2020 RETAIL & CONSUMER HORIZON SCANNER

CLICK ON THE TEXT TO NAVIGATE

Legal and business developments facing retailers and consumer brands in the year ahead

SHAPING TRENDS - KEY CHALLENGES, BIG OPPORTUNITIES:

Focus on the trends that are reshaping the industry

DEVELOPMENTS BY PRACTICE AREA

USE THE ICON BUTTONS TO NAVIGATE THE PRACTICE AREAS

- COMMERCIAL
- COMPETITION
- CORPORATE
- DATA PROTECTION
- DISPUTE RESOLUTION
- EMPLOYMENT
- ENERGY, ENVIRONMENT & SUSTAINABILITY
- FINANCIAL REGULATION
- HEALTH & SAFETY
- PENSIONS
- PRODUCT SAFETY
- REAL ESTATE

TIMELINE: KEY MILESTONES

USE THE ICON BUTTONS IN THE TIMELINE TO NAVIGATE

Jan 21

- UKCA safety markings
- Draft data protection Brexit legislation
- Brexit's impact on commercial contracts
- Overseas entities register of beneficial owners
- Brexit – jurisdiction / enforcement of judgments
- Replacement of the Financial Reporting Council
- Immigration and Social Security Co-ordination (EU Withdrawal) Bill
- The Deposit and Return Scheme for Scotland

Apr 21

- Reforms to the operation of the IR35 regime in the private sector
- New register of controlling interests in land - Scotland

Sep – Dec 21

- Whistleblowing: compliance with new EU directive
- The Food Information (amendment) (England) regulations 2019 / 'Natasha's Law'
- SCA (strong customer authentication) payments standard

Apr 22 – Apr 23

- EU Review of Consumer Law Directives
- Plastics Packaging Tax
- Improving Minimum Energy Efficiency Standards (MEES) consultation

KEY LEGAL DEVELOPMENTS

USE THE ICON BUTTONS TO NAVIGATE THE DEVELOPMENTS

Brexit

Brexit's impact on commercial contracts

Brexit – jurisdiction / enforcement of judgments

Immigration and Social Security Co-ordination (EU Withdrawal) Bill

UKCA safety markings

Draft data protection Brexit legislation

Commercial

EU review of consumer law directives

Brexit's impact on commercial contracts

Competition

Digital markets - Competition & Markets Authority (CMA) report

Changes to consumer law

White Paper on UK Internal Market

Foreign Direct Investment

Competition & Markets Authority covid-19 report

Vertical Agreements Block Exemption Regulation (VBER) review

Multi-lateral Interchange Fee (MIF) damages claims

Corporate

Corporate Insolvency and Governance Act

Overseas entities register of beneficial owners

Replacement of the Financial Reporting Council

Data Protection

European Court of Justice's decision to invalidate an EU-US data sharing agreement

Employment

Reforms to the operation of the IR35 regime in the private sector

Confidentiality clauses and non-disclosure agreements

New Employment Bill (various slides)

Whistleblowing: compliance with new EU Directive

Work-life balance for parents and carers

Energy, Environment & Sustainability

The Deposit and Return Scheme for Scotland

Climate Change Greener Contracts

Electric vehicle charge point requirements

Plastics Packaging Tax

Pensions

Tougher powers for the pensions regulator

Product Safety

The food information (amendment) (England) regulations 2019 / 'Natasha's law'

Real Estate

New register of controlling interests in land - Scotland

Increased connectivity: access to gigabit connections and Leasehold Telecoms Infrastructure Bill

Improving minimum energy efficiency standards (MEES) consultation

TRENDS: SUSTAINABILITY

WHERE NEXT?

Whilst plastics may be centre stage, which issues will vie for the front pages next? Fast fashion, microfibers in the food supply chain and in our oceans, incentivising train travel, emissions in delivery/online fulfilment, the global footprint of the meat and dairy industries?

PLASTIC USE

Pressure to recycle and to eradicate single-use plastic continues to be a big issue, with public expectations reinforced by vote-winning policies: deposit return schemes, plastic packaging tax. An Environmental Investigation Agency and Greenpeace report (2019) found that 7 out of 10 grocers in the UK have been found responsible for adding 900,000 tonnes of plastic to landfill.

REPORTING

Are you prepared for a greater scrutiny of financial and sustainability reporting? In line with consumer and regulator interest, investor engagement with corporates is already becoming much more proactive and demanding. What are the frameworks being used to measure the sustainability of your business? Environmental, Social and Governance? What targets can you use to drive and show change in your business?

SUSTAINABLE SUPPLY CHAINS

Pressure is increasing on measuring sustainability across all aspects of the supply chain and ensuring that this is done so transparently. Advanced tech such as blockchain could assist here. How are business' monitoring the environmental and social impacts across your supply chain?

CLIMATE CHANGE

Is your business both operationally and financially resilient in the face of climate change? What impact will changes in the climate and severe weather conditions have on your supply chain? Prioritisation of climate resilience and adaptation to within business operations is key.

DRIVE TO NET ZERO

There are lots of opportunities in becoming carbon neutral:

- More onsite renewable generation – a new revenue stream
- EV charging infrastructure – driver of site footfall
- EV delivery fleets – access to city centre carbon neutral zones
- Role model to drive supply chain behaviour – positive impact for growing ethical investment community

Leading retailers have cut their carbon emissions by a third since 2005, according to a 2019 report from the British Retail Consortium.

CIRCULAR ECONOMY

How can we move towards a circular economy and what are the challenges and benefits? Minimising waste, sophisticated recycling and extending the value of products will become even more of a focus for retailers, as often this will prolong the relationship with the consumer.

RELATED LEGAL DEVELOPMENTS

The Deposit and Return Scheme for Scotland

Climate Change Greener Contracts

Electric vehicle charge point requirements

Plastics Packaging Tax

Improving minimum energy efficiency standards (MEES) consultation

GlobalData reported that 93.5% of consumers agree that it is the responsibility of retailers to act sustainably

IBM reported that 45% of UK consumers are more concerned about the environment than they were a year previously and that nearly 30% are shopping with new retailers as a result

Research from PwC found that 52% of shoppers did not consider sustainability at all in their Christmas shopping choices

TRENDS: DIGITAL CONSUMER ENGAGEMENT

5G IMPACT

In consumer applications – removal of limits on data transfer e.g. media transfer, connectivity, smart home controls, autonomous sales outlets for food and other essentials.

New services and products will emerge to take advantage of the increase in connectivity, already digital wellness and personal health monitoring and applications are increasing.

The larger impact on consumers is likely to be indirect, with Internet of Things (IOT) sensors and data crunching capabilities providing large benefits in health care, manufacturing, and food production, which improves efficiency and yields, and makes the most of existing resources and infrastructure.

PERSONALISATION

Digital engagement means suppliers have to meet greater requirements for personalisation due to increased access to data, from the fit of your clothes to the design of your holiday or the media you consume. Manufacturing and systems capabilities now mean that supply can now meet increasing consumer demand for fit to individual requirements on a mass scale. This raises issues around sharing and management of increased data, pricing premia, production capability and supply chain management.

INTEGRATED TRANSACTIONS

Retailers want to have a complete picture of their customers' spending and likely spending habits. The interaction and analytics of payments, loyalty and customer behaviour (even at an aggregated level) are becoming important elements of retailers' sales strategy (notwithstanding the difficulties of GDPR and PCI compliance)

PAYMENTS PROLIFERATION

Customers are demanding and getting increasingly diverse methods of budgeting for their spend on goods and services: sophisticated deferred / staged / split payment methods are now a common feature of retailers virtual and physical points of sale and a number of products and companies are coming to market with zero interest options which offer increased customer choice for budgeting but may have regulatory and customer relationship issues.

GREATER SCRUTINY

We are seeing greater scrutiny of data sharing practices brought about by the microscope over the social media giants as a result of the SCL elections / Cambridge Analytica scandal. There is a clear trend in Europe pointing in the direction of finding ways to control data sharing practices, especially in the online space.

FACIAL RECOGNITION

Retailers are turning to facial recognition tech to help prevent shoplifting and to target their advertising more effectively. Businesses can build an image database of "persons of interest" which the retail unit's CCTV system may use to "match" visitors to the store and monitor their behaviour. Un-careful use of such technology could attract adverse attention from the media, general public and human rights groups, as well as legal sanctions for breaches of data protection law. Retailers should therefore identify a lawful ground under data protection legislation and address issues around transparency, proportionality and ethics before they deploy facial recognition technology.

VOICE ENABLED SERVICES

Voice enablement (particularly on mobile devices) is increasingly sophisticated and reliable. It is likely to grow in importance for transacting business, for consumers to buy products and services. This functionality has implications regarding how to verify authorisation of payments following the introduction of Strong Customer Authorisation standard.

ARTIFICIAL INTELLIGENCE

AI's use will continue to grow in order to digitise the end to end consumer experience and bridge the gap between in-store and online whilst increasing efficiencies across the supply chain: E.G chatbots, smart mirror technologies, visual searching, scanning shelves, maps of store layout, marketing, and trend prediction. Whilst this tech has wide ranging benefits there are various considerations to be made including: who owns the data captured, who has ultimate liability for an AI solutions? Is there new training/up-skilling required? How does the AI software interface with existing IT?.

RELATED LEGAL DEVELOPMENTS

European Court of Justice's decision to invalidate an EU-US data sharing agreement

Draft data protection Brexit legislation

Increased connectivity: access to gigabit connections and Leasehold Telecoms Infrastructure Bill

Digital markets - Competition & Markets Authority (CMA) report

SCA (strong customer authentication) payments standard

The BRC Annual Crime Survey 2019 reported that retailers are spending 17% more on cybersecurity than last year, nearly 80% of the retailers surveyed have seen an increase in the number of attacks and/or breaches.

According to the BRC, large organisations invested £162 million in cyber defences in the 2017–18 financial year, an increase of 17% on 2017.

TRENDS: FUTURE OF EMPLOYMENT

EQUAL PAY

This is particularly an issue for retail and consumer businesses given the typical gender balance and pay bargaining arrangements. Employers need to be able to justify pay decisions and gradings at all levels to protect themselves.

TECHNOLOGY

The technological change that has driven the development of the gig economy has led to a scrutiny of worker status within businesses, and challenges to the legality of new business models. Whilst gig economy businesses have been at the forefront of this (e.g. Uber and Deliveroo), we are seeing a significant number of businesses developing alternative workforce models utilising technology.

TRANSPARENCY

In addition to the increased possibility of equal pay claims, pay transparency generally has more focus, for example CEO pay ration reporting, race and ethnicity pay reporting. Therefore, employers will be subject to ever more scrutiny.

EMPLOYEE WELL BEING

There is an increased expectation on employers, and their executives, to look after their employees. For example, by taking a hard line when dealing with #MeToo issues, and with an increased focus on protecting employee mental health. The Government is also stepping up its expectations on employers in this area.

DIVERSITY

Employers are seeing increased pressure and challenge if they are not seen to be taking steps to achieve true diversity – for example in relation to family related leave, flexible working and at senior levels.

INTERNATIONAL WORKFORCE

Individuals are increasingly internationally mobile (and retail and consumer businesses historically have relied on an immigrant workforce), but with Brexit is likely to come increased regulation for employers regarding the employment of EU nationals. Employers will need to consider the international status of a greater cross section of employees, and a greater understanding of the rights of individuals from outside of the UK to work here will be increasingly required.

REPUTATIONAL CONSEQUENCES

The potential for reputational damage as a result of perceived poor treatment of the workforce has never been higher as a result of social media, and increased awareness of issues in the workplace as a result of #MeToo. Employers need to be aware of this impact when making policy decisions regarding employees.

COMPLIANCE

Employers will continue to face an increase in the amount of regulation that they need to comply with. For example, the recent IR35 changes in relation to the taxation of individuals providing services via personal service companies, and an increased focus on compliance with National Minimum Wage obligations.

Statista reported that during 2018, an average of 3.19 million people were employed in the retail industry in the UK.

According to Deloitte the retail industry in 2019 faced large-scale business restructuring: 85,000 jobs lost

RELATED LEGAL DEVELOPMENTS

Reforms to the operation of the IR35 regime in the private sector

Confidentiality clauses and non-disclosure agreements

New Employment Bill (various slides)

Whistleblowing: compliance with new EU Directive

Work-life balance for parents and carers

Immigration and Social Security Co-ordination (EU Withdrawal) Bill

INTERNATIONAL SNAPSHOT

SCOTLAND

- Circular Economy: Proposals for Legislation closed in December 2019 and is a Programme for Government 2019/20 commitment.
- Scotland's Deposit Return Scheme is anticipated to reduce the £46 million spent each year on litter removal.

GERMANY

- The Skilled Labour Immigration Act coming into effect 1 March 2020 will make it easier for skilled employees from Non-EU and Non-EEA countries to come and work in Germany.
- The German governments introduction of "Grüner Knopf" (the Green Button) for both products and companies. Products must certify compliance with 26 social and economic requirements demonstrating human rights and environmental due diligence.
- Hamburg is pursuing a 30% reduction of CO_2 emissions by 2030 and 80% by 2050 through combined climate and sustainability strategies.

CHINA

- Social commerce continues to be a progressive development in China. 'Buy buttons' on social platforms are used a lot by Chinese consumers. Mintel reported that 87% of urban Chinese consumers have bought, sold or shared information on products or services through social commerce platforms.
- "New retail" making ground in China. Albiba's Jack Ma coined the phrase 'new retail' to explain their vision of merging the online and offline shopping world.
- Unattended stores – scanning of face and phone to enter
- Stores on wheels – self driving grocery corner shops
- Increased demand of imported pork due to Swine Flu – Chinese paying 12% increase on standard price and British suppliers diverting away.

HONG KONG

- The Hong Kong Monetary Authority (HKMA) recently announced eight new virtual banking licenses in the market, and their operators will all launch new digital-only banks there before or in early 2020.
- A KPMG report found that the top business strategy identified by Hong Kong-based consumer companies was optimising customer experience on the mobile platform and meeting Generation Z's needs.
- Hong Kong's Chief Executive looks to improve workers benefits. In 2018, it was proposed to provide four more weeks of paid statutory maternity leave and to end the MPF-offset arrangement. These developments could see further progress in 2020.

DUBAI

- Dubai's Department of Tourism and Commerce Marketing (Dubai Tourism) announced that hotels in Dubai will have to comply with 19 new sustainability requirements within the next 18 months. They cover a variety of areas.
- In September 2019 Dubai launched the emirate's e-commerce strategy that aims to strengthen Dubai's position as a global logistic platform and accelerate e-commerce growth. This aim will be attained by reducing the total cost of e-commerce operations by 20% — including the costs of returned goods, storage, customs duties and VAT on transport.
- UAE Energy Strategy 2050 to increase the contribution of clean energy in the total energy mix to 50% by 2050, and the Dubai Clean Energy Strategy 2050 to provide 75% of Dubai's total power capacity from clean energy sources by 2050.

BREXIT’S IMPACT ON COMMERCIAL CONTRACTS

What’s happening?

There are a number of legal and commercial factors to consider when entering into/renewing contracts in 2020, whether businesses are customer or supplier. **Legal Considerations:** The EU currently still determines which are the appropriate courts to hear claims, and includes a system for serving claims originating in one jurisdiction on a party in another, and for enforcing judgments cross border within the EU. So businesses (at least in the Brexit Transition Period) have a degree of certainty. Beyond 31 December 2020 the position is less clear, exposing businesses to potential high legal costs of dealing with claims in multiple EU jurisdictions (particularly those where courts are slow to respond).

What should businesses do next?

Businesses should also look to the wider risks posed by contracts (existing and new) and whether the commercial terms will still work for them amidst possible market volatility and potential new customs borders. Who bears those risks between the parties and could any party's obligations become unenforceable through frustration or force majeure? As well as the dispute resolution and governing law clauses (discussed above) at AG we have been advising that clients looks out for the following key provisions/issues:

- Termination mechanisms;
- Force majeure;
- Compliance with law clauses;
- Pricing;
- Supply chain mapping;
- Incoterms;
- Data protection; and
- Any references to the "EU“.

So what?

The following case study shows how businesses should mitigate that risk: **A British retailer contracts with a French cheese supplier for the supply of cheeses from various EU states, not just France, and is looking to renew the fixed term supply contract**

- **Is the contract expressly subject to English law? If not, French law may apply** because the seller is resident in France, unless the contract is more closely connected with another country (eg: if the supply is almost exclusively for Italian cheese which the French supplier sources from an Italian subsidiary, and there is no choice of law clause, then Italian law could in theory apply to the contract).
- If it's expressly subject to English law, **is the contract also expressly subject to the jurisdiction of the English courts?** You don't want a foreign court applying English law. It can be done (using expert evidence of the relevant law) but would be v expensive and uncertain. Aim for an English exclusive jurisdiction clause.
- If the answer to both questions above is yes, has the supplier **appointed an agent for service of the proceedings in England?** If not service in France may become more difficult after the end of 2020.
  - Or is the supplier an English registered foreign company (on which you could serve a claim using the Companies Act)?
- Does the supplier have assets in England against which an English judgment can be enforced? If all its assets are in France, it may be more sensible to sue in France as enforcement would be easier. **Review where the assets are now located – the position may be different from the last time the contract was renewed**
- Might the supplier agree to an arbitration clause instead? **Note arbitration is unaffected by Brexit**.
  - If so, would it agree to English law, and an English "seat" (English Arb Act 1996) , possibly under ICC Rules? The ICC is Paris based, which might help persuade the supplier to agree to arbitration.

Note: you would have to bear in mind that any disputes relating to French registered IP would have to be carved out, as the Brussels Regulation allocates jurisdiction for those to the local French courts.

EU REVIEW OF CONSUMER LAW DIRECTIVES

May 2022

What's happening?

New rules aimed at modernising EU consumer protection laws for the digital era and to make it easier to enforce consumer rights will apply across the EU from 2022. A number of Directives are currently progressing though the EU legislative process concerning the rights of consumers when buying goods and digital content. These include a consumer rights Directive that would amend four existing EU Directives, concerning unfair contract terms, unfair commercial practices and the Consumer Rights Directive; and directives concerning contracts for the sale of goods and digital content, with the aim of facilitating cross-border trade within the EU. The changes introduced will be significant and cover a wide range of issues including: strong sanctions, transparency online, "free" digital services, dual quality products, and price reductions

Directive (EU) 2019/2161 on the better enforcement and modernisation of Union consumer protection rules (the "Directive") came into force on 7 January 2020. Member States have until 28 November 2021 to implement the Directive into their national laws and must apply those measures from 28 May 2022.

What should businesses do next?

Monitor developments; the Consumer Rights Directive is currently in draft and, depending on the terms in which the UK leaves the EU, these directives may or may not become law in the UK.

So what?

The Consumer Rights Directive would make changes across a range of consumer rights topics, including: stricter enforcement (including a potential 4% fine on a trader's turnover for the worst infringements); rights for consumers where they are harmed by unfair commercial practices(such as aggressive marketing); transparency for consumers on online market places; and protection for consumers when using "free" digital services.

After the directives under the digital contract rules are published in the Official Journal, Member States have two years to transpose them in their national law.

DIGITAL MARKETS - COMPETITION & MARKETS AUTHORITY (CMA) REPORT

What's happening?

The CMA has published the final report in its market study on online platforms and digital advertising, which focused on the role of Google and Facebook in the markets for search, social media, and digital advertising. The CMA concludes that Google and Facebook now have such strong incumbency advantages that potential rivals can no longer compete on equal terms and this has detriments for consumers and wider society. The CMA recommends a new pro-competition regulatory regime for online platforms with strategic market status, with a Digital Markets Unit (DMU) empowered to enforce a code (or codes) of conduct to govern the behaviour of platforms that have market power over an important online gateway; it would also have power to make pro-competitive interventions to tackle the sources of market power and to promote competition and innovation. This is consistent with the recommendations of the government commissioned Furman Report, although the CMA goes further by recommending the DMU be given powers to order the breakup of platforms, where necessary, and to restrict platforms' ability to secure default positions.

In next steps the CMA will lead on providing further advice on the development of the new regulatory regime, working through the Digital Markets Taskforce (whose members also include the Information Commissioner's Office and Ofcom). A further body, the Digital Regulation Cooperation Forum, has been formed by Ofcom, the ICO and the CMA to support cooperation and coordination between them on online regulatory matters.

So what?

The CMA is looking to shape the enforcement agenda in technology/digital markets. It is actively considering possible enforcement cases in the digital sector drawing on the work of the market study and, more broadly, will watch for any examples of digital platforms exploiting their market power or otherwise engaging in anti-competitive conduct. Businesses operating in this sphere can expect investigations to be intensive.

CHANGES TO CONSUMER LAW

What's happening?

The government is expected to consult on consumer protection reform this year. Kelly Tolhurst MP (BEIS Parliamentary Under-Secretary) announced in February that a competition and consumer Command/White Paper would be published in late spring, although it has not appeared yet. While the full scope of the Command Paper is not clear, it follows on from a 2018 Consumer Green Paper and Lord Tyrie's 2019 letter to the then Secretary of State for BEIS. Lord Tyrie's letter called for reform of the UK competition regime and a radical overhaul of the CMA's consumer protection powers. Central to this was his proposal for a new statutory duty, both for the CMA and the courts, to treat consumer interests and their protection from detriment as paramount. This would be backed up by new consumer protection functions and powers, and remedies more closely aligned with the competition regime, for example giving the CMA power to impose fines directly (avoiding the current need to apply for a court order) or to seek director disqualification. When announcing the Command Paper Kelly Tolhurst also said the CMA would conduct a review of the Consumer Rights Act 2015 later this year.

So what?

The Command Paper could put forward far-reaching reforms. If Lord Tyrie's recommendations are adopted they may well include increasing board-level responsibility for consumer law compliance. Businesses should be considering actively engaging in the consultation.

WHITE PAPER ON UK INTERNAL MARKET

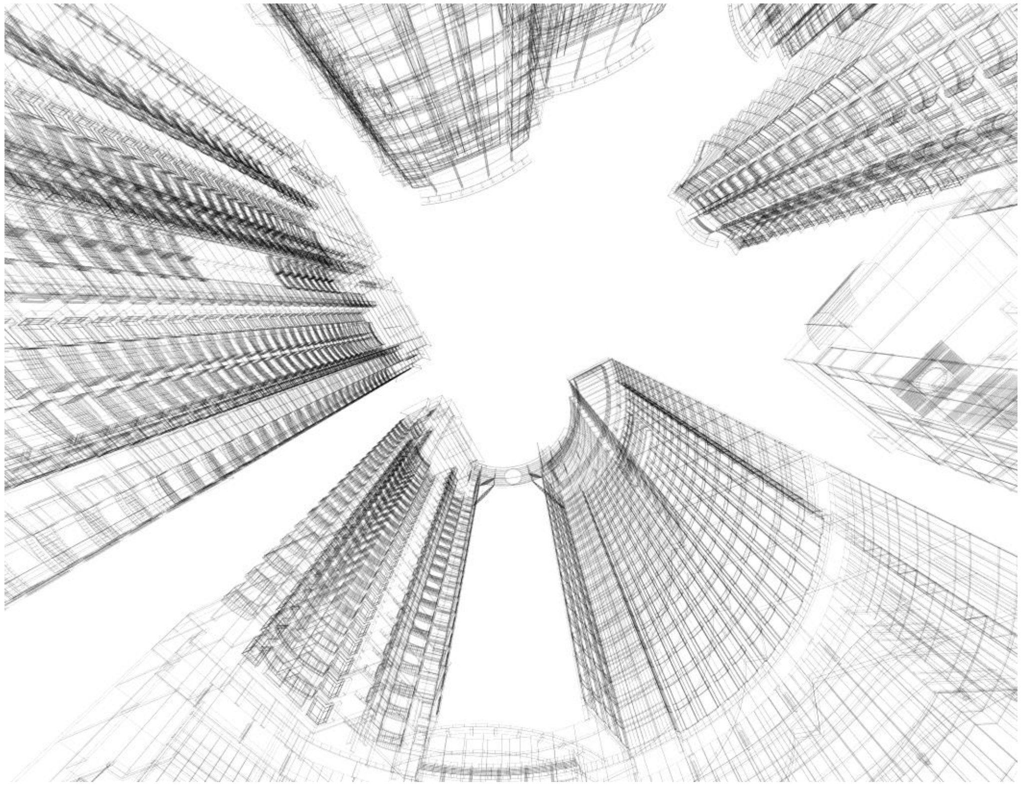
What's happening?

The government has published a White Paper seeking views on the shape of a future UK internal market regime to provide for continued seamless trade between the UK nations as we leave the EU internal market. Work continues to agree Common Frameworks in specific areas, for example food safety, hygiene and food labelling, but these do not address how the overall internal market is to function. The White Paper seeks to address this with legislation to provide a baseline level of regulatory coherence across a wider range of sectors, covering the production and sale of (most) goods and services in the UK and based on principles of mutual recognition and non-discrimination. The government is seeking views on the scope of application of these two principles and how they are to be applied to ensure the smooth functioning of the internal market.

Any expectations that the White Paper might give details of the government's plans for a UK state aid regime were not realised, but it does promise a new "sovereign subsidy control regime" for the UK as a whole; this will require legislation to make subsidy control the responsibility of Westminster rather than the devolved administrations.

So what?

Businesses should consider whether they wish to respond to the White Paper and should watch for further developments on this consultation, as well as the government's proposed domestic subsidy control regime.



FOREIGN DIRECT INVESTMENT

What's happening?

The government is making immediate changes to expand the current public interest intervention regime under which it may intervene to scrutinise a merger on public interest grounds (which include national security). It has added a further public interest criterion for intervention (in transactions meeting the normal merger control thresholds) in order to maintain "the capability to combat, and to mitigate the effects of, public health emergencies". This new power, which took effect on 23 June, has the potential to cover not just companies directly involved in pandemic preparedness (eg PPE manufacture), but also companies that supply other necessary goods and services during a health crisis, such as groceries or internet services. A second change lowers the jurisdictional thresholds for intervention in mergers concerning artificial intelligence, cryptographic authentication technology and advanced materials.

These measures come ahead of broader reforms for a whole new national security screening regime for vetting investments in sensitive industries and sectors. A National Security and Investment Bill was included in the Queen's Speech in December 2019 and is expected to be introduced this year. It follows a 2018 White Paper proposing a new, specific, national security regime that would apply to a wide range of investments, including in land and intellectual property, potentially across all sectors of the economy, although the White Paper expected the focus to be on core areas such as communications, transport, civil nuclear, energy, defence, some advanced technologies and critical suppliers to the government and emergency services. Following covid-19, we may see sectors essential to pandemic-readiness added to that list. It has also been suggested that the changes may go beyond those in the White Paper, with a scheme that would make notification mandatory.

So what?

In line with trends in other jurisdictions, the UK government is signalling a more hawkish approach on issues relating to national security. Businesses in the relevant sectors can expect foreign direct investment screening to become part of the new normal; they should be aware of the new powers to intervene in mergers that may impact on capabilities to respond to public health emergencies and watch for the draft legislation on the broader standalone regime. Further details of the short and long term changes are on our FDI hub.

COMPETITION & MARKETS AUTHORITY COVID-19 REPORT

What's happening?

According to the CMA's latest report on the work of its Covid-19 Taskforce, published on 3 July, the vast majority of businesses are behaving responsibly during the pandemic, but some may be exploiting the situation. The principle concerns are problems with refunds and cancellations, and unjustifiable price rises. Cancellations and refunds make up 70-80 % of the complaints the CMA has received and 60-70% of the total relate to online goods and services. The CMA issued Guidance on cancellations and refunds in April.

The vast majority of price complaints relate to food and drink, and hygiene and personal care products, with hand sanitiser the most complained about product overall. The CMA has launched investigations into suspected excessive and unfair pricing for hand sanitiser by four pharmacies and convenience stores and written to 277 businesses about unjustifiable price increases. In addition the Taskforce has issued a joint statement with trade associations in the retail, wholesale and pharmacy sectors and an open letter to the pharmaceutical and food and drink industries. In a joint letter with the General Pharmaceutical Council (GPhC) to pharmacy owners and pharmacists it recommends that retail prices for essential products, including hand sanitiser, face masks and paracetamol, do not include higher than usual mark-ups, when compared to the pre-coronavirus mark-ups for those products and mark-ups more generally.

The CMA recognises there will be occasions when it is appropriate for businesses to work together in ways that might normally risk contravening the competition rules, to ensure sufficient supplies of essential products and services. In March it announced it would not take competition enforcement action against cooperation between businesses or rationing of products that is necessary to protect consumers and gave further guidance on acceptable business cooperation in response to covid-19. At the same time it is clear that it will take action where the crisis conditions are used opportunistically.

So what?

The CMA continues to monitor coronavirus-related competition and consumer protection issues and will take enforcement action where warranted. Businesses should keep a vigilant eye on their trading policies and practices, particularly in relation to refunds and pricing, having regard to the CMA's guidance.

VERTICAL AGREEMENTS BLOCK EXEMPTION REGULATION (VBER) REVIEW

What's happening?

The European Commission has progressed its re-examination of the VBER (or VABE) with publication in May of its final report on the support studies evaluating the block exemption. Its overall conclusion is that the VBER and the Vertical Guidelines remain relevant in the landscape of vertical agreements, but they do not sufficiently cover the latest developments such as online platforms. The report focuses on typical vertical restraints of: resale price maintenance (RPM); selective distribution; exclusive distribution; and most favoured nation (MFN) or price parity clauses. Its findings provide evidence-based grounds for a revision of the VBER and the Guidelines.

So what?

We may see a complete re-write of the VBER and Vertical Guidelines or more limited revisions focusing on more problematic areas of online platforms, RPM and price parity clauses. Any changes will need to be closely examined for potential impact on existing agreements/trading terms and day-to-day business practices. The new VBER and accompanying guidelines are due to be adopted by May 2022, when the current version is due to expire.

MULTI-LATERAL INTERCHANGE FEE (MIF) DAMAGES CLAIMS

What's happening?

On 17 June the Supreme Court gave its much awaited judgment (press summary here) on appeals concerning the lawfulness of the default MIFs set by Mastercard and Visa and charged by issuing banks (that issue cards to cardholder) to acquiring banks (that provide card services to merchants). The appeals to the Supreme Court arose out of three sets of stand-alone damages claims by retailers.

The key points from the decision are:

- Mastercard and Visa's MIFs restricted competition; the Supreme Court held it was bound by EU Court of Justice's 2014 Mastercard decision, but that even if it was not, it would have reached the same conclusion
- parties seeking to rely on an exemption (by meeting the four conditions in Article 101(3)) need to prove their case with "robust analysis and cogent empirical evidence"
- to satisfy the second condition for exemption in a two sided market it must be shown that a "fair share" of the benefits resulting from the agreement is received by the consumers in the market where the harm occurred (in this case the merchants in the acquiring market)
- in relation to quantification and mitigation of loss in the form of "pass-on", no greater degree of precision in the quantification of pass-on is required from the defendant than of a claimant, but once the defendants have raised pass-on there is a heavy evidential burden on the merchants to provide evidence of what they have done to reduce costs and adverse inferences will be drawn from a failure to do so.

So what?

The judgment puts the retailers in a stronger position with their claims. Looking beyond their claims, the Supreme Court is due to rule on certification of the consumer class claim brought by Walter Merricks CBE on behalf of card users. If that claim proceeds, the Supreme Court's ruling on pass-on, which may help the defendant card schemes in the retailer claims, may count against them in the consumer class claim. More broadly still, the guidance the Supreme Court has given on a number of issues that are key to competition damages claims will have wider consequences for the way such claims are brought and their prospects for success.

CORPORATE INSOLVENCY AND GOVERNANCE ACT

What's happening?

The Corporate Insolvency and Governance Act has made significant changes to insolvency and corporate governance law represents the biggest change to the UK's insolvency framework in 20 years, and came into force on 26 June 2020. The Act is a combination of reactionary, temporary measures designed to help businesses survive the coronavirus pandemic, and permanent measures.

The overarching objective of the Act is to provide businesses with the flexibility and breathing space they need to continue trading during the COVID-19 pandemic. Applying to all forms of incorporated entities, as well as other bodies and associations (whether or not incorporated), and sole traders, the Act, amongst other more wide reaching impacts seeks to amend sections of the Companies Act 2006 and the Insolvency Act 1986. Most notably for both suppliers and customers, the Act inhibits the rights of a supplier to terminate a contract, or take other actions (e.g. changing payment terms) as a result of the insolvency. Additionally, suppliers will not be able to rely on a clause allowing them to terminate the contract due to an event (e.g. non-payment of invoices or material breach) that occurred before the start of the insolvency period, until the end of such insolvency period. More information here.

The main changes of interest are: introduction of a company moratorium; introduction of a restructuring plan; temporary restrictions on winding-up petitions; temporary suspension of wrongful trading liability; and prohibition on termination clauses in supply contracts.

For detailed information on each of the above changes see our overview here.

What should businesses do next?

Suppliers and customers should take the opportunity to review and revisit termination rights in their supply agreements for appropriateness in light of the ability to dis-apply termination for insolvency clauses, and consider what other protections can be added to the contract to limit risk. This may include any ability to terminate for convenience, payment terms which allow for payment in advance/on delivery, or other potential remedies. Of course, this does not come without risk.

So what?

Public companies and SEs whose original accounts filing deadline fell before 30 June 2020 will receive an extension under the Act. If your company is eligible, the government will update the filing deadline automatically and there is no need to apply for an extension. Note such entities will receive no further extension under the regulations referred to below.

Following the passing of the Companies etc. (Filing Requirements) (Temporary Modifications) Regulations 2020 eligible companies and other types of business will get more time to file accounts if the filing deadline falls any time from 27 June 2020 to 5 April 2021 (incl), with filing deadlines extended by 3 months. There are also extensions to other filings requirements such as annual confirmation statements and event driven filings.

OVERSEAS ENTITIES REGISTER OF BENEFICIAL OWNERS

Jan 2021

What's happening?

The Department for Business, Energy & Industrial Strategy (BEIS) published the draft Registration of Overseas Entities Bill, setting out provisions to establish a new beneficial ownership register of overseas entities that own UK property or participate in UK government procurement.

Overseas entities will be required to register their beneficial ownership information with Companies House before obtaining legal title to UK property via the Land Registries. Overseas entities that own UK property when the requirements come into force, as well as any overseas entities that subsequently acquire UK property, will be required to register (and regularly update) their beneficial ownership information before they can undertake certain transactions with that property, such as selling or leasing the land, or creating a legal charge over the land, such as a mortgage.

What should businesses do next?

Need to review whether any entities in current or future corporate structures will be affected by the proposed changes.

Until the Bill is into the next stages of the legislative process and ultimately passed, it is too early to start considering updates to any precedent documents. There will, however, need to be additional checks during any due diligence process.

So what?

Government currently analysing feedback from consultation. In terms of timing of the actual implementation of the Bill, the latest proposal is for implementation sometime in 2021.

Overseas entities that own UK property or engage in UK government procurement should monitor these proposals. Once in force, it is envisaged that where they own or wish to acquire UK property they must supply beneficial ownership information to Companies House and apply for a registration number. Registration of title to property (which will encompass freehold and some leasehold titles) will not be possible without having done so.

REPLACEMENT OF THE FINANCIAL REPORTING COUNCIL

Jan 2021

What's happening?

The Financial Reporting Council (FRC) is to be replaced by a new regulator called the Audit, Reporting and Governance Authority (ARGA). This follows the recommendations of the Independent Review of the FRC led by Sir John Kingman. At the same time, the Government issued a press release announcing an initial consultation on the recommendations made by the Independent Review, including the creation of a new regulator. The FRC continues to make progress towards becoming the ARGA by taking forwards work on the recommendations of the Independent Review of the FRC, The CMA review and Sir Donald Brydon's review into the quality and effectiveness of audit. In May the FRC published an update on the FRC transformation programme. The FRC's combined Transformation Programme comprises of six workstreams that will drive the FRC's delivery the recommendations across all three reviews as one holistic programme. The six workstreams are: setting up the new regulator; audit scope & regulation; corporate regulation; corporate reporting; corporate governance; and market reform. Their new governance structure is due to be implemented in January 2021.

The FRC issued a 22-point plan for the operational separation of the audit units of PwC, Deloitte, KPMG and EY. The firms must outline how they will implement it by the end of October, although they will have four years to put it into effect.

So what?

Under the proposals, the new regulator will be responsible for audit, corporate reporting and corporate governance and will:

- be a statutory body with powers such as those to make direct changes to accounts rather than apply to court to do so, and more comprehensive, visible reviews for greater transparency;
- have strategic direction and duties to protect the interests of customers and the public by setting high standards of statutory audit, corporate reporting and corporate governance, and by holding companies and professional advisors to account;
- regulate the biggest audit firms directly (rather than those being delegated); and
- have a new, diverse board and strong leadership to change the culture and rebuild respect of those it regulates.

There will also be greater sanctions for corporate failure, including new powers to require rapid explanations from companies and in the most serious cases publish a report about the company's conduct and management. The regulators new powers may also give them the ability to comment on and publicly criticise deficient s.172(1) statements and descriptions of corporate governance arrangements by those caught by The Companies (Miscellaneous Reporting) Regulations.

DRAFT DATA PROTECTION BREXIT LEGISLATION

Jan 2021
(No-deal)

What's happening?

The draft Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU exit) Regulations 2019 will apply in the event of a no deal Brexit. The main provisions came into force on 'exit day' (31 January 2020). The implications of the regulations will not be felt until the end of the Brexit transition period (currently 31 December 2020).

The Regulations make changes to the GDPR and the Data Protection Act 2018 so that the law continues to function after Brexit.

More information here.

What should businesses do next?

Be we aware of impacts and monitor. If it becomes clearer whether the UK is heading for a "no deal" scenario, considerations to provide training to teams who work with data could be made.

So what?

The key changes include:

- transfer of the European Commission's power to make adequacy decisions to the Secretary of State;
- a single regime for data processing currently regulated by both the GDPR and DPA 2018;
- removal of Chapter VII on co-operation and consistency and;
- the retained GDPR will be renamed the UK GDPR.
- Recognise current EU Standard Contractual Clauses as valid for international transfers, but the Information Commissioner's Office(ICO) will have the power to issue more clauses;
- Recognise all Binding Corporate Rules authorised before exit day; and
- Introduce an extraterritoriality into the UK data protection regime.

EUROPEAN COURT OF JUSTICE'S DECISION TO INVALIDATE AN EU-US DATA SHARING AGREEMENT

What's happening?

On the European Court of Justice's (ECJ) struck down the EU-US Privacy Shield Framework. This follows the ECJ's 2015 decision to invalidate the EU-US Safe Harbor agreement, the previous framework in place that attempted to ensure adequacy between EU and US cross-border data transfers. This decision by the ECJ has invalidated the European Commission's widely prescribed, and commonly used data transfer data mechanism between the EU and US.

In the opinion of the ECJ, the United States surveillance laws are too far-reaching for the EU-US Privacy Shield to adequately protect the data subjects. However, the ECJ has also confirmed that personal data of data subjects may continue to be transferred to the US and other states on the basis of so-called standard contractual clauses. The clauses were also scrutinised in this ruling, the ECJ did emphasise that these clauses and data transfers generally should be scrutinised more in the wake of their decision. Further work is underway by the European Commission and European Data Protection Board (EDPB) to provide more comprehensive guidance on extra measures you may need to take.

On 27 July the ICO issued updated guidance on the judgement, and said it will continue to provide practical and pragmatic advice and support.

What should businesses do next?

The EDPB has recommended that you must conduct a risk assessment as to whether standard contractual clauses provide enough protection within the local legal framework, whether the transfer is to the US or elsewhere.

So what?

The ruling is likely to have a fundamental impact on many companies within the EEA and in Switzerland that have integrated their relevant operations with the EU-US Privacy Shield, as the transfer of personal data to the United States is now lacking a legal basis in many cases.

Already harried data protection workers will be forced to scrutinise data transfers more carefully than ever – with businesses expected to suspend transfers if there is a risk the provisions cannot be complied with.

BREXIT – JURISDICTION / ENFORCEMENT OF JUDGMENTS

Jan 2021 (No-deal)

What's happening?

The UK cannot unilaterally replicate the full effects of the Recast Brussels Regulation which regulates jurisdiction, and the recognition and enforcement of judgements between EU member states.

In the absence of a deal as to its future relationship with the EU (after 31 December 2020) the UK will accede to the 2005 Hague Convention, which affords broadly similar enforceability outcomes to Brussels, but, crucially, only in relation to claims that are based on exclusive jurisdiction agreements. That would mean that for all tortious claims, and for contract claims where there is no exclusive jurisdiction agreement, the EU and EEA would have no reciprocal jurisdiction an enforcement regime with the UK, making it more cumbersome and expensive to establish jurisdiction and to enforce judgments. Service of UK proceedings in EU/EEA jurisdictions would also be more difficult.

As at February 2020 it appears likely that the UK will also become a party in its own right to the Lugano Convention which currently provides for the allocation of jurisdiction and enforcement of judgments between EFTA states and the EU, but without the refinements of the 2012 Recast Brussels Regulation.

What should businesses do next?

The "boilerplate" elements of contracts with overseas suppliers, particularly jurisdiction and service of process clauses will benefit from closer review.

Pay extra attention to jurisdiction clauses in new contracts: are they exclusive? Is there any reason to prefer a non exclusive clause e.g.: assets out of the jurisdiction?

So what?

Process agent clauses will become more important: if service of claims out of the jurisdiction becomes more complex, having the option to serve on an agent within the jurisdiction, where there is an English exclusive jurisdiction clause will make cross border claims easier.

IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL

Jan 2021

What's happening?

The purpose of the new immigration bill is to:

- bringing an end to free movement and ensuring that the Government can deliver a new Australian-style points-based immigration system from Jan 2021;
- making EU citizens arriving from 2021 subject to the same UK immigration controls as non-EU citizens, to enable the Government to deliver a single global immigration system based on people's skills;
- protecting the long-standing immigration status of Irish citizens when free movement ends; and
- enabling the Government to deliver future changes to social security co-ordination policy.

The Bill was re-introduced to Parliament in March 2020 and had its second reading on 19 May 2020. It will now be committed to a Public Bill Committee, with proceedings being concluded on 25 June 2020.

What should businesses do next?

Businesses should keep an eye out for further details of a new immigration system which are to be released in due course.

So what?

Immigration has been the most hotly debated topic preceding the Brexit vote and beyond. Measures include:

- repealing the main retained EU law relating to free movement and bringing EEA citizens and their family members under UK immigration control to enable the introduction of the global points-based immigration system;
- protecting the status of Irish citizens in UK immigration law once their EU free movement rights end;
- a power to amend, by regulations, legislation in consequence of, or in connection with the ending of free movement. This will enable the alignment of treatment for EEA and non-EEA citizens as part of the future immigration system, subject to saving certain provisions where appropriate and in accordance with the terms of the UK's withdrawal from the EU; and
- powers to amend, by regulations, retained EU law governing social security co-ordination, enabling policy changes to be delivered following the end of the transition period, and depending on the outcome of negotiations with the EU on the future relationship

REFORMS TO THE OPERATION OF THE IR35 REGIME IN THE PRIVATE SECTOR

Apr 2021

What's happening?

In 2018 the Government announced plans to extend the changes it made to the operation of the off payroll working rules (IR35) in the public sector, to certain medium and large sized private sector businesses. Under the proposed reform, the responsibility for assessing whether the IR35 regime applies will move to the party closest to the personal service company (PSC) in the relevant contractual chain. In a simple chain involving the individual, the PSC and the end-user, this would mean the end-user would have to make that assessment. If the IR35 regime does apply then, in this scenario, the end user would become responsible for deducting income tax and employee NICs and would also be responsible for paying employer NICs.

October 2019: HRMC issued a briefing note detailing: (i) the off-payroll working rules; (ii) reform to the rules; (iii) support from HMRC; and (iv) the check employment status for tax (CEST) tool, which was updated in November 2019. In February 2020, following a review, the Government announced that the rules will apply only to services provided on or after 6 April 2020 and that it will take a "light touch" approach to enforcement for the first year of the tax changes. This means that customers will not have to pay penalties for errors relating to off-payroll working in the first year, except in cases on deliberate non-compliance. On 6 April 2020, the Government announced that due to the coronavirus pandemic, the changes to the off-payroll rules have now been delayed to April 2021.

What should businesses do next?

Businesses must be aware of the changes that are coming into effect. To assess the potential impact of the reforms, businesses should take stock of the shape of their workforce and consider conducting an audit of its relationship with contractors with any resulting decisions on individuals' employment status documented and approved at the right level of the organisation. Where there is a financial impact, businesses will need to budget and plan for this accordingly. There may also be opportunities to reassess their workforce to ensure that it is fit for purpose - for example, companies who routinely hire contractors may find it advantageous to bring those contractors in as employees where it is easier to monitor and measure performance and which could lead to greater cohesion and commitment to the businesses'' ultimate strategy and performance.

So what?

Under IR35 businesses and individuals were often at a tax advantage when engaging via a PSC, rather than directly. As freelancer numbers grow and the 'gig economy' expands, businesses will no longer be able to safeguard themselves against PAYE/NIC risk relating to employment status simply by employing individuals through a PSC. Businesses will need to consider the shape of their workforce but the UR35 changes could also represent an opportunity for those businesses who want a clearer working relationship with contractors.

CONFIDENTIALITY CLAUSES AND NON-DISCLOSURE AGREEMENTS

What's happening?

In July 2019, the Department for Business, Energy and Industrial Strategy (BEIS) published the Government response to its consultation on changes to regulations on confidentiality clauses, also known as non-disclosure agreements (NDAs). The final proposals include legislating to limit NDAs from restricting disclosures being made to police, regulated health care professionals and legal professionals. The consultation had been launched in response to concerns that some employers had been using confidentiality clauses to "gag" victims of workplace harassment or discrimination.

What should businesses do next?

Once the draft legislation has been published, employers will need to review confidentiality clauses and settlement agreements to ensure that they comply with the new rules.

So what?

Final proposals in the Government response include:

- legislating so that limitations in NDAs are clearly set out in employment contracts and settlement agreements
- creating guidance for solicitors and legal professionals responsible for drafting settlement agreements
- legislating to enhance the independent legal advice received by individuals signing confidentiality clauses
- enforcement measures for confidentiality clauses that do not comply with legal requirements in written statements of employment particulars and settlement agreements.

NEW EMPLOYMENT BILL

What's happening?

In the Queen's Speech on 19 December 2019, the Government announced that a new Employment Bill would be brought forward, to seek to protect and enhance workers' rights post-Brexit.

The main elements of the Bill are:

1. creating a new, single enforcement body to offer better protection for workers;
2. ensuring that workers receive the tips left for them in full;
3. introducing a new right for all workers to request a more predictable contract;
4. extending redundancy protections to prevent discrimination against pregnant employees and mothers;
5. allowing parents to take extended leave for neonatal care;
6. introducing an entitlement to one week's leave for unpaid carers; and
7. subject to consultation, making flexible working the default unless employers have good reason not to.

So what?

The Bill is aimed at promoting fairness in the workplace, such as by establishing a single enforcement body to make it easier for workers to get redress for poor treatment and offering greater support to working families in various other ways.

NEW EMPLOYMENT BILL: TIPS TO GO TO WORKERS IN FULL

What's happening?

In the October 2019 Queen's Speech, the government proposed a new law that requires employers to pass on all tips and service charges to workers. Further, supported by a statutory Code of Practice, to ensure that tips would be distributed on a fair and transparent basis. Treatment of tips and service charges has been the subject of consultation and subsequent government announcements.

What should businesses do next?

If the law comes in as planned, employers will need to consider incorporating the new requirement into employment documentation such as employment contract and handbook.

So what?

This proposal is one of many continuing trends in making sure that there is transparency at a work place and that workers in retail and consumer sector are treated fairly and are given sufficient legal protection.

NEW EMPLOYMENT BILL: RIGHT TO REQUEST A MORE PREDICTABLE CONTRACT AND PROPOSALS FOR A SINGLE ENFORCEMENT BODY

What's happening?

- **A single enforcement body**

As part of the Good Work Plan the government announced proposals to create a single labour market enforcement agency to better ensure that vulnerable workers are aware of and can exercise their rights and which supports business compliance. A consultation on these closed on 6 October 2019.

- **The right to request a more predictable contract**

This proposal is to create a right for all workers to request a more predictable and stable contract after 26 weeks' service as part of the Good Work Plan. This will entail, for example, giving a worker on a zero-hour contract who tends to work 30 hours per week a contract that guarantees at least 30 hours a week.

What should businesses do next?

The right to request a more predictable contract is particularly pertinent to the Retail and Consumer Sector. If implemented, it will require employers who make use of, for example, zero hour contracts to consider and potentially revise working arrangements to make sure that the flexibility that these arrangements have given so far continue unaffected by the new law.

So what?

The problem of one-sided flexibility which currently lies with employers is being addressed through the proposal to request a more predictable contract. It's an attempt to redress the current imbalance in the use of zero-hour contracts and other forms of work arrangements.

NEW EMPLOYMENT BILL: EXTENSION OF LEAVE FOR NEONATAL CARE

What's happening?

The government's consultation on a new right to neonatal leave and pay, to support parents of premature or sick babies, closed on 11 October 2019. This right would not just be for parents of premature babies but for parents of any new-born requiring specialist neonatal care for two weeks or more. The proposal is for one week's leave for each week the baby is in neonatal care. Unlike paternity leave, it would be a 'day one' right with no qualifying period. Parents who would potentially be entitled to the new leave entitlement include the biological mother and father, the mother's spouse, civil partners, or partner who will be living with the mother and baby in an enduring family relationship, and the intended parents in a surrogacy arrangement or adoption.

What should businesses do next?

If implemented, employers would be well advised to review and revise their existing family-friendly policies to reflect the new entitlement.

So what?

The government estimates around 10,000 babies a year are admitted to neonatal care. In 2018, BEIS undertook a review of provisions for premature, sick and multiple babies, in order to understand the barriers that these parents face in the labour market. This consultation is a result of that review.

NEW EMPLOYMENT BILL: FLEXIBLE WORKING AND CARER'S LEAVE

What's happening?

Making flexible working the default

This proposal was set out in the Conservative Party's election manifesto. The proposal is to make flexible working the default position unless an employer has a good reason. There has not yet been a consultation on this proposal.

A week's leave for unpaid carers

This proposal was also in the Conservative Party's election manifesto. The proposal is a recognition that most carers are women.

What should businesses do next?

Details are thin at this stage of the proposal. Once consultation round has finished, there will be more clarity and details surrounding the above proposals.

So what?

The driving force behind these two early proposals is to help support working families especially women who often have the dual tasks of working and supporting young children.

NEW EMPLOYMENT BILL: EXTENDING REDUNDANCY PROTECTION FOR WOMEN AND NEW PARENTS

What's happening?

In response to a consultation, the Department for Business, Energy and Industrial Strategy (BEIS) announced in July 2019 that it intended to enhance redundancy protections for pregnant women and new parents. This had been a commitment in the Government's Good Work Plan (their response to the Taylor Review) and had also been raised by the Women and Equalities Select Committee. In summary, the Government has committed to:

- ensure that the redundancy protection period applies from the point the employee informs the employer that she is pregnant, whether orally or in writing;
- extend the redundancy protection period by/to six months once a new mother has returned to work;
- extend redundancy protection into a period of return to work for those taking adoption and shared parental leave; and
- establish a taskforce of employer and family representative groups (to make recommendations on what improvements can be made to the information available to employers and families on pregnancy and maternity discrimination and develop an action plan on what steps Government and other organisations can take to make it easier for pregnant women and new mothers to stay in work).

In the Queen's Speech on 19 December 2019, the Government announced that a new Employment Bill (see below) would be brought forward which would include extending redundancy protections to prevent discrimination against pregnant employees and mothers. More information here.

What should businesses do next?

The government has committed to bring forward legislation. Monitor for further developments and consultations from the Government on this issue.

So what?

The main change will be the length of time for which women will have enhanced rights during any redundancy process, as the proposed extension could effectively double the period of protection to up to two years. This could have a particular impact on any redundancy processes where workforces are female-dominated.

The most common sectors of employment for women are health and social work (accounting for 21% of all jobs held by women at September 2018) wholesale and retail (14%) and education (12%).

WHISTLEBLOWING: COMPLIANCE WITH NEW EU DIRECTIVE

Dec 2021

What's happening?

In April 2019 the European Parliament approved a draft Directive which provides that public and private organisations with more than 50 employees will have to set up internal reporting channels that would allow people to report breaches of EU law within the organisation. In addition, national authorities will have to establish external reporting channels.

The draft Directive provides for implementation by EU Member States by 17 December 2021. As Britain has now left the EU, the question of whether we will need to implement the Directive will depend on the terms of the relationship between Britain and the EU.

So what?

If the UK ends up substantially complying with the Directive, this would broaden some of the whistleblowing protections in the UK. For example: (i) covering more people with public interest concerns, such as job applicants, non-executive directors, volunteers and the self-employed; (ii) introducing a national whistleblowing regulator; and (iii) requiring organisations with 50+ employees to introduce internal channels and procedures for whistleblowing, including protecting their confidentiality and providing feedback.

The Directive came into force on 1 August 2019 and must be implemented by Member States within three years thereafter. For the UK, this will depend on the terms of a Brexit deal.

WORK-LIFE BALANCE FOR PARENTS AND CARERS

What's happening?

This draft Directive is designed to increase the participation of women in the labour market and provides for an individual right to four months of parental leave, from which two months are non-transferable between the parents, paid at a level set by Member States, and also introduces carers' leave so that workers caring for relatives in need are able to take five working days per year for that purpose. The Directive will come into force 20 days after publication in the Official Journal of the EU and must be implemented by Member States within three years thereafter. As Britain has now left the EU, the question of whether we need to implement the Directive will depend on the terms of the relationship between Britain and the EU.

So what?

The Directive came into force on 1 August 2019 and must be implemented by Member States within three years thereafter. For the UK, this will depend on the terms of a Brexit deal.

THE DEPOSIT AND RETURN SCHEME FOR SCOTLAND

Jan 2021

What's happening?

Scottish Ministers have made legislation to establish a Deposit Return Scheme, following a consultation on the regulation which had ran until 10 December 2019. The Scottish statutory instrument was made on 19 May 2020, the instrument was made in exercise of the powers conferred by sections 84, 89, 90 and 96(2) of the Climate Change (Scotland) Act 2009 ("the Act"). The multiple regulations will come into force on different dates: 20th May 2020, January 2021, January 2022 and July 2022. For more information on the in force dates see here.

The main policy driver for the Regulations is to promote and secure an increase in recycling of materials, forming part of the Scottish Government's response to the global climate emergency. This legislation will enable consumers to take single-use containers back and redeem a 20p deposit from any retailer selling drinks covered by the scheme, including plastic bottles made from PET plastic, aluminium and steel cans and glass bottles. All retail outlets, regardless of size, will need to comply with the scheme. The policy note is available here.

So what?

The regulations will:

- Prohibit the marketing or sale to consumers of single-use drinks in containers made of PET plastic, steel, aluminium or glass which are ultimately intended for retail sale in Scotland
- Require producers to collect a target percentage of the scheme packaging which they place on the market in a calendar year, by collecting their own scheme packaging from retailers and return points, and accepting the return of their scheme packaging from wholesalers.
- Provide for targets which will increase over the first three years of the scheme's operation (70% in year 1, 80% in year 2 and 90% in year 3).
- Provide for producers to act through a scheme administrator that will meet the above obligations on their behalf.
- Require retailers to operate a return point at premises from which sales of scheme products are made.
- Require retailers selling products by means of distance sales (e.g. through an online grocery sale and delivery service) to provide takeback services from the site of delivery to consumers who have purchased those items.

CLIMATE CHANGE: GREENER CONTRACTS

What's happening?

Across the globe, climate change is the most defining issue of our time and the impacts affect us all. In 2019 the UK increased its net carbon emissions target from 80% to 100%, that is, to net-zero emissions by 2050. Many companies are feeling the pressure to take action to facilitate this change by challenging current practices; in the retail and consumer sector pressures can be felt by customers who expect brands to be demonstrating their commitment to sustainability.

To equip lawyers in the quest to reach the net-zero emissions target, The Chancery Lane Project, an independent and politically neutral, pro-bono initiative made up of solicitors and barristers who are passionate about fighting climate change, has developed the Climate Contract Playbook and Green Paper of Model Laws. This project has brought together legal professionals to collaborate and rewrite contracts and laws in order to support businesses in the transition towards a green economy and achieving the net zero target. The contract precedents and model laws are free to use for lawyers, businesses and policymakers and available here.

The Green Paper of Model Laws sets out seven model laws to accelerate the transition to net-zero emissions, including a change to planning regulations in favour of sustainable developments and an incentive to "mobilise infrastructure scale investment" into tree planting.

What should businesses do next?

We expect that these clauses could be used by clients as a foundation to build their commitment to the fight against climate change in to their contracts and processes, be that into their articles of association or into their supply chain. By starting these conversations early on businesses will be prepared for further legislative changes which will no doubt be enacted in the coming years by the UK Government as we approach the 2050 target.

So what?

The Climate Contract Playbook is made up of 16 model clauses which are named after children to remind readers of the importance of the scheme for future generations, and are designed to help businesses wanting to:

- terminate contracts and switch to more climate-friendly suppliers;
- build "green improvement obligations" into supply contracts;
- include net-zero emissions targets in contracts;
- help fight climate change through investments; and
- encourage voluntary work on climate change through sabbaticals.

ELECTRIC VEHICLE CHARGE POINT REQUIREMENTS

What's happening?

The Automated and Electric Vehicles Act 2018 allows Government to require electric vehicle charge points, with common technical and operational standards, to be installed at motorway service stations and large fuel retailers throughout the UK. It will also help to promote the technology to enable electric vehicles to send electricity back to the grid at peak times.

On 15 July 2019 the Government issued a consultation on proposals for electric vehicle charge point smart technology regulations. The consultation ended 7 October 2019. The proposed regulations would require that private (not public) electric vehicle charge points sold or installed in the UK have smart charging functionality included. The Department for Transport published the summary of responses to the consultation in May 2020. The government published this to update stakeholders on the key themes within the consultation responses. A full policy response from government will follow in due course.

Also on 15 July the Government issued a consultation on proposals to alter building regulations to require all new residential and non-residential buildings to have an EV chargepoint; and existing non-residential buildings to retrofit chargepoints.

What should businesses do next?

Understand whether current and planned electric vehicle charging infrastructure across car parks and fuel retail operations are ready for compliance.

Consider how the proposals will affect future development plans and impact existing properties with over 10 parking spaces from 2025. You may consider ways in which to increase footfall whilst customers charge their vehicles.

So what?

The smart charging requirements will come into force in 2020, with longer-term operational requirements from 2025.

The proposed changes to building regulations will mean that EV charge points will need to be factored in to your development plans for new supermarkets (EV charge point for one in five car-parking spaces) and, from 2025, all existing supermarkets with more than 20 car parking spaces will have to have at least one EV charge point. You may consider ways in which to increase footfall whilst customers charge their vehicles.

The Government announced that all new rapid chargepoints should provide a 'pay as you go' option by spring 2020, otherwise it will use its powers under the Automated and Electric Vehicles Act to mandate this. For more information see our article.

PLASTICS PACKAGING TAX

Apr 2022

What's happening?

This is a new tax that applies to plastic packaging produced in, or imported into the UK that does not contain at least 30% recycled plastic. Plastic packaging is packaging that is predominantly plastic by weight. The tax will take effect from April 2022.

On 23 July 2019 the Government published a summary of responses to its consultation on a plastic packaging tax which would encourage greater use of recycled plastic and help to tackle plastic waste. More information here.

Imported plastic packaging will be liable to the tax, whether the packaging is unfilled or filled. The government will be holding a consultation on the design and implementation of the tax, which will be launched alongside Budget. The government will introduce paving legislation in Finance Bill 2020 to enable spending on costs associated with the development of the tax, in particular the development of the IT system. HMRC published a policy paper on the tax on 11 March 2020.

The measure will be monitored through information collected from tax returns and will be kept under review through communication with affected taxpayer groups. Who is likely to be affected? UK producers of plastic packaging, importers of plastic packaging, business customers of producers and importers of plastic packaging, and consumers who buy goods in plastic packaging in the UK.

So what?

The government intends to publish draft legislation for consultation in 2020, which will set out the key features of the tax, such as:

- the £200 per tonne tax rate for packaging with less than 30% recycled plastic
- the scope of the tax by definition of the type of taxable product and recycled content
- the exemption for producers and importers of small quantities of plastic packaging
- who will be liable to pay the tax and need to register with HM Revenue & Customs (HMRC)
- how the tax will be collected, recovered and enforced

SCA (STRONG CUSTOMER AUTHENTICATION) PAYMENTS STANDARD

Sep 2021

What's happening?

SCA is a new standard that is to be applied when a customer accesses their payment account online, undertakes any other action which may imply a risk of fraud, or initiates an electronic payment (i.e. it enables the validation of a customer's identity when using a payment instrument such as a card) brought in by the second payment services directive (**PSD2**) - the technical requirements are set out in a set of regulatory technical standards (**RTS**).

The requirement to apply SCA in the e-commerce space sits with the card issuer. However, the requirements affect the entire payments chain because, if merchants do not update their payment gateways to enable the issuer to perform SCA on the card holder, card issuers may start declining those transactions. More information here.

The legal implementation date was 14 September 2019. However, the FCA previously agreed an 18 month moratorium on enforcement for e-commerce, card not present, and payment transactions. Due to exceptional circumstances of the Covid crisis, the FCA has given the industry an additional 6 months to implement strong customer authentication (SCA) for e-commerce. The new timeline of 14 September 2021 replaces the 14 March 2021 date.

What should businesses do next?

Ensure that any new requirements would not negatively impact on the consumer's payment journey.

So what?

This moratorium on enforcement gives merchants, gateway providers, merchant acquirers and issuers more time to move to a version of 3DS (the e-commerce solution for SCA) which allows SCA to take place and any relevant exemptions to be requested and applied. The moratorium was given on the basis the industry works together on a manage roll out of SCA solutions to be implemented by the timescale set.

THE FOOD INFORMATION (AMENDMENT) (ENGLAND) REGULATIONS 2019 / 'NATASHA'S LAW'

Oct 2021

What's happening?

New legislation makes it mandatory for full ingredients to be labelled on foods which are pre-packed for direct sale. This will come into force in England, Wales and Northern Ireland on 1 October 2021.

Following the death of Natasha Ednan-Laperouse, who suffered an allergic reaction to a baguette which did not display allergen information, a consultation took place in January 2019 which collated views on updating food labelling laws. Another consultation was carried out by the Food Standards Agency between 23 January and 6 March 2020, to seek views on the proposed updates to the Technical Guidance.

Currently, pre-packed foods for direct sale are not required to carry labels on allergens due to the fact that these foods are made and packed on the same premises on which they are being sold and it is expected that the customer will raise any allergen queries with the person who made or packed it. More information here.

What should businesses do next?

Given the negative publicity surrounding the Pret A Manger case, many businesses now voluntarily comply with these requirements, however in light of the change it is advisable to review products likely to be affected. We also suggest updating training for all staff. Additionally looking into/exploring the use of technology in order to implement the changes in the law from 2021.

So what?

Food businesses will need to ensure steps are taken to update food packaging in order to comply with the new legislation before it comes into force in 2021. The FSA is currently developing a revised working interpretation of the types of food to which this legislation applies. This will give greater clarity on the types of food covered, and how they are made available to the consumer. More information here.

TOUGHER POWERS FOR THE PENSIONS REGULATOR

What's happening?

The Pension Schemes Bill published in October 2019 provides for a major extension of the Pensions Regulator's powers. Although the Bill's progress was halted by the dissolution of Parliament ready for the general election, it seems likely that a future government will seek to enact the measures contained in it, many of which are likely to command cross-party support. The Bill completed its House of Lords stages on 15 July 2020 and was presented to the House of Commons on 16 July 2020.

As expected following a consultation, the Bill includes wider so called "moral hazard" powers (the Regulator's powers to require employers and connected persons to provide additional scheme funding) and new information gathering powers. It also introduces new powers for the Regulator to impose penalties of up to £1m and new criminal offences which can apply to any person (other than insolvency practitioners) and carry an unlimited fine or a prison sentence of up to 7 years. Some of the new criminal offences are very broad, e.g. acting without reasonable excuse in a way which detrimentally affects the likelihood of accrued scheme benefits being received. More information here.

What should businesses do next?

Parties involved with companies that sponsor defined benefit schemes should make themselves familiar with the proposed broader Regulator powers, as there will be circumstances where the Regulator will be able to look at conduct before the Bill becomes law when it exercises the new powers.

So what?

Parties involved with companies that sponsor defined benefit schemes should make themselves familiar with the planned changes to the Regulator's powers, as there will be circumstances where the Regulator will be able to look at conduct before the Bill becomes law when it exercises the new powers.

Many corporate restructurings/re-financings have the potential to adversely impact a defined benefit pension scheme by weakening the employer covenant and/or reducing the debt which would be received by the scheme as an unsecured creditor in the event of employer insolvency, so those involved in such transactions will in future need to consider whether their acts risk exposing them to prosecution. The fact that the criminal offences apply to any person raises the possibility that funders such as private equity houses or banks could be subject to prosecution.

UKCA SAFETY MARKINGS

Jan 2021
(No-deal)

What's happening?

The Government has unveiled a new safety symbol, the UKCA mark, which could replace the existing CE mark in the event of Britain leaving the EU without a deal.

The CE symbol is currently used on toys, machinery and electrical equipment to show that they are compliant with EU regulatory requirements.

What should businesses do next?

At the end of the Brexit transition period or in a no deal scenario, products previously marked by CE will have to be re-assessed by EU conformity assessment body.

So what?

Ministers have said that the rules around using the new UKCA (UK Conformity Assessed) symbol will mirror those which currently apply for the application of the CE mark. This will create additional problems and complexity for the UK industry and potentially increase costs within the global supply chain. Affected manufacturers and importers will need to make urgent plans to switch to EU recognised conformity assessment bodies if they wish to continue to market in EU.

NEW REGISTER OF CONTROLLING INTERESTS IN LAND - SCOTLAND

Apr 2021

What's happening?

A new register, the Register of Persons Holding a Controlled Interest in Land, is to be set up in Scotland under powers introduced by The Land Reform (Scotland) Act 2016.

The purpose of this new register is to provide for the disclosure and publication of information about controlling interests in land owners and tenants across Scotland. A consultation on the draft Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) (Scotland) Regulations closed in November 2018. and The Scottish Government published independent analysis on 3 April 2019. See an overview of the consultation and agreed responses to be published.

This is separate from the UK wide register of beneficial owners of overseas companies owning UK property. We understand that both the UK and the Scottish Governments are keen to ensure that no companies will be required to report their information twice under the linked proposals.

What should businesses do next?

The Register will become operational on 1 April 2021. The Scottish Government intend to publish a consultation on the draft Regulations towards the end of 2019. Monitor for the publication of the Scottish Government consultation.

So what?

All parties involved with property dealings in Scotland should be aware of the requirements of this new legislation and the consequences of non-compliance.

Once the details of how the Register will work and the consequences of non-compliance are known, a review of how this will affect the sale and purchase process in Scotland will be considered.

INCREASED CONNECTIVITY: ACCESS TO GIGABIT CONNECTIONS AND LEASEHOLD TELECOMS INFRASTRUCTURE BILL

What's happening?

Government proposals to revise the Electronic Communications Code 2017 to encourage landlords to engage with telecom operators to provide tenants with the connectivity they require. The Telecommunications Infrastructure (Leasehold Property) Bill has been introduced to the House of Commons and has reached the committee stage. The report stage took place on 29 June. Amendments discussed covered clauses 1 and 2 of the Bill. The third reading is yet to be scheduled. More information here.

The Bill's aim is to *"accelerate the delivery of fast, reliable and secure broadband networks"*. It provides for telecoms network operators to gain access to multiple dwelling buildings to install fixed line broadband connections, where a landlord has repeatedly failed to respond to the operator's request for access following a tenant's request for an electronic communications service.

What should businesses do next?

Nothing currently but one to monitor. The government is keen to have the infrastructure in place to download more quickly and to have better signals in place. If an approach is made by an operator to install telecommunications apparatus it is wise to seek legal advice early on how to respond.

So what?

The government's view is that investment in broadband infrastructure and gigabit capable connections is vital in order to boost economic growth, make areas more attractive places to live and work, as well as to rejuvenate communities.

As broadband, 5G and connectivity were key themes during the recent general election, it is likely that the Telecommunications Infrastructure (Leasehold Property) Bill will be passed in 2020 when Parliamentary time permits.

IMPROVING MINIMUM ENERGY EFFICIENCY STANDARDS (MEES) CONSULTATION

Apr 2023

What's happening?

The government is consulting on a proposed future trajectory for raising the Minimum Energy Efficiency Standard (MEES) for let commercial buildings (referred to as non-domestic private rented buildings). Its favoured approach is raising the minimum EPC rating from an E rating to B by 1 April 2030. The announcement comes as part of the government's package of measures to reduce carbon emissions as it has committed to support businesses in reducing their energy use by at least 20% by 2030. The consultation closed on 7 January 2019 and the government will report on its findings.

The current MEES Regulations are in force and apply from 1 April 2020 (residential) and from 1 April 2023. The full consultation document can be seen here. The associated Impact Assessment can be seen here. For further information see our Energy Efficiency Article.

What should businesses do next?

Where a business is the landlord of commercial property, it will need to establish its right to enter the property to carry out energy efficiency improvement works in advance of the relevant date or whether it will be considering claiming an exemption.

So what?

From 1 April 2023, none of a business's investment portfolio or operational leasehold estate can be let if it has an EPC rating of F or G. However, there are some limited exemptions - see link.

If the regulations are breached, the lease will not be void; however there are potential fines of up to £150,000. Any exemption claimed will need to be recorded on a public register.

Despite the lack of enforcement by local authorities, evidence suggests that the regulations do seem to have had a substantial impact on new EPC registrations where ratings have significantly improved. The proposed increased rating will have a big impact for many landlords and investors despite the long lead in time which is proposed for the changes to be introduced.