ADDLESHAW GODDARD

2017/18 Horizon Scanner: the year ahead at a glance

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Fast moving sector themes…

Brexit	Digital engagement	Illegal working	Sugar and obesity
Competition law based damages claims	Employment watch list	Logistics	Tax evasion
Data and Cyber security	Environment: heightened risk of fines	Supply chain vigilance	Taxation changes to termination payments

Gambling Commission’s consultation to improve transparency for lottery players ends

The Gambling Commission has been consulting on new codes of practice to improve the transparency for lottery players since **20 July 2017.**

The aim of the consultation is to provide consumers with further information into how lottery proceeds are used and for which good causes. The law currently requires that the proceeds of lottery return a minimum of 20% to good causes. These new proposals would introduce an obligation for society and local lottery operators:

- To make it clear to consumers which society or charity proceeds of the lottery ticket sales will go to.
- Publish the amount of money that is being raised for the societies from ticket sales.

The proposals also seek to provide clarification on the terms “instant win” and “low frequency lottery,” to be in line with changes to the Remote Technical Standards and updates on regulatory data collection requirements.

The consultation will close on the **30 September 2017**.

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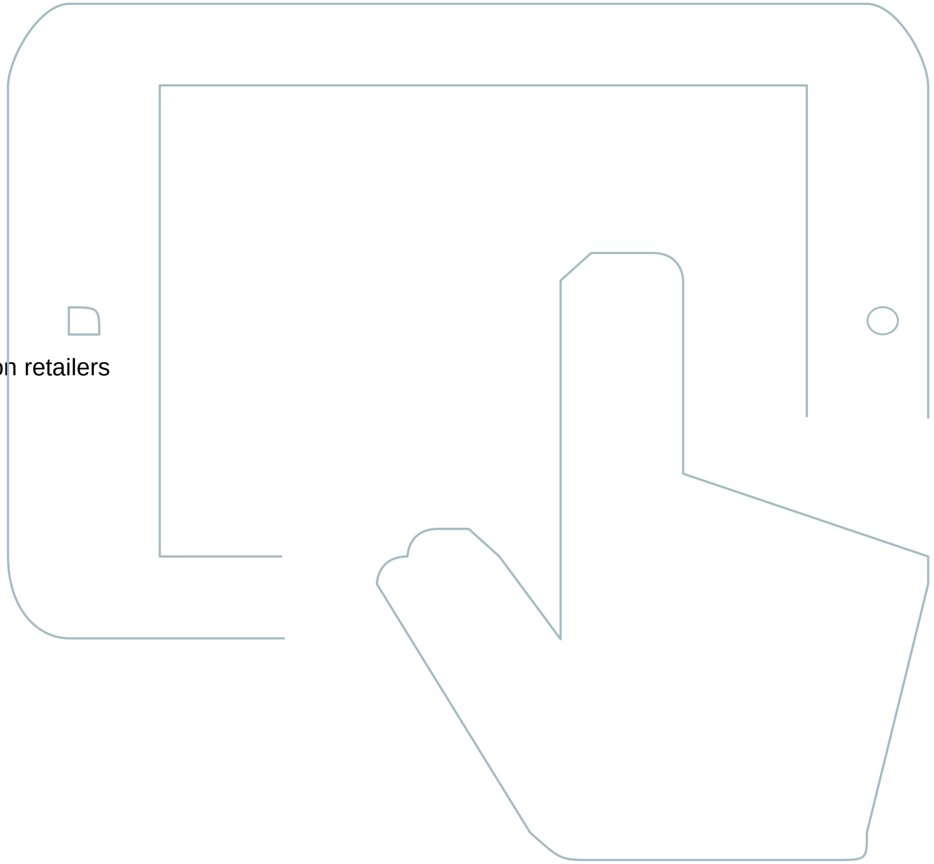
Consultation on Retail regulations multi-channel environments in the EU closes

As retail is the biggest sector in the EU other than financial services, its competitiveness is of key importance to the EU economy. There is a rapid rate of change within the sector as a result of the constant development of e-commerce, which has provided many new opportunities for retailers. The regulatory frameworks which are currently in place are not adapted to the new reality of business created by e-commerce, and as such a consultation has been called to seek input on best practices within the retail sector. The consultation seeks comments on issues such as:

- Whether regulatory frameworks need to be reviewed to adapt to the growth in e-commerce
- The implications of changing consumer habits on retailers
- Which conditions are creating the most significant barriers to market entry
- Opportunities that are available for the integration of the EU retail market
- How regulations on shop opening hours, sales promotions and discounts, and product-specific sales' restrictions are impacting on retailers

The consultation closes for comments on **8 October 2017**.



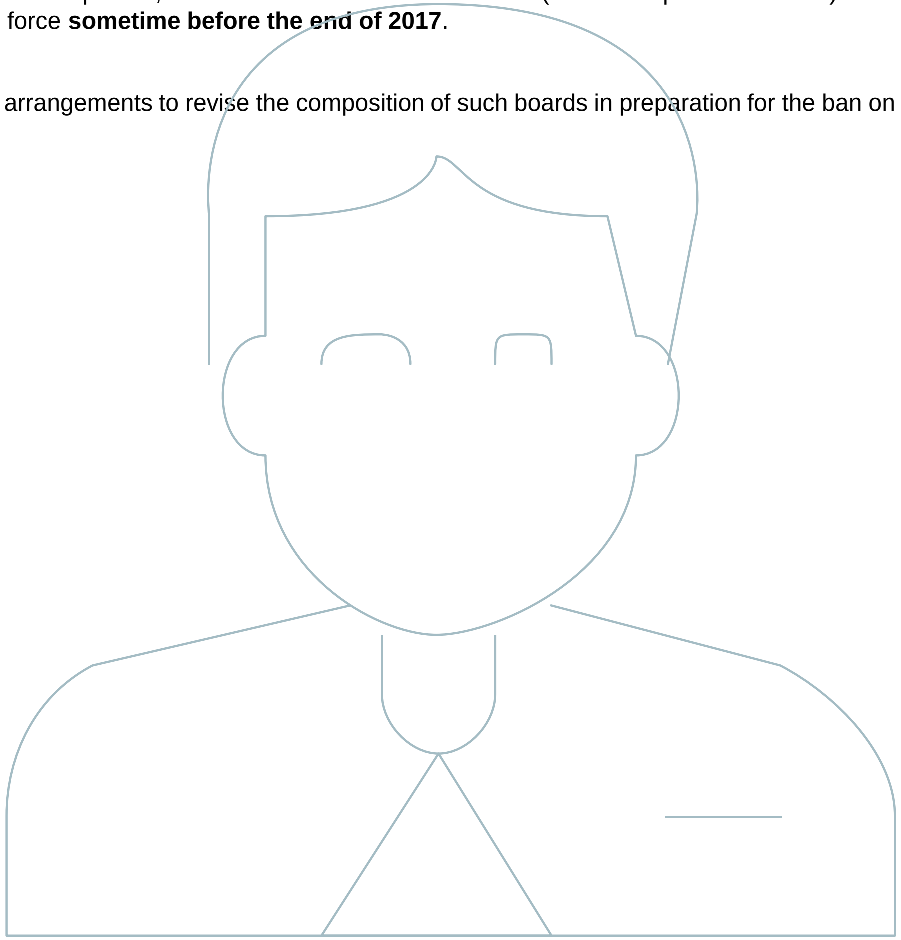
Triennial Review

- In response to an increased focus in the press and parliament on the social impact of gaming machines, the Department for Digital, Culture, Media & Sport announced a review in October 2016. After a number of delays, the Government is expected to publish its findings and proposals – colloquially known as the Triennial Review - in October 2017.
- All eyes in the industry will be on any proposed new restrictions placed on category B2 fixed odds betting terminals (FOBT), often labelled the "crack cocaine" of gaming machines for their users' ability to bet up to £100 ever 20 seconds. FOBTs are therefore seen by some as being particularly dangerous for at-risk gamblers.
- The headline proposal will likely be a change to the maximum stake that can be bet. Reports suggest that the Government is not willing to countenance a continuation of the status quo but how low they choose to set this will have massive ramifications for land-based operators. In an analyst note, Barclays have forecast that if the maximum stake was reduced to the **widely-mooted figure of £2** Ladbrokes Coral, William Hill and Paddy Power Betfair would between them lose **£788m** in annual revenue in 2018. Simon French, analyst at Cenkos Securities, has opined that a maximum stakes cut to £20 was already "priced in" to the share prices of the main operators.
- However, while the maximum stake restrictions will receive the attention, other significant restrictions are also possible: limitations on the number of machines and the length and frequency of spins have also reportedly been considered.
- While the Government's proposals do not immediately result in a change of law, they will provide a clear indication to the market of the likely outcome.

New rules on Company Directors

All company directors must be natural persons and not corporate entities (s.87 SBEEA). Limited exceptions to this 'ban on corporate directors' are expected, but details are awaited. Section 87 (ban on corporate directors) have not yet come into force. Section 87 was due to come into force in October 2016, but has now been delayed and is now expected to come into force **sometime before the end of 2017**.

Groups of companies should evaluate whether any group companies are directors of other companies within the group, and make necessary arrangements to revise the composition of such boards in preparation for the ban on corporate directors. Quorum requirements set out in articles of association should also be reviewed to assess if they will be affected.



VAT on pension scheme costs

HMRC is currently reviewing how VAT is claimed in relation to UK pension schemes. In February 2014, they announced that it was ending its existing practice of allowing employers to offset VAT paid on certain pension costs, against their own VAT liability, where the pension costs were technically incurred by the scheme trustees. The announcement was a response to the decision of the Court of Justice of the European Union in the "PPG case". The original HMRC announcement was very unclear, and subsequent attempts to clarify the policy have thrown up various legal issues. This has been a long drawn out process 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 2017**. This change leaves schemes facing a possible 20% increase on their running costs from January 2018.

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. The best option 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.

Electronic communications code

The new Electronic Communications Code is set out in the Digital Economy Act 2017, which came into force on the **27 April 2017**. The code makes changes relating to valuation, site sharing and upgrading, assignments, dispute resolution and the disapplication of the Landlord and Tenant Act 1954 (LTA 1954) to code leases. The code has not yet come into force – we are currently waiting for its enactment.

Land registry – beneficial ownership/transparency consultation

The Department of Business, Energy and Industrial Strategy (BEIS) is seeking views on proposals to establish a register of the beneficial owners of overseas entities that either own UK property, or that engage in UK government procurement. The paper sets out the basic framework of the government's proposals, including that:

- All overseas legal entities that can hold property or that can bid on central government procurement contracts will be within the scope of the new regime;
- provisions similar to those under the existing PSC regime as regards to how to identify beneficial owners, what reasonable steps an entity should take to do so and the required particulars that must appear on the publicly available register will be applied;
- criminal sanctions will apply in respect of a number of failures to comply with the new regime; and
- overseas entities that own or wish to acquire UK property must supply beneficial ownership information to Companies House and apply for a registration number. Registration of the title to property (which will encompass freehold and some leasehold titles) will not be possible without having done so.

Impact

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

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New rules prohibiting the sexualisation of U18's in advertising

In January, a consultation ran by CAP (for non-broadcast media) and BCAP (for broadcast media) closed which examined new rules to prohibit the sexual portrayal or sexual representation of under-18s (or those who appear to be under 18) in advertising. The result of the consultation was an agreement that stricter rules should be implemented to protect the welfare of under-18s, to take into account the links between premature sexualisation and harm, alongside national and international measures prohibiting certain types of sexual depiction of under-18s.

The BCAP Code already has specific wording which prohibits the portrayal of children in a sexual way, which applies to broadcast media, has a specific rule prohibiting the portrayal of children in a sexual way. The new rules being introduced will bring the CAP Code into line with the BCAP Code, as it has no specific rule prohibiting the portrayal at the moment. The new rules go further by protecting all those under-18, as opposed to just children under-16.

The new rules state:

- New CAP Code rule: Marketing communications must not portray or represent anyone who is, or seems to be, under-18s in a sexual way. However, this rule does not apply to marketing communications whose principal function is to promote the welfare of, or to prevent harm to, under-18s, provided any sexual portrayal or representation is not excessive.
- New BCAP Code rule: Advertisements must not portray or represent anyone who is, or seems to be, under-18s in a sexual way. However, this rule does not apply to advertisements whose principal function is to promote the welfare of, or to prevent harm to, under-18s, provided any sexual portrayal or representation is not excessive.

The rules will take effect from **2 January 2018**.

Ban on microbeads

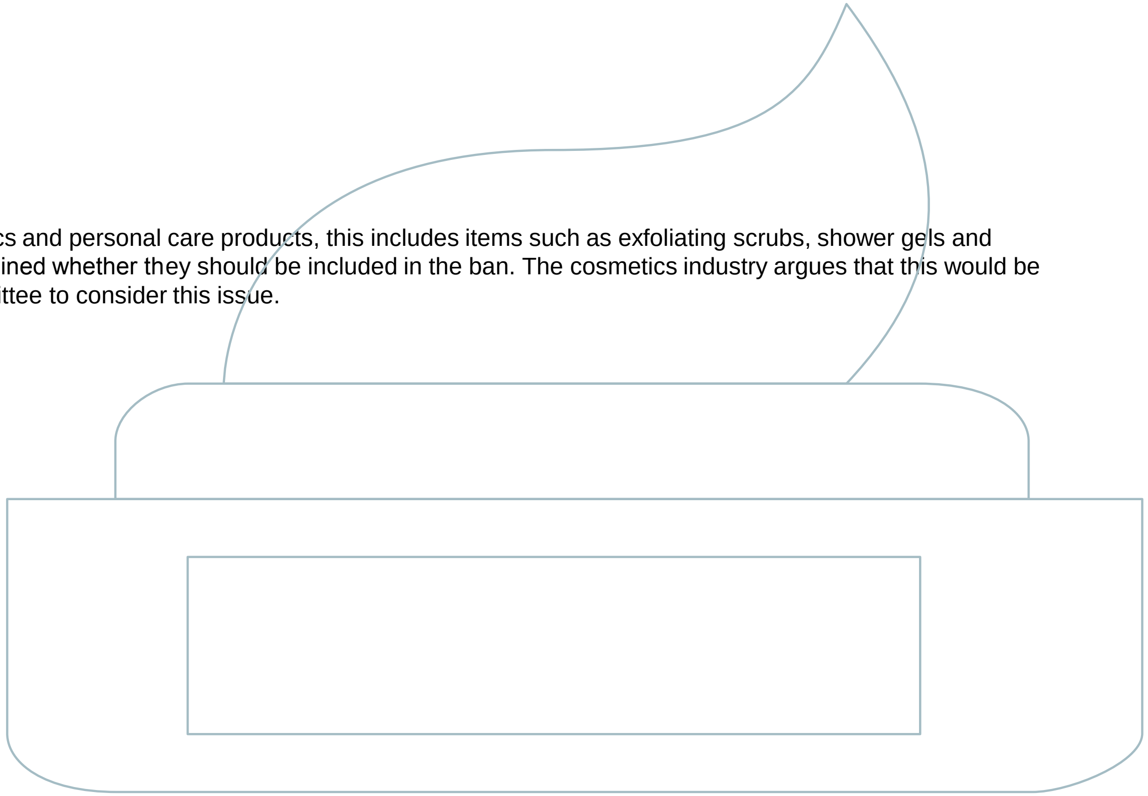
Following a consultation by the Department for Environment, Food and Rural Affairs (Defra) and the devolved administrations earlier this year that ended on **28 February 2017**, the government has decided to implement its proposals to ban the sale of cosmetic and personal care products that use rinse-off plastic microbeads. These changes have been made following increasing evidence that the tiny microbead plastics are damaging marine life, and may also pose a threat to human health.

The legislation will come into force on **1 October 2017**, with the effect that:

From **1 January 2018**, the manufacture of microbeads will be banned.

From **30 June 2018**, the sale of relevant products will be banned.

The ban applies to solid microplastic ingredients less than 5mm in size that are used as an ingredients in rinse-off cosmetics and personal care products, this includes items such as exfoliating scrubs, shower gels and toothpastes. For other products that fall under the “leave-on” category, such as sunscreen or makeup, it is yet to be determined whether they should be included in the ban. The cosmetics industry argues that this would be difficult and expensive as they would need to adapt 90% of their products. The Government has called for an expert committee to consider this issue.



Trade Marks Directive

The purpose of the Trade Marks Directive (Directive 2015/2436/EC) is to make it easier and cheaper to register trade marks in the EU, and modernise trade mark laws in member states. The new changes to this Directive include amendments to the basic definitions, the removal of the graphic representation requirements in trade mark applications, and the endorsement of the "literal meaning" approach to class headings as ruled in the IP Translator case.

The deadline for implementation is **14 January 2019.**

Gender pay gap reporting deadline

On **6 December 2016**, the Government published the final draft of The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (Regulations), together with an Explanatory Memorandum. At the time of writing, the Government's response to the consultation on the draft rules has not been published. Supporting non-statutory guidance for employers will be published after the Regulations have been approved by Parliament. These Regulations came into force on 6 April 2017, and first reports must be made no later than **30 April 2018**.

Acas and the GEO have published the final version of their guidance and there are a number of important changes between this and the draft version published in January, this can be found here. The Guidance has been extended to apply to public authorities who are covered by a separate, but near-identical, set of regulations. This has necessitated a number of changes:

- The guidance no longer refers to 5 April as the snapshot date. Instead the generic term "snapshot date" is used throughout because the date differs between the two sets of regulations (for public authorities it is 31 March and for private and voluntary sector employers it is 5 April).
- Advice is given on how to identify which set of regulations applies to a particular employer. Also highlighted are the small number of exceptions where large employers do not have to follow either set of regulations.
- The guidance clarifies that the requirement for a supporting statement by an authorised person only applies to private and voluntary sector employers and not to public authorities.
- The guidance highlights that the reporting deadline is different for public authorities (being 30 March 2018 and each year thereafter) and private and voluntary sector employers (being 4 April 2018 and each year thereafter).

The Government's gender pay gap results website is now up and running (in beta format), showing the results employers so far who have bitten the bullet and decided to report their results now. A link to the website is here.

Salary sacrifice scheme deadline/Termination payment rules

In **July 2015**, HM Revenue and Customs and HM Treasury launched a public consultation on the simplification of the tax and national insurance treatment of termination payments. On **10 August 2016**, the Government published its response to the consultation, together with a second consultation on the amendments to the law that will be required to implement the planned changes on 6 April 2018.

The changes include:

- Clarifying the scope of the exemption for termination payments to prevent manipulation, by making the tax and National Insurance contributions (NICs) and consequences of all post-employment payments consistent. This will mean that all types of payments in lieu of notice (PILONs) will be taxable and subject to Class 1 NICs.
- Aligning the rules for income tax and employer NICs so that employer NICs will be payable on payments above £30,000 (which are currently only subject to income tax).

The first £30,000 of any termination payment will remain exempt from income tax and the entirety of the payment will remain exempt from employee NICs

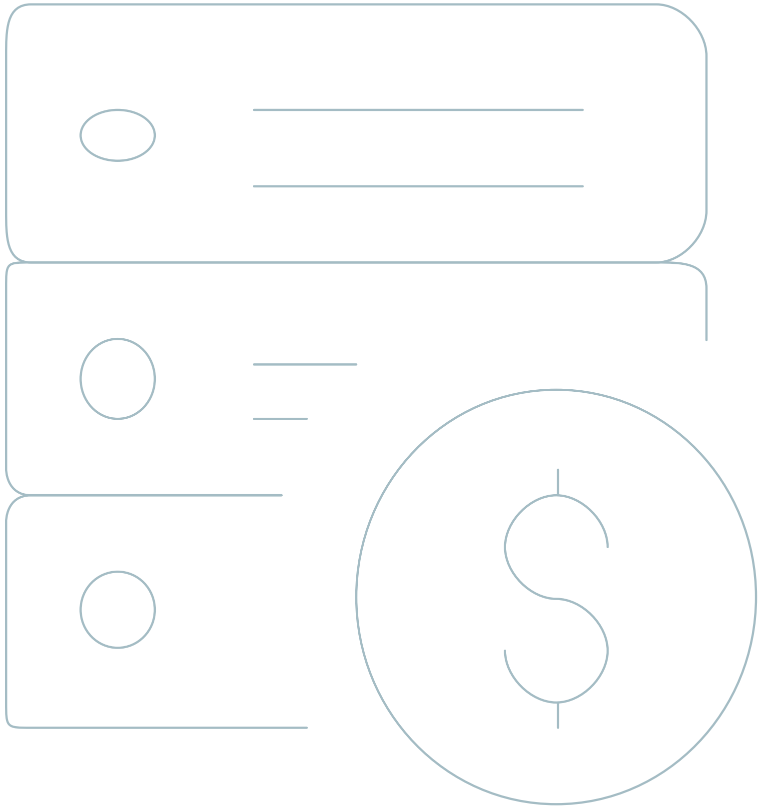
- Removing foreign service relief.
- Clarifying that the exemption for injury does not apply in cases of injured feelings.

The new rules are expected to come into force on **6 April 2018**.

Pensions auto-enrolment: increase in minimum contribution rates

From 6 **April 2018**, the minimum rate of pension contributions that must be paid to comply with automatic enrolment legislation will increase with the start of the "second transitional period" under the automatic enrolment regime.

Employers should consider whether their existing pension arrangements will still be compliant with auto-enrolment legislation from April 2018, and if not, consider what steps will need to be taken to ensure they are compliant by that date. Employers should consider the cost impact of any contribution increase, taking into account the impact of the National Living Wage .



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Soft drinks industrial levy

Soft Drinks Industry Levy, part of the government's Childhood Obesity Plan and a drive to reduce sugar consumption. The levy, implemented from **April 2018**, is designed to encourage companies to invest in recipe changes, portion size reductions and the marketing of low sugar brands. It will be a levy on producers and importers.

In a further move to combat the obesity issue the Committee of Advertising Practice announced on **8 December 2016** that junk food advertising aimed at children will be banned entirely from **July 2017**. Food and drink producers of snacks, fast-food and fizzy-drink high in fat, salt or sugar will be no longer able to circumvent the existing television ban by promoting their products online and through social media. The ban applies to any platform where children account for more than one-quarter of the audience.

The use of licensed characters and celebrities in junk food advertisements will also be banned, although they can still be used on packaging as this is not regulated by the CAP. Interestingly, the Dutch Food Industry Federation has voluntarily decided to "restrict media characters" on food and drinks high fat, salt or sugar which are aimed at children. The new rules will be enforced by the Advertising Standards Authority.

Energy Efficiency Regulations (MEES)

The Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015, stipulate that on or after **1 April 2018** a lease may not be granted at a commercial property if it has an EPC rating of F or G. From **1 April 2023**, no commercial property can continue to be let if it has an EPC rating of F or G, thus catching existing leases at that date. There are exemptions which can be claimed, and not all properties require an EPC. If the regulations are breached, however, the lease itself will not be void, but there are potential fines of up to £150,000. If exemptions are to be claimed, they will be entered on a public register.

Landlords will be assessing properties to ascertain whether they need improving and whether the cost will be the landlord's or tenant's responsibility. Landlords will be cautious about allowing alterations to property that may reduce an EPC rating.

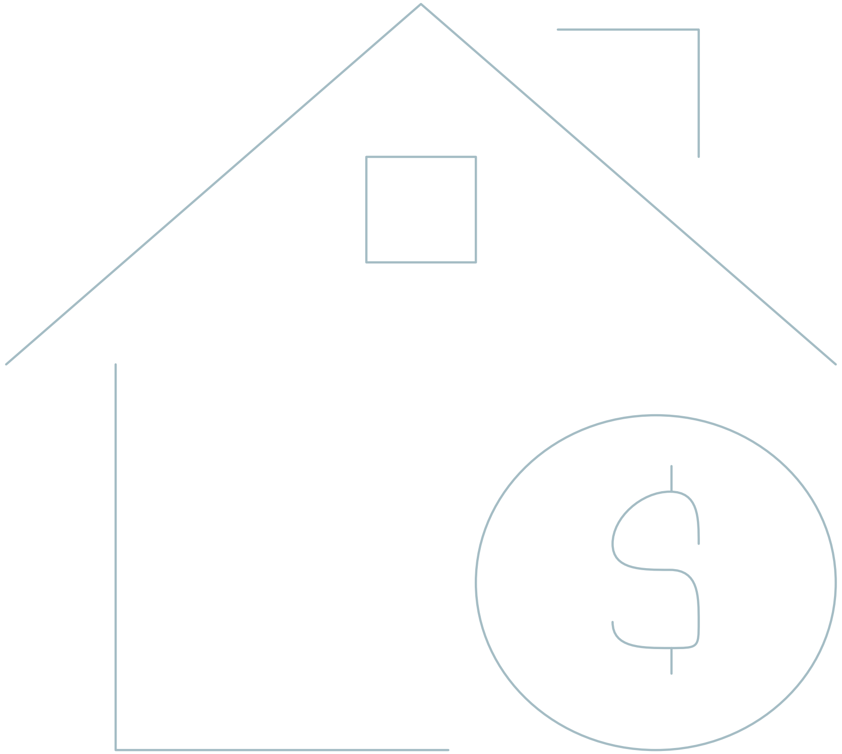
Tenants may be reluctant to be responsible for the cost of energy efficient improvements to property, although they will need to consider the issue from a landlord's perspective too if they plan to underlet.

Government Guidance on the regulations was issued in **February 2017**, but there is still a lack of clarity in terms of practical application of the legislation.

Stamp Duty Land Tax

The Stamp Duty Land Tax filing and payment window will be reduced from 30 days to 14 days, however the introduction has been delayed by one year until 2018/19, its implementation will not be before **April 2018**. The decision to delay is based on concerns from respondents to the consultation on the proposals. The consultation also invited general views on the Stamp Duty Land Tax filing and payment process.

In Wales from April 2018 a Land Transaction Tax will replace stamp duty land tax. Proposed tax rates and bands to be announced **October 2017**.



PPE Regulations

The new PPE Regulation (EU) 2016/425 was adopted on 12 February 2016 and published shortly thereafter in the Official Journal. A two year transitional period will now take place to allow member states to prepare for the change in law with UK regulations likely to come into force in April 2018. The former PPE Directive has been in place for over 20 years. The new legislation has been designed to guarantee consumer safety, ensure a level playing field throughout the PPE industry and to reflect the developments in technology which have taken place over the last two decades.

Key changes

- One of the main changes that will be brought in by the new regulation is the increased focus on the whole supply chain. The current regulations cover manufacturers only. However, in future, importers, distributers and retailers will also be required to ensure that PPE handled by them are fully compliant.
- Further, hearing protection will be reclassified from category 2 to category 3. Life jackets will also be subject to the same recategorisation which will ensure that these products are more stringently examined and monitored.
- EC Type examination certificates will now only be valid for a maximum of 5 years. This change will ensure that products are the subject of regular reviews and testing with the aim of discouraging certain manufacturers from introducing counterfeit products to the market.
- The introduction of the new legislation also means that all products currently certified to the old standards will need to be tested to the latest current standard.
- Distributors will be required to ensure that PPE is accompanied by instructions in a language, which can be understood by the end user in the country in which the product is to be made available.

The changes within the new legislation have been introduced with a view to ultimately enhance the protection and the health and safety of PPE users, and discourage manufacturers and importers who place non compliant products on the market. Furthermore, the new requirement to ensure compliance throughout the entire supply chain will result in equipment passing through 3 stages of testing which will ultimately result in a higher standard of PPE throughout the industry. It is important to remember that PPE Regulation is mandatory and that it is a legal requirement to comply. Failure to do so is a criminal offence.

National Living Wage and National Minimum Wage increases

The Government announced that National Minimum Wage rates will come into force in April of each year from 2017. The Office for Budgetary Responsibility has estimated that by 2020, the level of the National Living Wage, at 60% of median hourly earnings will stand at £9.00 an hour. If this forecast is correct for the 2020 target there will be a 55 pence rise in the National Living Wage rate from £7.50 to £8.05 per hour **from April 2018**.

The National Minimum Wage (NMW) increased on 1 April 2017 to the following:

- for 21 to 24 year olds – from £7.10 per hour to £7.35
- for 18 to 20 year olds – from £5.55 per hour to £5.60
- for 16 to 17 year olds – from £4.00 per hour to £4.05
- for apprentices – from £3.40 per hour to £3.50

The Government has also committed to invest an additional £4.3 million per year to strengthen enforcement. This will fund new HMRC teams to proactively review those employers considered most at risk of non-compliance with the NMW.

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General Data Protection Regulation and e-Privacy Regulation

The **GDPR** is coming into force on **25 May 2018** - our key focus for 2017 will be on:

- the impact of the GDPR and what this means for data collection, data portability, underlying consent, data minimisation and data profiling and how we communicate with customers about their privacy rights
- what companies acting as data controllers need to do and correspondingly what companies who offer data processing services need to comply with GDPR and address the significant change in risk that GDPR represents (with maximum fines increasing from £500,000 to 4% of turnover or 20 million euros)
- a growing move towards future proofing contracts (internal and external) for GDPR compliance
- increasing organisational awareness of data protection issues

A draft of the **e-Privacy Regulation** (or EPR) was issued by the European Commission earlier this year. The EPR applies in addition to the GDPR in relation to the collection of metadata and content (for example tracking) and the conduct of telephone and e-marketing. The EPR is still to be finalised, but should be taken into account in respect of current or new e-marketing initiatives or projects involving tracking or location data. Key issues under the draft EPR include:

- it applies to all providers or electronic communications services – including WhatsApp, Facebook Messenger and Gmail – not just traditional telecoms operators
- consent is necessary to apply privacy invasive cookies – such as tracking cookies – on an individual's device. Such consent is subject to the higher GDPR standard of consent and can no longer be 'opt-out'
- a narrower version of the soft opt-in for marketing – which allows business to send e-mail marketing to existing customers – is retained in the current draft. Any other unsolicited e-marketing that might previously have been covered by the 'soft opt-in' is subject to 'opt-in' consent at a GDPR standard
- breaches for the EPR will be fined at the same level as GDPR breaches

The Department for Digital, Culture, Media and Sport released a "**statement of intent**" of its planned data protection reforms on **7 August 2017**. The Department and the ICO has previously confirmed that the GDPR will come into effect in the UK on 25 May 2018 despite Brexit, and that plan has not changed. The recent announcement **confirms the Government's plans to repeal the existing Data Protection Act 1998 and replace it with the GDPR** and new data protection legislation to accommodate those parts of the GDPR that allowed member states to make their own rules (such as the age of consent for social media use, and how we can use criminal convictions data. The draft bill is due to be published later this year.

Grandparents leave

The Government has announced that they will extend shared parental leave and pay to working grandparents **by 2018**. A public consultation on this proposal was due to commence in May 2016, but was postponed until after the EU referendum. It is not yet clear when the consultation will commence.

Immigration measures

At the 2016 Conservative Party Conference, the Home Secretary, Amber Rudd, announced a number of immigration related proposals including some that are of relevance to employers:

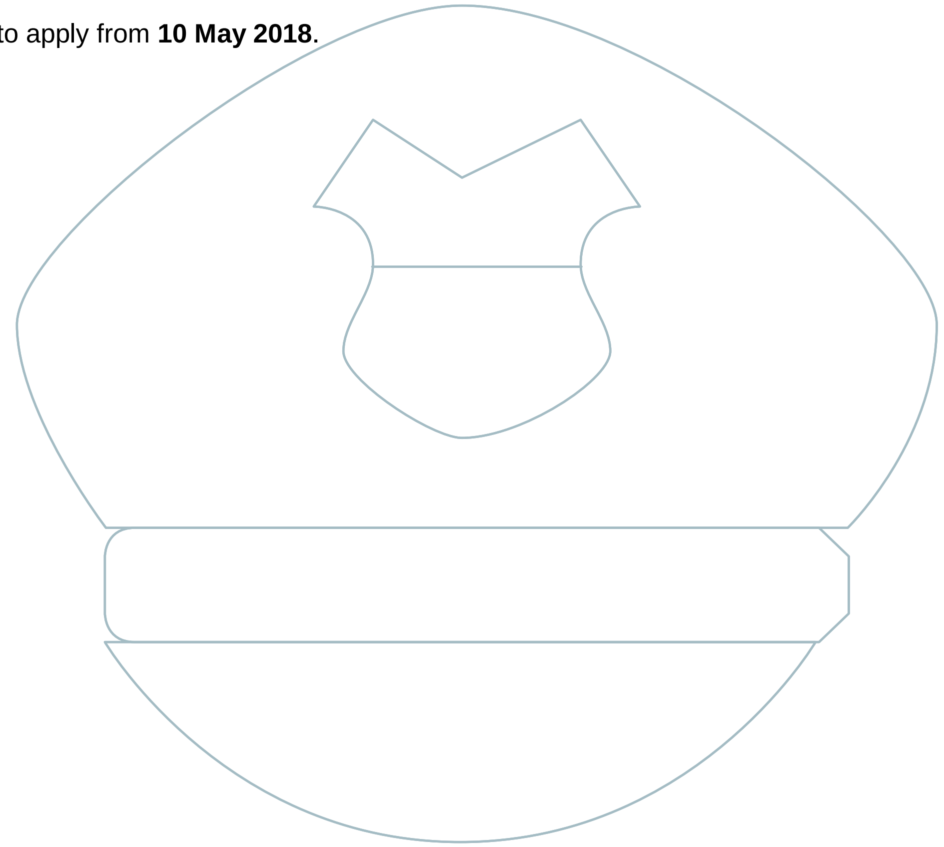
- Tightening the test for the recruitment of foreign workers (both EEA and non-EEA workers) with the aim of reducing net migration to the UK to the "tens of thousands"
- Requiring companies to provide the Government with details of how many foreign workers they employ
- Mandatory immigration checks for those applying for a licence to drive a taxi

Some of these measures may come into force prior to Brexit Day (on or after **31 March 2019**). Others, such as measures to reduce EEA migrant numbers will only be able to come into effect after Britain has left the EU.

Cyber security directive

New EU-wide legislation on cybersecurity is to be introduced, the Cyber Security Directive requires certain "operators of essential services" to adopt risk management practices and report major security incidents on their core services to the appropriate national authority.

Member States have until **9 May 2018** to adopt appropriate national legislation to comply with the Directive, with such legislation to apply from **10 May 2018**.



Revaluation of business rates

HM Treasury is due to report 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.”

The plans, set out in the Chancellor's Autumn Statement, to devolve the setting of business rates to local authorities have caused some concern that this might be the extent of the reform, but more, surely, is needed. A number of national retailers, who have large property portfolios (and therefore large business rates bills) will be hoping for something 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.

IFRS 16

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

IFRS 16 is effective **1 January 2019**. Early application is permitted for companies that also apply IFRS 15 Revenue from Contracts with Customers.

Trade Secrets Directive

A new European Directive introducing an EU-wide definition of "trade secret" and setting out rules on the unlawful acquisition, disclosure and use of trade secrets came into force in **June 2016**.

The Directive prohibits the acquisition of a trade secret through unlawful access to materials or other conduct which is contrary to "honest commercial practices" (a term that is not defined in the Directive); the use or disclosure of a trade secret where this would breach any contractual or other duty, or where the trade secret was acquired unlawfully; and the exploitation of goods produced using the trade secret where the user (for example, a subsequent employer) knew or ought to have known that the trade secret was acquired unlawfully. The Directive also includes enforcement measures, procedures and civil remedies, including interim injunctions and precautionary seizure of infringing goods. The proposal also covers the preservation of confidentiality during the litigation process.

This Directive must be implemented by member states by **9 June 2018**. Note, though, that the Directive largely reflects current law in the UK and is unlikely to lead to significant legislative changes.

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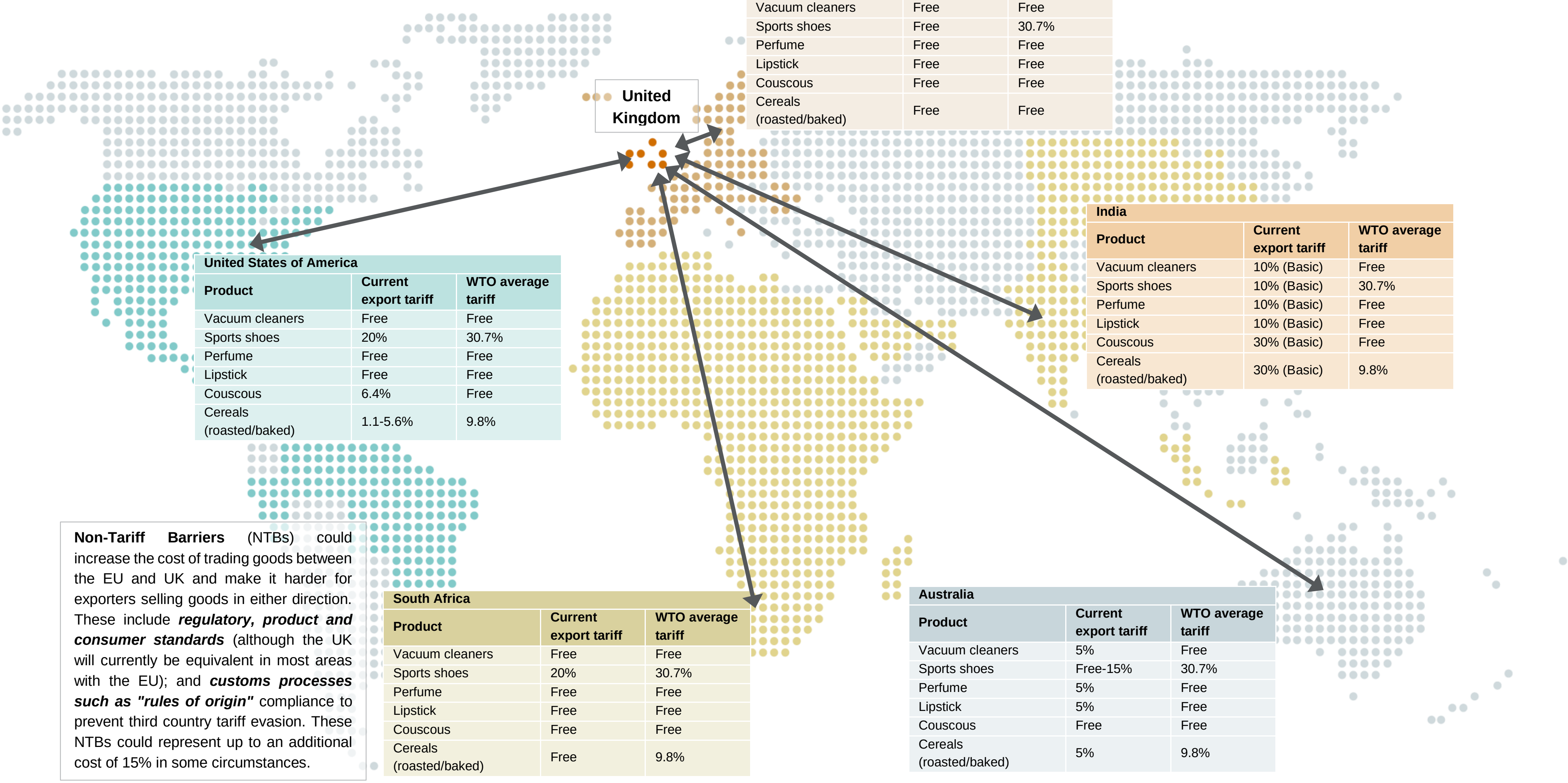
Brexit Tariff Tracker 2017

Brexit

As our exit process and indeed the electoral cycles across Europe unfold through 2017, we will continue to monitor how Brexit and any other changes to the European landscape will affect retailers and consumer businesses. Our tracker covers the key impacts of Brexit in the sector, which you can access here.

Our **tariffs map** here considers how the cost of trading goods could change Post Brexit, if the UK has to rely on WTO tariffs. If there are any particular product categories or territories that you want to track please let us know, we will happily work with you to create your own tariff map.

Many businesses **hedged their currency exposure** before the June 16 referendum but it is expected that some such protections will run out in the coming months, leaving more businesses more exposed to supply chain price increases. Bank of Ireland, the country's largest lender by assets, witnesses a material spike in hedging activity in the weeks leading up to the referendum and said that November / December 2016 saw that activity increase again. We will continue to track currency management trends.



Europe		
Product	**Current export tariff**	**WTO average tariff**
Vacuum cleaners	Free	Free
Sports shoes	Free	30.7%
Perfume	Free	Free
Lipstick	Free	Free
Couscous	Free	Free
Cereals (roasted/baked)	Free	Free

United States of America		
Product	**Current export tariff**	**WTO average tariff**
Vacuum cleaners	Free	Free
Sports shoes	20%	30.7%
Perfume	Free	Free
Lipstick	Free	Free
Couscous	6.4%	Free
Cereals (roasted/baked)	1.1-5.6%	9.8%

India		
Product	**Current export tariff**	**WTO average tariff**
Vacuum cleaners	10% (Basic)	Free
Sports shoes	10% (Basic)	30.7%
Perfume	10% (Basic)	Free
Lipstick	10% (Basic)	Free
Couscous	30% (Basic)	Free
Cereals (roasted/baked)	30% (Basic)	9.8%

Non-Tariff Barriers (NTBs) could increase the cost of trading goods between the EU and UK and make it harder for exporters selling goods in either direction. These include ***regulatory, product and consumer standards*** (although the UK will currently be equivalent in most areas with the EU); and ***customs processes such as "rules of origin"*** compliance to prevent third country tariff evasion. These NTBs could represent up to an additional cost of 15% in some circumstances.

South Africa		
Product	**Current export tariff**	**WTO average tariff**
Vacuum cleaners	Free	Free
Sports shoes	20%	30.7%
Perfume	Free	Free
Lipstick	Free	Free
Couscous	Free	Free
Cereals (roasted/baked)	Free	9.8%

Australia		
Product	**Current export tariff**	**WTO average tariff**
Vacuum cleaners	5%	Free
Sports shoes	Free-15%	30.7%
Perfume	5%	Free
Lipstick	5%	Free
Couscous	Free	Free
Cereals (roasted/baked)	5%	9.8%

Brexit and the immigration status of EEA nationals

As we know, the UK has until March 2019 to negotiate and agree the terms on which it leaves the EU. What that departure looks like, and the ultimate impact of the UK leaving the EU on the immigration status of EEA migrants, is far from clear. The Repeal Bill was introduced to Parliament on **Thursday 13 July 2017**. However, the Bill was decidedly quiet on any issues relating to immigration, which will be set out in a separate immigration-specific bill, to be published during **2018**.

To that end, in July, the government commissioned the Migration Advisory Committee (**MAC**) to examine the contribution made by EU nationals to the UK economy and society, and draw up proposals to align the UK immigration system with a modern industrial strategy. This will run alongside the government's own fact finding and evidence gathering and there has been talk of a Government white paper on these proposals towards the end of 2017.

The government outlined its ultimate objectives in its letter to the MAC, stating its intention **to "achieve sustainable levels" of net migration** and introduce a phased system away from the current free movement regime. The letter suggested that EU nationals will still be able to come to the UK during a transitional period after Brexit but will have to go through a “registration and documentation” process, which may last until **2022**. This transitional period will be followed by the final, third phase, which will determine the long-term arrangements relating to the migration of EU citizens based on the UK’s social and economic needs "and reflecting our future deep and special partnership with the EU".

Consultation on areas identified by MAC for their report closes on **27 October 2017**, with the MAC report due back by **September 2018.**

Competition law based damages claims

What are damages claims based on competition law?

Over recent years we have seen a marked increase in the number of private damages proceedings in the High Court and the Competition Appeal Tribunal (CAT), claiming for losses suffered as a result of competition law breaches. 2016 saw a major judgment in *Sainsbury's v MasterCard,* with Sainsbury's being awarded £68.8M in damages when the CAT ruled that MasterCard's UK multilateral interchange fees (MIFs) infringed competition law. The claim was a "follow-on" claim based on the European Commission's 2007 finding that MasterCard's EEA MIF was in breach of the competition rules. However six months after the CAT judgment, the High Court found, in *Asda and ors v MasterCard*, that MasterCard's UK (and Irish) MIFs did not restrict competition, reaching very different conclusions from the CAT on what would have happened if MasterCard had not set the MIF, and demonstrating the very real possibility of different courts reaching different conclusions on what appear at first sight to be similar scenarios.

2017 has seen two attempted consumer "class actions" for damages for infringements of competition law. The CAT may now hear these claims on an "opt-out" basis - brought on behalf of each member of a class, except any member who opts out – in addition to "opt-in" claims, but the claim will only proceed if the CAT first grants a collective proceedings order (CPO). The first application for a CPO made in *Gibson v Pride,* a damages claim that rested on the (former) Office of Fair Trading's decision in Mobility Scooters, was withdrawn after the CAT adjourned the proceedings to allow Mrs Gibson to reformulate her claim and the definition of the sub-classes of claimants (with which the CAT had found fault). The second class action, *Merricks v MasterCard*, based on the European Commission decision noted above, was declined a CPO in July this year because the CAT was not satisfied that there was sufficient commonality in the claims, particularly in relation to the actual losses suffered by individual members of the class.

Why is it important?

A number of live damages claims continue before the courts (e.g. in relation to LCD screens, power cables, trucks) and more claims are being lodged (most recently by Dixons and Carphone Warehouse against Visa). It is clear that both major retail chains and consumer businesses still see this as an area where they stand to recover substantial sums in damages.

Although the first two collective proceedings applications made on behalf of consumers have failed, in both cases the CAT has provided valuable guidance on the way in which it will determine whether a class representative is suitable and whether there is sufficient commonality between the claims. The challenges highlighted by these two cases are certainly capable of being addressed in the context of opt-in collective proceedings, and we expect to see more collective claims being brought in the future. The CAT has also indicated that Canada provides better guidance than the US for collective proceedings in the UK, reinforcing that collective proceedings in the UK will not develop along the same lines and scale as class damages actions in the USA.

Data and cyber security

- The ICO released its annual report on 13 July 2017, which show that it is still heavily focussed on tackling unsolicited marketing behaviours. The total number of fines issued for breaches of direct marketing law totalled just under £2million, while the total number of fines issued for data protection breaches (including security breaches) totalled £1.6million. The report also shows an increase in the number of criminal prosecutions – up 50% in the last year. Figures released in the report also show that the number of cyber-attacks on online retailers has doubled in the past year. Breaches involving the loss of customer information from hacking or leaking increased from 19 in 2015/16 to 38 in 2016/17. This continues a trend for increasing scrutiny of marketing practices by the ICO, even before the GDPR comes into force.

- The Wannacry and Petya global cybersecurity attacks have highlighted how easy it is for hackers to gain access to valuable personal and confidential business information and hold this to ransom. The increase in global-scale cybersecurity attacks is a trend that is expected to increase. The consequences of these attacks go beyond legal ramifications, with affected organisations having to rebuild trust with individual's whose data was hacked. Data protection security strategy and solutions are a critical focus for the year, and will be for years to come. The increased liability for any data breach brought about by the GDPR brings this even more sharply into focus.

Digital engagement

- **Mobile commerce** will continue to be a growing trend for retail businesses, with an increased move from bricks and mortar sales to online sales. A number of developments at a European Union level are likely to impact the growth of mobile commerce in the European Union. The **EU Electronic Communications Framework** will form the basis of the changes at a European Union level and these will be largely driven by the EC published proposals reviewing the Electronic Communications Framework in September 2016. Ofcom will be working with the European institutions and the UK Government to review the proposals put forward by the EC over the course of 2017 and early 2018. “Social” shopping, usage of the Internet of Things and personalised retargeting are key trends retailers are seeing which require increased usage of customer data to facilitate targeted sales.
- **Improved mobile internet** is being considered at an EU level in terms of how to coordinate the use of the 700 MHz band to bring mobile internet services to all Europeans and new applications across borders, thus facilitating the introduction of 5G as of 2020. Member States will adopt and make public their national plans for releasing this band by **30 June 2018**. They will need also to conclude cross-border coordination agreements by the end of 2017. Additionally, on **15 June 2017**, the European Council ended mobile roaming charges for EU citizens. This is part of the wider effort of the EU to establish a Digital Single Market to promote ecommerce in the EU.
- The move to the cloud will continue and the impact of **Brexit and cloud computing** will be a key area. We expect to see turbulence in this area, which depends on what position the UK takes.
- Other key trends that will require regulatory and legal review are the increased use of **location and proximity-based messaging, virtual reality, video/ mobile offerings and the increased use of artificial intelligence and chatbot solutions**.

Employment watch list

Holiday pay: voluntary overtime payments to be included in holiday pay if "normal pay"

While we all paused to put our feet up over the Summer, employers could have been forgiven for scratching their heads when it came to working out what to pay their staff for their well-earned breaks. The law surrounding the calculation of holiday pay has been in a state of flux over the last few years. Here we summarise where things have got to on some key components of pay. Of particular interest to employers in the retail and consumer will be the recent ruling on the inclusion of voluntary overtime pay.

- **Compulsory, non-guaranteed overtime payments** – the Employment Appeal Tribunal (EAT) ruled in November 2014 that any payments made in respect of compulsory overtime not guaranteed by the employer should be included in the calculation of a worker's holiday pay provided it could be said that such payments are part of the worker's "normal pay". This means that the payment has to be one which is regularly received and made over a sufficient period of time to justify the label.
- **Voluntary overtime payments** – although several Employment Tribunal decisions had pointed towards adopting the same approach for voluntary overtime, none of these decisions were binding upon employers. Finally, in July 2017, a binding decision on the issue was given by the EAT in the case of Dudley Metropolitan Borough Council v Willetts. The EAT said that payments for voluntary overtime should also be included in holiday pay, where it could be said they represented "normal pay". The question will be whether the voluntary overtime extends for a sufficient period of time on a regular basis to justify the description of "normal". It is not yet known whether this decision will be appealed.
- **Commission payments** – the Court of Appeal ruled in October 2016 that results-based commission payments which can be said to be part of a worker's "normal pay" should be included in the calculation of that worker's holiday pay. They rejected the argument that our domestic Working Time Regulations 1998 did not allow for the inclusion of such payments.

Impact?

Employers considering adjusting the calculation of holiday pay in light of these rulings should bear the following points in mind:

- These payments **only strictly need to be included for EU-derived holiday** (i.e. 20 days per year for a full time worker) and not the additional UK-derived holiday (i.e. 8 days per year for a full time worker). However, some employers may opt to make the changes on a wholesale basis on the grounds of administrative simplicity.
- It's possible that there may be a further appeal on the question of including voluntary overtime and so this may justify deferring a decision on this element of pay until the outcome is known.
- There are still uncertainties surrounding how the calculation should be made in practice. First, what is the correct reference period to be used to calculate pay? Is a 12-week reference period appropriate, or should a longer reference period (e.g. 52 weeks) be used? Second, when will a payment be considered sufficiently regular to warrant inclusion in holiday pay? How irregular does a payment have to be to fall out of scope (e.g. is once a year, every year, regular or irregular)? In the absence of any guidance from the Tribunals or the Government, employers will have to make their own judgement on these points.
- If the UK leaves the EU and does not have to comply with EU law, it is possible that the Government will rewrite the Working Time Regulations 1998 to provide that holiday pay should be basic pay only. Therefore, if adjusting, employers may wish to preserve a degree of flexibility by reserving the right to adjust the calculation of holiday pay in accordance with applicable law.

Employment watch list

Worker status: whether Uber taxi drivers were workers

The Employment Tribunal decided that taxi drivers engaged by Uber were workers, rather than self-employed contractors. The consequence is that the drivers will be entitled to certain employment rights such as to be paid in accordance with the National Minimum / Living Wage and protections under the Working Time Regulations (e.g. rest breaks and paid holiday). Potentially costly pensions auto-enrolment obligations will also apply if relevant earnings thresholds are reached. The Employment Tribunal decision was handed down on 28th October 2016, and Uber won the right to appeal this decision in April 2017. The appeal will be heard at the Employment Appeal Tribunal in London on 27 and 28 September 2017.

Impact?

The decision was eagerly awaited as a test of the so-called "gig economy" model of working (i.e. a self-employment, or freelancing, model of working, where individuals sell their skills and services, possibly on an ad hoc basis). It is important to remember that the original decision was highly fact-sensitive and that, as a first instance decision, it is not binding on future cases. One of the arguments Uber has put forward is that the decision does not work for their employees as 76% of their drivers prefer being self-employed and able to choose their own hours to being employed. If Uber is able to persuade the Employment Appeal Tribunal to uphold its appeal this could have broader implications for those looking to bring employment status cases, and will make it more difficult for individuals in similar businesses to make a case for worker status.

Equal Pay: large-scale claim against private sector employer

This case concerned whether women working in Asda stores should be paid the same as men working in its distribution warehouse on the grounds that the roles are of equal-value. The case was the first large-scale equal pay claim brought against a private-sector employer. A Preliminary Hearing was held in June 2016, and judgment delivered in October 2016, where it was decided that female retail workers were entitled to compare themselves to the male depot workers. Asda appealed the decision on ten grounds, arguing that colleagues doing the same job in the same location are paid the same, but the decision was upheld in August 2017 by the Employment Appeal Tribunal.

Impact?

Asda has indicated that they may appeal this decision again, however if they are not successful they will have to review around 10,000 jobs who may have been paid unlawfully. If the claimants are ultimately successful, this could have a significant impact on the private sector – with employers in the retail sector at the forefront, given the similarities and relevance to them. Equal pay claims are notoriously expensive due to their complexity and the length of time they take to resolve. Typically, such claims are brought en masse and with the assistance of a trade union. Therefore, there is a lower risk of such claims where the workforce in question is not unionised.

Employment watch list

The Taylor Review of Modern Working Practices

The Taylor Review of Modern Working Practices (the Review) was published on 11 July 2017 and makes wide-ranging recommendations for the reform of working practices in the UK. The overriding ambition of the Review is to make the case for all work in the UK to be fair and offer a realistic scope for development and fulfilment. If implemented, the proposals will affect all employers across all sectors. However, the following proposals have the potential to have a particularly significant impact on working practices in the retail and consumer sector:

- **New employment status of "dependent contractor"** – the proposal is that workers who are not employees should be rebranded as dependent contractors and the test for acquiring this new status should place much greater weight on the control the employer has over the individual, than on a requirement for personal service. What this means is that those who are currently classified as self-employed contractors because of the presence of a "substitution clause" in their contract (i.e. a clause which allows them to send someone else in their place to do the work) could move to the new dependent contractor status in future. This will bring with it a set of enhanced obligations and costs for employers such as providing paid holiday, rest breaks and pensions auto-enrolment.

- **New higher rate National Minimum Wage for non-guaranteed hours of work** – the proposal is that there should be a new uplifted rate of National Minimum Wage payable for hours worked which are not guaranteed under the contract. As well as enhancing pay for those engaged on zero hours contracts, this proposal would also uplift the rate of pay for non-guaranteed overtime hours.

- **Zero hours workers who have been engaged for 12 months or more to have the right to request guaranteed hours** – this proposal would give long-serving zero hours workers the right to request a guaranteed hours contract which reflects the number of hours they typically end up working. Although this is only a right to request, rather than a right to have, employers will have to put in place appropriate procedures and consider such requests reasonably. The Review also proposes that employers should be required to publicly report on the number of requests received and how many were accepted.

- **Change in the calculation of holiday pay for those who work irregular hours** – the proposal is that the reference period used to calculate holiday pay should be increased from 12 to 52 weeks to take account of seasonal variations in work. This will benefit workers who work irregular hours by ensuring that their holiday pay is not depressed after a period of working fewer hours. Conversely, it would also help employers by ensuring holiday pay is not inflated after a period of working more hours, for example, as typically happens in the retail and consumer sector over the Christmas period.

- **Better protections for agency workers** – the Review makes a number of recommendations aimed at improving the position for agency workers, who are commonly used within the retail and consumer sector. The proposal include: providing clearer information on pay arrangements and giving agency workers the right to request a direct contract of employment after 12 months working for the same end user. Significantly, the Review also proposes the abolition of the "Swedish derogation" which allows agencies to avoid matching end-user pay rates. If abolished, employers could see the cost of engaging affected agency workers increase as they would become entitled to the same rate of pay as comparable employees after 12 weeks. The Review also suggest that employers above a certain size should be required to publicise their employment model and use of agency workers.

You can access our full report analysing the impact of the proposals contain in the Review here.

Employment watch list

Supreme Court rules Employment Tribunal fees unlawful

On the 26 July 2017 the Supreme Court ruled that The Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 SI 2013/1893 is unlawful under both domestic and EU law because it has the effect of preventing access to justice.

Consequently, the Supreme Court ruled that the Fees Order must be rescinded with immediate effect. All fees paid between 29 July 2013 (when they were introduced) and 26 July 2017 (when they were declared unlawful) will have to be refunded, at an estimated cost of £27 million.

Impact?

Apart from the immediate revocation of the Fees Order and the Lord Chancellor's undertaking to repay any fees paid between 2013 and today's date, next steps are currently unclear. In the short to medium term, the Government is likely to consult again about a new fees regime, perhaps with fees at a lower level or requiring employers to pay a fee when they lodge their ET3. Following the decision, we expect that the Employment Tribunals Service will now be looking at how to rewrite the employment tribunal rules of procedure and how to reconfigure the online system to remove all mention of fees and the remission regime.

It is expected that the Retail and Consumer sector will be hit most by this news given that:

- it continues to be the UK's largest private sector employer, responsible for 2.9 million jobs;
- the majority of its workers (some 1.7 million) earn close to the National Minimum Wage, and so would have found it more difficult than workers in other sectors to pay the fees - indeed, the difference between average weekly earnings across the sectors is illustrated by the recent ONS survey which reported that in May 2017, the average weekly wage earned by a retail worker was just £351, compared to £577 in the construction sector and £622 in the financial services sector; and
- this sector has experienced ever reducing profit margins, such that retailers have had to look constantly at ways to reduce costs through streamlining and automating processes, reducing headcount and/or looking at more innovative ways of working, such as increasing the number of people on zero hour contracts. Arguably, this has, in turn, created a disgruntled workforce but one that, since the fees were introduced on 29 July 2013, could not afford to bring a claim.

Environment: heightened risk of fines

Manufacturers, distributors, importers and retailers – often grouped together as 'producers' in environmental regulation – need to ensure they are fully aware of the obligations they face under environmental law.

For R&C businesses, who often have complex and/or far reaching supply chains, this should be an **area of increased focus** as failure to comply with the majority of environmental regulations constitutes a criminal offence. This can then result in a criminal conviction, a criminal sanction, and a damaging PR issue to manage. Furthermore, with **recent changes to the severity of fines that can be imposed for environmental offences**, the situation is now reaching a critical point. It has been made very clear that the level of fines to be imposed must be "…*sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to improve regulatory compliance*."

What are 'producer responsibilities'?

Some of the key areas of environmental regulation that R&C businesses need to be aware of, include:

UK regulations

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

EU regulations

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

What impact do these regulations have?

Each of these regulations imposes **obligations throughout the supply chain**. It is often assumed that the manufacturer of a product is the one who must ensure the environmental obligations are met. However, this is not the case: every actor in the supply chain, including importers, distributors and retailers, has some level of obligation.

Where a company, say, is importing a product into the UK from China, while the manufacturer has to comply with local regulations, the importer must check that product complies with REACH and CLP. The importer cannot just rely on the Chinese manufacturer's word and should verifying test reports provided by the manufacturer (which may include the importer carrying out its own testing). A subsequent retailer of that product must also carry out its own due diligence to ensure compliance before placing that product on the EU market.

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Illegal working

In our last horizon scanner, we flagged the highly publicised arrests of illegal workers at Byron Burger (following orchestrated Home Office raids of the upmarket hamburger chain) and the need for employers to carry out appropriate "right to work" checks.

Since then, the Home Office has published updated guidance on the right to work checks employers must undertake to prevent illegal working. The new guidance replaces the version dated **12 July 2016** (although that guidance still applies to anyone who commenced employment before **8 August 2017**).

Changes include advice in respect of those who claim to have a right to work as a non-EEA family member of an EEA national, voluntary workers and the employment of international students. It also explains the new illegal work measures introduced by the Immigration Act 2016 such as closure notices and compliance orders as well as the introduction of immigration checks in to the licencing regimes for taxis and private hire vehicles and alcohol and late night refreshment.

A copy of the new guidance can be viewed here.

Logistics

E-commerce has revolutionised the way we shop. In July 2017 internet sales accounted for approximately 16% of total retail sales according to ONS statistics, this figure is predicted by the Centre for Retail Research to reach 21.5% by 2018. We are seeing the changes impact footfall into physical stores, in July 2017 high streets saw a 2.1% drop in footfall, whilst shopping centres saw 1.3%, according to figures released by the British Retail Consortium. The exception to this trend were retail parks who have performed relatively well since March, which partially reflects the lower rental costs compared city centre locations as well as convenience they offer shoppers. As a result the logistics behind our changing shopping habits continues to be impacted and change rapidly.

Our recent report highlights that the UK needs more than 18m sq ft of new warehouse space a year, but currently only 3.5m sq ft is set to be built. A shortage of space in warehouses could lead to rising rents, pushing up prices for retailers. City-based distribution centres are in demand the most due to their place in facilitating services such as one-hour delivery. While retailers are continuing to bear the cost of fulfilment to offer faster and cheaper delivery options, the question is whether consumers will begin to pay the price for these services. Although currently only half of retailers offer click and collect services, it is expected that this will rise to 92% by 2021.

Whilst the convenience of home delivery and click and collect benefit the consumer, the wider problem for retailers is what to do with returns. Logistic providers are now offering services to cope with returns but all at the expense of the retailer. Clear Returns estimate that returns cost UK retailers £60bn a year. A recent study carried out by Zebra Technologies showed that 65% of retailers plan to explore innovative delivery services, such as delivery to workplaces, homes and parked cars.

The growth of automation will also shape the future of retail, assisting companies in packing and shipping of products, tracking inventories and helping customers track items.

- Our report emphasises a future drive towards sharing infrastructure and networks in order for retailers to compete with the likes of Amazon, keep up with consumer expectations and ensure the sustainability of e-commerce and the home delivery model. Click here to read our report.

Supply chain vigilance

- Supply chain vigilance remains a key theme in 2017. The retail trading environment is tough. The slide of sterling is already bringing higher prices, squeezing margins further. With businesses under pressure to maintain profitability, how far is it acceptable to go to get the best prices from suppliers? To what extent are businesses prepared to turn a blind eye to the activities of their supply chain participants?

- **Increased scrutiny** from consumers, competitors, customers, activists and the media means that retailers and big brands need to pay extra attention to the composition and behaviour of their supply chain. Focusing solely on first tier suppliers is no longer sufficient. The problems (and the scandals) can come from many angles: **breaches of anti-bribery and corruption laws, tax evasion, use of illegal workers, cyber security failings and data breaches, poor conditions for workers, food safety offences**, to name but a few. In August 2017, the National Crime Agency reported that levels of modern slavery in the UK are much higher than previously thought, and the number of potential victims continues to rise.

- In this area, 2016 was very much the year of **transparency in supply chains** reporting under the **Modern Slavery Act 2015**. In 2017, many businesses are still getting to grips with the requirement to make a public statement setting out the steps they are taking to ensure that modern slavery and human trafficking are not taking place in their business or supply chains. By the end of September 2017, all business who are obliged to make a supply chain statement should have done so. However, at the start of September, the registry of statements maintained by the Business & Human Rights Research Centre (available at www.modernslaveryregistry.org) showed a mere 2847 statements. The Government originally estimated that over 12,000 UK companies alone would be required to publish a statement.

- Hot on the heels of the Modern Slavery Act supply chain reporting requirement, comes the obligation to report on certain non-financial matters (see Non-Financial Reporting). This requires in-scope businesses to report on their approach to **human rights issues, employee and social matters and ABAC issues**.

- So what **practical steps** are businesses taking in the name of supply chain vigilance? **MSA clauses** in supply contracts are increasingly common, along with tighter provisions on a supplier's use of sub-contractors. **Supply-chain mapping** forms a key part of many strategies. Software tools such as String3 (http://getstring3.com/) are emerging as efficient and effective ways to identify which entities are responsible for contributing raw materials and processes towards the manufacture of a finished product.

- Similarly, supplier (and sub-contractor) **audits** are frequently used to assess compliance against the ethical standards adopted by retailers and brand owners. Audits themselves are becoming more sophisticated, as businesses see the advantages of using the forensic and investigatory experience of companies such as Kroll (http://www.kroll.com/en-us/default.aspx) to unearth issues which would otherwise go undetected.

- We continue to monitor supply chain transparency statements as they are published, as well as the response of retail and consumer businesses to the new laws on preventing tax evasion, reporting on payment practices, and others.

Sugar and obesity

Obesity has long been on the government's agenda due to its associated health and economic costs. More recently the focus has turned to sugar content and in particular soft drinks culminating in the Soft Drinks Industry Levy (levy), part of the government's Childhood Obesity Plan and a drive to reduce sugar consumption.

The levy, is to be implemented from **6 April 2018**, and is designed to encourage companies to invest in recipe changes, portion size reductions and the marketing of low sugar brands. It will be a levy on producers and importers.

An eight week technical consultation on the draft legislation **closed on 30 January 2017** followed by draft secondary legislation in early 2017. This means that some sweets and chocolates may dramatically shrink in size in order to meet the new targets.

In **March 2017**, Public Health England published a report on their aim **to reduce the amount of sugar in the foods that contribute most to children's intakes by 20% by 2020, with a 5% reduction in the first year**.

In a further move to combat the obesity issue junk food advertising aimed at children was banned entirely **from July 2017**. Food and drink producers of snacks, fast-food and fizzy-drink high in fat, salt or sugar are no longer able to circumvent the existing television ban by promoting their products online and through social media. The ban applies to any platform where children account for more than one-quarter of the audience.

An estimated £775m will be raised by the implementation of the Soft Drink Industry Levy, which will be spent on improving children's health by increasing the Physical Education spending for schools to £320m a year.

The use of licensed characters and celebrities in junk food advertisements will also be banned, although they can still be used on packaging as this is not regulated by the CAP. Interestingly the Dutch Food Industry Federation has voluntarily decided to "restrict media characters" on food and drinks high fat, salt or sugar which are aimed at children. The new rules will be enforced by the Advertising Standards Authority.

Retailers have called for the government to take tougher action on tackling obesity. The British Retail Consortium, a group which represents over 90 major retailers, has commented that the government needs to do more, moving beyond voluntary agreements if they are going to be able to make a real difference.

The measure of whether these initiatives work in combating obesity will not be seen for some time. What has been clear throughout the decision making process of these initiatives is that there is no collective agreement from government, manufactures or retailers on the way to tackle to issue, or indeed what the key culprits of the many contributing factors of obesity are. Should the focus be more on education and exercise?

ADDLESHAW GODDARD

Tax evasion

The new corporate offences of failure to prevent facilitation of tax evasion (FTE offences) come into force on **30 September 2017**. All partnerships, limited liability partnerships and companies need to start to work now on their prevention procedures. From 30 September, if someone in (or associated with) your organisation facilitates tax evasion and you do not have reasonable prevention procedures in place, **your organisation could be faced with unlimited fines**, not to mention reputational damage. These are strict liability offences – no criminal intent, knowledge, collusion or coordination is required. In addition, unlike the Bribery Act, there is no requirement that any person intended to obtain or retain business.

The Criminal Finances Act 2017 has two FTE offences which impose criminal liability on a 'relevant body' where it has failed to prevent the criminal facilitation of tax evasion by a 'person associated' with the 'relevant body'. This is supported by HMRC guidance centering around six core principles that should inform your prevention procedures. The principles are strongly reminiscent of the Bribery Act regime but with subtle differences, for example, "adequate" prevention procedure becomes "such prevention procedures as was reasonable in all the circumstances to expect".

Final Guidance

HMRC published its final guidance at the start of September which has not altered materially since the draft guidance was published last year. There are a couple of clarifications worth noting:

- the risk assessment must be documented and all elements (not just customer facing roles) must be included in such assessment.
- it is now clear from the guidance that an overseas organisation having only part of its business in the UK will be caught by both FTE offences
- if the risk assessment means that your organisation is classified as high risk then to the extent it operates overseas and in the UK, it is insufficient to only introduce prevention procedures in the UK .

HMRC Guidance can be found here.

Tax evasion

A number of industry bodies have or are in the process of publishing further guidance tailored for their members.

What needs to be in place before 30 September?

HMRC has indicated that it does not expect all reasonable procedures to be place immediately from 30 September. However, there are certain steps HMRC does expect to be in place by that date:

- demonstration of a clear commitment to compliance, this might include a high level written risk assessment, an assessment as to the potential reach of the offences when looking at the location of your businesses, clients and associated persons;
- securing top-level commitment, which could be demonstrated a briefing paper which is considered by your board or appropriate oversight committee and the appointment of a senior member of your organisation who is responsible for the implementation and monitoring of the reasonable procedures;
- initial communication plan which may include the publication of a brief policy statement circulated to your employees and/or on your website; and
- an implementation plan for tackling the risk in a proportionate and timely manner, which could be demonstrated outlining the time line for a detailed risk assessment, training to relevant people, review of contractual terms with contractors and certain service providers and procedure for ongoing monitoring.

However, it should not be forgotten that HMRC makes it clear that they expect there to be rapid implementation focusing the major risks and priorities after 30 September.

Taxation changes to termination payments

In July 2015 HM Revenue and Customs and HM Treasury launched a public consultation on the simplification of the tax and national insurance treatment of termination payments. On 10 August 2016, the Government published its response to the consultation, together with a second consultation on the amendments to the law which will be required to implement the planned changes **on 6 April 2018**.

The changes include:

- Clarifying the scope of the exemption for termination payments to prevent manipulation, by making the tax and National Insurance contributions (NICs) and consequences of all post-employment payments consistent. This will mean that all types of payments in lieu of notice (PILONs) will be taxable and subject to Class 1 NICs
- Aligning the rules for income tax and employer NICs so that employer NICs will be payable on payments above £30,000 (which are currently only subject to income tax). The first £30,000 of any termination payment will remain exempt from income tax and the entirety of the payment will remain exempt from employee NICs
- Removing foreign service relief
- Clarifying that the exemption for injury does not apply in cases of injured feelings