Retail Risk Outlook 2024

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Contents

Introduction

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Welcome to TLT's Retail Risk Outlook 2024. We have retained the same format this year by grouping our updates thematically and the aim remains the same – to help retailers understand the legal and regulatory changes affecting the market for the year ahead and beyond. Our retail experts also share their advice on how to prepare for these changes and ways to reduce the risk to the business.

The main themes in the Outlook are:

- As expected there remains a key focus on sustainability and environmental issues where we've seen a spotlight on Green claims by regulators but also flexibility afforded to those who wish to collaborate on environmentally beneficial projects. 2024 will also be a year to focus on progress against transition plans for net zero and consider ESG reporting requirements;
- Those retailers who are prepared and able to focus on greater transparency and accountability with customers, investors and regulators in this area will be best placed to navigate the anticipated changes ahead;
- The consumer law shake up which is on the horizon will also frame where some retailers may need to amend current practice to ensure continued compliance particularly around price transparency. With significant penalties looming for non-compliance there is still time to get ahead of the game but there will no doubt be some untested areas where regulatory risk could arise;
- As ever tech, data and AI is proving to be an area where regulation is playing 'catch-up' so it is well worth keeping up with developments. New tech-led solutions and wider incorporation of AI in operational processes can lead to significant cost savings for retailers; and
- Challenging trading conditions for retailers remain the order of the day with continued external forces impacting on the supply chain. Keeping an eye on costs and close monitoring of any changes in customer purchasing as a result of the ongoing cost of living crisis will be key.

Although these remain challenging times for retailers, by being prepared and putting in place appropriate planning and strategies, retailers can continue to go from strength to strength.

We hope you find this report useful in planning for the year ahead. If you have any questions about these changes or would like assistance in preparing for them, please do get in touch.

Supply chain due diligence: ESG reporting

Impact M

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What's changing?

As we flagged in our 2023 Retail Risk Outlook, the supply chain should be a key concern for retailers when setting sustainability targets. The past year has seen major legislative developments in the EU, the impact of which will be felt by many UK businesses. Developments include:

- In January 2023, the Corporate Sustainability Reporting Directive (CSRD) entered into force. It expands the existing non-financial reporting requirements to include ESG-related matters; companies must record and report on the impact of ESG issues on the organisation, as well as the impact of the organisation's activities on people and the environment. It also expands the scope of the reporting requirements to include listed SMEs and certain non-EU companies that have links to the EU. The first tranche of companies will be required to report in 2025 on data collected in 2024.
- In December 2023, the European Council and the Parliament agreed the provisional text of the Corporate Sustainability Due Diligence Directive (CS3D). The CS3D will introduce a corporate due diligence duty to identify, prevent, mitigate and account for adverse human rights and environmental impacts in the company's own operations, its subsidiaries and their value chains. It is focussed on large companies and introduces civil liability and sanctions that aim to hold organisations accountable for human rights and environmental violations occurring in their value chains.

What should retailers do to prepare?

Although the UK government does not currently have plans to replicate this legislation, both directives apply to certain non-EU companies with activities in the EU. Even if retailers are not directly within scope of the directives, they might be asked to respond to information requests from other, in-scope companies that are reporting on their supply chains. As such, retailers should continue to strengthen their due diligence enquiries and contractual commitments from suppliers in relation to sustainability.

In terms of environmental clauses, TLT continues its close collaboration with **The Chancery Lane Project**, which has developed a wide range of freely available contract clauses. These include due diligence questionnaires and several supply chain clauses which are helpful for retailers when considering how they can strengthen contractual assurances from suppliers.

Drafting can include both incentives and punitive measures to encourage compliance, such as:

- Supplier warranties relating to environmental performance and continuous improvement obligations;
- Clauses to cascade greenhouse gas reporting and reduction obligations throughout the supply chain;
- A target product carbon footprint budget (which reduces over time) for each product manufactured and supplied; and
- Clauses to introduce a 'repair, reuse and recycle' concept in supply agreements.

Sustainability and environment

Green Claims

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What's changing?

The Competition and Markets Authority (CMA) and Advertising Standards Authority (ASA) continue to view misleading green claims as a high priority. This has been reinforced by the enforcement action we have seen throughout 2023, which looks set to continue in 2024 and beyond.

CMA

Alongside its ongoing retail fashion sector investigation, which focuses on the environmental claims made by ASOS, boohoo, and ASDA (George), the CMA opened a new investigation into the environmental claims made by Unilever in December 2023. The announcement followed the CMA's investigation into the fast-moving consumer goods sector, as the CMA identified concerns that Unilever may be exaggerating the green credentials of some if its household essential items, such as cleaning products and toiletries, by using vague, broad, and unclear statements and misleading images and colours.

The CMA raised specific concerns around:

- The presentation of claims around ingredients, which may give an inaccurate and misleading impression of how natural the product is;
- Claims that focus on a single aspect of the product, but which give the impression that the whole product is environmentally friendly; and
- Claims around recyclability of the product which fail to specify whether they relate to all or part of a product or its packaging.

ASA

The ASA has continued to regularly investigate complaints of misleading environmental claims and is increasingly using intelligence gathered by Active Ad Monitoring Systems to self-identify potentially misleading ads for investigation.

With all bar one of the green claims complaints ruled upon by the ASA Council in 2023 having been upheld, it is clear that the ASA is holding brands to a very high standard, particularly when it comes to the substantiation of green claims.

A good example of the tough line taken by the ASA was the December 2023 **Ruling against Brewdog** in relation to an Instagram post which featured the text "Positive Planet Certified Carbon Negative Company". Although the ad referred consumers to a link for the Brewdog website, which contained further information about their carbon reduction and offsetting project, the ASA held that the ad itself did not include information which explained the basis of the claim and was therefore misleading.

Over the last six months the ASA has also made a series of updates to its **guidance on environmental claims** to reflect recent decisions and to provide valuable additional guidance to businesses wishing to make green claims:

- On 23 June 2023, the ASA updated its guidance to include a new section entitled "Claims about initiatives designed to reduce environmental impact". Significantly, the new section reiterates the principle established in the 2023 fossil fuel rulings; that if you are in a sector which has a particularly harmful environmental impact, you are likely to need to give more balancing information when making a green claim.
- Following the publication of the ASA's key findings from its review into "green disposal" in November 2023, the ASA also amended its guidance to include a section on the use of green disposal claims in advertising. Amongst other things, the section advises advertisers to clearly qualify green disposal claims such as "recycled" or "recyclable" to specify which parts of a product or packaging the claim refers to and include information within the ad about special disposal methods that are material to consumers' understanding of a "recyclable" claim.

What should retailers do to prepare?

The CMA and ASA have both demonstrated a continuing intention to clampdown on misleading environmental claims. Retailers are advised to review their practices now to make sure they are operating in line with the law. Retailers should also watch out for CMA produced practical guidance on greenwashing as part of its ongoing misleading claims project.

Other developments to watch out for are:

ASA enforcement: Tackling misleading green disposal claims is a specific enforcement priority for the ASA. From 1 April 2024 the ASA will begin proactively investigating potentially problematic claims, with a focus on claims that: omit end of use green disposal information; suggest a product has multiple green disposal options where that is misleading; or where substantiation to back up green disposal claims is not present.

CMA enforcement: The risk of breaching consumer protection rules and the CMA's Green Claims Code are expected to increase significantly when the Digital Markets, Competition and Consumers Bill comes into force later in 2024, which will give the CMA much greater enforcement powers. This includes the power for the CMA to impose penalties of up to 10% of global turnover on companies that breach consumer protection laws without going to court.

Sustainability and environment

Extended Producer Responsibility update

Impact M

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What's changing?

In this year's update on producer responsibility, we are seeing a further expansion of existing producer responsibility obligations. This builds on recent changes which extended obligations for producers and other economic operators who produce, distribute or import packaging. The latest development in this field aims to combat the low recycling rates associated with Waste Electrical and Electronic Equipment (WEEE).

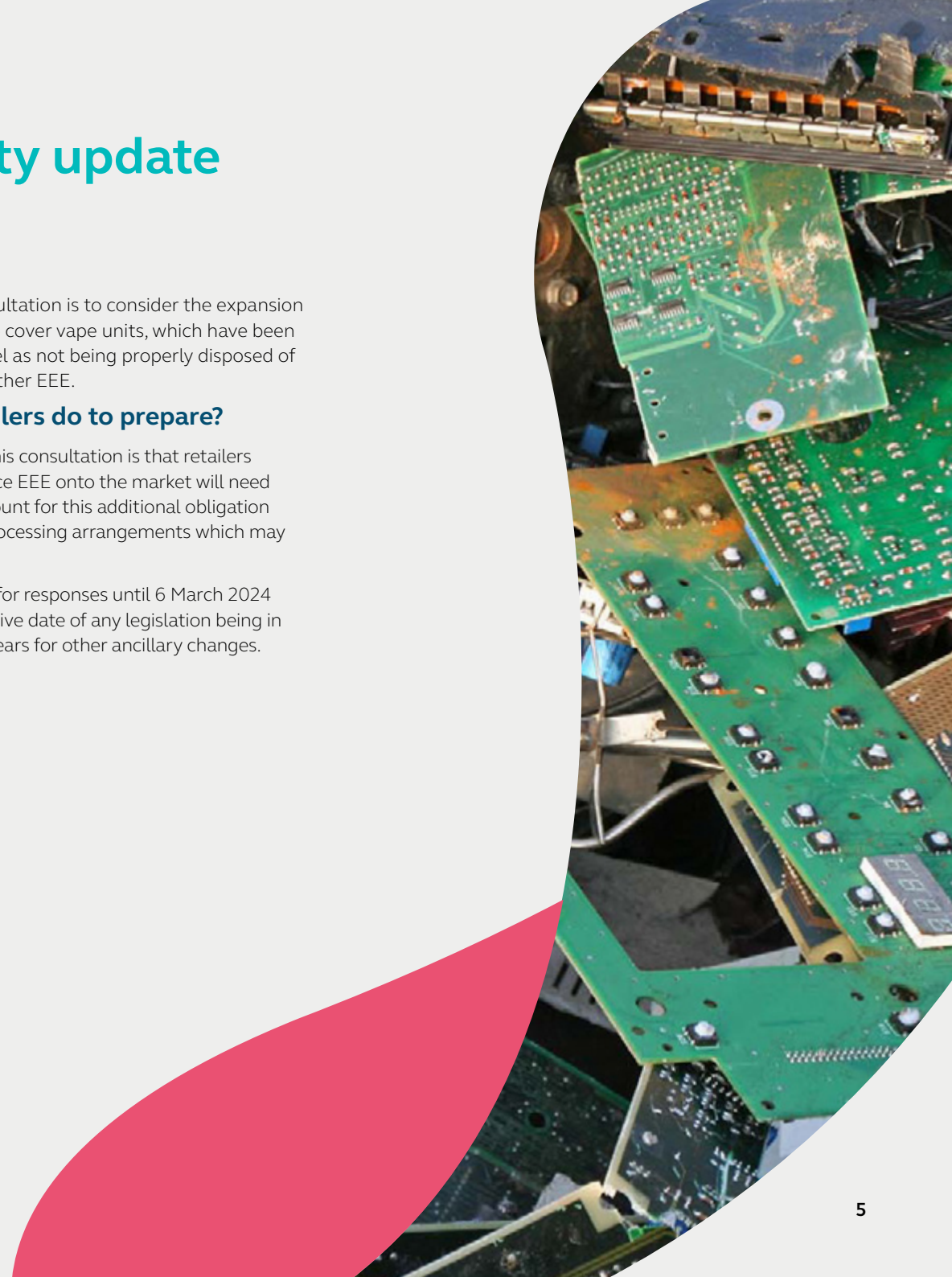
As part of the wider legislative push to create a more sustainable and cyclical product lifecycle, the UK government has opened a consultation on a potential obligation for relevant economic operators to accept WEEE without the consumer having been required to purchase a replacement. This obligation would rest with producers to effectively finance this scheme, which is a continuation of the 'polluter pays' principle that we have seen expanded over recent years. The aim of this obligation is to reduce WEEE, as it is not properly processed following its end of life which has the impact of the loss of valuable materials and potential environmental damage.

Another aim of this consultation is to consider the expansion of a new EEE category to cover vape units, which have been widely flagged at UK level as not being properly disposed of in the same manner as other EEE.

What should retailers do to prepare?

The practical impact of this consultation is that retailers who handle WEEE or place EEE onto the market will need to review budgets to account for this additional obligation and explore any waste processing arrangements which may already be in place.

The consultation is open for responses until 6 March 2024 with an anticipated effective date of any legislation being in 2026 and the following years for other ancillary changes.



Sustainability and environment

Transition Plan Taskforce: update on sector based plans

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What's changing?

The Transition Plan Taskforce was set up by the current government to support organisations making public commitments and planning to reach net zero. This is with a view to ultimately making the publication of transition plans mandatory (starting with large public and private companies).

Towards the end of last year, Sector Guidance Summaries were published along with a number of Sector Deep Dives.

The **Sector Guidance Summaries** include, for Consumer Goods – Apparel & Textiles, Consumer Discretionary Products and Consumer Goods Retail and Food and Drink. These guidance notes are due to be updated in 2024 following a consultation process which has now ended.

The Sector Deep Dives include guidance for the Food and Beverage Sector which specifically includes distribution and retail along with a **video.** The Sector Deep Dives are, once again, in draft form and due to be finalised later in 2024. The guidance helpfully sets out suggested examples of what a retailer, wholesaler, or food service entity may include in their transition plan.

What should retailers do to prepare?

Retailers should review the Sector Guidance and Sector Deep Dive guidance (where appropriate) and consider how these compare to their ongoing transition planning. These are useful checks to make sure relevant sector issues are considered. It will also be worth taking another look at the guidance notes once they are finalised.

The timescales for legal requirements for publication of transition plans are yet to be finalised but are likely to be confirmed during the course of 2024.

Organisations who regularly review their transition plan and report on progress will be prepared for the disclosure requirements which are on the horizon.

Sustainability and environment

Green collaboration agreements

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What's changing?

In October 2023, following consultation, the CMA launched its "Guidance on the application of Chapter 1 of the Competition Act 1998 to environmental sustainability agreements" now more commonly referred to as **Green Agreements Guidance** (the Guidance).

The Guidance is intended to assist businesses with cooperation to achieve sustainability objectives, in a way which is compliant with competition law. Publication of the Guidance follows consultation on the CMA's draft guidance in February 2023, as reported on in our **Retail Risk Outlook 2023**.

As we have **previously considered**, the extent to which the CMA could take into account the environmental benefits of direct co-ordination between competitors hasn't always been clear and the Guidance provides some welcome clarity around the issue.

The CMA attributes a broad definition to "environmental sustainability agreements" and the Guidance can apply to any collaborative initiative that is aimed at reducing the adverse impact of an economic activity on the environment. The Guidance explains how competition law applies to environmental sustainability agreements between firms operating at the same level of the supply chain, to enable collaboration that will help combat climate change and meet further environmental sustainability goals.

The Guidance sets out a range of agreements that are unlikely to give rise to competition concerns and types of agreements that may be likely to infringe competition law.

Where the position is not clear, the Guidance includes an invitation to businesses/trade organisations to approach the CMA for informal guidance at an early stage in the development of sustainability agreements. Under this open-door policy, where guidance is sought in an open and transparent manner, the CMA has indicated that it will not seek to impose penalties, provided that the CMA did not raise any objections during the consultation process.

In November 2023, following a request from the Fairtrade Foundation, the CMA issued, and has now published, its first informal guidance under this open-door policy. The informal guidance relates to an environmental sustainability agreement, the Shared Impact Initiative, concerning the sourcing of bananas, coffee, and cocoa products by participating grocery retailers. The stated objective of the Shared Impact Initiative is to agree longer term supply arrangements between retailers and participating Fairtrade producers to give producers the security to invest in sustainable practices.

In the **informal guidance** the CMA demonstrates its approach to assessing the impact of the proposed initiative, that the CMA concluded was not expected to have a significant impact on competition between the retailers nor between the producers. The CMA acknowledged that the terms of the Shared Impact Initiative may evolve, and Fairtrade expressed an intention to review the agreement after a year.

What should retailers do to prepare?

Retailers should familiarise themselves with the new Guidance. Should retailers develop plans to enter into any kind of environmental sustainability agreement with competitors, they would be well advised to approach us for advice in relation to ensuring that the proposals fall within the Guidance or for assistance in liaising with the CMA under the open-door policy.

The CMA has demonstrated its commitment to working with businesses to structure compliant environmental sustainability agreements and it is clear that this will continue to be a key area of focus for the CMA. The approach is a positive step, giving assurance to retailers who wish to cooperate and achieve sustainability objectives in a competition compliant manner.

Product and marketing

ASA update

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What's changing?

The Advertising Standards Authority (ASA), part-way through 2023, released its **2022 Annual Report** commenting on its evolution over the years, as part of its 60th anniversary regulating UK ads (the Report). The Report focuses on the final year (2023) of its current 5-year strategy ("More Impact Online"), and previews how the ASA intends to continue evolving, and its plans to utilise technology further in order to do so.

The Report sets out the main areas of focus for the ASA, both in 2023, and for the immediate future. A number of these will not come as a surprise, given the headlines over the previous 12 - 24 months, and the Report splits out the topics of interest into both ad content, and ad approach (how the ASA is evolving its own methods of reviewing and detecting content in breach of the CAP Code).

The main themes can be categorised as follows:

Ad Approach: ASA actions

- Using data science and AI to help regulate ads
- Working closely with platforms and online intermediaries

Ad content: ASA focuses

- Green claims (see earlier article on Green Claims)
- Non-compliant influencers
- Cryptocurrency and NFTs
- Age-restricted ads, and limiting exposure of such ads to consumers outside of the relevant age brackets

ASA actions

With businesses in every industry increasing their tech utilisation day to day, it is unsurprising that regulators are following suit. The ASA sets out that it now has a wide array of tools, to allow it to capture content automatically, and to also help prioritise the adverts that require immediate expert review. The **Mid-year 2023 Report**, published in November 2023, highlights that AI will form part of this toolkit to help accelerate and streamline the detection process.

The ASA also launched its Intermediary and Platform Principles (IPP) Pilot in 2022 and has used this to help spread awareness and understanding about the role key platforms such as Google, Amazon Ads, Yahoo, etc, play in supporting the ASA with online regulation. An aim of this Pilot was to increase advertiser's awareness of the CAP Code, and to help secure compliance by directly removing non-compliant ads where an advertiser refuses to withdraw such content (please see later article on Intermediary Platform Principles Pilot).

ASA focuses

Non-compliant influencers: This was again a key area of focus of the ASA, making up just over a quarter of all online cases in 2022. The ASA continues to utilise tech in this area to identify ad content that is unlabelled, and to categorise influencers who are most likely to produce non-compliant content.

Cryptocurency and NFTs: Identified by the ASA as a "red alert" issue, given the unregulated nature of the market. Enforcement Notices were issued to 60 cryptocurrency firms focusing on the inclusion of risk warnings and the requirement for such firms to be more responsible, and not take advantage of inexperienced consumer investors. NFTs were addressed with a similar attitude, with three basic principles being established in 2022: ads must include risk warnings; ads must include information on fees; and ads should not exaggerate the value of any NFTs.

Age-restricted ads: New guidance has been released with a view to directing advertisers and agencies to take a "more prescriptive" approach in relation to the targeting of age-restricted ad content online. The fundamental principles include:

- Choosing an age-appropriate media for ads;
- Placing restrictions on ads where possible to limit their reach to an inappropriate audience (and considering the appropriateness of links to any influencers and their audiences); and
- Monitoring campaigns closely (with ad platform / provider data), to adjust and improve targeting of such ads. Please see **here** for more detail.

What should retailers do to prepare?

A key takeaway for retailers, is the ever-growing toolkit that the ASA is developing to help capture non-compliant ads. Not only by utilising technology to help it carry out its existing functions in a quicker and more efficient manner (detecting non-compliant content and prioritising urgency of review), but also by using the wider players in the digital ad supply chain to spread awareness and support securing compliance.

It is clear that as tech-assisted monitoring increases, retailers will need to be mindful of the increased likelihood of potentially non-compliant content being captured and reviewed / considered. In particular, given the now well-established nature of influencer marketing, the ASA is using its technology to identify brands that work with influencers and provide guidance ahead of any non-compliance, which will likely cast a wider net as to who the ASA is monitoring.

The Report notes throughout that the ASA will continue to collaborate with the Competition and Markets Authority and Ofcom on areas of "mutual concern", suggesting that where the ASA itself lacks enforcement power, it may look to utilise other regulators to provide such support.

Product marking and labelling update

Impact L

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Have we seen the end of the UKCA regime?

In our 2023 update, we highlighted that the transition from CE marking to UKCA marking had been delayed, with the CE mark continuing to be recognised in the UK to show goods meet necessary safety standards until 31 December 2024.

The **government has since announced**, in August 2023, that full implementation of the UKCA regime has been delayed indefinitely for most categories of goods, to reduce the burdens on business and allow them to focus on creating jobs and boosting growth for the UK economy.

This means that the CE mark, demonstrating that goods meet EU requirements, will continue to be recognised in the UK for the foreseeable future. This essentially makes use of the UKCA mark voluntary for products destined for the GB market.

What does this mean for retailers?

Many businesses had already made the shift to UKCA marking and therefore this U-turn by the government is a little late for some. However, this should ease unnecessary costs and burdens going forward, particularly for those who produce goods for both GB and EU markets, as only one regime needs to be followed.

It remains to be seen whether businesses that had already made the shift will continue to apply the UKCA mark going forward. There is a potential risk that consumers, without knowledge of this policy change, may (mistakenly) see a product with both CE and UKCA markings as having a higher level of regulatory compliance than those with just the CE mark. We may therefore see businesses maintaining this position for existing products where the necessary testing and compliance processes have been followed.

Note that there are different rules for **medical devices**, **construction products**, **cableways**, **transportable pressure equipment**, unmanned aircraft systems, **rail products**, **marine equipment** and ecodesign, all of which fall outside of the remit of the Department for Business and Trade. Rules for these goods will be stipulated by the relevant departments covering those sectors.

Windsor Framework labelling requirements underway

The new "green lane" to Northern Ireland (NI) was officially opened on 1 October 2023, allowing businesses in Great Britain (GB) to move pre-packed retail goods, as well as some loose goods like fruit and veg, not destined for the EU, across the Irish Sea with reduced checks and controls.

Under the new Northern Ireland Retail Movement Scheme, which was established under the Windsor Framework, labelling requirements have been introduced to prevent goods using the "green lane" from being moved onwards from NI into the EU.

In addition to existing UK food packaging and labelling requirements, this scheme has introduced a new labelling requirement for a large number of food products to display the words "Not for EU" on individual product labels (or on outer packaging of multipacks).

However, implementation of the individual product labelling rules will be split across three phases:

- **Phase 1: From 1 October 2023**
  All meat products and some dairy products moving from GB to NI must be individually labelled. Labels are only required for products sold in NI.
- **Phase 2: From 1 October 2024**
  In addition to Phase 1 products, all milk and dairy products moving from GB to NI must be individually labelled. Individual labels will also be required on all meat, milk and dairy products placed on the market in GB.
- **Phase 3: From 1 July 2025**
  In addition to Phase 1 & 2 products, composite products, fruit, vegetables and fish moving through the green lane to NI, must be individually labelled, as well as the same goods placed on the market in GB.

In recognition that some unlabelled products may already be on the market in NI at the start of each phase, there will be a 30-day transition period for each phase, making the implementation deadlines 31 October 2023, 31 October 2024, and 31 July 2025, respectively. Before those dates, relevant products already on the market will not need to be relabelled.

Where products within scope of the regime do not require individual product labels, such as those falling within the **list of exceptions**, labels must be included on boxes or crates heading to NI. In addition, for retailers in NI, shelf level labelling with the words "Not for EU" is required, as well as posters to aid consumers' understanding of the scheme.

DEFRA consultation

A recent **Command Paper** published by the government identified that some retailers were disincentivised from selling into NI because of these new labelling requirements (currently applicable for goods destined for NI only under Phase 1). The government therefore plans to introduce legislation to ensure that Phases 2 and 3 are implemented across the whole UK market (not just in NI).

Indicative legislation has been published and the government is currently **consulting on this**, with responses required by 15 March 2024. In particular, the government is seeking views on how the labelling should work in practice, the likely impact it will have on businesses, whether any exemptions should be included and how these rules should be enforced, including the possibility of civil sanctions for non-compliance. We may therefore see some new guidance in the spring.

What should retailers do to prepare?

As we have now passed Phase 1, retailers making use of the "green lane" will need to start gearing up for Phase 2, and ensure that arrangements are in place to add the necessary labels to milk and dairy products (such as milk (incl. UHT), cream, yogurt, ice-cream etc) destined for both GB and NI, as well as meat products in GB.

More guidance is expected in relation to GB product labelling requirements, as well as in relation to the remaining phases, but we don't expect to see this until after the government has considered all consultation responses. We are also likely to see changes to the operation of the Windsor Framework more generally when the proposals under the new **Northern Ireland trade deal** are implemented.

See the full existing DEFRA guidance **here**.

Product and marketing

Product liability reform

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What's changing?

The Department for Business and Trade and Office for Product Safety and Standards (OPSS) published a consultation in August 2023 setting out its proposals to reform and update the UK's product safety regime.

One of the key recommendations is the creation of duty of care requirements on online marketplaces for the identification and removal of unsafe product listings. This would require online marketplaces to assess if they're meeting due care requirements by identifying any specific risks, developing systems and processes proportionate to their business and risk level, and publicly and/or privately reporting on their performance.

In addition, OPSS wants to ensure that online listings have clear consumer-facing information to make it safer for consumers to shop online by including:

- Warnings to consumers;
- A clear, prominent indication of whether the product has been listed by a third-party seller (alongside the name and contact address of the seller);
- Details of what checks (if any) have been carried out on the product or seller; and
- Key product safety information, which is already on the product, its packaging or accompanying documents.

Finally, OPSS proposes introducing enhanced co-operation duties, which would apply to online marketplaces when managing product safety issues and/or recalls – including engagement with enforcement bodies and third parties.

What should retailers do to prepare?

Retailers should monitor these developments closely. In particular, you should assess whether the product safety policies and procedures you have in place for products produced and/or sold by third party suppliers comply with the principles outlined in the OPSS consultation.

Product and marketing

Improving price transparency and product information for consumers

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What's changing?

On 4 September 2023, the Department for Business and Trade (DBT) published a new 'Smart Regulation' **consultation** that outlined a number of proposals to improve price transparency and product information for consumers. The government published its **response** on 24 January 2024.

In this update we focus on some of the key outcomes of consultation. (Please note that the proposed changes to the Price Marking Order are covered in the next article: Display of pricing information – upcoming changes).

Further regulation of 'drip pricing'

The practice of drip pricing occurs when consumers are presented with an initial price for a product or service (known as the base price) at the beginning of the sales journey, with additional fees being introduced (or 'dripped') as they proceed towards the final transaction. The government's concern is that drip pricing can result in consumers being 'baited' into choosing a product because of its lower base price, but then ultimately end up paying more once further fees or products are added. The consultation sought views on whether there should be further intervention specifically focused on drip pricing, and if so, which practices it should address.

Having reviewed the responses, the government intends to expressly prohibit presenting a headline price which does not: incorporate in the price any fixed mandatory fees that must be paid by all consumers; and disclose the existence of any variable mandatory fees and how they will be calculated. This proposed course of action will enable swifter enforcement action and reinforce the existing legal provisions which address misleading pricing practices currently contained in Consumer Protection from Unfair Trading Regulations 2008 (CPRs), which are restated in the Digital Markets, Competition and Consumers Bill (DMCC Bill). The government is not planning to legislate in relation to optional fees at this stage, but will continue to assess the position.

Fake and misleading reviews

One of the key changes in the DMCC Bill is the creation of new powers to add to the list of banned unfair commercial practices (at Schedule 19) by way of secondary legislation. The consultation sought views on how the list of banned practices could be extended to cover false and misleading product reviews.

The response confirmed that there was strong support for requiring traders to take reasonable and proportionate steps to remove (and prevent consumers from encountering) fake reviews. The government therefore intends to add the proposed banned practices relating to fake reviews to the list of banned practices in Schedule 19. It will work with the CMA to publish guidance to explain the law and set out what 'reasonable and proportionate' steps traders are expected to take to remove and prevent consumers from encountering fake reviews; and to prevent any other information presented on the platform (that is determined or influenced by reviews) from being false or in any way capable of misleading consumers.

According to the DBT, taking reasonable and proportionate steps is likely to require a trader to put in place the following practical measures:

- Policies and processes for regularly and proactively assessing risk;
- Detecting suspicious reviews and removing fake reviews;
- Sanctioning those that commission, facilitate, or otherwise arrange for the posting of fake reviews; and
- Reporting mechanisms that allow consumers to report suspicious activity, as well as conducting a regular evaluation of the effectiveness of their policies, processes, and monitoring systems.

Application of consumer law to digital platforms

Whilst it is accepted that digital platforms are subject to the so-called "professional diligence" requirement under the CPRs, the statutory formulation of this test is derived from the EU Unfair Commercial Practices Directive and is not always easy to apply in practice. The government is keen to ensure that the application of these standards to online platforms is well understood. This is particularly important given the changing nature of online marketplaces, which has created a new avenue for consumer harms.

In the consultation response, the government acknowledged that it would be helpful to have greater clarity on what the professional diligence requirements entail for online

platforms in practice. However, in view of the complexity and variety of online platforms and markets, further engagement will be required with a variety of stakeholders to identify the scope and content of further guidance in this area.

Protection from unfair trading

Currently, consumers have the right to bring direct civil claims against traders in the courts to recover damages when they have been the victim of a misleading action or an aggressive practice. Such rights are replicated in the DMCC Bill. However, as things stand, consumers who have suffered detriment as a result of a misleading omission, a breach of professional diligence, or a breach of one of the "blacklisted" offences, do not have any private rights of redress.

The government consulted on whether it should use the powers under the DMCC Bill to extend consumers' civil rights of redress. In its response, it stated that it will continue to consider the evidence for extending private rights to additional practices and it could, if necessary, use the delegated powers in the DMCC Bill to allow for the extension of private redress rights in the future.

Online interface orders

Existing powers under the Enterprise Act 2002 allow the CMA to apply to court for an online interface order (or, in urgent cases, an interim online interface order) as a matter of last resort where certain conditions are met. Such orders may direct a person to remove or modify content from an online interface, disable or restrict access to an online interface; display a warning to consumers; or delete a fully qualified domain name. The DMCC Bill restates a simplified and streamlined version of these powers.

The government consulted on whether to enable other consumer law enforcers to use online interface orders to force platforms to remove or amend content. In its response, it states that it intends to extend the power to make applications to the court for online interface and interim online interface orders to 'public designated enforcers' (as specified in the DMCC Bill).

What should retailers do to prepare?

The new proposals continue the shake-up of the UK's consumer protection regime in the DMCC Bill and clearly underlines the government's goals of ensuring that UK consumer law is fit for purpose and is effective in practice.

Businesses should look out for further guidance arising from the announcements in the government's response to the consultation, as well as the progress of the associated DMCC Bill through Parliament. It will be particularly interesting to see the further guidance on what reasonable and proportionate steps will be required in relation to fake reviews.

In the meantime, and given the new fining powers attributed to the CMA under the DMCC Bill, businesses would be wise to start reviewing their own selling practices now to determine whether any updates are required to their own consumers' online experiences, particularly those that directly or indirectly influence consumers' abilities to make informed decisions about transactions.

Product and marketing

Display of pricing information – upcoming changes

Impact M

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What's changing?

The cost-of-living crisis prompted the CMA to review unit pricing practices following concerns that grocers were profiteering at the expense of the consumers' purse. With shoppers changing habits and shopping around more because of cost-of-living pressures, unit pricing is a particularly useful tool.

The CMA's review set out to ensure retail competition is working effectively in order to keep price rises as low as possible and ensure consumers can shop around to compare prices easily and with confidence. In July 2023, the CMA published its **initial findings**, highlighting four main areas of concern:

- **Consistency** – different units of measurements are being used for similar products, making it difficult to make a comparison;
- **Transparency** – missing or incorrectly calculated unit pricing information;
- **Legibility** – unit pricing information can be difficult to read due to, for example, nearby labels obstructing its view; and
- **Promotions** – unit price information is not being included for products on promotion.

Following the CMA's initial review, the DBT launched its **'Smart Regulation'** consultation. The DBT reviewed the suitability of the outdated Price Marking Order 2004 (the PMO), which governs the rules for the display of pricing information in Great Britain and aims to make the display of pricing information on labels (both in-store and online) clear and unambiguous so that consumers can make easy comparisons between alike products. The PMO requires retailers to display the 'unit price' (i.e. price per weight or volume) of grocery products, as well as the 'selling price' (i.e. final price for a unit of a product). The DBT has acknowledged that certain provisions in the PMO are unclear, leading to inconsistent approaches taken by traders and anti-competitive outcomes. In its **consultation response** in January 2024, the DBT has confirmed that it will progress the following proposals of reform to the PMO:

- Mandating a consistent unit pricing method (i.e. all products to be displayed in a specified unit / measure);
- Improving legibility of pricing information (e.g. ensuring prominence of labels do not differ between, for example, prices for loyalty scheme members and non-members); and
- Clarifying the requirement to provide unit pricing for promoted products.

In the **CMA's update** in November 2023, it made announcements that it will be amongst other things, working with government on improving legislation on unit pricing and partnering with Trading Standards to assess the scale of the problem with inaccurate price displays.

In January 2024, the CMA provided a further update including **publishing its findings** from consumer research and unit pricing analysis. It found that awareness, understanding and use of unit pricing varied greatly amongst shoppers, but those that did use it found it a helpful tool to compare prices. The barriers to its use included being too discreet and easily overlooked by more prominent placement of information, especially that of nearby promotions, as well as different units of measurement across similar products.

It revealed that some shoppers relied on 'rules of thumb', such as bigger pack sizes are always better value and promoted products have the cheapest price per unit, but that these do not always hold true. The CMA's findings support its recommendations for improving legibility of pricing information in-store and online as well as the greater consistency in unit pricing information. The CMA has shared its findings with the DBT to inform the ongoing technical work they are doing to reform of the PMO. In the meantime, the CMA is encouraging retailers to do all they can to help shoppers make meaningful comparisons between products, irrespective of brand, size and promotion by improving consistency and comparability of the display of unit prices. It is calling on retailers to do more to raise awareness of the usefulness of unit pricing by, for example, disseminating the CMA's short **guide**.

The same month, the CMA launched a **review** of loyalty pricing by supermarkets. The review will focus on whether loyalty pricing:

- Is truly promotional or misleading shoppers;
- Disadvantages certain groups of shoppers; and/or
- Is affecting consumer behaviour and competition between supermarkets.

The CMA will provide a further update in spring 2024.

What should retailers do to prepare?

Supermarkets and other grocers should start preparing for these changes now, by reviewing their pricing practices and developing plans to comply with the new requirements. They should also engage with the CMA, as they actively monitor compliance and assess what practical challenges with the display of pricing information retailers face in the real-world.

Product and marketing

Intermediary and Platform Principles Pilot

Impact L

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What's changing?

In our previous Retail Risk Outlook 2023, we discussed the ASA announcement of its "Intermediary and Platform Principles (IPP) Pilot", which was launched in Spring 2022 (the Pilot). As part of the Pilot, the ASA joined forces with some of the largest companies in digital advertising, to help formalise and enhance transparency and accountability in digital ads, as well as to identify any gaps in the ASA's ability to secure compliance, and how this could be addressed by working with the Pilot participants (Google, TikTok, Amazon Ads, etc), and other online intermediary businesses.

The Pilot has now concluded, and the ASA has published its final summary report. As part of the Pilot, the ASA introduced six key principles (relating to programmatic advertisements), details of which can be found **here**. The Pilot findings made clear that the participants were able to implement the principles throughout the duration of the Pilot, and in doing so, they tangibly supported the ASA in both (a) raising awareness of the online advertising rules, and (b) in removing persistently non-complying online ads (where applicable).

As part of the report, the ASA proposes how the six principles could be complied with, and offers key suggestions of "good practice" for participating companies that includes:

- Ensuring that references to the CAP Code and related guidance, are included in company policies that relate to advertisements or during the advertising purchasing process. The reference should be prominent and include a hyperlink to relevant guidance where possible. Additionally, it was suggested that participants could go even further, and feature this in an advertiser's onboarding process i.e. the process of welcoming new businesses who wish to advertise on the platforms;
- Continuing to take reasonable and appropriate measures to make advertisers of age-restricted ads aware of the tools that can be used on the service, in order to ensure compliance with CAP's age-targeted restrictions;
- Ensuring that any steps the platform has taken to act independently and proactively to identify and take remedial action (at pre and post-publication stage), against ads that raise non-compliance issues detailed in any relevant notice from the CAP Compliance function, are recorded and submitted to the ASA; and
- Establishing an internal dedicated point of contact and/or method of communication, such that the ASA can easily notify a participating company of investigations and breach notices.

Whilst the suggestions were particularly aimed towards the participants as advertising platforms in the Pilot, there are key takeaways for retailers to ensure compliance with the wider CAP Code principles when placing advertisements, or when enlisting a third-party advertiser to place advertisements on their behalf.

What should retailers do to prepare?

There are currently no planned regulatory changes as a result of the Pilot. However, it has been made clear that retailers should ensure that their advertising policies (and any policies applying to third-party advertisers who place paid advertisements on their behalf), adequately highlight the requirement for compliance with the CAP Code Principles, and prominently signpost the CAP Code and relevant guidance via hyperlinks where appropriate.

Retailers should be looking to take a more proactive approach to compliant advertising, including:

- Ensuring that any non-compliant advertisements are taken down promptly / that they do not get published before they are signed-off as compliant;
- Keeping records of instances where non-compliant ads have been circulated, in the event that a breach notice is served by the ASA; and
- Appointing an individual or team within the business to act as a direct point of contact where a breach notice is issued, or if the ASA seeks information from the retailer regarding its compliance with the CAP Code – to ensure consistency, speed, and transparency.

It will come as no surprise that the ASA is intending to take a more active approach moving forwards, in scrutinising how advertisements are placed online. The ASA has made it clear that it will continue to work with the Pilot participants going forward, and this may extend to platforms being more proactive themselves, particularly in relation to removing non-compliant ads.

Product and marketing

New rules for subscription contracts

Impact M

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What's changing?

The DMCC Bill will introduce a new, more stringent set of rules for auto-renewing subscription contracts, so consumers don't find themselves trapped in subscriptions they either don't want, or don't realise they're still paying for.

The definition of subscription contracts is very broad and can capture any form of auto-renewing membership, whether monthly or annual. This would likely apply to retailers who offer repeat subscriptions of goods or "premium" memberships entitling customers to discounts and cheaper deliveries.

The proposed rules mean traders will have to:

- Provide consumers with key information about the subscription before they enter the contract, including how it will operate, how much it will cost after any free or discounted trial period, the frequency of payments and how to exit the contract;
- Send consumers reminder notices before renewal payments are due. These must specify when and how much they will be charged and how they can cancel before they're liable to pay. These need to be sent at six-month intervals and, for contracts with free or discounted trial periods, before a consumer's first full payment is due. An extra notice will also need to be sent in advance for renewals of 12+month contracts. Recent amendments to the Bill allow the Secretary of State to disapply these rules for certain types of traders / contracts;
- Introduce a 14-day cooling-off period following the expiry of a free or discounted trial period when the consumer starts paying the full price of the contract, and again on renewal of a 12 month+ subscription contract;
- Inform consumers of their 14-day cooling-off rights and how to exercise them by sending them a cooling-off notice when their free / discounted trial is about to expire or their 12 months+ contract is about to renew; and
- Make sure consumers can exit their subscription easily, in one single communication with no unnecessary steps, as well as sending them a cancellation notice to confirm this.

What should retailers do to prepare?

As compliance with these new rules will require changes to subscription terms and conditions, as well as front and back-end processes, retailers may want to consider getting the ball rolling with implementing these changes ahead of the commencement of the Bill, currently expected in Autumn 2024.

As the finer details of the rules are still being debated in Parliament, further guidance is expected when the Bill receives Royal Assent.

Property

Levelling-up and Regeneration Act 2023

Impact M

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What's changing?

The Levelling-up and Regeneration Act (LURA) received Royal Assent at the end of October 2023. LURA is extensive and covers a multitude of issues, but elements that will be of interest to retailers include the provisions around the letting by local authorities of vacant high street premises (Part 10), and information about interests and dealings with land (Part 11).

Where high street premises have remained vacant either for a continuous period of 12 months, or 366 days in a two year period, the local authority can serve notice on the landlord, which starts the process which could (if the premises are not let in accordance with the prescribed procedure) lead to a rental auction. The details will be set out in Regulations, but lease terms will be between one and five years and will be contracted out of the security of tenure provisions of the Landlord and Tenant Act 1954.

Part 11 essentially provides the Secretary of State with power to require the provision of information about interests and dealings in land to the Chief Land Registrar (or another government body) if that information is within one of the permitted purposes (beneficial ownership, contractual control, or national security).

The information can include 'transactional information', including details of the parties and those for whom they act, transaction terms, details of professional advisers, the source of funds, and copies of documents evidencing a transaction. It is possible that the provisions will have retrospective effect. Part 11 of LURA is in force, but secondary legislation is needed to set out the details on how the provisions will operate.

Large sections of LURA relate to planning reform. You can find a brief summary of key elements **here**.

What should retailers do to prepare?

Retailers should keep track of regulations issued under LURA.

The regulations in relation to Part 10 will provide information on how rental auctions will operate. The threat of a rental auction may lead landlords to seek to let vacant high street properties on more favourable terms than they may otherwise, in order to keep the letting within their control and avoid the local authority intervening. However, this remains to be seen.

The regulations in relation to Part 11 may prevent registration at the Land Registry if the information requirements have not been complied with. Non-compliance is also a criminal offence.

Property

Minimum Energy Efficiency Standards

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What's changing?

In 2021, the government released a consultation on raising Minimum Energy Efficiency Standards (MEES) in tenanted non-domestic properties from the current minimum standard of EPC rating E. The intention is that the minimum standard will be raised to C in 2027, followed by B in 2030.

The consultation acknowledged the difficulties that the current system poses where a tenant is going to be fitting premises out after the lease has been granted. Currently, a landlord has to get the property up to the required standard (at least E) before it can be let. However, the tenant may immediately remove the measures installed by the landlord so that it can fit the premises out as it requires. Not only is this a waste of time, money (which will be passed on by way of increased rent) and resources (adding to the carbon footprint of the premises), but the tenant may reduce the EPC rating of the premises as a result of its fit out.

The consultation suggested that shell and core let properties should benefit from a grace period of six months to enable the parties to get them to the required standard.

The consultation also proposed that landlords should have a valid EPC at all times, removing the current position where properties with an EPC which is no longer valid (because it is more than ten years' old) are not within the scope of the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (commonly known as the MEES Regulations).

What should retailers do to prepare?

Retailers should keep abreast of developments, particularly the government response to the consultation and any resultant legislation. Even where retailers occupy premises as tenants, the MEES Regulations are relevant where they want to sub-let premises. In such circumstances, they need to ensure that the premises are either at the minimum EPC level, or that an exemption applies and has been validly registered.

Property

Review of the Landlord and Tenant Act 1954

Impact M

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What's changing?

In March 2023, it was announced that there will be a review of the Landlord and Tenant Act 1954, which will be of great interest to retailers, as they will occupy their premises under the Act. The consultation paper was due to be published in December 2023, but the Law Commission has revised that timetable, stating that it 'aims to publish a consultation paper as soon as possible in 2024.'

What should retailers do to prepare?

Retailers should keep abreast of developments and consider responding to the Law Commission's consultation. The aim is to modernise commercial leasehold legislation, and will focus on:

- *creating a legal framework that is widely used rather than opted out of, without limiting the rights of parties to reach their own agreements, by making sure legislation is clear, easy to use, and beneficial to landlords and tenants;*
- *supporting the efficient use of space in high streets and town centres, now and in future, by making sure current legislation is fit for today's commercial market, taking into account other legislative frameworks and wider government priorities, such as the "net zero" and "levelling up" agendas; and*
- *fostering a productive and beneficial commercial leasing relationship between landlords and tenants.'*

(Law Commission review on Business Tenancies: the right to renew)

Property

Building Safety Act

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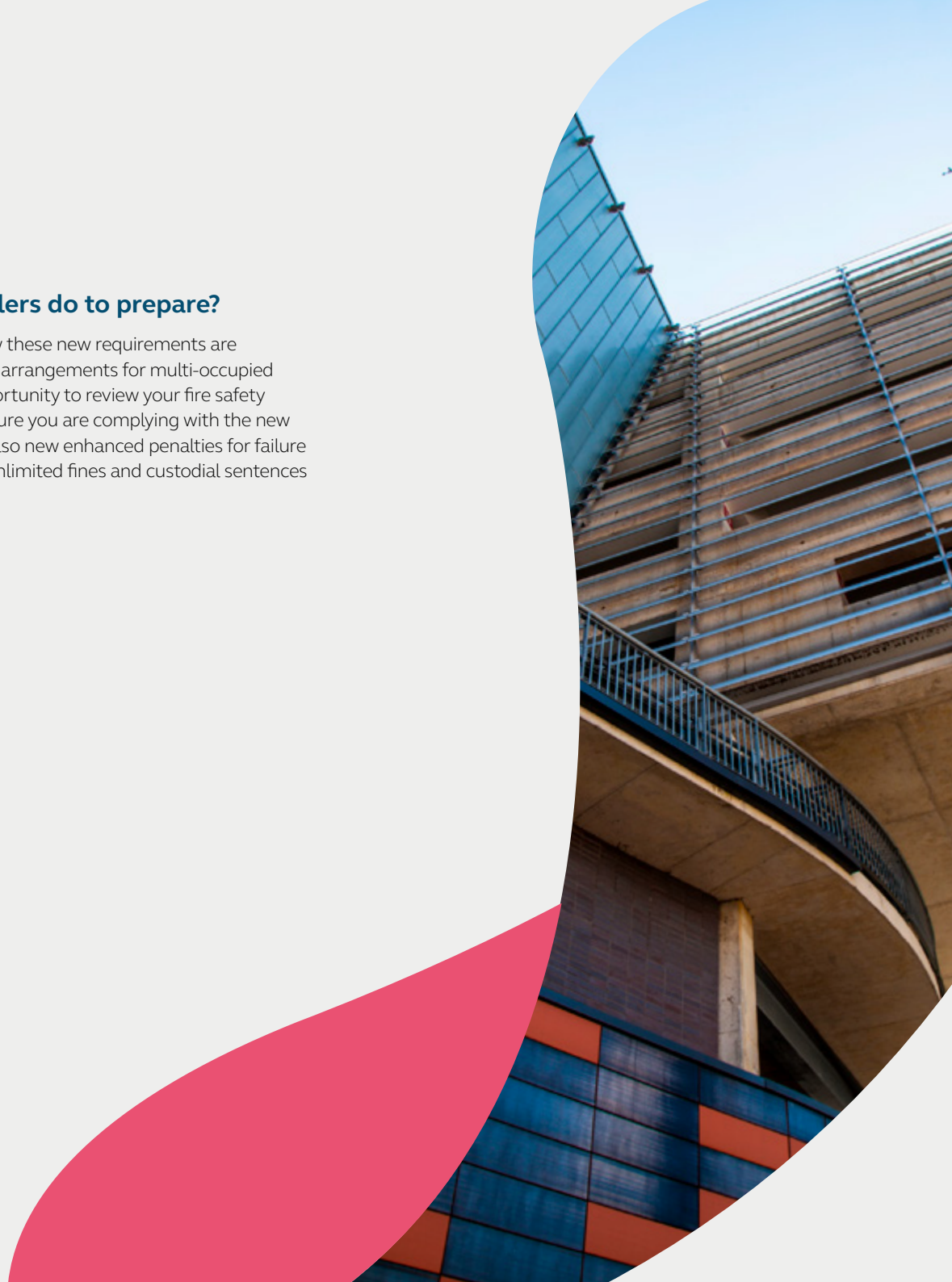
The Building Safety Act is a significant piece of legislation which has bolstered the fire safety regime and whilst there has been a focus on the changes impacting residential buildings and high risk buildings, there have also been some changes which retailers should be aware of. The main changes build upon existing responsibilities under the Fire Safety Order which will apply to any organisation which has control over a commercial building (so will impact upon most retailers). The changes came into force on 1 October 2023 and can be summarised as follows:

- Fire Safety Risk Assessments and Fire Safety arrangements must now be recorded in full in writing;
- There is an enhanced requirement for co-operation and co-ordination between Responsible Persons which includes identifying and sharing information; and
- There is also a requirement for an out-going Responsible Person to share all relevant information with a new Responsible Person.

The Home Office has produced a useful guidance **note** giving some further detail on the changes.

What should retailers do to prepare?

We are starting to see how these new requirements are impacting upon fire safety arrangements for multi-occupied buildings. It is a good opportunity to review your fire safety arrangements and make sure you are complying with the new requirements. There are also new enhanced penalties for failure to comply which include unlimited fines and custodial sentences for serious breaches.



Contents

Employment

Artificial Intelligence and employment law

Impact H

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What's changing?

Whilst 'conventional' AI is nothing new (such as automated recruitment screening and 'chat bots'), generative AI marks a step-change in the development of AI technologies, and its growth is set to continue at an exponential rate. Its impact on the labour market is impossible to accurately predict, but most commentators agree that it is likely to be a disruptive force across most sectors.

Nevertheless, regulation of this rapidly evolving technology will be "light touch", taking the form of guidance rather than legislation (see article: AI regulation). The government has confirmed its plans to introduce a voluntary regime for AI and tasked various existing regulatory bodies (such as the Information Commissioner's Office, the Financial Conduct Authority and Ofcom) with publishing an outline approach to AI regulation by 30 April 2024.

What should retailers do to prepare?

As the use of AI technology grows, retailers will need to keep careful tabs on how the use of this technology, by an employer, might impact data security, rights around algorithmic decision making, equalities, efficiencies, and possible job displacement/workforce redesign.

If a decision is made to utilise AI, its application should be carefully scoped, risk assessed, and governed by a written policy. Training will need to be rolled out on the use of any AI technology and relevant policies, including overlap with any existing policies, such as Bring Your Own Device and Data Protection policies. Workforce communications will also need to address employees' concerns about the role of AI, focussing on its job augmentation capabilities, rather than job replacement. Another key focus will be equalities and fairness: while machine-driven decision-making may, on the face of it, appear to be entirely objective, bias can be baked into the systems themselves – this will need to be audited and assessed. Dismissal and disciplinary procedures which incorporate AI may also need to be adjusted to account for transparency and fairness.

Retailers with operations in the European Union will also need to prepare for the new EU AI Act (the text of which is anticipated to be approved by the European Parliament in April 2024) and ensure compliance if utilising AI systems within the EU.

Please see our Insight, '**Harnessing Technology**' for tips on how to prepare before drafting an AI policy, and listen to our AI podcast for further insights on employment law and data protection **risks around AI at work and how to deal with them**.

> "As the use of AI grows, retailers will need to keep careful tabs on how they use this technology"

Employment contracts and pay

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What's changing?

We highlighted in our last Retail Risk Outlook that the government had announced its intention to introduce a new statutory Code of Practice on dismissal and re-engagement procedures. This was in response to widespread press and public criticism of 'fire and re-hire' practices in the wake of mass P&O redundancies. Since then, the government has published a draft statutory Code of Practice on dismissal and re-engagement processes (or, 'fire and re-hire'). There is no specific timescale for its introduction, but the consultation closed on 18 April 2023, meaning the Code may be introduced imminently.

A three-month cap on post-termination non-compete clauses has been proposed, although this reform will require new primary legislation and it is not likely that the government will be able to push this through before the forthcoming general election.

The government has indicated that the categories of 'worker', 'self-employed contractor' and 'employee' require reform but has not committed to any concrete proposals and has not suggested any change in the foreseeable future.

However, the Labour Party has pledged to introduce a single status of 'worker' which will apply to all but the genuinely self-employed. Additionally, a new EU Directive has been proposed by the European Commission (expected to be adopted in April 2024), which would require online platform companies, such as Uber and Deliveroo, to reclassify workers as employees. Retailers with operations within the EU would have to comply with this Directive.

The Employment (Allocation of Tips) Act 2022-23 will introduce a duty for employers to ensure that all qualifying tips, gratuities, and service charges are allocated fairly to workers (including eligible agency workers), and to make payment in full no later than the end of the month following the month in which the customer paid the tip. Employers must have a written policy on how tips are dealt with and deductions for processing tip allocations will no longer be permitted from May 2024. A statutory Code of Practice on the fair allocation of tips will be introduced - a draft for consultation was published on 15 December 2023 and the final version is expected to be published in spring 2024. Please **click here** to read our Briefing on the draft Code of Practice.

In January 2024, new legislation came into force which aims to simplify several aspects of holiday pay. The new rules on holiday pay will apply to pay periods starting from 1 April 2024. They will simplify the calculation of holiday pay for part-year and irregular hours workers (with 'rolled-up' holiday pay becoming a lawful practice for these workers) and will codify the notion that holiday pay should be based on normal pay. Please **click here** for our Briefing covering these reforms. The government's guidance on holiday pay entitlement and pay reforms from 1 January 2024 is **here**.

A right to request a 'more predictable' contract of employment will be introduced for agency workers and workers engaged on casual/irregular hours/annualised hours contracts under the Workers (Predictable Terms and Conditions) Act 2023. This is expected to come into force in Autumn 2024. Acas' consultation on a new statutory **Code** of Practice on handling requests for a predictable working pattern closed on 26 January 2024.

What should retailers do to prepare?

Retailers should be aware that dismissal and re-engagement procedures will soon be subject to a statutory Code, but a new Labour government would seek to ban these procedures entirely if they are being used to impose less favourable terms. When the new statutory Code of Practice is published, it will need to be carefully reviewed and reflected in internal dismissal and re-engagement procedures.

Retailers should also bear in mind that post-termination non-competition clauses may be subject to a three-month cap in the future. If retailers rely on such clauses to protect their business, they may wish to consider whether other contractual clauses can be used instead of non-compete clauses, such as 'garden leave' clauses, confidentiality and intellectual property clauses, or non-solicitation clauses. It should be noted that no information has been provided on whether existing non-competition clauses in excess of three months will fall away in their entirety if this legislation is brought into force, or if longer non-competition clauses would remain enforceable but only for three months.

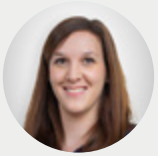
Retailers should also keep developments on employment status under review. The pace of change is likely to depend on the outcome of the general election, with change taking place sooner if we have a change of government. Significant workforce redesign may be required in response to any reform of existing structures. That said, any such change would require primary legislation which would involve consultation and a full parliamentary process. Therefore, retailers will have plenty of time to respond to proposals and prepare for any change.

The hospitality sector will need to prepare for the new obligation to ensure that workers receive tips, gratuities, and service charges in full, and that those payments are allocated in a fair and transparent manner. Please **click here** for our guidance on preparing for this new legislation.

Employment

EDI and ESG workforce issues

Impact M



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What's changing?

Governance obligations on employers will be expanded with the introduction of a new criminal offence if an employer fails to prevent fraud carried out by its employees. Additionally, following on from a re-examination of sexual harassment legislation sparked by the #MeToo campaign, a new positive duty to take reasonable steps to prevent sexual harassment at work will be introduced in October 2024, with the **Worker Protection (Amendment of Equality Act 2010) Act 2023** coming into force. Please **click here** for our Briefing on these developments.

Whilst the government has rowed back from legislating to expand menopause protections, there are several menopause support initiatives in the pipeline, and it seems this topic will remain in the spotlight for the foreseeable future. An All Party Parliamentary Group has published a 'Manifesto for Menopause' – employment aspects of which include calls for:

- legislation requiring large employers to introduce menopause action plans;
- specific guidance for SMEs on supporting employees experiencing the menopause; and
- tax incentives for employers integrating menopause into occupational health.

The Labour Party has committed to the first two reforms, should it win the next General Election. The current government has published its plans to improve menopause support, via a policy paper, **No Time to Step Back: the government's Menopause Employment Champion**. This initially focuses on five sectors, one of which is retail. Sector based workshops will be rolled out in the early part of 2024, and a four-point plan will be implemented, including an online repository for employers to share best practice. For more information, please see our **November 2023 article in People Management magazine**.

After defeating litigation which claimed that it was unlawful, the government's **National Disability Strategy** has survived and outlines support and plans for reform. Alongside this, the government has launched its new **Disability Action Plan** which sets out 32 practical actions to transform the everyday lives of disabled people. Whilst the government has indicated that it does not intend to introduce mandatory disability pay gap reporting, the Labour Party has announced that it would introduce this for larger employers.

> "Government initiatives signal a new era of workplace accountability, with expanded governance obligations and proactive measures to address issues like sexual harassment and menopause support."

Family friendly legislation is expected to change as follows.

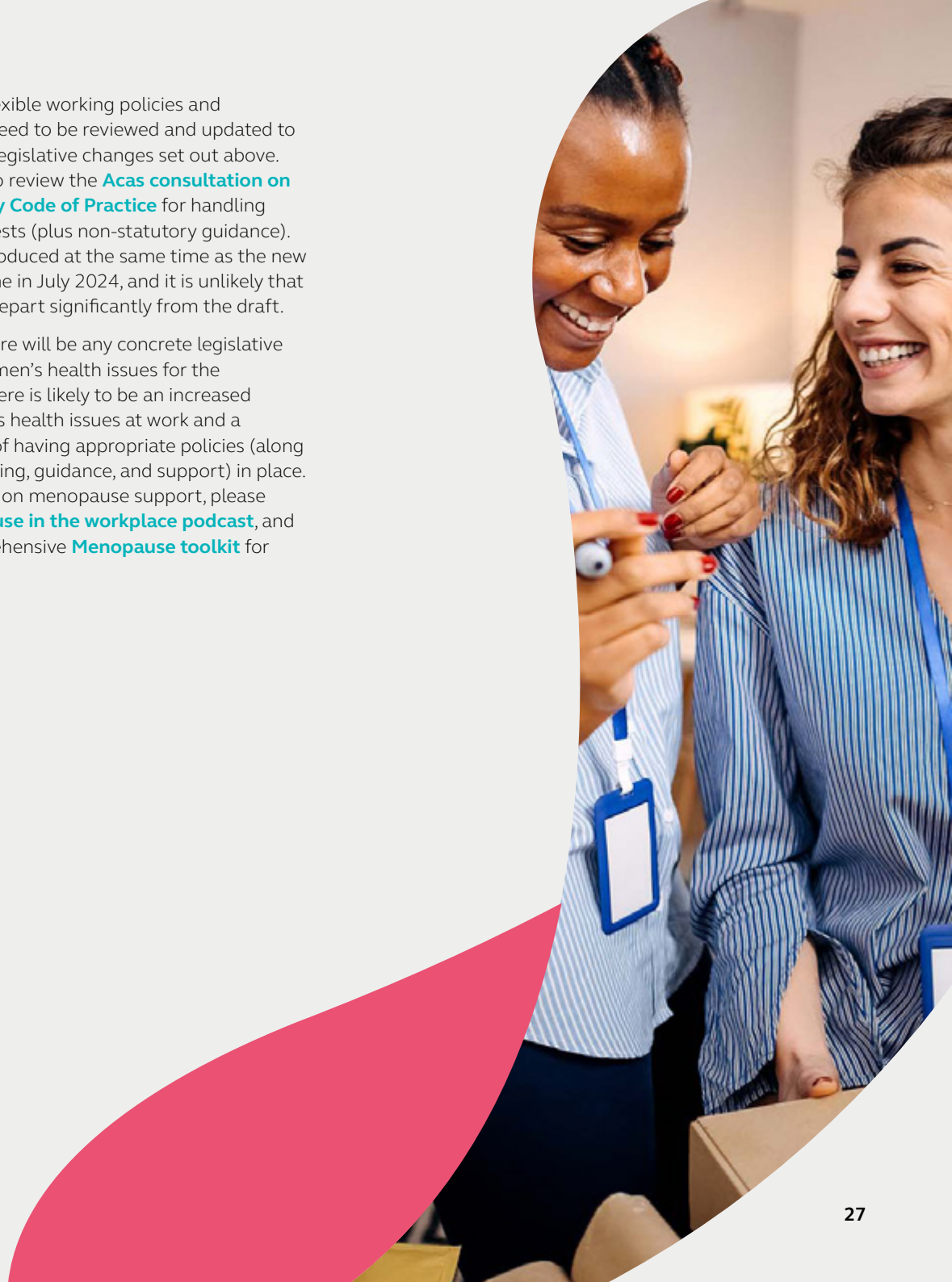
- The right to request flexible working is set to become a 'day one' right from April 2024, with the flexible working request procedure also being bolstered in April 2024.
- The existing requirement to offer suitable alternative employment to employees at risk of redundancy during maternity, adoption, or shared parental leave is also likely to be extended. Draft regulations expected to come into force in April 2024 provide that (very broadly) this special redundancy protection will apply from the start of a pregnancy and for eighteen months from the birth/adoption of the child.
- Changes to paternity leave are expected, with draft **regulations** proposed to come into force in March 2024, changing the way in which the statutory entitlement to paternity leave is exercised.
- A right to one week's unpaid leave for carers is likely to be brought in from 6 April 2024.
- The Neonatal Care (Leave and Pay) Act is expected to come into force in April 2025 and will introduce statutory neonatal leave and pay for up to 12 weeks for parents of babies requiring neonatal care, which must be taken within 68 weeks of birth.

For more information see our Briefings on **New employment legislation: strikes, flexible working, redundancy protections and carer's leave** and **Horizon scanning**.

What should retailers do to prepare?

There is a long 'to do' list for anyone tasked with keeping pace with the ED&I/ESG agenda in 2024 and beyond. ED&I/ESG strategies will need to be reviewed and refreshed to keep pace with the ever-changing societal and legal landscape. Specific key action points are as follows.

- Retailers who are 'large' employers (i.e. employers which meet at least two of three following criteria: (i) more than 250 employees; (ii) turnover of more than £36million; (iii) assets of more than £18million) will need to prepare a new anti-fraud strategy, to ensure that they have a defence to the new corporate crime of 'failing to prevent fraud'. For more information and guidance see our In Focus page on **Navigating the Economic Crime and Corporate Transparency Act 2023** and please **click here** for our Q&A for employers.
- All retailers will need to prepare for the introduction of the new positive duty to prevent sexual harassment, and the likely increased volume of requests for flexible working from April 2024 onwards. In doing so, they should take account of **The Equality & Human Rights Commission technical guidance on sexual harassment and harassment at work** because this is likely to be updated in light of the new duty. It will also form the basis of a statutory Code of Practice in due course, meaning that compliance will be mandatory. We will be putting out a podcast on how to prepare for the forthcoming duty to be released at the end of February/early March, so **watch this space** for more information or follow Employment Law Focus online.
- Family friendly and flexible working policies and procedures will also need to be reviewed and updated to reflect the proposed legislative changes set out above. It would be prudent to review the **Acas consultation on its updated Statutory Code of Practice** for handling flexible working requests (plus non-statutory guidance). This is likely to be introduced at the same time as the new flexible working regime in July 2024, and it is unlikely that the final version will depart significantly from the draft.
- Whilst it's unlikely there will be any concrete legislative developments on women's health issues for the foreseeable future, there is likely to be an increased awareness of women's health issues at work and a growing importance of having appropriate policies (along with appropriate training, guidance, and support) in place. For more information on menopause support, please listen to our **Menopause in the workplace podcast**, and download our comprehensive **Menopause toolkit** for employers



Employment

Competition risks for employers

Impact M

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What's changing?

Regulators across the globe are cracking down on wage fixing and other competition issues in labour markets. In the retail industry, the CMA is investigating anti-competitive conduct in relation to the supply of fragrances and fragrance ingredients for use in various commodities, including household and personal care products. This follows the CMA's first two investigations into the labour market, which opened in 2022, and 2023, with a focus on the treatment of freelancers and employees by broadcasters.

The types of anti-competitive behaviour that employers should avoid are included in the CMA's 2023 **guidance** and include:

- **No-poach agreements:** Agreements between two or more businesses not to approach or hire each other's employees (or not to do so without the other employer's consent). No-poaching agreements reduce competition and mobility in the labour market, which can lead to lower pay and poorer working conditions. The investigation into the supply of fragrances and fragrance ingredients, mentioned above, has recently been expanded to include concerns about the hiring or recruitment of certain staff.
- **Wage fixing:** Agreements between two or more businesses to fix employees' pay or other benefits. They include agreeing the same wage rates or setting maximum caps on pay. In the broadcasting context, the CMA alleges that several companies collectively agreed to pay a fixed amount to freelance cameramen, which supposedly restricted the ability of those freelance workers to compete for higher pay.
- **Information sharing:** The sharing of commercially sensitive information between actual or potential competitors. HR professionals should be aware of these risks if contemplating discussing salaries or other commercially sensitive employment terms with other businesses. Problematic information sharing may also take the form of staff moving between rival companies, which has the potential to serve as a conduit for businesses to exchange commercially sensitive information. The interplay between this type of information sharing and no-poach agreements is a complicated area and will need to be kept under careful review

Notably, the CMA's interpretation of anti-competitive practices is wide. Whilst the CMA guidance refers to all of the above headings as 'business cartels', the categories are non-exhaustive and a practice may be anti-competitive even if it does not fall neatly into a single category. Additionally, the concept of an 'agreement' captures informal agreements such as oral discussions or a gentleman's agreement, as well as legally binding contracts, and the principles are not limited to direct employees and permanent salaried staff; they also apply to collusion between (potentially) competing employers in the gig economy that affects casual workers and contractors.

What are the consequences of breaching competition law?

Aside from the trauma of a lengthy competition investigation, the CMA has the power to fine businesses up to 10% of their annual worldwide turnover. Individuals can face personal fines, director disqualification orders of up to fifteen years and, potentially, criminal liability. It is also important to note that the financial penalties that the CMA can impose will often pale in comparison to the potential for a class action claim that can be brought (whether on a standalone or a follow-on basis) after the CMA has established anti-competitive behaviour through an infringement decision.

What should retailers do to prepare?

As a starting point, the CMA has advised that employers:

- Understand how competition law applies to no-poaching and wage-fixing agreements;
- Don't agree with a competitor to fix wages;
- Don't agree with a competitor not to approach or hire each other's employees;
- Don't share sensitive information about your business or employees with a competitor;
- Provide recruitment staff with training on competition law and how it applies in the recruitment context; and
- Ensure solid internal reporting processes are in place, and that staff are aware of these and how they can use them.

AI regulation

Impact M

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What's changing?

In December 2023, the EU agreed an "AI Act", the world's first comprehensive law on AI, which imposes new obligations, including substantial new transparency requirements, on AI companies that are making "high-risk" technologies.

By contrast, the UK government released its **AI white paper** for consultation on 29 March 2023 which outlined a principles-based approach to put the UK at the forefront of the AI race. Emphasising business accountability while encouraging innovation and a measure of calculated risk, the paper details five fundamental principles:

- Safety, security and robustness;
- Appropriate transparency and explainability;
- Fairness;
- Accountability and governance;
- Contestability and redress.

The government published its **response** to the consultation on 6th February 2024 which confirms its intention to stick to this agile approach in order to support innovation and be ready to adapt to new risks. The response also outlines the government's initial thinking on potential new responsibilities on developers of 'highly capable general-purpose AI systems' in addition to voluntary commitments. While the overall approach is described as being right for today, the government acknowledges that the challenges posed by AI will ultimately require legislative action in every country once understanding of risk has matured.

Several regulators have already started to take action in line with the non-statutory framework. For example, the CMA has published a review of foundation models to understand the opportunities and risks for competition and consumer protection (see next article: AI – what are the consumer law risks?) .

In January, the ICO launched a consultation series on how aspects of data protection law should apply to the development and use of generative AI models. It states that it is moving fast to address any risks and enable organisations and the public to reap the benefits of generative AI. A series of chapters will be published over the coming months to outline the ICO's emerging thinking on how it interprets specific requirements of UK GDPR and Part 2 of the DPA 2018 in relation to the new questions posed by generative AI.

So far, leading AI companies like Google, Microsoft, and OpenAI, are aligned with the goodwill over regulation approach taken by the government, and recently signed a series of voluntary safety commitments on their products at the inaugural global AI Safety Summit hosted by the UK government.

The Summit also resulted in the Bletchley Declaration being adopted by countries including the UK, the USA, and China; the key theme is the need to legislate on a global basis to address the safety concerns and fears that have been expressed to date.

What should retailers do to prepare?

The government has written to a number of regulators impacted by AI to ask them to publish an update outlining their strategic approach to AI by 30 April 2024. Retailers should continue to monitor developments and ensure they understand how regulators will practically implement the principles set out in the white paper.

AI – what are the consumer law risks?

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What's changing?

AI offers huge potential to optimise experiences and drive efficiencies for consumers. While the CMA recognises these benefits, it's also alert to AI's potential to cause economic harm to consumers.

This is reflected in the 'fair dealing' and 'transparency' principles in the CMA's seven guiding principles of **AI Foundation Models**.

The CMA has highlighted the following risks:

- **Chatbot errors:** Foundation models can get things wrong, and developers have not been able to reduce the chatbot error rate to zero. This issue is potentially exacerbated by the fact chatbots can sound very convincing and consumers may, therefore, be more inclined to trust the responses they receive. This could present a problem if a chatbot provides a consumer with false or misleading information about products or their consumer rights.
- **Harmful search algorithms:** Search algorithms can help direct consumers to the products and services they need. But there's a risk they could be distorted by factors that harm their economic interests. For example, by diverting consumers away from the products they need and towards the products which provide the highest profit margins. The CMA already focuses on online architecture because of this theory of harm. But it's concerned that more sophisticated AI tools could exacerbate the problem.
- **Targeting vulnerable consumers:** Using ad tech to target ads more effectively brings consumer benefits. But the CMA is concerned that AI could also be used to exploit consumers when they are vulnerable, for example at times when their judgement is impaired, and they may make impulsive buying decisions. The DMCC Bill proposes extending the definition of "vulnerable" consumers to cover a wider range of personal circumstances. The explanatory notes to the Bill clarifies this may include consumers who have recently lost their job or who have suffered a bereavement.
- **Fake product reviews:** The DMCC Bill sets out new rules to combat fake product reviews (see earlier article: Improving price transparency and product information for consumers). While the CMA has been using AI to help identify fake reviews, it's also concerned that AI could create sophisticated fake reviews that are much harder to detect.

What should retailers do to prepare?

The Consumer Protection from Unfair Trading Regulations 2008 (CPRs), which will be largely recast in Part 4 of the DMCC Bill, already provide the CMA with significant powers to take enforcement action in relation to unfair commercial practices and it is anticipated that these will be sufficient to deal with the kind of harm highlighted above.

We advise that retailers who are considering integrating AI into B2C products carefully consider the consumer law risks before doing so.

DPDI Bill

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What's changing?

The first version of the Data Protection and Digital Information Bill was introduced in 2022, and its second appearance, the Data Protection and Digital Information (No.2) Bill (DPDI Bill), also proposes amendments to the existing UK GDPR and Data Protection Act 2018. The second version of the DPDI Bill was introduced in March 2023, and it received its second reading in the House of Lords in December 2023.

Many of the proposed changes in the second DPDI Bill are the same as its first iteration. Some of these key changes include:

- **Legitimate interests:** the DPDI Bill introduces a list of "recognised legitimate interests" as a basis for processing data which will not require a balancing test against the rights and freedoms of data subjects where those legitimate interests are "recognised". For example, processing for the purpose of public security or preventing crime. These "recognised legitimate interests" have been criticised in both versions of the DPDI Bill as being of little use to commercial entities.
- **Senior Responsible Individual:** the second DPDI Bill includes the same role change from the Data Protection Officer to a Senior Responsible Individual (SRI). An organisation will only need to appoint an SRI if it is engaged in high-risk processing or is a public authority. The DPDI Bill also expressly states that the SRI can have another role within the organisation, unlike the independent role currently required by the UK GDPR.
- **Cookies:** the DPDI Bill continues to update the Privacy and Electronic Communications Regulations 2003 to cut down 'user consent' pop-ups and banners.
- **Automated decision making and AI:** the DPDI Bill aims to clarify the rules around automated decision-making and profiling to make it easier for organisations to rely on AI technologies.
- **Data Subject Access Requests (DSARs):** the second DPDI Bill's explanatory notes clarify that a DSAR can be refused if the request is either "vexatious or excessive", replacing the UK GDPR's current "manifestly unfounded" refusal right.
- **Reducing paperwork:** only organisations whose processing activities are likely to pose high risks to individuals' rights and freedoms will need to keep processing records. Organisations will still need to comply with other UK GDPR requirements such as transparency, accountability, and responding to DSARs, so awareness of processing activities will still be required.

What should retailers do to prepare?

In practice, retailers will be able to continue with their current level of compliance without making any significant changes as a result of the DPDI Bill. The DPDI Bill does not propose any significant changes to international transfer requirements and in fact, the DPDI Bill makes it clear that lawful transfer mechanisms entered before it comes into force will continue to be valid.

It was originally anticipated that the DPDI Bill would become law by mid-2024, however, a date has not yet been set for the Committee stage in the House of Lords, following a carry-over motion to avoid the Bill lapsing in March. TLT will continue to keep an eye on the DPDI Bill's progress and provide regular commentary on its development.

International Data Transfers

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What's changing?

In July 2023, the EU announced its adequacy decision for the 'EU – US Data Privacy Framework' (the Framework) which states that certain US companies can participate in the Framework to ensure an adequate level of protection for personal data that is subject to the EU GDPR. In practice, this means that personal data can once again flow freely from the EU to US entities (public or private) that have signed up to the Framework, without additional measures needing to be put in place. Quickly following suit, the UK government has enacted legislation to extend the Framework's adequacy status for US data recipients to UK transfers (the UK Extension).

It is currently unclear how the Framework's adequacy status will fare if it is challenged, with, among others, Max Schrems already threatening to challenge it. Given that the UK Extension is reliant on the Framework's validity, it is likely that any successful challenge could also invalidate the UK Extension too.

The EU's standard contractual clauses for overseas data transfers (SCCs) with the UK's addendum to the EU's SCCs, and the UK's own version of the SCCs in the form of an international data transfer agreement (IDTA), continue to be the preferred methods used for international data transfers subject to the EU GDPR and UK GDPR.

What should retailers do to prepare?

Retailers have until 21 March 2024 to incorporate the IDTA or the UK addendum to the EU SCCs into their agreements containing international data transfers.

If a retailer is considering relying on the UK Extension, it should first check whether the US organisation is fully certified under the Framework and that it has signed up to the UK Extension on the **dataprivacyframework.gov** website. If the transfer will involve HR data, a check of this website should also confirm that the US organisation can receive HR data. If other transfer mechanisms (such as SCCs) are already in place, these could continue to be used either with the Framework featuring in the corresponding transfer risk assessment, or as a fall-back option in light of the uncertainty of the Frameworks' long-term validity.

Payment methods

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What's changing?

As technology develops, consumers are becoming increasingly accustomed to a wide-ranging choice in terms of payment method, and a detachment from the payments process. Two payments methods which continue to increase in popularity are:

Buy-Now-Pay-Later (BNPL)

The emergence of BNPL, and other point of sale financing, has led to a decline in other payment methods, for example, credit card use. Upcoming regulation of BNPL is set to fortify this growth.

The government's release of the consultation on draft BNPL legislation in 2023 indicates that any third-party lender offering BNPL (based on repayments being made in 12 instalments or less, within 12 months or less) will need to be authorised and regulated by the FCA. Regulation by the FCA exposes third -party lenders to provisions under the Consumer Credit Act 1974 (CCA) they were not previously subject to. For example, any purchase of a single item within the threshold of £100-£30,000 made under a BNPL arrangement will come with a consumer right to bring a claim against the lender, as a consumer would be able to for a purchase made using a credit card.

This added protection is likely to bolster confidence in this kind of interest free loan and the use of BNPL is set to continue to grow sustainably.

Digital wallets

Digital wallets are one of the most popular payment methods used globally and their popularity is set to increase, largely because of their convenience. A consumer can now store the details of multiple payment cards on a single device, offering consumers the ability to pay with one tap, from virtually anywhere. To function, digital wallets require a digital wallet operator; this presents an added risk to the consumer by adding a third party to the payment process. Despite this, digital wallets are renowned as a secure payment method, largely because card networks have imposed scheme rules specific to digital wallets to account for this additional player in the payment process. Consequently, it is important that digital wallet operators comply with the rules, and that retailers are aware of the funding options available and the consumer consents that must be obtained when offering payments via a digital wallet.

What should retailers do to prepare?

Cash is still a key player in the payments sector globally; however its use has declined, falling heavily throughout the Covid-19 pandemic. Considering current trends, rapidly developing technology suggests central bank digital currencies may one day take over from physical cash; nonetheless, this shift will require careful planning to minimise the possibility of digital exclusion, and if not carefully managed, could have severe economic consequences.

Retailers offering BNPL via third-party lenders will need to ensure compliance with developing legislation and manage the shift to regulation carefully if they are to continue to reap the benefits of this popular payment method.

The variety of payment methods available to consumers is expanding exponentially, opening opportunities for retailers to expand their services and broaden their customer reach. As the payments sector harnesses the benefits of AI technology, we are seeing increasing use of payment authorisation via facial recognition, voice shopping, and actionable audio adverts. For more information about the key benefits and risks of AI for the payments sector, please see our insight on **AI in payments**.

Economic Crime and Corporate Transparency Act

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Economic crime reforms and new failure to prevent fraud

The Economic Crime and Corporate Transparency Act (ECCT Act) received Royal Assent on 26 October 2023. The ECCT Act is incredibly wide-ranging, from the reforms to Companies House (described below) through to new provisions to encourage businesses to share information to tackle economic crime, and greater powers to the National Crime Agency to compel businesses to hand over information in relation to money laundering and terrorist financing.

However, it is the introduction of the failure to prevent fraud offence, and the extension of corporate liability for all economic crimes committed by an organisation's senior manager, that means the ECCT Act represents the biggest legislative shake up in economic crime the UK has seen since the Proceeds of Crime Act in 2002.

Failure to prevent fraud: What's changing?

Under the new offence of failure to prevent fraud, large organisations will be criminally liable if an employee or third party acting on its behalf commits external fraud (not fraud against the business itself).

Large organisations are companies and partnerships that meet two of the following three criteria:

- Turnover – more than £36m
- Balance sheet total – more than £18m
- Employees – more than 250

The types of fraud covered by this offence are very broad, so businesses could be automatically liable for greenwashing offences and false statements in marketing materials. However, it will be a complete defence for the business to show it had reasonable preventative procedures, or that it was reasonable not to have them, in place at the time of the offence.

What can retailers do to prepare?

The government will issue guidance on what constitutes reasonable procedures before this offence comes into force. Nevertheless, the guidance is likely to closely follow the guidance for the similar bribery and tax failure to prevent offences. As a result, retailers can get ahead now by:

- Assessing the risk of outward fraud;
- Mapping out existing fraud controls and completing a gap analysis against the level of reasonable preventative procedures;
- Drafting or updating policies and procedures;
- Undertaking third party reviews;
- Implementing the new or revised policies and procedures and delivering training; and
- Providing sessions with senior management to discuss expectations within the business.

Extension of corporate liability: What's changing?

The extension of corporate liability will make it easier for law enforcement to prosecute organisations for economic crimes committed by senior managers. Economic crime in this instance is very broad and includes money laundering, sanctions, bribery, tax evasion, sanctions violations, and terrorist financing offences committed by senior managers.

Unlike the failure to prevent fraud offence, this applies to all commercial organisations, irrespective of size, and there is no statutory defence to rely on. Organisations will have to rely on their compliance programmes to prevent such incidents from occurring or using them to mitigate penalties.

'Senior manager' is not just a statutory director but is also defined as a person playing a significant role in decision making or management of the organisation, allowing prosecutors to assess what the employee was doing in practice and whether this can be attributed to the organisation, rather than their job title. In addition, as this is the criminal law, it will be difficult to run so-called "corporate veil" arguments to distinguish an individual's conduct with that of the company, or to provide a complete defence for the company.

What can retailers do to prepare?

This offence came into force on 26 December 2023 and now is the time for retailers to review and refresh their economic crime compliance programmes to ensure they are fit for purpose to seek to prevent their senior managers from committing economic crime.

Companies House reforms: What's changing?

In its New Year blog, **Companies House** describes 2023 as a turning point in its history with the introduction of the ECCT Act. Not only will the new legislation strengthen the powers of the company registrars, it will also contribute to a fairer and more transparent business environment. Some changes will be introduced as early as March 2024, with additional changes at a later date.

The following are some of the proposals that are most relevant to retailers' day-to-day operations:

Directors

- All new and existing directors will have to verify their identity (with photo ID) with Companies House.
- An individual who isn't appropriately verified or notified to Companies House must not act as a director of a company and it will be a criminal offence to do so.
- Corporate directors (being a corporate entity registered as a director of a UK company) will no longer be allowed unless:
  - (a) the corporate director is incorporated in the UK and has only natural persons (whose identities have been separately verified) on its own board; and
  - (b) there is at least one natural director sitting alongside the corporate director (which mirrors existing law). Existing companies with corporate directors will have 12 months to comply.
- Only one "layer" of corporate directors will be allowed. Multiple corporate directors running up and down groups of companies will not be permitted.

Beneficial owners and shareholders

- Every existing and new "person with significant control" (PSC) will have to verify their identity with Companies House.
- Companies House will collect and display more information from companies claiming an exemption from the requirement to provide details of their PSCs.
- Shareholders will not need to verify their identity. However, private companies (and certain traded companies) will need to provide a one-off shareholders list, which must be annually updated through their confirmation statements.

Company secretaries and other presenters

- Anyone making filings on behalf of a UK entity must first be verified or authorised by Companies House. This includes company secretaries, formation agents and other third-party suppliers e.g. law and accounting firms.

Company records

- Full names (not abbreviations) of shareholders, subscribers, and members must be noted in a company's statutory registers.
- Companies will no longer need to keep their own registers of directors, directors' residential addresses, secretaries and PSCs (but will need to notify Companies House of any related changes).
- The only register a company will need to maintain is a register of members (shareholders).
- Individuals will be able to ask, in certain circumstances, for additional personal information to be suppressed from the Companies House public record e.g. signatures, full dates of birth, former names, residential addresses, and professions.
- A company must have a registered office address which is "appropriate", meaning somewhere that documents delivered to it would be expected to come to the attention of a person acting on behalf of the company and can be recorded by obtaining an acknowledgement.
- All companies will need to maintain a non-public "appropriate" e-mail address where messages can reach a person acting on behalf of the company.

Accounts

- Accounts filed at Companies House will need to be fully tagged in iXBRL digital format.
- Filing options for small and micro companies will be simplified. Companies House will require a balance sheet, profit and loss account and directors' report for all small companies (except where a small company satisfies the micro-entity thresholds).
- Small companies and micro-entities will need to file sufficient information to confirm they qualify for the accounting category they claim to fall within. Dormant companies will also need to file an eligibility statement.

What do retailers need to do to prepare?

Retailers should:

- Decide what their "appropriate e-mail address" and "appropriate registered office address" will be.
- Work through group structures to identify any corporate directors and map out changes to these that may be required (for example, to remove any "layering").
- Prepare directors, PSCs, and presenters for ID verification – so that when the verification process is finalised and live, they are ready to lodge what is needed.
- Review each group company's register of members to ensure no abbreviated names are used. If the register of members is held centrally at Companies House, start preparing a version to be maintained by the company itself.
- Consider how best to prepare for iXBRL digital formatting and the balance sheet, profit and loss account, and directors' report requirements being introduced. Consider what exemption evidence and eligibility statements will need to be provided (for dormant companies, small companies, micro-entities, and PSCs particularly).

For more information about the possible impact of the reforms on your business, please see our **in focus** page.

Progress on DMCC Bill: consumer protection

Impact H

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What's changing?

Under the DMCC Bill, the CMA will gain new powers to impose penalties of up to 10% of global turnover on companies that breach consumer protection law.

At the moment, the CMA generally tries to work with businesses to change their behaviour via undertakings when it identifies consumer protection concerns. This approach will change when the DMCC Bill comes into force towards the end of 2024.

The changes will bring the CMA's consumer enforcement powers in line with its existing competition/ antitrust toolkit (where multi-million-pound fines are the norm). The changes are widely viewed as 'game changing' for consumer law enforcement.

It is important to note that the CMA may use its power to impose penalties in relation to a wide range of unfair commercial practices relevant to retailers such as:

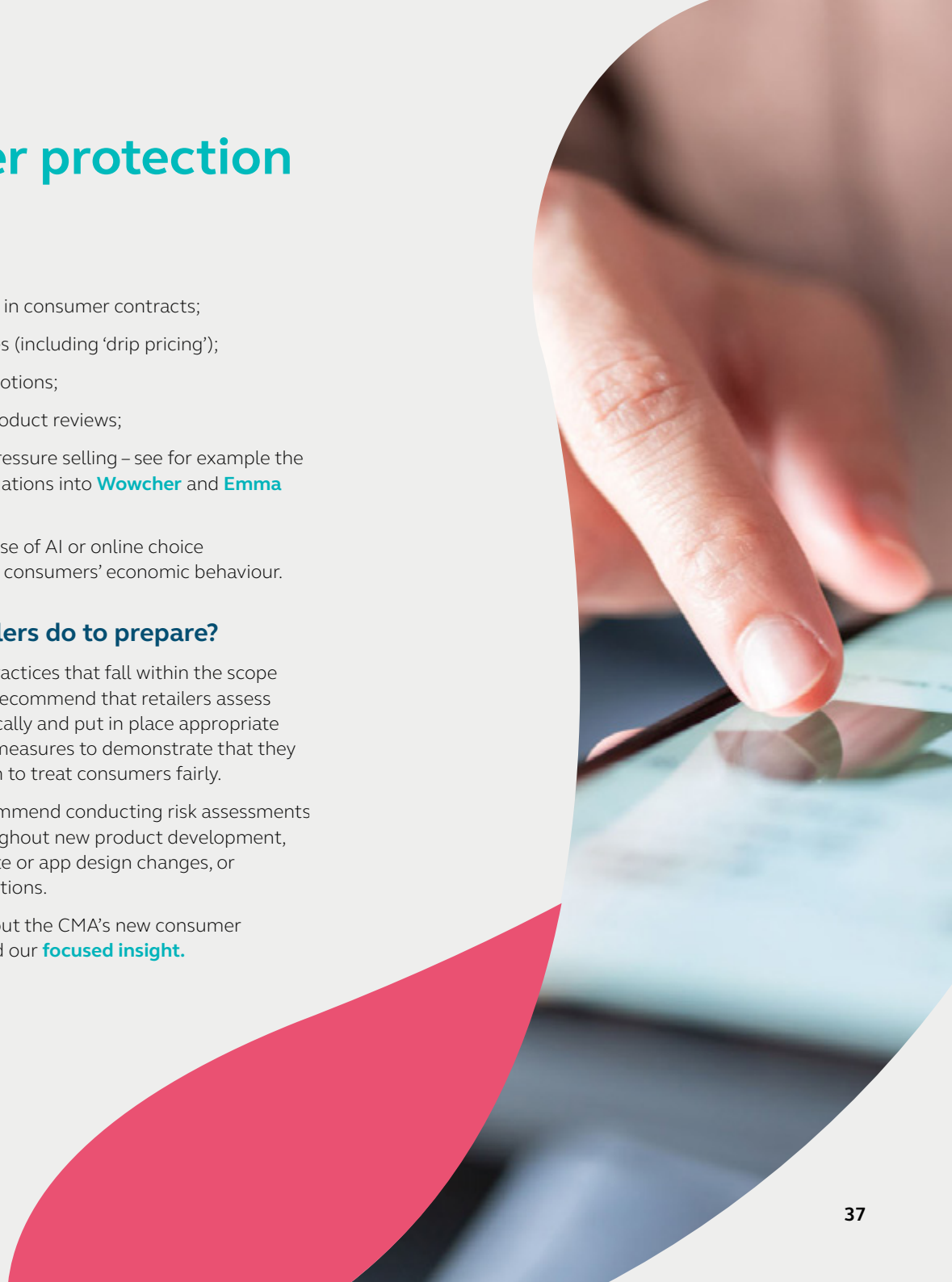
- Including unfair terms in consumer contracts;
- Unfair pricing practices (including 'drip pricing');
- Misleading price promotions;
- False or misleading product reviews;
- Misleading forms of pressure selling – see for example the CMA's current investigations into **Wowcher** and **Emma Sleep**; and
- Unfair or misleading use of AI or online choice architecture to distort consumers' economic behaviour.

What should retailers do to prepare?

Given the vast range of practices that fall within the scope of the CMA's powers, we recommend that retailers assess their risk exposure holistically and put in place appropriate compliance and training measures to demonstrate that they are doing all that they can to treat consumers fairly.

At produce level, we recommend conducting risk assessments as early as possible, throughout new product development, and before making website or app design changes, or updating terms and conditions.

For more information about the CMA's new consumer enforcement powers, read our **focused insight.**



Modern Slavery update

Impact H

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What's changing?

When the UK's Modern Slavery Act came into force in 2015, it was heralded as a landmark piece of legislation which took significant strides in tackling modern slavery. Today however, the UK's regulatory regime risks falling behind the times, as other jurisdictions begin to push ahead and consider significant new measures to enhance corporate accountability.

Despite being heralded in the Queen's speech back in May 2022, we are still awaiting publication of a new Modern Slavery Bill. The intention for the Bill was to set out bold ambitions to increase accountability of companies and other organisations operating in the UK to drive modern slavery and human trafficking out of their supply chains.

The main elements of the Modern Slavery Bill outlined in the legislative reform agenda include:

- Extending the modern slavery statement publication requirements to public bodies with a budget threshold of over £36 million;
- Mandating the principal areas that must be covered by modern slavery statements, effectively turning the previous guidance into a requirement;
- Requiring organisations to submit their modern slavery statement to the Government modern slavery statement registry (publication in the registry is currently voluntary);
- Setting a single reporting deadline of 30 September by which statements should be published annually (with all organisations required to report on the same 12-month period from April to March); and
- Introducing financial penalties for non-compliance with the updated modern slavery statement reporting requirements.

Whilst there doesn't appear to be an immediate appetite to progress the proposed Modern Slavery Bill into law, the last 12 months have seen other countries take significant steps in reforming Modern Slavery legislation, raising the bar on reporting and introducing new rules to help eliminate forced labour in supply chains.

International developments

Canada's new Fighting Against Forced Labour and Child Labour in Supply Chains Act came into force on 1 January 2024. The Act goes a step further than the Modern Slavery Act 2015, imposing an obligation on many entities with a connection to Canada to provide prescribed information to the federal government about the measures taken to prevent and reduce the risk that forced labour or child labour is used by them or in their supply chains.

Similarly, in Australia, the Australian government is currently considering its response to a statutory review carried out into Australia's Modern Slavery Act. Much like the UK review, the Australian review singled out three key points as targets for legislative change – improving the standard of modern slavery reporting, enforcing the reporting obligations of entities, and addressing the large percentage of incompatible Modern Slavery Statements.

Of particular interest, however, is the European Commission's legislative proposal for a regulation prohibiting products made with forced labour on the European Union Market (Forced Labour Regulation).

The proposed Forced Labour Regulation, which draws from similar initiatives taken by partner countries such as the US, prohibits the placing and making available on and the export from the EU market of any product where forced labour has been used in whole or in part at any stage of its extraction, harvest, production, or manufacture. It doesn't matter whether it's the final product or one of its components that benefited from the forced labour. The origin of the product and the sector in which it was produced is also irrelevant to the applicability of the main prohibition.

The Forced Labour Regulation is currently under review by the European Parliament and Council and will need to be jointly endorsed by the European Parliament and Council before it can be formally adopted.

Aside from the Forced Labour Regulation, December 2023 also saw the European Parliament and Council reach agreement on the Corporate Sustainability Due Diligence Directive. The Directive, which will apply to EU companies meeting certain size and turnover thresholds, as well as non-EU companies generating high turnover in the EU, will require companies to identify, assess, prevent, mitigate, and remedy their adverse impacts and those of their upstream and downstream partners on people and the planet. Adverse impacts will be defined as including child labour, slavery and labour exploitation, as well as various environmental impacts.

What can retailers do to prepare?

Though legislative reform in the UK remains slow, the changing global legislative landscape has led to increasing calls from policymakers, businesses, investors, and the general public for legislation that makes businesses legally responsible for respecting the rights of workers in their supply chains.

This is evidenced by the fact that on 28 November 2023, Baroness Young of Hornsey introduced the Commercial Organisations and Public Authorities Duty (Human rights and Environment) Bill into the House of Lords. Much like the Corporate Sustainability Due Diligence Directive, the Bill would place a duty on commercial organisations to prevent human rights and environmental harms, so far as reasonably practicable, with respect to their own operations, products, and services and those of their subsidiaries, and throughout their value chains. This duty would include the obligation to conduct human rights and environmental due diligence.

Although the trajectory of the Bill through Parliament is far from guaranteed given the challenges Private Members' bills often face in becoming law, its proposal may assist in raising awareness about critical issues and influencing the legislative agenda of the UK government.

With that in mind, retailers would be wise to start preparing and revising their own human rights due diligence policies and procedures to ensure that they are able to adequately identify, assess, and address actual or potential human right harms within their supply chains.

TLT’s retail sector team

Our national practice advises many of the UK’s leading retailers and consumer goods businesses. Our clients represent over 15,000 stores, 1 million employees and £100 billion of retail sales.

Our team have an in-depth understanding of the industry, offering advice in context and solutions that work. Our clients include three of the UK’s largest supermarket chains, a wide range of fashion brands, home improvement stores, motor dealership groups and pure-play online retailers.

We provide strategic advice on major projects, as well as support for in-house teams on day-to-day matters where we act as an extension of their in-house teams. We are ranked among the very best law firms in Chambers UK 2023 for Retail (UK-wide), an independent guide to the legal profession.

We also support retailers through our retail-specific training programme, seminars, e-alerts, industry reports, risk reports etc. and are actively involved in industry groups such as Revo and Retail Week’s General Counsel programme.

To find out more visit: **tlt.com/retail**

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