Retail Risk Outlook 2023

For what comes next

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Introduction

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Welcome to TLT's Retail Risk Outlook 2023

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 retailers do have a key part to play and attention will be focussed on sustainable growth whilst still delivering value to customers;
- There is without doubt a requirement for greater transparency and accountability with customers, investors and regulators in this area;
- Innovation in technology is another area where regulation is playing 'catch-up' with tech-led solutions and we've seen more retailers embrace new tech solutions and marketing tools to give them a leading edge; and
- Whilst retailers would have liked to have seen a return to more normalised market conditions post-pandemic, many are still facing external challenges from supply chain and operating cost increases and a change in customer purchasing as a result of the cost of living crisis.

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.

"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.

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Green Claims

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What's changing?

Since the Competition and Markets Authority (CMA) introduced its Green Claims Code in September 2021, it's been an eventful year or so in the consumer protection arena. In July 2022 the CMA launched an investigation into environmental claims made by several leading fashion brands and, in January 2023, it announced that it was widening the net to examine potential 'greenwashing' in the wider **FMCG sector**. The review will examine environmental claims made about a wide range of essential items such as food and drink, cleaning products, toiletries, and personal care items.

In our recent report **'Green Claims Outlook 2023'**, we take a closer look at the regulatory trends in this space and also provide a summary of the recent ASA enforcement of sustainability claims. It is clear that the ASA is holding brands to a very high standard, with a particular inclination to interpret claims as meaning that the product has a net positive impact on the environment. Unsurprisingly, this has led to many brands falling short when it comes to substantiation. We have also seen a trend of businesses taking direct action against competitors for misleading green claims.

The CMA continues to take steps in its policy development, following its advice to government in March 2022 on how the UK's consumer and competition regime could work better to help the government achieve its net zero target by 2050. Since then, it has launched a Sustainability Taskforce and confirmed in its Annual Plan (2023 to 2024) that promoting environmental sustainability is a strategic priority.

> "The CMA has made it clear that it will be scrutinising companies big and small to see whether their environmental claims relating to FMCG stack up.

What should retailers do to prepare?

The CMA has made it clear that it will be scrutinising companies big and small to see whether their environmental claims relating to FMCG stack up. It advises businesses to review their practices now to make sure they're operating with the law. Retailers should watch out to see if the CMA produces any practical guidance on greenwashing as part of its ongoing misleading claims project.

Other developments to watch out for are:

New legislation: in its advice to government, the CMA proposed a number of statutory amendments to the Consumer Protection from Unfair Trading Regulations 2008 in order to strengthen the underlying legislation relating to environmental claims. It also proposed amendments to the Business Protection from Misleading Advertising Regulations to introduce clearer regulatory offences for businesses that mislead their supply chain partners on ESG matters. Retailers should monitor legislative developments closely.

CMA enforcement: in April 2022, the government announced plans to give the CMA the power to impose administrative fines of up to 10% of global turnover on businesses that breach consumer protection laws. Retailers should be aware that, once these plans are implemented, businesses that fail to comply with the Green Claims Code could face "anitrust level" financial penalties without the CMA needing to go to court.

ASA enforcement/CAP guidance: while the ASA rulings have provided some helpful guidance, it remains difficult for brands to interpret multiple guidelines from different regulators. Retailers should monitor new guidance published; it would be helpful if the ASA and CMA decided to issue consolidated guidance on some key issues.

Extended Producer Responsibility (EPR) scheme

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What's changing?

On 9 November 2021, the Environment Act was passed by parliament and made significant changes to environmental governance in the UK. One of the most important changes for retailers is set out in schedule 4(3), which creates an extended producer responsibility (EPR) scheme.

The EPR scheme is based on the principle that producers of packaging bear responsibility for its disposal and reuse, with enhanced costs and targets to be used to achieve this. This will increase the cost of using packaging for producers if they don't take any action to meet the full net cost of disposal.

The latest **guidance** provided by DEFRA on the EPR scheme includes useful guidance on how organisations both small and large can begin to prepare and take proactive steps to ensure compliance.

Who is affected?

Any business that meets the following criteria:

- is an individual business, subsidiary or group (charities are excluded);
- has an annual turnover of £1m or more;
- is responsible for over 25 tonnes of packaging per year; and
- carries out certain packaging activities.

If retailers have a turnover of £2m or more and are responsible for handling and supplying more than 50 tonnes of packaged goods or empty packaging then they will be classified as a large organisation and additional responsibilities apply and are outlined below.

> "The EPR scheme is based on the principle that producers of packaging bear responsibility for its disposal and reuse, with enhanced costs and targets to be used to achieve this.

What are packaging activities?

Packaging activities are defined by DEFRA to include:

- packaging own-brand products to sell to UK consumers;
- using a third party to package and sell own-brand goods to UK consumers;
- using 'transit packaging' to protect goods during transport so they can be sold to UK consumers;
- importing own-brand and third-party packaged products into the UK to sell to consumers, unless doing so on behalf of a third party;
- allowing third parties based outside the UK to sell packaged products or empty packaging through an online marketplace that the retailer owns;
- hiring or loaning out reusable packaging to UK third parties; and
- making and then selling empty packaging to third-party organisations that do not need to take action under the regulations.

Retailers are therefore highly likely to be carrying out 'packaging activities'.

What should retailers do to prepare?

In order to achieve compliance retailers are required to gather information and report on this to the environmental regulator. This includes:

- Collecting information on packaging that they supply and/or handle from 1 January 2023;
- Registering for the EPR packaging online service which opens in 2024 for small organisations (i.e. where a retailer is not categorised as a 'large organisation');
- Paying an annual fee to the environmental regulator from 2024; and
- Submitting data about empty packaging and packaged goods in 2024 for that which is handled or supplied in 2023.

Large organisations must also:

- Register for the EPR packaging online service but from the earlier date of April 2023;
- Buy packaging waste recycling notes or packing waste export recycling notes to meet their recycling obligations; and
- Submit data about empty packaging and packaged goods every 6 months, starting from 1 July 2023 to cover the period from January to June 2023.

What information do retailers need to collect?

As part of the information submission retailers will need to gather information on the weight of packaging to the nearest tonne and should include the weight of:

- Individual materials in the packaging (e.g. cork, paper, aluminium, wood etc.) which are to be reported separately;
- Materials used in primary packaging (e.g. sales packaging in which the goods are sold to consumers), secondary packaging (e.g. shipment packaging or display packaging) and transit packaging (e.g. the packaging used to group secondary packaging units together);
- Packaging that will become household or non-household waste; and
- Packaging that will be placed in household bins and disposed of through local waste collections.

For large organisations, this data will be used to calculate the packaging waste recycling notes or packing waste export recycling notes required.

Supply chain due diligence

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What's changing?

The supply chain remains a key concern for retailers when setting sustainability targets. Although we have seen an increase in due diligence enquiries and contractual obligations relating to sustainability within the supply chain over the last year, this has mainly been driven by societal pressure, rather than legislative requirements. The position is shifting however, with the EU leading the transition from soft law standards to mandatory regulations, particularly relating to climate risk. Developments include:

- **German Supply Chain Due Diligence Act:** this Act, which came into force on 1 January 2023, obliges in-scope companies to observe human rights and environmental due diligence obligations in their supply chain, including establishing a risk management system to identify risks or actual violations. The Act extends the scope of responsibility from a company's own business area to direct suppliers, and in certain circumstances, indirect suppliers.
- **Proposal for a Corporate Sustainability Due Diligence Directive:** in February 2022, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence setting out duties similar to those contained in the German law. The new proposal includes 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. The European Council has now adopted its negotiating position on the Directive and the European Parliament is expected to do so in May 2023, when formal negotiations will commence.

Although the UK government does not currently have plans to replicate this legislation, it has indicated that it may consider due diligence disclosures in the context of the international standards being developed by the International Sustainability Standards Board to harmonise environmental, social and governance reporting.

More specific legislation is also due to be introduced to address deforestation risks, as required by the Environment Act 2021. Once implemented, in-scope businesses will be obliged to introduce supply chain due diligence requirements for forest risk commodities.

> "TLT continues its close collaboration with **The Chancery Lane Project**, which has developed a wide range of freely available contract clauses.

What should retailers do to prepare?

Even if retailers do not feel the direct impact of developments in the EU, they should continue to strengthen their due diligence enquiries and contractual commitments from suppliers in relation to sustainability, as their sustainability ambitions develop and further regulation is introduced.

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.

The Better Business Act campaign

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What's changing?

The **Better Business Act (BBA)** is a campaign which pushes for a change in UK law to ensure every company in the UK aligns their interests with those of our wider society and the environment.

More specifically, the campaign calls for the UK government to reform directors' duties under section 172 of the Companies Act 2006.

Section 172 currently requires directors to act in a way they consider most likely to *"promote the success of the company for the benefit of its members (i.e. shareholders) as a whole"*.

The BBA seeks to redraft this so that board decision-making doesn't focus solely on shareholders – instead aligning the interests of people (including shareholders), the planet and profit. The key is to ensure businesses are legally responsible for benefitting workers, customers, communities and the environment while delivering profit.

The BBA would redraft section 172 to incorporate the following four principles:

- **Aligning interests** of wider society and the environment alongside shareholders.
- **Empowering directors** to make better decisions weighing up and advancing the interests of all stakeholders.
- **By default**, applying this change to businesses.
- **Businesses reporting** on how they balance people, planet and profit.

The campaign has drafted suggested amendments to the Companies Act 2006 which can be found **here**.

> "Many businesses have already started to shift their focus from shareholder profit to the protection of society and the planet more generally.

Although no changes to the Companies Act 2006 have yet been made, the campaign has the support of over 1,000 UK businesses and organisations and is led by B Lab UK, which forms part of a global non-profit network whose focus is on business being used as a force for good.

What should retailers do to prepare?

As no amendments have yet been made to section 172, there is no legal requirement for retailers to change their approach in response to the BBA campaign. That said, to a certain extent the campaign dovetails with what some boards are already choosing to consider.

Many businesses have already started to shift their focus from shareholder profit to the protection of society and the planet more generally. There are also voluntary (although planned to be compulsory) requirements for UK listed companies and larger corporates to think about climate-related risks and opportunities in their reporting. Our article **here** provides an overview.

Co-ordination on environmental sustainability

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What's changing?

The CMA has issued draft guidance on the application of competition rules to agreements between competitors in relation to environmental sustainability.

The extent to which the CMA could take into account the environmental benefits of any direct co-ordination between competitors hasn't always been clear and this new **draft guidance on Sustainability Agreements** provides some welcome clarity around the issue.

The guidance will, once finalised, offer a valuable point of reference for businesses seeking to navigate this space. Amongst other things, the draft guidance confirms that the CMA can take into account environmental and sustainability benefits when assessing whether a "horizontal" agreement between competitors complies with Chapter I of the Competition Act 1998. This approach, which closely adheres to the position taken by the European Commission in its corresponding guidance at EU level, represents a significant evolution within the competition law world where the focus has traditionally been on more conventional economic metrics, such as whether an agreement is likely to result in higher or lower prices.

> "The draft guidance sets out a number of different types of environmental sustainability agreements...

What does this mean for retailers in practice?

Once finalised, the guidance will give businesses or trade associations that wish to explore new ways to drive sustainable change at industry level a framework for doing so. The draft guidance sets out a number of different types of environmental sustainability agreements that may be deemed compatible with the Competition Act. For example, this includes:

- Phasing out or withdrawal of non-sustainable products or processes;
- Creation of industry standards that promote sustainability;
- Pooling sustainability credentials on suppliers or customers;
- Industry-wide efforts to tackle climate change; and
- Co-operation on sustainable R&D.

The CMA defines 'environmental sustainability agreements' broadly, which means that the guidance can apply to any initiative that is aimed at reducing the adverse impact of economic activity on the environment. This could include, for example, reducing pollution and CO2 emissions, as well as conserving biodiversity, improving air or water quality or promoting the sustainable use of raw materials.

It's important to be aware however, that no matter how laudable the parties' intentions are, from a competition law perspective no agreements between competitors can ever be considered totally "risk free". In its draft guidance, the CMA states that there are (broadly speaking) two different types of environmental sustainability agreement:

- Those that **do not affect the main parameters of competition** in the market; and
- those that **do** have an appreciable effect on competition, for example because they result in less consumer choice or higher prices.

It is the latter form of agreement that has prompted the most academic debate amongst competition law practitioners who have traditionally been more accustomed to weighing up pure economic factors when assessing an agreement's compatibility with the Competition Act. The CMA's draft guidance confirms that environmental sustainability benefits can be taken into account when assessing whether consumers receive a "fair share" of the benefit of any agreement, but the position is rarely straightforward. All agreements need to be assessed in their economic context.

In its guidance, the CMA indicates that it is operating an "open door" policy and is prepared to enter into dialogue with businesses that seek guidance on whether certain initiatives are likely to be compatible with competition rules. The CMA has also indicated that it will not seek to impose penalties on businesses that had sought advice in an open and transparent manner, provided that the CMA did not raise any objections during the consultation process.

The CMA's draft guidance is currently subject to an open consultation process and stakeholders have until 11 April 2023 to respond.

ASA update

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What's changing?

The Advertising Standards Authority (ASA), part-way through 2022, released its 2021 Annual Report commenting on its current 5 year strategy ("More Impact Online"), its key milestones of the previous year and those looking forward.

The ASA has undertaken a noticeable shift in focus, placing as much emphasis on how an ad can make a consumer feel, particularly in the wider context of mental health, as it has previously on the more traditional considerations of whether an ad is labelled correctly, for example.

The Report sets out the main areas of concern for the ASA moving forward, and these can be categorised as follows:

- vulnerable user protection (focusing particularly on young people and children);
- cosmetic brands/products and associated advertising; and
- climate concerns and claims.

Vulnerable user protection

With the internet becoming ingrained in so many aspects of day-to-day life, more time than ever is being spent online, and there is an assumption that young people will have access to the internet in some capacity, at the same stage as learning basic life skills. The ASA is taking this assumed responsibility seriously, and has already, or intends to, implement a number of measures to increase protection for this particular group:

- It is working in partnership with Ofcom to focus on regulating the content and targeting of advertising on Video-Sharing Platforms (VSP) i.e. any online platform that allows users to upload and share videos publicly. This will mean greater scrutiny for the majority of social media sites used by young people, and as a result the entities that advertise on them;
- It is harnessing technology to regulate online ads at a more significant scale, in particular, limiting the exposure of online ads to children who are incorrectly registered, or who falsely claim to be, 18+ on social media (it is suggested that anywhere between 50% to 80% of young people have misrepresented their age online); and
- It is working alongside the Health and Care Act 2022 to ban adverts for less healthy food and drink being shown in adverts before the watershed on TV, on-demand services and online, by considering its current involvement in this area, and how code rules may need to be updated or even introduced accordingly.

A sector under review: Health and beauty

The health and beauty industry is a key sector to note, when considering the ASA's increased proactiveness. Whilst legislation is playing catch up, the ASA has taken on additional responsibility in monitoring ads in this field, with a number of rulings focusing on the potentially damaging nature of such content.

> …retailers will need to be aware of the ASA's expanding toolkit to detect non-compliant ads across social media channels…

As of May 2022, any ads relating to cosmetic interventions will be age-restricted, and retailers should expect to see similar restrictions being introduced across the board.

A new focus: Climate concerns and claims

The ASA is also increasingly turning its focus to the environment, and particularly, in a world where every brand is striving for the label of "sustainable", green claims. Please see our **update on Green Claims** above for more detail.

What should retailers do to prepare?

A key takeaway for retailers, is that the ASA is not, according to its Chairman (Lord Currie of Marylebone), waiting for legislation before it responds to some of the complex challenges of "regulating the online advertising ecosystem".

The introduction of its Platform Principles pilot (as described in more detail in the update on the "ASA Intermediary and Platform Principles Pilot" below), demonstrates the ASA's intention to enhance transparency and accountability online, ahead of any legislation being published that might actively require it to do so.

In addition, the ASA has confirmed that it will continue to focus on using tech-assisted monitoring (such as increasing its investment into AI), and as a result, retailers will need to be aware of the ASA's expanding toolkit to detect non-compliant ads across social media channels, and the fact that it will be able to do so automatically.

The ASA has made very clear that it is keen to continue to build awareness of its existence, and trust in its capability to react and protect. This therefore means that retailers should be aware, now more than ever, of their advertising compliance, both in the traditional sense, and in relation to the increasing standards of social responsibility to which they will be held.

Transition from CE to UKCA marking delayed

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What's changing?

In November 2022, the government announced that businesses can continue to use CE marking on goods sold in Great Britain (GB) until 31 December 2024 to demonstrate conformity with product standards. The UK Conformity Assessed (UKCA) mark was introduced for manufactured goods placed on the GB market in 2021 and it was originally intended that that this would replace the CE marking regime from 31 December 2022. However, the government decided that it did not want to burden businesses with the requirement to meet the original deadline, in view of the difficult economic conditions created by post-pandemic shifts in demand and supply, alongside the war in Ukraine and the associated high energy prices.

To reduce labelling costs, businesses will be allowed to affix the UKCA marking and include importer information for products from EEA countries on an accompanying document or label until 31 December 2027 (instead of the original deadline of 2025). In addition, manufacturers will be able to use conformity assessment activities for CE marking undertaken by 31 December 2024 (instead of 2022) as the basis for the UKCA marking until 31 December 2027.

> Even though the extensions are helpful, retailers should continue to work with suppliers to ensure compliance by the new deadlines.

The extensions follow a number of changes announced last June, aimed at simplifying the move to UKCA product safety markings for businesses. These included plans to reduce re-testing costs, removing the need to re-test existing imported stock, continuing to accept spare parts onto the GB market, as well as extending labelling measures.

The government has published detailed **guidance** on placing manufactured goods on the market in Great Britain.

What should retailers do to prepare?

UK retailers are currently under the same obligations in relation to product markings as they were before Brexit, such as verifying that the goods they are placing on the market bear the necessary UKCA marking (and/or CE marking up to 31 December 2024), ceasing selling products if it is suspected that the requirements have not been met, and notifying specified parties if that is the case.

Even though the extensions are helpful, retailers should continue to work with suppliers to ensure compliance by the new deadlines.

The UKCA mark is not recognised within the EU, which means that if you sell goods in the EU, they must continue to bear the CE mark. However, goods can carry both the CE and UKCA markings as long as they are fully compliant with both UK and EU regulations.

ASA Intermediary and Platform Principles Pilot

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What's changing?

In Spring of 2022, the Advertising Standards Authority (ASA) announced its 'Intermediary and Platform Principles' pilot. Under the pilot, the ASA has 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 extending the ASA's general role online. Some of the participating companies involved in the pilot include Adform, Amazon Ads, Google, Index Exchange, Magnite, Meta, TikTok, Twitter, Snap Inc. and Yahoo.

Alongside IAB UK (a member body of the Committee of Advertising Practice), the ASA commenced the pilot in June 2022. The pilot will run for twelve months, and during this period, the participating companies shall seek to implement the principles of the pilot. The participating companies will be required to provide explanatory and contextual information to the ASA, to allow the ASA to see how they comply, and promote awareness of the pilot rules concerning responsible online advertising.

The participating companies will have to:

- bring to advertisers' attention i.e. the relevant retailer, in a reasonably prominent way, the requirement for advertisements aimed at a UK audience to comply with the CAP Code;
- ensure their advertising policies and applicable contractual terms require advertisements aimed at a UK audience to comply with the CAP Code;
- assist the ASA in promoting the public's and advertiser's awareness of the ASA system and processes;
- take measures, and provide tools and controls, to minimise a young person's (children in particular) exposure to ads which attract an age-targeting restriction;
- on receipt of a relevant notice from the CAP compliance function, act swiftly to remove a non-compliant ad that is subject to a specific breach or is indisputably a breach of the CAP Code, in instances where the advertiser fails to appropriately amend or withdraw the non-compliant ad; and
- respond in a timely manner to reasonable requests for information from the ASA in relation to an advertiser's use of the company's services, and to assist any investigation of a suspected breach of the CAP Code, in instances where the information cannot be obtained from the advertiser.

It should be noted, that the aforementioned principles do not substitute the companies' obligations to comply with applicable consumer protection or other applicable laws.

> Based on the pilot principles, retailers should expect further scrutiny regarding how online advertisements are placed online.

What should retailers do to prepare?

Based on the pilot principles, retailers should expect further scrutiny regarding how online advertisements are placed online. The pilot suggests that instances could arise where the ASA asks social media platforms directly to remove non-compliant ads, in instances where the retailer does not do so in a timely manner.

The findings of the pilot could also result in the ASA requesting and expecting to be privy to further information relating to a companies' paid ad structure, where there is a suspected breach. A 2022 ASA ruling (Playorcas) demonstrates the ASA's concern and intention to act, where the advertiser itself does not provide a substantial enough response to a request for information, particularly if the ASA deems that the advertiser has disregarded the importance of the CAP Code.

CMA focus on online choice architecture

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What's changing?

The CMA is currently devoting considerable time and resources to better understanding, and tackling potential harms arising from, "online choice architecture" (OCA), in particular its potential to distort competition and consumer behaviour.

In spring 2022 the CMA's Behavioural Hub published a Discussion paper considering how OCA can harm competition and consumers, together with an extensive Evidence review underpinning the paper. While it is recognised that OCA can play a positive role in terms of enhancing consumer experience and driving better choices, the CMA is particularly concerned about the following types of "bad" OCA:

- **"dark patterns"** – i.e. user interface design choices that benefit an online service by coercing, steering, or deceiving users into making unintended and potentially harmful decisions;
- **"sludge"** – i.e. excessive or unjustified friction that makes it difficult for consumers to get what they want or to do as they wish (for example exiting unwanted subscription contracts); and
- **"dark nudges"** – i.e. practices where a choice architect makes it easy or removes friction for consumers to make inadvertent or ill-considered decisions.

The CMA's annual plan for 2023–2024 and recent **Citizens Advice report** on online customer journeys further reinforce the regulatory scrutiny in this space. As evidenced by its recent investigation into Emma Sleep (see below), the CMA's annual plan for the year ahead makes it clear it intends to crack down on traders who use online choice architecture as a tool to engage in pressure selling or mislead consumers.

> While there have not yet been instances in the UK of enforcement action being taken exclusively in relation to consumer-harm caused by OCA, the CMA is currently focusing on this issue with two ongoing investigations.

What should retailers do to prepare?

While there have not yet been instances in the UK of enforcement action being taken exclusively in relation to consumer-harm caused by OCA, the CMA is currently focusing on this issue with two ongoing investigations.

On 30 November 2022, the CMA opened an investigation into **Emma Sleep GmbH** and others within the Emma Group, in relation to the use of online urgency claims, such as countdown clocks. The CMA is examining whether the use of such practices amounted to a breach of consumer law.

As a further example, in relation to its investigation in the online video gaming sector, the CMA found that Nintendo and Microsoft's user interfaces helped it to maintain high levels of "zombie" subscriptions that served no consumer benefit.

In another move to tackle OCA-related issues, the CMA published an **open letter** on 29 March 2023 containing compliance advice concerning urgency claims and price reduction claims. The advice, which applies to all business selling anything online, states that sellers must not use claims that are misleading or put unfair pressure on consumers. Any claims must be substantiated by evidence and genuinely reflect selling conditions. The guidance, which we would recommend reading, is illustrated with visual examples of non-compliance. For each scenario, the CMA explains how and why the particular claim infringes the law.

More recently, on 31 March 2023, the CMA announced that it is investigating **Wowcher** for misusing online countdown timers and other urgency claims.

Given that pro-consumer OCA is used, or considered, by many retailers to develop a positive user experience online, we would advise that retailers follow developments in this space closely. Practically speaking, in cases where consumer choice is being actively "nudged" in particular directions via the deliberate use of OCA (especially where this happens without the consumers' knowledge), as a general rule of thumb retailers should be able to defend the use of OCA as being pro-consumer.

The Windsor Framework

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What's changing?

On 27 February 2023, the UK government and EU announced the Windsor Framework, which sets out the parties' joint declaration on how to solve many of the practical and logistical issues arising out of the existing Northern Ireland Protocol (NI Protocol). The Windsor Framework was subsequently approved by MPs and has now been formally adopted by the UK and the EU.

The Windsor Framework is designed to improve some of the barriers to trade between Northern Ireland and the UK and gives the Stormont assembly in Northern Ireland more say over EU rules.

The new arrangements have been welcomed by those that have distribution agreements that cover the whole of the UK. On 10 March 2023 a number of business leaders (including Coca-cola, Amazon UK and Diageo, amongst others) signed an **open letter from the CBI** to the Prime Minister backing the deal for the positive contribution it will make for trade flow between GB and NI.

While the Windsor Framework clearly does not address all of the complexities involved in NI-GB trade, the relaxation of some of the rules may prompt suppliers/distributors to reflect on the way they structure their distribution agreements. For example, this may make it more practically feasible for some distributors to take on a territory that comprises the whole of the UK, rather than carving out NI due to the logistical difficulties that distributors experienced under the existing NI Protocol.

> The new arrangements have been welcomed by those that have distribution agreements that cover the whole of the UK.

What should retailers do to prepare?

The main changes will impact on goods moving from GB to NI so retailers operating in this area should note the following:

- All goods moving from GB to NI which are destined to be used or consumed in NI (i.e. 'not at risk' of moving to the EU) will be able to benefit from the new "green lane".
- Green lane goods will be subject to fewer checks and controls as they will automatically be treated as internal UK movements for tariff purposes (with no rules of origin requirements) which should significantly speed up the process of moving goods into NI; only normal commercial paperwork will be required, and paperwork checks will be minimal.
- For businesses involved in moving goods that will be used for processing or manufacturing, as before, there is a turnover limit to be able to use the "green lane" (subject to some exceptions), but this has been quadrupled from the previous rules – see more below.
- Any goods destined for the EU will use "red lanes", which will apply normal EU border processes. In practice this means that suppliers who supply both NI and the Republic of Ireland (ROI) will need to split goods into different loads depending on their intended destination to be able to feel the benefits of the speedier "green lane".
- 'Not for EU' labels will be required on various levels for agri-food retail goods that are intended for sale to consumers in NI, to inform consumers that these good are not for the EU. This will be required at all levels from individual product packaging to shelf signs and posters.
- As with all labelling requirements, the devil will be in the detail, but the current **guidance** from the EU says: *"from 1 October 2023, prepacked meat and fresh milk will be individually labelled. Goods sold loose need only to be labelled at box level (e.g. apples) and easily visible signs would need to be placed next to the price tag on the shelves in the supermarkets."*
- Labelling requirements are planned to be introduced gradually, with a current target overall deadline of 1 July 2025. Visual identification processes for lorries carrying such goods are expected to reduce in line with the labelling deadlines, with a 95% reduction in inspections expected from 2025 when labelling requirements are fully in place.

We await further practical guidance as to how these requirements will apply in practice.

Minimum energy efficiency standards (MEES)

Impact M

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What's changing?

On 1 April 2023, it became unlawful to continue to let a sub-standard property, unless an exemption applies and has been validly registered on the PRS Exemptions register.

A 'sub-standard' property is currently a property with an EPC rating of below E. However, that is set to change. In 2021, the government released a consultation on raising MEES in tenanted non-domestic properties. The intention is that the minimum standard will be C in 2027 and 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 when it does 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.

> Retailers should keep abreast of developments, particularly the government response to the consultation and any resultant legislation.

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, MEES 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.

Overseas Entities Register

Impact M

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What's changing?

The Overseas Entities Register (OER) came into force on 1 August 2022 through the new Economic Crime (Transparency and Enforcement) Act 2022 (ECTEA). Overseas entities who want to buy, sell or transfer property or land in the UK, must register with Companies House and identify their registrable beneficial owners or managing officers.

An **overseas entity** is defined as 'a legal entity that is governed by the law of a country or territory outside the United Kingdom.' A **legal entity** is 'a body corporate, partnership or other entity that (in each case) is a legal person under the law by which it is governed.'

There were transitional provisions in place until 31 January 2023. The transitional period has now expired and it is a criminal offence for an overseas entity not to have registered on the OER.

The way in which ECTEA applies will depend on whether the land is held in England & Wales, Scotland or Northern Ireland. For example, in England & Wales, the definition of 'qualifying estate' is a freehold property or leasehold estate of more than seven years, whereas in Northern Ireland, the obligation to register only applies to owners of freehold estates and leasehold interests of more than 21 years so is far more limited than the requirement in England and Wales.

What should retailers do to prepare?

Whilst retailers registered in the UK will not, themselves, need to register on the OER if they are entering into leases of over 7 years, the requirements will be relevant if their landlord is an overseas entity. If a retailer were to enter into a lease with an overseas entity which had not registered on the OER, or kept its registration updated, the retailer could find that they were unable to register their lease at the Land Registry.

"Whilst retailers registered in the UK will not, themselves, need to register on the OER if they are entering into leases of over 7 years, the requirements will be relevant if their landlord is an overseas entity.

Protect Duty: Martyn's law

Impact M

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What's changing?

In December 2022, the government announced details of 'Martyn's Law' which is also known as the 'Protect Duty'. In short, this will be a new law which will place obligations on those responsible for certain locations and venues to consider the threat from terrorism and implement appropriate and proportionate mitigation measures. The new law is named as a tribute to Martyn Hett who was killed in the Manchester Arena attack. The new law is intended to make sure that people are better prepared, ready to respond and know what to do in the event of a terrorist attack.

The current proposals include premises where "qualifying activities" take place, which includes retail activities. Legislation will establish a tiered model, introducing a requirements framework that is linked to the type of activity that takes place at eligible locations and the number of people that the location can safety accommodate at any time. The distinct requirements for each tier are:

- Standard: locations with a maximum occupancy of greater than 100 people at any time will be required to undertake 'low-cost' activities to improve protective security; and
- Enhanced: locations with an occupancy of 800+ at any time will additionally be required to undertake a risk assessment and subsequently develop and implement a security plan.

Locations with a maximum occupancy at any time of less than 100 will fall out of scope. However, they will be encouraged to adopt good security practices on a voluntary basis.

What should retailers do to prepare?

Retailers should watch out for further legislative developments noting the occupancy thresholds for the tiers above. Once Martyn's Law is finalised, it is anticipated that there will be a lead time to allow those captured by the new requirements to prepare. It is also expected that those stores located within larger retail outlets will need to consider what measures they have in place to protect against the threat from terrorism. An inspection and enforcement regime will be established to advise on the new requirements as well as to ensure compliance.

Levelling Up and Regeneration Bill

Impact L

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What's changing?

The Levelling-Up and Regeneration Bill is currently making its way through parliament. In addition to changes to the planning system, the Bill deals with letting by local authorities of vacant high street premises, and information and records about interests in, and dealings with, land.

What should retailers do to prepare?

As retailers are, generally, tenants, the provisions in relation to the letting of vacant high street premises will not affect retailers' premises. However, retailers may wish to bid for vacant units, if a local authority calls for a compulsory rental auction, under the terms of the legislation.

The Bill is not yet law, so retailers should keep abreast of developments in relation to the passage of the Bill through parliament and the issuing of Regulations setting out the detail of how the provisions will operate.

Flexible and hybrid working

Impact M

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What's changing?

The legacy of the pandemic on employment practices is undisputable and very likely here to stay: increased hybrid, remote and flexible working. More than a fifth of UK workers were using a hybrid model of working in October 2022, largely unchanged since Spring 2022, according to a survey undertaken by the Office for National Statistics. But, whilst the uptake of hybrid working appears to have settled, there are a number of changes to flexible working arrangements generally which are now on their way.

The government confirmed in December 2022 that the statutory right to request flexible working will become a 'day one' right (currently the right only arises after 26 weeks' employment). The Employment Relations (Flexible Working) Bill 2022–23, implementing this change is being supported by the government and this reform will be introduced "when Parliamentary time allows". No specific timeframe has been indicated. The following additional changes to the 'right to request' procedure will also be implemented:

- Retailers will be required to consult with their employees if they are considering rejecting a request for flexible working.
- Employees will be allowed to make two requests for flexible working in a 12-month period (currently only one request is permitted).
- Retailers must respond to a flexible working request within two months (currently the time limit is three months).
- Employees will no longer be required to specify how retailers may deal with the impact of their flexible working request.

In a separate development, the Office for Tax Simplification (OTS) published a report in December 2022, outlining that it is likely that there is a need for changes to tax policy, benefits and expenses rules in response to the large-scale transition to hybrid/remote working. In the report, it is confirmed that HMRC will allow a UK employer to apply for a certificate of continuing UK NICs liability for an employee who has opted to work abroad (rather than having been posted abroad). A range of improvements to both legal compliance and guidance have been suggested in the report and these will likely be taken up by government in due course.

> "…employers should ensure that their approach to atypical working is flexible…

Retailers who use zero-hours contracts should also be aware a new right is being introduced for workers and agency workers to request more predictable terms and conditions and conditions of work, under the Workers (Predictable Terms and Conditions) Bill 2022-23. There is no implementation date for this change at present.

What should retailers do to prepare?

Retailers should keep a watching brief on the progress through parliament of legislation which will make the right to request flexible working a 'day one' right, along with the promised associated guidance and changes to the right to request procedure. The progress of the Bill introducing the right to request a more stable contract should also be tracked. It is important, however, to remember that both these reforms only confer a right to request; not a right to be granted flexible work or a more stable contract.

Unless retailers' flexible working policies and procedures already encompass the new rights and procedures outlined above, employment documentation will need to be updated in line with the new requirements.

Given that the onus on employees to explain how the proposed new working pattern can be accommodate is being removed, employers will need to consider this point, in consultation with the employee in question. It may be that retailers will see an increase in requests to work flexibly once the new legislation is in place, alongside requests for more conventional working arrangements under the new provisions for agency workers and zero-hours workers.

Any retailers who are considering cross-border remote working should review the OTS report outlined above, as this will likely form the basis for future reform.

During 2023, retailers will need to be aware of the 'double-edged' sword of flexible, remote and hybrid working i.e. the potential impact of atypical working patterns on equalities, promotion, equal pay, wellbeing and burnout. In order to deal with these challenges, employers should ensure that their approach to atypical working is flexible, undertaken with an understanding of the impact of policies on the workforce and with support for employees' wellbeing being prioritised.

Employment contracts and pay

Impact M

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What's changing?

As we highlighted in our last Retail Risk Report, the government rejected calls for the practice of dismissal and re-engagement of employees to be banned and has instead opted to introduce a new statutory Code of Practice. This was in response to widespread press and public criticism of 'fire and re-hire' practices in the wake of mass P&O redundancies. The government has now published a consultation on a draft statutory Code of Practice on employers' responsibilities when seeking to change employees' terms and conditions. The consultation closes on 18 April 2023.

The landmark holiday pay case of *Agnew v the Police Service of Northern Ireland (PSNI)* was heard by the Supreme Court on 14 and 15 December 2022 and a decision is awaited. If the Supreme Court finds against the PSNI, this could result in significantly higher holiday pay costs, including backpay, for employers in Northern Ireland. There may also be indirect ramifications for employers in Great Britain in terms of existing holiday pay caselaw being thrown into doubt – in particular, the concept that a 'series' of deductions for underpayment of holiday pay purposes is broken if there is a break of more than 3 months between underpayments.

The government has confirmed that it does not intend to introduce mandatory ethnicity pay gap reporting or disability pay gap reporting. However, employers who voluntarily choose to report their ethnicity pay figures will be required to publish a diagnosis and action plan alongside their published figures. The timescale for legislation enacting this requirement has not been announced. Guidance for employers on voluntary reporting has also been promised, but no timescale has been announced.

What should retailers do to prepare?

Retailers should review the draft Code of Practice outlined above and check the extent to which it would impact on policies and procedures, before the final Code is approved. Note, however, that the new Code's requirements mirror existing good employment practice – for example, undertaking fair and transparent consultation on proposed changes, in good time before the changes take effect and giving consideration to representations made by employees. Retailers should also note that an unreasonable failure to comply with the Code will mean a 25% uplift on any compensation payable.

Retailers in Northern Ireland will need to keep abreast of the outcome of the Supreme Court hearing in *Agnew v PSNI* in December 2022. There is no timescale for publication of the Court's judgment at the time of writing, but it is likely to be some months following the hearing. Increased holiday pay costs could be on their way for Northern Irish retailers. GB retailers may also want to keep developments in relation to the Agnew decision under review, considering its possible wider ramifications.

> "...employers who voluntarily choose to report their ethnicity pay figures will be required to publish a diagnosis and action plan alongside their published figures.

Although the government has announced that it will not make it a legal requirement to publish disability or ethnicity pay gap data for the foreseeable future, retailers may wish to undertake voluntarily reporting. Retailers will need to remember that any voluntary reporting of ethnicity pay gap data will be subject to the additional reporting requirements outlined above, once the relevant legislation is in place. Analysis of data gathered will, therefore, need to commence before the legislation takes effect.

Workplace equalities and inclusion

Impact M

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What's changing?

Reform of the Human Rights Act 1998 was halted during 2022, but it is now back on the legislative agenda. The Bill of Rights 2022–2023 will be making its way through parliament during 2023, but no premise timescales have been published. If enacted, the Bill would give greater priority to domestic case law and loosen the requirement to interpret UK legislation in line with Convention rights.

Separately, legislation will be passed implementing a new duty on employers to:

- take proactive steps to prevent sexual harassment, and
- prevent third-party harassment in the workplace.

The detail of the new obligation to prevent third-party harassment is still awaited but it will likely cover harassment of retail employees by customers, as well as other third-parties such as external contractors and suppliers.

These changes to sexual harassment legislation will be introduced under the Workplace Protection (Amendment of Equality Act 2010) Bill, but a date for implementation is not yet known. However, it is expected that in the second half of 2023, the government will convert the non-statutory, technical guidance on preventing sexual harassment into a statutory code (meaning that an Employment Tribunal would be legally required to take the code into account when deciding relevant cases).

The government is supporting legislation which will extend redundancy protection to cover the period after the return to work, for employees who have taken maternity, adoption and shared parental leave. The extended period of protection is likely to be six months after the return to work. In addition, five days of unpaid carer's leave will be available to employees with dependants, and the government will introduce a new a new right to neonatal leave and pay. This will provide new rights to paid time off to parents whose babies require treatment in neonatal care units. Private members bills introducing these changes are being backed by the government and will pass through parliament during 2023, but there is no timescale for full implementation available yet; it may be that these changes will not come into effect until 2024.

> "The government is supporting legislation which will extend redundancy protection to cover the period after the return to work, for employees who have taken maternity, adoption and shared parental leave.

What should retailers do to prepare?

Retailers should keep a watching brief on the Bill of Rights 2022–2023 as it progresses through parliament.

The new proactive duty on employers to prevent sexual harassment at work (rather than relying solely on reactive complaints by employees) will be based on the technical guidance published by the Equality and Human Rights Commission in January 2020. Retailers should review this guidance ahead of the new duty coming into force, to understand what further steps may need to be taken in order to adopt a proactive approach to preventing sexual harassment. This will then need to be reviewed again when further guidance is published.

Retailers will also need to start preparing for the introduction of protection from third-party harassment. Again, the detail of the new obligations is awaited, but the government has proposed that there will be a defence if "all reasonable steps" are taken to prevent the harassment taking place. The technical guidance referenced above would be a good reference point for understanding what steps employers can take to prevent third harassment – ahead of this becoming a specific legal obligation – and as a matter of good practice.

Retailers will also need to keep track of the progress of the family-friendly reforms outlined above, and amend or introduce relevant policies and procedures in line with the requirements of the new legislation.

International data transfers

Impact H

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What's changing?

Following the judgment of the Court of Justice of the European Union (CJEU) in the Schrems II case in July 2020, there have been several developments on the legal requirements surrounding international data transfers over the last couple of years.

In 2021, the EU released revised sets of standard contractual clauses for overseas data transfers (SCCs), as the previous versions were very out of date. The European Data Protection Board (EDPB) also published recommendations on supplementary measures that may be required in accordance with the Schrems II judgment (Recommendations).

The Information Commissioner's Office (ICO) subsequently produced an international data transfer agreement (IDTA), the UK's own version of the SCCs, together with a UK addendum to the EU's SCCs, both of which came into effect on 21 March 2022. The ICO also published updates to its guidance on international transfers in November 2022, which includes a new section on transfer risk assessments (TRAs) and a TRA tool. It views its TRA guidance as an alternative approach to the one put forward by the EDPB.

The IDTA is more user-friendly than the EU SCCs and doesn't follow the same "modular" approach as the EU SCCs. It is generally more flexible, in key areas such as obligations relating to third party access to personal data. The UK addendum is particularly useful to multinational companies as it can be attached to the EU SCCs to make them work for transfers subject to the UK GDPR. This will remove the need for two separate sets of clauses covering transfers subject to the UK GDPR and those subject to the EU GDPR. The TRA tool performs a similar role to the EDPB Recommendations but is, again, more user-friendly and pragmatic.

> For existing contracts involving international transfers from the UK, retailers have until 21 March 2024 to incorporate the UK IDTA (or the UK addendum, as appropriate.

What should retailers do to prepare?

The deadline for replacing existing SCCs with the new EU SCCs has now passed for transfers of personal data subject to the EU GDPR.

For existing contracts involving international transfers from the UK, retailers have until 21 March 2024 to incorporate the UK IDTA (or the UK addendum, as appropriate). Remediation work should now be underway, subject to the caveat that further guidance is still awaited from the ICO on using the IDTA and the UK addendum.

If they have not already done so, retailers should complete transfer risk assessments for overseas transfers, focussing on the most common jurisdictions and highest-risk transfers as a priority, and identify any supplementary measures that need to be implemented in accordance with the Recommendations and/or the ICO's transfer risk assessment tool, as applicable.

Data Protection and Digital Information Bill

Impact M

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What's changing?

Following a government consultation on reforming the UK's data protection laws in 2021, the Data Protection and Digital Information Bill was first introduced last summer. It proposed to amend the existing UK General Data Protection Regulation and Data Protection Act 2018. Progress stalled in September 2022, however, to allow ministers to consider the legislation further. An updated Data Protection and Digital Information (No.2) Bill was introduced into parliament by the Department for Science, Innovation and Technology (DSIT) on 8 March 2023, with the intention of improving upon the reforms suggested in the first Bill.

The DSIT announced that the new law will "introduce a simple, clear and business-friendly framework that will not be difficult or costly to implement – taking the best elements of GDPR and providing businesses with more flexibility about how they comply with the new data law". The Bill aims to tread a careful line between creating a simpler data regime for the UK post-Brexit, while at the same time ensuring that such a new regime maintains data adequacy with the EU, as well as wider international confidence in the UK's data protection standards.

Some of the key proposed changes to the current regime include:

- **Legitimate interests:** the Bill introduces a list of "recognised legitimate interests" as a basis for processing data. An organisation will not have to carry out 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);
- **Senior Responsible Individual:** the role of the Data Protection Officer will be replaced with that of the 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 Bill also expressly states that the SRI can have another role within the organisation;
- **Cookies:** the Bill updates the Privacy and Electronic Communications Regulations 2003 to cut down 'user consent' pop-ups and banners;
- **Automated decision making and AI:** the Bill aims to clarify the rules around automated decision-making and profiling to make it easier for organisations to rely on AI technologies;
- **Reducing paperwork:** only organisations whose processing activities are likely to pose high risks to individual's rights and freedoms will need to keep processing records.

> "
> The DSIT announced that the new law will "introduce a simple, clear and business-friendly framework that will not be difficult or costly to implement…

What should retailers do to prepare?

It remains to be seen whether the Bill will achieve the government's goal of saving British businesses more than £4 billion over the next 10 years. In practice, retailers will be able to continue with their current level of compliance without making any significant changes as a result of the Bill.

The Bill does not propose any significant changes to the international transfers regime and in fact, the Bill makes it clear that alternative transfer mechanisms entered into before the new law comes into force will continue to be valid.

As the revised Bill has only just been reintroduced into the House of Commons, it is too early to say whether it will be amended further. Retailers should monitor the progress of the Bill through parliament during the course of 2023 and TLT will be providing regular commentary on developments.

AI regulation in the UK

Impact L

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What's changing?

Following the government's **policy paper** last July, the government has now confirmed its plans to implement a pro-innovation approach to the regulation of AI in a new **white paper**, published on 29 March. The white paper confirms that the new AI regulatory framework will be be risk based but flexible, and it sets out horizontal principles for specific regulators to subsequently implement vertically within the regulator's remit – a key difference when compared to the approach taken by the EU. The principles will not be put on a statutory footing initially, but following a period of implementation, the government anticipates introducing a statutory duty on regulators to have due regard to the principles.

Currently, AI is partially regulated through a collage of legal and regulatory requirements that have been designed for other purposes. This includes specific requirements under UK data protection law surrounding automated decision-making and the broader processing of personal data (which covers processing for the purpose of developing and training AI technologies).

> "...ensure that data protection impact assessments are carried out in relation to any new AI tools the business is looking to implement.

Arguably, the most significant proposal to achieve the government's goal to "unleash" innovation is included in the Data Protection and Digital Information Bill (published originally alongside the policy paper last July, and then in an updated form in March), namely the proposed amendments to Article 22 of the UK GDPR. Currently, Article 22 restricts solely-automated decisions to three circumstances, namely:

- where it is necessary for entering into or performing a contract between a controller and data subject;
- where such activity is required or authorised by law; and
- where a data subject has provided explicit consent.

The updated article proposed by the Bill does not restrict automated decision-making to those three circumstances, making it easier for organisations to implement AI into their processes, potentially driving efficiencies in service delivery. However, the safeguards and rights of data subjects have been made more explicit.

What should retailers do to prepare?

Whilst the development and fast-paced nature of AI can pose inevitable related risks, the government intends to take a far less prescriptive approach to address potential risks when compared to how other countries are looking to regulate AI. The risk-based AI regulatory framework proposed by the European Commission sets out four levels of risk in AI, which again highlights the potential disparity between approaches in the UK and the EU.

However, it is worth noting that action is already actively being taken by various organisations to support the responsible use of AI. This includes publications by the Centre for Data Ethics and Innovation and the Equality and Human Rights Commission. The ICO has also taken steps to provide **guidance** on the use of AI and data protection, including its most recent update which clarifies the requirements for fairness in AI. It will be interesting to see how new data legislation and other guidance/ policy documents on AI regulatory reform overlap (or in fact differ) in their approaches to AI reform.

Retailers should closely follow developments on data protection reforms, while continuing to be aware of and comply with their GDPR obligations in connection with the use of AI systems. They should, in particular, ensure that data protection impact assessments are carried out in relation to any new AI tools the business is looking to implement.

Direct marketing and adtech

Impact M

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What's changing?

In December 2022, the Information Commissioner's Office (ICO) published new detailed guidance on direct marketing (the Guidance), which is accompanied by various helpful resources, including checklists, FAQs, and an online training module. It also includes specific guidance for SMEs, B2B marketing, data brokers, political campaigning, and direct marketing in the public sector.

In 2020, the ICO consulted on and produced a draft Direct Marketing Code of Practice (the Code) in order to provide practical guidance and promote good practice in regard to processing for direct marketing purposes. The Code differs from the Guidance in that it has statutory force, which means that the ICO must take it into account when deciding whether to take enforcement action and, if so, what action is appropriate. The Code is yet to be finalised, which is likely due to the delay in the proposed Data Protection and Digital Information Bill making its way through Parliament. The Guidance acts as a useful interim measure and an important tool which businesses can utilise to tackle various issues when navigating their direct marketing practices.

The Guidance re-emphasises a number of principles that have been embedded in ICO direct marketing guidance for a long time, such as the requirement for a lawful basis for direct marketing (likely to be either consent or legitimate interests), how to conduct email marketing, automated calls, and service messages vs marketing messages.

The Guidance also delves into more detail on certain areas of compliance, including some "newer" aspects. For example:

- it highlights the UK GDPR's principle of accountability and the need for data protection by design to be built into direct marketing practices;
- it requires due diligence to be carried out in respect of profiling and data enrichment activities, and stresses the importance of transparency to address the potential intrusive nature of such marketing, particularly where it involves special category data;
- it contains some useful guidance on how long marketing consents last and emphasises that businesses must make sure consent was validly given even if it was provided via a third party; and
- it includes various sections dedicated to some of the more innovative ways of direct marketing, such as custom and lookalike audiences, emphasising that it is particularly important to be transparent with individuals about how their personal data is used for marketing purposes in this context and how they are being targeted.

Additionally, in November 2021, as part of its ongoing investigation into advertising technology (adtech), the ICO published an opinion on data protection and privacy expectations for online advertising proposals (Opinion). The Opinion sets out the standards that companies must meet to safeguard privacy online when developing adtech and warns against the excessive collection and use of people's data.

What should retailers do to prepare?

The Guidance is a welcome piece of guidance for businesses, particularly for those using social media advertising and new technologies for direct marketing purposes. It does not include the same level of detail as the draft Code and does not delve into some of the "knottier" issues that can arise, but is a helpful and user-friendly resource.

The Code will likely build upon the Guidance, so we recommend all retailers carefully consider its contents (along with the Code once it is finalised), review their direct marketing practices across their business and implement any changes needed to ensure compliance.

Retailers should also review their online and targeted advertising activities, as well as all arrangements with third parties for data enrichment. Although a variety of legal proposals are still under development to address cookies and similar technologies, the Opinion makes it clear that the use of intrusive online tracking practices needs to change now.

The principles of data protection by design and by default already apply and retailers should ensure that these are built into any new adtech initiatives. In particular, the ICO expects companies designing new digital advertising technologies to offer people the ability to receive ads without tracking, profiling or targeting based on excessive collection of personal information. Where people choose to share their data, all companies within the adtech supply chain must ensure there is meaningful accountability, and give people control over their data and the ability to exercise their information rights. Retailers should therefore make sure that, when they are undertaking new adtech projects, they carry out diligence into proposals offered by providers and closely examine the supply chain to ensure that the proposals meet the ICO's requirements.

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Buy now pay later

Impact M

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What's changing?

In 2021, the Financial Conduct Authority (FCA) published the Woolard review which expressed concerns regarding the burgeoning 'buy now pay later' (BNPL) market. An initial consultation followed, and the government confirmed its intention to regulate BNPL products in June 2022. A further **consultation** was published on 14 February 2023, alongside draft legislation which covers the scope of regulation, anti-avoidance measures, regulatory controls and transitional arrangements for BNPL providers.

> "…the government has decided that regulation will be limited to agreements that are offered by third party lenders.

While some elements may still be subject to change, certain key points affecting retailers are (in summary) as follows:

- **Scope:** the government has decided that regulation will be limited to agreements that are offered by third party lenders. Agreements directly between retailers and their customers, such as one off in-store purchases and trade credit agreements, have been excluded from regulation.
- **Credit broking:** retailers (with some exceptions) will not need to become authorised credit brokers. Such a requirement would have carried a significant cost for retailers, so this will be a welcome development.
- **Advertising and promotions:** advertising and promotions of newly regulated agreements will fall within the FCA's financial promotion regime as well as being monitored by the ASA. In practice, the government's intention is that retailers will be provided with pre-approved material from their lending partners.
- **Pre-contractual requirements:** the prescriptive pre-contractual disclosure requirements in the Consumer Credit Act 1974 will be disapplied in favour of FCA rules, on the grounds of proportionality.

What should retailers do to prepare?

Our recent report **'Retail Agility: Virtual World Order'** set out the results of our research among the UK's top 100 retailers into the impact of digitalisation on different payment methods, including the growth of BNPL. Despite the risks, more retailers are planning to offer BNPL in the future (58%) than currently do today (42%) in order to make products more affordable, but also to stay relevant as more people look for this option and the apps evolve into marketplaces in themselves. The majority (59%) of retailers also believe BNPL should be better regulated.

It is obviously good news for retailers that the BNPL lending which they provide themselves will not be regulated under the current proposals. However, it remains to be seen whether tighter controls and restrictions on BNPL lending by third party lenders could impact sales or whether the additional statutory protection for consumers could make BNPL a more attractive customer offering.

Prudent retailers should keep a close eye on developments following the latest consultation and consider the role that BNPL plays in their long-term strategy, and the potential impact of tighter regulatory measures on their sales and business models.

The Modern Slavery Act 2015: reporting requirements

Impact H

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In 2015, the UK coalition government introduced the Modern Slavery Act 2015 (the "Act"). Recognised at the time as a landmark piece of legislation, the Act was the UK's first legislative attempt at combatting crimes of slavery and human trafficking.

A key feature of the Act was a new requirement for commercial organisations with a global turnover above £36 million to publish a slavery and human trafficking statement each financial year.

The statement must disclose what steps the organisation has taken to ensure that human trafficking is not taking place in any of its supply chains or its business, or state that it has taken no such steps. The aim is to ensure that businesses are transparent about what they are doing to tackle modern slavery and human trafficking.

At present, although businesses could face commercial and reputational consequences for non-compliance with the modern slavery reporting provisions in the Act, there is no provision for monetary penalties to be imposed in the event of a breach.

As such, the current position on enforcement has attracted criticism for lacking teeth and calls for reform to the Act have grown significantly over the years.

What's changing?

It is against this backdrop that the government has proposed amendments to the Act, first in response to the transparency in supply chains consultation published in September 2020, and more recently in the Queen's Speech on 10 May 2022.

The Queen's Speech outlined the government's legislative plans to introduce a Modern Slavery Bill during this parliamentary session. The purpose of the Bill is stated to be to strengthen the protection and support for victims of human trafficking and modern slavery and increase accountability of companies and other organisations to drive out modern slavery from their supply chains.

> "The purpose of the Bill is stated to be to strengthen the protection and support for victims of human trafficking and modern slavery…

This announcement came just a month before the publication of the FRC's report into modern slavery reporting practices in the UK. The report found that around one in ten companies did not provide a modern slavery statement at all and, where companies did comply, only one third of modern slavery statements were considered clear and easy to read. The majority of statements were fragmented, lacking a clear focus or narrative, or were unduly complicated.

Details of the Bill have not yet been published, but the announcement is consistent with the government's response to a consultation exercise on changes to the Modern Slavery Act 2015's transparency in supply chain provisions.

The proposed changes are expected to include:

- **Extending the modern slavery statement publication requirements to public bodies with a budget threshold of over £36 million.**

  While public sector bodies currently report on a voluntary basis, the government proposes extending the mandatory reporting requirements to public bodies that have a budget threshold of £36 million or more.

- **Requiring organisations to cover specific reporting topics in their statements.**

  The government has committed to mandating the principle areas that must be covered by modern slavery statements, effectively turning the previous guidance into a requirement. This means that companies and organisations reporting under Section 54 will have to include the following in their modern slavery statements:

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

- **Requiring organisations to submit their statement to the government modern slavery statement registry.**

  The government launched the modern slavery statement registry in March 2021. The Registry is designed to make it easier for consumers and investors to search for statements, and to compare the actions that businesses subject to the requirements are taking to identify and address the risks of modern slavery in their operations and supply chains. Publication in the registry is currently voluntary, but the government intends to legislate for mandatory reporting under the planned changes to the regime.

- **Setting a single reporting deadline of 30 September by which statements should be published annually.**

  This would require all organisations to report on the same 12-month period from April to March, effectively giving companies six months to prepare their statements.

- **Introducing stricter penalties for organisations which fail to meet their statutory obligations to produce annual modern slavery statements.**

  The government has also committed to setting up or assigning a new single enforcement body to combat modern slavery, enforce employment rights and protect agency works. The new enforcement body will have the power to impose financial (civil) penalties for non-compliance with the updated modern slavery statement reporting requirements (as described above).

The planned changes should raise the bar on modern slavery reporting and help ensure that best practice becomes firmly embedded. The move also reflects the changes internationally in human rights legislation which are increasingly mandating companies to conduct human rights due diligence throughout their operations.

What should retailers do to prepare?

Companies in the scope of the UK modern slavery reporting requirements are urged to start planning for the future changes to modern slavery reporting requirements. Whilst the changes will not come into force until the necessary legislation is passed, there are steps that companies can be taking now to prepare:

- Review the company's current statement against the mandatory requirements to identify the gaps and plan how these can be addressed;
- Carry out a review of modern slavery statements and guidance to identify what would be considered best practice and how this could be adopted within the company;
- Carry out a gap analysis of existing policies and procedures to assess whether they meet the proposed enhanced requirements and to identify any areas for improvement in the company's governance and management of modern slavery; and
- Become comfortable with use of the new modern slavery statement registry. Companies are encouraged to use this portal before it becomes mandatory.

CMA's new consumer law enforcement powers

Impact H

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What's changing?

In its response to the wide-ranging consultation on refreshing the UK's consumer and competition regulatory landscape, the government announced (in April) that businesses that breach UK consumer protection laws could face administrative fines of up to 10% of global turnover. The changes are due to be implemented via the Digital Markets, Competition and Consumer Bill, which is expected to be tabled in draft form in Spring 2023.

Currently, a company that has engaged in unfair commercial practices vis-à-vis consumers may find itself investigated by the CMA – but the CMA has, until now, lacked the statutory powers to impose fines. The new regime will bring the CMA's consumer law enforcement powers in line with its much more punitive competition law enforcement toolkit. What this means in practice is that after the CMA has conducted its own investigation and satisfied itself that a consumer law breach has occurred, it can unilaterally impose a penalty of up to 10% of global turnover without going to court. The CMA will additionally be handed the power to impose fines up to 1% of global turnover on businesses that fail to comply (even in part) with CMA information requests during investigations.

What should retailers do to prepare?

While the full extent of commercial practices that are within scope of the CMA's fining powers is not yet set in stone, retailers should start the process of reviewing their policies and standard terms and conditions to satisfy themselves that they are not at risk.

Businesses do not necessarily need to have knowingly engaged in underhand tactics to fall foul of consumer protection laws. For example, the CMA has shown a willingness to take enforcement action on the highly subjective basis that businesses have failed to act in accordance with "professional diligence" in relation to their customers – which is sometimes referred to as a form of "duty of care" owed by businesses to consumers. The CMA certainly considers its powers under the CPRs to extend to the general fair treatment of existing customers, not just overtly misleading sales activities used to attract new ones.

This could be relevant in terms of a number of developing areas the CMA is currently investigating, including online choice architecture, misleading pricing practices and its focus on auto-renewal and "subscription traps".

Government to legislate on subscription contracts and auto-renewal

Impact M

To empower consumers, increase their confidence, and facilitate further market growth, the government is making changes to subscriptions rules.
The Digital Markets, Competition and Consumer Bill will:

- **Clarify and enhance existing pre-contract information requirements for subscription contracts**
- **Introduce a specific requirement on traders to send reminders to consumers before a contract rolls over (or auto-renews) onto a new term**
- **Create a specific obligation requiring traders to remind consumers that a free trial or low-cost introductory offer is coming to an end**
- **Create a specific requirement for traders to ensure their consumers are able to exit a contract in a straightforward and timely way**

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New sentencing guidelines for underage sale of knives

Impact M

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What's changing?

On 15 February 2023, the Sentencing Council published two guidelines for sentencing retailers convicted of selling knives to children in England and Wales. The two guidelines, which will come into effect on 1 April 2023, apply to organisations and individuals who fail to ensure that adequate safeguards are in place to prevent the sale of knives to under 18s either in-store or online. Previously, there were no sentencing guidelines for this offence which carries an unlimited fine. Under the new guidelines for organisations, a range of fines from £500 to £1 million have been introduced with fines linked to turnover to make penalties proportionate to the size of the organisation. As a result, it is apparent that large organisations will see significantly higher fines under the new guidelines.

What should retailers do to prepare?

In order to reduce the risk of committing an offence, retailers should:

- train and monitor staff to ensure they follow age verification checks and other safeguards put in place by the business;
- keep and maintain a refusal register to demonstrate underage sales are actively refused;
- remind their staff of their responsibility to not make an underage sale by till prompts (if electronic tills are used); and
- display posters where the knives are kept and add warning stickers to the knife packaging.

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> …large organisations could see significantly higher fines under these new proposals.

These systems should be regularly monitored and updated as necessary to identify and rectify any problems or weaknesses, as well as keep pace with any advances in technology.

VABEO – dual distribution for retailers

Impact M

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What's changing?

On 1 June 2022, competition rules governing "vertical agreements" were updated at both UK and EU level. In the EU, a new version of the Vertical Agreements Block Exemption Regulation (VBER) came into force while the UK (post-Brexit) adopted a new (similar but not identical) Vertical Agreements Block Exemption Order (VABEO). The rules across the UK and EU remain largely aligned, both in terms of the text and the underlying guidance from the Competition and Markets Authority (CMA) and European Commission.

In both cases, the new regimes codify certain existing case law principles and clarify previous areas of ambiguity, although the VABEO is stricter in its treatment of certain types of clause, for example, categorising certain types of price parity clause as "hardcore" (see below) whereas the EU instrument indicates that their effects should be examined before any adverse conclusions are drawn.

However, the core structure of the VBER and VABEO (including the market share thresholds) has been maintained so that, under both sets of rules, agreements between parties who have market shares of 30% or less in the relevant markets will benefit from a block exemption, provided that any such agreement does not contain restrictions generally deemed so harmful to competition that they remove the entire agreement from the exemption's safe-harbour (so-called "hardcore restrictions").

One notable area of development for retailers at UK and EU level is dual distribution. With the huge expansion of e-retailing since the VBER rules were last updated, manufacturers now increasingly operate in direct competition with their own distributors when selling directly to end consumers online (i.e. via their own websites). The CMA's main concern with this kind of distribution model is that it could facilitate anti-competitive information exchange that distorts competition at the retail level of supply.

Helpfully, the VABEO and accompanying CMA guidelines have been drafted to help businesses determine whether their potential dual distribution arrangements give rise to particular information exchange risks that fall outside the block exemption, which in turn informs how those risks might be managed. Any information exchange must be i) strictly limited to the requirements of the "vertical" relationship between the parties and ii) serve a legitimate, contextual commercial purpose, so as not to infringe the Chapter 1 prohibition. The CMA (UK) and Commission (EU) guidelines provide non-exhaustive examples of such information, and procedural safeguards to facilitate compliant exchange.

One key difference between the two regimes is that the VABEO stops short of carving out online intermediary services from the exemption it offers (unlike the VBER). This means that, in principle at least, there is greater flexibility for hybrid "online" platforms in the UK that both act as intermediaries and sell products/services in direct competition with suppliers who use the platform (despite Commission guidelines suggesting that the horizontal risks to competition from this type of arrangement are too great to merit any kind of automatic safe harbour). However, it's important to note that the CMA is alive to these issues, which it is considering as part of its ongoing investigation into **Amazon Marketplace**.

> "The CMA's main concern with [dual-distribution] kind of distribution model is that it could facilitate anti-competitive information exchange that distorts competition at the retail level of supply.

What should retailers do to prepare?

We recommend that UK retailers reflect on the commercial dealings they have with manufacturers who also compete at the retail level of supply to ensure that adequate safeguards are in place to address any risks associated with the potential disclosure of competitively sensitive information, for example the sharing of future pricing information or certain customer-specific information. The CMA and Commission guidelines provide some helpful practical guidance.

In some cases it may be necessary to provide staff training on the risks and, in instances where the exchange of potentially harmful commercially sensitive information is unavoidable, IT solutions such as information barriers may need to be implemented.

Corporate transparency

Impact M

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What's changing?

To address concerns about the misuse of UK corporate entities and criticisms about the accuracy of Companies House information, the UK government has introduced **The Economic Crime and Corporate Transparency Bill** setting out the following key proposals:

- New and existing directors (and equivalents for other UK entity types) and "persons with significant control" (PSCs) will have to verify their identity with Companies House. This requirement may also extend to non-UK companies with an "establishment" in the UK;
- Corporate entities will be permitted to be directors of a UK company if they are incorporated in the UK themselves and have only natural persons on their own boards;
- There can be only one "layer" of corporate director. Multiple corporate directors running up and down groups of companies will not be permitted;
- Anyone seeking to make filings on behalf of a UK entity must first be authorised by Companies House;
- Full names of shareholders, subscribers and members must be noted in a company's statutory registers (not abbreviations);
- Companies will no longer need to keep their own registers of directors, directors' residential addresses, secretaries and PSCs;
- Private companies (and certain traded companies) must provide a one-off shareholder list, which is annually updated;
- Accounts filed at Companies House must be fully tagged in iXBRL digital format;
- Filing options for small and micro companies are to be simplified;
- Companies must have an "appropriate" registered office address and e-mail address;
- Companies House to have broader powers to reject and query information being filed, review and change company names and registered office addresses and remove material which impacts the integrity of the public register;
- Companies House to have greater powers to check that certain exemptions/claims to eligibility are valid e.g. PSC exemptions and accounting category eligibility (including for dormant entities);
- Companies House to be able to cross reference and share information more widely with other government/public bodies to identify discrepancies and economic crime; and
- Individuals will be able to ask for additional personal information to be suppressed from the Companies House public record e.g. signatures, full dates of birth, former names and residential addresses.

Sanctions for breach are expected to be varied but, in certain circumstances, will include criminal liability as well as civil penalties. These could attach to relevant individuals, as well as the UK entity involved.

> "Retailers should work through their group structure to identify any corporate directorships and map out changes to these that might be required.

What should retailers do to prepare?

Keep an eye on developments – the Bill is being reviewed by members of parliament and amendments may be made. The timing for implementation is not known. The summary above focuses on what we have identified as key features of the planned regime but much more is covered in **this** TLT insight, the **Bill** and these **Factsheets**, to which we recommend retailers refer.

Retailers should work through their group structure to identify any corporate directorships and map out changes to these that might be required. It would also be useful to prepare directors, PSCs and presenters for ID verification, consider how best to implement iXBRL digital formatting and "appropriate" addresses, and identify the exemption evidence and eligibility statements needed for any relevant companies.

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 2022 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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