The year ahead: at a glance

We've put together a diary of some of the dates and topics that we will be tracking over the coming year. Click on a topic to read more.

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Keep an eye on these ongoing issues...

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The year ahead: further details

1. General Data Protection Regulation

The General Data Protection Regulation (GDPR) has now been adopted. It will be published this summer and automatically come into force two years later in 2018, allowing organisations to adjust their compliance practices in light of the new law.

The GDPR will impose significant new burdens on companies across Europe, making changes to how companies obtain consent, outsource, transfer data, maintain internal record keeping and undertake impact assessments for new product development.

IT contracts being negotiated now, and customer agreements made in the next 12 months, will all be affected by the new law. As the GDPR will cover a diverse range of business activity you will need to ensure that compliance is being considered today for ongoing projects as well as those post implementation.

In order to assess readiness for the Regulation it would be a good idea for organisations to invest in a data audit to assess areas of non-compliance and deficiencies with current privacy legislation. As the Regulation builds upon existing principles, this groundwork will provide a solid basis to springboard into the additional compliance requirements imposed by the regulation in a more streamlined way, to avoid minimal business interruption and medium uptake across the organisation.

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2. EU Referendum

The stage is set, the campaigning underway and, in June, the UK must decide on whether its future lies within or outside of the EU. Initial polls, so far, suggest a closely-run campaign with results too close to call. Apart from a significant re-shaping of the political landscape, the exit of the UK from the EU (the so-called ‘Brexit’), would surely have a substantial impact on businesses in the UK.

It is impossible to say exactly what the full business implications might be, as they depend almost entirely on how the UK’s withdrawal from the EU is negotiated. However there are some key areas likely to be affected and we have explored how these would specifically impact upon businesses in the retail and consumer sector.

Currency uncertainty

As soon as London Mayor, Boris Johnson, announced his intention to campaign for a Brexit, the value of sterling dropped. Given many retail and consumer businesses are significant importers, their costs will have risen overnight. This highlights the risk that continuing uncertainty over Brexit or, post-June 23, potential uncertainty over the precise terms governing a Brexit, pose for retail and consumer businesses.

Tariffs

Depending which poll you read and which Brexit model you look at, if the UK leaves the EU it may be subject to significant tariffs on goods and services going into or out of the EU. If it were to join the European Economic Area, like Norway, it may avoid tariffs, but until we know more about the specific Brexit model the UK would adopt, the possibility of tariffs remains an unwelcome prospect for many retail and consumer businesses.

Recruitment

Many businesses in the retail and consumer sector rely significantly on unskilled labour from other countries in the EU to fill roles such as warehouse pickers, distribution centre staff, production line workers and drivers, amongst others.

If the UK left the EU, again, depending on the model of its ongoing relationship with the EU, it may no longer be party to the free movement of people obligations, making it much harder to recruit foreign workers for these crucial but often undervalued roles. Conversely, some argue that this would create more opportunities for UK job seekers.

Agriculture and food

The common agricultural policy, or CAP, is often held up as a totem for all that is wrong with the EU, with its overbearing complexity and bureaucracy. Opinions are polarised on whether the UK would save significant sums of money by leaving
CAP, or whether it would, in fact, be detrimental to British farmers. The UK is a significant importer of food, so if we were to leave CAP, we would need to find another framework for collaborating with the EU.

**Longer term volatility**

Article 50 of the EU Treaty sets out a 2-year negotiation period to negotiate the terms of departure from the EU, although many commentators expect discussions to last much longer than that. The UK will also need to negotiate with non-EU states to establish trade deals, though again views differ as to whether this can be done readily and quickly. Whatever model is negotiated, leaving the EU is likely to lead to a period of disruption of several years while consultations progress and the new model is established. For any business, trying to operate effectively through years of uncertainty brings significant challenges.

**Overseas territories**

An exit from the EU poses additional challenges for the three Crown dependencies (Isle of Man, Jersey and Guernsey) and the British Overseas Territory of Gibraltar each of whose relationship with the EU derives from the UK's accession, (although some of the islands already have direct agreements with certain Member States (e.g. in relation to free movement of goods and tax). In a complex re-negotiation of Britain's relationship with the EU there is likely to be less appetite to address the specific practical priorities of these territories, whose residents and economies will have different concerns to mainland UK.

**Legal impact**

There are unlikely to be few sudden changes across swathes of legislation if there was a Brexit, because most legislation originating in the EU is incorporated into UK law. But as the UK asserts its 'independence' from the EU, there is likely to be a gradual divergence. In turn, that could lead to more flexibility and opportunities for UK businesses. Equally, it could leave them out in the cold if the UK legal framework continues in one direction, while the UK heads in another.

Without knowing which new UK/EU relationship ‘model’ would be implemented in the event of a Brexit, there will be continued uncertainty for businesses as to the potential fall-out. Whether the UK remains within Europe or strikes out alone, retail and consumer businesses need to make sure they are fully apprised of any developments, together with the challenges and opportunities ahead. Whether those come, and in what form, lies in the hands of the British people.

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### 3. National Living Wage

Within weeks of the introduction of the National Living Wage on 1 April 2016, there have been reports that some employers - primarily those operating in the retail sector - have reduced hours, pay rates and other benefits to offset the cost of raising the wage floor. In response to this, the Chancellor, George Osborne, has warned that such measures do not abide by the "spirit of the law" and that such employers should be mindful of their social responsibilities and corporate reputation. Labour MPs have also called for penalties to be imposed on employers who make use of such offsetting measures.

The National Living Wage came into force on 1 April 2016, introducing a new minimum hourly wage rate of £7.20 for workers aged 25 and over. This rate is expected to rise to £9.00 by 2020. You can read more about the National Living Wage in our report here.

Research by the Regulatory Policy Committee found that the direct cost to private-sector employers of raising wages is £700 million, with a further £137 million of related costs such as pensions and National Insurance Contributions. Perhaps unsurprisingly, many employers, primarily those operating in the retail sector, have taken steps to offset the cost of raising the wage floor. There have been recent press reports of employers introducing the following offsetting measures:

- Reduction in working hours (a major support services employer)
- Withdrawal or reduction of enhanced overtime pay rates (a major groceries retailer and a major hardware retailer)
- Withdrawal or reduction of enhanced Sunday pay rates (three major groceries retailers and three major hardware / homeware retailers)
- Withdrawal or reduction of paid breaks (a car parts manufacturer, a major groceries retailer and a major hardware retailer)
- Withdrawal of free food / closure of staff canteens (two major groceries retailers and a major café chain)
Reports have emerged that one major retailer has instituted a combination of measures, including cuts to Sunday and Bank Holiday pay rates and bonuses, which has resulted in a 30% reduction in take-home pay overall for some workers.

In response to these developments, Labour MP, Siobhan McDonagh, initiated a campaign to raise awareness of the impact of the National Living Wage for some workers. She has asked the Government to take action to prevent employers from instituting offsetting measures such as those set out above. One suggestion is to introduce a statutory right to a paid rest break of 20 minutes per 6-hour shift. Currently, employers are not obliged to pay for such rest breaks. Ms McDonagh also called a Parliamentary debate on the effect of the National Living Wage on 18 April 2016. At the debate, fellow Labour MP, Joan Ryan, called for penalties to be imposed on employers who had cut pay and benefits in order to circumvent the cost of the National Living Wage.

Whilst offsetting measures do not breach the National Living Wage legislation, the Government has sought to apply moral pressure on employers to resist cutting pay and benefits in this way. The Chancellor, George Osborne, said that at employers should: “...be careful about their reputation and...their social responsibility to their workforce as well as to their community”. Further, Business Minister, Nick Boles urged MPs to notify the Government of businesses taking such measures so that “pressure” could be applied upon them.

Employers considering introducing offsetting measures must ensure that any changes to employees’ terms and conditions of employment are effected lawfully. If the employer is unable to secure agreement to such changes, then it may need to dismiss and offer to re-engage on the new terms and conditions. Where 20 or more employees are affected within a 90-day period, this would trigger collective redundancy consultation of at least 30 days (or 45 days if 100+ employees are affected). Employers should also carefully consider the potential reputational impact of taking such measures given Siobhan McDonagh MP’s campaign and the intense media scrutiny of this issue.

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4. Gender pay gap reporting

Section 78 of the Equality Act 2010 enables the government to make regulations requiring employers with over 250 employees to publish their gender pay gap. However, no regulations have been made to date.

Section 147 of the Small Business, Enterprise and Employment Act 2015 requires the government to make regulations (under section 78 of the EqA 2010) requiring private and voluntary sector employers with at least 250 employees to publish information about their gender pay gap within 12 months of the Act coming into force.

In July 2015, the Government published a principles-based consultation seeking views on the key points of detail of the new gender pay reporting regime, which closed on 6 September 2015. On 12 February 2016, the response was published together with a follow-up consultation and the draft Equality Act 2010 (Gender Pay Gap Information) Regulations 2016, which set out the framework reporting requirements.

The draft regulations were open for consultation until 11 March 2016. It is intended that they will come into force on 1 October 2016.

What impact will the new legislation have in practice?

The regulations will require employers to calculate gender pay gaps using data from a specific pay period every April from 2017. Employers will initially produce a preliminary “data snapshot” by 30 April 2017. Full reports will not need to be produced until 30 April 2018.

Under current draft regulations, employers with 250 or more employees will have to publish: (i) mean and median overall pay gap figures (including bonus, commission, LTIPs and the cash value of shares); and (ii) mean bonus gap figures on an annual basis. In addition, affected employers must also publish the numbers of men and women paid across salary quartiles within their business and the proportion of men and women who received a bonus payment within a 12-month period.

Employers should consider now how they will approach gathering the relevant data. It will be key to identify people with a good understanding of equal pay principles and law and who have the skills to collect and analyse the data. Training and resources may need to be made available to complete the exercise.

Although the first reporting deadline is some time away, it would be advisable for employers to begin gathering data and calculating the figures now. This will allow businesses to understand what they are dealing with and consider what remedial steps to put in place now in order to reduce the gap by the reporting deadline.
5. VAT on pension schemes

31 December 2016 – End of transition period for employers to reclaim VAT on certain pension scheme costs

HMRC is currently reviewing how VAT is claimed in relation to UK pension schemes. This has been a long drawn out and somewhat vexed issue as employers have waited for clarity (or at least, less confusion) from HMRC on this, following earlier court rulings that called into question the way the UK approached this.

One of the main issues is that HMRC has removed the concession that has been in operation for many years, under which certain costs, including administrative costs, of running a pension scheme, can be reclaimed by the scheme employer as part of its VAT returns. This is subject to a transitional period which ends on 31 December 2016. This change leaves schemes facing a possible 20% increase on their running costs from January 2017.

There are potential options for maintaining the ability to make these VAT reclaims at the end of the transitional period. However, none of them are straightforward and all have different pros and cons. Which option is best will vary between organisations and employers and trustees will need to carefully consider these and take tax and legal advice before implementing any changes. However, we recommend waiting for further HMRC guidance before making any final decisions.

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6. Apprenticeship levy

What is the apprenticeship levy?

- The apprenticeship levy (levy) is effectively a new tax which will be imposed on certain employers as part of the Government's initiative to fund three million new apprenticeships by 2020. If achieved, this will be a 35% increase compared to the previous five years. The objective is to drive increased productivity which will ultimately lead to increased profitability for businesses and increased wages in the long term.

- Aiming to also increase the quality of apprenticeships in England, the Government is putting control of funding in the hands of employers. It is hoped that the levy will raise around £3 billion for the Exchequer to spend on boosting the quantity and quality of apprenticeships.

- HMRC published draft legislation on 4 February 2016 introducing the levy, which will have effect on and after 6 April 2017.

- The levy will be set at 0.5% of an employer's paybill (see section 2 below as to how this is defined and calculated), with an annual allowance of £15,000 to offset against their levy payment (paid in vouchers). Once in effect, the levy will only be payable on paybills in excess of £3 million per year, which is estimated to catch only 2% of employers.

- From April 2017, employers will be able to access funding for training through the new online portal service, Digital Apprenticeships Services, regardless of whether they have contributed to the levy. Employers can use the portal to 'shop' for apprenticeships, find accredited training providers and pay for training with their digital vouchers.

- Employers obliged to pay the levy will be able to draw down more funding than they have contributed through Government top-ups. Funding not used within two years will expire and be made available for other employers.

- HMRC will introduce many of the rules including assessment, payment and record keeping via secondary legislation.

How will it be calculated?

- An employer’s paybill will be calculated on total employee earnings subject to Class 1 secondary National Insurance Contributions (NICs), but not including benefits in kind.
The levy will be collected by HMRC through the PAYE mechanism.

A person will be treated as liable for NICs even where the applicable rate is 0% (for example where a worker is under 21, or an apprentice under 25).

Where two or more companies are connected, for example a group of companies, only one will be entitled to use the £15,000 annual allowance for that year.

Examples of how the levy could be calculated is detailed below:

Example 1: The paybill for an employer with 250 employees, each with a gross salary of £20,000 will total £5,000,000 (250 x £20,000). The total levy sum will be calculated at £25,000 (0.5% x £5,000,000 = £25,000). Taking into account the annual offset allowance of £15,000 the total levy sum payable is £10,000.

Example 2: The paybill for an employer with 100 employees, each with a gross salary of £20,000 will total £2,000,000 (100 x £20,000). The total levy sum will be calculated at £10,000 (0.5% x £2,000,000). Taking into account the annual offset allowance the total levy sum payable will be £0.

What training will be covered?

The plan is to reform the current batch of apprenticeship frameworks so they become ‘standards’, developed in conjunction with employers. Work has already begun on this through the Government’s Apprenticeship Trailblazer programme, which has published 194 standards, of which 60 are either higher or degree apprenticeships.

In April 2017, when the levy commences, the government will establish an Institute for Apprenticeships, where employers or groups can submit apprenticeship standards and assessment plans. In the interim, the government will stagger the withdrawal of funding for new starters on old, framework apprenticeships.

One of the key roles of the Institute for Apprenticeships will be to oversee quality, and apprenticeships will need to last a minimum of 12 months and involve at least 20 per cent off-the-job training.

What does this mean in practice?

For large employers, the levy will not be fully recoverable through the annual allowance, and, therefore, becomes an additional cost. In the short term, the levy may also entail some further administration costs.

Reaction from the industry to the proposals are particularly negative, with many considering the levy to be fundamentally a new payroll tax. In particular, some sectors, such as those less likely to train apprentices, may end up subsidising apprenticeships in those sectors where apprenticeships are more common.

However, HRMC have commented that employers who are committed to training are likely to get more back than they put in through the levy, by training apprentices.

From a practical perspective, we know that the money will be drawn from PAYE, but the full mechanics of this have not been confirmed. Employers will, therefore, in time need to engage with their payroll team/provider to clarify how the money will be taken and avoid any potential hiccups when the levy is introduced (if it is applicable).

For more information, please contact Sally Hulston: sally.hulston@addleshawgoddard.com.

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7. Business rates reform

In the Budget 2016 HM Treasury reported back on its wide-ranging review of business rates which, as it states in the foreword to its Terms of reference and discussion paper, is “in response to concerns from many business ratepayers that business rates are in need of reform to make them fit for purpose in a 21st century economy”.

Smaller R&C businesses are likely to view the Budget with more optimism as result of planned changes to business rates – an issue that retailers have been campaigning on for many years. From April 2017, the threshold for small business rate relief will be raised to £15,000 rateable value, up from £6,000, while the higher rate threshold will rise from £18,000 to £51,000. The changes should mean around 600,000 small businesses, pay no rates from April 2017, and around 250,000 will see their rates reduced. A further welcome change is the move from using the Consumer Prices Index (CPI) as the basis for future business rates increases, rather than the Retail Prices Index (RPI). The change will be introduced in April 2020 and should lead to less-steep increases in rates bills for retailers. The frequency of business rates reviews will also be increased to every three years.
The wider retail industry will view the business rates changes as a step in the right direction, after campaigning for a number of years for a fairer system. However, the proposed changes only benefit small businesses and there is still a huge sense of unfairness that, in an increasingly digital world, bricks and mortar retailers continue to be penalised by the business rates system.

A number of national retailers, who have large property portfolios (and therefore large business rates bills) were hoping for something more radical, for example basing the liability on economic output (as per the French system, which is linked to business turnover) or on number of employees rather than purely on rateable value of properties. There is a clear disparity between contributions to business rates between those bricks and mortar retailers and their purely online competitors.

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8. BHS in administration

BHS hit the headlines in April when it entered administration with a £571m pension deficit. Here Addleshaw Goddard’s Retail and Consumer team assesses a bleak situation for a former giant of Britain’s high streets...

What went wrong?

Just four weeks after company voluntary arrangements (CVAs) were approved for BHS Limited (BHSL) and BHS Properties Limited (BHSPL), both companies crashed into administration.

The CVA proposals cited three main reasons for BHS’s demise: a more competitive retail market, a failure to respond to changing consumer behaviours, and a failure to capitalise on the growing trend of digital sales and retail-park shopping.

But there were other key moments, too. BHSL’s available cash suffered a negative impact in 2015 when major suppliers of the BHS group had their credit insurance cover cut, pushing BHSL into funding £25m of letters of credit, and a further £10m of security deposits.

How big was the BHS black hole?

Even after creditors had signed up to rent-reducing proposals for a number of landlords, there were still major difficulties ahead.

The CVA proposals detailed how the group needed extra funds in order to trade beyond 25 March 2016, and that the directors were engaged in efforts to raise funding of up to £100m from three different sources. That sum consisted of up to £60m from an asset-based lending facility to be secured against stock and debtors; up to £30m from property funding and disposals; and up to £10m from the release of funds tied up in letters of credit and security deposits held with suppliers of goods not for resale. But it proved a task beyond the reach of BHS’s management.

Now 11,000 staff are facing enormous uncertainty, and a number of unanswered questions surround the future of BHS’s retail units and its underfunded pension scheme.

Will anyone want BHS’s old retail units?

When Woolworths collapsed in 2008, discount retailers, such as Iceland, B&M and Poundland, took the majority of its estate (and seized the opportunity to accelerate their programmes for expansion). BHS’s 160+ stores are a different proposition though; they are considerably larger stores than the average Woolworths.

BHS also reaches beyond the high street, with a number of stores in out-of-town retail parks. Indeed, a report by Cushman & Wakefield, quoted in the Evening Standard, raised fears that more than a quarter of BHS’s stores could lie empty for months.

In light of this, it would be easy to conclude that new tenants for BHS’s store portfolio may appear unlikely to be found. But as Joe Maitland, a Real Estate specialist from Addleshaw Goddard’s Retail and Consumer team says, “claims like that do not take into account that retail property specialist landlords will not sit idly by waiting for a replacement tenant. They will re-design or sub-divide the awkward-shaped stores and, importantly, will have seen this demise coming for months; it may even be seen by some landlords as an opportunity.”

Occupier demand is also much higher than in 2008, with several well-known names – including Primark, H&M, and Next – already being linked with approaches for the empty stores.

“There are still a number of retailers who will be able to make a BHS location work for them,” believes Maitland. “It would be a mistake to say that because BHS failed, the individual stores cannot be a success for another retailer.”

And what now for the BHS pension fund?
With a reported deficit of £571m, attention is focusing on BHS’s underfunded staff pension scheme. Pressure is being put on former owners Sir Philip Green and Retail Acquisitions to explain whether capital extracted from BHS was at the expense of the pension scheme.

Many believe the handling of the BHS case by the UK’s pensions regulator is its first genuine test of its ‘anti-avoidance’ powers. Sir Philip Green has reportedly offered to make a voluntary contribution of £80m towards the deficit, but the regulator is believed to want a much greater sum.

What can the pensions regulator do?

“The Pensions Regulator has draconian powers to render corporate groups, individual directors and shareholders legally liable to contribute towards defined benefit (DB) scheme deficits in certain circumstances,” says Jade Murray, of Addleshaw Goddard’s pensions team.

“However, many think the regulator has yet to fully flex its muscles – especially in cases where the factual background and, therefore, the justification for sanction, is complex. The Pensions Regulator’s response to the BHS case will be closely watched by anyone involved with managing a DB scheme in deficit.”

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9. Changes to holiday pay

A continuing area of uncertainty in calculating holiday pay has been how variable components of pay should be treated for these purposes. Previous case law had established that workers who earned a basic salary plus additional sales-based commission were only entitled to holiday pay based upon their basic salary. However, the ECJ subsequently held that workers should receive their "normal remuneration" whilst on holiday and this includes any variable remuneration payments which are “intrinsically linked” to the performance of the tasks which a worker is contractually required to perform.

In the case of Lock v British Gas Trading Ltd Mr. Lock was employed as a sales consultant and was remunerated by way of a basic salary payment, plus a sales-based commission payment which accounted for approximately 60% of his total pay. The commission payment was variable and was paid several weeks or months after the sale to which it related was achieved. When Mr. Lock was on holiday, he was unable to make any sales. This, in turn, meant that he was unable to accrue any sales-based commission payments to be paid in the subsequent weeks or months. Consequently, his income was reduced in the weeks or months following a period of holiday.

Mr. Lock brought an Employment Tribunal claim for unpaid holiday pay in respect of the lost holiday commission payments. Given the conflicting domestic and ECJ case authorities on this area, the Tribunal elected to refer a number of questions to the ECJ. In essence, the ECJ was asked whether annual leave should include commission payments that Mr. Lock would have accrued had he not been on annual leave.

In May 2014 the ECJ ruled that the EU Working Time Directive requires that during annual leave workers must receive their normal remuneration. The purpose of holiday pay is to put the worker, during that period of rest, in a situation which is comparable to periods of work. It ruled that where pay is made up of different components and a component is “intrinsically linked” to the worker’s contractual duties, then holiday pay should be calculated to include such payments.

In February 2015, following the ECJ’s ruling, the case returned to the Employment Tribunal to decide whether our domestic Working Time Regulations 1998 could be interpreted in line with the ECJ’s decision. If it could not, then employees of private sector employers would not be able to enforce their rights to have such payments included in their holiday pay and the Government would be required to amend the regulations.

Unsurprisingly, the Tribunal decided that the WTR could be interpreted so as to be consistent with European law. In recent years the Courts and Tribunals have not held back from stretching the wording of our domestic legislation to comply with European law. Indeed, the EAT took a similar step in Bear Scotland Ltd v Fulton and Baxter, Hertel (UK) Ltd v Wood and others, Amec Group Limited v Law and others (Bear Scotland) which concerned the inclusion of overtime within holiday pay. You can read our report on the Bear Scotland decision here.

However, British Gas went on to launch an appeal of the Tribunal’s decision on two grounds:

- The Tribunal was wrong to conclude that the EAT’s recent decision in Bear Scotland had any bearing on the Lock case. Commission and non-guaranteed overtime are dealt with under different provisions and should be treated differently.
- In any event, even if it was appropriate to approach overtime and commission in the same way, the EAT in Bear Scotland had been wrong to decide that the Working Time Regulations 1998 could be read purposively. This is the more significant...
ground of appeal, since if it is successful then it would conflict with the EAT’s position on the inclusion of non-guaranteed overtime in holiday pay. This would make a further appeal to the Court of Appeal seem highly likely.

The appeal hearing took place on 8 and 9 December 2015, in a decision handed down on 22 February 2016, the EAT dismissed the appeal. British Gas have appealed again to the Court of Appeal. The Court of Appeal hearing is due to take place by 17 February 2017.

Employers should remember that the position at EU level is unchanged by this appeal: UK law must provide for holiday pay to be based on normal remuneration, which may include commission payments. However, if British Gas’s appeal succeeds then the Government would need to rewrite the Working Time Regulations 1998 before private sector employers would be obliged to comply with this requirement (and any changes would not retrospective).

Given the ongoing litigation concerning the calculation of holiday pay, some employers may wish to take a more robust stance when it comes to making adjustments to holiday pay. Many will prefer to wait for a definitive ruling from the Courts. On the other hand, some employers, including retail businesses, have decided to proceed with adjusting holiday pay calculations despite the continuing uncertainty. For example, in January 2015, the John Lewis Partnership announced that it was changing its holiday pay practices in response to the Bear Scotland decision. At the time, Tracey Killen, the Partnership’s Director of Personnel, said: “The John Lewis Partnership has acted promptly to change its pay practices in response to the Employment Appeal Tribunal ruling. We believe our approach is a fair and practical outcome for our partners in light of this decision”. The company said that it expected the adjustment would result in additional costs of £12 million every year and that this could negatively affect the annual profit-related bonus given to workers.

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10. Sugar tax – legal challenge?

When George Osborne announced his plans to implement a sugar tax on soft drinks from 2018, many food and drink manufacturers were left in a state of surprise. Now, though, the tax and its implications are facing mounting scrutiny. Could a legal challenge be brewing?

The new tax is set to add 24p per litre to the price of those soft drinks with the highest sugar levels with a lower tier tax of 18p per litre. Osborne tried to deflect attention away from any increased prices as a result of the tax by focusing instead on the planned beneficiaries of any extra income.

Proposed benefits of a sugar tax

The tax is intended to address alleged concerns about the role of sugary drinks in childhood obesity. The Chancellor suggested a sugar tax would raise more than £500m per year, and promised to use the extra cash to double the funding available for primary school sports – although of course, if the tax is successful in its stated aim of reducing consumption and changing products to reduce their sugar content, the tax take may be somewhat lower. The two-year gap between the announcement and implementation also gives enough time for manufacturers to change their product mix and reduce their sugar content, the Chancellor argued.

On unveiling the tax in the House of Commons, Osborne said: “I’m not prepared to look back at my time here in this parliament doing this job, and say to my children’s generation: ‘I’m sorry, we knew there was a problem with sugary drinks, we knew it caused disease, but we ducked the difficult decisions and we did nothing’.”

However, revelations that the tax would cost £1bn to implement further angered soft drink manufacturers who insist an exemption of fruit juices and milkshakes, which often have higher sugar content than soft drinks, is fundamentally unfair and discriminatory.

What are the legal options for food and drink manufacturers?

Osborne’s announcement has already had a significant impact: sharp falls were recorded in the share prices of soft drink manufacturers.

Any legal challenge will need to be prompt, but that does not appear to be deterring drink manufacturers. An industry source told The Sunday Times: “It’s fair to say we are more than just considering legal action. This has been rushed through without warning.” Furthermore, reports suggest that any regulatory challenge is likely to be supported by the food industry as a whole, with concerns mounting that a tax on sugar in soft drinks could be widened to other food and drink products with a high sugar content and could also represent the first of a number of ‘sin’ taxes on food that might also focus on fat and salt.
Contravention of EU law?

Any legal action is likely to be on the basis that the sugar tax is incompatible with an element of EU law or, potentially, human rights law. There are parallels – most recently a successful challenge to the introduction of minimum alcohol pricing in Scotland.

For example, is the tax discriminatory, in that it applies to manufacturers of some products and not others, without good reason? Or is it disproportionate to achieving the objective of protecting public health? The European Commission has undertaken research into the distortions caused by food taxes, which is likely to be a key reference point. The research found that the impacts where such food taxes have been introduced are uncertain.

Nevertheless, any regulatory challenge would be likely to last for several years, and food and drink manufacturers could be tempted by the prospect of buying time in this manner. So far, Osborne's reaction to the threat of challenge has been robust – "bring it on".

Whether any legal challenge is successful or not, there is an argument that the Chancellor is not wanting to raise extra revenue: he wants to change behaviours, with the UK now the fattest nation in Europe by some distance (28.1% of Brits are obese, while France, the next fattest nation, has 23.9% of its population as obese).

There is evidence to suggest he is succeeding on that front. Within a month of Osborne’s sugar tax budget, Mars Food, the makers of Dolmio and Uncle Ben’s products, voluntarily labelled some food with warnings that they should be eaten no more than once a week.

The Government is likely to face some kind of challenge to the sugar tax, but the final outcome is far from predictable.

For more information, please contact Louisa Caswell: louisa.caswell@addleshawgoddard.com or Rona Bar-Isaac: rona.bar-isaac@addleshawgoddard.com.

View from Mexico

For many, a strong tax policy against obesity in a country recognized as number two in world obesity was not only a necessity, but a clear step forward in tackling a public health issue affecting society from a very young age.

The Mexican Government’s response came in 2012 with a bill proposing an ad valorem tax of 20% over the retail price of drinks sweetened with sugar. The proposed bill estimated tax collections of $22,861 MM Mexican Pesos (€1,125 MM- £890 MM), however, it was not approved and thus never entered into force.

On 31st October 2013 a second strongly supported bill proposed by the executive power set forth a specific tax of $1.00 Mexican Peso (€0.049-£0.039) per litre of any drinks sweetened with sugar as well as an additional 25% tax over energy drinks. The reform not only targeted sweetened beverages but also some non-basic foods with a caloric density of 275 kilocalories or more per 100 grams (including, among others: potato chips, chocolates and ice-cream) with an 8% tax.

Said bill entered into force on January 2014 and was recently reviewed by Congress upon the discussion of the 2016 tax reform. The proposal of one of the parliamentary groups consisted of reducing the sweetened beverage tax by 50% in cases where the beverages did not exceed the 5 grams of sugar per 100 milliliters threshold. The proposal was overturned by the Senate.

The 2014 reform has been scrutinized by the public and affected groups. In this sense, the response from the authorities has been loud and clear, stating that the impact of the new tax over sweetened beverages will not be fully visible in the short term; however, the past two years have seen an estimated reduction of 6% in the consumption of fizzy drinks and an increase between 3% and 5% on the consumption of bottled water, which has been gladly acknowledged.

The Mexican government has made a public commitment to not increase taxes in the remainder of its term (i.e. until 2018) and at the same time tax collections remain considerably low due to low oil prices. Therefore, it is expected that the tax on sugared drinks and caloric foods is here to stay in the Mexican tax system.

For more information, please contact Santiago Chacon: santiago.chacon@garrigues.com or Gabriela Cosio: gabriela.cosio@garrigues.com.

Take me back to The year ahead

11. Commodity prices

Oil and gas

Various macro-economic and political factors are likely to keep downward pressure on various commodity prices, particularly oil and gas and iron ore and base metals for steel production. These include both supply-side issues, such as Opec's
The year ahead

12. Consumer Rights Act

The principal provisions of the Consumer Rights Act (CRA) came into force on 1 October 2015. The Act set out a framework that overhauled consumer rights and remedies in relation to defective goods, services and digital content and provided clarity in relation to consumer rights and in particular the remedies available. It also updated the law relating to unfair terms in consumer contracts, provided better means for consumers and small to medium-sized enterprises to challenge anti-competitive behaviour and consolidated enforcers’ powers to investigate breaches of consumer law.

Following a flurry of activity prior to the Act coming into force, there has been very little information from many businesses, about what action, if any, they have taken to update their policies and procedures and to ensure that they are compliant with the legislation. We are also still awaiting the first claims brought under the Act, which are yet to come before the courts.

Key rights under the Act

► Goods must be of satisfactory quality (section 9), fit for purpose (section 10) and match the model seen (section 14)

► Goods must be installed correctly (section 15)

► Goods must be delivered within the agreed time or if no time has been agreed within 30 days (section 28)

► Digital content must be of satisfactory quality (section 34), fit for purpose (section 35) and as described (section 36)

► Services must be provided with skill and care (section 49)

This would suggest that, since it came into force, the full implications of the Act have not been widely considered. We believe that the enhanced consumer rights provided in the Act together with the requirement (under the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015) for traders to provide consumers with details of an alternative dispute resolution provider, should mark a change in the relationship between businesses and their consumers. We anticipate that business will be forced to make changes once cases start to come before the courts, consumer law enforcers begin to exercise the full range of powers granted to them, and in particular the right to reject products and we start to see judges punishing those businesses who have failed to comply with the strict remedies set out in the Act.

Key rights under the Act
13. Equal pay claims

In 2008, around 300 female Asda workers brought equal pay cases in the Employment Tribunal, arguing that they should be paid the same as male workers working in its distribution centres on the basis that their jobs were of equal value. The claims were initially brought by the GMB trade union. These claims were stayed and in 2013 an agreement was reached between GMB and Asda, whereby the GMB agreed not to pursue the claims in return for a four year “working party” with Asda about equal pay.

Following this, the law firm, Leigh Day, took over the cases. In April 2014, The Guardian newspaper reported that a further group of (mainly female) employees had initiated test cases for equal pay. These additional cases have now been joined with the original 2008 cases. Following the announcement that Leigh Day were managing these cases it was reported that they had been approached by a further 19,000 people interested in pursuing claims.

Leigh Day have warned that the implications of these legal claims were: "...enormous for Asda and many other supermarkets in the UK", noting that in supermarkets: “...the check-out staff and shelf-stackers are mostly women. The people in the warehouses are pretty much all men. And, as a whole, the group that is mostly men gets paid more.” Leigh Day reported that their investigations suggest that the job roles are broadly equivalent. Warehouse staff are responsible for taking items off shelves, putting them on pallets and loading them into lorries. Whereas, in the supermarket, the staff do the reverse: taking the pallets off the lorries, unstacking them and putting the items on the shelves. However, the warehouse staff were paid anything from £1.00 to £4.00 more per hour than the store staff.

A hearing is expected in the course of 2016. This case will be of particular interest to supermarkets and other retailers who own distribution centres. If the employees are ultimately successful, they could be entitled to up to six years’ back pay for the difference in earnings.

For more information, please contact Sally Hulston: sally.hulston@addleshawgoddard.com.


The EU Commission wants to further harmonise guarantees under consumer sales law. The plans for refunds of “payments” with consumer data are likely to encounter resistance, explains Bärbel Milsch of Noerr LLP.

Please click here to read Noerr’s full briefing on the EU Commission’s plans.

For more information, please contact Bärbel Milsch: baerbal.milsch@noerr.com.
15. The evolving threat of cyber security

With the increased rise in the volume of online sales, data is now at the heart of many retail and consumer businesses. It is being utilised in a number of ways, from providing intelligence and insight into products and services trends, to collecting personal customer data such as address, bank and credit card details for delivery and payment purposes. Businesses dealing in customer data need to have appropriate security measures in place to protect this data and these measures need to be airtight. Breaches in cyber security can see people's personal data spilled across the internet (such as in the Ashley Madison case), or their financial information in the hands of hackers, putting their personal data such as their identity, bank balance and credit scores at risk.

Over the course of 2015 we have seen a number of high profile cyber security breaches in the retail and consumer sector, including a website error at Marks & Spencer’s and breaches at Morrisons, as well as the high profile Ashley Madison and BBC iPlayer hacks. In the Marks and Spencer case, customers who logged in online to shop were able to freely view other customers personal details including names and addresses. This issue highlighted a serious flaw in the security of the website and its functionality. These and other breaches have served to highlight the importance of having strict cyber security policies and processes in place. This type of data breach carries real reputational risk for a business causing not only great embarrassment but potentially causing businesses to lose customers. They also raise thorny questions around potential customer compensation. Aside from these potential costs, it is estimated that the average cost to rectify a cyber security breach is between £600k – £1.15m for large businesses and £65k – 115k for SMEs.

As seen above in the special data report by Loyens and Loef, which spotlights the mandatory breach reporting being introduced in the Netherlands as well as the draft Data Protection Regulation, the issue of reportable security failures in not going to go away and will be on an increasingly formal basis across Europe, which has a very strong privacy legislative culture led centrally by the EC.

Customers have become more aware and alert to issues surrounding security breaches. With the advent of social media customers often turn to a variety of mediums such as Facebook and Twitter to express their concerns and views about breaches that have affected them, their friends or family. This trend in customer behaviour is on the rise and businesses need to consider the potential backlash they might face on these platforms which serve to add to the reputational damage. Retailers need to provide a much higher level of reassurance to keep customer loyalty and their brand image intact. Indeed often a comprehensive breach management response plan is key to ensuring that, if a cyber attack does strike, it need not mean that a fall in share price or a loss of customer confidence are inevitable.

So what can you do?

It is vital to protect your business as far as possible. Retail and consumer businesses need to dedicate budget and resource to making sure they get things right, so they aren't putting their customers and their own reputations at risk. This will mean investing in reputable and robust online security measures and adequate protections suitable for the type of data you are handling.

While existing insurance policies such as commercial property, business interruption or professional indemnity may provide some cover against cyber risks, businesses are increasingly buying specialised cyber insurance policies to supplement their existing insurance arrangements. You need to keep on top of changes to the law, including the proposed introduction of the Network and Information Security Directive, which aims to bolster the security of critical infrastructure in the EU; the General Data Protection Regulation, which looks to offer a new perspective on protecting user data; and the possible extension of Section 7 Bribery Act 2010-type offences, to make it an offence for a “relevant commercial organisation” to fail to prevent financial crime generally.

Regular audits, compliance modelling, risk assessments and even controlled “live hack” demonstrations to test your security can all aid businesses in keeping ahead of the threat. Testing your security at regular intervals will help ensure that customer data is being protected in real time. Regularly updating your online capabilities is key, installing the latest security updates and keeping on top of the latest malware should ensure you know what potential weaknesses there may be in your site. Cyber should be seen as a 360 degree holistic risk management review of the whole of your business rather than an IT, legal or PR issue: each and every business stakeholder has a part in ensuring that as many weak links in the security chain are identified.

Arguably there is also a certain level of acceptance in the market that data breaches are now a fact of life. Often it will be simple practical steps that will determine how a business will fare in the eyes of investors, regulators, customers and the press, eg timely and well-informed press statements by the CEO, ensuring that staff do not leak technical details of the breach to the media and active efforts to contain the breach. Of course this must all still be backed up by robust security, in particular encryption, which is also a major selling point for personal devices like iPhones. Used effectively, it is a key tool in the security kit but also a hallmark of trust with consumers.

So, while prevention is key, you should also have a breach management plan in place including insurance, communications and customer care. You should have established procedures and personnel who can ensure quick and fast damage limitation in case of a data breach.
16. Food fraud

Food consumerism in the UK is an industry worth billions, dominated by big brands and governed by strict food safety regulations. But in recent years the average consumer has been forced to question what is actually in the products they buy. The vast majority of food retailers and manufacturers have a spotless track record when it comes to food and food safety but in recent years there have been numerous high profile cases of food fraud which have cast an uneasy shadow over the entire food industry.

Food fraud is committed when food is placed on the market in order to deceive the customer for financial gain. The deception can be through the sale of food which is unfit and harmful to the consumer or via a deliberate misdescription of the food.

The issue of food fraud has never been more topical; who could forget the horse meat scandal during which it was revealed that some processed beef products sold by UK supermarkets were found to contain horsemeat. The likes of Tesco, Lidl, Iceland and Aldi were all tainted by this controversy and suffered severe reputational and brand damage. Beef wasn’t the only meat affected. In April 2014 the Food Standards Agency undertook a sample of lamb takeaway dishes from various high street establishments finding that a substantial number of lamb takeaways were wrongly described and that 25 of the samples contained no lamb at all and were actually beef – a clear example of food fraud misdescription.

On the same theme, a recent American study found that of 258 burgers, 2 vegetarian burgers contained meat, 3 burgers contained rat and 1 contained human DNA. Around 6% of those burgers had substituted in them one ingredient for another. As well as potentially offending people who don’t intend to eat certain foods for a variety of principled reasons, the swapping out of ingredients can have serious ramifications for those who are allergic to ingredients they shouldn’t, and didn’t intend, to eat, such as happened in a case currently on trial at Teesside Crown Court. There, the owner of a takeaway, who is alleged to have deliberately included nut-containing products in foods he labelled as not containing nuts, is on trial for gross negligence manslaughter after a customer who unintentionally ate nuts died following a severe anaphylactic shock. If convicted the takeaway owner faces a prison sentence of many years!

In light of such high profile cases, manufacturers and retailers are sensible in focussing their attentions on these issues, to make themselves aware of their duties regarding food safety and advertising, to protect their brand and ultimately to ensure the safety of the consumer.

Addleshaw Goddard's Safety Team are experienced in advising international retailers regarding product safety issues and are able to advise you as to your responsibilities and liabilities.

17. Fulfilment and its costs

As online sales surge, retailers are continuing to bear the cost of fulfilment to offer faster and cheaper delivery options to consumers. Even “click and collect” offerings (a low cost fulfilment alternative) can still pose significant costs for the retailer in terms of logistics, warehousing and staff.

Ocado were heavily criticised for their introduction of a £9.99 delivery charge in the week before Christmas, particularly as the charge was applicable to those already paying a monthly delivery fee. John Lewis has started charging £2 on “click and collect” delivery for orders under £30, commenting that free deliveries across the board are unsustainable. John Lewis invested over £80m in its supply chain in 2015 and £100m in its IT functions, testament to the growth they’ve seen in online sales in recent years – 6m orders per year were made in 2014 compared to 350,000 orders in the first year of online sales. Amazon offers a one hour delivery service to its “Prime” service subscribers on selected items within London, Birmingham and the northeast for only £6.99, which is unlikely to cover the costs of fulfilling an order.

Passing on increased fulfilment costs to customers could prove damaging to customer loyalty, however this risk must be weighed against balancing the burden of the huge increase in online shopping and delivery demands. Analysts suggest that
fulfilling an online order from acceptance to delivery costs supermarkets an average of £15 per order, and on average, large grocers typically charge £1-6 per delivery, which means they lose out on around £9-14 per order.

It will be interesting to see how retail and consumer businesses deal with the costs of fulfilment in an increasingly omni-channel environment - whether they seek to transfer the burden of fulfilment costs by only offering free delivery to members, as we have seen with Amazon’s “Prime” service or Ocado’s monthly delivery subscription; or increasing the cost threshold at which delivery becomes free, such as John Lewis’s £2 “click and collect” fee on orders under £30. The impact of the costs will have to be carefully considered to ensure keeping up with the competition is worth the investment.

Take me back to The year ahead

18. Modern Slavery Act

31 March 2016 was a key date in the life of the Modern Slavery Act 2015. Businesses whose financial year ended on that date are the first who are required to publish an annual supply chain transparency statement.

The legal requirement – as set out in Section 54 of the Act – seems straightforward: every business trading in the UK which has a turnover of at least £36m must publish an annual statement setting out the steps it has taken to ensure that modern slavery and human trafficking are not taking place in its business or supply chains. The statement must be approved by the board and signed by a director (or equivalent) and published on the business’s website, with a prominent link on its homepage.

What should the statement look like?

The UK Government chose not to prescribe any particular format or length of the statement; neither has it legislated to impose a fine or other penalty on non-compliant businesses. In fact, the risks of non-compliance are perceived as being largely reputational. Rather, Section 54 specifies that a business may wish to include information on the following in its statement:

► the organisation’s structure, its business and its supply chains;
► its policies in relation to slavery and human trafficking;
► its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
► the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
► its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;
► the training about slavery and human trafficking available to its staff.

What are businesses doing to comply?

As we would expect, charities and campaign groups working in this area are keen to identify and analyse statements as they become available. For example, the organisation Business & Human Rights Resource Centre (the BHRCC) is developing an online database of statements which it has collected from Internet searches.

The BHRCC calculated that, by early March 2016, around 75 supply chain transparency statements had been published. Although this represents a tiny fraction of the total number of statements we expect to see, it is possible to identify some trends. For example, some of the most detailed and informative statements come from multi-nationals (including Ford and Intel). This is not surprising. Many of these companies will already be obliged to report on supply chain transparency in California, under the California Supply Chains Act 2010 (for more on this, see below) and, aside from any legal requirement, will be familiar with the reputational risks inherent in managing a complex global supply chain.

However, the BHRCC has also identified a general lack of compliance with administrative requirements. For example, statements which do not appear to have been signed by a director, and where no clear link appears on the business’s homepage.

Lessons from California

Businesses in California have been required to report on supply chain transparency since 2012. No enforcement actions have yet been brought against non-compliant businesses. Crucially, though, there are indications that modern slavery, forced labour and human trafficking issues are rising up the public agenda and play an increasing part in consumer decision-making. Read more about this from US law firm Mintz Levin here.

Getting the basics right

So, what can we learn from the statements that have been published so far and the reaction to them? We are yet to see any major players announce market-leading initiatives specifically in response to the Modern Slavery Act. Rather, businesses seem unclear as to what exactly is required of them and are perhaps waiting to see how market practice develops.

However, a key message so far is: get the basics right. This helps avoid any suggestion that the business is not approaching this issue with the seriousness it merits. In particular:

► ensure that a link to the statement appears on your homepage. Give the link an unambiguous title, such as “Modern Slavery Act Transparency Statement”.

► Make sure that the statement – as it appears on your website – includes the name and title of the director who signed the original. This demonstrates accountability at the highest level.

► Wherever possible, mirror the wording of Section 54 by referring to the six suggested areas of content (see above).

► Be open: there is no requirement to guarantee that your business or supply chain is totally free of slavery. Explaining how and where the business aims to improve falls firmly within the spirit of the legislation.

We have developed a Supply Chain Transparency Reporting - Compliance Pack. The pack includes materials such as model MSA clauses, due diligence wording for tenders and compliance checklists, and is hosted on a dedicated secure extranet site. If you require further information, please contact: Katie Kinloch: katie.kinloch@addleshawgoddard.com

Take me back to The year ahead

19. Minimum alcohol pricing

Having concluded that alcohol consumption in Scotland is so problematic that ground breaking measures were required, the Scottish Government passed The Alcohol (Minimum Pricing) (Scotland) Act 2012, prohibiting the sale of alcohol at a price below a minimum price, to be fixed at 50p per unit of alcohol under the draft Alcohol (Minimum Price per Unit) (Scotland) Order 2013.

The Act is not yet in force. It has been held up by a legal challenge brought in the Scottish Court of Session by three producer organisations, led by the Scotch Whisky Association. They argue that the legislation is incompatible with EU law, as it would amount to a restriction on the trade of alcoholic beverages between Scotland and EU member states, could distort competition between alcohol producers, and that fiscal methods such as excise duties on alcoholic beverages (which preserve freedom to determine selling prices) could equally meet the aims of the legislation in a less restrictive manner.

The Scottish Ministers seek to justify the legislation on grounds of protecting human health, a justification provided for under EU law. They also argue that a minimum price per unit (MPU) would target prices of the alcoholic drinks most purchased by harmful drinkers (those that are very cheap relative to their strength) in a way that fiscal measures could not replicate precisely.

The Court of Session asked the European Court of Justice (ECJ) whether the introduction of MPU is compatible with EU law - whether it amounts to a restriction on trade and whether it can be justified on health grounds where the member state is free to take less distortive fiscal measures which would meet the wider aims of the measure, though not necessarily the more specific ones.

On 23 December 2015 the ECJ, in a ruling that broadly followed the opinion of the Advocate General given in September, concluded that MPU does amount to a restriction on trade in the EU because it deprives suppliers based in other member states of the commercial advantage they may obtain from their lower cost prices. The measure may be justified on health protection grounds only if it is proportionate to the objective pursued. The ECJ noted that an increase in taxation of alcoholic drinks is likely to be less restrictive than an MPU measure, because traders retain the freedom to determine their selling price. It also noted that the Scottish legislation pursues a twofold objective - to reduce hazardous consumption of alcohol and to reduce the Scottish population’s consumption of alcohol more generally - and that a taxation measure that entails a generalised increase in the price of drinks, and contributes to achieving the objective of combating alcohol misuse more generally, would justify that taxation measure being preferred to MPU. However the ECJ stated that it is ultimately for the national court to determine whether measures other than that provided for by the MPU legislation are capable of protecting human life and health as effectively, while being less restrictive of trade in those products within the EU.

The ECJ’s decision has been welcomed by First Minister Nicola Sturgeon who considers MPU the most effective way of tackling alcohol misuse. The Scotch Whisky Association has also welcomed the judgment for confirming that MPU is a restriction on trade and that it is illegal to choose MPU where there are less restrictive ways of achieving the same end.
The case will now return to the Court of Session which must determine whether the MPU legislation is compatible with EU law. The ECJ confirmed that the Court of Session must have regard to all the information and evidence available to it when it gives its ruling and is not confined to examining only the information that was available when the legislation was passed. The stage is therefore set for vigorous argument before the Scottish court on the merits of the MPU legislation versus alternative measures, such as increased taxation, for tackling alcohol misuse without breaching EU law. It seems unlikely that the Court of Session’s judgment will be the final decision – a further appeal to the UK’s Supreme Court is very much on the cards, whichever way the Court of Session rules.

Alcoholic beverage labelling

A new EU level strategy for the reduction of alcohol-related harm is also being developed. On 7 December the Employment, Social Policy, Health and Consumer Affairs Council called on the European Commission to adopt, by the end of 2016, a comprehensive EU strategy dedicated to the reduction of alcohol-related harm. The Council also asked member states and the Commission to consider the possible introduction of mandatory labelling of ingredients and declaration of nutrition values (in particular energy value) of alcoholic beverages. Alcoholic beverages were exempted from the labelling obligations laid down in EU Regulation 1169/2011 on the provision of food information to consumers, pending a Commission report, due in December 2014 but delayed, on whether alcoholic beverages should be covered. However in March 2015 the European Brewers Association announced that the brewery sector was committing itself voluntarily to providing more consumer information on the calorie and nutritional content of alcoholic drinks. The Commission has responded to the Council, confirming that it will report on the mandatory labelling of alcoholic beverages and continue to work closely with member states in preventing and addressing alcohol misuse.

If you require further information, please contact: Adrienne Wilson: adrienne.wilson@addleshawgoddard.com

Take me back to The year ahead

20. Mobile payment developments

It seems like every other month a new digital/mobile/app payment method is launched to part consumers from their cash. For everyone it seems that every second counts, but as payments get easier, customer and retailer expectations get higher, and meeting them gets more challenging.

So what does it mean for retailers and what are the key risks to be aware of?

After decades of using cash, cheques and plastic at physical or internet based points of sale, consumers have very quickly come to expect an omni-channel, omni-payment environment, with various different digitally-driven payment solutions to choose from, from the now commonplace PayPal to contactless cards to cutting edge technologies such as ApplePay and Pingit.

The fully integrated omni-channel transactional experience is the holy grail for retailers, allowing customers to interact online, in store, via an app, on their phone, in the cloud or even through social media. Many retailers have well developed and implemented strategies in this regard but many more are trying to determine whether the significant investment, both in terms of new technologies, such as replacing POS estates, and better integrated payment, stock and loyalty systems is worth it when there is no guarantee that the investment will be rewarded, as customers can change payment/loyalty/engagement methods as quickly as they can download the latest app – Facebook today is MySpace tomorrow.

Keeping up with consumers

However, strategic investments must be made if retailers are to keep up with the pace at which consumer expectations are rising. In November 2015, spending on contactless cards exceeded £1bn in a single month for the first time, according to The UK Cards Association, and contactless and digital technologies are permeating every facet of society.

Already this year, plans are afoot to enable London cabbies to accept card and contactless payments on all public transport. London’s extensive tube network and 9,600 buses already accept contactless, and the rest of the UK’s 32,000-plus bus fleet look set to follow suit, with the country’s five leading bus operators - Stagecoach, First Bus, Go-Ahead, Arriva and National Express - working together on a plan to see new EMV contactless technology installed on all the UK’s buses outside London within the next four years.

However, four years is a long time in the payments market. By contrast, ApplePay, barely a rumour in 2014, is set to launch in China this year, while on the blocks in the UK are two big new entrants, Samsung Pay and Android Pay, presaging a further decline in the use of cash. The popularity of mobile based payment methodologies looks set to outstrip contactless cards, as the biometric (fingerprint etc.) and other encryption based protection required to access new devices allows for higher value transactions than those currently allowed using contactless cards.
Investing in new technology

The arrival of Samsung Pay, Android Pay and Apple Pay heaps more pressure on retailers to upgrade their POS estates to terminals compatible with near field communications (NFC) technology – the technology that underpins most contactless payment systems.

Samsung Pay may have an edge on its rivals in this regard, as it is the only of these ‘big three’ to also work with the magnetic secure transmission (MST) technology used by most standard ‘mag-stripe’ card readers and will allow “contactless” transactions with mag-stripe only POS terminals. It therefore requires less investment in new hardware, software or staff training on the part of retailers.

Integrating the customer experience

Digital payment is one of the central pillars of the omni-channel model and the creation of a seamless/frictionless consumer experience. The other watchword is integration, an area which many retailers, such as Argos, are already exploring, with programmes such as ‘FastTrack’, where an item ordered online in the evening can be collected in store the next day integrating the on-line/in-store experience with logistics and stock/supply chain management.

Retailers only have to look at South Korea to see where things might be heading. South Korean consumers can simply point their phone at a product on a poster and get it delivered to their home an hour or two later. Indeed, Tesco’s South Korean affiliate, HomePlus launched a ‘virtual supermarket’ as far back as 2011. Whether it would work in the UK is debatable, but the general direction of travel is clear: retailers who aren’t on board risk getting left behind.

It’s all about the data

The lynchpin that holds these developments together, of course, is data. Stock data, logistics data, incredibly detailed customer data, staff data, data of all kinds in ever increasing torrents; data that needs to be collected, stored, analysed, managed and secured extremely efficiently and highly effectively if retailers are to have any chance of riding the wave of technology-driven opportunity (and, avoid the attentions of the regulators).

The goal for retailers is to have a situation where, for example, a customer buying a ready meal can instantaneously be sent a voucher for a bottle of wine while they are still in the store. Or they pick up a new shirt and by the time they reach the tie isle, they already have a special offer on a tie to go with it. But to achieve that, retailers need powerful data analytics. And that, of course, needs more investment and a detailed understanding of what data retailers “own” and what their customers actually want.

And of course, the data issue raises very valid concerns around privacy and data protection issues, with regulators across Europe and further afield taking a keen interest in developments – and often reaching different conclusions. How well retailers are able to assuage regulators’ concerns, while collecting, analysing, protecting and monetising their data, is likely to be a key retail battleground over the next few years.

If you require further information, please contact Will James: will.james@addleshawgoddard.com.

Take me back to The year ahead

21. Online Competition developments

The application of competition law to selling online is not for the faint-hearted. Although the European Commission (EC) has a clear direction of travel towards a digital single market, for online retailers the current mix of EU and national legislation and case law is far from clear. Nevertheless, there are some key areas that retailers need to be aware of in 2016.

Bricks and mortar vs online

The competition framework for the traditional bricks and mortar outlets focuses on the restrictions a supplier might impose on a retailer, particularly price agreements, the customers you sell to and the permitted sales territories.

However, when those principles are transposed to the online environment, this muddy’s the water, as regulators need to decide where the trade-offs lie between allowing suppliers and retailers some control over their selling environment and returns on their investments - which ultimately benefit customers, set against low prices and wide availability for consumers – which is where the internet is so powerful.

This is the challenge that EU competition authorities and retailers themselves are struggling with. Two of the key principles that online retailers need to be mindful of are:

► suppliers are not allowed to prevent retailers making sales online, or insist that retailers advertise their products at a minimum price
suppliers cannot ‘geo-block’ or introduce other measures to prevent customers from other EU countries buying a product online. This includes practices such as automatically redirecting customers to the retailer’s website in their own country, or preventing transactions if the customer’s credit card data shows they are in a different country.

How are national competition authorities approaching these issues?

However, beyond this, there are divergences, with France and Germany, in particular, taking a more restrictive approach in some areas. This was demonstrated by the introduction of a French law outlawing all forms of price parity (e.g. best price guarantees) – a restriction that is being challenged by online booking companies.

Similarly, in Germany, the competition authority (Federal Cartel Office, or FCO) appears to be taking a less tolerant approach than the EC, particularly in regard to best price/price parity clauses, third party platform bans and dual pricing schemes.

It recently judged, for example, that Booking.com's 'best price' clauses were anti-competitive, as they did not allow hotels to display lower prices on their own website than those given to Booking.com. Another high profile judgement ruled that producers may not prohibit authorised retailers from using the manufacturer's brand names to direct customers to their own online shops, while another found that dual pricing schemes for online and offline sales were anti-competitive.

Within the UK itself, the Competition and Markets Authority (CMA) has issued a statement of objections to Ping Europe Limited alleging that a ban which prevents retailers selling Ping golf clubs online breaches competition law. The CMA has also imposed significant fines in the bathroom fittings and commercial catering equipment sectors, for infringements involving resale price maintenance (RPM) in relation to online sales. As a result of these cases and the publicity surrounding them businesses should ensure their activities are competition-law compliant; as in future we would expect the CMA to treat any similar arrangements harshly.

What are the risks for online retailers?

It’s not only about differences in legal interpretation. Some of the differences between markets may reflect behavioural, practical and cultural differences that would render a single consistent approach unworkable – one of the reasons why the EC was reluctant to give an EU-wide opinion in the Expedia/Booking.com case.

Online businesses that trade across borders therefore need to ensure they comply with the patchwork of differing legal regimes. In practice, that may mean that the business has to comply with the most restrictive regime, regardless of the more pro-competitive approach that may be taken in neighbouring markets.

Online marketplaces are also under the spotlight. Specifically, whether suppliers can stop retailers selling their products through them. Some countries say it’s OK for suppliers to prohibit this, while others, including Germany, do not allow it. In Germany, the FCO has recently published a working paper on "Market Power of Platforms and Networks", focusing on platforms as 'multi-sided markets' and considering the implications for competition law enforcement.

In the UK, the House of Lords EU Internal Market Sub-Committee has published a report on online platform regulation, following evidence submitted from Amazon, Etsy, Google and Airbnb among others. The committee scrutinised the adequacy of competition law and recommended implementing codes of practice and protection for complainants, to address the asymmetries of bargaining power between online platforms and supplier businesses.

Additionally, the committee urged the CMA to carry out an urgent market investigation into the online travel agent sector following claims that online travel agents are using deliberately misleading messages about vacancies, and so-called 'shell websites' which pretend to be the hotel website, to take bookings at a higher rate.

Using online tools, such as algorithms, to charge different prices also needs to be on retailers’ radars. It is still a relatively new area of focus for EU competition authorities, but any automated mechanism that could allow retailers to collude on pricing or infringe competition law in any other way is bound to attract their attention.

How are things likely to change in 2016?

The EC, with its digital single market strategy, sees online retailing as a major factor in increasing cross-border competition. Geo-blocking is a particularly hot topic.

In March 2016 the EC published its initial findings in its e-commerce sector inquiry, which found that a high proportion of retailers use geo-blocking to limit cross-border e-commerce, and a majority of digital content providers are required to do so by their suppliers. The investigation looked particularly at barriers to cross-border trade through online channels, focussing on electronics, clothes and shoes, where e-commerce is most common, as well as digital content. The final report is scheduled for the first quarter of 2017. We think it is likely that enforcement action may well follow the conclusion of the inquiry.

As part of the digital single market strategy, the EC released a report in May 2016 on the digital performance of EU Member States. The report found that while several of the Nordic EU countries were leading international providers, e-commerce across the EU as a whole was not high. The EC subsequently presented a three-pronged plan to boost e-commerce with
proposals on (i) geo-blocking, (ii) making cross-border parcel delivery more affordable and efficient and (iii) promoting customer trust though better protection and enforcement.

Whereas the EC's e-commerce sector inquiry has looked at geo-blocking restrictions within agreements, the EC's latest proposals are aimed at tackling unjustified geo-blocking even where this is a business's own unilateral decision.

With the exception of these latest developments, the EC has tended to avoid taking legal action at the EU level, preferring to let national courts reach their own, inevitably different, judgments.

One area that all competition authorities are likely to agree on, however, is that the spotlight is firmly on internet selling. Meanwhile, suppliers and retailers must continue to walk the fine line between the approaches of the competition authorities in markets they trade in, as well as with new developments at the EU-level.

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Take me back to The year ahead

22. Plain packaging for tobacco products

A transition to plain cigarette packaging seems likely in the near future, with various related legal actions also currently underway: the outcome is bound to be of interest not just to the cigarette industry but to all brand businesses and IP lawyers (especially those which own brands which carry any health sensitivities).

The UK Government introduced standardised tobacco packaging legislation with a vote in the House of Commons in March 2015, with measures planned for introduction in May 2016 and full roll out by 2017. The powers to introduce standardised packaging were included in the Children and Families Act 2014, and only needed approval from Parliament before being introduced, as the packaging regulations are not primary legislation. Packaging will be required to conform to a standard size, shape and design, with only the brand name (in a standardised font) and a graphic health warning image permitted on the front of the pack. The hope is that plain packaging will decrease consumption of tobacco products in the same way that similar measures introduced in Australia coincided with a fall in smoking rates of 12% in the year between December 2013 to December 2014. The plain packaging measures follow the 2012 ban on openly displaying tobacco products in supermarkets and large shops, and the phasing out of active advertising and marketing of tobacco products almost a decade ago across 2003-2005.

Four of the world's biggest tobacco companies, Philip Morris International, British American Tobacco, Imperial Tobacco and Japan Tobacco International, have filed lawsuits against the UK Government over the planned legislation. The claims put forward are that the measures deprive them of property in the form of trademarks, and that the measures violate European intellectual property laws. They are seeking compensation that could extend to billions of pounds should their lawsuits be successful. They may also be hoping to delay the implementation of the plain packaging policies, or deter other countries from introducing similar measures. The Government claims that the new legislation is compliant with European law and appear to be confident of victory. The case was heard in a six-day hearing at London's Royal Courts of Justice, with a verdict expected in early 2016.

A similar lawsuit in Australia's High Court following the introduction of standardised packaging that country was unsuccessful, however further legal challenges were made via the World Trade Organisation by the Ukraine, Honduras, Dominican Republic, Cuba and Indonesia arguing that plain packaging law breaches the WTO's General Agreement on Tariffs and Trade (GATT), Agreement on Technical Barriers to Trade (TBT Agreement) and Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement) because plain packaging is discriminatory, more trade restrictive than necessary, and unjustifiably infringes upon trademark rights. The WTO ruling is expected in late 2016.

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Take me back to The year ahead

23. Taxation changes to termination payments

From July 2015 to October 2015, the Government ran a consultation on reforming the income tax and national insurance exemptions for termination payments with the aim of (1) giving employees certainty about the amount of money they will
receive when they lose their jobs (2) simplifying the current position making administration easier for employers and HMRC and (3) tightening the termination payment rules to prevent manipulation.

Although a full summary of the responses and a consultation on the draft legislation is expected later in 2016, the Chancellor has already announced a number of changes in the Budget 2016 including that:

- all payments in lieu of notice (regardless of whether they are contractual or not) will be subject to income tax and NICs in the same way as other payments of earnings;
- the rules will be tightened to ensure that certain contractual payments cannot be paid as damages (instead such payments will be treated as earnings and subject to tax and NICs);
- the current exemption for foreign service will be removed; and
- alignment of the rules so that employer NICs are due on those payments above £30,000 that are already subject to income tax. The full payment will remain outside the scope of employee NICs.

These changes will be introduced in the Finance Bill 2017 and a future National Insurance Contributions Bill.

Further, although it would appear from the Chancellor's announcement that some of the more complex proposals floated in the recent consultation have not been taken further at this stage, employers should be mindful that further information from the Government and a further consultation are expected in 2016, which may lead to additional changes being implemented.

Aldeshaw Goddard LLP worked with the GC100 group on formulating the GC100 response to the proposals.

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24. GSCOP

The Groceries Code Adjudicator (GCA), Christine Tacon, published the results of her year-long inquiry into Tesco at the end of January. Although her investigation focused exclusively on Tesco, the findings could have significant implications for all retailers and the standards they are expected to meet under the Groceries Supply Code of Practice (GSCOP).

The inquiry was launched in February 2015 after Tesco admitted it had overstated its profits for the first half of the 2014 financial year by an estimated £250m. This was later revised to £263m. Tacon identified that some of the issues behind the overstatement, which continue to be investigated by the Serious Fraud Office, may have also violated GSCOP, and asked Tesco to report the result of its internal audit to her.

Covering the period between June 2013 and February 2015, investigations centred on Tesco's payments to suppliers and payments made by suppliers to improve shelf positioning or space, in contravention of paragraphs 5 and 12 of GSCOP.

Did Tesco breach the Code?

In her report, Tacon said that Tesco had breached paragraph 5 in terms of payments to suppliers, deliberately and repeatedly withholding money owed to suppliers to boost its sales performance. According to the report, in the lead up to Tesco's presentations of results to the City, suppliers were pushed even harder to accept payment delays that would artificially inflate sales figures.

With regard to paragraph 12 of the Code, Tacon said that although Tesco had not directly requested payments for better shelf positioning or more space, there was evidence of practices that amounted to indirect requirements for such payments. Clearly concerned that these practices circumvented the Code itself, over which she has no control, Tacon has requested that the CMA look into the issue and has launched her own additional probe into existing practices.

As a result of the report's findings, the GCA ordered Tesco to make "significant changes" to the way it deals with suppliers, including:

- Money owed must be paid according to terms agreed with the supplier
- No unilateral deductions to be taken from suppliers
- Suppliers must be given 30 days' notice to challenge any proposed deductions, with deductions barred if challenged
- Any pricing errors must be corrected within seven days of notification by a supplier
Dealings with suppliers must be undertaken with transparency and clarity – including clarifying the status of Joint Business Plans.

Staff must be trained on the findings of the report.

The GCA did not have the power to fine Tesco. She could only make recommendations or require information to be published, as the power to fine retailers only applies to breaches occurring from 6 April 2015 onwards.

Nevertheless, it is reported that Tacon has asked Tesco to pay £1 m towards the cost of the inquiry and although this may sound like a fine by another name, it is not altogether surprising. The GCA is funded by contributions from retailers themselves, not by government, so it is logical that other retailers would not be expected to pay for an inquiry specifically into Tesco.

What are the wider implications for retailers and suppliers?

The full impact of the report’s recommendations will not be seen for some time, but suppliers can take comfort from the fact that Tesco is understood to have already changed the way it operates in order to improve its compliance with GSCOP.

The GCA’s recommendations also sets out expectations for what all the big grocery retailers need to do to comply with GSCOP.

In particular, the report details certain specific behaviours that may need to change in order to comply with GSCO P. This should clarify interpretation of the Code throughout the industry, make it easier for other large retailers to assess their own practices and provide a clearer basis for retailers and suppliers to resolve differences relating to GSCOP.

The fact she has written to the CMA to ask it look into indirect payments better shelf positioning through category captaincy or otherwise is also significant for retailers and suppliers, and will be a development both are watching closely. Interestingly, the Competition Commission already scrutinised this area in 2008 when it recommended the Code, but ultimately decided that it did not need to be covered, and it is not clear whether use of category management or other payments has changed significantly since then.

Some commentators may see the recommendations as evidence that the GCA lacks the necessary powers to adequately enforce the Code. But the GCA’s firm and robust approach to investigating the causes of the breaches, including her request to the CMA to investigate further, is evidence that any alleged breaches of GSCOP will be treated very seriously.

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Take me back to The year ahead

25. Zero hours contract (ZHC) regulations

Over the last twelve months the Government has focussed on regulating the use of ZHCs. Such contracts have attracted controversy following the working practices adopted by organisations such as Sports Direct. For example, in February 2015, it was confirmed that nearly 300 current and former employees of Sports Direct were proceeding with claims following the retailer’s decision not to grant them a share of a £160 million bonus pool because they were employed on ZHCs.

On 26 May 2015 a ban on the use of "exclusivity clauses" in ZHCs came into force. Exclusivity clauses provide that the worker is not entitled to work for another employer, even when their primary employer has no work available for them. CIPD research published in November 2013 had found that 9% of individuals engaged on ZHCs were subject to exclusivity clauses.

The ban was followed in October 2015 by new guidance on how ZHCs should be used. The guidance is aimed at employers and includes information on employment rights, appropriate use, best practice and exclusivity clauses. The guidance provides that:

- ZHCs are only appropriate in certain situations, for example, when the employee is engaged in seasonal work, a start up business or, a one-off special event. These contracts are not appropriate for individuals who are contracted for permanent work, with regular hours, over a continuous amount of time

- When recruiting for a ZHC, employers should clearly advertise the job as such and the individual should be informed that hours are not guaranteed

- When offering a ZHC, employers should consider including specific information such as, whether the individual is an employee or worker, what employment rights they are entitled to, the process by which work will be offered and, how the individual’s contract will be terminated
Cancelling work at late notice is not acceptable unless truly unavoidable and employers should give employees as much notice as possible when work is, or is not, offered.

Exclusivity clauses are prohibited, meaning that employers cannot stop zero hours workers from looking for work with, or accepting work from, another employer.

Looking ahead to 2016, it is expected that the Government will introduce further legislation designed to protect zero hours workers. The Government has previously consulted on the potential ways in which employers might seek to avoid the ban on exclusivity clauses and concluded that further measures were required. In October 2015, the Government published the draft *Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015*. The regulations were laid before Parliament on 19 October 2015 and came into force on 11 January 2016.

The regulations provide:

- A right for zero hours workers not to be unfairly dismissed if the reason, or principal reason, is that they have failed to comply with an exclusivity clause. There is no qualifying period of employment needed to bring such an unfair dismissal claim.
- A right for zero hours workers not to be subjected to any detriment because they have failed to comply with an exclusivity clause.
- Where an employer breaches these rights, the worker may issue a claim in the Employment Tribunal and seek a declaration and/or compensation.

Although ZHCs are most commonly associated with the public and voluntary sector, they are used by 17% of private firms. All employers, regardless of their size or sector, must pay attention to the BIS guidance and how the new regulations work in practice to avoid unintended consequences. For example, following the ban of exclusivity clauses, employers should review their employment contracts and ensure they are adequately protected in relation to confidentiality and competition issues, without falling foul of the regulations.

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Take me back to The year ahead