions of Food and Drink that is High in Fat, Sugar and Salt

What's happening?

The Department of Health and Social Care have launched a consultation which seeks views on its plans to restrict promotions of food and drink products high in fat, sugar and salt (HFSS) by location and price.

The consultation asks for thoughts on:

- restricting volume-based price promotions of HFSS food and drink that encourage people to buy more than they need, for example, 'buy one, get one free' and free refills of sugary soft drinks
- restricting the placement of HFSS food and drink at main selling locations in stores, such as checkouts, aisle ends and store entrances
- which businesses, products and types of promotions should be included in the restrictions
- definitions for HFSS products, price promotions and locations in stores
- how businesses can put this into practice and whether they will face any difficulties

What should clients do next?

Clients should consider whether they wish to respond to the consultation.

The consultation closes at 11:59pm on **6 April 2019.**

So what?

The Government want businesses to promote healthier food and drink, to help people make healthier choices.

Ethnicity Pay Gap Reporting

What's happening?

The Government ran a consultation seeking views on how to take forward the manifesto commitment that large employers should be required to publish ethnicity information. The consultation closed recently and response is awaited.

The consultation sought views on:

- what ethnicity pay information should be reported by employers to allow for meaningful action
- who should be expected to report
- next steps

What should clients do next?

More information can be found by reading our article here.

Gender Pay Gap Reporting

What's happening?

The next gender pay gap reports are due by **4 April 2019**.

So what?

Private sector employers with 250+ employees must report on their pay gaps by this date.

What do clients need to do next?

Clients should ensure that they have reported on their pay gap(s) on their website(s) by 4 April 2019, as well as uploading details to the Government website.

Good Work Plan: Taylor Review of Modern Working Practices

What's happening?

In November 2016, the Government launched the Independent Review of Employment Practices in the Modern Economy.

Its purpose was to consider the implications of new models of working, including those used in the "gig economy", for the rights and responsibilities of companies and individuals. Matthew Taylor's report - Good Work: the Taylor Review of Modern Working Practices – was published in July 2017.

The Good Work Plan has now been published, which sets out the Government's considered position on Taylor's recommendations, and is described as the Government's *"vision for the future of the UK labour market".* This remains, however, largely just a list of proposals, accompanied by some (but not all) draft legislation. As yet, there are no firm dates for when many of the reforms will come into effect or what much of the important legislative detail will look like.

So what?

This is the biggest reform of employment law in 20 Years.

What should clients do next?

Clients should monitor the proposals, notably for which draft legislation has been published as follows and will come into force from **6 April 2020.**

- Removal of the "Swedish derogations" in the Agency Workers Regulations 2019 – here;
- Extending right of statement of employment particulars to all workers from day one – here;
- Increasing reference period for holiday pay from 12 weeks to 52 weeks – here;
- Introducing "name and shame" scheme for employers who fail to pay Employment Tribunal awards – here;
- Stronger sanctions for employers who have previously lost cases – here; and
- Lowering information and consultation threshold from 10% to 2% (keeping 15 employee minimum threshold) – here.

Allergen Food Labelling - Natasha's Law

What's happening?

In 2018 there was an inquest into the death of Natasha Ednan-Laperouse, who passed away following an allergic reaction to food purchased at Pret A Manger. This precipitated calls to implement what has been referred to as 'Natasha's Law': legislation targeted at closing what is considered as a 'loop hole' in food labelling laws. If food items which are not pre-packed; packed on the sales premises at the consumer's request; or pre-packed for direct sale, the business operator has no obligation to list any allergenic ingredients on the product itself. Thus Pret A Manger did not break the law as it stands.

Michael Gove, Secretary of State for Environment, Food and Rural Affairs said in October 2018 that he wanted 'Natasha's Law' to be introduced in 2019, and also said that he expects more companies to start including full ingredient listings and allergy information on their food products before any new law is made, saying that "businesses do not need to wait for the law to change to do the right thing"

In November 2018 Mr Gove reiterated his commitment to change the law holding a roundtable meeting with allergy groups, specialists and industry stakeholders to discuss the matter.

What do clients need to do next?

The Food Standards Agency and Association of Convenience Stores have recommended that retailers closely follow their advice on food allergen labelling.

Making Tax Digital

What's happening?

Making Tax Digital is a key part of the Government's plan to become paperless in tax returns. There are several planned phases in the plan, however the immediate cause for attention is that:

From **1 April 2019** VAT-registered businesses with a taxable turnover above the VAT threshold (£85,000) are required to use the Making Tax Digital service to keep records digitally and use software to submit their VAT returns.

From **1 October 2019**, more complex businesses who were originally deferred will need to comply with Making Tax Digital.

What should clients do next?

On 10 January 2019, the Government published "Making Tax Digital: how VAT businesses and other VAT entities can get ready".

The note advises that businesses will need to keep business records digitally from the start of their accounting period. If clients already use software to keep business records, they ought to check their software provider's plans to introduce MTD-compatible software.

If clients don't currently use software to keep records or if software won't be MTD-compatible, clients will need to consider what software is suitable for their requirements.
The Government has produced a directory of software suppliers here.

Guidance from the Government states that clients' digital records should include, for each supply:

The time of supply (tax point), the value of the supply (net excluding VAT) and the rate of VAT charged. They should also include information about your business, including business name and principle business address, as well as your VAT registration number and details of any VAT accounting schemes you use.

Brexit – No Deal

- The legal default outcome of the European Union Withdrawal Act 2018 (**EUWA**) is Brexit without a withdrawal deal on 29 March 2019. If there is no-deal (and Article 50 is not extended or revoked), then there will be no transition period and at 11.00 p.m. (UK time) on 29 March 2019, the UK will leave the EU. In the absence of the Government changing course or Parliament being able to find a majority for an alternative solution which it can then write into law, no-deal will prevail.
- A 'no-deal' outcome does not necessarily mean the end of negotiations on withdrawal arrangements, as a negotiation outside of the Article 50 process could take place covering key issues of mutual concern. Such a **"bare-bones" deal** (or deals) could even result in a last minute transition period to avoid the "cliff edge" scenario on 29 March 2019, in exchange for some or all of the UK promised payment of c.£39bn to the EU.
- Once the UK leaves the EU, formal negotiations on the long-term future UK-EU relationship will start under Article 218 of the Treaty on the Functioning of the European Union.

Brexit: Potential Implications of No Deal

- Clients are likely to see increased costs of buying goods from the EU, and selling goods to the EU, in the form of import tariffs and the cost of complying with import formalities on imports into the UK and sales into the EU, as well as the costs of additional staff to process all of this.
- Additional border checks may lead to delays in supply and shortages, and there is concern in particular that Dover may struggle to cope given the shortage of land there for additional facilities.
- In the Retail & Consumer sector, it is likely that economic uncertainty will further impact consumer confidence and spending. Research from *GlobalData* shows that consumer sentiment has already been trending negatively, with the question 'How do you feel leaving the EU will impact your personal finances?' seeing answers of 'I will be worse off' having an increase from 39.3% in July 2018 to 46.5% in November 2018. Further 60% believe that the economy will become worse in the next 6 months (from Nov 2018) compared to less than 10% who think it will get better. It is possible that with food prices potentially rising (*GlobalData* suggests there could be a rise of up to 10% on basic foodstuffs in a worst-case scenario), non-food categories will bear the brunt of reduced spending, with a higher proportion of disposable income being dedicated to food.
- Currency fluctuations mean many businesses will suffer from increased costs, reduced profits and reduced demand – particularly if increased costs are passed onto consumers.
- Employers may struggle to fill positions, as the sector is particularly reliant on EU labour currently. In 2016, the ONS estimated that over 170,000 EU nationals work across the retail sector, with London and the South being the most reliant on EU labour. The *BRC Workforce Study* found that the proportion of retailers employing EU nationals by skill level was: Unskilled work – 83%, Semi-skilled work – 72%, Skilled work – 44% and Highly skilled work – 39%

Brexit: No Deal – Food production and labelling Implications

What's happening?

Guidance from the UK Government suggests that, from 29 March 2019, current EU regulations will be absorbed into English Law as part of the European Union (Withdrawal) Act 2018, and a plethora of additional Sis.

Products from the UK will have to be labelled as originating from the 'UK', whereas they currently can be stated to be of 'EU' origin.

Pre-packed products which will be sold in the UK and the EU will need to include both a UK and EU address to be sold in both locations. Thus clients may need to set up a base in another EU Member State or work with an EU importer in order to provide this address.

The UK Government intends for recognitions of Natural Mineral Waters granted in the EU to continue to be effective across the UK under a no-deal scenario.

Some products are protected by 'geographical indication' (GI), an EU based regime which protects GIs from imitation in the EU (think Jersey Royal Potatoes). The UK will set up its own scheme to mirror the EU scheme. It is unclear howver, whether current UK Gis will be protected under EU law after Brexit.

What should clients do next?

Clients should review their current labels and packaging to assess whether any changes will be required and make plans to do so.

Selective Distribution Systems and Third Party Platforms

In September 2018 the Competition Appeal Tribunal (CAT) confirmed the 2017 decision of the Competition and Markets Authority (CMA) to fine Ping Europe Limited (Ping), a manufacturer of golf clubs, for infringing competition law by entering into agreements with two UK retailers containing clauses prohibiting those retailers from selling Ping golf clubs online.

The CMA had rejected Ping's argument that, because its products are designed to be custom-fit in person, it should be entitled to limit the sale of its products to in-store club-fitting services and that this did not harm competition. Although the CMA acknowledged that Ping was pursuing a genuine commercial aim of promoting in-store custom fitting, it considered it could achieve that objective by less restrictive means.

The CAT agreed with the CMA that the agreements constituted a restriction by object – that is they were, by their very nature, liable to harm competition - and failed to qualify for exemption from the competition rules. The CAT noted that the potential impact of the ban was real and material: "It significantly restricts consumers from accessing Ping golf club retailers outside their local area and from comparing prices and it significantly reduces the ability of, and incentives for, retailers to compete for business using the internet." The CAT has also refused Ping permission to appeal the ruling.

This decision confirms the strict approach taken by competition authorities to online sales bans. Although Ping could place certain conditions on the online sale of its golf clubs – and the European Court of Justice's 2017 Coty judgment opened the way, in selective distribution systems, for appropriate restrictions on sales via third party platforms - outright sales bans are not permitted and continue to be regarded as serious infringements of competition law.

Data and Cyber Security

GDPR brought in substantial new penalties. The highest fines for serious breaches of data subject rights can incur fines of up to the higher of 20millionEUR (£17m) or 4% global turnover.

The ICO published it's first GDPR and Data Protection Act 2018 Enforcement Notice in July 2018 against AggretateIQ Data Services Ltd., whom were associated with targeted advertising for the 'Vote Leave' campaign during the referendum on the UK's membership of the European Union. The ICO published a Second Notice dated 24 October 2018. The ICO surmised that AggregateIQ is a Data Controller and that it violated the principles of data processing. Subsequently, the Commissioner required AIQ to stop processing any personal data of UK or EU citizens gathered from UK political organisations. If AggregateIQ failed to comply within 30 days they would face the fines stated above.

Profiling under the GDPR

Profiling is a form of automated processing of personal data where such personal data is used to analyse and evaluate aspects of a person's behaviour, which can be for the purposes of determining their likely interests, personal preferences or consumer behaviour. Profiling has many commercial applications and is often used to better segment markets to allow for more targeted and effective marketing, ensuring the advertised products or services are appropriate to the needs of the consumer. However, as profiling can pose risk to an individual's rights and freedoms by undermining an individual's ability to make their own decisions on their consumer activity, certain safeguards have been put in place to monitor the use of profiling.

The GDPR introduces new provisions aimed at addressing the risks associated with profiling. Together with an individual's more general rights under the GDPR, the individual being profiled has a right to be informed of the profiling, which includes being informed of the fact that their personal data is being profiled; being given meaningful information regarding the logic involved in the profiling; and given an explanation setting out the significance and envisaged consequences of the processing.

Failure to comply with the provisions of the GDPR when undertaking the profiling of personal data is a breach of the GDPR, and any organisation in breach of the GDPR may be subject to enforcement action by the ICO.

Digital Engagement

- **Voice** – voice-enabled online ordering will become increasingly prevalent this year. Lots of resources are going into the voice interfaces from major operators such as Google and Amazon, whether finding digital content to watch on your television, or ordering groceries or takeaway food. Looking at means of including this functionality in your customer interfaces could be something to consider depending on your product or service offering – repeat purchases, commodity products, searching databases for content are all applications which should have early adoption. However you should bear in mind how to verify that the authorisation and payment has been made by the person who gave those payment details in the first place – this may get more complicated with Strong Customer Authentication which is due to come into force most likely in 2019, so if you are investing in this technology, keep this in mind (see separate section on Payments Ecosystem)

- **Software Licensing** – Addleshaw Goddard's Commercial Disputes teams displayed their expertise in the software under licensing field with its involvement in the SAP v Diageo case last year. Many customers are facing claims from software suppliers seeking multi-million £ licence fee and maintenance payments in respect of alleged under licensing or indirect use of /access to the supplier's software. Some suppliers are also seeking software audits in order to verify customer usage. These claims are capable of being reduced to a fraction of the sum claimed or eliminated altogether. AG is in a unique position to advise on these matters having successfully resolved the only reported case on this issue in England and Wales (SAP v Diageo [2017] EWHC 189 (TCC) and advised on many others.

- **Blockchain** – much talked about in the context of crytpocurrencies such as Bitcoin, this technology is now being used by businesses to record both contracts and transactions, guarantee the movement of information and track the provenance of goods whether that be food or fashion.

  Where you need an unamendable reliable record of a series of transactions then this technology could be applied. It could be used to demonstrate compliance with Supply Chain Transparency compliance programme for example such that you can track the provenance of components, and raw materials that have gone into products that you are then putting on sale.

Digital Engagement

- **Robotic Process Automation and AI** – not as newsworthy as some of the more eye catching front office solutions, there are significant efficiency gains to be made in automating back office processes such as certain HR processes, finance and accounting and aspects of IT service provision. The largest challenge to gaining these benefits is having standard processes to enable their implementation. Standardising across different countries and legislative systems can be difficult.

  However if you are about to outsource, renew, benchmark or challenge your in-house service hub then your business case should take these benefits into account. Labour cost arbitrage as a model has passed the greatest savings to be had already – the future is technology, not a cheaper workforce.

- **Deep Retail** – currently and moving forwards, data is and will be the fundamental force that drives retailer and draws them together with their consumers. Many consumers will expect retail brands to put new forms of data to work, be that emotional data, eye tracking, DNA and more, to offer deeper personalisation. As new technologies are released, more data is available to capture. The last year has seen facial recognition as a way to unlock iPhone and android devices, so it is perhaps not a surprise that Walmart in 2017 filed a patent for technology that will detect the emotional state of shoppers in their stores, meaning that negative experiences could be mitigated.

  Further Air New Zealand are using facial recognition technology in an effort to make personalised holiday recommendations to travellers.

- **Google Adwords / Online Advertising** – brandowners and retailers have, for some time, been finding that they bump into each other as each bid for the sponsored advertising slots available from Google and bid up the prices of those slots as they seek to be top-ranked. Competition authorities are becoming increasingly interested in restrictions designed to prevent such bidding wars.

  The German competition authority has found such a clause to be anticompetitive, whereas a recent UK investigation sought to distinguish between different kinds of restrictions which may have greater or lesser anti-competitive effects. This is an area that continues to be one to watch.

ADDLESHAW GODDARD

FAST MOVING SECTOR THEMES

Employment Watch List

Worker status: are Uber taxi drivers workers?

In *Uber B.V. v Aslam,* the EAT decided that taxi drivers engaged by Uber were workers, rather than self-employed contractors. The consequence is that the drivers will be entitled to certain employment rights such as to be paid in accordance with the National Minimum / Living Wage and protections under the Working Time Regulations 1998 (e.g. rest breaks and paid holiday). You can read our full report on the decision here.

The Court of Appeal judgment was handed down on 19 December 2018. We are awaiting decision on permission to appeal to the Supreme Court.

Worker status: are outsourced staff also workers of the end-user?

In *IWGB and University of London,* the IWGB applied to the Central Arbitration Committee (CAC) for trade union recognition. As part of that application the CAC had to decide whether outsourced staff (security guards, porters, receptionists, post-room staff and AV staff) employed by Cordant Security were also workers engaged by the University of London. If they were not workers of the University then the application for trade union recognition would fail.

On 10 January 2018, the CAC rejected the application on the grounds that the staff were not workers of the University due to the absence of a contract between the parties. You can read our full report on the CAC decision here.

The IWGB were granted permission to have the CAC's decision judicially reviewed by the High Court. BEIS have been joined as an intervener.

Employment Watch List

Impact?

The Act received Royal Assent on 13 September 2018. Supporting regulations have yet to be published. The Act and Regulations are expected to come into force by April 2020.

- **Bereavement policies:** if you don't have a bereavement policy in place, it would be sensible to put one in place to outline the entitlement to the new right and the process for applying for the leave. If you already have a bereavement policy in place, it would be worth thinking about whether any changes will be needed to dovetail with the new rules.
- **Enhancement of rights:** consideration should be given to whether you will enhance the statutory rules, for example by: allowing leave to be taken for the death of a child over the age of 18; permitting a period of leave greater than 2 weeks; and/or paying full pay for some or all of the leave period.
- **Other support you can offer:** consideration should be given to what other support mechanisms you can put in place for employees in this difficult situation. ACAS has published Managing Bereavement in the Workplace – a good practice guide, which contains many useful suggestions on how employers can support employees through bereavement.

You can read our article on the proposal when it was at the bill stage here.

New company reporting requirements

New reporting requirements have come into force requiring:

- quoted companies with more than 250 UK employees to report annually on the ratio of CEO pay to the average pay of their UK workforce;
- large public and private companies to explain how their directors comply with the Companies Act 2006 requirement to have regard to employee and other stakeholders' interests;
- large private companies to report on their corporate governance arrangements (a company is treated as "large" if it has either more than 2,000 employees, or a turnover of more than £200m and a balance sheet total of more than £2billion); and
- listed companies to show what effect an increase in share prices will have on executive pay.

Employment Watch List

Britain's withdrawal from the European Union

The European Union (Withdrawal) Act 2018 sets out the approach for converting existing EU legislation into UK law when Brexit takes place on 29 March 2019.

The draft employment-specific regulations specify the technical changes to be made to employment laws post-Brexit. The changes are technical in nature only, for example, removing EU-related references that will no longer be valid. The aim of the amendments is to ensure that the existing statutory framework continues to operate effectively in its current form after Brexit. However, as far as European Works Councils (EWCs) are concerned, the Government acknowledges that a reciprocal agreement from the EU would be required for the statutory framework to continue as it presently does. You can read the Government's explanatory note here.

The Government has also published a technical notice on the impact of a "no deal" Brexit on workplace rights. The note states that the only potential impacts are in relation to EWCs (i.e. no new requests could be made to set up an EWC or information and consultation procedure) and employer insolvencies (i.e. employees working for a UK employer in the EU may not be protected by the national guarantee fund operating in that country). You can read the technical notice here.

Solvency Concerns

Throughout the media there have been predictions of the “death of the high street” over the last few years, and the current market is doing little to calm these nerves. The pressure is on for retailers to adapt to the challenge of evolving consumer demand. Statistics from PwC show that during 2017 there were 14 retail store closures per day, a trend that continued through 2018, indeed a net 1,123 stores closed in the first half of 2018 alone. Many retailers are facing rising costs for everything from employment and business rates to innovation in order to stand out from the crowd and respond to the move to online and digital solutions. In response to these pressures there has been a lot of restructuring activity in the sector including some high-profile administrations, CVA's and landlord renegotiations.

If your business is affected by the incidents of financial distress in the market you should consider early warning signs, particularly any changes or delays in payment terms, or change or withdrawal of credit insurance and ensure that your contractual conditions are up to date and applied.

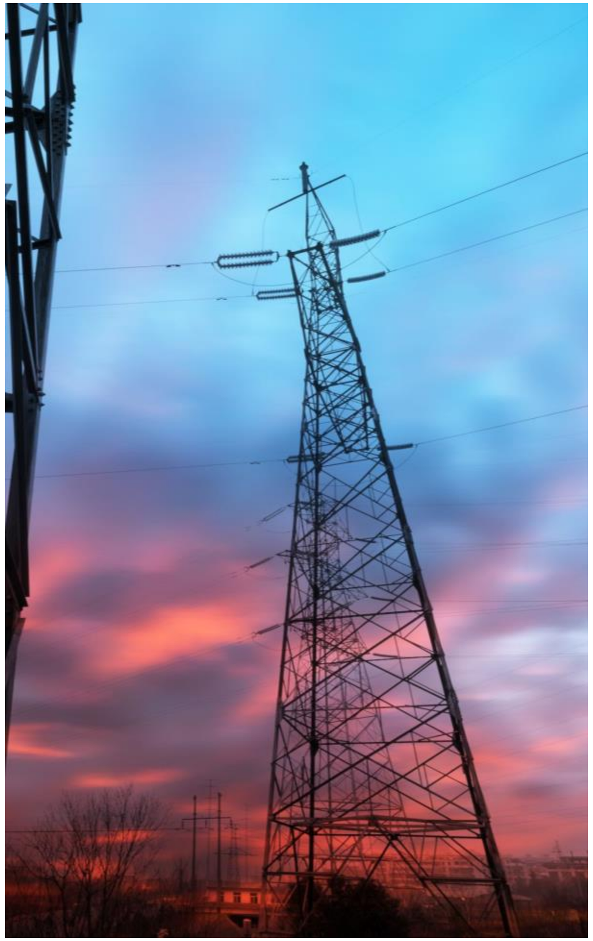
You may wish to consider:

- Do you know who is critical to your business and the impact their failure may have?
- Are you monitoring effectively and do you have a contingency plan?
- Do you understand the nature of your rights and the impact of insolvency?

Environment: Heightened Risk of Fines

Manufacturers, distributors, importers and retailers – often grouped together as 'producers' in environmental regulation – need to ensure they are fully aware of the obligations they face under environmental law. For R&C businesses, who often have complex and/or far reaching supply chains, this should be an **area of increased focus** as failure to comply with the majority of environmental regulations constitutes a criminal offence. This can then result in a criminal conviction, a criminal sanction, and a damaging PR issue to manage. Furthermore, with **changes to the severity of fines that can be imposed for environmental offences**, the situation is now reaching a critical point. It has been made very clear that the level of fines to be imposed must be "…*sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to improve regulatory compliance*." Some of the key areas of environmental regulation that R&C businesses need to be aware of, include:

- **WEEE (waste electrical and electronic equipment) Regulations** – these impose obligations on manufacturers, importers, distributors and retailers of electrical and electronic equipment. Your specific obligations depend on your place in the supply chain but include: financing the collection, treatment, recovery and disposal of WEEE; ensuring products are correctly labelled; and, providing appropriate information to customers.
- **Batteries Regulations** – the Regulations impose similar obligations to those outlined in the WEEE Regulations, but the type of battery involved will affect the producer's' obligations.
- **Packaging Regulations** – companies meeting the thresholds (annually handling 50 tonnes or more of packaging and a turnover of £2m or more) must recover and recycle specific percentages of packaging they 'handle' – this includes a variety of packaging such as that around products sold by retailers and packaging imported into the UK. Compliance is usually achieved via membership of a compliance scheme. order to be lawfully used.



Environment: Heightened Risk of Fines

- **CLP (Classification, Labelling and Packaging of substances and mixtures) Regulation –** this requires the vast majority of chemical substances and mixtures to be classified and then labelled appropriately, identifying the hazards associated with them. Information must also be provided as to how to avoid those hazards and packaging must be compliant, including the use of child-resistant closures and tactile warnings. Obligations fall throughout the supply chain and apply to both hazardous and seemingly harmless substances. A wide range of products are caught by CLP from cleaning products to printer cartridges and scented items (including some toys).
- **REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals) Regulation –** the aim of this Regulation is to provide a high level of protection for both the environment and human health. Manufacturers and importers have significant obligations in respect of the assessment of risks posed and the registration of substances (if there is no registration, substances must be removed from the market). However, REACH also provides for Restriction on the use of certain substances (e.g. nickel and lead) and others must be specifically authorised for a particular use in order to be lawfully used.

What are the impacts?

- Each of these regulations imposes **obligations throughout the supply chain**. It is often assumed that the manufacturer of a product is the one who must ensure the environmental obligations are met. However, this is not the case: every actor in the supply chain, including importers, distributors and retailers, has some level of obligation.
- Where a company, say, is importing a product into the UK from China, while the manufacturer has to comply with local regulations, the importer must check that product complies with REACH and CLP. The importer cannot just rely on the Chinese manufacturer's word and should verifying test reports provided by the manufacturer (which may include the importer carrying out its own testing). A subsequent retailer of that product must also carry out its own due diligence to ensure compliance before placing that product on the EU market. Both distributors and retailers can face criminal prosecutions if they are found to be making non-compliant products available both from a B2B and B2C perspective, or if they have failed to participate in the relevant producer compliance scheme. The potential implications are significant. Now that all fines for environmental offences are unlimited, these are being pushed ever higher by the Courts. In addition, negative PR will result from publication of the details of all prosecutions on the 'news' sections of regulators' websites. Other enforcement action taken can also be viewed via on-line public registers.

Environment: Heightened Risk of Fines

What next?

Consumers are becoming more aware of the ongoing environmental issues; a recent Government consultation received around 162,000 respondents to the Treasury's call for evidence on tough action against plastic waste. Last year the use of microbeads in cosmetic products was banned; following this the Government is now considering banning plastic straws, stirrers and cotton buds, as well as the introduction of a deposit return scheme for recycling.

However, the recently announced ban by China on imports of plastic waste could have huge implications for such a scheme. Currently there appear to be insufficient plastic recycling facilities within the UK to handle such extra volumes of plastic waste.

In the November 2018 Budget the Government announced plans to introduce a new tax on plastic packaging which does not include at least 30% recycled content. Subject to a planned consultation, this tax is due to come into force in April 2022.

To read our recent article from our Retail & Consumer newsletter "Moving from recycling to waste prevention" please click here.

Energy and Electric Vehicles

Consumers are increasingly choosing to shop with brands who see the importance of social and environmental issues and place value on sustainability. Many retailers have made significant progress implementing sustainability plans, some even appointing heads of sustainability to their management team. Pursuing these policies can have a number of positive impacts such as reducing costs, enhancing your brand, satisfying shareholder demand and staying ahead of the regulation.

In the UK, there is a legally binding target imposed by Promotion of the Use of Energy from Renewable Sources Regulations 2011, which states that 15% of UK's energy (not just electricity) consumption must be from renewable sources by 2020. Currently, the UK is predicted to miss its target by 0.2% according to the latest progress report, which can be found here.

Retailers should be doing what they can to adapt to these demands to keep consumers happy and stay ahead of the regulation. Policy and industry developments are combining to transform the electricity and transport sectors and the Electric Vehicle (EV) charging point is now a new point of sale for retailers.

In recent years sales of new cars in UK have decreased. However, the sale of EVs has bucked that trend. Figures published in September 2018 showed that sales of EVs reached a record high in August 2018, accounting for one in every 12 new cars purchased in the UK. The Society of Motor Manufacturers and Traders claimed that hybrid, plug-in hybrid and pure electric cars made up 8% of the overall market, up 23% from the year before.

As more consumers switch to EV they will require more EV chargers and the facilities around them to cater for drivers being stationary for longer periods of time. Approximately 44% of petrol sold in the UK is now purchased at supermarkets i.e. supermarkets are large fuel retailers and likely to be included within the scope of the AEV. Retail and leisure centres appear to be the obvious place for the first wave of EV chargers to be installed.

Energy and Electric Vehicles

The growth of EV use presents a prime opportunity for retailers who can provide charging facilities within their car parks. The sale of electricity for charging purposes can offer positive returns for those who invest in this technology early, as well as competitive edge. The EVs themselves rely on the digital networks for mapping and route planning and the EV chargers are connected to nationwide networks. New products and services are being developed to service this transport revolution. Retailers should be conducting research into these opportunities now so that they are able to design the infrastructure to provide services to EV drivers.

An October 2018 report from the House of Commons Business, Energy and Industrial Strategy Committee noted that 'poor provision of charging infrastructure is one of the greatest barriers to growth of the UK EV market'.

In 2018, the Automated and Electric Vehicles Act was passed, a key stepping stone for the Government's aim for almost every car and van to be a zero emission vehicle by 2050. The Government published this briefing paper which explains the background, contents and purpose of the Act. It should be noted that although the Act has been passed, much of it will be implemented via secondary legislation at a later date.

The Clean Air Strategy

On 14th January 2019 the Government published its Clean Air Strategy.

The document details the actions that will be taken to protect the health of citizens and the environment.

The document states that there will be new powers across England to “control major sources of air pollution, in line with the risk they pose to public health and the environment, plus new local powers to take action in areas with an air pollution problem.” These powers will support the creation of ‘Clean Air Zones’ which aim to lower emissions from all sources of air pollution.

5 Clean Air Zones which will come into place by 2020 have been announced; in Oxford, Leeds, Birmingham, Southampton and Derby.

These zones will have big implications for retailers whom have stores or other sites within the zones as people are being discouraged from taking petrol and diesel powered vehicles into them. This will increase the cost of vehicles entering the zones and could see a large increase of costs of transporting goods. There have been consultations happening within local authorities at the moment, clients should check whether they have been contacted.

An Ultra Low Emission Zone (ULEZ) will be coming into place in central London from 8 April 2019 in which most vehicles including cars and vans will need to match more stringent exhaust emission standards or pay a daily charge to travel within the area of the ULEZ. This zone is expected to include the inner London area from 25 October 2021.

Fire Safety

Since the Grenfell Tragedy, the Hackitt Report has been published which recommends a new regulatory framework and measures to strengthen regulatory oversight. The Hackitt Report did not, as many expected it to, ban the use of combustible materials for use in external façades.

A Government consultation was set up to review a proposed ban on the use of combustible materials in the external walls of high-rise residential buildings. The Government responded to this consultation in November 2018 and have now made new regulations which ban combustible materials on the external walls of new buildings over 18 metres. These regulations came into force on 21 December 2018.

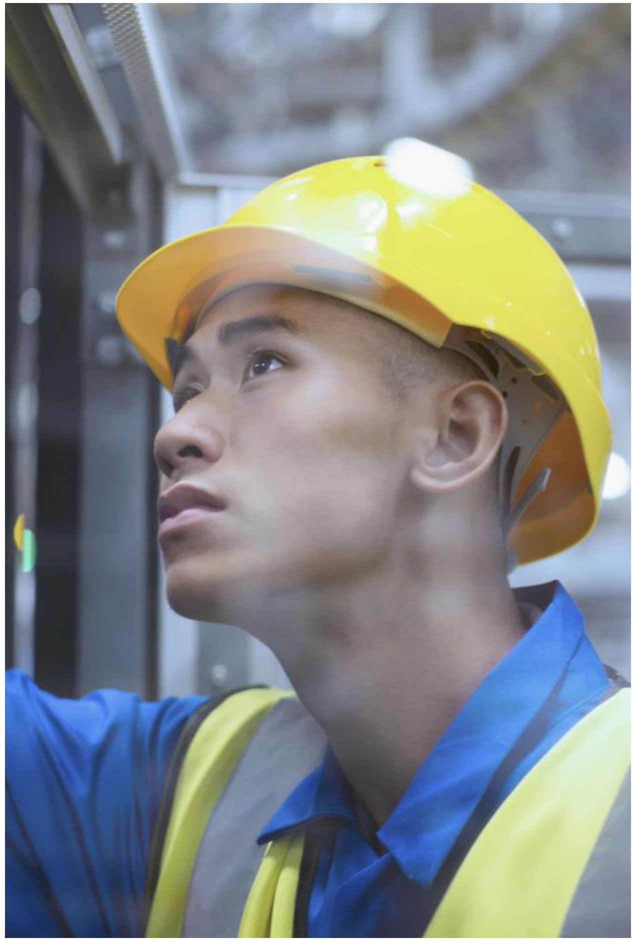
A second consultation was set up to review a proposed clarification of building regulations guidance on fire safety (i.e. Approved Document B). The consultation closed on 11 October 2018, Government response is awaited.

The Department for Communities and Local Government has issued a number of advice notes for building owners and landlords, which set out what steps ought to be taken by duty holders to satisfy themselves of the build-up of their properties' external façades and what interim safety measures ought to be in place whilst investigations and/or remedial works are carried out.

Where a retailer is a 'Responsible Person', pursuant to the Regulatory Reform (Fire Safety) Order 2005, a failure to discharge the relevant obligations may result in criminal sanctions.

The order imposes a general duty of fire safety care.

Retailers need to consider if appropriate fire safety measures are being taken through a suitable fire risk assessment.



Tax Avoidance

The issue of tax avoidance has remained a priority for legislative reform in the last year.

For instance:

- The Finance Bill 2019 includes draft legislation to tackle tax avoidance involving fragmentation of business profits, expected to take effect in **April 2019**. The draft legislation targets arrangements which typically involve some or all of the profits of a UK business being moved to an offshore entity where little or no tax is paid.
- The UK government has published a draft clause which will empower HMRC to make regulations to enable it to comply with international rules on the disclosure of cross border tax arrangements, requiring 'intermediaries' and in some cases taxpayers, to report information to tax authorities about cross-border arrangements that contain certain hallmarks.
- This is an ongoing theme which should be monitored by clients.

Trespassers

Trespassers are increasingly becoming a problem for commercial land owners. Recently there have been a significant increase in instructions to remove all types of trespassers, the most common being traveller groups and protestors. **All types of property are vulnerable to this risk**, but particularly open land, development sites, car parks, industrial estates and retail parks. In all cases, the presence of trespassers represents a significant cost to the landowner. The longer the trespass continues the larger the landowner's clean-up costs. In some cases, there has been tonnes of waste dumped within days, leading to tens of thousands of pounds in clean-up costs. A trespass can also hold up developments and stop nearby businesses from trading.

Land owners sometimes attempt to remove trespassers from non-residential property informally. This is known as the Common Law remedy, and involves Enforcement Agents attending the premises to encourage trespassers to move on. However, this method has become less effective, particularly in certain parts of the country and certainly against well organised and determined groups. Land owners are therefore often forced to commence formal court proceedings. If a very basic application to Court for a possession order is made it can take between one to two weeks to obtain and enforce the order, by which time the land owner's exposure to clean up costs could be considerable.

Addleshaw Goddard have designed **AG Enforce** to address the challenges and risks faced by land owners in current times. AG work with and co-ordinate our trusted team of contacts within the industry, such as enforcement agents, specialised barristers, and process servers in order to minimise delays and achieve the best results possible for our clients. AG and its team will advise on Common Law versus formal proceedings at the beginning of an instruction and then manage the process for land owners. In some cases, we have been able to obtain a High Court Writ of Possession to **remove trespassers the same day that proceedings were issued**, minimising exposure.

A recent case we worked on was a retail and leisure park in Essex:

We received instructions to obtain a High Court Writ of Possession where the Common Law method had proven unsuccessful in relation to a large group of travellers in the Essex area, known to our Enforcement Agents as "dumpers". The travellers had set up camp at a retail and leisure park and within a few days had dumped around 400 tonnes of waste which cost tens of thousands of pounds to clean up. Once instructed, AG managed to obtain a High Court Writ of Possession the same day as proceedings were issued which was enforced by a team of Enforcement Agents the following day.

To find out more information about AG Enforce, please contact Julie Middlemass.

Competition Law Based Damages Claims

What's Happening?

A number of damages claims have been filed in the UK (and elsewhere in the EU) against truckmakers found to have breached EU competition rules. In July 2016, DAF, Daimler (Mercedes), Iveco, MAN and Volvo/Renault admitted to having participated in a 14-year illegal price-fixing cartel, between 1997 and 2011. Scania denied any wrongdoing but, following an investigation by the European Commission, was also found to have participated in the cartel. Collectively, the truck manufacturers were fined more than €3.8 billion (although Scania is appealing the level of its fine).

Two collective proceedings have been commenced in the UK, seeking damages for losses caused by the cartel. The UK Road Haulage Association (RHA) has filed an "opt-in" claim in the Competition Appeals Tribunal (CAT), as the representative of the UK haulage sector and truck operators who purchased or leased new or pre-owned medium or heavy trucks in the period of the cartel. The UK Trucks Claim has filed an "opt-out" claim (with an "opt-in" alternative) targeting business units of Daimler, Iveco and Fiat Chrysler, as the representative of purchasers of new medium or heavy trucks in the cartel period.

Before they can proceed collective claims require certification, in the form of a Collective Proceedings Order (CPO) that authorises the class representative and certifies the class of persons covered by the claim. The RHA and UK Trucks Claim applications for CPOs will be heard by the CAT in early June 2019.

A number of individual claims, including retailer claims, have also been filed in the CAT; pre-trial hearings in some of these will be heard in February 2019.

Who might be affected?

Any business who purchased or leased medium or heavy trucks from DAF, Daimler (Mercedes), Iveco, MAN, Scania and Volvo/Renault during the cartel period may have a claim for damages. It is estimated that, while the cartel operated, around 650,000 new trucks were sold and that compensation could be in the region of £6,000 per truck on average across different truck sizes.

Please read more here.

Payments

Payments Overview

There are some themes in payments around authentication and fraud prevention that while make the shopping experience on-line and in-store safer, there is also the risk that it makes it less friction free and therefore more difficult for customers to buy goods and services. In addition, the Payment Systems Regulator is taking a keen interest in merchant acquiring and will report shortly on their investigation – we assume some action may follow.

Strong Customer Authentication

The requirements for Strong Customer Authentication (**SCA**) and how this will be applied by reference to the Regulatory and Technical Standards (**RTS**) has become much clearer.

The FCA has published Consultation Paper - Brexit – Regulatory Technical Standards for Strong Customer Authentication and Common and Secure Open Standards of Communication (CP18/44).

In this Consultation Paper the FCA proposes to make regulatory technical standards for strong customer authentication and common and secure open standards of communication, which will apply in the UK from 14 September 2019 in the event of a no-deal exit by the UK from the EU. Comments are due by 19 February 2019.

Merchant Acquiring and Payments Processing

In July 2018, the Payment Systems Regulator (PSR) announced its proposal to carry out a market review into the supply of card-acquiring services. The PSR originally intended to publish the final terms of reference by the end of 2018. It has confirmed that its final document will now be published at the beginning of 2019. This will be the first time that there has been a review of merchant acquiring and will be of particular interest to retailers engaged with acquirers, payment processors and other payment entities.

Biometric Payments

The basis on which customer will authenticate transactions in the future has been being considered and the European Payments Council has published the results of a poll on biometric authentication technology adoption for payments in the coming 5 years. The EPC asked professionals working in the payments industry which biometric authentication technology they considered to offer the greatest potential for customer adoption for payments in the coming 5 years. Most of the voters (60%) agreed that multiple and fingerprint scanning technologies have the greatest potential in the coming five years. Facial and eye recognition represented a fifth of the total votes and only 5% of respondents voted for no biometric authentication technology being in widespread use within 5 years.

Click here to see more about developments in payments.

Retail & Real Estate Outlook

Challenges

There are a myriad of challenges on the horizon for Retail & Consumer clients in regards to Real Estate. Consumer confidence is down, which could to less spending, especially in relation to non-food items. Uncertainty over how Brexit will affect the sector is also prominent. Together with pressures from business rates and the rise of online retail, bricks and mortar retailers are faced with an at best unclear and at worst bleak outlook.

Trends

There are a number of key trends being seen in the sector as a result of the poor outlook.

Paralysis: Multiple joint ventures have been put on hold in recent months. These are multi-billion pound redevelopment or extension projects which are on hold indefinitely. Investment directors are not able to green-light such high-cost and time-consuming projects whilst outlook is so uncertain or poor.

Secondary/Tertiary/Insolvency: Businesses are struggling if they are not in the dominant shopping centre destination in their catchment area. Banks are beginning to pull funding for projects in less favourable areas.

Out of Town Retail Parks: The success and viability of these parks is disputed within the sector. Certain companies such as Hammerson are publicly exiting to focus on a much smaller group of trophy Shopping Centre assets. There are however buyers at the right price, and many smaller asset managers have backing from foreign investors to buy such assets.

Local Authorities: Over recent years Councils have seen their central government funding scaled back drastically. This, coupled with a mandate to reclaim struggling high-streets has precipitated high levels of investment from Local Authorities in shopping centres (£800m in 26 shopping centres, with 10 being in 2018). AG have experience in this area, having acted on shopping centres in:

- Swan Centre in Bootle for Sefton Council
- Camberley Town Centre for Surrey Heath BC
- Coalville Town Centre for Leicestershire DC

Change: Retailers have to be willing to change to thrive in this environment. Online platforms are answering some of the customer proposition, but not all. An important area for retailers to focus on could be to differentiate “buying” from “shopping”, and to do this need to consider what the physical buildings requirements are for that. Buying in this instance would be a transactional occurrence, with shopping being more experiential.

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