Retail Risk Report

2020

Contents

Introduction

The TLT Retail Risk Report has returned for a fifth year, following the success of previous editions in helping retailers understand the legal and regulatory changes affecting the market for the year ahead and beyond.

Our retail specialists also share their advice on how to prepare for these changes and ways to reduce the risk to the business.

2020 will be another challenging year for retailers, with a number of high profile names succumbing to the tougher economic conditions that the sector is facing.

These tough economic conditions show little sign of letting up. The domestic political uncertainty which has dominated the last few years has now relented with the decisive general election result. However, the precise arrangements for the UK's departure from the European Union are not yet finalised. Our future trading arrangements with the European Union and the rest of the world will be shaped over the next few years.

In addition, 2020 will bring a number of domestic regulatory changes that are affecting the sector.

We have also seen the impact of Coronavirus on some sectors and the financial markets in 2020. The full impact on the retail sector remains to be seen. The UK has committed to achieving net zero carbon emissions by 2050 and we are starting to see regulatory change to this effect. New carbon reporting regulations intend to increase awareness among large organisations of energy costs and help reduce their impact on climate change. There will be additional requirements in relation to the reporting of carbon emissions, energy use and efficiency.

An increasing awareness of the impact of plastic waste upon the environment has led to a number of initiatives to improve the ability to recycle and re-use plastic. Although some progress has been made by retailers, this has been voluntary and slow so regulation is on the horizon in the form of a Plastic Packaging Tax. The focus on sustainability will also see a switch to electric vehicles with the Government setting a target of 70% of new car sales in the ultra-low emissions category by 2030.

UK consumer online spending is set to increase in 2020 expecting to reach £48bn. This has led to an increased focus on the digital space. Tighter consumer legislation is on the way through the EU's "new deal" for consumers focusing on online consumer rights. The CMA has also launched a study into online platforms and digital advertising in the UK setting out how it plans to foster innovation while protecting consumers in the rapidly developing digital economy.

Although these are 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 that 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.

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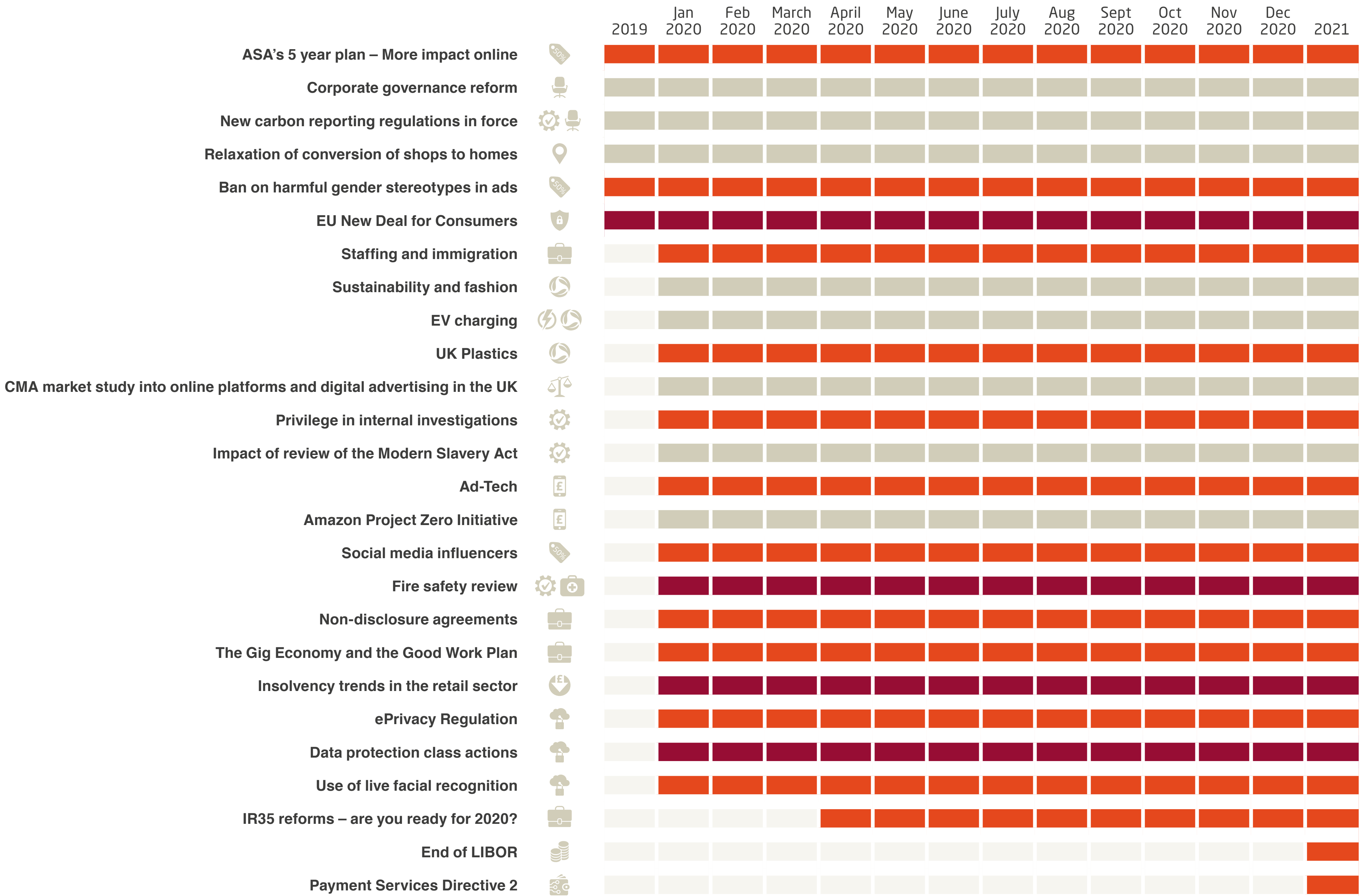
Retail regulatory timeline 2020

Click on the linked headings below to find out more about each change

High risk | Medium risk | Low risk



ASA's 5 year plan - More impact online

2019 onwards | Advertising 50% | Impact on retailers M

What's changing?

The Advertising Standards Authority are now part way through their 5 year strategy which is entitled "More Impact Online". The strategy sets out a clear focus and commitment to strengthening further regulation of online adverts including exploring the use of machine learning in regulation.

The reason for the focus on online advertising is simple – 88% of the ASAs workload relates to online ads.

Highlights of the strategy are as follows:

- The ASA will prioritise protection of vulnerable people limiting children and young people's exposure to age restricted ads for particular food types, alcohol and gambling
- The ASA will monitor in new ways including research, data-driven intelligence gathering and machine learning to find out which other advertising-related issues are the most important to tackle
- Thought-leadership in online ad regulation will be developed, including on advertising content and targeting issues relating to areas like voice, facial recognition, machine-generated personalised content and biometrics
- The ASA are exploring lighter-touch ways for people to flag concerns

As an example of the strategy in action the ASA have recently launched a campaign around Botox advertising. Guidance has been issued in conjunction with the Medicines and Healthcare products Regulatory Agency about the advertising of botox on social media channels. The Committee of Advertising Practice has also issued an enforcement notice that they will be taking action in this area of illegal advertising. The ASA is working closely with Facebook to identify non-compliant adverts and remove them.

What should retailers do to prepare?

Retailers will need to keep abreast of changes in the way in which online ads are regulated by the ASA but also around how complaints are dealt with. Having compliant advertising in the first place will reduce the risk of complaints but having a strategy to deal with complaints arising will also be important in managing the risk of further action being taken.

'The ASA is working closely with Facebook to identify non-compliant adverts and remove them.'

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Corporate Governance Reform

2019 onwards | Corporate | Impact on retailers L

What's changing?

"Large" companies have, for financial years beginning on or after 1 January 2019, an obligation to disclose in their strategic report (and publish on their website) if they apply a corporate governance code and how they comply with or depart (with reasons why) from that code. If they don't apply a code, their report must explain why not and the governance arrangements implemented instead.

For companies who adopt the Quoted Companies Alliance (QCA) code, an updated version of their Audit Committee Guide has been published. Some of its key recommendations are summarised below.

- **Effective audit committee**
  The Guide recommends an appropriate balance of skills and experience on an audit committee, with at least one member having recent financial experience. It suggests that committees are made up of at least two independent non-executive directors.
- **Committee roles and responsibilities**
  The Guide expands on the roles of the members of the audit committee, particularly the chair. The chair should work closely with the company's finance director and company secretary, however it is not advised that they form part of the committee. Unless impractical, the person serving as company secretary should not also be the finance director. The Guide recommends that Terms of Reference for the committee are reviewed at least annually.
- **Risk management and internal controls**
  The Guide focuses on implementing appropriate internal controls and a system of risk management. Businesses are encouraged to develop their own approach to risk management, embedded in day-to-day management and decision making practices.

  Identification, assessment and monitoring of risks and controls should not be treated as a one-off or annual exercise, but carried out regularly as an ongoing process.
- **Relationship with external auditors**
  There is guidance on the appointment of external auditors, particularly their terms of engagement and fees, auditor independence and tendering (including frequency).
- **Audit committee report**
  The audit committee report within a company's annual report and accounts should be clear and concise – articulating the steps taken by the committee to fulfil its role (including addressing auditor rotation, appointment, tendering, the risk and control framework and internal assurance function).

Standard "boilerplate" text should be avoided, as well as information which is irrelevant or already detailed sufficiently elsewhere in the accounts.

What should retailers do to prepare?

If your company adopts the QCA Corporate Governance Code for its financial years beginning on or after 1 January 2019, you should review the current operations of your Audit Committee (including composition and terms of reference) and update its practice to address the new Guide.

'If they don't apply a code, their report must explain why not and the governance arrangements implemented instead.'

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New carbon reporting regulations in force

From April 2019 | Regulatory | Corporate Governance | Impact on retailers L

What's changing?

On 1 April 2019, the new Streamlined Energy and Carbon Reporting Policy (SECR) was implemented as the Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018 came into force. This introduced additional requirements in relation to the reporting of carbon emissions, energy use and efficiency by quoted companies, large unquoted companies and large limited liability partnerships (LLPs). This reporting takes place over a reporting period, which is 12 months, ideally tied to the organisation's financial year. It is intended increase awareness among large organisations of energy costs and help reduce their impact on climate change.

Large unquoted companies and large LLPs are most affected by the change and are defined as 'large' if they meet at least two of the following criteria:

- A turnover of £36 million or more;
- A balance sheet of £18 million or more; or
- 250 employees of more.

Any quoted companies, large unquoted companies or large LLPs which use less than 40MWh of energy during the reporting period can be exempt from the reporting requirements but need to confirm this in their Directors' Report. Unquoted companies which are not defined as 'large' are also encouraged to report but are not obliged to do so. Further to this, subsidiaries may be excluded where alone they do not meet the reporting threshold, however a subsidiary may not need to include the information in its Directors' Report if this has already been captured by the parent company group report.

What should retailers do to prepare?

If quoted, retailers will already be familiar with the reporting style and the SECR will not represent a radical departure from current practice. However, in addition to the previous requirements, quoted companies will now need to report their underlying global energy use for the current reporting year (and going forward a comparison with the previous SECR reporting year) and information about energy efficiency action taken in the financial year. For financial years starting after 1 April 2019, quoted companies will also need to state what proportion of their energy consumption and emissions related to emissions and energy consumption in the UK (including offshore area).

Large unquoted companies will need to include in their Director's Report UK energy use from electricity, gas and transport fuel and greenhouse gas emissions. Additionally, the reporting obligations require an 'intensity ratio' to be used. An 'intensity ratio' is an industry specific comparator which can be used to contextualise the figures, e.g. for Retail this is tonnes of CO2 per square metre of gross store area. This is then to be included in the Directors' Report for quoted and large unquoted companies and in the Energy and Carbon Report for large LLPs for the financial year. These requirements are in force from the financial year beginning 1 April 2019.

'If quoted, retailers will already be familiar with the reporting style and the SECR will not represent a radical departure from current practice.'

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Relaxation of conversion of shops to homes

May 2019 | Planning | Impact on retailers L

Changes to the planning controls on the high street

During the summer changes were made to what are known as permitted development rights. These are the rights that allow development to proceed without the need to submit an application for full planning permission. In this case the changes will allow a greater degree of flexibility of uses to which buildings on the high street can be put. Whether this is positive change depends on your point of view. It is likely to assist in reducing vacancies as landowners will be have a large pool of potential tenants. It could also lead to the further decline of the high street as a retail destination, as shops are converted to other uses.

The changes allow:

- shops, takeaways, betting offices, pay day loan shops and launderettes to be converted to offices (subject to prior approval)
- takeaways to be converted to residential (together with the building works reasonably necessary to allow that conversion)

The changes were not all relaxations. The summer also saw the removal of the right to install phone boxes on the high street, a change introduced because phone boxes had been increasingly used to circumvent the control of advertising.

> 'It could also lead to the further decline of the high street as a retail destination, as shops are converted to other uses.'

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Ban on harmful gender stereotypes in ads

From June 2019 | Advertising | Impact on retailers M

What's changing?

On 14 June 2019 this year, the CAP Code was amended to introduce a ban on marketing communications that include harmful or offensive gender stereotypes. The ASA has subsequently handed down Rulings against two advertisers (Volkswagon and Mondelez) which helps shed light on what types of gender stereotyping are likely to be deemed sufficiently harmful or offensive that they breach advertising rules.

In the first of the two cases, the ASA Council banned a Volkwagon eGolf ad that showed male characters in a number of uplifting, inspiration roles before ending with a prominent shot of a woman sitting on a bench next to a pram as the eGolf drives past. The ASA took issue with the juxtaposition between the male and female characters – with the female character shown in a traditional child-rearing role.

In the Mondelez Ruling, it was traditional male stereotypes that were under the spotlight. In the ad for Philadelphia, two fathers were shown accidentally leaving their children on food conveyor belts while they were distracted by an appetising selection of buffet food. The ASA took the view that the ad perpetuated harmful gender stereotypes because they suggested that men are typically incapable of taking care of their children.

The ASA Rulings prompted something of a backlash at the time, with critics saying the ASA have set the threshold for demonstrating "*harm*" and "*serious or widespread offence*" too low. Advertisers await further Rulings in this area with keen interest.

What should retailers do to prepare?

In order to stay on the right side of advertising rules and avoid negative headlines in the press, we advise that retailers consider the gender stereotyping risks at all stage of the advertising creative process. High risk concepts can often be identified at an early stage and dealt with before production costs have been incurred. Issues that come to light in the post-production stage can sometimes be mitigated with targeted edits.

As always, advertising agencies and marketing teams should ensure that their ads are critically reviewed by a "third pair of eyes" who are not involved in the creative design process.

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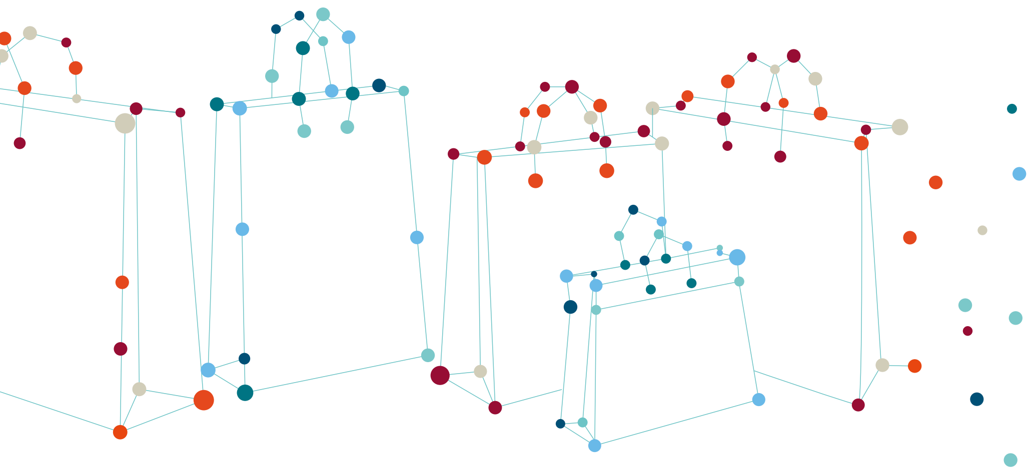

EU New Deal for Consumers

2020 onwards | Consumer protection | Impact on retailers: H

What's changing?

As mentioned in our last update, the European Commission presented its proposed 'New Deal for Consumers' in 2018 in response to the results of its 'Fitness Check on EU Consumer and Marketing Law'. The European Parliament and Council have now agreed the new Directive on better enforcement and modernisation of EU consumer protection rules.

The next step will be publication in the Official Journal after which the Directive will come into force 20 days later. Member States will have 24 months to adopt and publish the new measures.

The New Deal for Consumers aims to implement a number of the targeted amendments the Fitness Check proposed to certain areas of consumer protection. The changes include:

- Introducing financial penalties that are more proportionate and effective in order to tackle breaches of consumer laws. National authorities will be able to impose a fine of a minimum of 4% of a trader's annual turnover;
- Providing individual redress for consumers who have been harmed by unfair commercial practices;
- Providing more transparency for consumers in online transactions and making it easier for consumers to understand who their contracts are concluded with when making purchases online; and
- Extending certain consumer rights to contracts for online services where consumers provide data instead of paying with money.

The UK's departure from the EU has the potential to affect these proposals. There is however a chance that the UK will decide to adopt them to assist with the trade negotiations with the EU.

What should retailers do to prepare?

Retailers should be aware of developments in this area that could impact on their operations. While the measures are unlikely to apply for some time, financial penalties have the potential to be more serious under the new framework. It is therefore advisable to review compliance with consumer rights not only in respect of the upcoming changes but also existing agreements in place with consumers.

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Staffing and Immigration

2020 | Employment | Impact on retailers M

What's changing?

Leaving the European Union will result in the end of free movement of people as we know it – although not until the end of the transition period.

EU/EEA/Swiss nationals (and certain family members) who are resident in the UK by 31 December 2020 can apply for UK immigration status under the EU Settlement Scheme. The Scheme is intended to be user-friendly, aiming to grant UK immigration status where possible. The application process is simple and involves identity, residence and criminal record checks.

Depending on length of residence, applicants can either be granted "settled status" (permanent residence) or "pre-settled status" (time-limited residence that can be potentially converted to permanent residence at a later date). The Scheme has been open for nearly a year, with around 2.5 million people having already been granted status.

The position from 2021 onwards has yet to be definitively confirmed. The Government has stated that an "Australian-style" points-based system will be introduced, but these comments have yet to be expanded upon. The Migration Advisory Committee recently published its report on the potential use of a pointsbased system, but broadly recommended that the framework of the existing Tier 2 (General) system be retained. The MAC Report is advisory only, with proposals expected from the Government in the coming months.

However, it's almost certain - as recommended by the MAC – that the new system will bring EU/EEA/Swiss migrants (who arrive in the UK for the first time after 31 December 2020) and non-EU/EEA/Swiss migrants under the same umbrella when implemented.

What should retailers do to prepare?

One of the biggest risks is that staff supply will be impacted. Many EU/EEA/Swiss nationals will find it more difficult to migrate to the UK from 2021 onwards. Staff granted settled or pre-settled status will not face the same restrictions as those governed by the new rules, so ensuring eligible staff make Scheme applications should be a priority for employers throughout 2020. We recommend that employers carry out workforce audits to establish those who may be impacted.

Employers should also be mindful that wholesale changes to the current immigration system may leave their HR teams with knowledge gaps. They should provide training and support, ensuring that developments are tracked and cascaded appropriately.

Finally, the provision of immigration advice is a regulated area. Providing unregulated immigration advice is a criminal offence, so take care when communicating with staff. It is advisable to direct staff to existing Government resources, including the detailed toolkit in relation to the Scheme which is available online.

'Despite the ongoing delays, the EU Settlement Scheme opened as planned on 30 March 2019.'

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Sustainability in fashion

2020 | Environment | Impact on retailers L

What's changing?

The government's select committee report into Fast Fashion made a number of recommendations for improvements to be made around sustainability in fast fashion. However none of these were formally adopted in the final report.

Sustainability in fashion is largely non-regulated in the UK currently – that is to say it is typically left to self-regulation through the use of standards and logos that retailers and manufacturers can voluntarily meet. It's the carrot rather than the stick approach, if you like.

There is a strong incentive for meeting these standards, as retailers and manufacturers can then use it as a distinguishing factor for their brand and attract more followers who care about the issue.

While this approach does generally work, there can be issues around the use of words like 'recycled', 'green', 'ethical' and 'organic' in promotional advertising if this is deemed to be misleading to customers. These concepts are very fluid and can mean different things to different people, so brands can easily end up in hot water.

What should retailers do to prepare?

The question now is what should brands and retailers be doing to make sure they are ahead of the sustainability curve ball. In the absence of specific legal regulation much will depend upon the organisations willingness to address sometimes very challenging issues but also to involve their customers in the choices they make.

Sustainability and ethical credentials are so intertwined with the customer purchasing habits in terms of the brands they will go to. It is also worth having a think about how retailers and brands can effectively communicate sustainability messages and ethical values whilst remaining compliant with advertising and consumer law requirements.

'There is a strong incentive for meeting these standards...'

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EV charging

2020 | Energy | Environment | Impact on retailers L

What's changing?

Sustainability has moved through a number of phases over recent years, driven by a noticeable change in social attitude. The UK seems now to be entering a new phase of sustainability, with the focus shifting to clean energy. With the commitment to achieving "net zero" carbon emissions by 2050, this will see more focus on the switch to electric vehicles (EVs). Currently, fewer than 1% of the UK's vehicles are plug-ins but that is likely to change rapidly in the next decade with the government setting a target of as many as 70% of new car sales in the ultra-low emissions category by 2030. Indeed sales of all-electric vehicles are up sharply since 2018, which indicates that we are at real turning point. However there are challenges to the uptake of EVs, with one of the main challenges being the lack of charging points on the roads.

What should retailers do to prepare?

A number of retailers are considering investments in new charging infrastructure, to take advantage of the shift towards EVs. For example, Lidl has recently entered into a partnership with the vehicle-charging start-up, Pod Point which should see 300 charging points installed at its stores by 2022.

The shortage of charging points in the UK means retailers are well-placed to capitalise on the time EV drivers spend waiting to recharge. Retailers should start considering if and how they can provide public charging points to consumers, in particular how destination charging can complement the shopping experience, and how they can move towards electrifying their fleets.

'...sales of all-electric vehicles are up sharply since 2018, which indicates that we are at real turning point.'

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UK Plastics

2020 | Environment | Impact on retailers M

What's changing?

Growing concern over the impact of plastic waste upon the environment has led to a number of voluntary initiatives to improve recyclability and re-use of plastic. To achieve the Government's stated aim of 'zero avoidable waste" by 2050, new legislation is being introduced which will affect packaging manufacturers, retailers and others in the packaging chain.

In 2018 the Waste and Resources Action Programme (WRAP) launched the UK Plastics Pact to encourage a shift away from the linear, disposable, plastics economy. The Pact is a voluntary coalition including over 120 large businesses who reportedly make or sell 85% of the plastic packaging used in supermarkets. The Pact has 4 key targets focussing on different aspects of the plastic waste problem, including the elimination of single use plastic and increasing the levels of recycled content or recyclability of packaging.

In April 2019 WRAP published the UK Plastics Roadmap, setting out a framework of actions to assist businesses to meet the targets. The most recent progress report shows some significant changes, but the issues are complex and the speed of change is slow. To drive progress the Government intends to (a) introduce a specific plastic tax; and (b) extend the producer responsibility system for packaging.

The new tax on the production and import of plastic packaging with less than 30% recycled content is planned for 2022. At the present time it is not intended that the tax will include filled plastic packaging imports but this could change. Initial research indicates the tax should be set at £150 per tonne to drive growth in the use of recycled polymers in new products.

The other significant proposal is to extend the producer responsibility system for packaging. The Producer Responsibility Obligations (Packaging Waste) Regulations already place obligations on a company (or group) with a turnover of over £2m that handles over 50 tonnes of packaging per year. The definition of "packaging handled" is very wide and includes packaging on imported goods, pack-filling and selling packaged goods to the end user. An extended system would make businesses bear the full net cost of managing the packaging they handle, which will obviously increase compliance costs.

What should retailers do to prepare?

Most retailers are already considering how their products can be delivered and used by customers with minimum packaging. This issue has become important to consumers and retailers who show they are listening to consumer concerns and devising new ways to reduce or re-use packaging will be ahead of their competitors.

The obvious steps are to reduce the amount of waste the business produces, and source packaging with a higher percentage of recycled material, or which can more easily be recycled. The UK Plastics Roadmap might be of some help, but more practical ideas can be gained from looking at what others in your sector are doing. Any changes made now will reduce liability under the new legislation.

Once details of the new and amended legislation are published, you will need to consider this in detail to determine your compliance requirements. Retailers who prioritise this issue now will reap both PR and financial benefits once the new laws do come into force.

'The Pact has 4 key targets focussing on different aspects of the plastic waste problem, including the elimination of single use plastic and increasing the levels of recycled content or recyclability of packaging.'

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CMA market study into online platforms and digital advertising in the UK

2020 | Competition | Impact on retailers L

What's changing?

The Competition and Markets Authority (CMA) has launched a market study into online platforms and digital advertising in the UK, which will continue during 2020.

This forms part of the CMA's Digital Market Strategy, which sets out how the CMA plans to foster innovation while protecting consumers in the rapidly developing digital economy. The CMA describes the market study as being "core" to the strategy and expects it to play a major part in informing policy, especially in relation to advertising-funded business models. The market study follows calls from the government for the CMA to conduct a review of the digital advertising sector given its wider implications for the digital economy.

Scope of the market study

According to the CMA's **statement of scope**, the market study will assess the nature of competition on both sides of the digital advertising market, namely the consumer-facing market, which provides the relevant service to consumers in exchange for their data, and the business-facing market, which monetises consumers' data by selling advertising space. The market study focusses on the following three key areas:

- The market power of online platforms
- Consumer control over data collection practices
- Competition in the supply of digital advertising

In December 2019 the CMA published an interim report detailing their findings to date. The findings focus on the market power of Google and Facebook in the digital advertising space with a further consultation proposed before the CMA formally sets out their proposals for regulation.

What should retailers do to prepare?

If the market study results in competition law concerns that need to be addressed, the CMA will consider the need for remedies. The CMA notes that any remedies it will consider are likely to build on proposals made by the Furman review, including the implementation of legislative changes for the development of a regulatory regime to control the activities of online platforms and the creation of a new regulatory body to enforce any new provisions under the regime.

Other potential areas of reform include giving consumers greater protection in respect of their data and improving transparency and oversight for participants in digital advertising markets on both financial flows and the delivery of advertisements.

'The CMA describes the market study as being "core" to the strategy and expects it to play a major part in informing policy, especially in relation to advertising-funded business models.'

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Privilege in internal investigations

2020 | Regulatory | Impact on retailers M

What's changing?

There are two types of privilege: legal advice privilege, where a lawyer gives you advice; and litigation privilege, which applies to material generated for the dominant purpose of actual or contemplated litigation even if a lawyer is not involved in its creation. With the latter there has to be a real likelihood of actual litigation, rather than a mere possibility.

Some recent decisions by the Courts continue to impact on the traditional view of solicitor and client privilege. Case law including: SFO v ENRC; RBS v Bilta; and HSE v Jukes has shown the increased frequency where these matters have been considered by the Courts. This impacts on internal investigations, as well as subsequent disclosures after investigation, and the conduct of any future proceedings.

Key points to remember:

- Having a lawyer involved does not always guarantee privilege if the contextual evidence does not support it, consider privilege from the outset and before you generate significant documentation or internal reports.
- Make sure any legally qualified in-house staff are acting in their capacity as legal advisers and that this is clear in documentation.
- Given the inconsistencies between the *Bilta* and *ENRC cases* it is wise not to rely entirely on litigation privilege. Ensure that your lawyers are involved from the outset and that they provide advice at every stage which is not held separate to documents covering factual content.
- Evidence the reasons for privilege in clear contemporaneous documents that can be produced to the Court. The burden of proof is on the party claiming privilege to prove that a document is privileged.
- Given the comments in the *Jukes* case it would be wise to make reference to all criminal and civil litigation that is anticipated.
- Remember that non-adversarial proceedings and investigations are not a form of litigation – be careful when referencing investigations, public inquiries, inquests or disciplinary proceedings in privileged documents.
- Try to avoid situations where privileged documents are seized by regulators. Keep privileged documents in a secure location and clearly marked as privileged to minimise the risk that they are reviewed without the issue of privilege being considered.
- Don't forget basic precautions. Encryption and passwords are simple ways to minimise the risk of improper access.

'Some recent decisions by the Courts continue to impact on the traditional view of solicitor and client privilege.'

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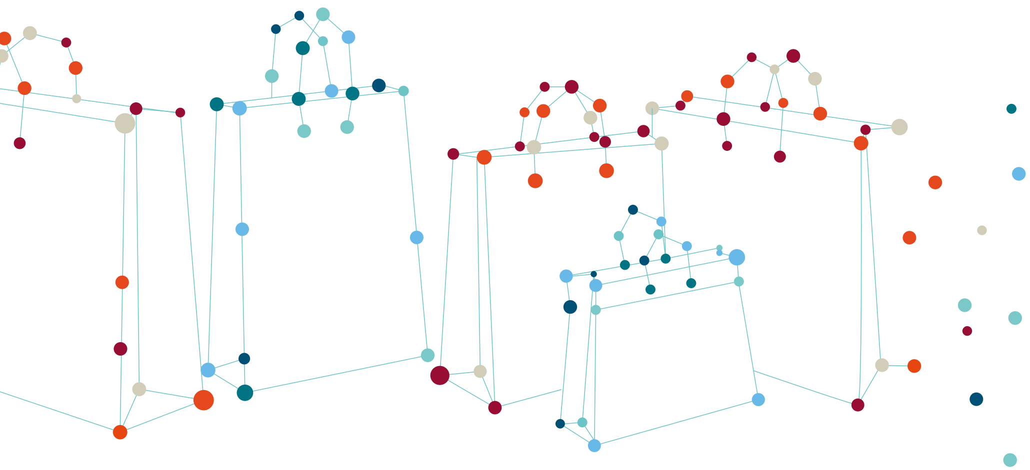

Impact of the review of the Modern Slavery Act

2020 onwards | Regulatory | Impact on retailers: L

What's changing?

- **Modern slavery:** Throughout 2019 the government undertook an independent review of the Modern Slavery Act 2015 with an express focus on the operation and effectiveness of the Act.

  One of the key issues considered in the review was that of transparency in a company's supply chain. The current requirements of section 54 of the Modern Slavery Act 2015 require retailers supplying goods or services and carrying on business in the UK to prepare a slavery and human trafficking statement for each financial year. The statement must set out the steps it has taken to ensure that slavery and human trafficking is not taking place in its business or supply chain, or it must state that it has taken no steps.

  The review acknowledged that there is no prescriptive requirement about what needs to be covered in a section 54 statement but also noted that many eligible companies are not complying at all with the legislative requirements. There are therefore a number of recommendations to ensure compliance and improve the quality of the statements produced.

  In particular the government has confirmed that it will focus on the following recommendations:

- Creating an International Modern Slavery and Migration Envoy to represent the UK's interests internationally and drive the global response to modern slavery forward.
- Consulting on measures to strengthen transparency in supply chains legislation, including extending the transparency requirements to the public sector and improving the quality of statements.
- Creating a free online central reporting service for business' modern slavery statements, to empower consumers, NGOs and investors to scrutinise the action that businesses are taking to prevent modern slavery in their supply chains.

What should retailers do to prepare?

Retailers will need to continue to review their arrangements for dealing with modern slavery in their supply chains working towards producing transparent section 54 statements accurately reflecting their business operations.

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Ad-Tech

2020 | Ecommerce | Impact on retailers M

What's changing?

Over the last year or so, the Information Commissioner's Office (ICO) has been conducting a review into how personal data is used in the advertising technology (adtech) space, with a particular focus on the use of real time bidding (RTB). In June, the ICO released an interim report summarising its findings up to that point. The report identified numerous compliance issues with current adtech and RTB practices, including:

- A lack of clarity from many RTB participants as to the appropriate lawful basis for processing, including inappropriate reliance on "legitimate interests" for the collection of personal data using cookies, which requires consent under the Privacy and Electronic Communications Regulations 2003 (PECR).
- Failures to carry out "legitimate interests assessments" where legitimate interests is relied on as the lawful basis for processing.
- Regular failures to obtain valid explicit consent for the use of special category personal data for adtech and RTB purposes.
- A lack of transparency in the adtech and RTB processes; the ecosystem is incredibly complex and individuals are rarely provided with sufficient information at the right points in the user journey to enable them to understand how their personal data is being processed for these purposes.
- Risks of "data leakage" due to the number of different parties involved in adtech and RTB (a single RTB request can lead to personal data being processed by hundreds of organisations).
- Inconsistent security measures throughout the adtech supply chain due to the large number of organisations involved in the processing of personal data.
- Failures of participants in the adtech ecosystem to conduct appropriate data protection impact assessments (DPIAs) to document and mitigate the privacy risks arising out of adtech activities.

The ICO is continuing to engage with participants in the adtech industry and is considering their next steps and deciding how best to address their concerns.

In January 2020 the ICO reported that they had received commitments from key key players in RTB namely the Internet Advertising Bureau and Google which go some way to address the concerns raised..

What should retailers do to prepare?

We recommend that retailers conduct a detailed review of the activities they carry out in the adtech and RTB space, including arrangements with third party providers.

DPIAs should be conducted on all adtech activities to identify the relationships that retailers have with relevant providers, how the transparency obligations can be effectively complied with and what the appropriate lawful bases are for processing personal data in an adtech and RTB context.

In general and in light of the current regulatory scrutiny, the use of adtech should be approached with caution and we recommend only using those providers who have a clear idea of their role in the supply chain and how the relevant obligations can be complied with.

'...adtech should be approached with caution...'

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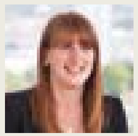

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Amazon Project Zero Initiative

Ongoing | Ecommerce | Impact on retailers L

What's changing?

Amazon has recently launched its Project Zero initiative aiming to enable brand owners to control the spread of fraudulent products on its marketplace.

Project Zero is designed to detect suspected counterfeit products contained in its stores using brand information provided by brand owners and is based on the following three tools:

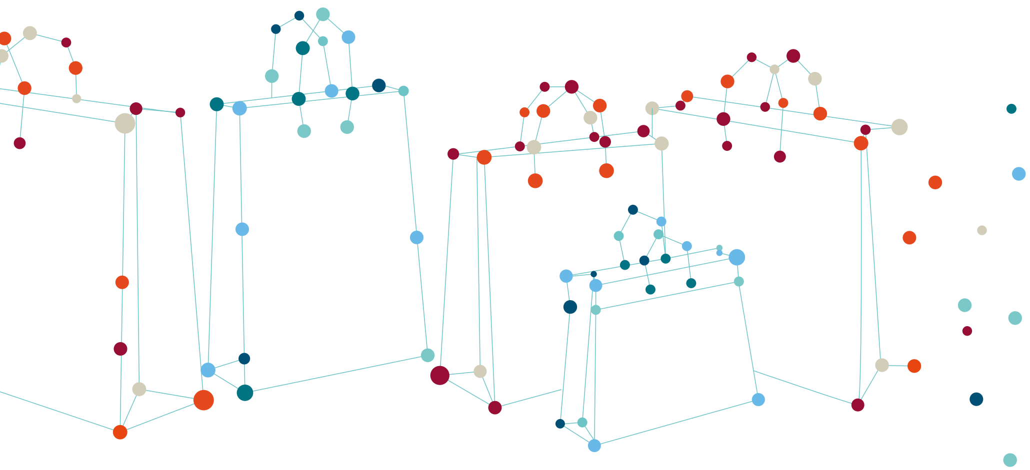
- Automated protection: this tool continuously scans product listings and pro-actively removes suspected counterfeit products from Amazon's stores. The product listing scans are done by using key information about a brand, such as trademarks, logos and other relevant data.
- Self-service removal tool: this provides brand owners with the ability to remove counterfeit product listings themselves, instead of undergoing the prior reporting and removal process which required them to contact Amazon to remove the fraudulent listings. Amazon requires brand owners to undertake training (provided by Amazon) and maintain a high level of accuracy in order to be able to use this tool with the aim of preventing misuse of the tool.
- Product serialisation: Brand owners can utilise a tool that generates a unique serialised barcode for each product unit which can be printed onto each unit as part of the manufacturing process. This allows Amazon to scan and confirm the authenticity of each product unit entering an Amazon warehouse with the aim to detect and stop counterfeiting before the unit reaches the customer.

Participation in Project Zero is currently by invitation only. In order to participate, brand owners will need to have a registered trademark, enrol in Amazon's Brand Registry and join a waitlist for participation.

Enrolment in Project Zero and access to the automated protections and the self-service removal tool is free of charge. Fees apply for the use of the product serialisation service.

What should retailers do to prepare?

Amazon recently updated the service from an invite only offering to an open one that anyone can apply for. To be eligible the brand must be enrolled in Amazon's Brand Registry with a government registered trademark. Other eligibility requirements also apply.



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Social media influencers

2020 and onwards | Advertising | Impact on retailers M

Choosing a brand ambassador to engage with your customers and potential customers online is tricky to get right in terms of making sure that they are the best fit for your brand, that they have the right audience and that their content is moving in the same direction as your business. Getting it right becomes even more complicated when you consider the fact that influencers don't always get the law right, as recent press coverage of the Advertising Standards Authority's investigations into the activities of various influencers demonstrates.

The ASA is working hard to respond to the complaints it receives about unclear ads and also to educate influencers about best practice. In addition, the Committee of Advertising Practice has spelled out its requirements in guidance directed towards those involved in influencer marketing. The guidance makes it clear that it has to be obvious that a post is advertising something, if an influencer has been paid to do it and if there is some form of editorial control over the influencer by the person or company paying for it, including if this is just final approval of a post before it is published.

Following this guidance, when posting an ad an influencer should:

- Be upfront that their post is an ad, with this message visible at the start of the post or before people click or engage, and not hidden within a long list of hashtags at the end.
- Specify that the post is an advertisement, with the recommended labels for this being "Ad", "Advert", "Advertising", "Advertisement". It is not acceptable to state "Spon" or similar, merely give thanks to the brand, say "in association with" or just tag the brand.
- Edit each post so that it takes into account how the channel they are posting on works, considering what people will see and when.
- Ensure posts will work across all potential devices that they may be viewed on.

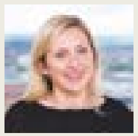
Some posts may not be caught by the CAP Code, (for example, if the post does not require approval by the brand owner) but the Consumer Rights Act 2015 will nevertheless apply and the posts will be under the scrutiny of the Competition & Market Authority. The CMA requires posts to be labelled as "advertisement feature" or "advertisement promotion" to make it clear money is changing hands even if an ad falls outside the scope of those subject to the CAP Code (which those involved in the advertising process should still, ideally, have regard for).

Taking all this into account, how can you, as the business paying for influencers to market your brand, control what the influencer does and make sure that they don't overstep the mark? Beyond researching how an influencer tends to post and whether or not they comply with the rules explained above, how can you reduce the risks of using an influencer to promote your brand landing you in trouble from a reputational or legal standpoint?

At the point you engage with an influencer (either directly or via their agent if they have one), it may be prudent to make it a requirement that they adhere to relevant laws and also any rules or guidance published by the CMA, ASA and/or CAP.

You should also consider building in specific references to how ads should be posted in line with the relevant law and rules in your media guidelines, which you can then provide a copy of to the influencer and require them to adhere to in your contract with them. Using celebrities to promote brands is of course not a new thing, and the kind of clauses used in celebrity endorsement agreements to protect a brand can also be used with influencers. These include undertakings not to do anything to damage the reputation of or make negative statements about the brand or company they are promoting and not to damage their own reputation when promoting the brand by acting in an illegal or inappropriate manner.

'...how can you, as the business paying for influencers to market your brand, control what the influencer does and make sure that they don't overstep the mark?'



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Fire safety review

2020 onwards | Regulatory | Health and safety | Impact on retailers H

What's changing?

There has been much development and recommendation over the last year relating to fire safety regulations. Much of this has been as a result of the fire at Grenfell Tower and commenced with the independent review led by Dame Judith Hackitt (Hackitt Review) which considered current Building Regulations and fire safety with a particular focus on high-rise residential buildings.

The final report resulting from the Hackitt Review was published in May 2018 and made numerous recommendations including:

- A new regulatory framework for multi-occupancy higher risk residential buildings (HRRBs);
- A stricter regime for overseeing the constructions of an HRRB, clarifying the role of local authority building standards and that of any approved inspector;
- An increased focus on safety during a building's occupation, including a means for tenants to raise concerns.

A number of government consultations into how to implement the recommendations; the use of desktop fire safety assessments; and the use of combustible cladding in high rise residential buildings followed the final report.

In December 2018, the government published new versions of Approved Document B (in force from 21 January 2019) which confirmed that assessments in lieu of tests should only be used where necessary and if used, should be carried out in an appropriate way. An assessment in lieu of a test should not be a way to avoid undertaking a test where one is necessary and should only be carried out where sufficient, relevant test evidence is available.

On 21 December 2018, the government also introduced a ban on the use of combustible construction materials in the external walls of buildings above 18m.

On 20 January 2020 the government announced new measures to improve building safety and issued advice for building owners of multi-storey, multi-occupied residential buildings.

Phase 2 of the Grenfell Tower Inquiry is underway and will continue throughout 2020 and 2021 the conclusion of which may bring further recommendations for the government to consider. The reform of fire safety will be an ongoing factor throughout 2020.

What should retailers do to prepare?

Retailers will need to keep abreast of the developments to fire safety reform; particularly any further changes to the regime on construction of HRRBs and safety where buildings are occupied by tenants. Retailers should also be aware of any forthcoming changes to legislation relating to non-high-rise buildings which may result from the final report of the Grenfell Tower Inquiry or further advice or legislation.

Depending on the recommendations, we could see the situation where retailers may be required to retrospectively ensure fire safety in current buildings is at the required standard.

'The reform of fire safety will be an ongoing factor throughout 2020.'

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Non-disclosure agreements

Ongoing | Employment | Impact on retailers M

What's changing?

Confidentiality or non-disclosure agreements (NDAs) are legal contracts that restrict what the parties can say about a matter.

#MeToo exposed the misuse of NDAs by some employers, and their lawyers, to silence victims of sexual harassment. There have also been a series of high profile scandals in the retail sector regarding sexual harassment – notably leading to the resignation of the founder of Ted Baker after allegations he massaged employees and that hugs were "forced" on female members of staff.

This publicity has led to reviews of the law on sexual harassment and NDAs culminating in the Equality and Human Rights Commission publishing new guidance in October 2019 on the use of confidentiality agreements in discrimination claims. The guidance confirms that:

- Confidentiality clauses must make it clear that they will not prevent employees from raising concerns about harassment, reporting criminal matters to the police, making a protected disclosure or reporting matters to a regulator
- Employees should not be put under any pressure to sign a confidentiality agreement
- Employers should weigh up whether confidentiality agreements are required in settlements and should not, as a matter of course, always require employees to keep purported acts of discrimination confidential
- Employers should monitor the use of confidentiality agreements and keep a central record to enable them to identify any systemic issues

Further legislative changes have been recommended by the House of Commons Women and Equality Committee Report (published in June 2019) which suggested that in the future employers might be required to cover the cost of employees obtaining legal advice on settlement agreements and could be forced to report annually on the number of discrimination complaints and their outcome as well as how many settlement agreements have been reached.

What should retailers do to prepare?

With NDA's firmly under the microscope, retailers should ask the following questions when considering their use:

- What is the purpose of the NDA in the particular circumstance?
- Is it necessary?
- Is it lawful?
- Who is going to be bound by it? One party? Both?
- How long will it last?
- Is the wording clear and easily understood?

NDA's will remain a hot topic of discussion and their use will likely face on-going controversy in a MeToo era. However it's important to remember that when used appropriately and created by legal professionals for legitimate purposes, they can be a valuable tool in safeguarding a business.

'#MeToo exposed the misuse of NDAs by some employers, and their lawyers, to silence victims of sexual harassment.'

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The Gig Economy and the Good Work Plan

Ongoing | Employment | Impact on retailers M

What's changing?

The headline question linked to the gig economy is the correct approach to determining employment status. The Supreme Court is due to hear an appeal against the Court of Appeal's 2018 decision that Uber drivers are 'workers' rather than self-employed contractors, but no date has been set as yet. Proposals for reform of employment status tests have been promised by the government but not yet produced; we are not expecting any concrete proposals in the foreseeable future.

Linked to the gig economy is the Good Work Plan, published by the government in December 2018. It builds on its previous response to the Taylor Review of July 2017.

The Good Work Plan includes various legislative changes, including that from April 2020:

- all workers will be entitled to an expanded statement of terms and particulars (to which only employees are currently entitled) which must be given on or before the first day of work
- the reference period for determining average weekly pay for holiday pay purposes will increase from 12 weeks to 52 weeks; and
- the Swedish derogation for agency workers, through which pay parity with permanent employees of the hirer can currently be avoided, will be abolished.

Also following on from the Good Work Plan, the government proposes to establish a new single Labour Market Enforcement body. This will bring together various workforce law enforcement bodies, and provide a single source of guidance for employers. It is also proposed that this body will be responsible for state enforcement of holiday pay and the regulation of umbrella companies. No timescale has yet been announced for any of these reforms.

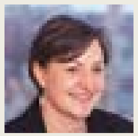
What should retailers do to prepare?

Retailers should continue to be alert to the risk of litigation in relation to the contingent workforce and atypical workers. To mitigate against this, the true relationship between the parties should be captured within the contract wherever possible.

Retailers must ensure that expanded statements of terms and particulars are provided to all employees and workers from April 2020 and keep track of developments in the other areas covered by the Good Work Plan. A key implication is likely to be in relation to pay parity after 12 weeks for agency workers; whilst there is no impact for end-user clients, retailers may need to re-visit budgeted agency spend in preparation for any increased costs passed on by suppliers.

In anticipation of a new labour market enforcement body, all retailers should expect greater scrutiny of employment practices. Ensuring the correct calculation of holiday pay will be more important than ever, as this will be the first time that government enforcement of holiday pay has been introduced. Retailers must ensure that holiday pay is based on the increased pay reference period, from April 2020.

'Retailers should continue to be alert to the risk of litigation in relation to the contingent workforce and atypical workers.'



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Insolvency trends in the retail sector

2020 | Insolvency | Impact on retailers H

Continued Distress in the Retail Sector

No-one will need reminding that financial distress remains prevalent across the sector. Many retailers continue to struggle to adapt in the face of changing consumer demands and spending habits and dwindling consumer confidence. To make matters worse, the competing interests of the various stakeholders in retail businesses continue to produce a dynamic and increasingly unpredictable legal environment.

Company Voluntary Arrangements (CVAs) continue to be championed as the leading restructuring tool for struggling "bricks-and-mortar" retailers, typically targeting the landlord community to deliver savings while preserving equity value. But more recent experiences are proving the old restructuring adage correct; that CVAs should only ever be seen as part of the solution. They can effectively "clean-up the balance sheet" of a distressed business but they do not solve its other problems. CVAs are not a ready-made one-size-fits-all restructuring opportunity. There is a growing list of well-known retailers which have disappeared altogether, less than a year after having been through a CVA process.

2019 has seen a growing number of challenges to CVAs come before the Courts, or settle on the Court steps. The highest profile has been the Debenhams CVA, which faced a strong attack by landlords, with very public support from Sports Direct. The outcome ensured the immediate survival of the group but the judgment will be closely examined by landlords wishing to launch future challenges and it may still be appealed. Even without an appeal, the landlord community will be heartened by the Court's confirmation that rights to forfeit leases cannot be compromised by CVA. We are generally seeing more closely co-ordinated action being taken by landlords, in an attempt to counteract the divide-and-conquer strategy which has underpinned many of the existing retail CVAs. There is growing anger that landlords are the compromised creditor of choice for retailers in financial distress. After all, landlords will often have geared their own businesses on the basis of their tenants' covenants. It is no coincidence that shopping centre businesses are feeling the impact of increasing numbers of tenant cuts.

In some cases, the continuing distress in the sector is being used as a cloak for some opportunists which are not experiencing such acute issues, to seek to rationalise property portfolios and renegotiate supplier relationships. Their motivation is to achieve competitive advantage by utilising the power of CVAs to cram down minority dissenting creditors, benefitting from the elimination of the stigma traditionally associated with companies entering formal insolvency processes. This is an inevitable consequence of the fact that CVAs are becoming widely known as a concept but their strengths and limitations still not fully understood by many stakeholders and financial commentators.

We are aware that some retailers are threatening to seek rent reductions from landlords outside of an insolvency process, in cases where local competitors are enjoying stronger trading performance as a result of having restructured their balance sheets. While this makes clear commercial sense where achievable, the relative balance of power between landlord and retail tenant continues to be determined by a mixture of micro and macro-economic factors. Further landlord push-back to formal CVAs and requests for more favourable terms can be expected in all but the most obvious cases.

What should retailers do in the circumstances:

- Be realistic. CVAs remain a very effective flexible restructuring tool, when deployed properly. However they are not suitable for every retail scenario and cannot cure problems that exist outside of the retailer's balance sheet.
- Be fair. Any restructuring strategy needs to take account of the reality that the landlord community is alive to the market problem, extremely unhappy with being the compromised creditor and has a growing awareness of its legal rights (both under and outside of a CVA). An unfair CVA should not get past first base.
- Communicate effectively. If a CVA is being considered, a robust stakeholder communication strategy will be key. The CVA must be demonstrably fair and able to generate a better outcome than the alternatives. Just as importantly, the creditors need to know this. Rumour and gossip can be the death of any restructuring, particularly one that involves a consumer brand. Yet, even the best CVA plans will come unstuck if insufficient creditors trust the CVA strategy as being in their best interests and management's ability to deliver it.
- Watch the market. At the time of any lease renewals, consider whether it is possible to negotiate a rent reduction clause to match competitor CVA concessions with the same landlord. This might be viewed as a sound and proportionate protection against the need for a future CVA. But institutional landlords will be keen to avoid setting precedents.
- Take advice. Given the risks of a wrong move to all concerned and the importance to the outcome of getting things right from the outset, it is vital that any retailer facing these issues should obtain good professional advice early. The range of positive outcomes narrows dramatically over time.

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ePrivacy Regulation

2020 | Data protection | Impact on retailers M

What's changing?

The draft ePrivacy Regulation has been making its way through the EU legislative system for quite some time. It was intended to come into force at the same time as the GDPR came into effect, i.e. 25 May 2018, to replace the existing ePrivacy Directive at an EU level. However, over 18 months on, it still has not been finalised. Numerous different drafts have been released and there is no consensus among legislators as to what the final version will look like yet.

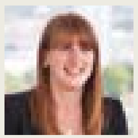
There is therefore a significant amount of uncertainty for businesses as to what changes the new legislation will bring. For retailers, the most relevant parts of the legislation relate to direct marketing and cookies. Whilst it is unlikely to introduce wholesale changes to direct marketing laws, some of the proposed changes to the cookies rules (such as a ban on cookie walls and obligations to offer "do not track" settings) could have implications for how retailers set cookies on their websites.

In the meantime, the Planet49 case in the CJEU, as well as updated ICO guidance on cookies, has confirmed that implied consent for cookies, which is relied on by many retailers on their websites, is not sufficient and that all except "strictly necessary" cookies must be set to "off" by default and not set on a user's browser unless they expressly consent (including analytics cookies).

What should retailers do to prepare?

Regardless of the ePrivacy Regulation, we recommend that retailers consider conducting a cookies audit to identify and "clean up" the cookies used across their websites and review where they need to obtain consent. Consent should not unreasonably disrupt a user's journey, so retailers should look at implementing creative, "layered" cookies consent mechanisms. This will help to put retailers in a strong position, when the ePrivacy Regulation is finalised, to review the changes to cookies rules and implement required changes to cookies processes.

Over the next few months, retailers should monitor developments of the ePrivacy Regulation closely and, when a final version has been agreed, consider the additional steps required to bring their organisations to a compliant position.



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Data protection class actions

Ongoing | Data protection | Impact on retailers H

What's changing?

Upon the GDPR's arrival, group actions in data breach claims became a very real threat. Whilst initially lacking substance, recent case law has changed this landscape drastically, deeming group actions as the biggest threat attached to having a data breach.

In Lloyd v Google LLC 2019, the claimant was unsuccessful in bringing a claim on behalf of more than 4 million Apple iPhone users. The High Court held that a group action must be dismissed due to members failing to have the 'same interest' as required by CPR 19.6(1). However, in 2019 the Court of Appeal granted permission for the case to proceed, stating it is *'impossible to imagine that Google could raise any defence to one represented claimant that did not apply to all others'*. This is of paramount importance as it is potentially opening the door to US style 'opt out' class actions in the English Courts for breaches of data protection. It is arguable that a fluid application of the CPR may result in the unlocking of the 'floodgates'.

Group actions will also be affected by the long anticipated decision in WM Morrisons Supermarkets PLC v Various Claimants. Following its hearing in the Supreme Court, there is potential for employers to be held vicariously liable for actions of a single rogue employee. If successful, Morrison's will be held to account for all applicable employees despite being fully compliant with all data protection legislation.

These cases demonstrate the potential for wide reaching and ruinous consequences of group actions for data breaches.

What should retailers do to prepare?

Whilst the frequency of these cases is yet to be seen, retailors can take various steps to minimise their risk of class actions:

- Implement appropriate technical and organisational security measures to guard against security breaches and create a defence against group actions.
- Ensure all individuals entrusted with data processing of employees are subject to high level vetting.
- Train staff in the event of data protection complaints.
- Rehearse a clear action plan in the event of a data breach and how to escalate any issues spotted.

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Use of live facial recognition

Ongoing | Data protection | Impact on retailers M

What's changing?

The use of live facial recognition (LFC) technology in public places is a controversial topic. There have been multiple cases of its use, most notably following judgment being handed down in Bridges v South Wales Police which upheld police use of LFR. In the private sector, there has also been a growing demand amongst retailers to use LFR technology to prevent shoplifting, manage customer loyalty programmes and speed checkouts.

The hotly anticipated Information Commissioner's Opinion has now been published on this topic, stating that LFR is an 'unnecessary intrusion into individuals' daily lives'. She has also called on government to produce a new statutory binding code of practice to provide safeguards that address the specific issues arising from the use of biometric technology, including LFR. This will be of paramount importance to its future usage in the wider private sector.

What should retailers do to prepare?

Any retailer intending to undertake a LFR project moving forward must:

- Articulate a sufficient justification for using LFR within a new narrowly defined purpose
- Undertake a thorough and well-informed Data Protection Impact Assessment (DPIA)
- Engage a Data Protection Officer with a well-resourced project team

The Information Commissioner has confirmed her intention to issue a further Opinion addressing the use of LFR by private sector organisations. Retailers would be well advised to take note of this further Opinion when it is published

'In the private sector, there has also been a growing demand amongst retailers to use LFR technology...'

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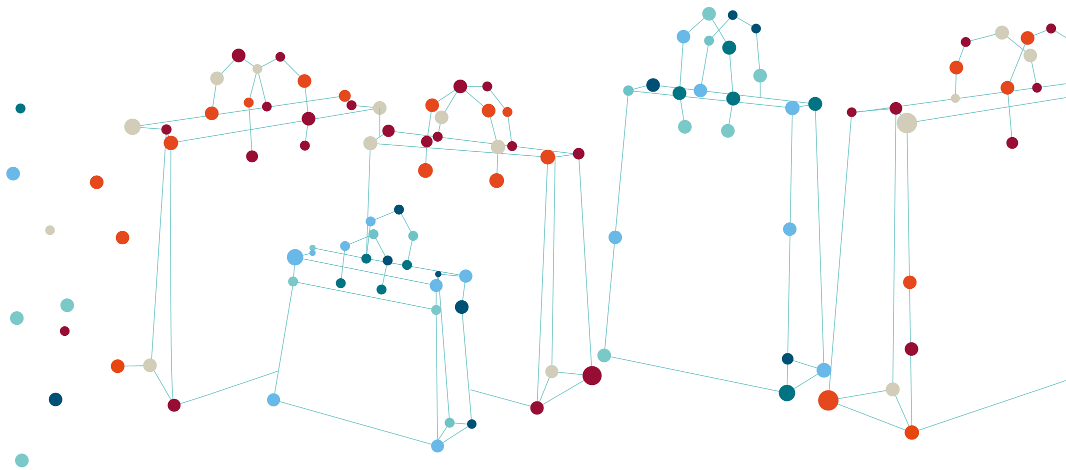

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IR35 reforms - are you ready for 2020?

April 2020 | Employment | Impact on retailers M

What's changing?

IR35 is a piece of tax anti-avoidance legislation. It aims to bring into income tax arrangements where individual contractors supply their services to a client through an intermediary and, but for the existence of the intermediary, they would be considered to be an employee of the client. Currently in the private sector it is the contractors who have to assess whether IR35 applies and account for income tax and national insurance on the fees that they receive from an engagement.

Reforms to IR35 (the rules governing off-payroll working through an intermediary) that occurred in the public sector are due to be extended to large and medium sized businesses in the private sector with effect from April 2020.

This will be relevant for all circumstances where contractors supply services to retailers through a specific type of intermediary (for example a personal services company (PSC)), covering situations where intermediaries are engaged directly or through an agency or chain of agencies.

What should retailers do to prepare?

Instead of contractors assessing whether they fall "within scope" of IR35, retailers, as the end client, will be required to:

- assess a contractor's deemed employment status;
- notify relevant parties (including the worker) of the outcome of that assessment in the form of a Status Determination Statement, where companies must give reasons for that decision;
- manage any disputes over the Status Determination Statement in the form of the client-led status disagreement process; and
- possibly account for income tax and national insurance (both employer and employee) on fees paid to the intermediary.

If they has not already started retailers will need to commence an audit of its current labour population to identify those to whom the legislation might apply.

Other steps internally and externally would be to:

- identify alternative models of contingent labour supply and undertake an analysis of associated costs for those models;
- assess possible risk areas in relation to a shortage of labour or expertise and contractors with key strategic importance;
- review supplier and contractor contracts to ensure that they are fit for purpose; and
- ensure that processes are in place and implemented to ensure that the business complies with its obligations under the legislation and within the required timeframes.

'Reforms to IR35 that occurred in the public sector are due to be extended to large and medium sized businesses in the private sector with effect from April 2020.'

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End of LIBOR

Current - 31 Dec 2021 | Banking/treasury | Impact on retailers M

What's changing?

The Financial Conduct Authority has announced that LIBOR (the London Interbank Offer Rate) will cease to be published by the end of 2021. LIBOR should reflect the cost of banks borrowing from other banks in order to fund loans to customers. In reality, LIBOR is calculated based on banks' judgements and not on underlying data which makes it open to manipulation.

Financial regulators have therefore called for a switch to alternative benchmark rates which are risk free. For sterling transactions this is likely to mean SONIA (the Sterling Overnight Index Average). Increasingly financial products will be made available which reference SONIA or other risk free rates in place of LIBOR. Alternatively, loan products may be switched to base rates.

Many financial products use LIBOR as the applicable rate of interest, particularly debt instruments such as loans and bonds, and linked derivative hedging products. LIBOR may also be used in other contracts which call for a rate of interest including rental leases, supplier financing arrangements, tax papers, finance leases, subsidies and supply contracts. If these arrangements are to remain in place past end 2021, when LIBOR will cease to be published, the parties will need to agree revised terms. The sheer volume of contracts affected by LIBOR ceasing makes planning for its demise essential. Retailers who rely on multicurrency products may have the most difficulty transitioning from LIBOR to multiple different alternative rates.

What should retailers do to prepare?

To prepare for LIBOR cessation, retail businesses can:

- Understand their LIBOR exposures (in financial and other contracts)
- Consult with their finance providers
- Weigh up pros and cons of alternative interest rates such as base rate or SONIA
- Review individual contracts to identify clauses setting out what happens in the absence of LIBOR
- Obtain professional advice on affected contracts and other impacts of LIBOR ceasing
- Consider other elements such as systems, accounting and tax matters

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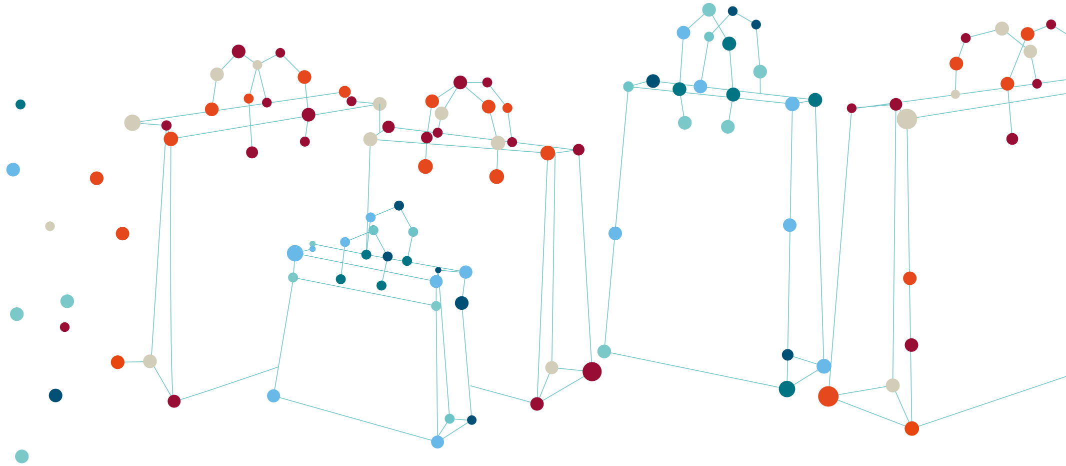

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Payment Services Directive 2

2021 | FinTech | Impact on retailers M

What's changing?

A new regulation, known as Strong Customer Authentication (SCA), came into force in Europe on 14 September 2019 with a focus on reducing fraud across the European economy by requiring additional authentication steps to be completed by customers before their payment transactions are accepted by their banks. Due to the general state of unpreparedness across the industry, industry regulators have agreed an 18 month managed roll out to SCA compliance with active supervision (and possible enforcement action for non-compliance) commencing on 14 March 2021.

What does SCA require?

Retailers will need to use two independent authentication measures to verify payments made to them by customers. The authentication measures require use of at least two of something the customer: (i) knows (such as a password or PIN); (ii) has (such as a phone or other device) and/or (iii) is (such as a fingerprint, iris scan or other biometric measure).

How can businesses satisfy SCA?

Face to face payments will rely on existing technologies, such as Chip & Pin, to be authenticated in a manner which satisfies SCA. However online payments, which are most likely to be impacted by SCA, will require authentication measures to be in place and used.

At the moment, online business have the option to use 3D secure technologies (via their payment service providers) to authenticate their customers' online payments, but under SCA payment service providers will need to ensure that their merchants, such as businesses like yours, use a new version of 3D Secure (v.2), which will be the primary authentication measure used to satisfy SCA requirements for online payments moving forwards.

Disruption caused to businesses

3D secure technologies typically work by taking customers away from your website / app to another page, hosted by their bank, where they can type additional details in order to authenticate each payment transaction prior to it being completed. Where businesses do use certain 3D secure technologies, they can benefit from liability shifting away from them (and their payment service providers) for fraud-related risks in certain circumstances.

On the less-positive side, 3D secure and other forms of authentication measures established to satisfy SCA requirements may inevitably disrupt online customer journeys, the sale conversion rates for online businesses and ultimately their bottom line.

To avoid or minimise the potential impact, businesses may be able to take advantage of some of the exemptions available to SCA, as noted below.

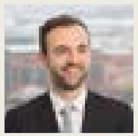
Exemptions to SCA

If your business is not already doing so, it may wish to engage with its payment service providers to determine how they might benefit from some of the exemptions, which in turn may necessitate your business making certain changes to its sales models and pricing propositions. Some non-exhaustive examples of exemptions to SCA include:

- **Contactless payments** – Will be exempt, but only relevant for face to face payment transactions that can benefit from contactless technologies and each payment transaction remains subject to the contactless value limits set from time to time.
- **Whitelisting** – Customers may place businesses on a "whitelist" of approved payees, meaning that payments after the first initial payment to such businesses will not require additional authentication (unless the customers' banks override this).
- **Recurring payments** – Customer payments of the same amount to the same business may not require additional authentication after the initial payment transaction.
- **Low value transactions** – Payments below €30 (subject to certain other requirements) will be exempt from SCA.
- **Transaction risk analysis** – Payment service providers who benefit from low levels of fraud across their customer base may allow their customers (which could include your business) to exempt payments which they identify as low risk.

What should retailers do to prepare?

Your business should be engaging with its payment service providers and professional advisors to assess the potential impact of SCA and how best to minimise any disruption to your customer payment journeys, conversion rates and margins.



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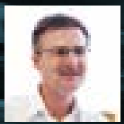

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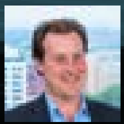

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