# Retail Risk Outlook 2022

**For what comes next**

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# Introduction

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## Welcome to TLT's Retail Risk Outlook 2022

**We have a new format this year but 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 specialists 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 is a greater focus on environmental, social and corporate governance (ESG) issues and the associated legal risks;
- There is greater transparency and accountability with customers and regulators holding retailers to account in the way they treat people and the planet;
- Areas where regulation is playing 'catch-up' with tech-led innovation such as AI, data and fintech; and
- Retailers continuing to face pandemic-related risks and the next stage of Brexit transition.

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 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 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.

# CMA – Green Claims Code

Impact H

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## What's changing?

In September last year, the Competition and Markets Authority (CMA) published its final guidance for businesses making green claims and indicated it will act in 2022 to ensure operators are following this. Previous research from the CMA indicated that up to 40% of green claims made by online retailers of goods were misleading and could not be supported.

There is no new legal regime or mechanism introduced as part of this, as the compliance requirements arise from existing consumer law, however the CMA's full review this year could mean formal investigations, published undertakings where businesses have previously failed to meet their requirements, and in the case of serious breaches, prosecutions.

In particular, the CMA has indicated that it will be looking at claims in the following sectors: textiles and fashion, travel and sport and fast-moving consumer goods (such as food and drink, beauty products and cleaning products).

The principles underpinning the new code are summarised as follows:

- claims must be truthful and accurate
- claims must be clear and unambiguous
- claims must not omit or hide important relevant information
- comparisons must be fair and meaningful
- claims must consider the full lifecycle of the product or service
- claims must be substantiated

> “Previous research from the CMA indicated that up to 40% of green claims made by online retailers of goods were misleading and could not be supported.

## What can retailers do to prepare?

All retailers should be reviewing any green claims made in connection with products and services to ensure they comply with the CMA code. There is a helpful checklist from the CMA that sets out 13 questions to consider for each claim.

The guidance from the CMA acknowledges that this area of compliance can also involve regulatory activity by Trading Standards and the Advertising Standards Authority (who have their own guidance on green/sustainability claims), so retailers should be aware that they may face scrutiny from more than one regulator in this area.

Internal training to those within the organisation who are involved in sustainability claims to highlight and consider these issues would also be worth considering.

In addition, the review should present an opportunity to consider supply chain issues and risk where claims for products are based upon information provided by suppliers, which may need to be supported by further substantiation.

# Extended Producer Responsibility (EPR) scheme

Impact M

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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.

At this stage, we are yet to see the accompanying regulations that set out the detail behind the exercise of the newer powers under the Act. However, we can ascertain the direction the regulations may follow based on the latest EPR consultation.

The government proposed six categories of brand owners, which includes online marketplaces and sellers. The biggest proposed change is that the EPR scheme is intended to fund the entire cost of the recovery and collection of the waste packaging. This contrasts with the current PRN regime which only covers part of the cost.

The introduction of the EPR scheme also ties in with the introduction of the plastic packaging tax, which will levy charges on producers of packaging that is predominantly plastic by weight and which is less than 30% recycled plastic content. This tax will be introduced from April 2022.

> "Since departing from the European Union, this Act is one of the UK's first major changes to the framework governing the environment and will be a key piece of legislation in driving a more sustainable retail sector.

## What should retailers do to prepare?

Based on the information currently available, pre-emptive steps can and should be taken immediately to offset the financial impact of the changes. Some suggested steps are:

- Examine the existing supply chain to gather data on how packaging is sourced and of which materials it is comprised. This will ensure the business is prepared for the commencement of the EPR scheme and can make wider decisions on packaging moving forward;
- Reduce the amount of packaging used and thereby reduce the cost of the EPR; and
- Review how packaging is currently comprised and seek to use sustainable and recycled materials. The impact of revising the composition of the packaging may offset the financial burden, as the government will use modulated fees, meaning more sustainable materials will attract lower fees and less sustainable materials will attract higher fees.

As sustainability becomes a key focus for consumers, these changes may also assist in driving developments that create a more sustainable business and end product.

Since departing from the European Union, this Act is one of the UK's first major changes to the framework governing the environment and will be a key piece of legislation in driving a more sustainable retail sector. Despite a lack of clarity on the practical operation of the EPR scheme, retailers should act now to be in the best possible position once further guidance is released.

# Climate-related financial disclosures

Impact M

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## What's changing?

Recent updates from the Task Force on Climate-Related Financial Disclosures (TCFD) may require new attention from all retailers, and in particular early attention for large retailers, as TCFD-aligned disclosures are set to become mandatory starting in 2022.

In an initiative to standardise the climate-related risks and opportunities information provided to stakeholders (such as investors, lenders and insurers), TCFD produced its **recommendations** for financial disclosures in June 2017. Implementation includes building the capability to identify, assess, manage and disclose climate-related risks and opportunities.

The recommendations are tied to four keys areas:

- **Governance:** governance around climate-related risks and opportunities.
- **Strategy:** actual and potential impacts of climate-related risks and opportunities on the business, strategy and financial planning.
- **Risk management:** the processes used to identify, assess and manage climate-related risks.
- **Metrics and targets:** the metrics and targets used to assess and manage relevant climate-related risks and opportunities.

Organisations were asked to prioritise risk management and governance structures.

At present, the recommendations are followed on a "comply or explain" basis. However, in October 2021, it was confirmed that the UK will become the first G20 country to make TCFD-aligned disclosures fully mandatory – across the economy by 2025 in a gradual **roadmap**. These rules will come into force from April 2022, and will start with the UK's largest companies (with over 500 employees and over £500m in turnover).

The amount of 'green data' available has been gradually increasing, and the requirements for mandatory TCFD standards may increase data availability, accuracy of sustainability models and other climate impact tools.

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## What should retailers do to prepare?

Even organisations that have already been providing climate-based reporting may need to revisit their current reporting practices to ensure they are acceptable. As climate-related disclosures bear more scrutiny, their content and consistency should be properly considered.

Retailers will need to:

- Check if current disclosures align with the TCFD recommended disclosures and identify any discrepancies;
- Plan how to remedy the misalignment;
- Decide the reporting strategy, including structure and content; and
- Prepare the draft statements and disclosures for reporting.

# Drafting for net zero

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## What's changing?

As pressure from investors and consumers increases ahead of the introduction of certain mandatory climate-related financial disclosures, more companies have started to publish their net zero plans. These generally include "scope 3 emissions", that is, all indirect greenhouse gas emissions that occur in the upstream and downstream supply chain.

Our report **'Sustainability Matters – putting the 'eco' in retail economics'** reveals that retailers see their supply chain as the area most in need of improvement when it comes to sustainability. In an attempt to address this, more than half (52%) of retailers include sustainability credentials in their due diligence enquiries, and almost half (48%) include sustainability obligations in their contractual arrangements with third parties.

One initiative that has arisen out of the increasing need for climate-aligned contract clauses is The Chancery Lane Project's **playbook**, drafted and reviewed by a global community of more than 1,300 lawyers, including from TLT. It contains over 100 freely available clauses, and retailers will find the supply chain and universal sector areas particularly helpful. **We explain some of these on our website**.

## What should retailers do to prepare?

Retailers should consider whether they can add or expand climate-aligned clauses in their supply contracts to achieve their sustainability goals more quickly. This should be an ongoing project as their sustainability ambitions develop and further regulation is introduced.

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, to enable parties to meet their net zero targets and reduce their scope 3 emissions;
- A target product carbon footprint budget (which reduces over time) for each product manufactured and supplied pursuant to the contract; and
- Clauses to reduce supply chain food waste, reduce single use plastics or introduce a 'repair, reuse and recycle' concept in supply agreements.

Climate-aligned clauses should also be considered throughout retailers' operations, including governance and employment matters. This is a growing area and retailers should take constructive steps now to demonstrate their sustainability credentials, while preparing for further regulation.

> Retailers should consider whether they can add or expand climate-aligned clauses in their supply contracts to achieve their sustainability goals more quickly.

# CBD regulation

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## What's changing?

The UK cannabidiol (CBD) market has experienced huge growth over the last few years and is now the second largest consumer market for CBD products in the world.

CBD products sold in the UK may be subject to one of a number of complicated regulatory regimes depending on which product category they fall into, which will then affect how the product can be advertised. If taken orally, CBD products tend to be defined as food supplements.

### CBD products as novel foods

CBD was added to the European Commission's Novel Food Catalogue in January 2019, meaning that foods containing CBD extracts are now subject to the **Novel Foods Regulations**. Under the regulations, which are retained EU law and therefore still apply in the UK post-Brexit, risk assessments and authorisations are required before these foods can be sold.

As of November 2021, there were no authorised CBD extracts or isolates on the market. The Food Standards Agency (FSA), the body that oversees novel food applications, provides a **list of CBD products** for which novel food applications have been made, which distinguishes between applications that have been validated in the initial stage (i.e. are ready to proceed to the authorisation process), and those that are 'on hold' awaiting further information. This therefore allows retailers to check the status of their suppliers' products. Please note that the addition of a CBD product to this list does not mean it is authorised or approved, only that the applicant is seeking authorisation.

### What are the rules for marketing CBD products?

Once the relevant authorisations for placing a CBD product on the GB market, if required, have been obtained, the following rules will apply for the advertising of that product:

<table>
<tr><th>Product type</th><th>Advertising rules</th></tr>
<tr><td>Foods</td><td>Orally taken CBD products are likely to be caught by Regulation (EC) No 1924/2006 on Nutrition and Health Claims made on Foods, which is reflected in section 15 of the CAP Code. The rules under section 15 are as follows:<br>• Ads promoting food or food supplements may only use specific health claims authorised on the Great Britain nutrition and health claims (NHC) register, and only if the product meets the conditions of use associated with the authorised health claim.<br>• As of December 2021, there were no health claims relating to CBD authorised on the NHC register.<br>• General health claims (e.g. general benefits of a nutrient or food for overall good health or health-related wellbeing) must be accompanied by a relevant specific authorised health claim.</td></tr>
<tr><td>General</td><td>Advertising of CBD products must not suggest that the products are approved or authorised (e.g. by the FSA or MHRA) if they are not.<br>Advertisers should also take particular care in using any wording or imagery linked to cannabis to advertise CBD products, as there is a risk this could cause offence or be considered socially irresponsible.<br>In particular, marketing communication must not link alcohol to illicit drugs, which was the subject of the October 2019 ASA x against the Cornish Rum Company for their marketing of their Dead Man's Fingers Hemp Rum product.</td></tr>
</table>

## What should retailers do to prepare?

CBD products are subject to a number of complex regulatory regimes, and as the novel food status of CBD extracts was only confirmed in January 2019, there are likely to be products placed on the market before this date that do not currently have the necessary regulatory authorisations.

Given the growth of the CBD market in the UK, this is becoming a hot topic for regulators, with the Chief Executive of the FSA, Emily Miles, warning the CBD industry and retailers in December that it needs to market products responsibly. She has also offered support to local authorities if they need to increase their enforcement efforts on CBD food products in the coming months.

It is therefore very important to check that suppliers have obtained the necessary authorisations before placing their product on the GB market; otherwise there may be a risk of regulatory enforcement and the products having to be removed from the shelves.

CBD products are still relatively new and, given the current rate of growth in the market, we may see better regulation of CBD products and advertising of such products in the future.

> “Given the growth of the CBD market in the UK, this is becoming a hot topic for regulators, with the Chief Executive of the FSA, Emily Miles, warning the CBD industry and retailers in December that it needs to market products responsibly.

# ASA update

Impact M

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## What's changing?

The Advertising Standards Authority (ASA) is now halfway through its five-year strategy, 'More Impact Online', with a number of additional projects to be targeted in 2022.

The focus to date has been on protecting the vulnerable (more specifically, children/young people) from, most particularly, misleading content and inappropriate targeting of online advertising.

As a result, the ASA completed a number of projects in 2021, including:

- Creating a dedicated webpage to name and highlight particular influencers who have repeatedly failed to follow advertising rules, after reporting that compliance with ASA rules (in relation to declaring an ad) sits at only 35%;
- Publishing a guide for marketers on using online media, setting out how they can demonstrate that they have taken adequate steps to limit children/young people's exposure to targeted, age-restricted marketing communications;
- Producing specific guidance regarding multi-level marketing (MLM), setting out that both the advertising of any goods/services and posts relating to the recruitment of others to the MLM scheme are subject to Committee of Advertising Practice guidance, and claims under both need to be clearly substantiated and not misleading; and
- In response to the coronavirus pandemic, working closely with the Medicines and Healthcare products Regulatory Agency (MHRA) to target enforcement action at treatments claiming any ability to prevent or treat Covid-19, such as IV drips and vitamin shots.

In 2022, we can expect to see a focus on regulating weight loss injection ads, and the presence of racial and ethnic stereotyping in advertising.

> "There has been a notable shift in the ASA's focus to wellbeing, and the consideration of how harmful an ad may be on a consumer's mental health.

## What should retailers do to prepare?

Retailers will need to carefully consider who they choose to represent their brands, given the continued prominence of influencer marketing (from the celebrity end of the spectrum to the micro-influencer), given the renewed focus on naming and shaming those who are non-compliant. As with any negative publicity, retailers should be aware of the potential knock-on effects of working with such individuals.

Given the concentrated attention on the beauty and wellbeing industry, as a result of its size and reach, retailers in this sphere should be more cautious than ever, regarding how, and who, it targets with its products. There has been a notable shift in the ASA's focus to wellbeing, and the consideration of how harmful an ad may be on a consumer's mental health (in addition to the usual practical considerations, such as whether an ad is correctly labelled an ad).

# Update on transition from CE to UKCA marking

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## What's changing?

Since 1 January 2021, the UK Conformity Assessed (UKCA) mark has been introduced for manufactured goods placed on the market in Great Britain (GB), replacing the previous CE marking regime albeit with a transitionary period. Like the previous CE mark, the UKCA mark confirms that a product meets certain health, safety and environmental regulations and standards.

The essential requirements, the process for conformity assessment and the standards for conformity assessment are, at least for now, largely the same as the CE marking regime. There is a separate regime for Northern Ireland.

The UK government had been encouraging manufacturers to use UKCA marking as soon as possible after 1 January 2021. However, on August 2021, the UK government extended the period of time for which it would continue to accept CE product markings until 1 January 2023. This is subject to a few exceptions, and there are specific rules for some types of products, such as medical devices.

After 31 December 2022, the CE mark will no longer be recognised in GB and all products placed on the GB market after that date will need to bear the UKCA mark.

Since the government's announcement in August 2021, it has prepared draft regulations allowing businesses to fix the UKCA marking using a label or accompanying document until 31 December 2023. After then, the mark must appear on the actual product.

> After 31 December 2022, the CE mark will no longer be recognised in GB and all products placed on the GB market after that date will need to bear the UKCA mark.

## What should retailers do to prepare?

In the post-Brexit era, UK retailers are likely to be under the same obligations in relation to product markings as they are currently, 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 2022), ceasing selling products if it is suspected that the requirements have not been met, and notifying specified parties if that is the case.

Retailers will need to continue to work with suppliers to ensure compliance. Given the supply chain issues we saw in 2021, retailers should look at this sooner rather than later.

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.

# Overhaul of UK product safety regime

Impact H

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## What's changing?

Since Brexit, the Office of Products Safety and Standards (OPSS) has had an increased profile in the UK product safety regime. This is because the EU-wide RAPEX system for reporting defective and dangerous products no longer includes the UK and there is now a national market surveillance strategy for ensuring product safety.

The UK product safety database (PSD) is used by UK market surveillance authorities – including local authority trading standards and OPSS – to notify unsafe and non-compliant products. Weekly UK product safety **reports** are now produced, which include an increasing number of small electrical products and children's toys, similar to the European RAPEX reports.

However, the OPSS carried out a consultation last year as it is looking to overhaul the UK product safety regime to ensure if remains fit for purpose. Three key themes arose:

- The UK needs to modernise its regulatory system to catch up with technological innovation. In particular, the move to online markets and sales through third-party listings on online marketplaces creates challenges for regulators.
- Given the speed of product innovation, and new technology that has facilitated this, the future UK framework needs to adapt so that there are no enforcement gaps and to facilitate safe innovation.
- The current landscape could benefit from greater consistency, coherence and clarity.

> Weekly UK product safety reports are now produced, which include an increasing number of small electrical products and children's toys, similar to the European RAPEX reports.

## What should retailers do to prepare?

Retailers will need to continue to not only monitor the safety of the products they supply but also continue to monitor customer complaints and share relevant safety information through the supply chain.

It is also useful to review the weekly product safety reports to consider whether there are any similar products identified with a safety concern.

Retailers will also need to keep up to date with developments in the product safety regime as a result of the consultation, and we are likely to see changes in:

- Online markets: this will be a focus area and enforcement work will focus on undertaking a programme of regulatory interventions on goods supplied through online marketplaces.
- OPSS acknowledges the need to simplify its remit, including supporting local authority trading standards and refreshing and updating business tools for placing products on the market (including second hand goods).
- It will also review and update the functionality of the PSD.

# Update on business rates

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## What's changing?

The raft of business rates measures announced in last autumn's budget will be welcomed by many retailers. However, some will be left disappointed the government did not go further with its reforms.

**50% discount for retail, hospitality and leisure:** Retailers will see their 2022-23 rates liability halved, subject to a maximum relief of £110,000 per business.

**Freezing the multiplier:** The planned increase in the multiplier for 2022-23 will be cancelled. The government is planning a consultation on further changes to the multiplier, including making the Consumer Price Index the default measure of inflation used for uprating.

**Three-yearly revaluations:** In April 2023, rateable values will be adjusted to those at the April 2021 revaluation date. Following that, revaluation will occur every three years, rather than the scheduled five years. Businesses will have new duties to notify any changes to the occupier details or physical property characteristics.

**Business rates improvement relief:** From 2023, this new relief will enable businesses to make eligible property improvements without incurring an immediate increase in rates liability. For 12 months, they will pay no extra business rates.

**Green technology investment relief:** Also from 2023, an exemption will apply for investment in eligible onsite renewable energy generation and storage.

**Online sales tax:** The government continues to explore the idea of an online sales tax as a way to rebalance tax liability between the high street and online retail businesses. A consultation is expected.

> Retailers should also consider whether they can take advantage of the new reliefs announced for improvements and green technology investment, once they are in place.

## What should retailers do to prepare?

Retailers should keep abreast of developments and consider responding to future consultations on the business rates regime. In particular, the online sales tax consultation promises to split the sector due to strong opinions on either side of the debate.

The government says that three-yearly revaluations will make the rates system fairer and more responsive to economic change. There is also a risk that it may increase the burden on the system through the potential for more frequent, expensive challenges to values. Retailers should be ready to comply with their new notification duties and to challenge valuations where appropriate.

Retailers should also consider whether they can take advantage of the new reliefs announced for improvements and green technology investment, once they are in place. The latter is aligned with the increasing emphasis many retailers place on their sustainability goals.

# Changes to minimum energy efficiency standards (MEES)

Impact M

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## What's changing?

From 1 April 2023, it will be 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.

## 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.

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

# HR issues and Covid-19

Impact H

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## What's changing?

As we saw in 2021, new variants and a rise in infections can cause a sudden change in workplace restrictions surrounding Covid-19. Retailers must be prepared to respond quickly to any future changes to the rules, including regarding home working and the use of face coverings.

In 2022 and beyond, many more employers will be taking advantage of the flexibility of more widespread agile working arrangements, with employees working from home or combining home and work via hybrid working arrangements. Added to this, the right to request flexible working is set to become a 'day one' right, with amendments to the Flexible Working Regulations expected during 2022 (currently, this right is only available to employees with 26 weeks' service).

Following the final closure of the Coronavirus Job Retention Scheme (CJRS) in September 2021, the anticipated uptick in redundancies did not materialise. On the contrary, according to the Office for National Statistics, there were 400,000 more vacancies in October 2021 than before the pandemic and recruitment is expected to become even more competitive in the first half of 2022.

The government is currently considering evidence on the impact of Long Covid on workers, following the formation of an All-Party Parliamentary Group in July 2021. New guidance, and possibly new legislation recognising Long Covid as a disability, is expected. Retailers should be mindful that notwithstanding this, claimants may argue that Long Covid should be treated as a disability.

## What should retailers do to prepare?

Retailers should continue to follow policies put in place to manage health and safety risk, and keep a watching brief for amendments to the working safely guidance issued by the government in each of the UK's devolved jurisdictions.

As hybrid/home working arrangements bed in, retailers should follow the new Acas guidance on hybrid working and ensure that health and safety obligations are met, particularly in relation to the mental wellbeing of employees working remotely.

Given the competitive post-lockdown recruitment market, retailers may wish to consider using increased flexibilities around working arrangements to expand their geographical recruitment base for non-shop floor based staff. Other options for attracting and retaining staff could include staff retention and recruitment bonuses, upskilling employees, undertaking pay reviews and introducing contractual provisions to encourage staff retention – for example, 'bad leaver' provisions in incentive schemes, repayment clauses for staff training, and post-termination restrictions.

"As hybrid/home working arrangements bed in, retailers should follow the new Acas guidance on hybrid working and ensure that health and safety obligations are met, particularly in relation to the mental wellbeing of employees working remotely.

Given the risk that Long Covid could be classed as a disability and/or an industrial disease, managers should be made aware of this when dealing with both long-term sickness absence and short-term intermittent absence. If Long Covid is a disability, sufferers will be protected from discrimination and entitled to reasonable adjustments at work.

You can find more insights and advice on our podcast, **Employment Law Focus**, where our experts discuss topics such as flexible and agile working, employee monitoring, working parents, employee wellbeing, the rise of the disability agenda and returns to work.

# Employment contracts and contingent workers

Impact M

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## What's changing?

Following the Supreme Court's 2021 decision in Uber v Aslam, employment tribunals will focus on the reality of contingent workers' engagement when assessing their employment status; any contractual terms that seek to avoid worker/employment rights will be disregarded.

Flexible working as the 'default' was promised by the government in its 2019 manifesto. It has now announced that this will be delivered through an amendment to the Flexible Working Regulations, making the right to request flexible working a 'day one' right. Currently, only employees with 26 weeks' service have this right. Draft legislation on this change is expected during spring/summer 2022 and any changes agreed under the regulations will be permanent.

In February 2021, the government ended a consultation on whether post-termination restrictions in employment contracts should be:

1. banned entirely; or
2. whether new restrictions on these clauses should be introduced, such as requiring that ex-employees are paid for the duration of the restriction or whether they should have a statutory maximum duration.

The government is expected to publish the outcome of its consultation in 2022. It is highly unlikely that post-termination restrictions will be outlawed entirely; a 2016 call for evidence found that most employers felt restrictive covenants worked well and did not unfairly impact an individual's ability to find new work.

> Retailers may wish to consider to what extent the removal of a qualifying period for the right to request flexible working will impact on working arrangements.

## What should retailers do to prepare?

Given the focus on the 'gig economy' following the Uber decision and a raft of other cases concerning contingent workers, retailers should review their contractual documentation to ensure it reflects the reality of the working relationship. Any terms in an employment contract that seek to circumvent legislative protections will be disregarded.

Retailers may wish to consider to what extent the removal of a qualifying period for the right to request flexible working will impact on working arrangements. This reform covers all atypical models – not just remote working – for example, job-sharing or annualised hours. It would be prudent for retailers to start considering now how they will audit and assess roles' suitability for flexible working and objective reasons for any refusals, particularly where there are competing requests.

Retailers should keep a watching brief for the outcome of the consultation on post-termination restrictions. Any reforms will likely impact on contractual documentation for senior staff and employees in commercially sensitive roles. If post-termination restrictions are tightened, retailers should consider whether other contractual clauses can be used to protect their business, such as strengthened confidentiality or intellectual property clauses.

# Workplace equalities and inclusion

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## What's changing?

Equality, diversity and inclusion is set to remain at the top of the agenda for employers in 2022.

In July 2021, the government published its National Disability Strategy, which aims to reduce the 'disability employment gap'. In December 2021, it published a consultation on voluntary or mandatory disability pay gap reporting, with draft legislation and/or guidance likely to follow in 2022. According to the strategy, disability workforce reporting will focus on general information about disabled employees, rather than pay differentials.

Given that disabled people are the world's largest minority, and they face some of the biggest hurdles at work, we believe the focus on disability rights will continue throughout 2022 and beyond. In the longer term, it may even be the subject of a high-profile equalities movement, along the lines of Black Lives Matter and #MeToo. Listen to our experts discuss the impending rise of the disability agenda on our podcast, **Employment Law Focus**.

Following calls from businesses and equalities organisations, the government has confirmed it will introduce ethnicity pay gap reporting. The timescale for this is not known, but the model is likely to follow that of gender pay reporting.

> Additional obligations to assist employees experiencing menopause symptoms are expected following an inquiry into menopause and the workplace in 2021.

Additional obligations to assist employees experiencing menopause symptoms are expected following an inquiry into menopause and the workplace in 2021. The inquiry said it has not ruled out recommending that severe menopause symptoms should be classed as a disability under equalities legislation. However, it is more likely that new guidance or a code of practice will be recommended.

The government has announced that it will introduce a new positive duty for employers to:

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

A defence will be available if the employer took "all reasonable steps" to prevent the harassment from occurring. The timescales for these changes are not yet known.

More broadly, the government has announced it intends to change how it tackles inequalities: moving away from legislation linked to specific "protected characteristics" and towards removing broader barriers, such as social and geographic inequality.

## What should retailers do to prepare?

In advance of mandatory ethnicity pay gap reporting, and possibly disability pay gap reporting, retailers may wish to start gathering data and considering whether they want to report on a voluntary basis.

Retailers should keep a watching brief for specific timescales on the introduction of a positive duty to prevent sexual harassment and the re-introduction of a duty to prevent harassment by third parties. 'Third parties' will include contractors visiting offices and stores, suppliers and customers. Businesses will need to consider what reasonable steps they can take to prevent harassment – for example, signage making it clear that harassment will not be tolerated. Internal training, policies and procedures will likely need to be bolstered and refreshed to take account of the positive duty.

Given that socio-economic exclusion is moving into the spotlight, retailers may wish to review the Social Mobility Unit's employer toolkit on **socio-economic diversity and inclusion**.

It would also be prudent for retailers to review the government's disability strategy to ensure their equalities strategy is in alignment.

In anticipation of the likely development of new guidance (and possibly legislation) on menopause at work, it is advisable for retailers to review any support they have in place for women experiencing menopause symptoms and consider what improvements can be made – for example, ensuring easy access to toilet facilities or checking that staff uniform is comfortable for women experiencing hot flushes. A menopause policy should be put in place, alongside training for managers and signposting of support for employees.

# 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.

### EU's new SCCs

The EU has released revised sets of standard contractual clauses for overseas data transfers (SCCs), to replace the previous SCCs, which were very out of date. The new clauses include some key changes and now cover data transfers from processors to (sub-) processors and from processors to controllers for the first time. They are structured differently, in four "modules" with a set of general clauses applying to all data transfer scenarios.

The clauses also include the mandatory data processing clauses required by Articles 28(3) and (4) of the General Data Protection Regulation (GDPR), and make it clear that any additional clauses entered into by parties must not conflict with the SCCs.

Another important change is that the clauses include new provisions reflecting the requirements of the *Schrems II* judgment regarding local laws affecting compliance and government data access requests.

### EDPB recommendations

The European Data Protection Board (EDPB) has also released its recommendations on supplementary measures that may be required in accordance with the *Schrems II* judgment. The recommendations set out steps that organisations should take to carry out data transfer impact assessments and, importantly, clarify that organisations can take into account factors such as whether the data importer has previously received a large volume of government access requests.

### UK version: IDTA

The Information Commissioner's Office (ICO) subsequently issued a consultation of its own, seeking responses on its draft international data transfer agreement (IDTA), the UK's own version of the SCCs. The IDTA is far more user-friendly than the EU SCCs, which is likely to help retailers looking to rely on it. It doesn't follow the same "modular" approach as the EU SCCs and is generally more flexible, in key areas such as obligations relating to third party access to personal data.

The ICO also consulted on an international transfer risk assessment tool, associated guidance and a draft UK addendum to the EU's SCCs. This addendum is likely to be particularly useful to multinational retailers 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 transfer risk assessment tool performs a similar role to the EDPB recommendations but is, again, more user-friendly and pragmatic.

The final versions of the documents have now been laid before parliament and if no objections are raised, they will come into force on 21 March 2022. Retailers will then have until 21 March 2024 to incorporate the UK IDTA (or the UK addendum , as appropriate) into existing contracts involving international transfers from the UK.

## What should retailers do to prepare?

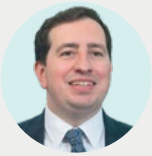
Organisations have until December 2022 to replace existing SCCs with the new EU SCCs, but the new SCCs can only be used for transfers of personal data subject to the EU GDPR.

Remediation work on contracts involving UK transfers can now commence, subject to the caveat that the IDTA and addendum are still awaiting parliamentary approval and further guidance is awaited from the ICO. Retailers should start by:

- Identifying all contracts that currently rely on SCCs and will require remediation, and identifying which involve UK transfers, which involve only EU transfers and which involve both;
- Commencing transfer risk assessments for overseas transfers, focussing on the most common jurisdictions and highest-risk transfers as a priority, and identifying any supplementary measures that need to be implemented in accordance with the recommendations and/or the ICO's transfer risk assessment tool, as applicable; and
- If any contracts only involve EU transfers, starting remediation work on those contracts first to reduce workload once the UK IDTA has been approved.

# The proposed new EU AI regulation

Impact M



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## What's changing?

In April 2021, the European Commission (EC) released a proposal for the first ever legal framework governing artificial intelligence (AI) (the regulation). The proposal aims to guarantee the safety and fundamental rights of both individuals and businesses and increase trust in AI systems.

The rules in the proposed regulation follow a risk-based approach. AI systems that are considered to pose a clear threat to the safety, livelihoods and rights of people ("unacceptable risk") will be banned outright; this includes AI social scoring systems such as that seen in China and any AI tools that manipulate human behaviour to circumvent free will.

"High risk" AI systems include technology used in a number of different areas, such as critical infrastructure, product safety components, education, employment, law enforcement, essential services and immigration. Before they can be put on the market, organisations releasing high risk AI systems will be subject to strict obligations, including carrying out risk assessments, ensuring high quality datasets, providing clear information to users and providing for appropriate human oversight.

There are also categories for "limited risk" tools (such as chatbots), which require users to be made aware they are interacting with a machine, and "minimal risk" tools (such as AI-enabled video games or spam filters). The regulation does not impose specific rules for minimal risk systems.

> The regulation needs to be adopted by the European parliament and member states and we would anticipate fairly heavy negotiations before it is finalised.

## What should retailers do to prepare?

The regulation needs to be adopted by the European parliament and member states and we would anticipate fairly heavy negotiations before it is finalised. As the regulation is an EU law, it is also not yet clear how closely, if at all, the UK will follow the EC's approach.

In recent years, the UK government has moved from saying there will be no specific AI regulation to supporting one, and the effective regulation of AI is closely aligned to data protection issues (where the UK wants to keep its EU adequacy decision), so the prospect of significant divergence in the UK seems unlikely.

Many of the obligations that apply to "high risk" AI systems reflect existing obligations imposed by the General Data Protection Regulation (GDPR). Retailers will already have processes in place to comply with these obligations, but the regulation is not limited to AI systems that process personal data.

Retailers should continue to be aware of and comply with their GDPR obligations in connection with the use of AI systems and 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.

Retailers should also closely follow developments in the EC's proposed regulation and, in particular, any announcements the UK government makes about the introduction of UK-specific rules relating to AI. The government's Office for AI plans to set out a national position on governing and regulating AI in a white paper in early 2022.

# Direct marketing and adtech

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## What's changing?

In 2020, the Information Commissioner's Office (ICO) consulted on a draft direct marketing code of practice and we are expecting this to be finalised shortly.

The code 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); the fact that organisations are unlikely to be able to make the availability of a service/product conditional upon consent to direct marketing; and the differences between business-to-business and business-to-consumer marketing.

The code also includes more detail on certain areas of compliance. For example:

- It highlights the General Data Protection Regulation'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
- It includes a section dedicated to online advertising and new technologies, 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.

As part of its ongoing investigation into advertising technology (adtech), the ICO has also recently published an opinion on data protection and privacy expectations for online advertising proposals. 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?

Once the code is finalised, we recommend all retailers review their direct marketing practices across their business and implement any changes needed to ensure compliance.

In the meantime, retailers should 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 these should be built into any new adtech initiatives. In particular, the ICO expects any new adtech proposal to offer users the choice of receiving adverts without tracking, profiling or targeting based on excessive collection of personal information.

"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.

# Buy now pay later

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## What's changing?

Alternative payment models forming the burgeoning 'buy now pay later' (BNPL) market have made a huge contribution to the ongoing growth of online retail in recent years. Consumer use of BNPL products in the UK almost quadrupled in 2020, and this attracted the attention of the Financial Conduct Authority (FCA) and a regulatory review.

On 2 February 2021, the FCA published a review undertaken by its former interim chief executive Chris Woolard (the Woolard Review), which expressed certain concerns regarding BNPL products. A consultation on the regulation of BNPL followed. In summary, the government says it is committed to introducing balanced and proportionate regulation of BNPL. The consultation, which closed on 6 January 2022, sought views to inform final decisions about how that regulation should take shape.

> "…the government says it is committed to introducing balanced and proportionate regulation of BNPL.

Of particular note for retailers, the government's present thinking in the consultation reveals:

- **Credit broking:** retailers are unlikely to need to become authorised credit brokers. The government recognises that this would have a significant cost for retailers, and would likely disproportionately impact small and medium sized businesses. Its concern is that this may lead to retailers dropping BNPL as a payment option, thereby reducing consumer choice.
- **Advertising and promotions:** BNPL agreements are already subject to regulations for advertising as set out by the UK Advertising Codes, overseen by the Advertising Standards Authority, and subject to the Consumer Protection from Unfair Trading Regulations 2008. But it is likely that promotion of BNPL agreements will also be brought within the FCA's rules on financial promotions (such that communications will need to be "clear, fair and not misleading", amongst other things). This may impact how retailers present BNPL products as part of their customer journey.
- **Unenforceability for improperly executed agreements:** the government's view is that sections 61 and 65 of the Consumer Credit Act (CCA) should apply to BNPL agreements. This is because they act as a strong incentive to creditors to ensure the necessary information is provided to consumers. Otherwise, credit agreements will be unenforceable without a court order. If this forms part of the regulation, it will be interesting to see the extent to which BNPL providers try to share this risk with the retailers they contract with.
- **Creditworthiness assessments:** the government also intends to work with credit reference agencies and others to agree how BNPL should be reported on consumers' credit files. Once enshrined in any regulations, businesses may need to revisit customer-facing terms and policies to ensure they are transparent.
- **Section 75:** although some BNPL providers offer purchaser protection, the government suggests a statutory protection could apply. If section 75 (or similar) protection is extended to all BNPL agreements, this may act as a further incentive for consumers to use BNPL. It may also provide customers with greater protection than other emerging forms of retail payments. For example, with interbank payments (which remain nascent in the retail space), there is currently no equivalent form of purchaser protection.

## What should retailers do to prepare?

Assuming BNPL is brought inside the regulatory perimeter in the way the government consultation envisages, the impact on retailers could be significant. Tighter restrictions on short term credit could impact sales, which would be keenly felt by the emerging breed of retailers for whom BNPL has been a core driver of growth. On the other hand, if the regulatory framework strikes the right balance and introduces further statutory protection for consumers when using BNPL, this could become an even more attractive payment option for retailers to offer.

At the very least, any regulation would inevitably require a different approach to the way BNPL products and payment options are presented to customers. Prudent retailers should keep a close eye on the 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.

# Contactless limits

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## What's changing?

From 15 October 2021, the contactless limit in the UK increased to £100 for single transactions and £300 for multiple transactions. This followed a successful increase in April 2020 from £30 to £45 for single transactions, and illustrates the Financial Conduct Authority (FCA)'s willingness to help drive economic growth as we move away from the EU and lockdown restrictions.

The changes were implemented by the FCA amending the regulatory technical standards on strong customer authentication (SCA) and common and secure methods of communication (SCA-RTS). Previously, people could make single contactless card payments of up to £45 until they either reached the total contactless transaction threshold of £130 or made five contactless payments in a row. At this point, consumers had to meet the SCA two-factor authentication standard by paying via chip and PIN.

People using their cards to purchase goods or services over the value of £100 can do so using chip and PIN, or may opt to use cash or other payment methods.

## What should retailers do to prepare?

It is likely that card payment terminals will need updating to accommodate the new limits, so retailers should liaise with their payment service providers to facilitate any technical updates needed to ensure their customers can benefit from the new limits.

While the changes are largely being celebrated, there are undoubtedly questions surrounding the prevention of fraud with limits having increased to over double the previous amount. Retailers that have embedded the increased limits into their sales channels should monitor for any fraudulent spikes and raise any concerns they may identify with their payment service providers.

> Previously, people could make single contactless card payments of up to £45 until they either reached the total contactless transaction threshold of £130 or made five contactless payments in a row.

# The Modern Slavery Act 2015: reporting requirements

Impact M

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## What's changing?

Following an internal review of the Modern Slavery Act 2015 and a consultation with businesses, public bodies, investors and civil society, the government has announced new proposals to strengthen the Act and hold businesses and public bodies accountable for tackling modern slavery.

Currently, under section 54 of the Act, certain businesses must produce an annual statement setting out the steps they are taking to prevent modern slavery in their operations and supply chains. This applies if:

- The organisation is a body corporate or a partnership, wherever formed;
- It carries on a business, or part of a business, in the UK;
- It supplies goods or services; and
- It has an annual turnover of £36m or more.

Organisations must publish their statement on their website via a prominent link from their homepage, or, if they do not have a website, a written copy must be provided within 30 days to anyone who requests one. Statements must also be approved by the board of directors, or equivalent, and signed by a director, or equivalent.

The proposed changes include:

1. **Extending the reporting requirement to public bodies with a budget of £36m or more.**

2. **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 organisations reporting under section 54 must now include:

   - 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, 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 and capacity building about slavery and human trafficking available to its staff.

3. **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 organisations are taking to identify and address the risks of modern slavery in their operations and supply chains. Publication is currently voluntary, but the government intends to legislate for mandatory reporting.

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

   All organisations will report on the same 12-month period from April to March, effectively giving them six months to prepare their statements.

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

   A gradual approach is proposed, including initial warning letters, with the additional option of civil penalties (set as a percentage of turnover). The government has also committed to setting up or assigning a new enforcement body to impose these penalties.

The planned changes should raise the bar on modern slavery reporting and help ensure that best practice to eradicate slavery and trafficking 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?

While the changes will not come into force until the necessary legislation is passed, there are steps that companies can take now to prepare:

1. Review your current statement against the mandatory requirements to identify the gaps and plan how these can be addressed;
2. Review other modern slavery statements and guidance to identify what would be considered best practice and how this could be adopted within your company;
3. Carry out a gap analysis between your existing policies and procedures and the proposed enhanced requirements, and identify any areas for improvement in your company's governance and management of modern slavery; and
4. Companies are encouraged to use the new modern slavery statement registry before it becomes mandatory.

> "The planned changes should raise the bar on modern slavery reporting and help ensure that best practice to eradicate slavery and trafficking becomes firmly embedded.

# Current trends in retailer sentencing

Impact H

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## What's changing?

When analysing these risks, we look at current enforcement activity, the various regulators' stated policy objectives, their likely focus, and what could proceed to prosecution.

Key enforcement agencies in the retail sector include local authorities; the Health and Safety Executive (where local authority powers do not apply to food safety, health and safety and environmental matters); the Environment Agency; and the police/Crown Prosecution Service (in respect of modern slavery matters).

Even during the pandemic, there has been extensive use of those investigation and enforcement powers against what are perceived to be the worst offenders, or where it is felt by the prosecuting authorities that there is both public interest and deterrent value in bringing a prosecution.

A large number of investigations have not resulted in criminal prosecution; alternative mechanisms have been agreed, including improvement notices (under strict time limits), civil proceedings and other enforcement undertakings.

Noteworthy cases include:

- On 19 April 2021, Tesco was fined £7.56m after pleading guilty to 22 breaches of the Food Safety and Hygiene (England) Regulations 2013, for selling out of date food at three of its Birmingham stores. This is the largest food safety fine ever imposed in the UK and clearly the court felt the fine would provide deterrent value to the rest of the sector.
- On 28 January 2020, Tesco was fined £700,000 for health and safety breaches after a 91-year-old pensioner slipped at its Hemel Hempstead store and broke his hip.
- On 18 December 2020, Tesco was fined £300,000 for health and safety breaches after a man was crushed under a roll cage.
- On 5 January 2021, Tesco was fined £500,000 for health and safety breaches over a child's electric shock in its Warfield store.

## What should retailers do to prepare?

Key points for retailers to remember:

- Sentencing in the criminal courts in respect of the above conduct is dealt with by the health and safety offences, corporate manslaughter and food safety offences sentencing guidelines, as well as the environmental offences guidelines.
- The guidelines set out a stepped process for the court to work through to calculate the fine, which includes assessing the seriousness of the harm caused, factoring in certain aggravating and mitigating factors.
- For present purposes, it is important to note that at step 2, the court identifies the annual turnover (or equivalent) of the offending company to help it determine a starting point and appropriate range for the fine. At step 3, the court 'steps back' and reviews whether the fine will be "sufficiently substantial to have a real economic impact, which will bring home to both management and shareholders the need to comply with health and safety legislation".
- Under the sentencing guidelines for environmental offences, the courts have held that very large organisations found to have caused harm in the worst possible way, either through deliberate action or inaction, could face fines of up to 100% of their pre-tax net profit for the relevant year. This would be the case "even if this results in fines in excess of £100m".
- Sentencing data confirms that large and very large organisations have been hit hard by the introduction of the guidelines. The median fine for a large or very large company has risen from £25,000 pre-guidelines to an average of £370,000.
- This is a developing area, but key to dealing with any of these issues is to decide an appropriate defence strategy from the outset.
- In the event that a guilty plea is likely, retailers should make sure they can present to the court both the most positive mitigation (including detailed financial mitigation) and any remedial measures, including positive changes to internal compliance procedures and risk management.

# BEIS consultation on consumer rights and enforcement

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## What's changing?

At the end of 2021, the Department for Business, Energy & Industrial Strategy (BEIS) opened a consultation handing beefed-up enforcement powers to the CMA. If enacted, these would enable it to impose huge administrative fines (up to 10% of global turnover) on businesses that it deems have breached consumer protection laws. This long-expected development would bring the CMA's consumer law enforcement powers in line with its powerful antitrust enforcement toolkit, and would greatly increase the risk of retailers and other consumer brands facing multi-million pound fines in cases where they are deemed to have misled consumers.

At present, the CMA tends to deal with consumer law breaches by seeking to change the behaviour of the parties involved, either via voluntary undertakings or, if necessary, by obtaining a court order banning the conduct in question. Local authority trading standards bodies can and do prosecute traders for breaching the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) in the criminal courts, but the fines have so far tended to be relatively low – at least when compared to other regulatory offences.

However, under the proposed new regime the CMA would be empowered to decide for itself whether a breach has occurred and then impose administrative fines without going to court. As with competition law enforcement, it is expected that any business that receives a financial penalty would have the right of appeal, although the details of any such appeal process have yet to be determined.

In addition, BEIS is concerned that consumer rights may not be keeping pace with online market developments. It therefore proposes updating consumer rights by:

- tackling subscription traps by strengthening the law on pre-contract information, giving consumers a choice on auto-renewal, and making it easier for them to exit subscriptions;
- preventing online exploitation of consumers by preventing the posting of fake reviews online and championing 'fairness by design' principles;
- improving consumers' access to alternative dispute resolution services such as arbitration and mediation; and
- mandating that consumer prepayment schemes have the means to safeguard customers' money.

## What should retailers do to prepare?

The BEIS consultation closed on 1 October 2021 and, given the scale of the consultation and likely volume of responses, BEIS is not expected to report back until the latter part of 2022.

> Even if, as expected, the CMA is granted additional enforcement powers, there remain a number of open questions.

Given the CMA is the main national consumer protection regulator for retailers and general consumer brands, we recommend that all UK retailers examine the outcome of the consultation closely when it is published. Even if, as expected, the CMA is granted additional enforcement powers, there remain a number of open questions. For example, will penalties be imposed for including unfair contract terms in consumer contracts, or will fines be reserved for more serious cases of "unfair commercial practices" under the CPRs such as misleading pricing or instances of greenwashing?

Retailers that offer any kind of subscription service should also watch this space carefully given that BEIS has tabled a number of proposals, some of which include restrictions and additional obligations in relation to subscriptions that automatically renew upon expiry of the initial term.

# Competition law – dual distribution under the spotlight

Impact M

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## What's changing?

As part of the ongoing review of the Vertical Agreements Block Exemption Regulations (VABER) at EU and UK level, the application of competition rules to "dual distribution" arrangements remains a hot topic for retailers and manufacturers.

Intensified by the impact of the pandemic on consumers' shopping habits, dual distribution is becoming increasingly common as more manufacturers seek to establish direct sales channels to reach customers online – thereby placing themselves in direct competition with their own network of retail and wholesale distributors.

Dual distribution agreements are, in principle, considered to be compatible with competition rules, in large part due to their beneficial treatment under the existing VABER. However, the increased prevalence of this kind of arrangement, which inevitably blurs the lines of competition, has led to calls for the rules to be tightened – in particular to address the risk of anti-competitive information exchange. The prime example would be a situation where a manufacturer uses sensitive pricing information it obtains from its network of retail distributors to inform the pricing strategy on its own website (or vice versa).

Interestingly, we are now seeing a divergence between EU and UK rules:

- **UK:** following a consultation on the UK-specific Vertical Agreements Block Exemption Order, the CMA has proposed retaining the existing exemption for dual distribution, subject to a market share limit of 30% for both parties.
- **EU:** the European Commission, on the other hand, has proposed limiting the scope of VABER safe harbour for dual distribution arrangements, so that the exemption only applies in full if the parties' aggregate retail market share does not exceed 10%. If the combined retail market share of the parties exceeds 10% but is below 30%, the exemption applies, but any information sharing between the parties is not covered by VABER and must be assessed separately.

This means that the competition risks associated with dual distribution in the EU will require much more careful scrutiny, not least as it will involve a complex assessment of the manufacturer's retail market share for the relevant product (i.e. not just its total market share).

However, there remains heightened sensitivity to information exchange in dual distribution setups under both UK and EU regimes. The European Commission published **draft guidance** on this subject on 4 February 2022, and further UK guidance from the CMA is expected in due course.

"To an extent, tighter regulation of dual distribution arguably helps retailers in the sense that it makes direct retail distribution more complicated for manufacturers.

## What should retailers do to prepare?

To an extent, tighter regulation of dual distribution arguably helps retailers in the sense that it makes direct retail distribution more complicated for manufacturers. However, retailers should nonetheless be aware of heightened sensitivity to information exchange (which brings risks on both sides) and, potentially, more complex discussions around market share, particularly with EU manufacturers.

Retailers with a continued sales presence in the EU should note that the revised EU VABER is due to come into force on 1 June 2022.

National retailers should look out for further guidance from the CMA as to what kind of information exchanges with manufacturers are permissible under competition rules. The wider UK competition regime is currently under review as part of an **ongoing BEIS consultation** on reforming UK consumer and competition rules, so retailers are advised to watch this space for future developments.

# 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: **www.tltsolicitors.com/retail**

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