2017 Horizon Scanner: the year ahead at a glance

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Fast moving sector themes…

Competition law based damages claims	Environment: heightened risk of fines	Logistics	Sugar and obesity
Digital engagement	Health and safety: rising fines	Minimum alcohol pricing	Tax evasion
Employment watch list	Illegal working	Supply chain vigilance	Taxation changes to termination payments

Non-financial reporting

The Companies, Partnerships and Groups (Accounts and Non-Financial Reporting) Regulations 2016 (Regulations) which implement the EU Non-financial Reporting Directive (2014/95/EU) (Directive) require certain companies to prepare a non-financial information statement as part of their strategic report. See our Compliance update for the details.

The statement must contain information to the extent necessary for an understanding of the company's **development, performance and position and the impact of its activity**, relating to, as a minimum:

- environmental matters (including the impact of the company's business on the environment);
- employee and social matters;
- respect for human rights; and
- anti-corruption and bribery matters.

The statement must include a description of:

- the company's business model;
- the policies pursued by the company in relation to the issues to be reported upon and the due diligence processes implemented by the company in pursuance of them;
- the outcome of those policies;
- the principal risks relating to the matters to be reported on including how the company manages those risks. The narrative should include, where relevant and proportionate, a description of those business relationships, products and services which are likely to cause adverse impacts in those areas of risk; and
- the non-financial key performance indicators relevant to the company's business.

If the company does not pursue policies in relation to one or more of the non-financial matters, it must provide a **clear and reasoned explanation for not doing so**. Disclosure of information about impending developments or matters in the course of negotiation may be withheld, if the disclosure would, in the opinion of the directors, be seriously prejudicial to the commercial interests of the company, provided that such non-disclosure does not prevent a fair and balanced understanding of the company's development, performance or position or the impact of the company's activity.

Many retail and consumer businesses already put these kinds of issues at the heart of their strategies, both within their own businesses and in relation to their supply chains (and please see our comments on the theme of supply chain vigilance).

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Unjustified geo-blocking

In November 2016, following proposals from the European Commission, the European Council reached agreement on draft regulations to ban **unjustified geo-blocking of cross-border sales**. The proposals have to be negotiated and agreed with the European Parliament before they become law but, as currently proposed, they will prevent traders from discriminating between customers on their general terms and conditions (including prices) for the sale of goods and services, where the trader:

- sells goods that are delivered in a member state to which the trader offers delivery, or are collected at a location agreed upon with the customer
- provides electronically supplied services (except where the main feature is the provision of copyright protected works)
- provides services to a customer in a country where the trader operates.

Price differentiation, as distinct from price discrimination, will not be prohibited, permitting traders to target certain groups of customers in specific territories. Moreover, traders will not be obliged to deliver goods to customers outside the member states to which they offer delivery. The regulations will also prohibit discrimination based on means of payment and restrictions on customers' access to their online interface, on grounds of nationality or residence. The uncertainty of brexit means that traders in the UK may or may not be subject to the regulation even once the proposals have been agreed with the European Parliament.

Online competition

A clear and unified approach is yet to emerge on many issues relating to online commerce under the competition rules. This reflects recognition that while digital markets may do more to facilitate competition, they may also do more to facilitate anti-competitive behaviour.

European Commission sector inquiry

- The European Commission's **sectoral inquiry into e-commerce in consumer goods and digital content**, which published its preliminary report on 15 September, may help to identify where that balance should lie. The report notes that increased online price transparency is the feature that most affects the behaviour of suppliers and customers in e-commerce markets. It directly affects customer behaviour by lowering search costs and allowing switching from one channel (online/offline) to another, but it also permits "free-riding" across sales channels, in particular where customers benefit from services offered by bricks and mortar stores, such as advice or the ability to browse, but then make their purchases online. So while greater transparency may increase price competition, other parameters of competition, such as quality, brand and innovation may suffer.

- How to address free-riding and create a level playing field between online and offline sales channels is identified as a key issue for manufacturers and retailers – 45% of manufacturers consulted said that free-riding is common or very common. The Commission says they have responded to the growth of e-commerce through practices that give them tighter control over the distribution of their products and the positioning of their brands. Selective distribution systems are used more widely and, increasingly, manufacturers are selling products online directly to consumers or, where they use resellers, including in their distribution agreements contractual restrictions on pricing, on selling or advertising through certain sales channels and on cross-border sales (although the report notes that most online geo-blocking measures result from unilateral decisions by online retailers). The report also notes concerns about contractual restrictions by online market places, especially price parity clauses or most favoured nation clauses imposed by an online platform that prevent suppliers from offering terms better than those available on that platform, through other sales channels (either the supplier's own direct sales and/or other online platforms). It is also concerned by contractual restrictions preventing the submission of offers to price comparison websites.

- The final report on the inquiry is **due in the first half of 2017**. It will not result in specific remedial measures (unlike the Competition and Markets Authority in the UK (CMA), the Commission has no powers to recommend or impose remedies where it considers a market is not working well), but the Commission has said it may open investigations into some of the practices it has identified during the inquiry and this could lead to competition infringement decisions. One area where it is treading with caution is in relation to restrictions that block retailers from selling through online marketplaces such as Amazon and eBay – 18% of retailers reported that manufacturers had imposed such restrictions on them. Part of the reason for the Commission's caution is that the European Court of Justice is expected to rule next year, in a case involving restrictions imposed by perfume manufacturer Coty on one of its distributors, on whether such bans should be considered to be, by their very nature, anticompetitive, without going through an analysis of their effects on competition in the market.

Online competition

National competition authorities

- The themes highlighted in the Commission's preliminary report are repeated in national markets. In the UK, the CMA recognises that, while the digital economy raises a number of problems for antitrust law and policy, it can also enhance competition and offer solutions that help markets work better, by offering cheaper and more innovative alternatives to existing products and by stimulating competition, for example through digital comparison tools such as price comparison websites. Indeed the CMA, as part of its remedies in recent sectoral enquiries (retail banking and energy), has turned to such tools as a means to enable customers to compare deals and encourage switching between different suppliers. It has now launched a market study into the role that digital comparison tools can play in fostering competition.
- The CMA regards competition between "bricks and mortar" shops and online retailers as perhaps the most challenging aspect of online competition enforcement, but its decisions show that the two channels are not always to be regarded as direct competitors. In its investigation into estate agents, for example, it concluded that online estate agents were a separate market and only exerted weak competitive pressure on bricks and mortar agents.
- The CMA has taken action against traditional hardcore anticompetitive behaviour conducted online, with a decision in August that online sellers of posters breached competition law by agreeing not to undercut each other's prices for posters and frames they sold on Amazon's UK website. Automated re-pricing software was used to operate the agreement. The severity with which the CMA views such arrangements was underscored by its decision not only to fine the companies, but also to obtain the disqualification of one company's managing director from being a company director for a period of five years. In November it launched a programme of competition compliance advice to online sellers, calling on online marketplace providers to help disseminate it.
- The CMA's most recent intervention in online markets comes with the launch of an investigation into online auction services in November. It says it is particularly concerned by online pricing clauses, including most favoured nation clauses that it has traditionally regarded as anti-competitive because they can create a price floor. The investigation is in its initial stages and it will be some months before we know whether the CMA intends to proceed with a full investigation.
- Most favoured nation and price parity clauses are the area where, perhaps, there is the greatest divergence of approach between the competition authorities. The European Commission expressed concerns in its preliminary report on its e-commerce inquiry but has, by and large, left the investigation of price parity arrangements to the national competition authorities. The national authorities have taken divergent approaches (with the German regulator clamping down more heavily than others in relation to Booking.com's price parity requirements on hotel room rates). Now legislation in France and Austria has outlawed price parity clauses and similar legislation appears likely in Italy.

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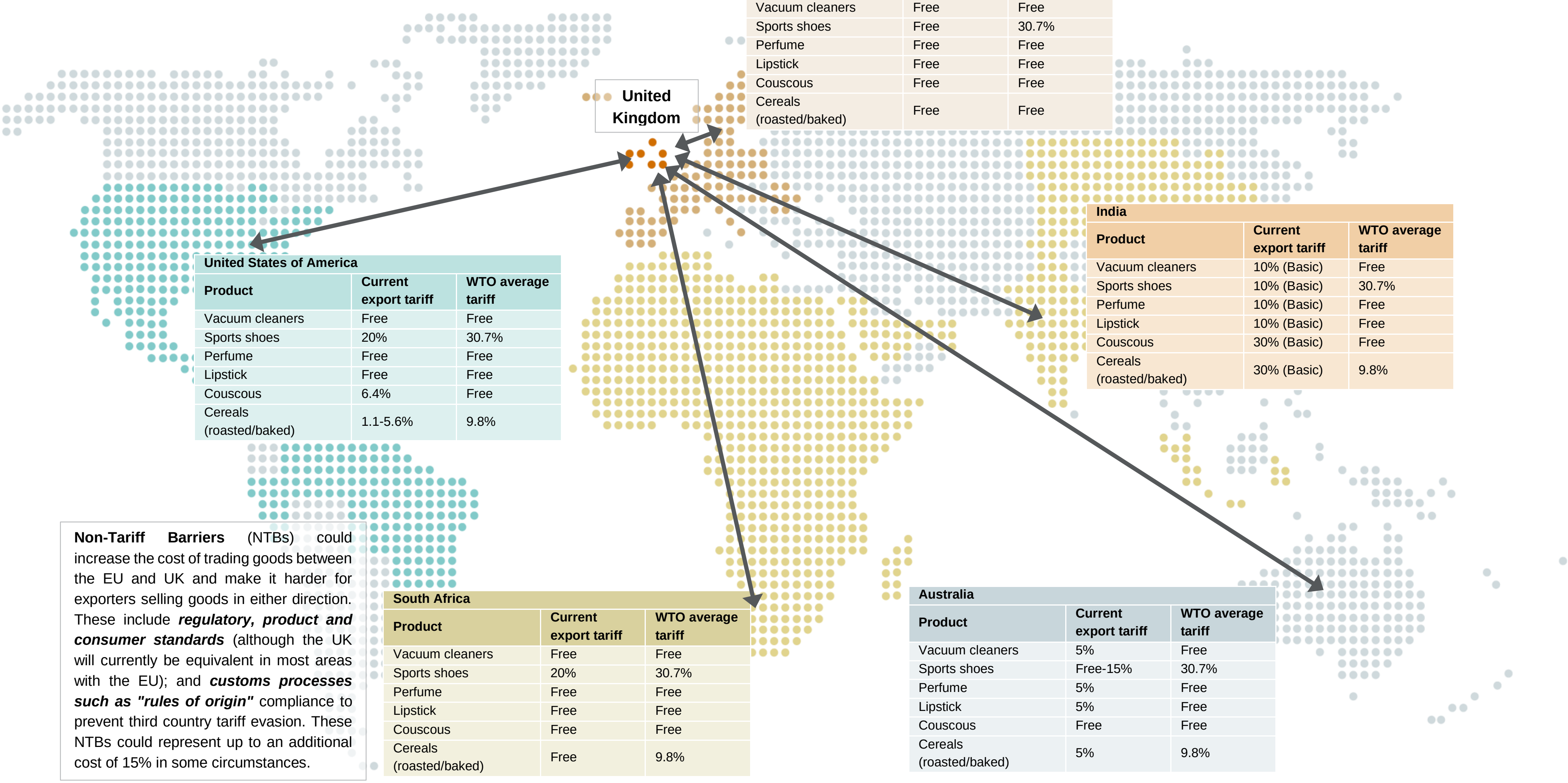
Brexit Tariff Tracker 2017

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%

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. 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.

The levy will be set at 0.5% of an employer's paybill, 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, when the levy commences, 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.

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).

Fixed recoverable legal costs in litigation

Why is it important?

Retailers and consumer businesses may have claims against suppliers and possibly also claims of low as well as high value against them. If the new costs proposals are **implemented from April**, it is likely that claimants will recover a much smaller proportion of their costs from a losing opponent than is currently the case. This may mean a greater appetite for early settlement.

Gender pay gap reporting

Why is gender pay gap reporting important?

Findings from the Institute of Fiscal Studies reveal that British women face an 18% gap to men on pay. It is clear that this needs to improve. The focus of discussions is often on the women - of lack thereof - cracking typically male dominated industries, such as mining, transport and financial services, but there are still unanswered questions of why there are few women leaders in the most female-focused sector in Britain - retail. Women are the biggest spenders and customers in retail, accounting for some 85% of purchases. They don't just hold the purse strings as they also account for the majority of the workforce. Around 60% of the 2.8 million retail employees in the UK are women, yet there is a noticeable absence of women at the top. Of the 24 retail companies listed on the FTSE 100 and 250 indices, only three have female chief executives. The retail sector has beaten other industries in taking strides to appoint more women to executive teams, including positions like HRD, but when it comes to the boardroom it still has just 10% of executive and non-executive directors being female. There is still a long way to go but it is hoped that the introduction of compulsory gender pay gap reporting will assist greatly with that.

What is the impact of the regulations?

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 are expected to **come into force on 6 April 2017**. Employers with 250 or more employees will be required to publish gender pay information on an annual basis. Employers will be required to report:

- The overall gender pay gap within their business calculated by reference to the specified pay period (on a mean and median basis).
- The overall bonus gap within their business calculated by reference to a 12-month period (on a mean and median basis).
- The proportion of men and women that received a bonus in a 12-month period.
- The numbers of men and women working across salary quartiles.
- Employers will be required to take their pay snapshot on 5 April 2017 and will need to publicly report the results on, or before, 4 April 2018.

National Living Wage and National Minimum Wage increases

There will be a 30 pence rise in the National Living Wage rate from £7.20 to £7.50 per hour **from April 2017**.

The National Minimum Wage (NMW) will also increase as follows:

- for 21 to 24 year olds – from £6.95 per hour to £7.05
- 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.

Statutory payments: rate increase

The following statutory payments will be up-rated as follows:

- Statutory maternity, paternity, adoption and shared parental pay and maternity allowance – from £139.58 to £140.98 per week
- Statutory sick pay – from £88.45 to £89.35 per week

Reporting on supplier settlement times

What's new?

- From **April 2017**, large businesses will be required to report publicly on how quickly they settle their suppliers' invoices.
- The Government has identified that late payment of invoices is a significant problem for UK businesses; it is hoped that shaming poor payers will lead to widespread behavioural change.
- A **"large business"** is one that hits two of the following on both of its last two balance sheet dates: 1) £36 million annual turnover; 2) £18 million balance sheet total; and 3) over 250 employees. Reporting is on a per company (or LLP) basis (consolidated reporting is not allowed), on a six-monthly basis. The report itself must be made on a Government internet portal (which is currently under development), within 30 days of the end of each six month reporting period. The first report required to be published by a business must relate to the first six months of its first financial year which starts on or after 6 April 2017.

The information on payment practices to be published relates to a broad range of contracts that retail and consumer businesses typically enter into: contracts for goods, services and intangible assets (including IP) are all in scope, except for those which do not have a significant connection with the UK. Crucially, where a business fails to make the required report, then the company and **every director commits an offence** (unless the director in question took all reasonable steps to ensure compliance). Similarly, it is also an offence knowingly to publish misleading information.

What information must go into each report?

- businesses' **standard payment terms**
- whether changes have been made to the standard terms over the previous six months, and whether suppliers had been informed or consulted on the changes
- the maximum period for payment entered into during the reporting period
- the process used by the business for resolving payment-related disputes
- the average time **taken to pay invoices** from the date of receipt
- the percentage of invoices paid in less than 30 days, between 31 and 60 days, and over sixty days
- the percentage of **invoices which were not paid within the agreed terms**
- confirmation (via tick boxes) of whether the business offers e-invoicing or supply chain finance and whether the business is a signatory of a prompt payment code

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Reporting on supplier settlement times

What can your business do to prepare?

A key issue for many businesses may be that they are being asked to report data which they do not gather and – more importantly – do not currently have the capability of gathering. This may be a particular issue for retail businesses, who tend to rely on a large number of suppliers and who operate in a fast-paced ordering and stock turnaround environment. Although businesses may be many months away from having to make their first report, they will need to have the systems in place to record the required information from the start of the relevant financial year. Here are some key points to consider:

- do you currently record when invoices are received and paid? In calculating payment times, it is the date of receipt of each invoice that is relevant
- do your systems allow for reporting on the percentage of invoices paid within specified time periods?
- what are your processes for ensuring that invoices are paid within the period that has been agreed contractually with each of your suppliers?
- do you have a clear picture of what your standard payment terms are and how often those terms are agreed with your suppliers? Similarly, do you know the maximum payment period that you have agreed with any supplier? Now would be a good time to review your standard purchase terms generally, as well as your processes for getting them incorporated into your contracts with suppliers
- do you currently receive invoices which cover supplies to several of your group companies? Reporting must be done per company, rather than consolidated across the group.
- is your process for resolving invoice disputes in good shape? are you happy for details of it to be published?

What is AG doing?

The Government has promised to issue guidance on this, which we will report on when available. In addition, once the Government's reporting portal is established, we will track reports as they are filed in order to report on market trends and learning points. We will also monitor how the reporting is received in the market – by consumers, competitors, powerful suppliers and small business lobbyists – in order to identify trends as they emerge.

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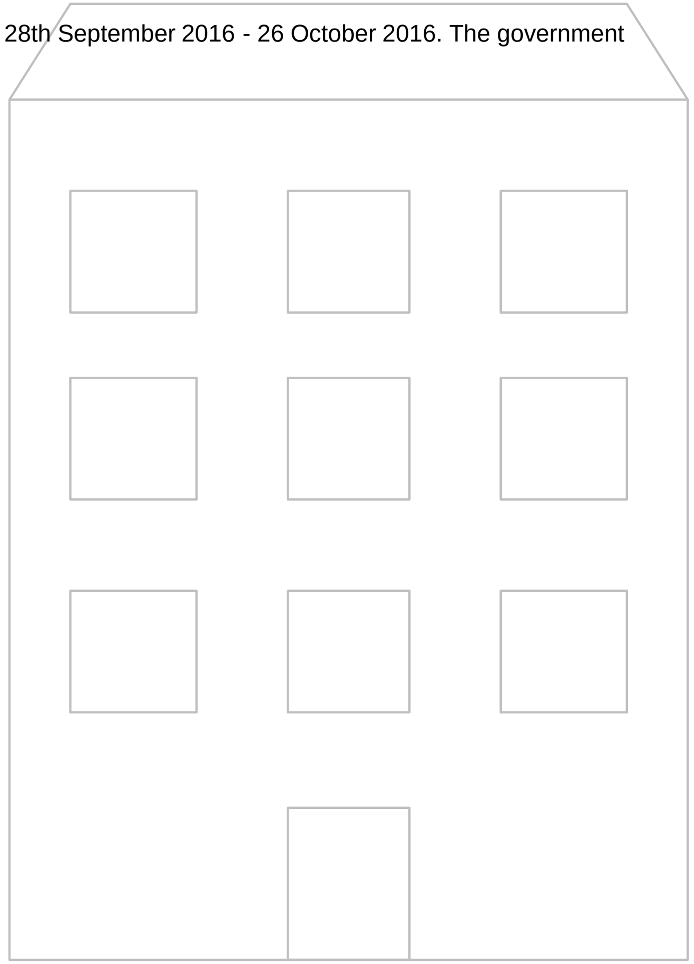
Revaluation of business rates

The next business rates revaluation will be in **April 2017 for England, Scotland and Wales**. The central rating list was published on 30th September 2016 and can be found here.

A consultation on the proposed transitional arrangements to phase in changes in the business rate bill as a result of the 2017 business rates revaluation ran from the 28th September 2016 - 26 October 2016. The government response is here.

It is thought that prime retail space will experience significant increases in business rates bills.



Taxation of salary sacrifice schemes

From April 2017, following the conclusion of the public consultation process, most salary sacrifice schemes will be subject to tax in the same way as cash income. The reforms will affect types of salary sacrifice schemes differently:

- pensions, pensions advice, childcare, cycle-to-work and ultra-low emission cars will be exempt;
- all arrangements in place before 6 April 2017 will be protected until 5 April 2018 (or before if the arrangement ends, changes, is modified or due for renewal at an earlier date); and
- arrangements in place before 6 April 2017 for cars, accommodation and school fees will be protected until 5 April 2021 (or before if the arrangement ends, changes, is modified or due for renewal at an earlier date).

Insurance issues

Damages for late payment of a claim

What are damages for late payment of an insurance claim?

2016 was a year of significant change in English insurance law and much has been written about the coming into force last August of the Insurance Act 2015 and the Third Parties (Rights Against Insurers) Act 2010. However, 2017 will see a further important change that will have an immediate impact on the presentation and management of claims: The Enterprise Act 2016 will come into force on **4 May 2017** and make it an implied term of every contract of insurance entered into from that date onwards that, once a claim is made, the **insurer must pay sums due within a reasonable time** or face a potential claim for damages for losses that result.

Why is it important?

For many policyholders 2017 will be the first renewal under the new English law regime. As a result there is likely to be a short hiatus before the inevitable bedding-in period sees the application of the new law tested before the courts. In contrast, the introduction of damages for unreasonable late payment of claims is likely to have an immediate impact as it will be a feature of every negotiation concerning a complex or potentially disputed claim, and insurers will want to be seen to be proactive in the claims management process. The change will be particularly interesting for policyholders in the R&C sector, who can face complex, high-value business interruption losses from sometimes relatively minor property damage or supply chain issues. Whereas an insurer could historically reserve its rights and put the onus firmly on the insured to progress matters, the risk of an additional damages claim gives the insured additional potential leverage. Policyholders should be mindful of the introduction into their policy wordings of contractual limitations or drafting that places them under a higher evidential threshold, which might operate to limit the extent to which they can take advantage of the change.

Warranty & Indemnity Insurance (W&I Insurance)

What is Warranty & Indemnity Insurance?

The use of W&I Insurance to manage risks and liabilities in M&A has continued to increase in recent years and there has been an ongoing standardisation of policy wordings. For example, the broker Howden reported 55% more policies being placed in 2015 than in 2014, and our own experience suggests continued growth in 2016. Buyer-side W&I policies are the most commonly purchased cover and allow an alternative to the traditional approach of the buyer seeking recourse against the seller pursuant to wide-reaching warranties and indemnities. However, whilst the market continues to grow and premiums remain as low as 1-2% of the insured limit, there is relatively limited public data concerning claims experience.

Why is it important?

We expect W&I insurance to continue to be used more widely in 2017. However, given the volume of policies in circulation and being written, as well as rumours in the market about a handful of significant disputed claims, 2017 may see the first coverage disputes become public. Policyholders considering using W&I Insurance should remember that it is a deal facilitation tool, rather than a guarantee of payment. They should also be careful to ensure that, where W&I Insurance is used, there is no impact on the quality of the DD process, particularly as policies are increasingly written on a non-recourse basis (i.e. with a buyer not needing to take steps against a seller before recovering under the insurance) and at attachment points as low as 1% of the limit of liability.

Pension surplus - changes to IFRIC 14 accounting standard

The IASB (International Accounting Standards Board) is proposing to make changes to IFRIC 14 and IAS 19, the accounting standards which addresses the circumstances in which a pension scheme surplus can be recognised in a company's accounts. Under these accounting standards a company can only account for a pension scheme surplus if there is an unconditional right to a refund of surplus under the scheme rules. The standards recognise that a right to a refund of surplus can arise in various circumstances, including assuming the gradual settlement of the scheme liabilities over time until all members have left the scheme. The proposed changes will provide that in such circumstances there is no unconditional right to a refund of surplus if other parties (eg the scheme trustees) can wind up the scheme without the entity's consent. The changes will also provide that the amount of surplus recognised as an asset on the basis of a future refund must not include amounts that other parties can use for other purposes that affect the benefits of scheme members, for example by enhancing scheme benefits without the entity's consent.

Organisations with a defined benefit pension scheme should check with their auditors whether the proposed changes will impact their accounts. In some circumstances, legal advice may be needed on the interpretation of a scheme's rules. It is expected that the final form amendments will be issued in the **second quarter of 2017**, and that the amendments will apply to annual reporting periods beginning on or after 1 January 2019, with earlier application permitted.

VAT on 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 2017**. This change leaves schemes facing a possible 20% increase on their running costs from January 2018.

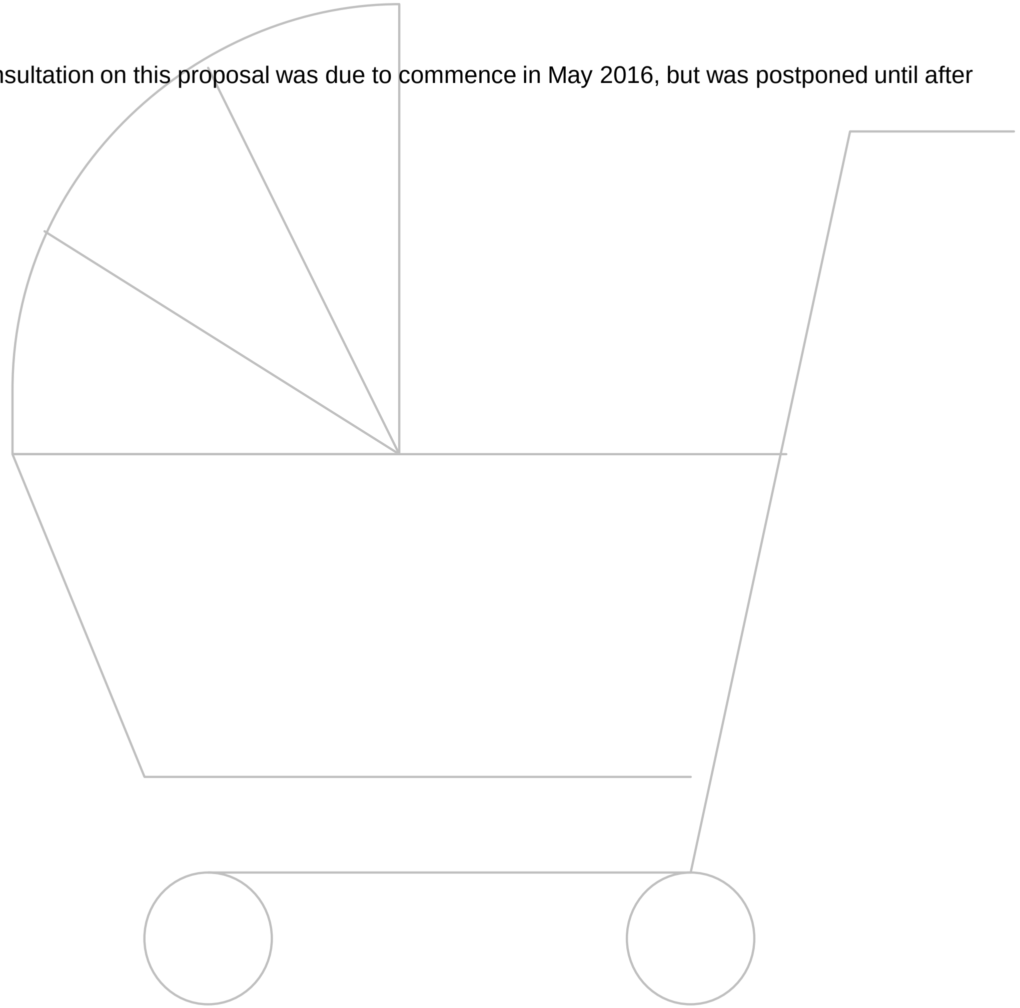
There are potential options for maintaining the ability to make these VAT reclaims at the end of the transitional period. However, none of them are straightforward and all have different pros and cons. Which option is best will vary between organisations and employers and trustees will need to carefully 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.

Data and cyber security

- The **GDPRs** are 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 portability, underlying consent, data minimisation and data profiling
  - what companies acting as data controllers need to do and correspondingly what companies who offer data processing services need to comply with
  - a growing move towards future proofing contracts (internal and external) for GDPR compliance.
- The Culture, Media and Sport Committee of the House of Commons has published a report in the wake of the **TalkTalk cyber attack** of 21 October 2015, recommending, amongst other things, that a part of CEO compensation be linked to effective cyber security. Although the report is not legally binding, it may have an influence on government strategy in the cyber security field. Other recommendations and conclusions of the Committee include:
  - That the ICO should introduce a series of escalating fines, based on the lack of attention to threats and vulnerabilities which have led to previous breaches (greater fines should also be available for any delay in notifying a breach to the regulator)
  - That the process for consumers to claim compensation for data breaches should be made easier
  - The Committee supported the availability of custodial sentences in cases of unlawful possession and sale of personal data
  - Strong support was also expressed for the ICO's decision to create a privacy seal, to be awarded to organisations with a strong privacy practice and data protection standards.
- Generally, given the number of large scale cyber-attacks that have occurred in the past year (a trend that will not reverse) as well as GDPR implementation (eg around new requirements for back up, data retention and encryption) **data protection strategy and solutions are a critical focus for the year**.
- The EU Network and Information Security Directive (otherwise known as the **Cyber Security or NIS Directive**) has finally been published in the Official Journal. Member States will now have until 9 May 2018 to adopt appropriate national legislation to comply with the Directive, with such legislation to apply from 10 May 2018. 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.
- Impact of **Privacy Shield** – We expect to see future developments around this in terms of whether it is effective for transatlantic data flows.

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.



Energy efficiency regulations

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 property requires 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 which may reduce an EPC rating.

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

Final Government Guidance on the regulations is still awaited.

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 claims being brought in the English High Court and the Competition Appeal Tribunal (CAT) for the loss and damage that has been suffered by companies as a result of companies involved in cartels or other breaches of competition law. 2016 saw the major judgment in this area in the Sainsbury's v MasterCard decision of the CAT, with Sainsbury's being awarded £68.8M in damages for overcharge of interchange fees by MasterCard before December.

Why is it important?

2017 looks like it will be a bumper year of claims for retail and consumer businesses, with damages claims arising out of Cathode Ray, LCD Screens, Trucks Cartels and Visa and MasterCard breaches of competition law. The MasterCard appeal and the first Visa cases are likely to be heard in is likely to be heard in 2017. MasterCard has provisioned $300m for the UK claims so far. Some major retail and consumer businesses are therefore now viewing this area as an area that can recovery substantial sums for the business and are setting up dedicated teams to deal with the claims.

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. Europe’s **data economy** is another key focus for the EU and the 1st quarter of 2017 brings the EU’s initiative for boosting Europe's data economy, by addressing existing barriers to the free flow of data across border and sectors. This will require as well a discussion on how to come to common standards which could help to ensure interoperability and portability of different data sets.
- The increased use of online for sales is clearly driven by broadband usage in the UK, and this will be affected by the proposed legal **separation of Openreach from BT**: Ofcom will be consulting on its proposed legal separation of Openreach from BT during the early part of 2017. It has also notified the European Commission that it intends imposing this remedy on BT (so that Openreach is legally separated from BT). The European Commission will during the course of 2017 also need to receive the approval of the European Commission before implementing the proposed measures. In addition **improved mobile internet** are 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.
- 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

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 a remedies hearing is to be listed. Uber has stated that it intends to appeal the decision to the Employment Appeal Tribunal.

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 decision was highly fact-sensitive and that, as a first instance decision, it is not binding on future cases. In October 2016, the Commons Select Committee on Business, Energy and Industrial Strategy (previously BIS) launched an inquiry into the future world of work, focusing on the rapidly changing nature of work, and the status and rights of agency workers, the self-employed, and those working in the 'gig economy'. Click here to read more.

Equal Pay: large-scale claim against private sector employer

This case concerns 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 is the first large-scale equal pay claim brought against a private-sector employer. A Preliminary Hearing was held in June 2016, and judgement delivered in October 2016, where it was decided that female retail workers were entitled to compare themselves to the male depot workers. Asda is expected to appeal this Preliminary Judgment and there may be further Preliminary Hearings in 2017 to consider any statutory defence and the question of equal value.

Impact?

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

Holiday pay: can the Working Time Regulations be interpreted to include commission in holiday pay?

The Court of Appeal ruled that the Working Time Regulations can be interpreted to provide that holiday pay must include relevant commission payments. The Court decided that it could be presumed that the UK Government intended to fulfil entirely the obligations arising under the Working Time Directive, including those which were not apparent at any time the Directive was implemented such as the requirement for holiday pay to be “normal pay”. British Gas has applied for permission to appeal to the Supreme Court.

Impact?

Although the recent Court of Appeal decision brings some further clarity to the ongoing issue of what should be included in the calculation of holiday pay, it seems likely that there may need to be further litigation or legislative intervention before employers have complete certainty on what should be included in the calculation of holiday pay, such as in relation to other bonus arrangements or even other, more complicated, commission arrangements.

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Employment watch list

Reports of harsh working conditions

Over the last 12 months, there has been a sharp focus on the "harsh" working conditions of low paid works at the likes of Sports Direct, Amazon and, more recently, JD Sports. Following the Guardian's investigation, it was found that three quarters of staff at Sports Direct high street shops in the UK are employed on zero hour contracts, which means that they are not eligible for things such as holiday pay and sick pay, and it was front page news that workers (especially agency workers) were being paid less than the minimum wage. Leaked reports of a draconian "six strikes and you are out" disciplinary policy has also resulted in workers saying that they felt exploited and on edge that they were going to get shamed by their bosses for "not working hard enough". Similarly, at JD Sports, a 5-week undercover investigation by Channel 4 claimed that there were harsh working practises at one of their warehouses, which included a "three strikes and you are out" policy, intense surveillance and heighted job insecurity among agency workers which has led workers to describe going to work there as "worse than prison". Meanwhile, the GMB claim that staff at Amazon's UK operation have developed physical and mental illnesses because of the harsh "regimes" that they work under and that warehouse staff have been "treated like cattle" as they are driven to work harder.

TUC general secretary, Frances O'Grady, has said that it is increasingly clear that Sports Direct wasn't one bad apple and that terrible working practices are taking place across the UK and has urged the government to look seriously at how this sort of behaviour continues to take place in today's Britain.

What is being done about it?

In October last year, the Business, Energy and Industrial Strategy (BEIS) Committee launched an enquiry into the future world of work, focussing on the rapidly changing nature of work, and the status and rights of agency workers, as well as issues such as low-pay and poor working conditions. This enquiry followed the Committee's unannounced visit to one of Sports Directs sites in Shirebrook (where reportedly Sports Direct sent a sandwich lady in with a hidden camera to record a private conversation at the end of the visit). The Committee was keen to hear from all interested parties. The deadline for sending in written submissions was 19 December 2016. We await the findings. Meanwhile, Sports Direct has committed to hold an independent review of its corporate governance and working conditions.

In addition, an Independent Review of Employment Practices in the Modern Economy was commissioned by the Prime Minister on 1 October 2016 and launched on 30 November 2016. It will take 6 months to complete. Matthew Taylor (the Chief Executive of the Royal Society of the Arts) will lead the review to consider how employment practices need to change in order to keep pace with modern business models. It will involve a regional tour of the UK, where Taylor will meet with employees and employers to discuss their concerns about the current UK labour market. The wide-ranging review will look at ways to ensure that the regulatory framework surrounding employment, and the support provided to businesses and workers, is keeping pace with changes in the labour market and the economy. It will examine how flexibility can be maintained while also supporting job security and workplace rights, and whether new employment practices can be better used as an opportunity for underrepresented groups. It will address 6 key themes: (1) security, pay and rights (2) progression and training (3) the balance of rights and responsibilities (4) representation (5) opportunities for underrepresented groups and (6) new business models.

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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Health and safety: rising fines

Why are fines rising?

Since the introduction of the Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline in February 2016, companies convicted of health and safety and food safety offences have seen a huge increase in fines. From previous starting points of £500,000 for corporate manslaughter and £100,000 for a health and safety offence resulting in a fatality, fines for the same offences have risen to starting points of £7.5 million and £4 million respectively for the largest organisations. 2016 saw a fine of £5 million levied against the owners of Alton Towers after the non-fatal Smiler-ride disaster.

Why is it important?

2017 will see more sizeable fines against companies. The Court of Appeal will likely be troubled more often by companies that feel fines are excessive and so additional guidance may trickle down to the lower courts on unclear issues such as what is a "very large organisation" and what burden of proof should prosecutors be held to when asserting that risks are likely to occur? Some clients are starting to engage advisors earlier to ensure that fines are as low as possible, and reviewing health and safety management to determine if anything can be done before an incident even occurs to help them during the sentencing process.

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Illegal working

Following the highly publicised arrests of illegal workers at Byron Burger (following orchestrated Home Office raids on branches of the upmarket hamburger chain), the introduction via the Immigration Act 2016 of new immigration offences and expanded powers for the Home Office to tackle illegal working (and of course with the uncertainties regarding Brexit on the horizon) this issue has moved further up the agenda of retail and hospitality sector employers.

Byron Burger's apparent enthusiastic co-operation with the Home Office surprised a number of observers. The hamburger chain was accused of duping its employees in order to assist a Home Office sting operation, and generally the press and public reaction have been unhelpful to its brand.

What was not made clear in some of the press coverage, however, is that employers are under a positive obligation to co-operate with the Home Office to prevent illegal working, and failure to do so can result in serious financial and even criminal consequences for an employer. Since the implementation in July of several of the key provisions of the Immigration Act 2016, the stakes have been raised still further.

Employers are generally well-acquainted with the need to carry out appropriate document checks and keep proper records in respect of their employees to protect themselves against a potential "civil penalty" (in case they have been unwittingly employing an illegal worker), and that there may be criminal sanctions if you knowingly employ an illegal worker. Under the new Immigration Act, however, the threshold for the criminal offence of knowingly employing illegal workers has been lowered; simply having "reasonable cause to believe" that a person is an illegal worker will suffice. On indictment, that offence may now carry up to 5 years' imprisonment (up from the previous 2 year limit). Further, immigration officers have expanded powers to close down businesses, impose compliance sanctions, search premises and seize records in relation to suspected offences.

Where illegal working is uncovered, the Home Office will take into account the timeliness of the employer's engagement with the authorities and the level of co-operation during their visits and investigations, when considering the appropriate civil and/or criminal penalty. There is, therefore, a strong incentive for employers to take active steps to assist the Home Office. In relation to the civil penalty, for example, "active co-operation" (such as providing prompt access to premises and records when requested, responding promptly and honestly to questions, and making employees available to officials during investigations) can result in the civil penalty being reduced by £5,000 per illegal worker.

An employer in a similar position to Byron will no doubt want to avoid the wave of negative publicity experienced by the burger chain, but it will need to balance its concerns about brand management and public relations (and of course the treatment of its employees) against the weighty sanctions it and its employees may now face if they fail to pro-actively engage with the Home Office during their investigations.

What can employers do to protect themselves?

Employers can introduce robust right to work checking (and rechecking) procedures; audit personnel records to ensure they are prepared in the event of a Home Office audit; train HR and recruitment teams on the punitive immigration landscape; and notify the migrant workforce about a new employee criminal offence of illegal working. Many retail and consumer businesses are already taking steps similar to these in order to mitigate a range of risks in their supply chains (see our comments on supply chain vigilance here .

However, if faced with an intervention by the Home Office, employers should consider seeking advice from their legal advisers on the level of co-operation that will be expected. Employers could consider entering into a dialogue with the Home Office if what is being requested will be detrimental to the employer's business, and employers should engage early with their press team or a reputation management firm to limit any potential damage from a PR perspective.

Logistics

E-commerce has revolutionised the way we shop. In October 2016 internet sales accounted for 15.1% 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, Shopping centres in particular were hit this new year as the number of shoppers fell 49.5% on the first day of 2017 compared to 1 January last year. 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.

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.

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 <u>here</u> to read our report.

Minimum alcohol pricing

The Court of Session in Edinburgh has rejected the legal challenge to the Scottish Government's Alcohol (Minimum Pricing) (Scotland) Act 2012 which would impose a minimum price per unit for the sale of alcohol (to be fixed at 50p per unit of alcohol under the draft Alcohol (Minimum Price per Unit) (Scotland) Order 2013).

The challenge was brought by three producer organisations, led by the Scotch Whisky Association, who argued 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 could equally meet the aims of the legislation, but in a less restrictive manner. The Scottish Ministers argued that the legislation is justified on grounds of protecting human health and that a minimum price per unit 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 legislation is compatible with EU law. On 23 December 2015 the ECJ ruled that the minimum pricing measure would be a restriction on trade because it would deprive suppliers in other member states of the commercial advantage they may obtain from their lower cost products. The measure may be justified on health protection grounds only if it is proportionate to the objective pursued. It considered that higher taxation of alcoholic drinks is likely to be less restrictive because traders would still be free to determine their selling price and it would contribute to the wider objective of the Scottish legislation. However it is ultimately for the Scottish court to determine whether measures other than the imposition of minimum pricing are capable of protecting human life and health as effectively, while being less restrictive of trade. The case was returned to the Court of Session for determination of this question.

On 21 October 2016 the Court of Session concluded that the minimum pricing measure is lawful as it will meet the stated objective of protecting life and health, particularly of harmful and hazardous drinkers in the lower quintile of the population, gauged by wealth, and that there is ample material to demonstrate that taxation, on its own or in combination with other measures, would not achieve the same objective.

The Scotch Whisky Association has since been granted permission to appeal the ruling to the Supreme Court.

Pricing and price promotions: new guidance

What's new?

- December 2016 saw the much-awaited publication by the Chartered Trading Standards Institute of its Guidance for Traders on Pricing Practices (the Guidance), which replaces BIS' 2010 Pricing Practices Guide. The Guidance takes account of the Competition and Markets Authority's recommendations following the super complaint brought by Which? in April 2015 on pricing practices in the grocery sector, as well as responses to a public consultation run by the CTSI in late 2015.

What is the impact on retail businesses?

- Retailers have a legal responsibility to ensure that their pricing practices do not mislead consumers. The Guidance aims to provide practical advice to retailers to help them stay within the law when setting retail prices and running price promotions. Although there has been no change in the law, it is expected that regulators will give retailers until **April 2017** to adjust to working to the new Guidance.

- In the Guidance, retailers are encouraged to assess their pricing practices through the eyes of the consumer. For example, when it comes to price promotions, retailers should ask themselves: how would an average consumer interpret the promotion? Is that different to the actual position? Is there anything about the promotion which is likely to deceive a consumer, including in terms of how the promotion is presented?

- The Guidance aims to have a more practical focus than its predecessor, but it is also less prescriptive. The emphasis is on understating how best to avoid being unfair or misleading. For example, retailers will be familiar with the old "28 day rule" for price establishing, specifically, that a price used as the basis of comparison with a discounted price must have been in place for at least 28 consecutive days. This does not feature in the new Guidance, which instead takes the approach of setting out a list of issues that retailers should consider, and giving practical examples of what is more likely to less likely to comply with the obligation not to mislead.

- Retailers should take time to digest the Guidance fully, and test their current pricing strategies against it. However, as the Guidance is principles based, they may also wish to strengthen their internal guidelines and policies so that those responsible for implementing pricing decisions are clear on what the business deems to be acceptable. We will continue to monitor market practice and action taken by regulators in this area.

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, 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.

An eight week technical consultation on the draft legislation will **close on 30 January 2017** followed by draft secondary legislation in early 2017. The Budget 2017 will confirm the final levy rates.

In a further move to combat the obesity issue the Committee of Advertising Practice announced on 8 December 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.

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?

Supply chain vigilance

- Supply chain vigilance is likely to remain a key theme in 2017. The retail trading environment remains 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 this area, 2016 was very much the year of **transparency in supply chains** reporting under the **Modern Slavery Act 2015**. At the start of 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, and we will have a clear view of those that have and those that have not complied.

- 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.

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Tax evasion

The Criminal Finances Bill will enact a new offence of failure to prevent facilitation of tax evasion, which is currently expected to come into force in early 2017. The new offence will be wide ranging in its scope, much like the Bribery Act 2010. Critically, a business that has prima facie committed the offence will have a defence if it can show that it had in place **reasonable procedures** to prevent facilitation of evasion by it or an associated person. There are a number of important practical implications:

- the draft guidance on the offence is explicit that procedures intended to comply with the new provision have to be based on a proper risk assessment by each business of which of its employees, agents and associates might have motive, means and opportunity to facilitate tax evasion. That risk assessment should be a priority for businesses that want to hit the ground running with compliant procedures when the new offence is enacted;
- as well as carrying out risk assessment and actually designing new procedures and policies, businesses need to plan how they will roll out the new procedures internally, what education and training is needed to explain the practicalities, who will police the policies etc. Early engagement by central teams with local or divisional management is likely to be important in this process, if not already done as part of the risk assessment and design process;
- businesses should also be evaluating which third parties (e.g. suppliers, distributors, agents, and JV partners) will be in the scope of the offence as "associated persons", how new procedures will apply to these persons and how those procedures can be incorporated into existing and new terms of business and contracts. The relevant third parties should also be in the scope of the risk assessment referred to above;
- the most important point for businesses to keep in mind is that their procedures have to be tailored for their own circumstances – an off the peg approach is unlikely to be successful. For example, if a business has two different divisions, one operating in a sector where tax evasion is a low risk and one in a sector where it is a higher risk, different procedures and policies are likely to be required for each division. Businesses may also consider identifying those employees or categories of employees that are most likely to come into contact with higher risk situations and provide tailored scenario based training. Businesses may be familiar with the broad concept of what is required from when the Bribery Act was introduced, but it would be a mistake to assume that existing policies will be sufficient.

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