RPC

Retail Compass

Issue 11 April 2024

YOUR QUICK REFERENCE GUIDE TO LEGAL DEVELOPMENTS IN THE RETAIL AND CONSUMER SPACE

How generational priorities are shaping consumer and retail propositions

>>

Welcome to this edition

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

We are delighted to have guest contributions from Dominic Collins, CEO at Darabase who gives us his thoughts on the immersive future of retail and Roshiny Panchalingam, Legal Counsel at Selfridges who discusses the implementation of sustainability initiatives in retail businesses. We also shine a spotlight on environmental sustainability and consider how the changing regulatory landscape impacts throughout the lifecycle of a product.

The retail and consumer market is experiencing a tumultuous time and the shakeout is demonstrating that those with the right structure and ethos are thriving whilst others are stalling. With businesses and retailers striving to attract customers in an increasingly competitive market, we take a closer look at how the priorities of the younger generations (in particular Gen Z) are shaping retail and consumer offerings; as well as the challenges and opportunities that those demands bring to retail and consumer brands across all channels. We take a closer look at developments including the rise of recommerce, the evolution of virtual marketing, the DMCC Bill's progress, key employment law changes and much more.

This edition also includes a section focusing on the important US market and some of the issues that are likely to be important to businesses. We are very grateful to each of the expert contributors for this section, each of whom is a colleague from a firm within our TerraLex network – Kyle LeClere of Barnes & Thornburg LLP; Zarema A Jaramillo and Sydney J Kaplan of Lowenstein Sandler LLP; and Matthew Lynch and David Kaufman of Nixon Peabody LLP.

We also include some key statistics highlighting consumer trends around the world and links to our handy legislation tracker which list all of the UK Government consultations and inquiries relevant to retail and consumer brands.

After incredible feedback from our previous events, we are delighted to confirm that our next Retail Compass Live! event will take place on 9 October. It promises to be a really engaging afternoon delving into some of the key topics in this issue (and the next edition in the autumn) and we hope to see you there – so please keep an eye out for a "save the date" message soon. In the meantime, we hope you find this publication useful, and as always, please do not hesitate to contact us if you have any comments or queries.

FROM TOP
KAREN HENDY
JEREMY DREW
CIARA CULLEN

THANKS FOR READING OUR LATEST ISSUE OF RETAIL COMPASS

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

Retail Compass is printed on Fedrigoni Arena, an environmentally sustainable paper made with 100% recycled FSC® fibres. It is completely biodegradable and recyclable.

Retail Compass is edited by Georgia Davis (Of Counsel), Harpreet Kaur (Associate) and a team from RPC Retail. Thanks go to Melanie Musgrave, Kiran Dhoot and Laura Verrecchia for their additional contributions. Designed by Jenni Lungley-Down.

Contents

"97% of Gen Z consumers use social platforms for shopping inspiration and 28% have actually purchased a product through social media in the last three months."

Foreword by Dominic Collins

CEO of Darabase

CEO AND CO-FOUNDER OF DARABASE, A UNIQUE PLATFORM AND TECHNOLOGY THAT ENABLES AUGMENTED REALITY ADVERTISING, CONTENT AND RIGHTS ON THE PHYSICAL WORLD – THE OUTDOOR MEDIA FOR THE SPATIAL WEB (DARABASE.COM).

The immersive future of retail

Over the last decade or so we have seen a significant shift in retail habits driven by technology and consumers' changing media habits. According to the ONS, online shopping represented 12% of total spend at the start of 2015 and more than tripled to 37.5% in 2021 during the pandemic. The average UK person now spends five hours 47 minutes online every day, nearly half of which is on their mobile phone.

Digital lives are continuing to evolve and 2024 is being seen as a major inflection point. The way consumers use their mobiles is shifting from 2D content on a flat screen to 3D content displayed on the world through the phone's camera. Yes, this is in games like Pokémon Go (which by the way still made $566m last year), but content is changing across every category. Virtual try-on and product visualisation is huge, for brands like Ikea, whose app lets you place virtual furniture to scale in your home to see if it will fit and how it looks. Social media platforms are changing too – 6bn AR (augmented reality) posts are sent every day on Snapchat and 800m people use AR on Instagram every month.

These changes of behaviour on mobile are just the beginning. Billions are being spent by tech giants to develop the hardware and software to replace mobiles with smart-glasses and spatial computing. As an example, Apple has just launched their first device into the market, the Apple Vision Pro, and Meta are already on their second version of their Ray Ban smart glasses.

The physical world is becoming the canvas for digital content. So why should retailers and consumer brands care and what should they be doing about these seismic shifts in their customer's behaviours and expectations?

Many people already shop with their mobile in their hand, especially within younger demographics. In fact 97% of Gen Z consumers use social platforms for shopping inspiration and 28% have actually purchased a product through social media in the last three months. Most of the time the apps, websites and content on their phone is not aware of their location or the fact they're in a retail environment. Now imagine a few years from now when the high streets and shopping centres are full of people wearing smart glasses. It won't be just the shoppers looking at and understanding the retail environment, the glasses will too, and they'll be able to layer personalised and interactive information and content onto the physical environment.

This clearly represents an amazing opportunity for retailers, but also a number of potential risks. It is unlikely that the existing contracts between retailers and landlords will consider the controls and commercials needed. Who has the right to display AR content and where can they show it? How are these Property Digital Rights, as they are becoming known, leveraged and commercialised?

From a legal and regulatory standpoint, many of the existing laws governing IP and Advertising already apply to AR content layered on the world. Retailers and landlords need to register their Property Digital Rights to give them a stronger position to both take action against unwanted AR content, but also more importantly benefit from this significant new commercial opportunity.

Consumers expect their favourite brands and stores to meet and engage them where they spend time, both physically and digitally. As these merge, successful retailers and consumer brands need to be ready to engage, inform, entertain and sell in an immersive way.

2024 is an inflection point and the year when things get spatial. Now is the time to learn and experiment to gain that advantage and be ready for our retail digital future.

Retail and consumer timeline 2024 and beyond

Ongoing	Key reforms to the UK Customs regime will be rolled out from 2024 onwards
Ongoing	Property Digital Rights (**PDRs**) are an emerging asset class with the rise of immersive tech
Ongoing	Cybercrime continues to increase as threat actors use AI capabilities and dependencies in the supply chain
2024	The rise of recommerce – what are the risks and opportunities retailers and brands should be aware of?
Mar 24	Conclusion of the first substantive trial of competition-based opt-out collective proceedings in the UK
Mar 24	Increased focus on trade mark infringement disputes between brand owners and online marketplaces
6 Apr 24	Day one right to request flexible working and changes to the supporting statutory procedure come into force
6 Apr 24	Introduction of carer's leave comes into force
6 Apr 24	Extended redundancy protection for pregnant workers and those returning from family-related leave comes into force
14 May 24	New ASA rules and guidance on the advertising of alcohol alternatives ("NoLo") come into force
Spring 24	With the Digital Markets, Competition and Consumers Bill (DMCC Bill) currently in the House of Lords, new dawn raid powers are expected to be introduced for the UK's Competition and Markets Authority
Spring 24	Final Deep Dive Food & Beverage sector guidance is expected
By Summer 24	FCA expected to publish amended UK Listing Rules, with a two-week period anticipated between publication and implementation
Summer 24	AB InBev top of the podium for Olympic Games' vast global audience. But how does the IOC protect the official partner rights it has granted to sponsors?
Autumn 24	The CMA's new responsibilities under the DMCC Bill (including improving price and product information for consumers) are expected to commence in autumn 2024
Oct 24	New positive duty on employers to take reasonable steps to prevent sexual harassment of their employees in the course of their employment comes into force
30 Dec 24	Unlawful to import, export or sell forest-risk products (eg cocoa, coffee, rubber and wood) into/from the EU unless they are "deforestation-free"
Oct 25	Implementation of the Extended Producer Responsibility (EPR) regime to reduce hard-to-recycle packaging entering the market deferred from 2024 until October 2025
Oct 25	2100 watershed introduced on advertising "less healthy" food and drink products on TV and on-demand, as well as restrictions on paid online advertising of HFSS products aimed at UK users
Jan 26	EU's Carbon Border Adjustment Mechanism regulations expected to be fully implemented
2028	Key reforms to the EU Customs regime due to be rolled out
1 Jul 28	EU BEFIT measures are due to take effect

MAR APR MAY JUN JUL AUG SEP OCT NOV DEC JAN FEB MAR APR MAY JUN JUL AUG SEP OCT NOV DEC 2026 2027 2028

24 25

Horizon scanning

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

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

AB InBev top of the podium: Olympic marketing

by Josh Charalambous and Sam Coppard

SUMMER 2024

WHAT IS HAPPENING?

AB InBev is the world's largest brewer, and has become a Worldwide Olympic Partner, with its Corona Cero alcohol free beer named as the official beer of Olympics through to 2028. The sponsorship is sure to provide significant brand and marketing exposure, but how can the IOC look to protect these valuable rights and prevent ambush marketing?

WHY DOES IT MATTER?

The new deal includes sponsorship of the 2024 Paris Olympic Games, 2026 Milano-Cortina Winter Olympic Games and 2028 Los Angeles Olympic Games.

The partnership highlights AB InBev and the IOC's commitment to responsible consumption, which is of the greatest importance and also evidenced by both organisations' contribution to the UN Sustainable Development Goals. Further, AB InBev will have the opportunity to engage with billions of Olympic fans across the world.

However, international events such as the Olympic Games are ripe ground for attracting opportunistic companies that seek to ride on the publicity value, but without any financial contribution to the event (aka "ambush marketing"). Ambush marketing is when a brand attempts to gain recognition by associating themselves with an event without consent and deceives the public into believing they are an official sponsor.

The Tokyo 2020 Olympic Games TV and digital coverage was seen by over

3bn

unique viewers: an incredibly appealing audience for all kinds of global brands!

(Source)

WHAT ACTION DOES THE IOC TAKE?

There is no doubt that ambush marketing harms the value of exclusive sponsorship and partnership deals – especially the likes of the lucrative partnership between AB InBev and the IOC. It is therefore imperative that event organisers put measures in place to protect exclusivity.

Fortunately for AB InBev and other Worldwide Olympic Partners, the IOC is renowned for proactively protecting its commercial rights. There have been several high-profile attempts by brands over the years who have tested the limits of relevant ambush marketing rules. Readers may recall PaddyPower, whose billboard ad featured a fictitious egg and spoon race in London, and claimed it was the "Official sponsor of the largest athletics event in London this year!". The North Face sold sportswear which was considered to suggest that it sponsored Team Canada for the Sochi Winter Olympics.

The IOC also establishes "clean zones" around venues, from which adverts (and, in some cases, even products themselves) are banned – other than those of official partners. Whilst off-site adverts are more difficult to police, the IOC is also active. For example, the Olympic Charter restricts athletes to only promoting official partners immediately before, during and after the Games, and host nations often pass specific legislation restricting the use of Olympic imagery.

We'll certainly be keeping a close eye on the IOC's multi-functional and cross-disciplinary means of monitoring marketing activities around the event to ensure an effective enforcement strategy against ambush marketers, and enable official sponsors to actively engage with billions of Olympic fans across the world.

CLICK TO REVEAL PAGE >

Speed read

AB InBev top of the podium: Olympic marketing

- AB InBev's partnership with the Olympic Games is a win-win for both parties: viewership is on the rise and rights are more valuable than ever.
- But events such as the Olympic Games are ripe ground for other brands to seek to "ambush" an association.
- We outline how the IOC protects their commercial rights, to help deliver value to official partners such as AB InBev.

Horizon scanning (continued)

Trade mark infringement and online marketplaces: what you need to know by Sarah Mountain and Zoe Harvey

20 MARCH 2024

WHAT IS HAPPENING?

Brand owners will be encouraged by a series of recent decisions which have held online marketplaces liable for third party IP infringements. We take a closer look at some of these cases, and the key takeaways.

WHY DOES IT MATTER?

When attempting to tackle infringements online (which are often anonymous), brand owners can save time and costs if they are able to seek recourse from online marketplaces directly. Taking this action can ensure that the infringement is cut off at source.

Previously, sales platforms have avoided liability where they have been found to play a sufficiently neutral role in terms of simply providing a vehicle for third parties to list their products through. This has made obtaining redress difficult for rights holders as there are often issues identifying and contacting third party sellers, who in any event may lack liquidity.

Brand owners will therefore welcome the following decisions which suggest that the courts now expect online platforms to take greater responsibility for illegal content.

Louboutin v Amazon: Louboutin initiated proceedings against Amazon as a result of third parties selling fake versions of its iconic, red-soled high heels on the Amazon marketplace.

The case was referred to the Court of Justice of the European Union which held that an online marketplace could itself be liable for trade mark infringement if a well-informed and reasonably observant internet user might: (i) establish a link between the online platform's services and the sign in question; and/or (ii) believe that the marketplace is marketing, in its own name and on its own account, the infringing product. Ultimately, liability may arise if consumers find it difficult to identify whether products are being sold by an online marketplace or by third party vendors.

Swatch v Samsung: The Swatch group brought a claim against Samsung, alleging that 23 of its registered trade marks were infringed by watch face apps which users could download from the Samsung Galaxy app store. In December 2023, the Court of Appeal upheld a first instance decision which found Samsung liable for trade mark infringement. The Court found that: (i) there was 'use' of the signs complained of as Samsung's actions went beyond creating the technical conditions for use of the signs (for example, Samsung had marketed its smartwatches as "truly watch-like" and had advertised the availability of a wide range of watch face apps in its app store); and (ii) Samsung's manual content review of apps before they were made available on its app store resulted in it having an active role and being unable to rely on Article 14 of the e-commerce Directive (ie the legislation which protects hosting providers from liability if they have no knowledge of illegal content listed on their platforms or if they act expeditiously to remove or disable content as soon as possible after they become aware of it).

In light of the Louboutin case discussed above, the Court also confirmed that the first instance judge was correct to consider the grouping of Samsung's own apps together with independently developed apps when assessing the average consumer's perception of the signs.

For a more detailed review of this case, see: here.

WHAT ACTION SHOULD YOU CONSIDER?

In light of what we have discussed, brand owners may prefer to raise IP infringements directly with online marketplaces.

However, before doing so, it is worth bearing in mind the following:

1. the responsibility of online platforms remains heavily contingent on the specific facts. For example, liability may be avoided by revising content review processes or making website design amends to clearly distinguish third party products
2. retailers should keep in mind their relationship with online marketplaces and the extent to which such platforms are utilised for the sale of their own products.

These cases will not mark t
litigation involving online
In fact, the Supreme Court
in *Lifestyle Equities v Ama*
the press, with the Court h
Amazon had infringed cer
by advertising, offering fo
selling US branded produc
consumers. This further fi
marketplace liability will lik
additional actions by bran

CLICK TO REVEAL PAGE >

Speed read

Trade mark infringement and online marketplaces: what you need to know

- In recent decisions, (*Louboutin v Amazon* and *Swatch v Samsung*) online marketplaces have been found liable for trade mark infringement despite the seller of the goods in question being unrelated third parties.
- Liability findings have focused on those marketplaces which sell their own products alongside third party products.
- Litigation in this area is not expected to slow down, particularly given the latest finding of online platform liability in the Supreme Court decision in *Lifestyle Equities v Amazon*.

<< Home >>

Horizon scanning (continued)

Affirmative action: response to government consultation confirms overwhelming support for consumer-friendly updates

by Tania Williams and Eve Matthews

AUTUMN 2024

WHAT IS HAPPENING?

Following receipt of some 372 responses to the "Smarter Regulation: Improving consumer price transparency and product information for consumers" Consultation, the government has published its response (the Consultation Outcome) in which it proposes significant amends to the Price Marking Order alongside new additions to the DMCC Bill.

WHY DOES IT MATTER?

Substantially reflecting the recommendations made in the CMA's corporate report on unit pricing in 2023, some of the key proposals include the following:

1. **prohibition on fake reviews**: respondents demonstrated their support for the Consultation proposal to add certain fake review practices – for example, the buying and selling of fake reviews, and failing to take reasonable and proportionate steps to ensure reviews are genuine – to the list of banned unfair commercial practices at Schedule 19 of the DMCC Bill. Given the concerns that the growing prevalence of fake reviews could distort consumer purchase decisions, the government intends to action this proposal, however, these banned practices on fake reviews will be subject to civil liability only
2. **drip pricing**: drip pricing is where a customer is shown an initial price for a product or service, and then additional fees are revealed (or "dripped") later during the checkout process. Respondents considered that the law should be strengthened to address both mandatory and optional dripped fees. The government confirmed its intention to prohibit companies from presenting a headline price which does not include any fixed mandatory fees, and companies will be required to disclose the existence of any variable mandatory fees and how they will be calculated. Optional fees, however, will not be included within these new measures at this stage
3. **private redress**: the Consultation sought views on whether to extend the existing private rights of redress under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and DMCC Bill to circumstances where consumers have suffered detriment as the result of a misleading omission, a breach of professional diligence by a trader or a banned practice in Schedule 19 of the DMCC Bill. While responses were broadly favourable, there was criticism that these rights are complex to understand and therefore unlikely to be used, and associated litigation would be prohibitively expensive. The government has consequently confirmed that it will continue to consider this issue further but that no action is proposed at this time.

WHAT ACTION SHOULD YOU CONSIDER?

With additional consumer rights of redress looming on the horizon, now is the time for retailers to take steps to address any problematic behaviours within their businesses and how they interact with consumers.

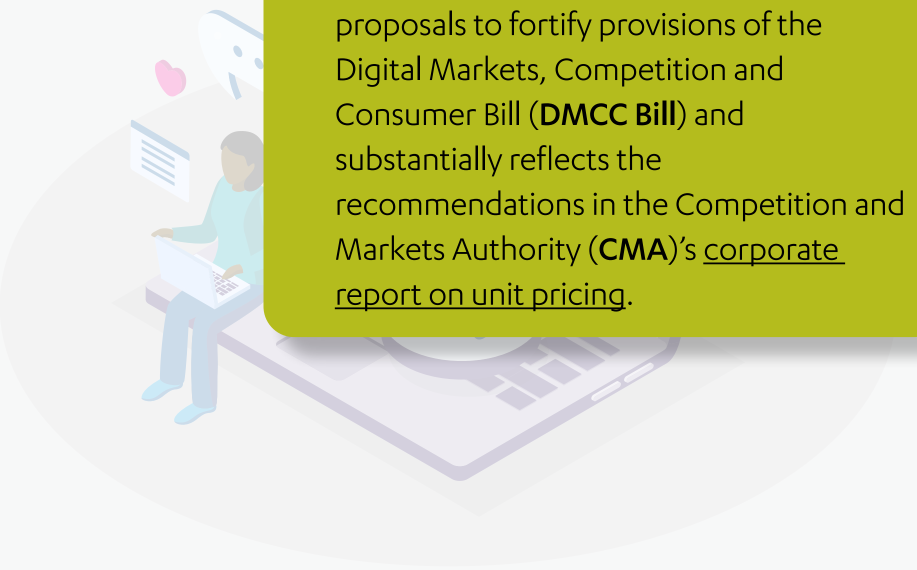
Retailers should consider t Response and carefully ass any of their activities may f the government's incomin requirements. Additional g expected as the governme the CMA to assist impacted comply with their new obli

It is thought that some

9/10

UK consumers read reviews, contributing to the billions spent in online retail markets.

(See source: Consultation Response)



CLICK TO REVEAL PAGE >

Speed read

Affirmative action: response to government consultation confirms overwhelming support for consumer-friendly updates

- In 2023 the Department for Business and Trade (the DBT) ran a consultation entitled: "Smarter Regulation: Improving consumer price transparency and product information for consumers" (the **Consultation**).
- The Consultation sought views on five key policy areas: display of pricing information, hidden fees and drip pricing, fake and misleading reviews, online platforms, and online interface orders (see our Autumn coverage for more).
- The DBT has now published its response to the Consultation, in which it sets out proposals to fortify provisions of the Digital Markets, Competition and Consumer Bill (**DMCC Bill**) and substantially reflects the recommendations in the Competition and Markets Authority (**CMA**)'s corporate report on unit pricing.

Horizon scanning (continued)

Levelling up of D&I in the workplace: four key employment law changes by Kelly Thomson and Patrick Brodie

6 APRIL 2024/OCTOBER 2024

WHAT IS HAPPENING?

Flexible working

On 6 April 2024, the Flexible Working (Amendment) Regulations 2023 amend the existing law on the right to request flexible working so that:

- the right to make a flexible working application is a "day one" right, (not requiring 26 weeks' continuous service)
- employees don't have to explain what effects their flexible working may have on the employer
- employees may make two (rather than one) requests in any 12-month period
- employers must consult with employees who make flexible working requests and deliver their decision within two (rather than three) months

Leave for carers

Since our Autumn 2023 edition of Retail Compass, where we outlined various reforms to rights for parents and carers, the government has confirmed that the new statutory right to carer's leave is due to come into force on 6 April 2024. The Carer's Leave Act 2023, together with The Carer's Leave Regulations 2024, provide that:

- employees are entitled to one week's unpaid carer's leave to provide or arrange care for a dependant with a long-term care need, in each rolling 12-month period
- carer's leave will apply to employees in England, Wales and Scotland
- the leave can be taken in individual days, half days or a block of a week
- employees are protected from suffering a detriment or from dismissal because they took, or sought to take, carer's leave.

The Act defines "long-term care need" as:

- a physical or mental illness or injury that requires, or is likely to require, care for more than three months
- a disability for the purposes of the Equality Act 2010, or
- a care requirement connected with the person's old age.

Enhanced redundancy protection

Due to come into force on 6 April 2024, the draft Maternity Leave, Adoption Leave and Shared Parental Leave (Amendment) Regulations 2024 enhance existing redundancy protections by extending the right to be offered suitable alternative employment to employees who are pregnant or who are returning from maternity, adoption or shared parental leave (previously this protection applied only to employees on maternity leave). The entitlement begins on the date that the employee informs their employer that they are pregnant and will continue for a period of 18 months after the expected week of birth, or date of birth of the child, or for those who are adopting a child 18 months after the placement of the child.

Positive duty to prevent sexual harassment of employees

In October 2024, the Worker Protection (Amendment of Equality Act 2010) Act 2023 is due to introduce a positive duty on employers to take reasonable steps to prevent sexual harassment of their employees in the course of their employment. Employment Tribunals will also have the power to uplift any compensation awarded in a sexual harassment claim by up to 25% if they find that the employer has breached this new duty. Although previously included in draft legislation, the Act will not introduce employer liability for the harassment of employees by third parties, such as customers.

WHY DOES IT MATTER?

The reforms raise a number of issues and practical considerations for businesses. With flexible working, for example, the explanatory memorandum to the Acas draft code of practice on requests for flexible working encourages employers to adopt an open-minded approach to requests and "consider what may be possible". While flexible working can undoubtedly help foster a diverse and inclusive workplace, as well as attract and retain the best talent, it is also imperative that the right checks and balances are made to avoid workloads and requirements of workplaces becoming unmanageable. Employees who have flexible working patterns ought to have access to the same opportunities as others who work more traditional patterns.

Turning to carer's leave, businesses must decide if they offer the statutory minimum or an enhanced benefit, for example by offering a longer period of leave or by offering an element of pay.

In many retail businesses, redundancy processes are not always managed by HR teams, so it is vital that everyone who might have responsibility for supporting redundancy programmes is made aware of the extended redundancy protections for pregnant employees and those returning from family-related leave – and, crucially, that information about an affected employee's pregnancy is provided to the relevant people at the earliest opportunity, in an appropriate manner and with information safeguards. HR advice may also be required.

Finally, the new duty to prevent sexual harassment of employees reflects the positive obligations on employers to proactively create safe working environments, both in terms of physical and psychological safety. Businesses need to assess now how they are going to discharge this obligation – having anti-harassment policies and annual training alone is unlikely to be sufficient.

WHAT ACTION SHOU

1. **Watch out for further g guidance on flexible w** expected in January 202 await the outcome of th consultation on non-sta flexible working, which November 2023.
2. **Review HR policies and reflect the changes to t flexible working proce** that checks and balance to avoid inadvertently e "two-tier" workforce.
3. **Identify your workforce's caring commitments and ensure leaders and line managers are aware of the new right to leave**, considering how you will inform employees and whether or not you will enhance the right, for example by offering paid leave or a longer period of leave.

what "reasonable steps" means for your organisation by asking these questions:

- how is bad behaviour rooted out?
- how are you creating a genuine "speak up" culture?
- how are you protecting people who do speak up?
- how are you educating your leaders on their role in discharging these obligations?

6. **Don't overlook third party harassment**. Although the government is not introducing employer liability for harassment by third parties, such as customers, third party harassment continues to pose serious commercial threats, including risks of claims for constructive dismissal, reputational damage and adverse impact on recruitment, retention – and, of course, harm to employee wellbeing.

CLICK TO REVEAL PAGE >

Speed read

Levelling up of D&I in the workplace: four key employment law changes

- Day one right to request flexible working and changes to the supporting statutory procedure come into force on 6 April 2024.
- Introduction of carer's leave comes into force on 6 April 2024.
- Extended redundancy protection for pregnant workers and those returning from family-related leave comes into force on 6 April 2024.
- New positive duty on employers to take reasonable steps to prevent sexual harassment of their employees in the course of their employment comes into force in October 2024.

<< Home >>

Horizon scanning (continued)

Key upcoming reforms to the EU and UK Customs regime

by Adam Craggs and Daniel Williams

EARLY 2024

WHAT IS HAPPENING?

The European Commission and the UK are preparing to implement a series of reforms to the EU Customs regime and UK customs procedures, respectively.

These reforms aim to streamline and digitise the customs and excise process and will impact retailers' and consumer brands' customs obligations.

WHY DOES IT MATTER?

A number of changes are due to come into force over the next 10-15 years in relation to the EU Customs regime. The European Commission will introduce a new EU Customs Data Hub (the Hub) which will provide customs authorities with real-time data in relation to supply chains and movement of goods. Through the Hub, businesses bringing goods into the EU will be able to log information about their products and supply chains and will only need to submit data once for multiple consignments, streamlining the process. The information provided to the Hub will be used for EU and national risk analysis and, together with partner authorities, customs authorities will be able to intervene at any point on consignments depending on the risk analysis. The Hub is due to open in 2028 for e-commerce consignments, followed by other importers, on a voluntary basis only, from 1 January 2032. The Hub will become mandatory from 2038 onwards.

A new EU Customs Authority will operate from 1 January 2028, which will rely on data from the Hub to carry out EU risk management.

These changes are likely to have a significant impact on those who operate, or who have cross-border trade, in the EU as imports and exports will come under increased scrutiny.

The UK plans to implement a project called 'Modernising Authorisations' which aims to streamline and digitise the customs and excise authorisations processes. A new customer portal will be introduced in 2024.

In addition, the number of data fields that traders importing and exporting goods have to complete will be reduced by up to a quarter, thereby simplifying the customs declarations process.

It is to be hoped that these reforms to the UK customs procedure will reduce the burden on businesses importing and exporting products.

WHAT ACTION SHOULD YOU CONSIDER?

Retailers and consumer brands operating in the EU should start their planning now to ensure that robust customs processes are in place in advance of the implementation of the Hub and the introduction of the new EU Customs Authority in 2028.

In particular, businesses will need to have systems in place that allow them to upload information about their products and supply chains to the Hub.

Whilst this should reduce the administrative burden in the long term, it will be more important than ever to ensure the data is accurate. The new EU Customs Authority and partner agencies will have access to the Hub data in real-time, and it is anticipated that they will use that data to make decisions in respect of the customs liabilities of traders and associated enquiries and investigations.

CLICK TO REVEAL PAGE >

Speed read

Key upcoming reforms to the EU and UK Customs regime

- The European Commission has proposed a series of reforms to the EU Customs regime which are due to be rolled out from 2028 onwards. These include a new EU Customs Data Hub and EU Customs Authority.
- The UK is also implementing a series of changes to its customs procedures which includes the Modernising Authorisations project, which is intended to streamline and digitise the customs and excise authorisation processes, and the simplification of customs declarations.
- Retailers and consumer brands should start to review their customs processes now in preparation for the upcoming changes.

<< Home >>

Horizon scanning (continued)

Business in Europe: a framework for income taxation
by Adam Craggs and Liam McKay

CLICK TO REVEAL PAGE >

Speed read
Business in Europe: a framework for income taxation

- The EU Business in Europe: Framework for Income Taxation (or **BEFIT**) measures are due to take effect from 1 July 2028.
- BEFIT is intended to reduce tax compliance costs for large businesses that operate in more than one Member State.
- BEFIT will mean that members of the same group will calculate their tax base in accordance with a common set of tax adjustments to their financial accounting statements, the tax bases of all members of the group will be aggregated into one single tax base, and each member of the group will have a percentage of the aggregated tax base.

NO LATER THAN 2024

WHAT IS HAPPENING?

The European Commission has adopted a package of measures relating to large cross-border businesses in the EU. The Business in Europe: Framework for Income Taxation (**BEFIT**) is intended to reduce tax compliance costs for large businesses that operate in more than one Member State and make it easier for national authorities to determine tax liability.

WHY DOES IT MATTER?

BEFIT has the potential to deliver tax compliance savings to large businesses operating in the EU.

BEFIT builds on the OECD/G20 international tax agreement on a global minimum level of taxation and the Pillar Two EU Directive, and will include:

- **common rules to compute the tax base at entity level** – all companies that are members of the same group will calculate their tax base in accordance with a common set of tax adjustments to their financial accounting statements
- **aggregation of the tax base at EU group level** – the tax bases of all members of the group will be aggregated into one single tax base. This will involve cross-border loss relief, as losses will automatically be set off against profits across borders, as well as increased tax certainty in transfer pricing compliance
- **allocation of the aggregated tax base** – by using a transitional allocation rule, each member of the BEFIT group will have a percentage of the aggregated tax base calculated on the basis of the average of the taxable results in the previous three fiscal years.

The new rules will be mandatory for groups operating in the EU with an annual combined revenue of at least €750m, and where the ultimate parent entity holds, directly or indirectly, at least 75% of the ownership rights, or of the rights giving entitlement to profit. For groups headquartered in third countries, their EU group members would need to have raised at least €50m of annual combined revenues in at least two of the last four fiscal years or at least 5% of the total revenues of the group.

The rules will be optional for smaller groups, which may choose to opt-in as long as they prepare consolidated financial statements.

The profits and losses of related parties that are not members of the BEFIT group (eg because they are not in the EU) will not be aggregated in the group tax base. This means that their losses would not be relieved across borders and transfer pricing would still apply in the transactions between these entities and BEFIT group members.

WHAT ACTION SHOULD YOU CONSIDER?

Businesses operating in the EU should familiarise themselves with the BEFIT measures, consider how the measures may affect their tax compliance and take steps to ensure they are best placed to take advantage of the measures if implemented.

The
curr
in th
une
mea
savi
EU – the EU itself has indicated that the BEFIT measures could reduce business tax compliance costs by up to

65%

(See source: Europa)

<< Home >>

Horizon scanning (continued)

Virtual advertising: a glimpse into the future by Elizabeth Alibhai and Lola Withrington

ONGOING

WHAT IS HAPPENING?

Virtual advertising and experiences are transforming the way real world property can be used by turning it into a canvas for digital content.

In our October 2023 White Paper, together with our client, Darabase, we discussed the legal considerations arising as virtual advertising and PDRs develop; which span all of property, advertising, data protection and intellectual property law (RPC's White Paper here). In this article, we focus on property law and the implications of these developments for retailers and consumer brands who own or occupy property.

WHY DOES IT MATTER?

Virtual advertising can give an immersive, multi-layered advertising experience to consumers while also leaving real world property untouched.

The use of real world property in a virtual context is derivative of the legal and regulatory framework in the real world. The owners of a building itself and the intellectual property in its designs have the primary right to licence its use. However, numerous third parties – the planning authority, central government, individual right holders etc control what advertisements can be placed on it.

If a property is instead used within a device – such as a phone or a pair of smart glasses – the place-making and other location-based sensitivities underlying these controls fall away, bringing exciting new opportunities.

It would also be a mistake to underestimate the potential of using a property for immersive experiences and advertising. Brands are already starting to utilise tools, for example to allow customers to place furniture in real world environments, to improve customer experience.

There is also significant asset value attached to advertising inventory, based on incremental revenue generated. For example, Landsec's Piccadilly Lights screen in London currently has an asset value of over £200m, making it one of Landsec's most valuable assets, larger than many office and retail properties they own[1].

A permission-based system?

The key question however is: "how will we protect PDRs and regulate the use of virtual billboards?"

In England and Wales, HM Land Registry registers the ownership of important interests in land and property. The register is recognised across the world for its high degree of accuracy which underpins the success of the property marketplace and resultant property values.

- However there has been no consistent and easy way to register and sell PDRs.
- In our White Paper, we explore how a similar registration system could work for the registration of PDRs and look at what the first movers are doing. The "property digital title" in a property can be equated to the title of a physical property, as registered with the Land Registry. Property owners can then use their property digital title to assert ownership of a property for the purposes of placing virtual advertising, record whether they allow third party immersive advertising to be associated with their property, and whether they reserve the property for their own immersive content or whether they block any immersive content from being displayed.
- This way property owners can generate a revenue stream with their virtual advertising space, while also taking an important first step to ensuring that only appropriate content is displayed on, or in connection with, their property.

1. https://landsec.com/properties/piccadilly-lights-w1

WHAT ACTION SHOULD YOU CONSIDER?

This is a fast-moving area and there is still some way to go in the development of a fully secure and reliable PDR registry. However businesses can and should:

- consider what location-based immersive experiences and adverts to offer to enhance the experience and loyalty of their customer base, and
- consider registering the on a digital advertising what content they wou order to take advantag revenue stream.

CLICK TO REVEAL PAGE >

Speed read

Virtual advertising: a glimpse into the future

- With the rise of immersive tech, advertisers and brands are increasingly looking to promote their products and services on "real world" property in augmented and virtual reality environments.
- Property Digital Rights (**PDRs**) are an emerging asset class, designed to allow property owners to protect, manage and monetise how their properties are used in immersive environments.
- We look at the future of PDRs and their role in building both customer experience and revenues.

The metaverse has over

4m

active users every month.

(Source: Hubspot)

The worldwide VR Advertising market is projected to achieve revenue of

US$174m in 2024

and a projected market value of

US$1844m in 2028

(Source: Statista)

Horizon scanning (continued)

Transition Plan Taskforce's publication of the Food & Beverage Sector Guidance by Karen Hendy and Rosamund Akayan

SPRING 2024

WHAT IS HAPPENING?

Following publication in October 2023 of its final Disclosure Framework for private sector entities to transition to a net zero economy, the TPT published draft Food & Beverage Sector Guidance in November 2023.

A final version of this guidance is expected to be published in spring 2024.

WHY DOES IT MATTER?

Mandatory requirements already exist for UK listed companies and financial firms to publish transition plans, showing investors how the organisation will reach net zero by 2050 across its operations and value chains. These are likely to be strengthened to align with the TPT Disclosure Framework and ISSB Standards.

The UK Government is also planning to consult on introducing requirements for the UK's largest companies to disclose their transition plans if they have them and is moving towards making publication of transition plans mandatory.

The TPT Disclosure Framework contains the foundational disclosure recommendations which apply to all sectors and is designed to complement and build on ISSB Standards. It applies three guiding principles of Ambition, Action and Accountability organised across five elements and 19 sub-elements which should be disclosed against in a transition plan. It recommends that all entities take a strategic and rounded approach to transition planning, considering the three inter-related channels of decarbonising the entity; responding to the entity's climate-related business risks and opportunities; and contributing to an economy-wide transition.

The Food & Beverage Sector Guidance adds further depth and detail for preparers of transition plans operating in the Food & Beverage sector in relation to nine of the 19 sub-elements of a transition plan, including specific recommendations for food retailers and distributors.

For example, in relation to the business operations sub-element, the guidance suggests that businesses should consider disclosing any plans they have to:

- transition a logistics fleet to electric vehicles
- increase the supply of seasonal and locally sourced produce
- replace refrigerants with lower global-warming potential alternatives
- diversify input suppliers to increase resilience
- engage with suppliers to reduce greenhouse gas emissions
- reduce food waste through waste monitoring and procurement initiatives, and
- influence end consumer behaviour and demand.

The guidance also suggests business and operational metrics against which an entity should consider reporting, such as percentages of purchases and product volume that are third-party certified to an environmental or social sustainability standard.

WHAT ACTION SHOULD YOU CONSIDER?

Listed retailers should already be preparing transition plans in accordance with the TPT Disclosure Framework and sector guidance.

Non-listed retailers may also benefit from putting together transition plans as mandatory requirements for non-listed companies to publish transition plans are expected to closely follow the existing requirements for listed companies.

Retailers operating in the Food & Beverage sector should first read the TPT Disclosure Framework for an understanding of the key concepts and the sub-elements against which disclosure is required and should then read the Food & Beverage Sector Guidance for further detail of how to disclose against the sub-elements considered in the guidance.

In addition to the Sector Deep Dives, retailers should also consider the TPT's Sector Summary which provides high-level guidance for a number of other sectors, including Consumer Goods Retail and Health Care Retail.

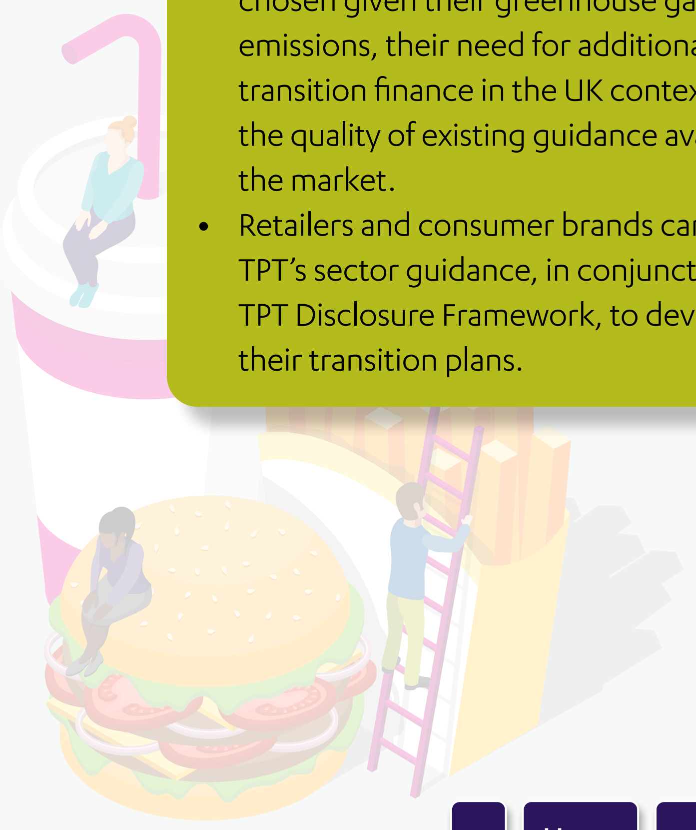
Retailers do not need to wait for mandatory requirements to start reflecting on the changes that transitioning to a net zero economy will require to their businesses. They should already be considering the sustainability and climate risks and opportunities that affect them; preparing to collect sustainability data from across their value chains; and ensuring that relevant personnel are adequately briefed on the reporting processes that may affect them.

CLICK TO REVEAL PAGE >

Speed read

Transition Plan Taskforce's publication of the Food & Beverage Sector Guidance

- In its 2023 Green Finance Strategy, the UK Government committed to consult on introducing requirements for the UK's largest companies to disclose their transition plans to net zero if they have them. The FCA has also signalled its intention to consult on strengthening existing requirements for transition plan disclosures by listed companies in line with the Transition Plan Taskforce (**TPT**) Disclosure Framework, alongside its consultation on implementing UK-endorsed ISSB Standards.
- Following publication of its final Disclosure Framework in October 2023, the TPT published draft Deep Dive guidance on seven sectors, including the Food & Beverage sector. These sectors were chosen given their greenhouse gas emissions, their need for additional transition finance in the UK context and the quality of existing guidance available in the market.
- Retailers and consumer brands can use the TPT's sector guidance, in conjunction with TPT Disclosure Framework, to develop their transition plans.



<< Home >>

Horizon scanning (continued)

Forthcoming legislative changes to bolster CMA's dawn raid powers by Leonia Chesterfield and Carolin Ayres

SPRING 2024

WHAT IS HAPPENING?

The new Digital Markets, Competition and Consumers Bill (**DMCC**) is rapidly making its way through the parliamentary processes. New dawn raid powers for the UK's Competition and Markets Authority (**CMA**) are envisaged under the forthcoming DMCC legislation.

WHY DOES IT MATTER?

More flexible dawn raid powers are proposed for the CMA to reflect post-pandemic changes in working practices and its increased remit post-Brexit.

In relation to dawn raids concluded at domestic premises, for example, the CMA would have the same powers as it currently does for inspections with a warrant at business premises. In particular, including its "seize and sift" powers.

The DMCC also seeks to strengthen the CMA's powers to obtain electronic information stored remotely. This will assist the CMA's enforcement practices where relevant information is stored by firms remotely, for example in the cloud. This will help safeguard the CMA's ability to conduct its investigations effectively, given the increasing trend for businesses of all sizes to store documents and other information remotely.

Further, the DMCC seeks to introduce a new duty to preserve documents relevant to investigations where a person knows or suspects that an investigation by the CMA under the Competition Act 1998 is being or is likely to be carried out.

While it is important firms and individuals involved do not obstruct an ongoing investigation, it may be possible to challenge a warrant or the conduct of the CMA during the investigation on procedural grounds after the dawn raid took place.

Recent examples of challenges to dawn raid procedures include:

- in early 2023, the European Court of Justice annulled three European Commission (**EC**) decisions concerning a suspected cartel by leading French supermarkets because the EC had failed to comply with the obligation to record interviews conducted during the dawn raid (Case C-682/20P; C-690/20P; C-693/20P)
- in a recent Competition Appeal Tribunal (**CAT**) ruling on the publication of a closed judgment concerning an application by the CMA for warrants (CMA v Another (Judgment (Publication decision)) [2023] CAT 68), the CAT concluded that:

"The publication of appropriately redacted open judgments, recording the reasons for the exercise (or non-exercise) of this jurisdiction is peculiarly important, not merely so that the instant case can appropriately be challenged, but so that there is guidance in future cases."

While the above examples were specific to the raids in question, there may be scope for firms targeted in dawn raids to bring a successful procedural challenge.

WHAT ACTION SHOULD YOU CONSIDER?

In light of the new legislation proposing to enhance the CMA's powers to carry out unannounced inspections – including further powers regarding raids of domestic premises, it is timely for firms to dust off existing policies and make sure they're up to date. This ensures relevant staff have had refresher training where needed.

CLICK TO REVEAL PAGE >

Speed read
Forthcoming legislative changes to bolster CMA's dawn raid powers

- The CMA is expected to receive new dawn raid powers under forthcoming legislation.
- Post-Brexit and Covid-19, the CMA's enforcement powers have been strengthened and are being further expanded.
- Firms are advised to ensure their dawn raid procedures are up to date and relevant staff recently trained on processes and procedures, should the inspectors call.

Horizon scanning (continued)

The rise of recommerce by Ciara Cullen and Emma Dunnill

2024

WHAT IS HAPPENING?

Recommerce (which includes reselling, renting, refilling, repairing or reusing goods) is already an extremely valuable business model, estimated by Barclays to be worth almost £7bn in the UK[2] alone and expected by Visa to increase to £82bn by 2030[3]. This growth – particularly in respect of resale – is widely regarded as being driven by Gen Z consumers, over two thirds of whom now prefer to buy second-hand over new goods, in part, due to sustainability concerns.

WHY DOES IT MATTER?

Of course, recommerce as a concept is not new. But driven by the adoption of recommerce business models by luxury retailers such as Selfridges (as discussed in our interview with Roshiny Panchalingam, Legal Counsel at Selfridges, on page 49), the increase in the number of specialist rental or resale platforms such as Poshmark and Vestiaire Collective, and the shift in focus to luxury goods, these business models seem to be going from strength to strength.

There are many benefits to recommerce including, sustainability (a particular focus for Gen Z, with 82% expressing concerns about the state of the planet[4]), appealing to new consumers and creating increased demand for new goods, on the basis that they may be considered an "investment", which can generate income through rental or resale. As such, certain luxury brands, such as Gucci, Rolex and Burberry have embraced recommerce and partnered with existing resale platforms or created their own curated platforms. Retailers such as Selfridges and brands including Mulberry also offer a repair service, which helps to increase the lifespan of products and encourages brand loyalty.

However, other luxury brands are understandably concerned by the risks involved with recommerce, including in relation to the authenticity of goods, parallel imports (also known as "grey goods", where goods put on the market in one territory are later put on the market in another territory without the brand owner's consent) and potential brand damage.

In particular, Chanel has been involved in various high-profile disputes in recent months, against reseller platforms The RealReal and What Goes Around Comes Around (WGACA). Chanel's main complaints in these cases were that these platforms have been selling counterfeit and/or grey goods and misusing their brand by falsely claiming to sell genuine Chanel goods. In response, The RealReal has accused Chanel of "anti-competitive conduct" for trying to stop the second-hand sale of its products. While Chanel recently won its claim against WGACA, the dispute with the RealReal continues and looks set to be hard fought by both sides.

WHAT ACTION SHOULD YOU CONSIDER?

While these cases are US cases, so not directly applicable to the UK, it's interesting to see the approach taken by different brands to recommerce, and also how the courts are starting to grapple with these issues. As these business models increase in popularity and value, we expect there to be more disputes of this kind in the future. In the meantime, retailers, platforms and brands adopting recommerce models should be alive to:

- the importance of implementing processes to authenticate goods and monitor legitimate distribution channels
- the benefit of using contracts to govern key issues such as liability (eg for damage to goods being repaired or the late return of rental goods) and restrictions around the use of brands' IPRs by the retailer/platform and the extent of such use, to provide greater certainty and clear remedies in the event of a breach by either party
- committing to continuous monitoring, so that prompt action can be taken in the event that any issues arise (whether that's brands objecting to the treatment of their brand or goods, or retailers/platforms taking action to prevent inadvertent infringement).

Going forward, it will be interesting to see how consumer laws and regulations will develop in response to the increased popularity and adoption of recommerce models.

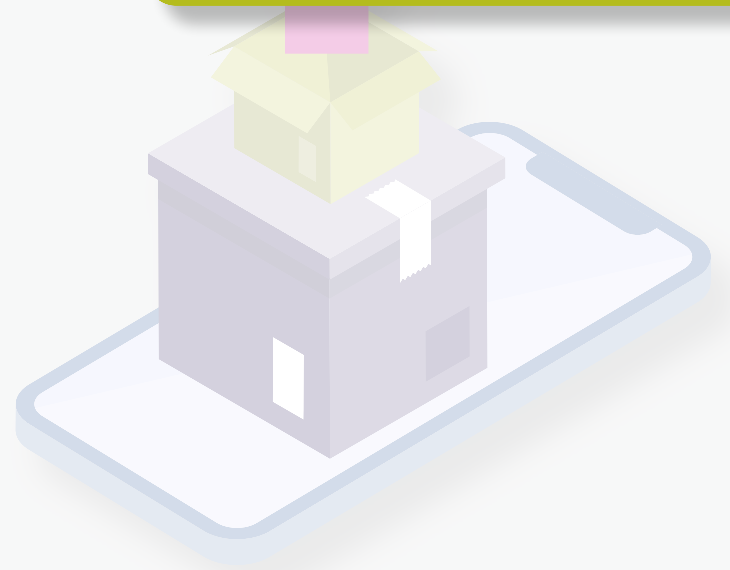
"The anal… sustainab… economy… £5.92bn o… renting ite… than purc…

(Source: Bar…

CLICK TO REVEAL PAGE >

Speed read
The rise of recommerce

- Recommerce is already big business, valued at almost £7bn in the UK alone in the last year, and is expected to grow to £82 bn by 2030 – primarily driven by Gen Z consumers.
- Some brands are seeing recommerce as an opportunity to exploit, whereas others see it as a potential threat to their brand.
- We take a brief look at some of the recent law suits brought by Chanel against resellers and some legal points for retailers and brands to consider in relation to recommerce.



"80% of Gen Z bought secondhand goods, while nearly 1-in-3 began selling them in the last year. Gen Z also makes up the largest generational category of new sellers at 32%."

(Source: eBay's annual Recommerce Report)

2. https://home.barclays/news/press-releases/2023/10/recommerce-revolution--reusing--reselling-and-renting-worth-almo/
3. https://www.visa.co.uk/about-visa/newsroom/press-releases.3222623.html
4. https://kadence.com/why-gen-z-values-sustainability-tips-for-marketing-to-the-eco-conscious-generation/#:~:text=They%20are%20growing%20up%20in,the%20state%20of%20the%20planet.

Horizon scanning (continued)

Will the rise of collective proceedings continue? by Will Carter, David Cran and Chris Ross

MARCH 2024

WHAT IS HAPPENING?

In March this year we saw the end of the first trial in the UK's opt-out collective proceedings regime. Judgment from this trial is likely to influence the future trajectory of the competition collective proceedings regime and may galvanise proposed class representatives to issue more claims.

WHY DOES IT MATTER?

Since 2021, the UK has seen explosive growth in opt-out collective proceedings brought in the Competition Appeal Tribunal (CAT). These are claims brought by a representative on behalf of a proposed "class" which can include both individuals and businesses.

All members of the class are included in the claim by default unless they take steps to opt-out. This means that the class will include many people and businesses that have no involvement in it. The large potential size of the represented class means substantial overall damages can be claimed.

The number of issued collective proceedings in the UK has grown substantially in recent years. A variety of consumer-facing businesses have been targeted across multiple sectors, including technology firms, train operating companies and musical instrument retailers.

Businesses may be on either side of a collective claim. Larger businesses that hold a position of market power in the markets in which they operate may be more exposed as potential defendants. However, businesses may also be members of a class. For example, proposed collective claims have been brought against Mastercard and Visa on behalf of classes of merchants who accept card payments.

In January 2024 the first substantive trial of collective proceedings commenced in the CAT. This claim is against BT with a class size of 2m. We expect the judgment from that trial, and events following it, will provide guidance on:

- **how far the boundaries of competition law can be pushed in collective proceedings**. The collective proceedings regime in the UK is limited to claims for infringements of competition law. This will be the first trial of a standalone collective claim alleging unfair and excessive pricing and it remains to be seen how this (and even more creative claims) will succeed
- **whether collective proceedings are economical for the funders supporting them**. While funding arrangements are scrutinised at the certification stage, this is not explicit approval of returns funders might receive in the event of a successful claim or settlement. The CAT will have the final say over the return a litigation funder will receive if the claim they back is successful. The amounts funders can expect to receive if successful will be one of the biggest factors affecting whether future collective proceedings will be brought.

It remains to be seen if the recent growth trajectory of the collective proceedings regime will continue following the outcome of the claim against BT.

WHAT ACTION SHOULD YOU CONSIDER?

Understand whether you are a member of a class or proposed class. Any business should consider whether it is a part of a class, and if so whether it is in its interest to opt-out of being represented in this way. Being a class member could result in a payment of damages without the burden of paying legal fees and risk of an individual claim, but could preclude an individual claim. It may be in the interest of the business to opt-out, for example to bring its own claim. Time limits for opting out are short.

Consider collective action risk when interacting with regulators. Consumer-facing businesses should consider collective action risk when interacting with regulators competition authorities su Regulatory findings are no to bringing a claim, but the influence whether one is b

Keep an eye on potential developments. There have to widen the regime to pe proceedings in claims bey law. While the governmen brought forward legislatio have been attempts to am Markets, Competition and Bill currently moving throu and the recent direction o suggested that this may be on the horizon.

>£18.5bn

estimated amount claimed across the 15 collective proceedings which have been certified to date

CLICK TO REVEAL PAGE >

Speed read

Will the rise of collective proceedings continue?

- The first substantive trial in the UK's collective proceedings regime for competition law claims (a form of **class action**) in March 2024.
- Judgment from this trial will likely provide clarity on aspects of the competition collective proceedings regime, and will be a significant factor in whether the number of collective proceedings continues to grow.
- Consumer-facing businesses should consider both whether they face the potential risk of a claim as a defendant, and whether they may form part of the represented classes as a claimant (including in the c. 40 collective proceedings claims issued to date).

<< Home >>

Horizon scanning (continued)

Increased cybercrime with higher stakes expected in 2024
by Elizabeth Zang and Richard Breavington

ONGOING

WHAT IS HAPPENING?

Cybercrime continues to increase and shows no signs of stopping.

A report published on Statista estimated that the annual cost of cybercrime in the UK was \$320m (approximately £250m) in 2023. This is projected to increase to over \$1.82trn (approximately £1.424trn) by 2028.

The figures are high and the impact is widespread, as cybercrime affects businesses across various sectors, including the retail sector, with the British Retail Consortium (BRC) reporting that 32% of retail organisations experienced a security breach in 2022/2023.

WHY DOES IT MATTER?

The increase in cybercrime may be caused, at least in part, by the growing accessibility to and use of artificial intelligence (AI). According to the NCSC's report on the impact of AI on the cyber threat, we will see "AI primarily offer threat actors capability uplift in social engineering". The compromise of account credentials, often through phishing emails, remains a common method of entry. If threat actors utilise AI to create increasingly convincing phishing emails that are more likely to be interacted with, the result will be a growing ability to obtain account credentials to gain access to organisations' systems and, subsequently, its data.

The large-scale supply chain incidents of 2023 also contributed to the increase in cybercrime. These include the ransomware attacks suffered by: (i) CTS, a provider of IT services, which impacted a number of its law firm clients; and (ii) MOVEit, a file transfer company, which brought more than 600 organisations worldwide within the sphere of a single incident according to Reuters. These incidents demonstrate the wide reach that supply chain incidents can have and the importance for management of those risks, as predicted and discussed in last year's Autumn edition of Retail Compass.

The impact of the increase in cybercrime is exacerbated by the increased scope of the cyberattacks. We have seen a trend towards larger quantities of data being taken from infiltrated systems, particularly in ransomware scenarios. Where threat actors were previously taking gigabytes of data from organisations, we are now sometimes seeing multiple terrabytes of data being exfiltrated. The result is a greater impact on victims, as the larger amount of data being taken from accessed systems could mean that there is a higher likelihood of data being taken which is either (i) personal information relating to data subjects or (ii) sensitive or confidential client information. This could represent a significant risk to retail organisations where large quantities of consumer data may be collected for retail analytics and/or where the data in scope could include confidential information relating to product releases.

WHAT ACTION SHOULD YOU CONSIDER?

The increased instances and impact of cybercrime underscores the need for implementing basic security protocols. We have seen some cyber insurers reject cover for claims where investigations into the incident have revealed that measures like multi-factor authentication (which can significantly reduce vulnerability to credential compromises) were not in place.

We have also seen a growing focus on incident response planning across various sectors. Only 48% of retailers have a formal ransomware plan in place according to the BRC. Planning for cyber security breaches before they have happened through the creation of crisis management plans and engagement in pre-breach workshops can help to minimise the effects of an incident.

A tool that mi… download her…

As one of only a handfu… released cyber apps on… RPCCyber_ is free to do… has the virtual "big pink… in the event of a cyber b… our response team into… contains pre-breach gu… developments in cyber risk.

Download today from the Apple Store or Google Play Store.

We also offer an award-winning 24/7 cyber incident response service, working both directly for clients and in collaboration with a number of insurers and brokers. We are able to pull into action lawyers, IT cyber forensics and crisis communications experts.

Statista estimated that the annual cost of cybercrime in the UK was **\$320m** in 2023. This is projected to increase to over **\$1.82tn** by 2028.

(Source: Statista)

CLICK TO REVEAL PAGE >

Speed read

Increased cybercrime with higher stakes expected in 2024

- Annual cost of cyber in the UK is expected to increase to over \$1.82trn (approximately £1.424trn) by 2028.
- Increase in cybercrime driven, in part, by the growing use of AI by threat actors and web of organisations reliant on supply chain contracts.
- Impact of cybercrime exacerbated by a trend towards much larger quantities of data being taken as part of ransomware attacks.

Horizon scanning – breaking news!

Green claims: key takeaways from the CMA's first investigation

by Ciara Cullen, Sophie Tuson and Lewis Manning

BREAKING: After much anticipation, the Competition and Markets Authority (CMA) has published the results of its investigation into green claims made by ASOS, Boohoo and George at Asda. All three retailers have signed undertakings committing to change the way they promote their green credentials and set up robust internal processes to ensure future green claims are not misleading.

Whilst the investigation focused on the fashion retail sector, there are important lessons for all retail and consumer brands making green claims in the UK (skip straight to the key takeaways). For our full analysis read our update).

The investigation

The CMA's two-year investigation, launched in July 2022, sought to address the regulator's concerns that green claims made by the three fashion retailers misled consumers about the environmental impact of their products. The investigation is one of multiple ongoing probes into business's green claims following the publication of the CMA's Green Claims Code (**GCC**) in September 2021. As part of the undertakings agreed with the CMA, ASOS, Boohoo and Asda have each committed to remove or amend any existing misleading green claims within two months and ensure that future green claims are not misleading. This includes complying with strict rules for specific types of green claims (such as claims about green product ranges or fabric composition) and implementing internal processes to prevent greenwashing (such as supplier due diligence, spot checks, and internal training). Over the next two years, each retailer must regularly report to the CMA on the steps it has taken to comply with the undertakings.

A litmus test for green claims enforcement

The investigation provides a helpful 'litmus test' for the CMA's approach to green claims enforcement as well as insight into the regulator's expectations around certain types of green claims and the internal measures that businesses should have in place to prevent greenwashing. This is relevant given the regulator's ongoing investigation into green claims in the FMCG sector, and its upcoming third limb of green claims investigatory work expected later this year (details tbc). In its open letter to the fashion retail sector (published at the same time as the decision), the CMA has made clear it expects all businesses to take time now to familiarise themselves with the undertakings, and ensure their own green claims and internal compliance systems are up to scratch. The CMA will publish further guidance for the fashion retail sector in due course.

Key takeaways for businesses

1. **Presentation of material information**: the undertakings reiterate principles in the GCC that where information is material to the green claim (eg where it qualifies the claim or where consumers need it to make an informed purchasing decision), it should be set out 'clearly and prominently' with the claim. For example, where a claim relates to only part of the product life cycle, businesses should provide information about which lifecycle stages are included. However, the undertakings build on the GCC by explaining what 'clear and prominent' means in practice - information must: (i) be clearly visible; (ii) in close proximity to the claim; (iii) not require the consumer to take further action (eg by clicking on a hyperlink or scanning a QR code); and (iv) not be displayed separately to the claim (eg on the other side of a product tag/ label). The CMA also endorses a 'layered' approach whereby further details can be included elsewhere so long as businesses clearly signpost where consumers can find this (eg via a hyperlink to a sustainability hub on their website).
2. **Green product ranges**: the undertakings build on the GCC by setting out the CMA's expectations around green product ranges. Where a business markets products as being part of a green product range, such as ASOS's "Responsible Edit" collection, there must be an objective set of criteria for determining which products are included in the range. Businesses must not market products as being part of the range, or include them in any landing page, if they do not meet those criteria. Businesses must also include a clear and prominent summary of the relevant criteria for the range on their website, product labels, and in any marketing materials or social media posts promoting the range (as relevant). Finally, the name of any green product range cannot itself be misleading (whilst no specifics were given in the undertakings, this is likely to apply to product ranges labelled broadly as "sustainable", "eco" etc).
3. **Statements about fabrics**: claims about fabrics must be specific (eg 'organic') and not ambiguous (eg 'sustainable fabrics'). Businesses must not claim that a product is 'recycled' or 'organic' if it contains more than a negligible proportion of non-recycled or non-organic fibres. Where a business does make recycled or organic claims, it must clearly set out the percentage of recycled or organic fibres contained in the product. Whilst this provision of the undertakings relates specifically to claims about fabric composition, the general principles could also be applied to other kinds of claims and product types (eg regarding the percentage of recycled plastic in a 'recycled' plastic bottle). The UK's Advertising Standards Authority is currently looking in detail at these kinds of green disposal claims, with increased enforcement activity expected this year.
4. **Third party accreditation**: the undertakings provide further detail about the information that businesses must give consumers when making green claims based on third-party affiliation or accreditation schemes. This includes details about the environmental benefits of the affiliation or scheme, any material connection the business has to the third party or scheme, and a link to the third party's and/or scheme's website. Whilst no specific schemes were mentioned in the undertakings, this is likely to include sector or product-specific accreditation schemes such as those run by Textiles Exchange or the Forest Stewardship Council.
5. **Supplier due diligence**: the undertakings make clear that where a business makes green claims about a product's composition (eg 'organic' or 'recycled' fibres) or manufacturing process, the CMA expects businesses to have a supplier due diligence process in place to ensure these claims are accurate. The undertakings indicate what this should involve, including: (i) getting relevant certificates from suppliers (eg final scope and transaction certificates) or, failing that, a written declaration from the supplier that the product information is correct; (ii) conducting annual spot checks on a sample of certificates; and (iii) getting contractual assurances from suppliers that they will comply with the business's green claims policies and contractual terms. Businesses should remove any green claims where the due diligence process is not complied with, or an error is identified which cannot be promptly rectified.
6. **Other internal processes around green claims**: the CMA expects businesses to have appropriate mechanisms in place to prevent misleading green claims. The undertakings indicate this could include: (i) automated software solutions and weekly spot checks to ensure product listings are accurate and do not contain any misleading green claims; (ii) introducing prompts for employees during the product listing and advertising processes; (iii) developing internal green claims policies and implementing annual training for relevant employees on green claims compliance (eg in marketing and product sourcing teams); and (iv) ensuring that all new green claims are vetted by legal teams before they are published.
7. **Substantiation and record-keeping**: the undertakings give an indication of the kinds of records that businesses should have on file to back up their green claims and to evidence their internal green claims processes including certificates and substantiation received from suppliers, supplier contracts, copies of internal green claims policies and training materials, and the results of any spot checks. (As per our previous blog, businesses should also consider keeping a separate (confidential and privileged) record of any risk assessments conducted for each green claim.

Tougher regulatory landscape

The CMA has issued a stark warning that future green claims enforcement could result in significant fines once the Digital Markets Competition and Consumers Bill (**DMCC Bill**) enters into force (expected in the coming months), under which it will be given significant new powers to make direct findings of breaches of consumer protection law (currently limited to the courts) and impose fines of up to 10% of global annual turnover. The message is clear: the potential liability for misleading green claims in the UK is set to increase and all businesses should review their green claims now to ensure they are compliant. For further commentary on the green claims regulatory landscape in the UK and our 'top tips' for compliance see our snapshot of the changing regulatory landscape on page 53.

Snapshot of retail statistics

Gen Z and millennials

UK AND EUROPE

43% of Gen Z use social media apps to follow brands or find reviews of brands and products.

Source: BDO

Low price is the second most important factor driving the purchase of clothing for **18** to **24-year-olds** in Great Britain (GB) in February 2023.

Source: Statista

53% of Gen Z and millennials chose physical stores as their preferred shopping channel in 2023, making stores the most popular channel, however 92% of Gen Z also now buy on mobile apps either often or sometimes.

Source: Drapers

68% of Gen Z and millennials purchased pre-loved items at some point in 2023.

Source: Drapers

There are over **3.7m** active TikTok users in the UK, engaging with the app for an average of 41 minutes a day. Significantly, **60%** of global users are Gen Z.

Source: Fashionsfinest

USA

22% of Gen Z, the highest of any generation, relies on recommendations from influencers to build a relationship with a brand.

Source: Forbes Advisor

82% of Gen Z are more likely to purchase from brands that advocate for social equality.

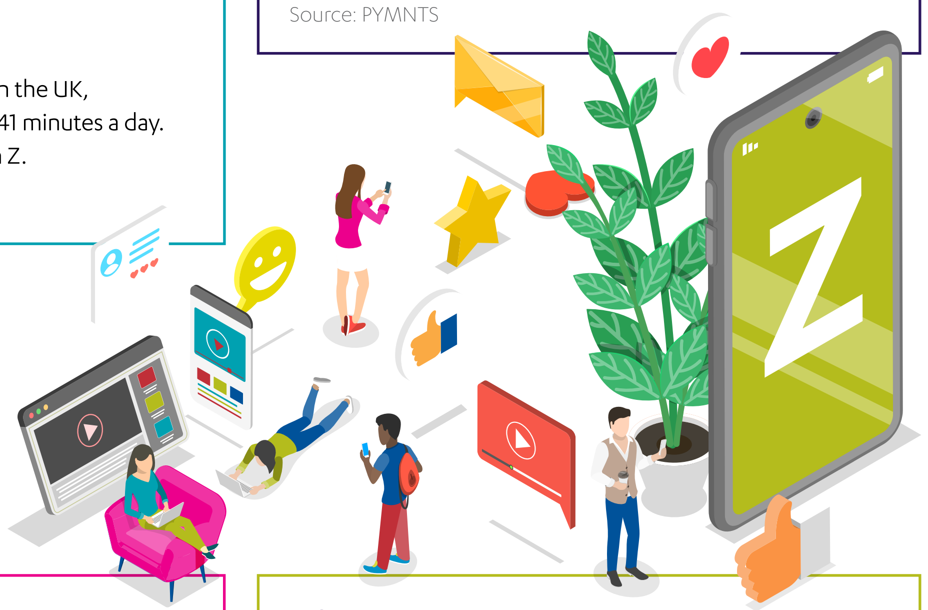
Source: Forbes Advisor

Consumers between **18** and **34** showed the greatest intent to spend more in 2024 compared to 2023, with Gen-Z viewing shopping as a form of entertainment.

Source: MMGNET Group

42% of Gen Z uses credit cards for payments, while it's **74%** for baby boomers and seniors.

Source: PYMNTS



REST OF WORLD/GLOBAL

For almost **3 in 10** Gen Z, social media is about finding inspiration for things.

Source: GWI

66% of Gen Z consumers are willing to share data with brands in exchange for personalised discounts or offers.

Source: Accenture

ASIA

72% of Gen Zers in Singapore prefer to shop online.

Source: Bain and Company

28% of Gen Y and **25%** of Gen Z revealed that new experiences from their product purchases can compel them to buy more, with foodservice having the most fertile opportunities.

Source: Retail Asia

UK and Europe

AI

More than **53%** of retailers said they would focus AI investment on their warehousing and distribution divisions, while **46.9%** said they were keen to improve their buying and merchandising through the use of AI.

Source: Retail Economics

25% of UK consumers agree AI is improving their shopping customer experience. And a further **44%** of shoppers say they don't mind if retailers use AI in their buying journeys, as long as the experience is positive.

Source: Retail connections

OMNICHANNEL

36% of consumers now make most purchases in physical stores, while another **36%** say they split their shopping between stores and online in equal measure.

Source: Retail Week

82% of businesses are confident physical stores will continue to play an important role in future commerce growth.

Source: Shopify

When given the choice, one survey shows young consumers in western Europe prefer to buy products in-store, compared to online (**57%**) compared to millennials (**53%**).

Source: YPulse

87% of customers think brands need to put more effort into providing a seamless experience across channels.

Source: Zipdo

COMMERCE

Supermarkets remain the four biggest European retailers in terms of turnover, for example Aldi took **€76bn** in turnover.

Source: Retail-Index

Buy now, pay later payments in Europe are expected to grow by **15.2%** on an annual basis to reach **US$219.2bn** in 2024.

Source: Business Wire

SUSTAINABILITY

Shopping more sustainably has contributed **£6.99bn** to the UK's economy in 2023, with Brits spending just over **£5.92bn** on second hand products and **£1.07bn** on renting items to use for a set amount of time, rather than purchasing them new.

Source: Barclays

European Gen Z's – those born after 1996 – are the ones most likely to buy pre-loved items, with **32%** of the clothes they wear and **36%** of the tech they own being second hand, on average.

Source: Amazon EU

The second-hand fashion market is projected to grow exponentially in the EU from 2021 to 2025. In 2021, the recommerce fashion market was valued at **€16bn**, and it is expected to almost double by 2025.

Source: Statista

RETAIL STATS

Snapshot of retail statistics (continued)

Global

USA

On average, **nearly two-thirds** of US consumers belong to one-to-five loyalty programs. However, most consumers use **50%** or less of their memberships – Deloitte

80% of retail executives expect their businesses to adopt AI automation – 2025 Analytics Insight

By 2025, it's estimated that around **37%** of Americans will have made a purchase through social media – Shopify

REST OF WORLD/GLOBAL

Consumer spending on TikTok has exceeded **$2.5bn** globally – Tidio

20% of luxury goods sales are expected to be made online by 2025 – Mckinsey

The online clothing rental market size is forecast to increase by **$1,56bn** between 2023 and 2027 – Technavio

ASIA

Over **70%** of internet users in Southeast Asia opting to purchase via smartphones, underscoring the region's readiness for social commerce – Redline

More than **50%** of consumers in the region have made purchases based on social media influencer recommendations – Redline

In China, there are already more than **800m** individuals engaging in shopping through social media platforms, and over half of the consumers in Southeast Asia have expressed interest in participating in social commerce – Statista

Other developments | UK and Europe

Here we round up some other developments which have occurred since our last publication of Retail Compass (in October 2023). In the first few developments, we look at hot topics for retailers and consumer brands in the UK and Europe. The final few developments should be of particular interest to retailers operating in (or considering operations in) Europe, specifically France, Germany and the Netherlands. As always, we recommend tailoring your consideration of these international topics to your own specific circumstances as there may be local law considerations which affect you.

Falling foul of unjustified threats with online complaint procedures

by Louise Morgan and Matt Jones

The recent Court of Appeal decision in *NOCO Co v Shenzhen Carku Technology Co Ltd* [2023] EWCA Civ 1502 provides a useful reminder for patent owners to take care when using notice and take-down procedures online.

A patentee used the Amazon IPR procedure, asserting that products infringed its patent, and requesting that Amazon remove these from sale. However, this was found to amount to a threat of infringement proceedings under s.70 of the Patents Act 1977, given the broad interpretation as to what amounts to a "threat". In this case, it was considered implicit in the request for the products to be removed from sale that if they remained for sale then infringement proceedings would be pursued through the courts.

The court summarised the applicable principles in deciding whether a notice (or other type of communication) constitutes a "threat of infringement proceedings" within s.70 of the Patents Act 1977.

Some key practical considerations are as follows:

- a threat is made under s.70 if the recipient of the communication understands that infringement proceedings will be brought against "another person" (not necessarily the recipient itself)
- a threat is not actionable if made in respect of primary infringement – eg the manufacture of the relevant product
- however, a request to a potential secondary infringer (eg a seller such as Amazon) to delist a product amounts to a threat, and will not be treated as a "permitted purpose" under s.70B(4)(a), and
- proceedings for unjustified threats can be brought by anyone "aggrieved" by the threat (here the seller of the goods removed by Amazon, rather than Amazon itself).

Tip

- Patent owners must take care when using notice and takedown procedures.
- Given the broad definition of what constitutes a "threat", remember that a specific request to remove products from sale, accompanied by an assertion of patent rights is likely to amount to a threat.
- Instead, consider whether a complaint can be made which falls within the exemptions eg making the complaint only against the primary infringer or simply notifying Amazon of patent ownership. Either is more likely to fall within a "permitted purpose" under the Patents Act 1977, and less likely to result in proceedings for unjustified threats.

Labelling of alcohol alternatives by Ciara Cullen and Harpreet Kaur

Responding to the rapid growth of the NoLo alcohol beverage category over the last few years, the ASA has announced that new rules and guidance on the advertising of alcohol alternatives will come into force on 14 May 2024. The rationale for the new rules is that the advertising of such beverages often uses imagery redolent of alcohol and refers to drinking occasions despite the limited alcohol content in the products themselves.

The new rules (amending Section 18 of the CAP Code on Alcohol) will apply to the advertising of beverages with an ABV of 0.5% or less, "that are intended to replace alcoholic drinks in contexts where they would normally be consumed" (eg non-alcoholic beer) (Alcohol Alternatives). The main points for advertisers to bear in mind are:

- **ABV**: the ABV of Alcohol Alternatives must be clearly presented with reasonable prominence in ads
- **target audience**: in line with rules on the promotion of alcoholic drinks, ads for Alcohol Alternatives are prohibited from being directed at, or designed to appeal to, individuals aged under 18 and must not prominently feature individuals who are, or appear to be, under 25
- **safety**: ads for Alcohol Alternatives are not permitted to depict scenarios where the consumption of alcoholic drinks would be inappropriate or unsafe, unless it is made clear in the ad that the product being advertised is an Alcohol Alternative.

Cross-promotion and shared branding: the new rules confirm the existing rules on cross-promotion of Alcohol Alternatives and alcoholic drinks or existing alcohol brands ie ads for Alcohol Alternatives which have "the effect of promoting an alcoholic drink" (whether accidentally or intentionally) must comply with existing rules on the promotion of alcoholic drinks. The guidance to the new rules clarifies how to avoid cross-promotion in ads for a shared-brand Alcohol Alternative, the crucial takeaway being that the primary focus of the ad must always be to promote the Alcohol Alternative not the existing alcohol brand and any reference to the existing alcohol brand must be in the context of, and clearly refer to, the Alcohol Alternative.

Tip

It will be interesting to see how this plays out in practice for existing alcohol brands with an Alcohol Alternative under the same brand name. We would suggest that you carefully consider your advertising campaigns and materials for your Alcohol Alternative to avoid inadvertently promoting the existing alcohol brand, thereby bringing the campaign and materials within the scope of the strict advertising restrictions on alcoholic drinks.

Other developments | UK and Europe (continued)

The lookalike product litigation trend continues

by Sarah Mountain and Rory Graham

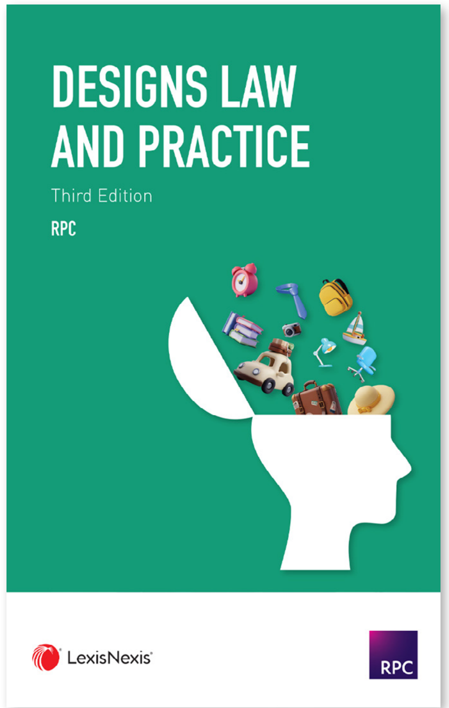
Retailers continue to look for an effective means of restricting the sale of lookalike products by discount brands. The UK courts have recently seen a spate of such actions based on trade mark infringement and passing off. In January 2024, the IPEC rejected Thatchers' claim against Aldi in relation to its cloudy lemon cider, finding that, although the overall appearance of the products was similar (to a low degree), there was insufficient evidence of a likelihood of confusion amongst the public (a now familiar stumbling block).

M&S brought a similar action against Aldi in 2021 over its Colin the Caterpillar cake which settled before it reached court. Hendricks had more success in its Scottish claim against Lidl, where it succeeded in obtaining an interim injunction to prevent the sale of Lidl's "Hampstead gin" on the basis that it took unfair advantage of Hendricks' trade marks under s.10(3) Trade Marks Act 1994 (**TMA**). Notably though, the judge again found insufficient evidence of customer confusion to support infringement under s.10(2) TMA or passing off.

Tip

Where a product's appearance is sufficiently distinctive, retailers should consider applying for registered designs, to sidestep consumer confusion issues.

M&S' design rights claim against Aldi over a light-up "snow globe" gin bottle may present another option to retailers. In a judgment handed down this month, the Court of Appeal upheld a judgment that Aldi's product infringed the rights in M&S' bottle. The decision may result in more retailers seeking to protect products as designs, as this neatly sidesteps the consumer confusion issue. Similar results have also followed in claims based on copyright infringement, suggesting that trade marks and passing off are not the most viable battleground when it comes to copycats. Meanwhile, lookalike litigation is trending internationally. In Tokyo, Uniqlo has launched proceedings against Shein, alleging copying of its viral "round mini" bag.



RPC's Designs Law & Practice (Third Edition) has been published and is available for purchase here.

How unified is the UPC? Is the early evolution of UPC decisions tied to its consistency and will Ocado keep its documents under wraps?

by Sophie Parkinson and Matt Jones

The Unified Patents Court (UPC) started accepting infringement and validity proceedings on 1 June 2023. UPC infringement claims are brought in the UPC division where the infringement is taking place, or where the defendant is located.

AutoStore and Ocado had three cases pending at UPC relating to Ocado's use of robo-assisted warehouse automation systems. However, all legal disputes were settled outside of court in July 2023 and all patent claims were withdrawn.

The UPC's Nordic-Baltic Regional Division granted a third-party access to claim documents (departing from the Munich Division's recent rulings) but permitted Ocado to appeal. Ocado asked the UPC's Appeal Court to consider whether the lower court was right in allowing limited third party access to the patent dispute information. The Appeal Court suspended the third party's access pending its decision and separately prevented two law firms from intervening for lack of "a direct and present interest in the grant by the Court of the order or decision". The Appeal Court also confirmed that (third) parties require representation to request access to court documents, which may decrease transparency.

Ocado awaits the Appeal Court's decision on releasing the case documents.

Patent litigators may shy away from UPC proceedings more generally if the process and reasoning for decisions remains unreconciled between the UPC divisions – as outcomes and decisions may be harder to predict. Hopefully the Appeal Court will resolve some uncertainty, at least regarding access to documents.

Tip

Retailers should be aware that documents relating to patents may become available to third parties if they enter legal proceedings.

New regulations to tackle HFSS promotions and advertising

by Courtney Brotherson and Rathi Thiagamoorthy

The UK Government has introduced new regulations which aim to restrict the promotion and advertising of high-fat, salt or sugar (**HFSS**) food and drink.

The regulations, initially planned to come into force in January 2023, will now be effective from October 2025. The changes include the introduction of a 2100 watershed on HFSS product TV adverts, which applies to all TV programmes irrespective of audience age and to all UK on-demand programme services (**ODPS**) regulated by Ofcom. There will also be a restriction on paid online advertising of HFSS products which will apply to both UK and non-UK regulated ODPS. Ofcom and the ASA will act as co-regulators.

Businesses will need to adhere to the restrictions based on defined product categories and nutrient profiling scores as outlined in the government's consultation guidance. Certain exemptions apply to the restrictions, such as:

- SMEs
- online-only audio content
- broadcast radio
- B2B online advertising
- online transactional content
- brand advertising which does not feature identifiable HFSS products
- a brand's "owned media" including blogs, websites and social media channels which they have full editorial control and ownership over.

Tip

Given the delays in implementation to date, broadcasters, providers of ODPS and advertisers will no doubt have started to address these changes in their working practices. However, they will need to stay alert – as the government plans to implement secondary legislation which will set out further details on the product categories in the coming months.

<< Home >>

Other developments | UK and Europe (continued)

The ICO issues a blog covering how retailers can most appropriately share information to combat crime by Joe Lippitt and Kiran Dhoot

The ICO has issued a blog in which it considers different examples of data sharing which are likely to be considered appropriate and inappropriate when retailers aim to clamp down on crimes such as shoplifting. A key concern highlighted is the need to enable businesses to combat crime whilst also allowing innocent customers to shop without experiencing undue intrusion into their personal lives.

In line with the need to ensure processing is proportionate and necessary for the relevant purpose under UK GDPR, personal data, such as that contained in images from CCTV footage, should only be shared with third parties who need it in order to prevent and detect crime. For example, it is likely to be appropriate to share CCTV images with the police, site security staff and other store managers in the same shopping centre.

However, it is likely to be less justifiable to share those same images on social media platforms, attach them to lampposts in hard copy in the local area, or display them in staff rooms where any individual who enters the room can view them. Furthermore, where such sharing occurs with other local businesses, it is recommended that a data sharing agreement is put in place implementing appropriate deletion protocols and mandating that only secure work devices are used to share and receive images.

Tip

Businesses should review staff handbooks to ensure that they do not reference or suggest inappropriate types of data sharing and update them to clarify what type of data sharing may be appropriate in the event a store needs to take further measures to combat crime.

ICO updates guidance on Transfer Risk Assessments by Joe Lippitt and Dan Jackson

The Information Commissioner's Office (ICO) recently published updates to its guidance on Transfer Risk Assessments (TRAs) (see here).

In most cases, organisations must conduct a TRA before they make a "restricted transfer" of personal data (ie a transfer of personal data to data importers located outside the UK). Conducting TRAs can be time consuming and involve a complex risk analysis process.

TRAs help organisations ensure that, in the specific circumstances of their restricted transfers, the chosen transfer mechanism (eg, the UK International Data Transfer Agreement or BCRs) will provide appropriate safeguards, and effective and enforceable rights for the people whose personal data is being transferred.

The ICO has recently updated its guidance to simplify the process of conducting TRAs for organisations transferring personal data from the UK to the US.

In particular, the ICO has clarified that organisations may rely on, and incorporate, the analysis produced by the Department for Science, Innovation & Technology (DSIT) for the purposes of assessing whether the US provides an adequate level of protection for personal data (instead of having to conduct this assessment themselves).

This update will help to significantly streamline the TRA process for personal data transferred from the UK to the US.

Tips

- When relying on the DSIT's analysis for the transfer of personal data from the UK to the US, organisations must regularly review their TRAs and update them in line with any future updates to the DSIT's analysis.
- Organisations should also be aware that, where a US organisation is certified as a participant in the EU-US Data Privacy Framework (**DPF**) and the UK Extension to the DPF (searchable here), then they will be able to transfer personal data to such organisations without the need to conduct a TRA or to put in place appropriate data transfer mechanisms (such as the SCCs or UK IDTA).

OTHER DEVELOPMENTS

UK Government plans consultation to address fashion and textile waste – are take back schemes looming? by Sophie Parkinson and Ashleigh Fehrenbach

The volume of fashion and textile waste is enormous. 92m tonnes of clothing are burned or dumped globally each year (see here) (336,000 tonnes, or £140m, in the UK alone (see here)). That's the equivalent of one rubbish truck of clothes going to a landfill each second (see here).

Beyond textiles, other resources are wasted in the manufacturing process. 20,000 litres of water are required to make just 1kg of cotton. For some perspective, 2,700 litres (enough to meet an adult's drinking requirements for nearly two and a half years) are needed per t-shirt (see here).

"Needle-less" to say, the UK Government has identified targeting textile waste as a priority area and plans to launch a consultation later this year. The aim of the consultation is to identify avenues to reduce the use of resources and increase reuse, repair and recycling to achieve a circular economy for the fashion and textile industry (see here). For example, requiring businesses over a certain size to offer "take back" systems for used textiles or how online-only businesses can be encouraged to partner with bricks and mortar companies to implement take back schemes that are cost-proportionate (see here).

Tip

Keep an eye out for the 2024 consultation and have your say on the government's considerations on take back systems and other environmentally conscious initiatives.

Other developments | UK and Europe (continued)

EU carbon border tax arrives and the UK is next

by Adam Craggs and Michelle Sloane

The European Union's Carbon Border Adjustment Mechanism (**EU CBAM**) began its gradual phasing in period on 1 October 2023. The regulations are to be fully implemented by January 2026.

The stated aim of the EU CBAM is to tackle 'carbon leakage' which is a phrase used to describe the risk that carbon costs could lead businesses to move their operations to countries with less stringent carbon pricing mechanisms.

Each year, from 1 January 2026, EU importers must purchase CBAM certificates, which act as an instrument through which importers can pay for the price of the emissions embedded in the goods they import.

By 31 May each year, the EU importer is required to declare the quantity of goods and the embedded emissions in the goods imported in the preceding year. At that point the importer surrenders the corresponding number of CBAM certificates.

Currently, the EU CBAM applies to six sectors which are considered to be carbon-intensive: cement; electricity; fertilisers; irons and steel; aluminium; and hydrogen.

On 18 December 2023, the UK Government announced the UK Carbon Border Adjustment Mechanism, to be implemented by 2027. Further details on the design and delivery of a UK CBAM will be subject to consultation later this year.

Tips

- Complying with CBAM is a major undertaking, requiring cooperation between different parts of a business and the collection of internal and external data, much of which has not been previously collected.
- The amount of embedded emissions in the products that UK businesses sell impacts the additional costs that any EU importers in the supply chain will bear through CBAM certificates. This will inevitably have an impact on the price of products and the ability of UK businesses to compete in the global market. Therefore, a key consideration for UK businesses will also be how to reduce those embedded emissions.
- In addition, now that the intention to implement a UK CBAM regime has been announced, it would be prudent for UK importers to consider how they might be impacted by, and able to meet, future obligations and to audit their current supply chains accordingly.

OTHER DEVELOPMENTS

New requirements for digital platforms to collect and report seller information to HMRC

by Jasprit Singh and Adam Craggs

New regulations require certain UK digital platforms to report information to HMRC relating to the income of sellers of goods and services on their platform and to provide a copy of the information to the taxpayer. HMRC will then cross-reference it with their records to check the tax position and exchange the information with other participating tax authorities for the jurisdictions where the sellers are tax resident.

The new regulations serve the government's stated policy objectives of helping taxpayers to pay the correct tax first time and tackle tax evasion. These rules, originating from the Organisation for Economic Co-operation and Development (OECD), mirror similar rules already brought into force by EU Member States. For the UK, these rules came into effect on 1 January 2024 with the first reporting due from January 2025.

This measure will affect digital platforms in the UK that facilitate the provision of services or the sale of goods by UK or other taxpayers and will affect UK taxpayers who provide services or sell goods on digital platforms.

Tips

We recommend that affected digital platforms and UK taxpayers, who provide services or sell goods on digital platforms, consider the new requirements carefully. For example:

- affected digital platforms should ensure they allocate sufficient resources to meet the collection, verification, and reporting requirements. This may require the collection of new information or extending the scope of information already collected to ensure everything is covered.
- UK taxpayers who provide services or sell goods on digital platforms should review the copy of information reported to HMRC and cross-check this with their own records to ensure the information reported is accurate.
- UK taxpayers who provide services or sell goods on digital platforms should consider whether they are eligible for the exemption applicable to 'occasional' sellers.

Other developments | UK and Europe (continued)

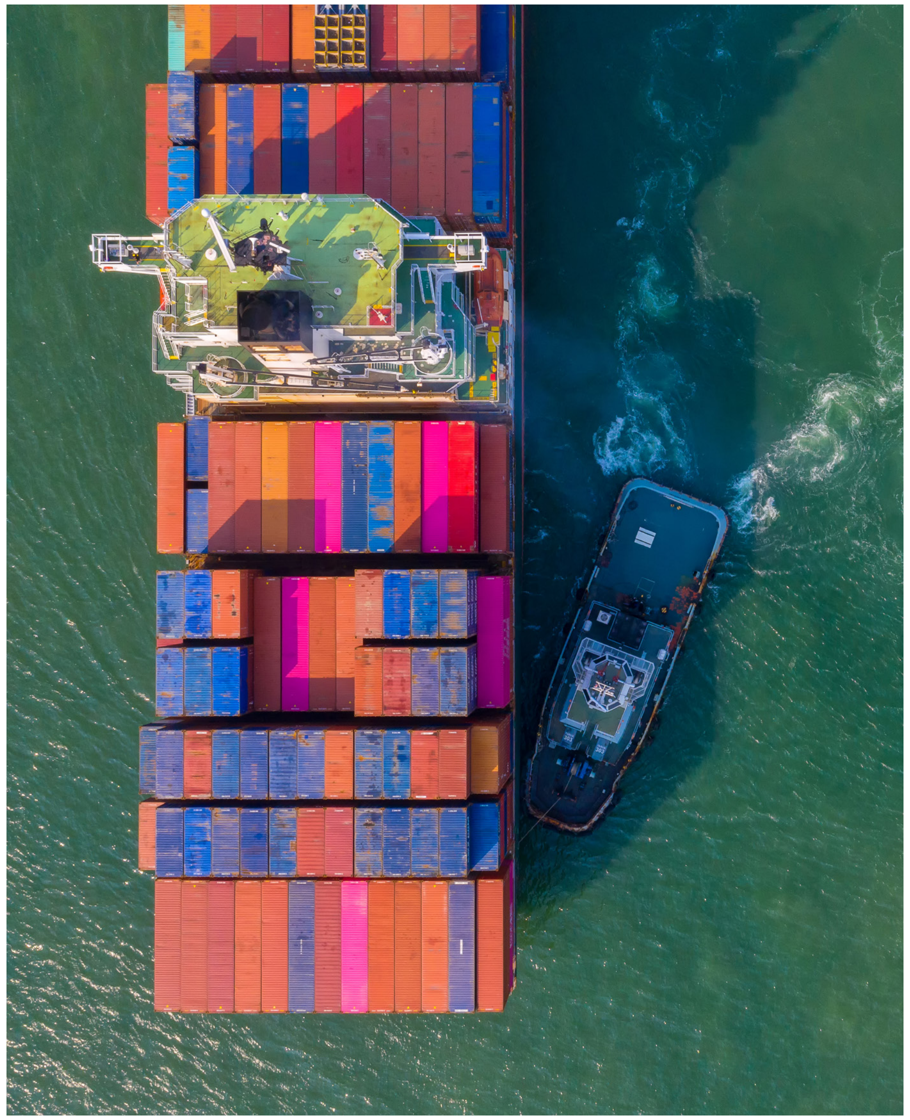
Customs: what is the Advance Valuation Ruling Service? by Alexis Armitage and Michelle Sloane

The Advance Valuation Ruling Service (**AVRS**) was first launched by HMRC in April 2023. Although not mandatory, the AVRS enables traders to apply for a legally binding Advance Valuation Ruling (**AVR**) from HMRC on the customs value of their goods, providing legal certainty that the correct valuation is being applied. In addition, the AVRS is now also available to agents who represent traders. The AVR is valid for three years.

The accuracy of valuing goods crossing the UK border is essential, as the value will relate precisely to the duties and taxes payable on imports. The trader is responsible for ensuring that the correct valuation method is used when working out the customs value of goods imported into the UK.

AVR's are particularly useful for businesses who will be importing the same goods over a long period of time.

To read more on AVRS and to apply, see here.



Tips

Key things to note about the AVRS

- Traders/agents need to apply for a ruling before all customs procedures have been completed – decisions cannot be made retrospectively.
- HMRC should confirm the application for a ruling has been accepted within 30 days.
- The correct valuation method should be confirmed within 90 days. If you do not agree with HMRC's decision, you can request a review by an independent HMRC Officer or you can appeal directly to the First-tier Tax Tribunal, who are independent of HMRC.
- Any AVR decision lasts for three years.
- A separate application will need to be completed for each type of good that requires an AVR decision.
- The AVR decision will refer to the name and address of the business or person who holds the ruling – this is who has the legal right to use it – AVR decisions are non-transferable.

The continuing rise of retail fraud and crime by Michelle Sloane and Sophie Yantain

Retail fraud and crime is on the rise and has reached unprecedented levels, now estimated to cost the country £7.9bn per year.

In recent years, retail fraud has extended beyond shoplifting; retailers are increasingly becoming victims of complex and sophisticated fraudulent activities aimed at stealing data. Skimming devices and radio-frequency identification (RFID) readers are used to capture PIN numbers and payment details from customers, and criminals are also employing various methods to steal or manipulate gift cards before the owner of the gift card is able to use it.

Shoplifting and simpler forms of retail fraud continue to grow with the cost of living crisis undoubtedly a factor in the increase in retail crime. There is also an increase in retail organised crime with 'shoplifting to order' and repeat offenders coordinating hits on multiple stores. Unfortunately, due to resourcing, the retail sector is not finding any assistance from the Police and many have given up reporting crime to the authorities. The inaction by the authorities is driving up crime as shoplifters believe they will not suffer any consequences.

Tips

Given the multifaceted threat posed by retail fraud and crime, it is important for retailers to be mindful of the different tactics criminals are using and ensure they have robust systems in place to protect their businesses.

Retailers need to have sufficient deterrents in place to prevent shoplifting such as; security tags on goods, anti-theft detectors, security officers at the door and walking around shops, undercover security guards, security cameras and being well staffed at peak times when the store is at its busiest.

Preventing fraud aimed at stealing data imposes challenges given its complex nature and so retailers should ensure that they have secure software to protect consumers' data and privacy.

The roadmap for solar energy is paved with benefits for commercial property owners by Jon Ely and Samuel Wood

Commercial property is central to the government's Solar Taskforce and Solar Roadmap which together aim to harness the untapped potential of rooftop and ground mounted solar capture devices to reach the fivefold increase in solar PV deployment by 2035.

Solar capture devices are being installed on unused rooftop and/or ground space at commercial sites, such as the installation of over 700 solar PV panels by Greencore Homes at their factory in Oxfordshire set to reduce electricity costs by 18%. Parallel to physical installation are investments in companies such as Metris Energy who recently launched their proprietary AI powered platform allowing property owners to easily assess, efficiently utilise, and/or monetise the energy captured by solar capture devices installed on their commercial property.

Many retailers will be considering how to take advantage of the benefits across their portfolios, including:

1. energy savings and asset attractiveness – cheaper energy costs coupled with the ability to offer discounted energy to current and/or prospective tenants increasing the commercial attractiveness of the property
2. revenue stream – a new revenue stream utilising otherwise unused space to capture and monetise solar energy through the sale to current and/or prospective tenants or to the National Grid via the Smart Export Guarantee (subject to compliance with conditions)
3. ESG – increases to both the ESG rating of the property and the owning entity, and
4. tax benefits – installation of solar panels is subject to the Annual Investment Allowance with an additional 50% first year allowance for integral features including solar panels (subject to compliance with conditions).

Other developments | UK and Europe (continued)

Proposed changes to UK listing regime

by Karen Hendy and Rosamund Akayan

On 20 December 2023, the FCA published a consultation paper setting out proposed reforms to the UK listing regime, which will affect both listed retailers and those considering a listing on the London Stock Exchange. The proposed reforms are designed to create a simpler UK listing regime that is attractive to a wider range of companies.

The key proposed changes to the existing listing regime include:

- the current premium and standard listing segments will be replaced by a single listing segment for equity shares in commercial companies, with reduced eligibility criteria (compared to current premium listing requirements)
- commercial companies will no longer need shareholder approval to carry out significant transactions or related party transactions.

The FCA has also published draft new UK Listing Rules and aims to publish the final UK Listing Rules in a policy statement in H2 2024, with a two week period anticipated between publication and implementation.

Tips

Existing premium listed companies will have less onerous ongoing obligations in relation to significant transactions and related party transactions, but should consider whether any modifications to systems and controls are required to reflect the new rules.

Companies considering listing may want to time their applications to ensure that the new reduced eligibility criteria will apply.

Reforms to holiday pay and entitlement for certain workers

by Patrick Brodie and Ellie Gelder

In the Autumn 2023 edition of Retail Compass, we outlined potential reforms to EU retained employment law, including to the calculation of holiday pay. Since then, the government has brought into force The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023, which, amongst other changes, introduces two important holiday pay reforms for irregular hours workers and part-year workers.

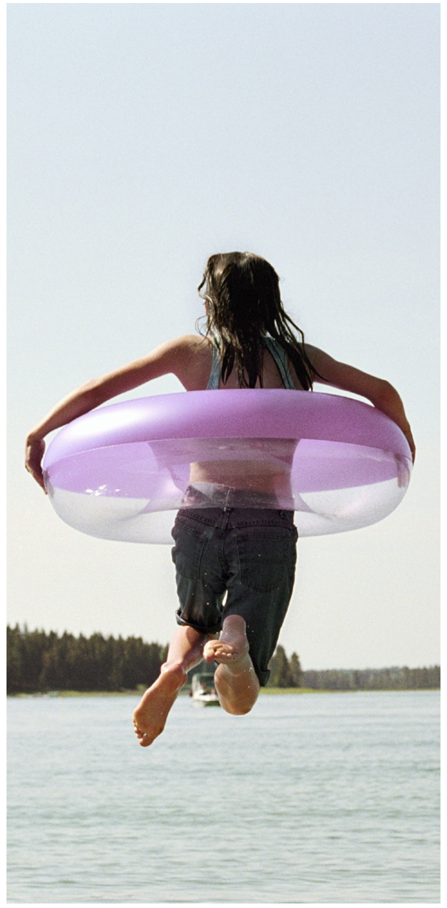
The first relates to holiday pay calculation. For workers with holiday years that begin on or after 1 April 2024, holiday pay entitlement is calculated as 12.07% of normal remuneration for the hours worked in the relevant pay period. The intention behind this change is to ensure that workers are paid by direct reference to the hours that they have worked.

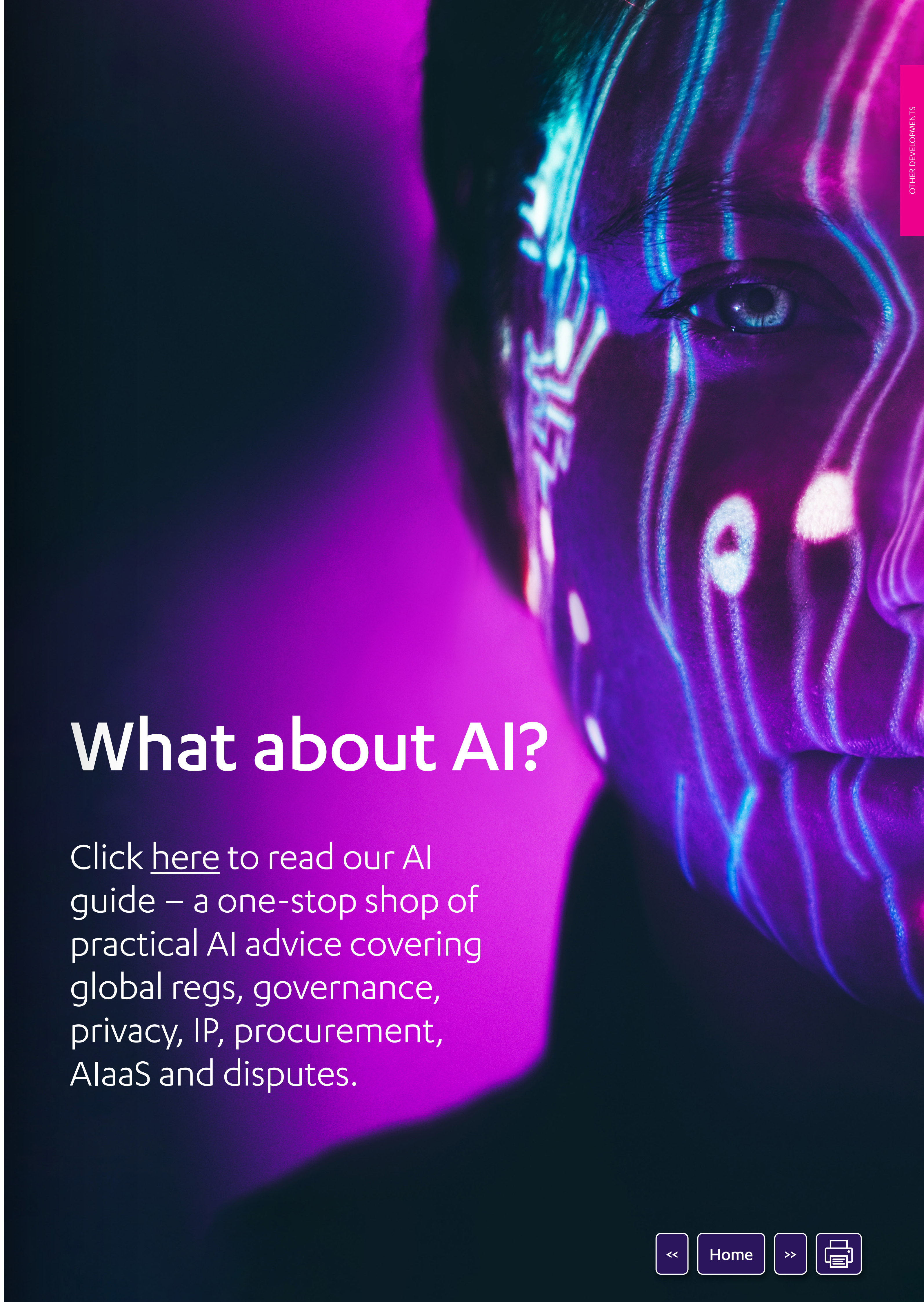
The second important change is that “rolled-up holiday” pay for part-time workers and those who work irregular hours will also be allowed, if the rolled-up element is clearly identified. This also applies to holiday years from 1 April 2024.

Rolled-up holiday pay enables employers to effectively include an amount for holiday pay on top of the worker’s hourly rate in their regular pay packet, as opposed to paying their holiday pay when the worker takes their annual leave. Previously, rolled-up holiday pay was unlawful due to health and safety concerns that workers might choose not to take leave because they would potentially earn more holiday pay by staying at work and working longer hours.

Tip

Retailers and consumer brands should liaise with payroll departments to ensure awareness of and compliance with these reforms. Bear in mind that these changes apply only to irregular hours workers and part-year workers.





Other developments | Spotlight on USA

In this section we are delighted to welcome contributions from our partners within the TerraLex network, who consider some key legal, regulatory and policy changes being faced by retail and consumer brands in the US, in particular "Right-to-Repair" laws, local leasing considerations and the increased scrutiny of Resale Price Maintenance agreements.

Whilst the following is intended to offer a helpful flag, we recommend tailoring your consideration of the changes to your own specific circumstances as there may be other local law considerations which affect you (and taking local advice where necessary).

These articles should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.

What do US Right-to-Repair laws mean for retailers and manufacturers?

by Kyle W LeClere of Barnes & Thornburg LLP

"Right to Repair is unstoppable and coming to a state near you. Lawmakers everywhere are seeing that Right to Repair is common sense: You buy a product, you own it, and you should be able to fix it. With 25 states considering Right to Repair legislation in the U.S., it's only a matter of time before Right to Repair is the law of the land."

That quote is from Kerry Maeve Sheehan, U.S. policy lead for iFixit, an American e-commerce and how-to website that sells repair parts and publishes free online repair guides for consumer electronics and gadgets.

The objective of right-to-repair legislation is to make it cheaper and easier for consumers to fix their products by requiring manufacturers to share product information such as parts lists, repair guides and replacement parts. The idea behind right-to-repair laws seems simple and fair enough. However, what are the implications for retailers and product manufacturers?

Regarding the economic impact, the answer may lie in the type of product being manufactured. For example, some suggest products that do not cost the manufacturer much to make may be sold to retailers at lower prices. The thought behind this is that if the product does not cost much, a consumer may choose to buy a new product rather than spend money repairing it. Alternatively, products that are expensive to make may see an increase in the sale price, but could come with a free repair offer to consumers, raising the value of the product in their eyes. Accordingly, the economic impact of right-to-repair laws may not be much of an impact at all.

However, in response to proposed right-to-repair legislation, product manufacturers have raised other valid concerns, consumer safety being one of them. For example, when an appliance needs to be repaired, manufacturers offer educated, trained and certified repair technicians to ensure products are repaired properly and safely. If a consumer instead attempts a repair after simply watching an online video or two, the result could prove costly, and even dangerous.

When a certified repair technician is hired, typically records are kept showing the repair performed. Once consumers are provided free reign to repair their owner products, will those repairs be tracked and, if so, how and by whom?

This disconnect could create significant issues in litigation. If the consumer's improper repair of a product causes it to fail, for example, and that failure results in property damage, the consumer's insurance company may seek subrogation to recover for the loss. If the insurer is unaware the consumer had previously improperly altered the product, it may wrongly pursue the product retailer or manufacturer.

Therefore, while right-to-repair legislation's economic impact ultimately may not be vast, the unintended consequences of this legislation may have a significant impact on retailers and manufacturers.

Scrutiny of Resale Price Maintenance Agreements

by Zarema Jaramillo and Sydney Kaplan of Lowenstein Sandler LLP

Since 2007, resale price maintenance (RPM) agreement – agreements between manufacturers, distributors, and/or retailers that set a minimum or maximum price for a given product – have been analyzed under the so-called "rule of reason" rather than viewed as automatically unlawful (ie, per se). Under the per se rule, courts categorically presume that an agreement is illegal because it acts as an unreasonable restraint on trade, and courts will not hear any justifications for the agreement. Under the rule of reason standard set by the U.S. Supreme Court in Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007), courts must weigh the pro-competitive justifications for a minimum RPM agreement against the likely anticompetitive effects of such a restraint, while factoring in the market position of the parties at issue.

Since the Supreme Court's decision in Leegin only interpreted a federal antitrust law, the Sherman Act, states are not bound by this decision, and any state can pass and/or interpret a law with a more restrictive view of RPM agreements. While most states adhere to the Leegin standard and apply the rule of reason when analyzing minimum RPM agreements, a handful of states have adopted unique laws or interpretations that manufacturers, distributors, and retailers should keep in mind if they intend to do business in these states.

In 2009, Maryland enacted legislation that expressly made minimum RPM agreements per se illegal, which directly contrasts the rule of reason standard set out in Leegin. Even though this law has been in place in Maryland for nearly fifteen years, it has only been used in a limited number of cases to date. One of those cases resulted in Johnson & Johnson Vision Care, Inc. settling with Maryland by (1) assuring the state that it had discontinued its use of minimum RPM agreements for its sale of contact lenses and (2) paying a $50,000 civil penalty. But that may change in the coming months, as indicated recently by the Chief of the Maryland Attorney General's Antitrust Division at an American Bar Association event, who noted that Maryland has ongoing investigations into RPM agreements and signaled more aggressive enforcement focused on "the substance, not just form" of agreements.

While Maryland is the only state that has enacted a "Leegin-repealer" statute to date, retail industry participants should be wary of how other states will view minimum RPM agreements, especially New York and California. For example, New York's antitrust law, the Donnelly Act, makes minimum RPM agreements unenforceable – but not unlawful. California courts have reached differing conclusions as to whether California's antitrust law, the Cartwright Act, requires courts to assess minimum RPM agreements as per se illegal or under the rule of reason.

Regardless of whether a state's laws require application of the rule of reason or per se illegality when looking at RPM agreements, manufacturers and their distributors should still be very careful when entering into RPM agreements, especially minimum RPM agreements. It is important to remember that even under the rule of reason, RPM agreements can be found to be illegal restraints of trade, so manufacturers and distributors should consult with antitrust counsel to determine if their pricing policies comply with U.S. federal and state laws.

Other developments | Spotlight on USA (continued)

Don't ignore local rules in the US when leasing locations

by Matthew Lynch and David Kaufman of Nixon Peabody LLP

Many international retailers entering the United States market take our national anthem phrases to heart — "the land of the free and the home of the brave." Frequently, clients feel that all they need to do is find a great location and they can set up shop with limited restrictions.

However, local regulations in the US for operating retail, food/beverage, consumer service, and other businesses that interact with the public can be quite cumbersome and require expert advice.

Many municipalities have planning codes (also called zoning) that control what businesses can operate where. Just because a site you select may have housed a similar business in the past, it is not guaranteed that your business will be approved to operate there. Codes could have changed since the last business began operation or there could be subtle differences in your business model or offerings. There also are significant regulations in construction and signage, which are often handled by different municipal departments, that could affect the execution and success of your retail plan.

Businesses that anticipate selling alcohol, cannabis products, or medical services face additional scrutiny. These products require additional licensure and could even require, in the case of medical services, supervision or possibly ownership of the business by a licensed medical professional.

In addition, many retail properties are owned by large national property owners that require the starting point for any negotiations be the landlord's form of lease which tends to be very pro-landlord. As such, the retailer should be prepared for a lengthy negotiation period when leasing from these types of owners.

In addition, many US retail properties are subject to mortgages that, if foreclosed upon, would result in the termination of the lease. So it is prudent for any retailer to confirm whether there are any mortgages over the relevant property, and if so, request an agreement from the landlord for the holder of the mortgage that would protect the retailer in the event of a foreclosure.

Although it is said success in the retail business often depends on location, location, location, you should still consult with a lawyer to determine if your preferred location is right for your business.

OTHER DEVELOPMENTS

Special feature

A full circle moment: implementing sustainability initiatives in your retail business

Roshiny Panchalingam, Selfridges

Source: Photo by Alexander Barhon on Unsplash

Roshiny is a mid-level, commercial lawyer currently working in the Selfridges legal team. Roshiny got her first taste of an in-house legal role in the retail sector from a secondment at leading British beauty brand Charlotte Tilbury during her training contract. Following qualification, she spent a few years in private practice honing her drafting skills, before re-entering the retail sector as a legal counsel at luxury online retailer Net-A-Porter. Having now worked in three varied and dynamic retail businesses, we sat down with Roshiny to pick her brain on the retail sector's focus on sustainability.

Why is sustainability so important to the retail landscape of today?

In 2024, the forward-thinking retailer is conscious of the retail sector's impact on the environment. A natural and positive way to take ownership of this is to support the process of extending the life of products to counteract overconsumption, whilst still delivering on exciting retail experiences for customers. Recognising that sustainability is not a "trend" and instead thinking holistically about sustainable practices and how to imbed these into a retail business for the long-term is more likely to gain the trust of customers who expect their chosen retailers to tackle these issues.

For Selfridges in particular, sustainability has been an intrinsic priority for over a decade, from banning fur in 2005, to our Project Ocean initiative in 2011, to the introduction of circular retail models into our business over the last few years.

Could you tell us a bit more about what Selfridges is doing in relation to the circular business models you mention?

We have quite a few options for our conscious consumers that all sit under our well-coined initiative "Reselfridges":

- **resale** – we offer the opportunity to sell pre-loved handbags back to us in exchange for cash or gift cards to spend in-store or online
- **pre-loved** – customers can purchase pre-owned luxury items both online and in-store
- **rental** – womenswear and accessories from the leading brands and labels at Selfridges can be rented online via selfridgesrental.com which offers complimentary deliveries, returns and dry-cleaning services. Rental of our top brands and labels are also available in our London Oxford Street store
- **refill** – numerous beauty brands offered online and in the Selfridges beauty halls offer refill options - from refillable lipsticks to haircare, fragrance and skincare products - so that customers can utilise existing beauty packaging over and over
- **repair** – we have multiple partners in-store that offer repair options on ready-to-wear, shoes and bags to increase the lifespan of existing wardrobe staples with a quick fix and avoid throwing away items prematurely.

Great to hear that Selfridges has managed to embrace these sustainability initiatives for its customers. Presumably, from a legal perspective there are important considerations to bear in mind when launching such business models?

Absolutely. To start with, legislation and regulation is a little behind the concept of the circular economy in the retail sector. In 2024 and beyond, we will see the introduction of various legislation that is pertinent to the sustainability sector; one of the most relevant being the DMCC bill, which brings about a plethora of consumer-law updates and a potential game-changer for retailers making product, environmental and advertising claims.

On the other hand, the law hasn't quite caught up with the second-hand market so the areas of pre-loved and re-sale is perhaps yet to be enshrined in law.

From an IP perspective, if you're thinking of setting out a long-term strategy for your sustainability initiative, registration of any name as a trademark will be an important consideration to ensure adequate brand protection. It's always useful to get a realistic set of instructions from stakeholders on the longevity of business use cases as often names and ideas can take off at speed within a business so securing appropriate IP protection at the outset is crucial.

Thinking about how you wish to authenticate your products is another key legal consideration. Is this something you will achieve in-house by a manual process, or will you partner with external third parties for a helping hand? If the latter, it's important to nail the contractual documentation listing the services the third party will carry out and crucially, who will be liable if issues with the authentication processes result in some form of loss to your business or customers. Another significant consideration is the language that will be used to describe the authentication process to your customers (both in-store and online), to avoid misleading customers on the item's origin, especially if absolute claims around authenticity are made.

Separately, it's important to set out the scope of any circular models for your customers via customer-facing terms and conditions to govern how customers can purchase/utilise those models. For example, for customers purchasing pre-loved items, will those purchases be subject to your usual returns policy, or will you develop a separate returns policy? Pre-loved items are often imperfect with defects, so it becomes more difficult to establish the base line for the goods being of "satisfactory quality" and "fit for purpose" in accordance with the requirements of the Consumer Rights Act 2015. If returns on such items were offered, a key consideration would be how to document defects at the point of sale, to verify whether fault claims that come to light following sale were in existence at the point of sale.

You've given us all plenty to think about on the legal side! Presumably, there are also a lot of practical and commercial considerations?

That's right. Working at the cutting edge of where retail meets innovation often means operating and advising in the wild west in terms of little to no black letter law guidance. This is where it's really key for in-house lawyers to be as practical as possible. For example, the central principle that underpins consumer law is "fairness" and not misleading consumers, so investing the time to model your policies, comms and processes for new circular business models with that in mind should steer you in the right direction and minimise potential deviation from established practices if and when new legislation comes into force.

Even when legislation is in place, in-house lawyers should have a firm grip on balancing this with the businesses risk appetite and the practical considerations of introducing a new concept or initiative into the business.

There is also plenty to consider on the operational side when it comes to circular models. For example, when running a rental service, having a well-oiled process for managing rentals is key to a successful service. Do your terms and conditions and your operational processes address what happens if rental items are not returned, or returned in an unsatisfactory state? Similarly, it's important to be crystal clear on how payment will be taken before and after an item is rented so customers understand how they will be charged. Are processes in place to check that the same item is returned after each rental?

Similarly, when offering pre-loved items for sale, managing customer expectations is also an important consideration. Although customers tend to expect imperfection with resale items, it's worth identifying these at the outset to avoid any doubt. For example, assigning pre-loved items a quality category and providing a copy in-store or online of clearly defined categories of pre-loved items with a detailed explanation of what these categories typically mean in terms of the state and quality of such items. Another way to achieve this is by presenting the customer with a list and/or up-close photographs of item defects at the point of sale.

Any other general learnings?

Being an early adopter of any new initiative certainly comes with a fine balance of risk and reward. It can be really rewarding to introduce your customer base to an original way of shopping by pioneering a new circular model into the market, but always keep one eye firmly on the risks of doing so. One example of this is relationship building with third party suppliers in the sustainability space. As circular models are a relatively new initiative, often third-party suppliers in this area lack governance and process in scaling-up an initiative, despite being highly sought-after experts in the market. It's therefore prudent for stakeholders to involve the legal team in conversations with these suppliers at an early stage to spot risks, challenge the longevity of an initiative and help to create a workable process for your business.

INSIGHTS AND OPINIONS

<< Home >>

Special feature

Environmental sustainability: a snapshot of a changing regulatory landscape

Sophie Tuson, RPC

The ESG regulatory landscape is evolving – and fast – in response to increasing pressure from shareholders, regulators and consumers. These changes are particularly acute for companies in the retail and consumer brands sectors which typically have complex global supply chains, rely heavily on natural resources and are consumer-facing. Sophie Tuson charts the key legal developments in the UK and EU across the product lifecycle and flags practical considerations for businesses.

Legal developments

Sourcing raw materials

New legislation is in force, or imminent, which will require companies to understand their interface with nature in their supply chains, particularly in the sourcing of raw materials, and take meaningful action to reduce, and report on, their impacts.

EU

Under the EU's new Deforestation Regulation (**EUDR**), from 30 December 2024 it will be unlawful for EU companies to import, export or sell forest-risk products (cocoa, coffee, oil palm, rubber, soya, cattle and wood) into/ from the EU unless they are 'deforestation-free' – meaning they have been produced on land that has not been converted from forest to agricultural use since 31 December 2020 and that they have been produced in compliance with applicable local laws. Companies will need to conduct comprehensive due diligence of their supply chains and submit a due diligence statement confirming this (note SMEs can benefit from certain exemptions or reduced requirements). Certain companies (typically large or listed companies meeting specific thresholds) may also need to start disclosing their material nature-related impacts, risks, dependencies and opportunities, including those linked to deforestation, as part of new annual reporting requirements under the Corporate Sustainability Reporting Directive (**CSRD**) (see our blog here).

UK

In the UK, the government has proposed its own set of anti-deforestation rules under the Environment Act 2021 (exact timing tbc). The rules will require companies with a global annual turnover of >£50m and which use >500 tonnes of beef, leather, cocoa, palm or soy (or any derived products) per year in their UK commercial activities to conduct due diligence to ensure those products were produced in compliance with relevant local laws. The UK requirements are limited to 'legality' only and are therefore narrower than their EU counterpart. Businesses with commercial activities in both the UK and EU will need to navigate a disjointed regulatory landscape to ensure compliance. The UK government is also considering introducing nature-related reporting requirements for the largest UK companies as part of its Sustainability Disclosure Requirements (**SDR**) regime, with further updates on that expected this year.

Jump to practical considerations >>

Contact
Sophie Tuson
Solicitor, Environment and Climate Change Practice Lead
+44 7712 511815
sophie.tuson@rpc.co.uk

Manufacturing and distribution

There is a swathe of emerging legislation requiring companies to address the environmental impact of their products across their full lifecycle. This includes requirements around climate transition plans, 'scope 3 reporting' and supply chain due diligence.

The majority of retailers and consumer brands' greenhouse gas emissions are likely linked to their supply chains (so called 'scope 3' emissions), including manufacturing and distribution processes. In both the UK and EU, listed and large private companies will increasingly be expected to report on these emissions and disclose their climate transition plans showing how they intend to reduce scope 3 emissions in line with the Paris Agreement's 1.5°c target – whether that's under the EU's CSRD (see our blog here) or as part of the UK's evolving SDR regime (see our blog here).

A new Corporate Sustainability Due Diligence Directive (CSDDD) has also recently been agreed in the EU which, once adopted, will require EU and non-EU companies over specific thresholds (broadly 1000 employees and €450m worldwide annual turnover) to address the environmental impacts of their business and supply chains (including impacts from their manufacturing and distribution processes) through due diligence, supplier codes of conduct and contracts, and improvements to business models. Companies face the risk of significant fines up to 5% of worldwide turnover and litigation for failure to comply. The obligations are expected to start applying for the largest in-scope companies from 2027 onwards. Whilst the UK is a step behind the EU, it is not inconceivable that similar supply chain laws could soon be introduced with growing support from both MPs and businesses. A private members' bill has recently been introduced in the House of Lords which, if passed into law, would introduce mandatory environmental due diligence for any company carrying on a business in the UK.

Jump to practical considerations >>

Packaging

With growing concerns around waste and a bigger focus on shifting to circular business models, companies are facing increased responsibility and costs relating to their use of product packaging.

UK

In the UK, extended producer responsibility (EPR) for packaging has been delayed by a year until October 2025. It will require companies importing or supplying packaged products under their own brand in the UK (amongst others) to report packaging data and finance the cost of recycling, and will apply to large producers if they have >£2m annual turnover and are responsible for >50 tonnes of packaging each year (note small producers with £1-2m annual turnover and responsible for 25-50 tonnes of packaging will also have data reporting (but not financing) obligations). Large producers must start reporting packaging data from 1 April 2024 (however the regulator has effectively extended this to 31 May 2024. Meanwhile, the UK government is pushing ahead with its proposed deposit return scheme for drinks containers which is expected to be rolled out from 2025 at the earliest.

EU

In the EU, the regulatory landscape for packaging is set for a big shake-up. At the time of writing, a new Packaging and Packaging Waste Regulation had been provisionally agreed and is expected to introduce much stricter rules for companies including: new requirements for minimum recycled content in plastic packaging; limits on the space ratio in packaging; restrictions on the use of certain types of single-use packaging; labelling requirements on the composition of packaging; a general requirement that all packaging placed on the EU market must be recyclable by specified deadlines; and obligations on companies to move towards re-use and refill models.

Jump to practical considerations >>

Environmental sustainability: a snapshot of a changing regulatory landscape continued

Legal developments

Marketing

There is increasing regulatory scrutiny of green advertising and marketing claims. Brands that get green claims right can build brand trust, credibility and engage purpose-driven consumers. Brands that get green claims wrong risk regulatory fines, reputational damage and consumer disengagement.

UK

The UK's consumer regulators, the Competition and Markets Authority (**CMA**) and the Advertising Standards Authority (**ASA**) are continuing their enforcement activity around green claims with recent CMA investigations into the fast fashion, and the fast-moving consumer goods sectors, and near-weekly rulings by the ASA against brands for misleading green claims. This year the CMA will launch a third arm of its green claims investigation work (scope tbc) and the ASA will focus on green disposal claims and green claims in the food and drink sector. Meanwhile, the DMCC Bill continues to make its way through Parliament and, once passed, will give the CMA the power to fine companies up to 10% of global annual turnover for consumer law breaches.

EU

In the EU, new rules are now in force banning specific green claims outright (eg unsubstantiated, vague claims like "green" "environmentally-friendly" and "carbon-neutral"). Member states must apply these rules in national law from 27 September 2026. In tandem, the EU has proposed a new 'Green Claims Directive' which, if adopted, will introduce much stricter rules on making and substantiating green claims, including requiring independent third-party verification of claims before they are made. These new rules will apply to all companies (including UK companies) that sell products in the EU (see our blog here).

Jump to practical considerations >>

Product disposal/recycling/reuse

There is a growing legislative push towards circularity with new rules in the offing to encourage companies to design for, and to facilitate, greater repair, recycling and reuse of products by consumers, and to minimise product waste.

EU

The EU has recently agreed a new Ecodesign Regulation which is expected to come into force this year. It will introduce a new framework for setting minimum ecodesign requirements for products placed on the EU market, to improve their durability, reusability and recyclability. Specific product requirements will be outlined by the European Commission through secondary legislation with products like clothing, footwear and furniture, flagged as priorities. All companies will need to report the numbers of unsold goods they destroy and there will be an outright ban on the destruction of unsold clothing and footwear in the EU two years after the regulation comes into force (or six years for medium-sized companies meaning those with between 50 and 250 employees and an annual turnover of between €10m and €50m).

The EU has agreed a new Right to Repair Directive (**RtR Directive**) which will require manufacturers to repair in-scope products (such as certain household appliances and tech products) outside the legal warranty and amend the legal warranty rules in the Sale of Goods Directive to make repair more attractive than replacement. The RtR Directive will sit alongside the EU's new Directive on Empowering Consumers for the Green Transition which will require traders to provide better information to consumers on the durability and repairability of products. Finally, proposed changes to the EU's Waste Framework Directive could see the introduction of an extended producer responsibility (EPR) scheme for household textiles, clothing and footwear in the EU as part of a wider push to improve the circularity of textiles, and new targets to reduce food waste in processing and manufacturing.

UK

The UK is a step behind the EU with regulation in this space still largely at policy proposal and consultation stage (see the government's Waste Prevention Programme).

Jump to practical considerations >>

INSIGHTS AND OPINIONS

Practical considerations

Sourcing raw materials

- Legal and procurement teams should map the company's supply chains to identify group companies and products in-scope of the EU's new anti-deforestation rules. They should conduct an 'audit' of existing due diligence systems to identify necessary changes – eg updating supplier questionnaires and creating internal check-lists of the new traceability data required.
- Businesses assessing their material nature-related impacts should consider the GRI's new biodiversity standard (GRI 101) and guidance from the Science Based Targets for Nature on how to do this.
- Businesses in the UK should review the Taskforce on Nature-Related Financial Disclosures (TNFD) framework which is the likely direction of travel for nature reporting in the UK.

Packaging

- Businesses importing or supplying packaged products in the UK should check they can comply with the new EPR data reporting requirements given the impending deadline.
- Review any green disposal claims (eg that packaging is "recyclable" or "biodegradable") as a priority given the ASA's focus on these.
- Businesses operating in the EU should get on top of the new requirements in the Packaging and Packaging Waste Regulation now. Whilst there will be a window of time to comply once the new rules come in, they could require significant changes to packaging design, processes and supply chains.

Product disposal/recycling/reuse

- Given the early stage of the legislative proposals, businesses should keep an eye on legal developments and work with legal teams to map the new requirements once in force.
- The contractual frameworks for new circular business models (like rental or resale) are likely to be different and brands entering this space should review and update their existing T&Cs and consumer-facing policies to ensure they are fit for purpose.

Manufacture and distribution

- Businesses should review and update their supplier questionnaires, contracts and procurement processes to help collect scope 3 emissions data and ensure confidentiality around this. Start with the top ten suppliers and work down.
- Businesses should consider aligning their transition plans and net zero targets with the Science Based Targets Initiative's Net Zero Standard and the UK's Transition Plan Taskforce's disclosure framework which are increasingly seen as the gold standard.
- Ahead of the CSDDD's due diligence rules, businesses in-scope should review their existing due diligence systems and make a list of priority changes.

Marketing

- As a rule of thumb, always start with the facts first and build green claims around those. This helps ensure claims are specific, evidence-based and can be properly substantiated.
- Steer clear of red flag terms like "eco", "sustainable", "green", and "carbon neutral" which are high risk.
- Marketing teams should get legal advice on any proposed green claims as early as possible to avoid having to row back later.
- All businesses should familiarise themselves with the ASOS, Boohoo and Asda undertakings (see here) as these give important insight into the CMA's areas of concern and expectations.

Key UK consultations and inquiries tracker

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

Legislative bills tracker

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

RPC contacts

For further information or guidance, please get in touch with one of our Partners below or your usual RPC contact.

Karen Hendy
Partner
+44 7545 100443
karen.hendy@rpc.co.uk

Jeremy Drew
Partner
+44 7717 528145
jeremy.drew@rpc.co.uk

Ciara Cullen
Partner
+44 7747 033165
ciara.cullen@rpc.co.uk

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

An overview of RPC and TerraLex

Full service firm

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

Retail through and through

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

We are recognised as a leading voice on retail issues

Twenty of our lawyers have been quoted or mentioned across 58 publications, including FT, The Telegraph, The Times, The New York Times, The Business of Fashion, Luxury Law Alliance, The Grocer, Drapers and Retail Gazette in the last 12 months.

What others say about us

Retail clients quoted in Legal 500 2024

"This is a group with real sector expertise; they get it. As well as high-end legal advice, I am consistently impressed by the insights I get from their experience elsewhere."

"A very personable, interested and interesting firm that has a keen awareness of the commercial and business context in which legal questions, problems and opportunities play out."

Retail clients quoted in Chambers and Partners 2024

"RPC have a wide bench of expertise across different areas and take a holistic approach, which consistently adds value."

"The team are very commercial and concerned with providing advice in a way that our business will find digestible and understandable."

"RPC have responded rapidly and effectively to a wide range of complex technical matters."

Top ranked
RANKED TIER 1 BY LEGAL 500 FOR RETAIL & CONSUMER
2024

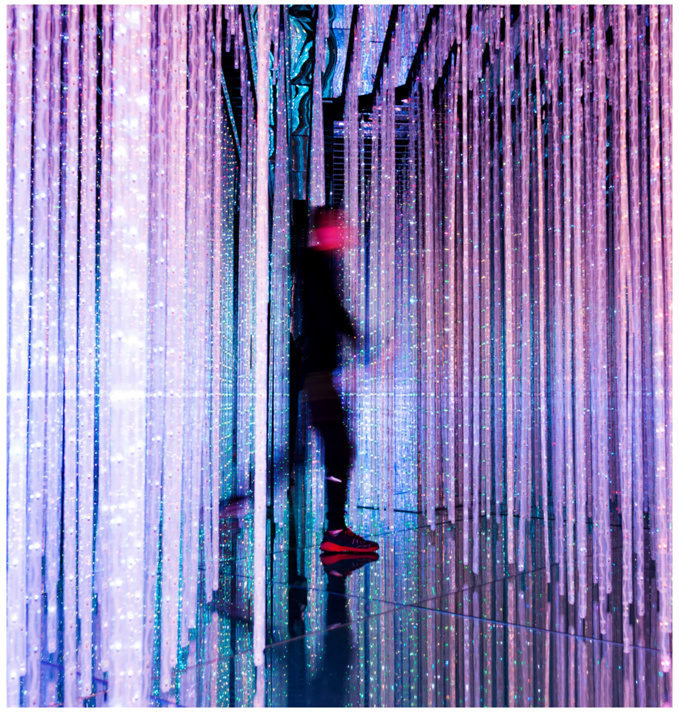
Winner
OUTSTANDING TRAINING INNOVATION – RETAIL AND CONSUMER LEGAL INNOVATION AWARDS
2023

Winner
RESPONSIBLE BUSINESS OF THE YEAR – WOMEN AND DIVERSITY IN LAW AWARDS
2023

Winner
CONSUMER & RETAIL LAW FIRM CHINA BUSINESS LAW AWARDS
2021

Listed
TMT LAW FIRMS OF THE YEAR – THE TIMES
2023

Top ranked
LEADING TECHNOLOGY FIRM – CHAMBERS AND LEGAL 500
2024



Global Expertise.
Local Connections.
Seamless Service.

TERRALEX

www.terralex.org

<< Home >>

rpc.co.uk