RPC

Retail compass

Issue 4 July 2020

YOUR QUICK REFERENCE GUIDE TO LEGAL DEVELOPMENTS IN RETAIL

The changing face of retail

Contents

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Welcome to our Summer 2020 edition of Retail Compass

We've designed this publication to highlight the present and upcoming legal and regulatory changes that are affecting the retail sector, and to provide you with some practical guidance on how to deal with them.

There's no doubt that 2020 has been an unprecedented year of upheaval for anyone operating in the sector. The ripples from Covid-19 will have far reaching consequences, and let's not forget Brexit, now firmly in sight on the horizon. Many retail businesses are under intense pressure to adapt to this year's events and operate business as usual, or at least some form of it.

In this edition, we round up what we see as the latest key issues for the next 6-9 months, whether for retail boards, in-house teams or those in the business. Importantly, these are not just related to Covid-19; they raise awareness of other key legal and regulatory changes that retailers should be aware of now, particularly as Brexit approaches. With input from key industry organisations, including the BRC, we scope out what the medium term has in store for the sector. We offer practical guidance on not "sleep walking" into a no-deal Brexit, how to manage furlough fraud risk, potential liabilities for directors in the wake of Covid-19-related issues (and how to manage / mitigate these), Natasha's Law, Advertising & Marketing reform – and much more.

In addition, WGSN, the market-leading trend forecasting organisation for fashion and retail, give us their thoughts on how consumers have changed and how retailers can learn from international success stories.

We hope you find this helpful and as always, please do feel free to contact us with any feedback, queries or requests for our next edition (January 2021).

FROM TOP
JEREMY DREW
KAREN HENDY

Jeremy Drew, Co-head of Retail
Karen Hendy, Co-head of Retail

Foreword:
Recalibrating the world of retail

As someone who spent more than 30 years as in-house counsel, I can only imagine what GCs and their teams must be going through at the moment.

by Robert Ivens, CLL Advisory Board, ex General Counsel at Marks & Spencer

One of the many differences between the retail industry (in all its many forms) and other sectors is the very personal nature of the relationship between the customer and the retail brand. That relationship is formed as a result of the frequent (often lifelong) interaction between customer and retailer - whether in a store during the "traditional" shopping trip or online - and the loyalty to the brand that customers demonstrate and the brand strives to maximise.

Given the extremely competitive nature of the retail market, the demands on the retailer to improve the customer experience have never been greater. That is the context in which the retail industry is now grappling with the consequences of Covid-19, as retail gradually opens its "bricks" doors as part of the Government's gradual reboot of the economy.

What we see is an industry where the norms of behaviour have been turned on their head. Where once marketing and advertising would have implored the customer to buy more, whether in store or online, we now have the bizarre sight of security teams having to limit the number of customers able to enter shops, long queues and strict social distancing and other requirements in place.

I have been sent a video from a local specialist retailer making it clear, in the nicest possible way, that they don't want me in their store for any longer than is strictly necessary.

Meanwhile, retail teams throughout the industry have been grappling with this new world order, none more so than in-house legal teams. Never has the mantra "more for less" been more relevant, as GCs and senior in-house lawyers deal with demands from harassed CFOs who are themselves often facing increased costs against a backdrop of declining revenues.

> *Communicating with business stakeholders while managing legal teams remotely has its own challenges*

Cost is only the start. Carefully laid structure plans within the legal team have had, in many cases, to be torn up to deal with the immediate crises, whether in the supply chain, the balance sheet or the shopping centre. Effective marshalling of resources, both within the in-house legal team and through external legal providers has become critical. Communicating with business stakeholders whilst managing legal teams remotely has its own challenges.

The life of the in-house lawyer has never been more demanding.

RPC has therefore put together this latest edition of Retail Compass with the aim of helping you recalibrate your path as a business, whether from an in-house counsel perspective or otherwise. In the short term, Covid-19 will continue to massively impact the work of in-house teams – see the update on force majeure and frustration issues [page 39]. Longer term changes, such as the introduction of Natasha's law for food and drink retailers [page 26], are also covered.

But RPC has not ignored essential business-as-usual topics. On data protection, both the immediate adequacy ruling from the EU Commission on the UK in respect of personal data transfers [page 13] and the judgment in the Schrems case [page 22] will impact privacy and international data flows. Now is also the time to review your trade mark portfolio in light of the impact on IP at the end of the Brexit transitional period [page 15].

Retail timeline 2020/21

2 June 2020 (ongoing) — **Implementation of EU consumer law reform package has begun**

Several key pieces of consumer-focused EU legislation will come into force over the next two years. The Consumer Protection Co-operation Regulation, Digital Content Directive, Sale of Goods Directive, Omnibus Directive and Collective Redress Directive are intended to reform consumer laws and strengthen their enforcement in response to the increasingly-globalised online consumer marketplace.

1 July 2020 — **Changes to corporate tax relief on intangible property**

Intangible property acquisitions after 1 July will benefit from broader corporate tax relief in a development intended to encourage investment in intangible assets.

12 July 2020 — **Platform-to-Business Regulation (P2BR)**

P2BR comes into force and imposes requirements of transparency, fairness and new complaints procedures on online platforms, including marketplaces and search engines.

Q3/Q4 2020 — a) ICO expected to recommence AdTech investigation
b) ICO expected to publish finalised Direct Marketing Code of Practice

Following a pause in light of Covid-19, the ICO indicated that it intends to restart its investigation into real time bidding and the Adtech industry in the coming months and, separately, the final version of its new Direct Marketing Code of Practice is expected.

Post-Brexit: changes to international data transfers — **1 January 2021**

Before the end of the transition period (31 December 2020), the UK will seek an 'adequacy decision' from the EU in an effort to maintain the continued free flow of personal data from the EU to the UK.

Post-Brexit: changes for food and drink businesses — **1 January 2021**

UK food and drink businesses trading with the EU will become subject to various new rules relating to important matters such as food labelling and packaging, marketing standards and imports and exports.

Post-Brexit: changes to trade marks and design rights — **1 January 2021**

EU Trade Marks, registered and unregistered Community designs and international registrations designating the EU will cease to provide protection in the UK.

Post-Brexit: changes for e-commerce, geo-blocking and electronic identification — **1 January 2021**

Rules on e-commerce, geo-blocking and electronic identification across the UK and EU may change depending on the position adopted by the UK before the end of the Brexit transition period and any applicable UK-EU trade agreements.

Authorisation deadline for CBD products as novel foods — **31 March 2021**

Businesses producing cannabidiol products must submit a valid novel food authorisation application to the UK Food Standards Agency by 31 March 2021.

JUN JUL AUG SEP OCT NOV DEC JAN FEB MAR APR MAY

2020 2021

Horizon scanning

In this section we consider the key legal, regulatory and policy changes on the immediate horizon which we think will affect retailers and what steps to consider taking in light of the changes. We cover both purely domestic changes and a number which have their origins in European Union law and, as such, may impact upon retailers' European operations.

Strictly, when discussing these changes, we may not always be talking about the jurisdictions in which we advise as a firm. Therefore, whilst the following is intended to offer a helpful flag of the changes, we recommend tailoring your consideration of the changes to your own specific circumstances as there may be other local law considerations which affect you (and taking local advice where necessary).

EU consumer law reform: the "next GDPR"?

by Jon Bartley, Partner and Anna Greco, Associate

2 JUNE 2020 (ONGOING)

WHAT IS HAPPENING?

The EU has launched a campaign to reform consumer laws and strengthen their enforcement in response to the increasingly-globalised online consumer marketplace.

In order to do so, it has developed five key pieces of legislation – including the "next GDPR", in force just under two years from now.

WHY DOES IT MATTER?

1. Summary and effect of the key legislation

EU LEGISLATION

Consumer Protection Co-operation Regulation (CPC Regulations) (here)

Summary

- Improves the EU-wide cooperation framework to enable Member State national authorities (the 'CPC network') to collaborate to address breaches of consumer protection law.
- Authorities are given greater investigation and enforcement powers – eg, in the UK, the Consumer Protection Regulations 2020 (here) allow the CMA to apply to the courts for "online interface orders" for any infringement of EU consumer law, requiring removal or modification of content on, or restriction of access to, any interface (eg, website or app).

Status

In force in the UK since **2 June**.

THE EU'S PACKAGE ON SALES CONTRACTS FOR GOODS AND DIGITAL CONTENT

Digital Content Directive (DCD) (here); and **Sale of Goods Directive (SGD)** (here)

Summary

- DCD regulates a greater scope of 'digital content' (eg, music, films, e-books) and 'digital services' (eg, platforms, apps, cloud storage, streaming services), including those for which a consumer "pays" with personal data.
- SGD regulates goods, now including those with a digital element (eg, smartwatches).
- Some significant issues include:
  - requirement to be fit for purpose (including any purpose the consumer has requested and trader accepted).
  - consumers must receive all reasonably expected accessories and instructions, and any updates necessary to keep goods with digital elements, digital content and digital services in conformity.
  - burden of proof in relation to non-conformity is shifted to the trader (eg, goods defective within one year of delivery will be taken to have not conformed to it on delivery).

Status

In force at EU level; to be transposed by Member States by **1 January 2022**.

THE EU'S "NEW DEAL FOR CONSUMERS"

Omnibus Directive (here)

Summary

- Updates four existing consumer law directives: Unfair Commercial Practices Directive, Consumer Rights Directive, Unfair Contract Terms Directive, and Price Indications Directive.
- Some significant issues include:
  - traders must disclose criteria used to rank product search results (eg, price, ratings) and any payments made to achieve a higher ranking.
  - "price" now covers payment with personal data, meaning those 'free' services or content are caught by the usual rules (eg, 14-day withdrawal right).
  - fake reviews are prohibited and traders must take reasonable steps to ensure reviews are genuine.
  - online marketplaces must inform consumers whether an item is bought from a private individual and, if so, that EU consumer protections do not apply.
  - traders must inform consumers of personalised pricing.
- The maximum fine set by each member state must be at least 4% of annual turnover (or, if no annual turnover is established, up to €2,000,000) – hence the parallels to the GDPR.

Status

In force at EU level; to be transposed by Member States by **28 May 2022**.

Collective Redress Directive (here)

Summary

- Allows "qualified entities" to bring representative (ie, group) actions in the collective consumer interest where a trader has infringed consumer rights – either in the entity's own or any other Member State, or by joining forces.
- Successful actions could result in measures to stop or prohibit a trader's practice, or redress orders requiring compensation, repair, replacement, price reduction, termination or reimbursement.

Status

Text provisionally agreed; awaiting final approval, after which Member States to transpose within two years.

2. Brexit

The transposition deadlines for the above Directives post-date the UK's Brexit transition deadline. The UK Government will therefore have to decide whether to opt-in and implement them into domestic legislation. No matter the outcome of this decision, however, UK businesses which trade in the EU will be subject to the new EU regime.

The CPC Regulations are likely to be revoked by the UK Government prior to the transition deadline to prevent EU Member States benefitting from unilateral access to UK resources within the co-operation network. The desired parts of the CPC Regulations, however, may well be retained in domestic law.

WHAT ACTION SHOULD YOU CONSIDER?

If your business trades in the EU, work on the assumption that it will be subject to the EU reforms and consider planning ahead now. Think back to the Great Data Protection Rush of May 2018, and consider the timeframes and effort involved in becoming compliant.

For example, you could:

1. Study the new requirements to understand how they will impact your business and what changes will need to be made.
2. Put in place a timeline for compliance, addressing the high-risk or time-consuming issues first. For instance, consumer purchase flows and consumer-facing materials (eg, Ts&Cs) are likely to be high priority, because they will be open to scrutiny by regulators and consumers themselves.
3. Consider designing new consumer offerings with the requirements in mind to limit the changes needed down the line.
4. Consider how you will engage and educate those key stakeholders whose buy-in will be required later down the line.
5. Keep up-to-date on regulatory activity, and particularly the UK Government's proposed post-Brexit implementation of the legislation.

Horizon scanning (continued)

Corporation tax treatment of intangible fixed assets from July 2020

by Adam Craggs, Partner and Constantine Christofi, Senior Associate

1 JULY 2020

WHAT IS HAPPENING?

Intangible property acquisitions after 1 July will benefit from broader corporate tax relief, in a development intended to encourage investment in intangible assets.

WHY DOES IT MATTER?

It was announced at the 2020 Budget that, for the purposes of acquisitions on or after 1 July, intangible assets created before the enactment of Finances Act 2002 will be treated in the same way as those created after. Previously, companies could only access tax relief for assets created after the Finances Act 2002 was enacted, and not for any assets created before. This effectively imposed a requirement on companies to calculate what proportion of an asset came before or after 2002, but the distinction has now been removed. To retailers, this could improve the attractiveness of certain brand acquisitions.

This is positive for any company with an existing or future interest in intangible assets. Firstly, the broadening of the relief means less tax will be payable. Secondly, the administrative burden of determining what proportion of an intangible asset comes before or after the 2002 Act will be removed, since it is now all treated in the same way.

From an international perspective, this measure brings the UK more in line with other tax regimes where the distinction never existed, and removes what has been described as a 'bugbear' of the UK tax system.

With the retail market in a state of flux as a result of Covid-19, now could be a great opportunity to secure a "win" by acquiring the intellectual property for desirable brands, especially because the administrative burden and tax implications of such a venture have never been more favourable.

WHAT ACTION SHOULD YOU CONSIDER?

1. Consider discussing with your finance/tax team or external advisers which of your existing IP assets could now benefit from the relief.
2. Evaluate whether this development provides sufficient impetus to pursue any new intangible asset acquisitions.
3. Consider reviewing the scale of any administrative resources you have committed to calculating the tax implications on intangible fixed assets – is it possible that some redistribution could improve efficiency?

The EU's Online Platforms Regulation comes into force

by Jon Bartley, Partner

12 JULY 2020

WHAT IS HAPPENING?

The EU's platform-to-business regulation (**P2BR**) came into effect this month. It imposes requirements of transparency, fairness and new complaints procedures on online platforms, including marketplaces and search engines.

WHY DOES IT MATTER?

Retailers may rely on a number of third party online platforms to reach their consumers. P2BR affects a range of marketplaces - from Amazon to Airbnb to Deliveroo. The driver behind the regulation is to improve the fairness of the relationship between platforms and the sellers operating on them. Measures are therefore focused on stopping unfair platform practices (especially in connection with suspension and termination of seller accounts) and improving both platform transparency and disputes procedures. Platforms will be required to flesh out seller complaints procedures, and name mediators which they would handle issues through. This regulation applies regardless of the payments functions of the platform; it doesn't matter whether the consumer actually purchases via the marketplace or whether it only puts the seller and consumer in contact with each other. At EU level, payments are governed by the separate, second Payments Services Directive (PSD2).

WHAT ACTION SHOULD YOU CONSIDER?

1. Going forward, it would be advisable for retailers to check that their terms with online platforms include a commitment to the relevant changes that they are required to make in respect of the sale of goods or services.
2. If you are considering raising any disputes with a platform, be aware that they should be providing a more solid complaints procedure after P2BR has come into force, including the opportunity to mediate.
3. Bear in mind the P2BR when considering your customer complaints processes with respect to online platforms – can you leverage the P2BR changes to create customer processes more favourable to you?

Horizon scanning (continued)

AdTech and Direct Marketing: where are we now and what's next?

by Oliver Bray, Senior Partner and Rachael Ellis, Associate

Q3 / Q4 2020

WHAT IS HAPPENING?

The ICO plans to restart work in the coming months on its investigation into real-time bidding (**RTB**) and the Adtech industry. Meanwhile, the final version of the ICO's new Direct Marketing Code of Practice (the **New Direct Marketing Code**) is expected to be published in the coming months.

WHY DOES IT MATTER?

1) ICO Adtech investigation

The ICO is part-way through its investigation into RTB and the Adtech industry, to address the perceived lack of transparency in the Adtech online environment (eg, around cookie settings). The ICO expects to resume work in the coming months after a temporary pause as it reprioritises during the Covid-19 outbreak. The ICO concluded in earlier reports that the Adtech industry appeared to be immature in its understanding of data protection requirements under GDPR for RTB and that real change is needed. It considered that there are three main areas that the industry should address: the lawfulness of processing special category data (**SCD**); the lack of explicit consent by users for the processing of their SCD; and the reliance on contractual clauses to justify onward data sharing to achieve compliance with the law in the absence of supporting case studies.

2) The New Direct Marketing Code

The ICO's proposed New Direct Marketing Code will supersede the ICO's existing Direct Marketing Guidance. The ICO states that it intends the New Direct Marketing Code to apply to all processing of data for "direct marketing purposes". This includes all processing activities that lead up to, enable or support the sending of direct marketing by an organisation or a third party. If the intention is direct marketing, it will be caught! Examples the ICO has selected include: (i) collecting personal data to build a profile of an individual with the intention of targeting advertising at them; (ii) list brokering; (iii) data enrichment; and, (iv) audience segmenting. The New Direct Marketing Code also includes guidance on (amongst others): the use of social media presence to target direct marketing, the use of location-based tracking for marketing, viral marketing ("tell a friend campaigns") and use of publicly available information eg, on social media platforms – which we expect to be of particular relevance to retailers.

WHAT ACTION SHOULD YOU CONSIDER?

1) Adtech

The ICO's findings to date all point towards a hardening of the ICO's lines, and regulatory action seems increasingly inevitable. If you have not done so already you should consider:

- ensuring that senior management understand that industry practices are changing and encouraging them to review their current approach;
- keeping a check on which cookies you are placing on your website and considering conducting a Data Protection Impact Assessment (**DPIA**) of your RTB activity; including
- employing a privacy by design approach to your use of RTB; and
- keeping engaged with your industry trade associations, both to make sure your voice is heard in the ongoing discussions and track their best practice recommendations, in particular those of the Internet Advertising Bureau.

2) The New Direct Marketing Code

The public consultation on the New Direct Marketing Code ended on 4 March 2020. Once adopted, the ICO says it will monitor compliance with the New Direct Marketing Code through proactive audits - so records of your marketing-based data processing activity will be important. It has also said that direct marketers who do not follow the New Direct Marketing Code will find it difficult to demonstrate that their processing complies with the GDPR or PECR. All processing activities that lead up to, enable or support the sending of direct marketing will be caught by the New Direct Marketing Code. If, as a retailer, you are thinking of collecting or using any data for any direct marketing activities (for example, creating a new CRM list of segmented customers you may target with a new product launch), you are likely to need to follow the new guidance. We suggest marketing-based data processing activities are driven through the legal team and DPO, to make sure the activities stay within the New Direct Marketing Code.

International data transfers post-Brexit

by Jon Bartley, Partner and Rachael Ellis, Associate

1 JANUARY 2021

WHAT IS HAPPENING?

To maintain the continued free flow of personal data from the EU to the UK, the UK will seek an 'adequacy decision' from the EU under both the GDPR and the Law Enforcement Directive before the end of the transition period ie, 31 December 2020.

WHY DOES IT MATTER?

The UK will be a 'third country' after the transition period so EU-based data controllers will need a safeguard under Article 46 (eg, standard contractual clauses or **SCCs**) or a derogation under Article 49 to transfer personal data to the UK unless it is recognised by the EU as providing an adequate level of personal data protection. The EU currently recognises 13 third countries globally including Japan, Canada and New Zealand.

The UK is seeking the above 'adequacy decisions' before the transition period ends. Organisations' compliance requirements after this point will depend on what deal is agreed between the UK/EU, but if current plans are maintained:

1. UK to EEA personal data transfers will not be affected by the granting (or not) of adequacy because EEA countries will continue to be deemed adequate by the UK (though this is to be kept under review).
2. UK to non-EEA transfers will also not be affected in so far as the transfer is to an adequate country or a safeguard or derogation applies eg, SCCs. This is the position 'as is'.
3. If the UK is not deemed adequate, EEA to UK transfers would need a safeguard under GDPR eg, SCCs or binding corporate rules to be in place, or a derogation to apply.
4. Non-EEA to UK transfers will continue to be subject to local law eg, the current adequate countries have all (except Andorra) said they will legitimise data transfers to the UK. Other non-EEA countries will need to comply with their local laws.

Also remember, separate to Brexit, following the decision in July by the European Court of Justice in case C-311/18 – Facebook Ireland and Schrems (a.k.a "Schrems II"), the EU-US Privacy Shield scheme is now invalid as a means of transferring personal data from the UK to the US. Therefore, other alternative safeguards will need to be relied upon (eg, SCCs or binding corporate rules) or an applicable derogation.

WHAT ACTION SHOULD YOU CONSIDER?

The absence of an adequacy decision would affect the following in-bound personal data transfers to the UK: (1) UK retailers that receive personal data from an EEA-based partner eg, a German ecommerce platform; and (2) EEA retailers that share personal data with their UK affiliates.

Practically, organisations should:

1. Consider mapping their data transfers to understand which are likely to need attention. This is most likely to be transfers from EEA to UK operations which would require compliance steps (eg, SCCs) if no adequacy ruling is granted.
2. Monitor the following areas:
   - The UK Government's position to continue to allow UK-EEA transfers as this is being kept under review (albeit if no deal is reached by the end of the transition period, and no extension, such that UK reverts to WTO rules, we doubt that the UK Government will cease to recognise EEA countries as adequate);
   - Other countries' positions towards data transfers to the UK if the EU declared the UK to be non-adequate eg, it remains to be seen whether the 13 countries deemed adequate would change their current position to legitimise transfers to the UK in this event;
   - Consider building in a programme to review and update privacy documentation, such as Privacy Notices, contracts and internal policies, to reflect the UK's new position post-transition period, and to explain the new steps taken in relation to data transfers (eg are you now relying on the SCCs to conduct EEU to UK data transfers?); and,
   - Keep an eye on developments arising from the Schrems II decision, as this has the potential to create problems for data transfers to the UK from the EEA that are based on the SCCs. As a result of this decision, there is greater pressure on the UK government to achieve an adequacy decision by the end of the transition period.

Horizon scanning (continued)

Changes affecting food and drink businesses post-Brexit

by Ciara Cullen, Partner and Sarah Mountain, Senior Associate

1 JANUARY 2021

WHAT IS HAPPENING?

From 1 January 2021, UK food and drink businesses which trade with the EU, will be subject to various new rules. Amongst other things, the changes relate to food labelling and packaging, marketing standards and imports / exports. Action should be taken now, to ensure compliance.

WHY DOES IT MATTER?

1) Food labelling

From 1 January 2021, there will be considerable changes to food product labelling requirements.
See Comprehensive Government guidance.

Notable changes include:

1. No continued use of the EU organics logo on goods, unless certain exceptions apply;
2. No continued use of the EU emblem on goods, unless authorised by the EU and no labelling of goods as "origin EU";
3. Where products are a mix of EU and non-EU origin, product packaging must specify this; and
4. For products of animal origin, the replacement of the EU oval health and identification marks with a new UK equivalent.

Food products placed on the EU market before 1 January 2021 will not be subject to the new labelling requirements and can continue to be sold or distributed in the EU, without changes to their labelling.

2) Marketing standards

From 1 January 2021, new marketing standards will also apply for a range of products, including wine, fruit and vegetables and poultry meat. The changes are expected to include additional documentary requirements and compliance checks at borders. The new rules are likely to vary from product to product and not all are expected to "kick-in" from 1 January 2021; businesses should make appropriate enquiries in advance of the new year.

3) Importing and exporting products between the UK and the EU

From 1 January 2021, businesses must possess a UK Economic Operator Registration and Identification (**EORI**) number to move goods between the UK and the EU. Whilst there are certain exceptions to this rule, failure to obtain an EORI number could lead to increased costs and delays at the border, if HMRC is unable to clear goods. Businesses should note that it can take up to one week to obtain an EORI number.

For importers of animals and animal products, the process through which the UK authorities are notified may also change. There are different guidelines depending on the type of animal that will be imported or exported. Further details can be viewed here. One notable change is the new requirement for a health certificate when exporting animals from the UK, which must be obtained in advance.

WHAT ACTION SHOULD YOU CONSIDER?

- Keep an eye out for an extension to the requirement to implement the above changes as there has been some debate about whether an extension should be agreed due to the effects of Covid-19.
- Think about what your suppliers are doing to implement these changes and what you need from them in order for you to be compliant.
- There will be lead times for any changes to the supply chain and any packaging redesigns. Bear this in mind when changing or ordering new packaging. The removal or addition of a new emblem may only have a 1-2 week lead time with an existing supplier during "normal" times. However, in the run up to the changes there may well be a rush on orders due to market-wide demand. For example, on 23 March 2020, the UK red tractor logo changed, and this is yet to be in widescale circulation by licence holders who are required to append the logo to all applicable packaging. Similarly, there may be delays in obtaining an EORI number so try to apply early.

A brave new world - trade marks and design rights post-Brexit

by Ben Mark, Partner and Sarah Mountain, Senior Associate

1 JANUARY 2021

WHAT IS HAPPENING?

From 1 January 2021, EU Trade Marks (**EUTMs**), registered and unregistered Community designs (**RCDs** and **UCDs**) and international registrations designating the EU will cease to provide protection in the UK.

WHY DOES IT MATTER?

It is crucial that retailers identify how their IP portfolios will be affected by the changes and that they determine whether action is required, to maintain maximum protection.

There are almost two million EUTMs and RCDs. On 1 January 2021, the UK Intellectual Property Office (**UKIPO**) will automatically convert these registrations into equivalent, but entirely independent, UK "re-registered rights".

UCDs arising before the end of the transition period will continue to be protected in the UK for the rest of their three-year terms.

For RCDs and EUTMs registered before 1 January 2021, an equivalent UK right will be recorded on the UK register. "Re-registered" design rights will retain their RCD registration, application and renewal dates and will inherit any priority dates. Similarly, "re-registered" trade marks will retain their EUTM filing and priority dates.

The position is more complex for applications that remain pending on 1 January 2021. There is no automatic conversion: instead, applicants will need to apply to register an equivalent UK right within nine months (ie, by 30 September 2021) and a fee will be payable.

For RCDs and EUTMs that are due to expire in the six months before 1 January 2021, an equivalent UK right will be noted on the UK register with an "expired" status. The continuation of "expired" rights will be subject to the late renewal of the corresponding RCD or EUTM within six months. It will be free to re-register "expired" rights but if no action is taken, they will be removed from the UK register.

Although no conversion costs are payable for existing registrations, separate renewal fees will apply for the re-registered UK right and the corresponding EUTM going forwards.

After the transition period, the ownership of EU rights by UK based entities and individuals will be regulated by Spanish law, unless the owner has a "real and effective establishment in an EU Member State", in which case, the law of that member state will apply.

After the transition period, use of a "re-registered" EUTM in the UK will no longer constitute genuine use in the EU. This will leave EUTMs that are predominately used in the UK vulnerable to revocation for non-use.

In terms of parallel goods and the exhaustion of IPRs, it has been agreed that rights exhausted in the EU and the UK before the end of the transition period will remain exhausted in both territories.

WHAT ACTION SHOULD YOU CONSIDER?

30 June 2020 was the last day that the UK could request an extension to the transition period. The Covid-19 outbreak prompted speculation that a request would be made but the deadline passed, without event, meaning that the new regime will begin on 1 January 2021.

To ensure the ongoing protection of existing rights, it is important that retailers use the intervening period to take the preparatory action necessary for them, including:

1. Ensuring any RCD and/or EUTM applications that could still be pending on 1 January 2021 have been identified – no automatic conversion will occur and action will be required to secure protection in the UK.
2. Evaluating the pros and cons of applying for EUTMs and RCDs before 1 January 2021, noting that an additional application and fee will be required in the UK.
3. Determining the extent to which EUTMs are currently used in member states other than the UK. Any EUTM, which are predominately used in the UK will be vulnerable to revocation, if, or once they have been registered for more than five years. Action can be taken during the next 6 months, to protect against this.

At present, trade mark and design right law is harmonised across the EU. After Brexit, it seems likely that the two regimes will diverge. Retailers who operate across Europe will therefore need to familiarise themselves with both regimes, as well as look out for changes on two horizons.

Horizon scanning (continued)

E-commerce, geo-blocking and electronic identification post-Brexit

by Jon Bartley, Partner

1 JANUARY 2021

WHAT IS HAPPENING?

On 1 January 2021, the UK will become a third country with regards to the implementation and application of EU law in the EU Member States. As such, there are possible consequences of Brexit on existing EU-based e-commerce, geo-blocking and electronic identification rules.

WHY DOES IT MATTER?

As online sales form an integral part of retail business models, especially during the current Covid-19 pandemic, retailers need to ensure that they are aware of the impact that Brexit could have on e-commerce, geo-blocking and electronic identification rules and act accordingly.

Depending on the position adopted by the UK before the end of the Transition Period (which is subject to any applicable UK-EU trade agreements):

1) E-commerce: EU Directive 2000/31/EC on e-commerce (eCommerce Directive) is not expected to apply to the UK after 1 January 2021. Among other things, this would prevent UK based online businesses from benefitting from the EU's country of origin principle (COO principle). The principle allows online businesses to sell goods and services in EU countries whilst only complying with the regulations of its own country. Come exit day, retailers could therefore bear the burden of complying with the rules governing online activities in every EU country that they operate in – though note that this change to the COO principle will mainly affect those in the business-to-business (B2B) online retail sector, as it does not apply to contractual obligations governing sales to consumers;

2) Online platforms: Regulation (EU) 2019/1150 may no longer apply to the UK after 1 January 2021. The Regulation ensures that online intermediation services (including those who offer online platforms for businesses to sell goods and services to end users) operate fairly. Whilst it may no longer apply to online intermediation services provided to businesses in the UK (or businesses established in the EU that are offering goods and services to UK consumers only) it would continue to apply to online intermediation services provided to businesses in the EU that are offering goods and services to EU consumers. The Regulation has direct effect as of 12 July 2020, so applicable compliance steps should already have been taken. However post-Brexit, platform providers should check whether such steps are still necessary and retailers that sell through relevant platforms should determine the extent to which the Regulation's protections continue to apply to them;

3) Geo-blocking: Regulation (EU) 2018/302 on geo-blocking, which protects cross-border online shoppers from discrimination based on nationality or place of residence will no longer apply to the UK after 1 January 2021. This means that: (1) subject to whether the geo-blocking regulation is replicated in UK law, retailers may not need to comply with the Regulation when selling goods and services in the UK to UK customers; however, (2) they would need to ensure EU customers they are selling goods and services to retain their rights under the Regulation; and,

4) Electronic identification: Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions (**eIDAS**) may no longer apply to the UK after 1 January 2021. If so, the UK electronic identification scheme would not be recognised by EU Member States and UK trust service providers would not be considered 'qualified trust services' in the EU. The upshot is a potential drop in consumer trust due to the lack of a 'qualified' label and retailers being unable to verify the identity of EU customers using well-established state-sponsored digital identity.

WHAT ACTION SHOULD YOU CONSIDER?

If you think these changes may affect you, possible steps include the following:

1. Working out into which EU Member States you make B2B sales as these are more of a priority in terms of the ecommerce Directive changes (on the basis that you may have been relying on the COO principle to avoid local law checks). Check which e-commerce requirements you may need to comply with (if any) in relevant EU Member States eg, (1) consider reviewing and updating terms of sale to ensure compliance with the local laws of the EU Member State into which sales are made; and (2) put systems in place to ensure that you stay up-to-date with any changes to the requirements of those Member States.
2. Working out which customers need to access sites in EU Member States (eg, to purchase from EU traders) to identify the sites you don't want to be geo-blocked and seek local advice on the geo-blocking requirements of the relevant EU Member States to understand how you need to comply.
3. Staying informed – although these EU rules may cease to apply post-Brexit, the UK could enact similar laws. For example, the ICO have highlighted that the Government intends to incorporate the eIDAS rules into UK law.

The countdown is on: FSA confirms novel food deadline for CBD products

by Ciara Cullen, Partner and Lucy Houghton, Associate

31 MARCH 2021

WHAT IS HAPPENING?

The UK Food Standards Agency (**FSA**) has confirmed that businesses producing cannabidiol (**CBD**) products must submit a valid novel food authorisation application by 31 March 2021, or risk having their products "*taken off the shelves*".

In doing so, the FSA rejected the Cannabis Trade Association's (**CTA**) request for a deadline extension to account for the impact of Covid-19.

WHY DOES IT MATTER?

With the UK market for wellness growing exponentially in recent years, CBD products have seen a huge popularity surge, and are now widely available across UK retail. Despite this, CBD extracts attract 'novel' food status under EU law, meaning CBD products intended for consumption require authorisation before they can be placed on the EU market.

In February 2020, the FSA confirmed the European Commission's decision to classify CBD as a novel food from a UK perspective, and set a deadline of 31 March 2021 for CBD businesses to submit valid applications for novel food authorisation. As a result, following this deadline, only products for which the FSA has received a valid application will be allowed to be sold on the UK market (note: the deadline does not apply in Scotland, with novel food status covered separately by Food Standards Scotland).

More recently, the CTA requested the FSA grant CBD businesses an extension to apply, as a result of the impact of Covid-19 on the CBD industry.

The CTA, which represents the hemp and cannabis industry, argued that many of its members had continued to trade "*highly discounted*" products during the pandemic, in an effort to assist the nation to maintain its wellbeing, and had even "*pivoted their operations to aid the NHS... by supplying, donating and manufacturing PPE and hand sanitisers*". In addition, the CTA also noted many of its members had furloughed a high-volume of staff (including laboratory workers) making it difficult for businesses to meet the application deadline.

However, despite such protestations, the FSA refused to grant an extension, confirming the original deadline of 31 March 2021 would remain in place.

WHAT ACTION SHOULD YOU CONSIDER?

In the interim (while the deadline approaches) businesses can continue to sell their existing CBD products on the UK market, subject to basic rules – namely that products for sale: (i) are not incorrectly labelled; (ii) are not unsafe for consumption; and (iii) do not contain illegal substances (most notably, THC).

However, to ensure seamless continuity of sale, businesses must continue to prioritise preparation of a valid application, to cover both new and existing products, ahead of the deadline on 31 March 2021.

In order to maximise the chance of your application being valid, we recommend engaging with the FSA from the outset – the FSA has offered to assist businesses with preparation on a consultative basis, to ensure applications are "progressed at pace". In any event, applications should be submitted as soon as possible and prior to the start of the FSA's authorisation period (which begins on 1 January 2021) – an early application will hopefully allow your business to 'beat the rush' to the deadline and expedite the application process to your ultimate market advantage.

Some interesting statistics

UK and Europe

UK FOOTFALL

on English high streets rose by 35.8% after 5pm on 'Super Saturday' (ie, 4th July) compared to the week before, as restaurants, pubs and cafes were allowed to reopen for the first time in over three months

Source: Springboard

UK FOOTFALL UP 35.8% ON SUPER SATURDAY

ONLINE SALES IN THE UK

as a proportion of all retailing reached a record high of 33.4% in May 2020, exceeding the original record reported in April 2020 of 30.7%

Source: ONS

TOTAL RETAIL SALES

in June 2020 improved 3.4% year on year, compared with a 1.6% decline in June 2019. This was far above the three and 12 month average declines of 6.4% and 2.1% respectively

Source: BRC-KPMG

EUROPE SALES

EUROPE SALES

In France, mobile sales are expected to rise by nearly 24% in 2020, to $28.67 billion (€25.60 billion). In Germany: mobile sales are expected to rise 19.9% in 2020, to $38.32 billion (€34.22 billion)

Source: emarketer

MULTICHANNEL RETAILERS

those with stores - saw a record 71% growth in online sales compared with 2019 as physical stores opened up

Source: IMRG Capgemini Online Retail Sales Index

Rest of the World

LATIN AMERICA

it is estimated that 10.8 million consumers will make a digital purchase for the first time this year. This will bring the total digital buyer count to 191.7 million, or 38.4% of the region's population aged 14 and older

Source: emarketer

US CLOTHING

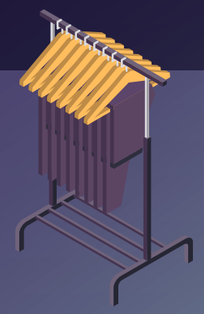
Where a typical US clothing retailer might hold twice as much stock as they sell during normal times, today that ratio is about 15 to one

Source: Bernstein, via BusinessofFashion.com

CHINA

From January to May 2020, the national online retail sales in China reached 4,017.6 billion yuan, an increase of 4.5 percent year on year, 2.8 percentage points higher than that from January to April 2020

Source: National Retail Federation, USA, via Forbes



US STORE CLOSURES

For every company closing stores in the US, 5.2 are opening stores

Source: National Retail Federation, USA, via Forbes

Other developments
UK and Europe

Here, we round up some other developments which have occurred since our last publication of Retail Compass (in January 2020) which we think are of interest for retail. We also include some developments due to take place in the longer term (ie, 2021 and beyond) for retailers to be aware of.

The final few developments should be of particular interest to retailers operating in (or considering operations in) South Asia/China. As always, we recommend tailoring your consideration of these international topics to your own specific circumstances as there may be local law considerations which affect you.

New drone regulations paving the way for futuristic tech

In June 2020, the European Commission announced that it is delaying the implementation of new European Union drone regulations (European Union Unmanned Aircraft Systems Implementing Regulation 2019/947 (EU UAS IR 2019/947)) until 31 December 2020 (with further delays possible due to Covid-19). These regulations govern the rules and procedures for the operation of drones and will become applicable within the UK on the same date. They will replace the current legislation in the UK and in EU member states.

The new drone regulations will introduce various licencing, registration and operational changes. For example, in certain circumstances, drones may get as close as five metres to people. The new rules will also remove the limitations based on commercial and non-commercial drone operations, with the focus now on the type of drone that is being used and where it is being flown.

As a result, it is likely that new flight options could open up and this could impact supply chain management. Using drones to expedite deliveries and reduce costs, especially earlier in the supply chain process, such as in manufacturing, warehousing and distribution, could increase efficiency and create new solutions for a retail sector which has been severely impacted by the Covid-19 pandemic (but has seen how online and doorstep delivery options are crucial and, importantly, can be executed without a signature). How readily consumers would embrace delivery with a non-human element, plus the obvious challenges around drone and sky traffic safety and creating robust packaging, is yet to be seen.

Both Amazon and Walmart have registered a number of patents on drones used for delivery and Uber has announced that it plans to launch drones as part of its food delivery service.

Tax guidance issued on upcoming joint liability notices

Earlier this year, the House of Commons Library published an overview of proposed legislation which would enable HMRC to issue joint and several liability notices (JSL notices). These notices transfer tax liability directly onto directors of companies that have participated in tax avoidance, evasion or 'phoenixism'.

The new provisions will empower HMRC to issue JSL notices to individuals when certain conditions relating to tax avoidance and insolvency are met, as well as to companies which have been involved with repeated insolvency or non-payment of tax (so-called 'phoenixism'). In some cases, the company only needs to be 'at risk' of insolvency. A JSL notice can be given where there has been involvement in tax avoidance or tax evasion, including cases involving a penalty for facilitating avoidance or evasion, and repeated insolvency and non-payment cases.

Under a JSL notice, the individual and the company are made jointly and severally liable for the debt, unless the company no longer exists, in which case the individual is wholly responsible for the debt.

Recipients of JSL notices can either require HMRC to review the decision to issue the notice, or appeal. However, the remit of appeals is carefully circumscribed.

The Finance Bill, which includes provisions relating to JSL notices, is currently making its way through Parliament; most recently, it was introduced to the House of Lords on 2 July 2020.

HMRC has been issuing similar notices to online retailers since 2016 as part of a crackdown against overseas VAT tax evasion. This development also covers VAT: given the impact of that tax on the sector, retailers should monitor this aspect of the Finance Bill closely.

Increase in the UK contactless limit

From 1 April 2020, the industry body, UK Finance, announced that the spending limit for contactless card payments had increased from £30 to £45. This change means that retailers now need to update their payment systems and terminals to accept contactless card payments up to £45.

The decision to increase the limit was taken following consultation between the retail sector and the finance and payments industry. However, the process was accelerated as part of the industry's swift response to Covid-19 to allow more customers to make safer payments. Given that this change has been expediated, retailers may find themselves in a position where they cannot process payments for the increased contactless limit right away – for example, on account of their payment system and terminals not yet having the necessary updated payment technology to take amounts over the previous contactless limit of £30.

All retailers have been advised to get in touch with their acquirers in order to start accepting the increased £45 limit. The payments industry has completed all the work to enable retailers to upgrade as soon as they can. Terminal manufacturers have said that they are ready to make the updates very quickly, but retailers may find it difficult to move quite so fast given the added pressures of the Covid-19 crisis.

The regulators and industry bodies recognise that it will not be possible for all retailers to push through the new contactless limit from day one. Therefore, an implementation window of several months began on 1 April 2020, with no firm deadline being communicated.

UK Finance is to proactively collaborate with members and merchants to help work through the changes and talk through key issues.

Andrew Cregan, the Head of Payments Policy at the British Retail Consortium commented that *"In the meantime, most customers can continue to make contactless payments for higher amounts using their smartphones"* ie, using mobile payment apps. The most widely-used mobile payment apps that are supported by the big banks are Apple Pay, Samsung Pay and Google Pay. Technically, there is no limit on how much users can spend via these apps, but some retailers do put a restriction in place. The reason for the lack of limit is that the individual has to authorise the payment (eg, using biometric technology such as, Touch ID or facial scan) when making the purchase.

Other developments | UK and Europe (cont.)

Reform of off-payroll working rules delayed to 2021

HM Treasury announced in March 2020 that the upcoming reform of off-payroll working rules (also referred to as IR35) will be rolled out to the private sector in 2021 instead of 2020, as part of the Government's response to Covid-19. This results in a longer period of time for retailers to prepare all necessary changes to their working practices relating to the use of contractors.

IR35 stands to affect retail more than most industries, due to a wide reliance on alternative contractual arrangements with staff, often stemming from the temporary nature of front-line work, as well as the interactions between retailers and their supply chains.

The Exchequer projected that it would be losing £1.3 billion per year by 2023-24 as a result of non-compliance with IR35. We anticipate that HMRC will continue to scrutinise the application of these rules closely. However, shifting the compliance burden onto the private sector will influence behaviours and invariably lead to more workers being retained on a direct, PAYE basis.

Retailers will no doubt be grateful for this extra time to ensure their arrangements with workers are in order. Careful thought ought to be given to the implications of increasing, potentially significantly, the number of workers operating under standard employment contracts.

Extension of time for strong customer authentication implementation

The FCA published a press release on 30 April 2020 announcing a six-month extension to the deadline for companies to implement strong customer authentication (**SCA**) for e-commerce. The new deadline of 14 September 2021 replaces the previous 14 March 2021 date.

Payment service providers are required to implement multi-factor authentication for when a payer accesses an online payment account, initiates an electronic payment or uses a remote channel in a way that implies a risk of payment fraud.

This comes as a result of the exceptional circumstances caused by the Covid-19 pandemic, which has significantly disrupted consumer and merchant activity. The FCA statement recognises the challenging commercial climate in which retailers must operate, although still expects momentum to be maintained on SCA implementation.

Retailers should be aware of this extension as the implementation of SCA requires merchants and payment service providers to work together with technology suppliers to deliver SCA in a consumer-friendly manner.

UK Finance, acting as industry co-ordinator, is expected to discuss the detailed phased implementation plan and critical path with stakeholders and agree it with the FCA. Once developed, UK Finance will publish the plan on its website.

Companies have been advised to continue with the necessary preparation in the meantime, such as robust end-to-end testing.

Key data protection decision expected mid-July: Schrems II

The highly anticipated data protection decision in case C-311/18 – Facebook Ireland and Schrems (aka **Schrems II**) – was handed down by the European Court of Justice (**CJEU**) on 16 July 2020. The CJEU held that:

- The EU's standard contractual clauses (**SCCs**) are a valid means of transferring personal data out of the EU under the EU's General Data Protection Regulation (**GDPR**). This will be a relief for the estimated 88% of companies that rely on them for their international data transfers (according to research by the International Association of Privacy Professionals). The EU Commission had been awaiting this judgement before modernising the SCCs, which date back as far as 2001 and have not been updated for the GDPR era – so companies may need to prepare for an SCCs successor.
- Although the SCCs remain valid, the CJEU held that it is not enough for organisations to simply sign up to the SCCs without consideration of the risks to personal data in the territory to which the data is being transferred, and that controllers may need to adopt "supplementary measures" to ensure that the data receives the same level of protection as it would in the EU. This element of the decision will cause concern amongst companies using the SCCs and it is hoped that regulatory guidance will be issued soon.
- The EU-US Privacy Shield scheme (**Privacy Shield**) is invalid, as it does not include satisfactory limitations to protect EU personal data from access and use by US public authorities under US domestic law. This outcome will give many a sense of *déjà vu* – it was less than five years ago, in "Schrems I", that the ECJ struck down Privacy Shield's predecessor (the US Safe Harbor scheme). Unfortunately, the companies who rely on Privacy Shield will now be required to re-visit their contracts and implement alternative safeguards once again.

For a more detailed analysis, please see here.

Rest of the World

China Revised Personal Information provisions

On 6 March 2020, the State Administration for Market Regulation and Standardization Administration of the PRC jointly announced that the National Standard: Information Security Technology - Personal Information Security Specification 2020 (**PI Specification 2020**) has been approved and will come into effect on 1 October 2020, replacing the existing 2017 version.

Collection of customer data allows retailers to create new personalised practices in communication, precise marketing and customer preference analysis, across both online and offline retail business; however, as we have already seen in Europe and elsewhere, the standards for how such data is handled are becoming more stringent.

The PI Specification 2020 is a set of national standards that provides guidance on personal information protection in China. Although it is not compulsory legislation, compliance is essential for retailers when determining compliance with their personal data protection obligations under the Cyber Security Law (and other future related regulations) in China.

We highlight below the key changes and requirements of the PI Specification 2020:

- retailers who operate multiple business functions must obtain customers' specific and clear consent (rather than bundled consent) for data processing, together with providing easy withdrawal options
- new right for data subjects to cancel their account, with a requirement for a data controller to respond to such request within 15 days
- notification of a breach must be given to data subjects (as well as to relevant authorities where required, as set out under separate regulations) when a data breach might cause them significant harm
- retailers must ensure that their privacy policy for the purpose of illustrating how data is collected, used and stored is clearly set out, and
- when handling customer's personal biometric information:
  - specific expressed consent from the customer is required;
  - such information may only be retained in the abstract (without raw data); and
  - additional requirements must be satisfied prior to sharing or transferring to third parties (such as established contracts between retailers and their suppliers).

At the point of writing, neither the PI Specification 2020 nor any official commentary is available in English. We would therefore recommend that retailers consult their legal counsel in order to understand the new standards.

Other developments | Rest of the World (cont.)

Changes in safety standards for toys and children's products in Hong Kong

The Toys and Children's Products Safety Ordinance in Hong Kong has been amended to update safety standards for all toys and eight classes of children's products, in line with international standards or standards adopted by major economies such as the UK or the USA. The new standards will come into operation on 1 October 2020.

Manufacturers, importers and suppliers of toys and children's products for local consumption (including babies' dummies, baby walking frames, child safety barriers, high chairs, paints, playpens and wheeled toys) should familiarise themselves with the changes and ensure compliance across the whole supply chain.

Since toy testing is becoming more and more stringent in Hong Kong, manufacturers should be engaging with professional quality and safety testers. This would give great comfort to importers and suppliers who are then able to trust the products and their certifications.

Design flaws, unsuitable material or substandard production can lead to liability for injuries and fatalities to children. Furthermore, a breach of the Ordinance's rules by a manufacturer, importer or supplier may result in a fine of HK$100,000 and one year's imprisonment on first conviction, and a fine of HK$500,000 and two years' imprisonment on subsequent conviction.

Further details can be found here, including a table summarising the changes to the safety standards (in Annex B).

Tightened measures under Singapore's Foreign Workforce Policy

The Singapore Ministry of Manpower (**MOM**) announced a number of changes to its foreign workforce policy with an aim to develop a strong local core of skilled workers and maintain the effectiveness of foreign workforce controls. We set out some of the key changes as follows.

With effect from 1 May 2020, the minimum qualifying monthly salary for a new Employment Pass (**EP**) was raised from S$3,600 (US$2,592) to S$3,900 (US$2,808) to keep up with the improving pay of fresh graduates from local autonomous universities. The salary criteria for older and more experienced EP candidates was also raised in tandem. For existing EPs, the new salary criteria will apply one year later, from 1 May 2021.

Employers in Singapore with at least 10 employees are required to advertise job openings on the national jobs portal MyCareersFuture.sg before submitting EP applications to the MOM. From 1 May 2020, this advertising requirement was expanded to include jobs paying up to S$20,000 (US$14,400) per month, an increase from the previous S$15,000 (US$10,800).

From 1 July 2020, the Local Qualifying Salary (**LQS**), which stipulates the minimum amount companies must pay their local workers each month if they want to hire foreigners on work permits and S Passes, will be raised from S$1,300 (US$936) to S$1,400 (US$1,008) monthly. The LQS was introduced to ensure that firms do not hire locals on a token pay just so they can hire more foreign workers.

This slew of changes to Singapore's foreign workforce policy are relevant to businesses in Singapore with local and foreign hires.

Singapore's new Work Injury Compensation Act promotes faster claims, fairer compensation and fewer injuries

The new Work Injury Compensation Act 2019 (**WICA 2019**) will come into force on 1 September 2020 with certain amendments progressively taking effect from 1 January 2020. In a press release, the Singapore Ministry of Manpower (**MOM**) explained that WICA 2019 aims to balance the interests of both employees and employers.

The key changes to the current WICA regime are as follows:

- greater transparency of information by requiring designed work injury compensation (**WIC**) insurers to share policy and claims data with the MOM
- expediting claims pay-out by allowing compensation to be based on the employee's current state of incapacity. Streamlining claims under the "auto-claim" process, ie, claim processing for fatal or serious injuries will commence once MOM or the insurer is notified of the accident, doing away with the need to file an application beforehand
- enhanced protection for employees by raising compensation limits and expanding compulsory insurance coverage
- greater certainty for employers by prescribing a core set of standard terms for WICA-compliant policies to ensure adequate coverage for WICA liabilities. Only WIC insurers that are approved by the Commissioner for Labour can sell WICA-compliant policies
- creation of new offences and enhanced penalties. Amongst others, new offences will be created for any employer which fails to deposit compensation with the Commissioner for Labour when directed

The new WICA 2019 affects all businesses with any local or foreign hires who are under a contract of service or contract of apprenticeship, regardless of salary, age or nationality.

Other developments:
On the longer-term horizon

"Natasha's Law" to come into force

The Food Information (Amendment) (England) Regulations 2019 (**Regulations**) are due to come into force on 1 October 2021 (a two-year transition period is already well under way), signalling significant changes to allergen information requirements for "prepacked for direct sale" (**PPDS**) food. The Regulations are often referred to as Natasha's Law.

The Regulations amend current legislation and will require businesses to include full ingredient labelling on all PPDS foodstuffs, even those prepared on-site. Items that will be caught by the Regulations include salads and pre-packaged sandwiches. The Regulations will only apply to businesses in England, but similar amendments are anticipated in the rest of the UK.

During the transition period, businesses should work towards ensuring that their labelling is comprehensive and includes full ingredient and allergen information. Appropriate training for staff, to ensure that they have the requisite knowledge and are fully appraised regarding the new regime is also a must.

With good reason, the labelling and advertisement of foodstuffs has received much scrutiny of late. In recent months alone, we have reported on a number of cases and ASA rulings in this area.

It is vital that businesses use the transition period to achieve compliance with the Regulations to avoid the negative attention that a failure to do so will attract and above all, to ensure customer safety. See a more detailed summary of the changes here.

Don't get caught up in the Plastic Packaging Tax

From April 2022, a 'Plastic Packaging Tax' will be levied on businesses that use plastic packaging which comprises less than 30% recycled material. The tax will be levied at £200 per tonne of qualifying packaging. This applies equally whether the packaging is manufactured in the UK, or has been imported and whether it was imported filled or unfilled.

First announced by Philip Hammond as part of the 2017 Budget, the measure aims to incentivise businesses to use recycled materials. Following a consultation period in early 2019, the 2020 budget introduced an exemption for businesses that manufacture or import less than 10 tonnes of plastic packages in a 12-month period. It is possible that further caveats will be announced, given that another consultation period came to a close on 20 May 2020.

Retailers can prepare for the tax by reviewing their use of un-recycled plastic and, if necessary, design and use plastic packaging that is easier to recycle.

To the extent that retailers believe they are eligible for one of the exemptions, it is important to preserve documents which prove this. The onus will be on businesses to show that they are exempt.

This comes as Google announced in July that it is partnering with WWF to create a platform for retail buyers to make more sustainable sourcing decisions. See press release here.

Business rates revaluation pushed back

In March 2020, the Non-Domestic Ratings (List) Bill 2019-20 brought the next revaluation of business rates forward a year from 2022 to 2021. Then, as a result of uncertainty caused by Covid-19, the Government pushed the revaluation back again to 2022 and introduced a business rates holiday for the 2020-21 tax year for retail, hospitality and leisure businesses.

This is a welcome development for retailers struggling with the impact of the pandemic and concerned that a revaluation in 2021, based on rents payable in April 2019, would likely be out of touch with the post-pandemic economic climate. Nonetheless, retailers that intend to contribute to the 2022 revaluation process should keep track of the effect that business rate payments would have had on business during the holiday and moving forward.

In other news, the Supreme Court ruled in favour of supermarkets in a long-running dispute with HMRC over business rates on ATMs. Ruling on *Cardtronics UK Ltd and others v Sykes and others*, the Supreme Court upheld an earlier decision that cash machines within existing properties (both internal-facing and external-facing) should not be subject to separate business rates bills. It is estimated that retailers are due refunds of up to £500m as a result of the ruling (Financial Times).

Update on the status of the draft e-Privacy Regulation

In *breaking* news, the draft e-Privacy Regulation is delayed...again. Like you, we find ourselves asking: will it ever arrive?

The Presidency of the Council of the EU has published an update on the progress of the draft e-Privacy Regulation (**Regulation**).

The headline is that earlier this year, revisions to the draft Regulation proposed the introduction of "legitimate interests" as a basis for cookies and similar technologies, albeit in limited circumstances and with an obligation to provide an opt-out. This could have been used by websites even for advertising purposes, provided they were not profiling individuals, so it could have reduced the impact and annoyance of cookie banners.

The proposal got a mixed reception from Member States, and there have been calls for clarity, including on the use of the "legitimate interests" basis for advertising cookies.

Measures to prevent the spread of Covid-19 curtailed best efforts by the Presidency to progress the further work required on the Regulation and the Croatian Presidency has committed to work closely with the incoming German Presidency to facilitate further discussions and to ensure smooth progress.

Covid-19 key issues for retailers

As retailers continue to work through the impacts of Covid-19, we have pulled together some key topics which we think retailers should be aware of to help you navigate the trials and opportunities of Covid-19 as we move through the next phase of the pandemic.

Financial support snapshot: a roundup of Government support for retailers during Covid

by Karen Hendy, Partner and Tim Moynihan, Senior Associate

The Government has recognised that the retail sector has been particularly affected by Covid-19. We have summarised the key interventional measures and developments introduced to support retailers during this time:

1. The Coronavirus Act 2020 brought in provisions for a three-month moratorium on forfeiture for non-payment of rent. This was extended in June and will now be in place until at least 30 September 2020. The forfeiture moratorium does not apply to all leases; consider advice on whether yours will benefit.
2. The Government has published a code of practice to assist retailers in discussions with landlords over rent payments. The code aims to provide clarity and be a guide to encouraging parties to work together.
3. The Corporate Insolvency and Governance Act 2020 (**CIGA**) allows companies in distress to seek protection from creditor action (ie, a moratorium) if they meet certain criteria. The moratorium can be for up to forty business days, (capable of further extension), and is intended to give companies a window in which to consider their options (eg, a restructuring, refinancing or simply weathering current pressures) free from the risk of creditor action to prevent a formal insolvency where possible.
4. CIGA also invalidates insolvency termination clauses in contracts for the supply of goods or services (which includes the new moratorium process mentioned above). Suppliers will not be permitted to do any of the following; terminate, charge higher prices or make continued supply conditional on settlement of outstanding balances solely due to a customer entering an insolvency process.
5. The Financial Conduct Authority (**FCA**) is seeking clarity on business interruption (**BI**) insurance and to what extent it applies in the context of the current pandemic. There have been many claims made under BI insurance policies and the FCA is looking to get insight of how insurers are making their decisions on these claims. As a test case, the FCA has started proceedings in the High Court.
6. Alok Sharma, Business Secretary, announced in April 2020 that he was considering proposals for a year-long suspension of Sunday trading laws. Current laws limit stores with retail space over 280 square metres to trade for six hours maximum on a Sunday. A suspension would have meant that larger retailers would have the option to stay open for longer. A similar proposal was last attempted in 2016 and history seems to have repeated itself as the Government recently abandoned the proposal as a significant number of MPs warned that they would vote against it.
7. The Government has agreed to provide guarantees of up to £10 billion to trade credit insurance schemes for business-to-business transactions. According to the Government, the Trade Credit Reinsurance Scheme will see the vast majority of trade credit insurance coverage maintained across the UK. The guarantees will help support supply chains and could protect retailers dealing in bulk B2B orders if a customer defaults on or delays payment. The Association of British Insurers (**ABI**) has published FAQs with practical details to help businesses navigate the scheme.

UK Government introduces "suspension" of wrongful trading provisions

by Tim Moynihan, Senior Associate

WHAT IS HAPPENING?

In March 2020, Business Secretary Alok Sharma announced that provisions on wrongful trading would be suspended. The move came as part of a wider package of measures that sought to provide assistance to businesses – and their beleaguered boards – experiencing financial distress due to Covid-19.

Now set out in the Corporate Insolvency and Governance Act 2020 (**CIGA**), which was passed on 26 June 2020, the provisions adapt the wrongful trading regime making directors' liability for the "relevant period" unlikely.

WHY DOES IT MATTER?

Under wrongful trading provisions, directors are required to take action if they know (or should know) that their business is approaching insolvency. If the directors continue to trade the business, there is a risk that they may be held personally liable in the insolvency for debts incurred after gaining that knowledge.

As a result of the Covid-19 pandemic and the forced closure of many retail operations, a large number of businesses are under considerable financial pressure, with directors facing difficult decisions on whether to continue trading. The UK Government's initial decision to suspend the wrongful trading provisions was to give boards breathing space to deal with the pandemic's impact on trading without the spectre of wrongful trading and personal liability hanging over them.

Rather than amend the underlying Insolvency Act provisions, the CIGA alters how the wrongful trading regime will be applied in relation to a company's financial position during the "relevant period" being 1 March 2020 until 30 September 2020 (unless extended further). For this period, the assumption is that any worsening in a company's financial position was due to the effects of the Covid-19 pandemic and not the actions of its directors.

What this means in practice is that during the relevant period, directors are not hampered by the wrongful trading regime whilst focussing their efforts on mitigating the effects of Covid-19 on the business. If a business can't be saved, it also means that, at least in relation to companies that go into insolvency shortly after the end of the relevant period, wrongful trading claims are unlikely to succeed unless it can be shown that the directors should have taken relevant steps before the start of the relevant period.

Whilst this suspension has been welcomed by the business community, the Government's announcement also made it clear that all other 'checks and balances' on directors would remain in place. Notably, directors will still be required to comply with their wider fiduciary duties and their duties under the Companies Act 2006. As a result, directors still need to proceed with particular caution when taking on additional debt or providing assurances to lenders and should consider and document creditor payments and asset disposals.

It also remains to be seen whether the secretary of state will use their powers to extend the suspension beyond the end of September. Whilst aspects of the lockdown are gradually being lifted in the UK and elsewhere, consumer behaviour will continue to be affected and many retailers, and their boards, are likely to face challenges extending beyond the relevant period.

WHAT ACTION SHOULD YOU CONSIDER?

1. If there are solvency concerns, a company's position immediately before the beginning of the "relevant period" and at the end of it are going to be important in relation to any potential wrongful trading liability. Directors and their advisers should consider both timeframes carefully.
2. Whilst the suspension of the regime gives some comfort, don't be lulled into a false sense of security! Directors are still subject to their other continuing duties and should take professional advice urgently on any solvency concerns.
3. Look out for further announcements. It remains to be seen whether the Government will extend this suspension beyond the end of September.

Covid-19 – key issues for retailers (continued)

Corporate Insolvency and Governance Act – Supplier Terms

by Tim Moynihan, Senior Associate

WHAT IS HAPPENING?

On 26 June 2020 the Corporate Insolvency and Governance Act (**CIGA**) came into force. The CIGA has made both permanent and short-term changes to the insolvency regime in response to the coronavirus pandemic and its consequences.

WHY DOES IT MATTER?

One of the permanent reforms provides that a contractual term of a contract to supply services or goods will be ineffective if:

- it terminates or entitles the supplier to terminate the supply; or
- does "any other thing", such as amending payment terms or requiring a company to pay outstanding charges as a condition of them continuing the supply (therefore preventing the demand of ransom payments), because the company has entered into insolvency.

These clauses can be referred to as "*ipso facto*" clauses, which translates to 'by the very fact' and relates to situations where a party seeks to terminate a contract by the very fact of insolvency.

Supply of goods or services contracts invariably include a right for the supplier to terminate in the event of the customer's "insolvency". What constitutes "insolvency" for those purposes will be a matter for negotiation between the parties. It will usually be in the supplier's interest to define "insolvency" so that it can be triggered by events that indicate financial distress which arise well before the customer enters into any formal insolvency process, such as administration or liquidation. Conversely, the customer will want as late a trigger as it can obtain.

There is a tension between the supplier's need to protect itself against non-payment and a customer's need for continued supply to continue trading and avoid formal insolvency. Historically only a specific set of suppliers, such as those providing utility and IT services, have been prohibited from stopping supplies due to customer's formal insolvency and where their supplies continue to be paid for.

The CIGA now prohibits all suppliers from: (i) stopping supplies by reason of a customer's insolvency if the supplies continue to be paid for, (ii) amending the contractual terms – eg, to charge higher prices and (iii) making continued supply conditional on settlement of historic debts. This prohibition has retrospective effect so will apply to all terms currently in force as well as those agreed going forward.

Suppliers will still be able to terminate the contract:

- with the consent of the insolvency office holder appointed over the customer
- with the permission of the court provided the court is satisfied that continuation of the contract would cause the supplier hardship, or
- in reliance on new breaches which happen after the insolvency procedure begins.

This new reform is of significant importance as it means that, subject to the exceptions, suppliers are required to continue to supply goods or services to an insolvent company, even when that supplier may be owed significant sums of money by the insolvent company prior to its insolvency.

WHAT ACTION SHOULD YOU CONSIDER?

The intention behind this new reform is to ensure continuity of supply and allow companies more of a chance to rescue their business. Suppliers should consider taking the following actions:

- reviewing your customer base to assess the risk of insolvency and then actively managing exposure to those customers
- reviewing your standard terms and conditions and consider revising them to include alternative termination rights that arise on customer financial distress but before insolvency
- taking advice on other options to insulate from customer insolvency such as retention of title rights, pro-forma invoicing or other security/ guarantee protection

Temporary Covid-19 measures in respect of AGMs and other general meetings

by Karen Hendy, Partner and Emily McGregor , Senior Associate

WHAT IS HAPPENING?

The Corporate Insolvency and Governance Act 2020 (**CIGA**), which came into force on 26 June 2020, provides temporary measures which enable companies to comply with their legal requirements on holding annual general meetings (**AGMs**) and other meetings whilst still respecting social distancing legislation and guidance.

WHY DOES IT MATTER?

Company law and individual company's constitutions impose particular requirements for both the timing and format of meetings which are (typically) incompatible with social distancing guidelines.

For example, the strict statutory timescale within which a public company must hold its AGM has presented real difficulties for companies with large shareholder bases in holding meetings during the Covid-19 pandemic.

Similarly, whilst some companies' articles permit the holding of "hybrid' general meetings (where a main, physical meeting is coupled with a form of electronic participation), this option certainly isn't available to all and, even then, physical attendance needs to be carefully managed.

In order to reconcile the company law position with restrictions on physical gatherings, the CIGA, with retrospective effect from 26 March until 30 September 2020 (unless extended further), temporarily suspends statutory and constitutional requirements to allow companies to:

- benefit from an extended time period within which to hold an AGM; and
- be flexible about the mode in which a meeting can be held (ie, a meeting can be convened with a quorum formed by members situated in different locations and communicating by electronic media, including by telephone).

By way of example, a public company with a 31 December financial year end that would ordinarily be required to hold its AGM by 30 June would have until 30 September to hold its 2020 AGM.

No one-size-fits-all approach

In the lead up to the CIGA, the Department for Business, Energy and Industrial Strategy (**BEIS**) and the Financial Reporting Council (**FRC**) published guidance on best practice for AGMs and other meetings during Covid-19 (the **Guidance**).

The Guidance acknowledges that there is no one-size-fits-all approach and companies will have to make their own judgements when deciding which date to hold, or how to adapt, their AGMs. "Business as usual" physical meetings open to all members (or a representative cross-section of members) are preferable but, where not possible, companies can explore other modes such as virtual meetings or live streaming. In any event, companies must carefully balance shareholders' safety against their right to engage with the board (and where engagement is ultimately limited, should try to accommodate later virtual or physical events).

The Guidance also sets out minimum best practice essentials for communications to shareholders to be followed regardless of the chosen mode of the AGM. These include providing sufficient clarity on, and time to consider, the AGM procedure and matters to be voted on, a Q&A system (with the company providing answers at the meeting or as soon as possible afterwards) and offering a physical meeting to all members once Government restrictions are lifted.

Retail response

Whilst some retailers have opted to delay their AGMs, others have chosen to hold their AGMs virtually or stream them online. For example, Co-op livestreamed and posted its AGM on YouTube (with a "lively discussion" taking place between shareholders in the sidebar) and, to comply with Q&A requirements, WM Morrisons set up a dedicated telephone service for shareholders to call and record their questions.

WHAT ACTION SHOULD YOU CONSIDER?

1. Understand what flexibility exists under the company's existing articles of association to determine the extent to which it's necessary to rely on the CIGA; if you don't have as many options as you would like, consider changing your articles now to allow for the possibility of a hybrid meeting model and other future flexibility around AGM planning (such as a power to postpone).
2. If you are thinking about holding an electronic meeting, how good is the company's voting and meeting technology?
3. When deciding on the timing and mode of an AGM, remember that boards still need to discharge their wider duties and carefully balance the safety of shareholders with the opportunity for engagement.
4. Should Covid-19 restrictions continue, for companies with a 31 March financial year end which would ordinarily need to hold their AGM by 30 September 2020, watch for further developments as the Government may permit an extension beyond that date.

Covid-19 – key issues for retailers (continued)

Furlough forecast: What kind of employment law claims are on the horizon?

by Kelly Thompson, Partner and Rachel Lord, Senior Associate

WHAT IS HAPPENING?

As retail workforces continue to be re-organised, what kind of employment claims could be brought by employees in the coming months, in light of the Coronavirus Job Retention Scheme (or **furlough scheme**) and what can you do in anticipation? We expect furlough-related claims by workers to focus on:

1. the decision to furlough being discriminatory;
2. employers failing to make use of furlough and dismissing or making redundancies instead; and
3. breach of contract/ unlawful deduction from wages claims during the furlough period.

WHY IS THIS IMPORTANT FOR RETAILERS?

There are no specific new employment law rights for furloughed workers arising out of the furlough scheme itself. However, if an employee is made redundant during a period of furlough, they may have a compelling argument that a reasonable employer would have furloughed them rather than make them redundant. The employee would then have to rely on existing employment law rights (ie, the right not to be unfairly dismissed) to bring their claim.

We expect claims to focus on:

1. **Discrimination**. A worker may claim that their selection (or not) to be furloughed is discriminatory ie, that the decision was made because of the existence of a protected characteristic such as gender or disability. Equality and discrimination laws apply in the usual way in this context;
2. **Unfair dismissal**. An employee may claim that their dismissal for redundancy was unfair because the employer could have avoided the redundancy situation by instead choosing to furlough them; and
3. **Breach of contract/unlawful deduction of wages**. During any period of furlough, the furloughed employees will still have a contractual right to receive their full wages. If, however, the employer chooses to reduce pay for the furloughed employee to the maximum HMRC grant (ie, 80% of their wage costs, capped at £2,500 per month), the employee may have a breach of contract claim and/ or a claim for constructive unfair dismissal if they have not consented to the pay reduction.

As these claims are completely untested, it is not clear how successful (or not) they would be. However, we know that one "traditional" defence may not be available. Employers have been able to argue in the past that a worker continuing to work following for example, a unilateral pay reduction, may have waived any breach of contract ie, they have affirmed the breach of the contractual terms such as the unilateral reduction in wages. With the furlough arrangement, however, an employee is prevented from working and so we would not expect this defence to be available in respect of an alleged unlawful deduction of wages.

ANY PRACTICAL TIPS?

1. **Consider furlough**. The furlough scheme will be highly relevant to the question of fairness in any redundancy exercise. We think employees may suggest, as part of any redundancy consultation process, that the employer should consider furloughing as an alternative to redundancy. It is therefore advisable for employers to:
   - consider the possibility of furloughing employees as a way of avoiding or mitigating the need to make redundancies; and
   - be able to demonstrate that they have considered this and the reasons for proceeding with the redundancy situation, (if applicable) ie, employers should carefully document that they have considered the possibility of furloughing employees in the context of any redundancy procedure. They do, however, need to balance against this the fact that the furlough scheme is not necessarily intended to be used if someone's job has already disappeared as this may be seen as an attempt to defraud HMRC. There is, therefore, a need to do a careful balancing exercise.

Note that the furlough scheme is continuing until 31 October 2020, although there will be a sliding reduction to the amount reimbursed by HMRC. Employers can, however, still fully furlough employees if they wish or they can put them in flexible furlough whereby they return to work on a part time basis or on reduced hours and are then furloughed for the remainder of the time. The employer must pay the employee for the hours worked.

2. **Address pay reductions upfront**. With a view to avoiding breach of contract claims, it is sensible for employers to deal with the contractual position relating to pay in the furlough letter with the employee. The employer will then have a record that the employee has consented to the pay reduction.

Furlough fraud and Government clawback: managing the risk

by Adam Craggs, Partner and Alice Kemp, Associate

WHAT IS HAPPENING?

HMRC has the right to go back up to five years when considering businesses' (including retailers') records relating to the Coronavirus Job Retention Scheme (the "furlough scheme") and will be able to clawback funds which have been claimed in error, or fraudulently, under new powers contained in the Finance Bill 2020, which is expected to become law in the latter half of 2020.

WHY IS THIS IMPORTANT FOR RETAILERS?

The furlough scheme is susceptible to fraud, for example, furloughed employees, or their employers, may be the victim of a phishing scam or ID theft by a third party.

Under the Criminal Finances Act 2017 (**CFA**), it is an offence for a corporate to fail to prevent a person associated with it from facilitating tax evasion. There is no requirement that the corporate assisted with the tax evasion, or in fact even knew it was happening. There is a defence if the corporate had in place reasonable procedures to prevent those providing services for, or on its behalf, from dishonestly and deliberately facilitating tax evasion. The reasonable procedures should be formulated using the following six guiding principles:

1. risk assessment
2. risk-based prevention procedures
3. top level commitment
4. due diligence
5. communication (including training)
6. monitoring and reviewing

HMRC provides its own whistleblowing facility for suspected furlough scheme fraud and it is understood that the number of notifications has increased dramatically in recent weeks.

Under the proposed new powers contained in the Finance Bill 2020, HMRC will be able to recover in full all furlough payments that the recipient was not entitled to. In addition, HMRC will be able to impose a 100% penalty if there has been deliberate conduct. The employer must pay funds to furloughed staff within "a reasonable period" and failure to do so can result in the payments being clawed back and penalties imposed.

Where a business or individual becomes aware that they received a furlough scheme payment in error, HMRC must be notified of the mistake within the time limit. The proposed deadline for notifying HMRC is the earlier of: (1) 90 days from Royal Assent to the Finance Bill; and (2) 90 days from the receipt of the payment (with special rules for CJRS payments). A failure to notify of an incorrect payment within this timeframe can result in the imposition of a 100% penalty.

The originally proposed timeframe was 30 days, but, following consultation, it was extended to 90 to allow for proper consideration and reporting. However, as the timeframe begins to run from the date of Royal Assent (currently estimated to be towards the end of July), there is potential for payments made in the later part of the re-jigged flexible furlough scheme to require notification within a much more condensed timeframe. As the flexible furlough scheme has more unknowns, there is a greater risk that a decision is made, resulting in an incorrect - and therefore notifiable – payment which may not be notified within 90 days of Royal Assent, triggering the clawback plus a 100% penalty for failing to notify.

WHAT ACTION SHOULD YOU CONSIDER?

The levels of furloughing in the retail sector means there is a greater risk of mistaken or fraudulent furlough payments being made. The reputational damage caused to a business as a consequence of it being involved in an investigation into suspected fraud (even if the business is completely innocent) should not be underestimated.

In order to minimise the risk of an investigation, we suggest you consider taking proactive steps, including:

- conducting a risk assessment to put in place reasonable and proportionate preventative procedures;
- assessing how associated persons operate in order to reduce the risk of exposure to furlough-based facilitation offences through the act of an associated person;
- checking carefully that they are eligible for any furlough scheme payments that they have received and have not over claimed (HMRC should be notified of any payments received in error);
- maintaining clear, auditable records to support the validity of furlough payments, such as details of amounts paid, which employees were furloughed (and who was carrying out any work performed); and
- having in place a comprehensive 'dawn raid' policy should the business be raided by HMRC. RPC has prepared a guide which can be found here.

HMRC acknowledges that the furlough scheme is new and it does not expect 100% compliance by organisations and accepts that genuine mistakes will be made by businesses. That said, we expect the furlough scheme to come under close scrutiny by HMRC in the coming months and appropriate risk prevention is advisable.

Covid-19 – key issues for retailers (continued)

Stores in focus; reopenings, safety and single use (plastic) setback

by Gavin Reese, Partner and Nick McMahon, Partner

WHAT IS HAPPENING?

With stores reopened, retailers face an unprecedented operational challenge in delivering the retail experience. The UK Government published its Working Safely During Covid-19 In Shops and Branches guidance (**Guidance**) on operating safely while minimising the risk of cases spreading. Many retailers carefully balanced the Guidance requirements with their own commercial and operational drivers and were able to reopen their stores in June – we take a brief look at some of the health, safety and sustainability drivers moving forward. Of course, this is an evolving picture so make sure you stay close to any post-July developments.

WHY DOES IT MATTER?

(1) Safety first

Retailers, like other employers, have a duty under health and safety legislation (such as the Health and Safety at Work etc. Act 1974) and common law to ensure the health, safety and welfare of their employees whilst at work by providing them with a safe workplace and system of working. This existing system is now supplemented by the Guidance which is intended to assist retailers in re-opening and operating their stores to protect employees and customers during the pandemic.

There is no one-size-fits-all solution and the way that each retailer discharges its duties will depend on the nature, activities and operations of the store in question. A risk assessment should have been considered, in consultation with trade unions or employees, to ensure that each re-opened store can manage the risks of Covid-19 moving forward. Remember, these obligations do not end on re-opening day and failure to comply on an ongoing basis may, in the worst case, result in employees refusing to work, employment claims, and/or regulatory enforcement action.

Retailers have looked to innovative ways to meet their obligations to maintain a Covid-secure environment:

- **Distancing**. Many retailers have moved towards contactless collection and delivery services, some restaurants in China have introduced conveyor belts to transport food to customers and other businesses are developing apps to track employees' distance from others.
- **Symptom testing and assessments**. Some retailers are using Covid-19 testing or assessments to protect employee health. There are, though, various legal considerations to work through before implementing this sort of measure. On the data protection side, retailers that intend to carry out such testing and assessments must complete a data protection impact assessment and comply with higher data protection obligations as the ICO has confirmed that employee health data is 'special category data'.
- **Hygiene and cleanliness**. Whilst most retailers are ramping up cleaning frequency and installing sanitation stations, some businesses are looking into cleaning robots and upgraded air-filtration systems.

(2) Single-use (plastic) setback

Sustainability remains high on the retail agenda and, with the increased scrutiny of in-store operations, many retailers will be relieved that the Government's ban on single-use plastic straws, stirrers and cotton buds has been pushed back to October 2020. Ensuring sanitary conditions in the context of multi-use items would, of course, add to the risk profile for any store and sourcing alternatives to single-use plastics from suppliers may be difficult in the current Covid-19 climate.

WHAT ACTION SHOULD YOU CONSIDER?

1. Ensure that you are familiar with the Guidance (including any (inevitable) updates) as well as the HSE guidance and think about how you will maintain records of compliance.
2. Understand your broader obligations to your workforce and stress test your plan of action for responding to specific concerns.
3. Consider innovative ways to ensure a Covid-secure environment in a manner which is commercially and operationally efficient.
4. Consider how your supply chain may need to be adjusted to ensure that you can comply with the single-use plastic ban by October 2020.
5. Consider retaining store safety literature and hardware after restrictions are lifted, in the event of a second "spike".
6. Longer-term, consider how you might dispose of unwanted spare plastic/ materials. Are there sustainable options?

Retail returns in light of Covid-19

by Henry Priestley, Partner and Brendan Collar, Associate

WHAT IS HAPPENING?

Many retail businesses have reopened/are preparing to reopen as the Covid-19 lockdown eases. Whilst retailers hope that sales will surge as consumers rush to the shops that they have been unable to visit since March, some fear that a large percentage of transactions will be returns of goods purchased pre-lockdown.

WHY IS THIS IMPORTANT FOR RETAILERS?

The impact of lockdown on the retail industry has been significant, with the closure of retail businesses leading to a dramatic decline in sales; according to Retail Gazette UK retail sales fell 18.1% in April compared with the previous month and it is estimated that lost sales for non-food retailers amount to £1.8bn.

Despite store re-openings, some fear that profits will continue to suffer because a large percentage of people visiting re-opened retailers will be so-called 'reverse buyers', returning goods that they purchased pre- lockdown. Some of these returns will likely be usual returns of ill-fitting clothing. However, it is also likely that retailers will see returns of purchases that have been rendered unnecessary by lockdown, such as new clothes for cancelled holidays. It is also possible that customers will seek refunds for now unwanted impulse purchases made whilst stuck at home.

In fact, an increase in the cost of refunds has already been seen in the travel industry, with Ryanair processing 10 million a month, 1,000 times its normal level.

An increase in post-lockdown returns will be facilitated by the extensions to normal returns periods that many e-commerce and brick-and-mortar retailers have implemented in an attempt to mitigate Covid-19 related financial losses, by encouraging customers to shop online. Even if safety concerns prevent some customers from returning to shops as soon as they reopen, returns policies of up to 100 days are being seen, which will give significant time to obtain a refund.

In addition, many fashion retailers are looking to reduce the handling of items by staff by closing fitting rooms, as has been the approach in other countries. This increases the likelihood of customers purchasing items that do not fit and will subsequently be returned.

WHAT ACTION SHOULD YOU CONSIDER?

1. Double check your returns policy and consider whether it is fit for purpose in the current climate – is any extended return period still appropriate?
2. Ensure that staff (particularly at point of sale and customer services) are up to speed on any changes to your returns policy and the criteria for accepting returns from a customer.
3. Consider any additional measure which could be implemented to mitigate against increased returns. For example, providing in-depth size guides to customers in stores where changing rooms are closed.

Covid-19 – key issues for retailers (continued)

Livestream shopping: making platform partnerships a success

by Marlon Cohen, Senior Associate and Rachael Ellis, Associate

WHAT IS HAPPENING?

Livestream shopping is now a well-established buying platform in the Chinese e-commerce space and it spiked in popularity during Covid-19 lockdowns. As Western brands, particularly in luxury, continue to increase their presence on livestream platforms, we consider the key areas for brands to consider when joining platforms such as Taobao Live or Alibaba's Tmall.

Livestream shopping is a live shopping event – think QVC - hosted by a brand on its own, or a third party website/mobile app. Usually, a celebrity, social media influencer or brand worker demonstrates a product and answers questions from a digital audience in real-time. Viewers are able to immediately purchase the item from an embedded link online. Just like presenters on QVC, livestreaming hosts sell a wide range of products, from apparel and cosmetics to electronics and even cars. In China, live streaming is a wildly popular way to shop, with the market worth an estimated US$63bn to its economy in 2019. (but the technology is starting to catch on in the US and UK too).

The first major livestream shopping player emerged in China in 2016 when Alibaba first launched Taobao Live. Since then, platforms like Tmall, Douyin or Xiaohongshu have become key Chinese e-commerce sites and saw a big spike in demand during lockdown as shoppers were forced to shop from home

WHY IS THIS IMPORTANT TO RETAILERS?

Given their popularity in Chinese/Asian markets, we would expect livestream shopping platforms to start to increase in popularity in the UK and EU over the coming months and years. As with any third party e-commerce strategy, it is important for brands to reach an agreement with their chosen platform which protects the brand and gives flexibility when launching in a new sales channel for the first time.

CHINA

From January to May, the national online retail sales in China reached 4,017.6 billion yuan, an increase of 4.5 percent year on year, 2.8 percentage points higher than that from January to April

Source: National Retail Federation, USA, via Forbes

WHAT ACTION SHOULD YOU CONSIDER?

There are a number of key areas retailers should be considering before they partner with online e-commerce platforms to sell goods into new territories:

Make sure your brand is protected in the territory you are selling into. Before you start selling goods into specific territories, make sure your brand is protected in the relevant territories. Brand audits and related registrations (such as trade mark and domain name registrations) should be carried out before you start selling your goods – especially as rules can vary widely by territory.

IP in the goods you are selling through the platform. Online platforms like Alibaba's Tmall will want to know that you have the rights to sell your goods into China and will not be infringing third party intellectual property rights. Make sure that you have the right level of protection from your suppliers and protect against any intellectual property infringement in your supply chain.

Understand the commercial risks of selling goods in different territories. Even though you are selling goods through an online e-commerce platform, you may still be liable directly to consumers in the relevant territory for any defective goods (or goods that don't meet local consumer law requirements). Your returns, exchange and refund processes also need to comply with local requirements. You may be expected to take on these risks and liability as part of your contract with the platform provider, so make sure you understand what local requirements apply.

Your supply chain to deliver sales in the relevant territory. Consider how the goods are going to be distributed from your factory or suppliers to consumers in the relevant territory. To what extent do you or your suppliers make use of bonded warehouses in the territory you are selling into? Will you be partnering with specific fulfilment providers with links to the territory you are supplying or will that be done through the platform itself?

Local knowledge of the market you are selling into. Your ability to forecast sales based on popularity of specific products in the territory and to change the SKUs you offer needs to be taken into account when selling through the portal. This often requires local knowledge of the territory you are selling to, as well as understanding how those changes can be made as part of the contract you are entering into.

Think about how the livestream platform will interact with your existing e-commerce platform. Some livestream platforms will redirect consumers to your e-commerce platform in order to make purchases, so this will need to be workable within your online ecosystem. Other livestream platforms – eg, Amazon Live – can handle payments themselves so this won't always be an issue.

Consider your approach to contracting with your chosen platform. Are you going to be contracting on the platform's standard terms? You may have leverage to negotiate additional terms to protect your brand eg, additional warranties; service levels (such as no disruption or black-outs during your live event); and/or, an obligation on the platform to provide analytics on consumers (such as who is viewing your product, the demographics and conversions of sale).

Don't forget the influencer. The success of livestream shopping platforms is often attributed to the use of popular influencers or hosts. Think about how you will contract with the influencer (eg, an online endorsement agreement). Be granular and prescriptive within your contract eg, in licensing relevant IP to the influencer (with a licence on the content the influencer produces, back to the brand); warranties to protect the brand and an 'only use' clause in relation to the product they are promoting. Lesser platforms may demand warranties/ indemnities from you in connection with content streamed by the influencer. Are you prepared to ensure the influencer complies with certain guidelines, and/or to give warranties to the platform concerning the influencer's IP and privacy rights?

Covid-19 – key issues for retailers (continued)

Consumers return to retail. The retail story in China…where are things now?

by Jason Carmichael, Partner and Stephanie Northcott, Registered Foreign Lawyer (England & Wales and Hong Kong)

WHAT IS HAPPENING?

Globally, the retail sector has been heavily impacted by Covid-19. As the epicentre for the outbreak of the virus in January 2020. China is now one of the first economies showing signs of recovery, and retailers are looking to understand the pattern there, in order to help predict how retail will recover (and how long it will take to do so) following enforced store closures and restrictions on people's daily lives.

WHERE DO THINGS STAND IN ASIA?

Retail sales in China fell by 20.5% (year on year) during January and February 2020; however, signs of recovery were already showing in March as stores started to reopen. By May, this year-on-year decline had shrunk to 2.8%, with some sectors, such as luxury goods, seeing a rapid recovery. Covid-19 also gave the already strong Chinese e-commerce industry an unexpected boost. Consumers went online for their essentials and retailers traditionally thought of as "offline" experimented with livestreaming e-commerce to try to recover their loss of sales. TaoBao (a Chinese online shopping website owned by Alibaba) and JD.com (another Chinese e-commerce company, partly owned by Tencent) reported that online sales of grocery, fresh produce and consumer essentials grew significantly during quarantine, driving up the country's online retail sales of physical goods by 3% in the first two months of 2020.

WHAT NEXT?

The new consumer expectations and habits formed during Covid-19 are expected to continue beyond 2020. As at May 2020, visits to online grocery channels were still 15% above pre-Covid levels. Studies have shown that more than a quarter of shoppers have shifted away from their primary stores during Covid-19, of which 47% do not intend to switch back (McKinsey & Company). The quality of fresh produce, distance and the delivery service offered were among the reasons for switching.

Luxury retailers traditionally relied more on brick-and-mortar stores, but the lockdown has made many re-think this strategy. JD.com reported that around 20 luxury brands have opened stores on its online marketplace since January 2020, including fine leather goods house Delvaux, jewellery brand Goossens and British luxury leather brand Smythson. The move toward omnichannel distribution is expected to continue given the younger, more tech-savvy demographics of luxury consumers in China, and the lure of collaborating with large online platforms in addition to in-house brand websites may challenge the brand positioning of traditional luxury brands.

There are mixed signals on what the longer-term impact Covid-19 will have on consumer sentiment in China. It is forecast that half of Chinese luxury spending will be domestic by 2025, and there are already figures to support this trend (Bain & Company). LVMH, owner of brands such as Dior and Louis Vuitton, reported increased sales of up to 50% in April in some parts of China and, at the reopening of its flagship store in Guangzhou, luxury fashion brand Hermès reported US$2.7m in sales in one day, as restrictions were relaxed and consumers returned. However, once this wave of "revenge buying" passes, some predict that luxury spending will stabilise under the backdrop of a global economic downturn and political uncertainties, whilst spending on fresh produce and health-related products such as supplements, workout equipment and wearables is likely to rise, as we see consumers' attitudes shift and become more health-conscious. More localised spending patterns developed during lockdown may also increase the market share of Chinese domestic brands.

Force majeure in a retail context in light of Covid-19

by David Cran, Partner and Brendan Collar, Associate

In general commercial contracts, force majeure clauses can often be overlooked as standard 'boilerplate' with little negotiation between the parties. Covid-19 and the disruption caused to businesses has highlighted how important these clauses can be for all types of commercial agreements and we anticipate that there will be significant focus on force majeure wording going forwards.

- A force majeure clause is a contractual provision that sets out what should happen to contractual obligations that become impossible or difficult to deliver due to events outside the (reasonable) control of the parties. They often excuse one or both parties from performance of the contract in some way following (and during) certain events (non-exhaustive lists of such events are often included). The affected obligation(s) are usually suspended and the party/s are not liable for the failure to perform them.
- For example, if a pandemic occurs resulting in complete lockdown of a country (as we have seen most recently with Covid-19), a widely drafted force majeure clause may allow a supplier to suspend delivering goods to a purchaser temporarily until such measures are lifted, without resulting in the supplier agreement being terminated.
- A force majeure clause may allow one or both parties to terminate the agreement if the event/disruption continues for a period, there is a material impact on the contract, etc.
- Example of a (short form) force majeure clause: *"Neither party shall be in breach of this agreement nor liable for any delay in performing, or failure to perform, any of its obligations under this agreement if such delay or failure result from events, circumstances or causes beyond its reasonable control. In such circumstances, the affected party shall be entitled to a reasonable extension of the time for performing such obligations. If the period of delay or non-performance continues for one month, the party not affected may terminate this agreement by giving seven days written notice to the affected party."*

PRACTICAL TIPS

1. **Good drafting** – consider tailoring these clauses to the particular circumstances/transaction. Consider what matters will trigger the provisions (and when); and what matters are not outside a party's reasonable control (eg, a widely drafted force majeure clause that includes pandemics may benefit retailers who cannot operate during a lockdown, as they will not want to purchase products that they cannot sell onwards). What are the consequences, what steps should be taken, and when?
2. **Payment obligations** – force majeure clauses often focus on the obligations that are delayed or impossible to perform. What about payment obligations – if not impossible, do they continue even if no services are being provided? Retailers may wish to suspend payment obligations and only be obliged to pay upon the service being completed.
3. **Notice provisions/formalities** – follow any notice or other formal requirements to serve force majeure notices or termination notices. If obligations are varied, ensure that they are documented (in accordance with any variation / no oral modification provisions).
4. **Other relevant provisions?** – consider other provisions that may assist, eg, change control notices, payment provisions (conditional upon provision of goods/services?), etc.
5. **Insurance** – retailers should consider appropriate policies and notify insurers promptly where relevant.
6. **Maintain records** – if a force majeure event arises, keep records as to why contractual performance was delayed/prevented and steps taken to mitigate effects eg, were supplier distribution centres closed, and did this affect the distribution of goods to a retailer?
7. **Breach/termination?** – bear in mind if/when force majeure applies. If a party wrongly seeks to rely on force majeure, it will potentially be in breach of contract. Similarly, wrongly seeking to terminate an agreement on the basis of force majeure may amount to a repudiatory breach, entitling the other party to accept the repudiation, terminate the agreement and claim damages. Consider the reputational and relationship damage this will have on your company.

Covid-19 – key issues for retailers (continued)

Return of the MAC (clauses) and practical steps for the retail world

by David Cran, Partner and Marlon Cohen, Senior Associate

WHAT IS HAPPENING?

The Covid-19 crisis is putting Material Adverse Change (or material adverse effect) (**MAC**) clauses back in the spotlight, none more so than in the world of retail.

WHY IS THIS IMPORTANT?

As more challenges arise from the current pandemic, we anticipate that retailers and their suppliers will continue to review their contracts to see how best to navigate the challenges they face, ie, renegotiating or terminating existing contracts and considering additional provisions to include in contracts going forwards. It is therefore worth considering whether any MAC clauses have been triggered as a result of Covid-19 or should be included in future agreements.

MAC clauses are most commonly used in M&A transactions but are often also included in significant or long-term commercial arrangements. Whereas force majeure provisions usually only bite if a party's performance becomes impossible, MAC clauses typically cater for unpredictable events or circumstances, or a significant deterioration in financial position, which materially alters the basis on which the deal was originally struck (even though performance of obligations may still be possible).

In a retail context, for example, a MAC clause (or similar termination provision) might include a buyer's right to terminate the contract if any one of a number of situations occurs that prevent the supplier performing the contract or substantially affects the nature of the deal - for example, where disruption to the global supply of raw materials significantly increases the cost of producing the end product (eg, a product at an agreed price of £1 now costs £2 to produce due to shortage of supply), rendering the intended nature of the deal commercially unviable.

Each MAC clause needs to be reviewed carefully and interpreted on the basis of the wording of the provision, in the context of the contract in which it appears and the relevant background at the time it was agreed, and bearing in mind business common sense.

WHAT ACTION SHOULD YOU CONSIDER?

There are some practical points that should be considered if you are reviewing a MAC clause in one of your existing retail contracts:

1. look at the precise MAC clause wording and related provisions. MAC clauses are often interpreted narrowly so the specific definition is very important
2. to be 'material', the adverse change must substantially affect the nature of the deal reached or the affected party's ability to perform its obligations under the contract. The change cannot just be a case of 'buyer's remorse'
3. any change in circumstances must have a permanent impact on the bargain or the affected party's ability to perform under the contract
4. do the relevant changes affect businesses across the sector or are there factors that are specific to the affected party in question?
5. check how these rights tie-in with the force majeure provisions and other related provisions (ie, service level agreements, liquidated damages, insolvency and general termination rights), and consider whether they are consistent with a MAC event/termination
6. parties that wrongfully rely on a MAC clause and terminate an agreement may be liable for repudiatory breach of contract (entitling the other party to terminate and claim damages)
7. if a MAC has occurred (or has arguably occurred), this may provide a good opportunity to renegotiate (without exercising the right / terminating the agreement). Commercial discussions (on a without prejudice basis) may provide a good outcome for both parties – so consider all commercial options before exercising any legal rights

Roundup of ASA guidance on advertising responsibly in relation to Covid-19

by Oliver Bray, Senior Partner and Victoria Noto, Associate

WHAT IS HAPPENING?

Retailers seeking to reference the Covid-19 pandemic in their advertising should be aware of the Advertising Standards Authority's (**ASA**) recent guidance and robust enforcement activity in this area. The ASA has published guidance on advertising responsibly in relation to the Covid-19 pandemic and published separate advice online in relation to advertising hand sanitiser and face masks. This new guidance is hot on the heels of several upheld Covid-19 related complaints, and two industry-wide Covid-related Enforcement Notices issued in conjunction with the Medicines & Healthcare Products Regulatory Agency (**MHRA**).

WHY IS THIS IMPORTANT TO RETAILERS?

With the pandemic at the forefront of consumers' minds at present, many retailers have incorporated Covid-related messaging into their creatives. Some retailers have also recently taken to selling products including hand sanitiser and face masks alongside their usual product lines.

The ASA's guidance warns that:

- those advertising such products should be wary of making claims in relation to preventing, treating or curing Covid-19. Such claims are likely to be considered "medicinal claims" and medicinal claims are only permitted in relation to licensed medicines or appropriately marked medicinal devices, and
- claims relating to alternative and complementary therapies should not be made unless there is robust clinical evidence to support them, something that advertisers are highly unlikely to possess at this stage of the pandemic.

By way of example, retailers should show great caution before stating that hand sanitiser "kills Covid-19" as this may suggest that the product can be used to treat or prevent the infection. However, more general antibacterial or antimicrobial claims (which do not include references to a named pathogen) are less risky, providing they adhere to HSE guidance on such claims.

Other areas of caution include food and supplements which allege to help protect consumers from Covid-19, for example, by boosting the immune system. Such products can only make claims which are permitted to be made according to the EU Register of nutrition and health claims and, in any case, food and food supplements cannot make claims that they are able to prevent, treat or cure human disease. Even indirect or implied claims to helping to treat or protect against Covid-19 are likely to be caught, noting that in the Enforcement Notice concerning the advertising of Vitamin Shots the ASA confirmed that it would be taking a broad approach with these types of claims.

Finally, the ASA warns against advertisers appealing to fear or distress. Ads should avoid exaggerating the risks caused if an individual does not purchase a certain product. However, the ASA notes that an appeal to fear in order to encourage "prudent behaviour" or to discourage "dangerous or ill-advised" actions may be considered justifiable, provided it is not excessive.

WHAT ACTION SHOULD YOU CONSIDER?

Whilst the guidance and advice is perhaps particularly pertinent to retailers selling items such as hand sanitiser, cleaning products and face masks, marketers of all products and services should be extremely wary before referencing the pandemic in their advertising. In particular, retailers should be wary of: (1) making any direct or implied claims about a products' ability to prevent, diagnose, treat or cure Covid-19; (2) offering advice on the diagnosis or treatment of Covid-19; and, (3) appealing to shoppers' fear or distress in ads. Given the clear public health implications at stake here, it is unsurprising that the ASA has issued a stern warning that it is "unlikely to have any patience for marketeers seeking to unfairly exploit the outbreak".

Brexit may have taken a backseat over the last few months whilst governments and businesses have responded to the impact of Covid-19, but as the final deadline to request an extension to the transition deadline has now passed, Brexit is back fighting for top spot on the agenda. We get an insight from the British Retail Consortium (BRC) on key issues for the retail sector.

The clock is ticking very loudly

They say you can't deal with a problem until you accept you have one. Well, the UK Government did that on the 20 May when it published its command paper on the Northern Ireland protocol.

by Andrew Opie, Director of Food & Sustainability, BRC

One of the most difficult parts of negotiating our exit from the EU was how to deal with the border between Northern Ireland and the Republic of Ireland. The solution was to accept measures which ensure no checks at that border by, in effect, installing a border post in the Irish Sea for goods travelling from Great Britain to Northern Ireland.

To ensure no border on the island of Ireland, the UK has accepted to reduce the risk of non-compliant goods 'leaking' into the EU across the non-existent border, as the UK will have a different tariff and regulatory policy to the EU that requires checks on goods going from GB. This was the problem the Government accepted on 20 May, now it needs to find solutions in the next six months to avoid additional delays and costs for Northern Irish consumers.

This is a particularly acute problem in food as much of that sold in Northern Irish supermarkets is made and transported from Great Britain. Currently that moves seamlessly as part of the supply chain, but new checks would add delays and cost, pushing up prices in store.

There are two key problems, firstly the UK, including Northern Ireland will be a separate customs territory to the EU and secondly that Northern Ireland will continue to align its regulations on food production and safety with the EU, not the rest of the UK.

On the first point, businesses will need to demonstrate goods from Great Britain are only destined for Northern Ireland. This is because the UK tariff schedule may be different to the EU and this prevents the risk of cheaper goods leaking across the EU border into the Republic of Ireland undermining EU producers.

The second point is perhaps more difficult to solve. The EU is particularly protective of its food industry and checks on imports to ensure they are safe and pose no risk are stringent. Whilst it might seem strange to think about this today as we share the same regulatory structures, what if the UK were, for example, to allow imports of chlorinated chicken or GM products not authorised in the EU? Checks on food imports are particularly complex and bureaucratic and certainly not something a supermarket sending multiple, composite food products wants to consider.

The one bit of good news is both sides are aware of the potential impact on Northern Irish supermarkets and recognised that in recent statements. There is also the possibility of a more flexible approach to imports than the EU is likely to take for exports to EU Member States. The hope is the UK will work with businesses to find solutions which both satisfy the EU but are not bureaucratic and unworkable. There are certainly IT solutions out there and if backed by a trusted trader approach we could solve this problem without impacting too greatly on Northern Irish consumers.

What is clear is the clock is ticking very loudly and businesses still don't know what they need to do from 1 January 2021. Any businesses whose supply chain runs across the UK, particularly GB to Northern Ireland should be paying close attention to developments to ensure they are as prepared as they can be. We at least have recognised the problem, it's just the solution we need now.

"...we could solve this problem without impacting too greatly on Northern Irish consumers"

ANDREW'S TOP TIPS

1. Form a group from across the business to assess the risk from supply chains and new legislation, meet regularly and review impact on business and ways to mitigate potential disruption.
2. Check key suppliers, including those in the EU, are keeping up to date with proposed changes to border controls.
3. Keep up to date with information through trade associations and gov.uk.

We asked Laura Saunter from trend forecasting giant WGSN (by Ascential) to give her insights on what's next for consumer behaviour in light of Covid-19. WGSN is the world's leading consumer and design trend authority, serving the fashion and creative industries with market leading products.

Consumer confidence: contact, controls and connections

with Laura Saunter, Senior Insight Strategist, WGSN (Ascential)

What things have successful brands done to combat the downturn in 2020 and what things should brands be planning next?

The Covid-19 pandemic has driven a shift towards a frictionless, low-impact society in which brands and consumers have little to no interaction within a physical space. The future of the retail space will have to adapt to a consumer who wants to control how much they opt in or out of human interaction, as they forge their own in-store experience. Strategies will need to allow for little to no human connection, while still providing excellent service.

We can expect to see a continuation of no-contact delivery services as well as to-go formats, with more drive-thru facilities implemented for the food and leisure industries. Leveraging digital ordering, which minimises human contact and reduces time in the store itself, will also be key.

Reducing friction and offering a low-touch but high-impact, fast and efficient experience that forgoes the need for human contact will be increasingly key. We can expect to see a rise in frictionless payments, more spaced out fitting rooms and cashier-less stores as consumers increasingly prioritise a sterile environment amid concerns around infection. No-touch technology – such as voice activated door handles and contactless tills – will be a priority as hygiene becomes a selling point pan industry, as well as anti-bacterial material innovations for carpets and fitting room dividers.

Designing for distance will also mean that store navigation needs to echo the one-way systems that grocery stores have implemented during the Covid-19 outbreak, creating additional space between shoppers.

> *we will see a rise in try-before-you-buy services translating from online to in-store*

Opening hours might also need to be adjusted as people want to shop at less busy times. Customer service will need to pivot so that consumers have more control and space – for example, we will see a rise in try-before-you-buy services translating from online to in-store, where shoppers can take items away to try on at home.

What lessons can UK retailers learn from international success stories in 2020?

Crisis always leads to a reassessment. In most cases we will find that people will be less inclined to buy traditional hard luxury items - priorities will shift towards saving and budgeting in light of the impending recession, and aspirations will move from wanting a designer handbag towards something more meaningful, such as health and wellbeing, travel, security and time spent with loved ones. However we can't discount the fact that there will be some consumers who will want to spend on themselves more than ever once the situation has stabilised. We've seen "revenge spending" in China already and to an extent this will happen globally as people adopt a hedonistic mindset and self-gift once lockdown lifts. We will also see more consumers buying smaller luxury items such as fragrance, cosmetics and candles during this time as new self-care rituals come to the fore.

What lasting effects will we see after 2020 in terms of online and physical stores?

Luxury retailers have further to go to adapt to eCommerce. This is largely because most luxury consumers prefer to shop in-store, and several luxury brands (Chanel, Goyard for example) don't have transactional eCommerce sites - so moving to a digital-first strategy and looking at new ways to engage online like through live-streaming and IGTV are going to be paramount. We've already seen luxury brands like Patek Philippe and Delvaux pivoting to selling online for the first time ever as a result of the pandemic, while white glove services have also had to shift online - brands will have to think about

Zoom consultations and virtual personal styling sessions going forwards as luxury clients want to have a low-impact but still very high-touch and personalised purchasing experience.

How can brands restore consumer confidence?

The global pandemic has been a really good opportunity for many brands to pivot, hitting reset on how they operate, and thinking of inventive and creative ways to give back. While we've seen many big luxury players making large philanthropic donations, it's the really meaningful shifts – such as brands giving their factories over to produce PPE and hand sanitiser and keeping sewing teams in work by producing masks – that will stay on top of consumers' minds for longer. Going forward, business success will increasingly be defined by how much a company adds value to people's lives, what it contributes to society and how it stands up to support those in need. With the pandemic exposing Government shortfalls on a global scale, brands will be under the spotlight.

MORE INFORMATION

wgsn.com

Time to think about Brexit

I know how hard everyone in the food industry has worked during Covid-19; a truly amazing job in serving the country in difficult times. However, one of the inevitable consequences has been no time to prepare for Brexit.

by Andrew Opie, Director of Food & Sustainability, BRC

If I had one piece of advice it would be to address that as soon as possible, as major changes are coming and they are less than six months away.

The Government recognised the problems facing the supply chain recently when it announced there would be a staged introduction to border controls from January 2021, regardless of whether or not we achieve a deal with the EU. So the clock is ticking louder every day and, whilst the Government announcement was helpful, they were at pains to remind the industry they need to prepare for January.

It is a short and only partial postponement of the problems of border controls. In fact, for anyone importing meat or dairy products, by April 2021 your suppliers will need to know how to adapt to a new process of export certificates and notification to UK authorities that doesn't even exist at the moment.

The problems are even bigger for exporters. To begin with we don't know what a deal, if any, with the EU will look like and whether tariffs will be applied. Regardless of that or the action the UK takes on its own borders, we know the EU is unlikely to relax its own controls.

> *The Government has acknowledged trade will no longer be frictionless*

The Government has acknowledged trade will no longer be frictionless. Exporters will certainly need appropriate export certification, customs notification and exit and entry notification. You may need to know which ports you can use on the Continent and to build in extra time to allow for new checks at those ports. Even within the UK there are unresolved issues. We know there will be some checks for transport between Great Britain and Northern Ireland but we don't know what they will look like and what they mean for businesses.

We are about to see barriers for the first time in a supply chain which has operated for decades across most of Europe and companies need to prioritise preparations. Not only will British companies need to prepare their own businesses but ensure their European suppliers are aware of controls this side of the Channel.

The opportunity is there; Governments both here and in the EU are entering an intensive period of engagement with business to help them prepare and understand what they will need to do. The challenge to businesses is lifting their heads from Covid-19 and using this period to take advantage of the time left in the final six months. In my view they can't afford not to.

Influencing indoors

Social media influencing has undergone drastic change recently. We speak to influencer Nicole Russell and get her thoughts on how Covid-19 has affected the way she works.

How has the impact of Covid-19 affected your work as an influencer?

It has mainly impacted the type of content I produce. Prior to Covid-19 my content was solely focused on "Street Style" fashion and shot in and around central London. Now that has all changed and I've had to move more to shooting indoors (in my bedroom to be precise!). The social aspect has also changed. Beforehand I would regularly go to PR events, this gave me a chance to socialise with other influencers and meet with brand representatives which helped grow my network and build relationships within the industry. I've also had a few campaigns put on hold as retail warehouses were shut for a period, so I couldn't finalise some of the collaborations I had lined up.

In what ways are you getting creative with producing content during lockdown and WFH?

Being in lockdown has meant I've had to be more creative in how I shoot my content as I no longer have easy access to an aesthetically pleasing London backdrop to make my photos look more interesting.

Instead, I've been focusing on shooting content using different angles and taking flat lay product photos. It's been good to slow down and think about what I'm creating, who it is for and how I can make it more varied so that my content isn't so repetitive.

Are you using any social platforms more that you haven't used before the coronavirus crisis?

Yes. Since lockdown I've started to use Pinterest (an image sharing platform) which is a great tool for inspiration and to help me think about how I take my photos. Since lockdown I've also signed up to various influencer marketing apps such as Tribe to help with securing brand deals.

Most of the brand deals available on this app are focused on beauty, lifestyle and food and drink. Prior to Covid-19, this wouldn't have been something I'd be interested in working on but as I've been producing more beauty content this has been a good resource to look for potential collaborations.

I've also joined an e-commerce affiliate revenue platform RewardStyle which allows me to earn a small commission from product sales that I've linked on my Instagram story.

Which type of brands are you still collaborating with and how? Any surge in particular types of products?

I still collaborate with online and high street fashion brands by styling their 'new in' pieces and shooting content from home for them to use on their social media channels. It did slow down at the beginning of lockdown, but its busier now retailers know what consumers are interested in buying and now they've had time to tailor campaigns towards 'working from home'.

There has been a surge in brands stocking loungewear (sweatshirts, jogging bottoms) and encouraging influencers to promote this. A lot of online retailers have also started to stock beauty products eg, hair masks, face creams, and encourage more self-care content at home.

This is an area I've started to promote more of on my own account. I recently collaborated with a hair care brand and promoted two of their hair care treatments via an Instagram post and on my Instagram story. Before lockdown I would have solely focused on fashion but there is a trend at the moment for beauty and self-care content.

What about product placement and sponsored posts? Has it changed? How?

Yes, product placement has changed - the obvious reason being I am creating more content at home as I can no longer easily take photos in my usual outside locations. In terms of sponsored posts, brands have cut down on their influencer marketing budget and are less likely to pay a fee for content creation and promotion on an influencers page, instead they encourage gifting collaborations.

What tips do you have for influencers on creating content during Covid-19?

Be more creative and inspired by what others in the fashion community are doing. Typically, people have more time on their hands now, so explore apps such as Pinterest, search fashion related hashtags and see how others are being creative and get inspired. It's hard to create interesting content from home, so experimenting with different content ideas can help with this.

> *I don't think this will permanently alter how influencers work*

Do you think this experience will permanently alter the way you and other influencers work when things get back to 'normal'? If so, how?

From a personal point of view, it has already altered the type of content I create and promote on my account as I'm not just creating fashion content. This experience has given me time to really think about what I'm creating and how I want the look and feel of my account to be.

Going forward, I'll be mixing up my outdoor and indoor content. I don't think this will permanently alter how influencers work because audiences will still want to see content from them and that interest is only growing more as we become more involved in what people are doing online.

Nicole Russell is also a member of the RPC Brand, Marketing and Sales team.

34%

of 18-to 34-year-olds say they now watch more influencer content during and because of the Covid-19 pandemic. That would seem like a promising bump in business for the social media mouthpieces.

Source: Fullscreen

Prior to Covid-19 my content was solely focused on "Street Style" fashion and shot in and around central London

The big transition back to work:

how to relieve your stress and anxiety with this simple strategy for self-care

by Eric Ho at Bumblebee Wellbeing

Negative feelings can have powerful negative consequences on you and your team's mental and physical health.

I've observed first-hand how the individuals and teams I work with are coping with lockdown. As the restrictions on physical distancing relax, so their negative feelings of dislocation, uncertainty, and fear have increased. And they seem to be intensifying as many individuals are now factoring in a return to their offices or work premises.

One key, recurring theme is that individuals have varying success at looking after themselves, but when they do, negative feelings become easier to manage; they regain perspective, they find their reserves of resilience, and are able to be hopeful and realistically optimistic about the future, even in extremely challenging times.

Self-care is not selfish!

STEP 1: Intention

Write down the answer to the question: "I want to look after myself because ..."

Perhaps you want to create safety and well-being for the people who rely on you? Perhaps you want to be a compassionate leader? Perhaps you want to have the energy, presence and resilience to deal with the stresses you know you'll face from your colleagues?

When you veer off course from your why, come back – purposefully and intentionally – to what you wrote down.

Your "why?" and your purpose, will re-focus on your deeper motivations to look after yourself and be present and available for the people – family, friends, colleagues – who rely on you.

STEP 2: Attention

You and your colleagues will be adjusting to a new working environment, one that's familiar, but markedly different than they were used to. They may react in ways that trigger you. You and they might make assumptions about what you and they are thinking. They may be answering telephone calls all day with impatient and angry customers or colleagues.

What's important is to pay attention - to observe and be aware of these patterns – and choose how you want to deal with it.

Take a look at and experiment with our 'Pay Attention' practices.

1. Pay attention to how you and your team are feeling

Make it a regular practice - perhaps every morning – to invite yourself and your team to express how you are feeling.

Eg, "What's on your mind that's urgent or important?"

Responses can be framed, for example, in terms of a weather forecast. "Today, I'm feeling sunny with intermittent showers." There's science behind naming your feelings. Brain imaging studies have demonstrated that recognising and labelling emotions reduces activity in the emotionally reactive regions of our brain.

As a leader, creating the space for individuals to express that they are anxious, or fearful, or optimistic, or hopeful allows you to create a strong, empathetic connection with your team and colleagues that builds connection, security and community.

2. Pay attention to moments of gratitude

Say what you and your colleagues are grateful for.

Simply expressing your gratitude, or inviting your colleagues to express what they are grateful for calms you down. In a 2016 pilot study of patients with heart failure, the patient group who did gratitude journaling saw a decrease in inflammatory markers (CRP, TNF-αIL-6) and an increase in heart rate variability, which corresponds to a decrease in the stress response.

3. Put self-care in your calendar

A day of meetings and demands on your time can pass by in a flash, squashing your desire to pay attention to your self-care!

Experiment with setting aside time in your diary for self-care. It's important, so treat it like an important meeting.

Write down your list of things (like walking outdoors, chatting to a friend) that relax you, and store it somewhere easy to come back to. When your scheduled time comes, pull out your list and choose one to do.

Why? When we're stressed, our pre-frontal cortex – the thinking part of our brain - is hijacked, and it becomes difficult to come up with ideas in the moment.

STEP 3: Reflection

We humans are learning creatures. As a coach, I know that insights are the most powerful pieces of information that lead to lasting behaviour change.

So, as you experiment with your own self-care and support your colleagues and your teams, ask yourself and jot down answers to these questions:

- how are you feeling?
- what worked?
- what didn't work?

"Failure = information"! If something didn't work, ask yourself "what have you learned from that?"

I hope this three-step strategy works for you to support your own health and wellbeing and those who rely on you.

Eric Ho
Bumblebee Wellbeing

Eric is an ex-Corporate lawyer turned wellness expert

Key UK consultations and inquiries tracker

There are numerous ongoing Government consultations and inquiries affecting retailers. You can view all of the up-to-date information here.

Legislative bills tracker

We maintain a list of bills, currently in the UK Parliament, which are relevant to the retail sector. These bills are not yet in force as law, but they give a flavour of developments to come.

RPC contacts

If you would like to get in touch, please contact our heads of Retail, Karen Hendy and Jeremy Drew, or your usual RPC contact.

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An overview of RPC and TerraLex

Full service firm: retail focus

Full service firm

RPC is an innovative professional services firm, providing a full business law service to UK and international clients across a wide range of industry sectors. With over 300 lawyers in London, Bristol, Hong Kong and Singapore – and as a founder-member of global network TerraLex – RPC offers a seamless service in more than 100 jurisdictions across the world.

Retail is one of five key focus areas for RPC – and serviced by every single practice area of the firm. We have a fantastic retail practice which provides expert sectoral focus and transparent and honest advice.

Market leaders

Our market-leading, multidisciplinary teams advise clients on a wide range of legal areas and are consistently ranked highly by both Legal 500 and Chambers & Partners.

What others say about us

"They have been very good at stepping up to meet our demands and proactive at providing legal updates."

"They were brilliant and helpful at getting us what we wanted."

"They are practical, very personable and have a good work ethic."

Retail clients quoted in Chambers & Partners 2020

Winner
BEST LEGAL ADVISER
2017-18

Winner
LEGAL WEEK
INNOVATION AWARDS
2019

Winner
LEGAL WEEK DIVERSITY
INNOVATION AWARD
2019

rpc.co.uk