RPC

Retail compass

Issue 4 February 2021

YOUR QUICK REFERENCE GUIDE TO LEGAL DEVELOPMENTS IN RETAIL

Retail's ability to adapt

Contents

THANKS FOR READING OUR LATEST ISSUE OF RETAIL COMPASS

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Welcome to the 2021 Spring Edition of Retail Compass

Welcome to the Spring edition of Retail Compass. We present our guide to the key upcoming legal and policy changes affecting Retail and our thoughts on the need-to-know issues – as retailers look forward to a post-pandemic landscape.

We cover furlough fraud risk, retail credit rating downgrades, tighter regulations around pre-pack administrations and much more.

As well as our horizon scanning pieces and other developments, we have guest contributions from:

- Lisa Byfield-Green, Head of Insights at Retail Week, on what retailers can expect in a post pandemic retail landscape
- Andrew Cregan, Head of Finance Policy at the British Retail Consortium, on calls for action on abusive credit card charges
- David Kaufman and Staci Jennifer Riordan from leading US firm Nixon Peabody LLP on tips to successfully enter the US market.

We continue to include key statistics and links to our legislation tracker and list all of the UK Government consultations and inquiries relevant to Retail.

We hope you find this publication useful, and as always, please do not hesitate to contact us if you have any comments or queries.

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

Retail Compass is compiled and edited by our Retail editorial team, led by Rachael Ellis (Associate).

FROM TOP
KAREN HENDY
JEREMY DREW

Foreword by Retail Week: **New year, new strategy – what to expect in a post-pandemic retail landscape**

Most importantly, retailers and brands must be ready to change and evolve to meet the rapidly shifting demands of consumers.

By Lisa Byfield-Green, Head of Insight, Retail Week

More than any other industry, retail must constantly evolve to stay relevant. The year 2020 was the most challenging in living memory, as the global pandemic disrupted our lifestyles and shopping behaviour. Additionally, in the UK, a prolonged period of uncertainty was finally laid to rest as a deal was struck in the final hours to get Brexit 'done'.

In a year that saw such rapid change there were seismic shifts within the industry, some of which shook the very foundations of big high street names including Arcadia and Debenhams. Purchasing behaviour completely changed, as fear of the pandemic meant that consumers stayed at home and social events were cancelled.

However, as some retailers inevitably falter, it is also true that others will emerge stronger. Now with the glimmer of hope in the form of a vaccine, there is finally an end in sight to some of this disruption.

So, what should be at the forefront of our minds as we prepare strategies for trading in 2021?

Flexible working and channel shifts

Consumers have spent the last year largely at home, both for work and leisure. At the time of writing we are in the midst of a third UK lockdown. Home-working patterns are expected to persist far beyond the pandemic, and this has led to new shopper mindsets and behaviours.

Home-based consumers have led to a huge acceleration in online demand, requiring retailers to evolve and adapt their strategies across areas such as supply chain, product development and marketing.

As we emerge from the crisis, brands should prepare to serve a shopper that is eager for more physical experiences but at the same time highly familiar with online shopping, with high expectations for convenience, speed of delivery and service.

Local and hyperlocal trends can also be expected to continue, giving retailers the opportunity to drive footfall with more local and flexible range curation.

Frictionless, contactless experiences

Technology trends into 2021 are likely to be focused on technology with purpose. Retailers will invest to reduce costs and increase efficiency, for example via smarter supply chains, automation for online, or by rolling out technology to improve customer experience.

As we saw in 2020, queuing and cash are most definitely out and contactless, frictionless experiences are in. These are not new trends, but now is a time when this technology really begins to matter to consumers.

The power of the store remains strong as a place for brand-building and inspiration, but brand relevance and customer experience must evolve to high standards to tempt shoppers back.

Income inequality signals a polarised market

As economies strive to recover post-pandemic, we can expect a growing divide in consumers' ability to spend. At the top end, there will be opportunities for luxury brands to sell to wealthier consumers, ie office workers who were largely able to keep jobs and save money throughout the pandemic. However, as concern for jobs persists into this year the major focus for most retailers must be to compete on price and value for money.

As both luxury and discount retail benefits, mid-market brands will need to strive to differentiate their product and service offering to ensure that they remain relevant.

"Consumers are increasingly seeking out and prioritising brands and retailers that care for the planet."

As far as Brexit is concerned, the last-minute deal struck at the end of the year has been a relief for the majority of retailers. Tesco is among those recently reporting confidence now in both its supply chain and ability to maintain low prices. However, it is not without its challenges, as the hard border in Ireland has created issues for those exporting from the UK, both in food and non-food.

Focus on sustainability and health

Sustainability and concern for the environment have continued to grow, even as we all had other issues to deal with. Consumers are increasingly seeking out and prioritising brands and retailers that care for the planet.

Policy makers can be expected to incentivise sustainable business practices in the coming year, focused on plastics, packaging and ethical sourcing. As this momentum grows, setting and measuring targets will be a key priority for retailers.

At the same time, health will be a focus area and we anticipate more initiatives to target rising levels of obesity, particularly considering its contribution to increased morbidity during the pandemic.

Partnerships and ecosystems will drive growth

Over the past few years, we have seen an increasing number of partnerships within retail, allowing brands and retailers to become more agile and reach new customers. The M&S joint venture with Ocado is a good example of this, as is Morrisons partnering with Amazon. As pressure within the sector intensifies, more tie-ups will follow as complementary partnerships help to drive efficiency and innovation.

As retailers aim to achieve more, they will need to democratise decision-making and allow those further down the organisation to help drive innovation.

The accelerated channel shift has led to ecosystems becoming even more powerful. As the likes of Alibaba, Jingdong and Amazon continue to dominate, brands must focus on understanding ways to win, and optimise their marketplace engagement strategies accordingly.

Retailers must increasingly act like brands and brands will become retailers, as they build direct-to-consumer models.

Doing good will be good for business

As we navigate out of the global crisis, consumers are likely to have a slightly different view of the world. Culture and purpose, kindness and community will all be important to us and these will intrinsically link to innovation, customer engagement and loyalty.

Shoppers will actively seek out ethical brands and now is the time for businesses owned by minority groups to seize the opportunity to make a real impact.

Peer-to-peer commerce will grow and as we emerge blinking into the new world, community and togetherness will be something to celebrate.

Most importantly, retailers and brands must be ready to change and evolve to meet the rapidly shifting demands of consumers.

We hope that the second half of 2021 will bring a much more positive retail environment for us all to enjoy, but retailers must prepare now to ensure that they are ready to benefit.

Retail timeline 2021/22

Immediate — **Credit ratings**

Retailers facing reduced footfall and cash-flow during the COVID-19 pandemic should consider assessing the risk of credit rating downgrades.

Immediate — **Tariffs under the Trade and Cooperation Agreement (TCA)**

Retailers which buy or sell from or to the EU should consider examining goods to determine whether they are goods of 'UK origin' and exempted from the EU's common external tariff on goods when they arrive in the EU.

Immediate — **Key changes to IPR and taxation post-Brexit**

Key changes to IPR and taxation from 1 January 2021: see page 25 for taxation and page 26 for IPR.

Expected early 2021 — **National minimum wage**

Supreme Court judgment in *Royal Mencap v Tomlinson-Blake* expected to provide clarity on national minimum wage entitlement for time not spent performing specific activities.

1 March 2021 — **TCA expected to be fully in force and ratified**

1 April 2021 — **The Coronavirus Job Retention Scheme is due to come to an end**

1 April 2021 — TCA: updated GB-NI e-Commerce Guidance is expected to be published by the government in time for the end of the three-month grace period for the sending of parcels from Great Britain to Northern Ireland.

April 2021 — Single use carrier bag charge: From April 2021, the charge will be extended to all retailers and increase from 5p to 10p.

April – July 2021 — Single-use plastic sales (eg straws and drink stirrers) to consumers has been banned in England since 1 October 2020. Surplus single-use plastic products purchased before 1 October 2020 can be sold until 1 April 2021 and drinks products with single-use plastic straws attached to the packaging can be sold until 3 July 2021.

June 2021 — If approved, the government's reforming regulations on pre-pack administrations are likely to come into force in June 2021. The regulations would require administrators to seek independent evaluation or creditor approval before transferring an asset to a connected party.

July 2021 — The long-stop for the extension period for data flows from the EU to the UK – whilst the UK awaits a European Commission "adequacy" ruling to receive data. If no "adequacy" decision is forthcoming by 1 May 2021 or 1 July 2021, mechanisms such as standard contractual clauses will need to be adopted.

31 December 2021 — CE markings can continue to be used for most goods until 31 December 2021 (with the option for most goods to affix the new UKCA markings required thereafter – until permanent attachment is expected to become mandatory on 1 January 2023).

1 January 2022 — Consider checking the rules: Certificates on Rules of Origin compliance may be required when importing goods between the UK and the EU.

1 January 2022 — The requirement to affix the new UK Conformity Assessed (**UKCA**) markings begins for relevant manufactured goods placed on the Great Britain market.

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

2021 2022

Horizon scanning

In this section we consider the key legal, regulatory and policy changes being faced by retail and what steps to consider taking, in light of these. We cover both purely domestic aspects and some which tie closely to 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, 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).

Retail credit rating downgrades – how to stop a downgrade becoming a default

by Sukh Ahark, Partner and Ed Colville, Legal Director

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IMMEDIATE

WHAT IS HAPPENING?

COVID-19 disruption and resulting lockdown measures have particularly impacted some retailers. For those hard-hit, signs of declining demand and profit erosion can cause concern for banks lending to them. Other factors such as missed debt payments and renegotiation of rents can affect corporate credit ratings, which could in turn impact retailers' credit facilities.

WHY DOES IT MATTER?

Retailers typically use a range of extern funding; from large syndicated faciliti and bond programmes, to smaller revolving facilities and overdrafts. The may also use additional banking faciliti such as invoice discounting, online payment facilities or guarantee faciliti or utilise derivatives for hedging. It is likely that these facilities were checke the outset of the pandemic for financi covenants relating to turnover and pr and specific events of default linked t missed payments, store closures etc.

Retailers with existing facilities in place should be mindful of any "rating trigge Finance documents may include cove obliging the retailer to maintain a cre rating above a certain threshold. In the event of a ratings downgrade, these covenants could be breached, giving a bank a right to take enforcement action against the retailer.

Speed read

Retail credit rating downgrades – how to stop a downgrade becoming a default

Retailers facing reduced footfall and cash-flow during the COVID-19 pandemic may find their credit ratings are at risk of downgrade. Check credit agreements; these may contain covenants requiring the maintenance of the retailer's credit rating at a predetermined level. Retailers can navigate potential covenant breaches by identifying the relevant covenants in advance and engaging in conversation with lenders early on.

Check your reporting obligations to lenders which may require you to notify lenders within a few days of any covenant breaches. Even where a grace period applies, a notice may still be required.

3. Apply for an amendment or waiver – If you know, or suspect, that a downgrade is likely, consider proactively contacting your lender(s). If the downgrade relates to COVID-19 issues, lenders may be willing to amend the relevant covenant or to grant a temporary waiver of any covenant breaches during the pandemic.

The furlough fraud risk: HMRC has ca can retailers do?

by Kelly Thomson, Partner and Charlotte R

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Speed read

The furlough fraud risk: HMRC has cast their net – what can retailers do?

HMRC has made clear its intention to pursue claims made in fraud or error under the government furlough schemes. To understand what risk they face in this area (if any), retailers should review any claims made under the schemes and collate, on a continuing basis, any documents and communications that provide a clear audit trail of decision making in relation to claims.

IMMEDIATE

WHAT IS HAPPENING?

While the government's Coronavirus Job Retention Scheme and Self-Employment Income Support Scheme (**CJRS** and **SEISS** respectively) have provided a valuable lifeline to many since their introduction, the initiative has been described as a "magnet for fraudsters" by HMRC officials.

The speed with which both schemes were implemented (a necessity at the time, given the urgent threat to employment caused by COVID-19) left them vulnerable to both deliberate and unintentional abuse. Examples of misuse of the schemes include placing employees on furlough and then requiring them to continue working as normal, pressuring employees to work on a 'voluntary' basis, and claiming on behalf of employees without their knowledge. Given the levels of confusion and misunderstanding that have surrounded the schemes, HMRC expects there to be a large number of claims which, whilst made in good faith, do not satisfy their rules.

WHY DOES IT MATTE

HMRC now has extensive powers under the Finance and has already identified of furlough fraud which it recover (although HMRC expect to have a complete the true extent of fraud and error under the schemes until the end of 2021 at the earliest). Given the high uptake of the scheme in the retail sector, we expect retailers to be well within HMRC's sights now that investigations are underway. HMRC's enforcement powers allow it to investigate suspected false claims, claw back payments, and to impose significant penalties in the most serious cases. An amnesty period for self-reporting claims made in error closed on 20 October 2020. Penalties going forward are expected to start at 100% of the sums incorrectly claimed; where remedial action is taken swiftly this may be reduced but the penalty will not fall below 30%.

making in relation to claims.

3. Although claims made in genuine error can expect some understanding from HMRC, where retailers suspect they have mistakenly claimed under the schemes they should seek legal advice as soon as practicable to ensure they can assist HMRC to the fullest extent, without inadvertently harming their position.

Horizon scanning (continued)

The UK-EU Trade and Cooperation Agreement (TCA) – Four key dates for retailers to watch

by Henry Priestley, Partner

Q1-Q4 2021

WHAT IS HAPPENING?

Further government guidance is expected to be published in relation to certain aspects of the TCA which particularly affect the retail sector (such as anticipated new guidance on GB-NI eCommerce parcels), as well as deadlines and the ending of easement periods relating to the new developments.

WHAT ACTION SHOULD YOU CONSIDER?

Whilst some of the following milestones are sector specific, retailers may wish to factor these into their continued TCA compliance programmes where these are of relevance:

1. **1 March 2021** – Since the TCA came into force at 11pm on 31 December 2020, it has been applied provisionally by both the EU and the UK, pending the European Parliament and Council of the EU's scrutiny of the deal. At the time of writing, provisional application is set to end on 28 February 2021 (unless another date is decided by the Partnership Council – the joint UK-EU body which oversees the TCA), meaning the TCA should be fully ratified and in force on 1 March 2021.
2. **1 April 2021** – Updated GB-NI e-Commerce Guidance is expected to be published by the government in time for the end of the three-month grace period (ie on or before 1 April 2021) for the sending of parcels from Great Britain to Northern Ireland. The BRC has indicated that it is likely that individual declarations will be required on individual packets after this time.
   From 1 April 2021, products of animal origin (**POAO**) imported from the EU must:
   - be pre-notified by the importer 24 hours before the relevant consignment is due to arrive, through the import of products, animals, food and feed system (**IPAFFS**). Currently, POAOs only need to be prior notified in this way if they are subject to safeguard measures, and
   - be accompanied by an Export Health Certificate in order to facilitate remote documentary checks in the UK.

   From 1 April 2021, high-risk food and feed not of animal origin (**HRFNAO**) imported from the EU must also be pre-notified by the importer 24 hours before the relevant consignment is due to arrive, through IPAFFS.
3. **1 July 2021** – The long-stop extension period for data flows from the EEA to the UK, agreed under the TCA, expires on 31 April 2021 (extendable to 30 June 2021), and if no "adequacy" decision from the European Commission is forthcoming by then, mechanisms such as the European Commission's Standard Contractual Clauses will need to be adopted to ensure data flows to the UK party receiving the data are not interrupted.
   - Until 1 July 2021, so called "restricted and prohibited" meat products (including chilled meat preparations and frozen or chilled minced meat or poultry) can move between Great Britain and Northern Ireland (subject to certain conditions agreed for this period), after which point, the government has promised to explore more permanent reciprocal arrangements.
4. **1 January 2022** – The TCA provides for certain temporary easements in an attempt to reduce the burden on traders. Two such easements are set to expire on 31 December 2021:
   - from 1 January 2022, certificates on Rules of Origin compliance will be required when importing goods between the UK and the EU, and
   - from 1 January 2022, the requirement to affix the new UK Conformity Assessed (**UKCA**) marking begins for manufactured goods placed on the Great Britain market – unless the goods are subject to special rules for certain product types. From 1 January 2023 it must be permanently attached and note that it is not recognised by the EU. Prior to 1 January 2022, the use of CE markings is permitted unless the relevant goods placed on the Great Britain market meet the following (and the UK and EU regulations remain aligned): (i) covered by legislation requiring UKCA markings, (ii) require mandatory third-party conformity assessment, and, (iii) conformity assessment is carried out by a UK conformity assessment body.

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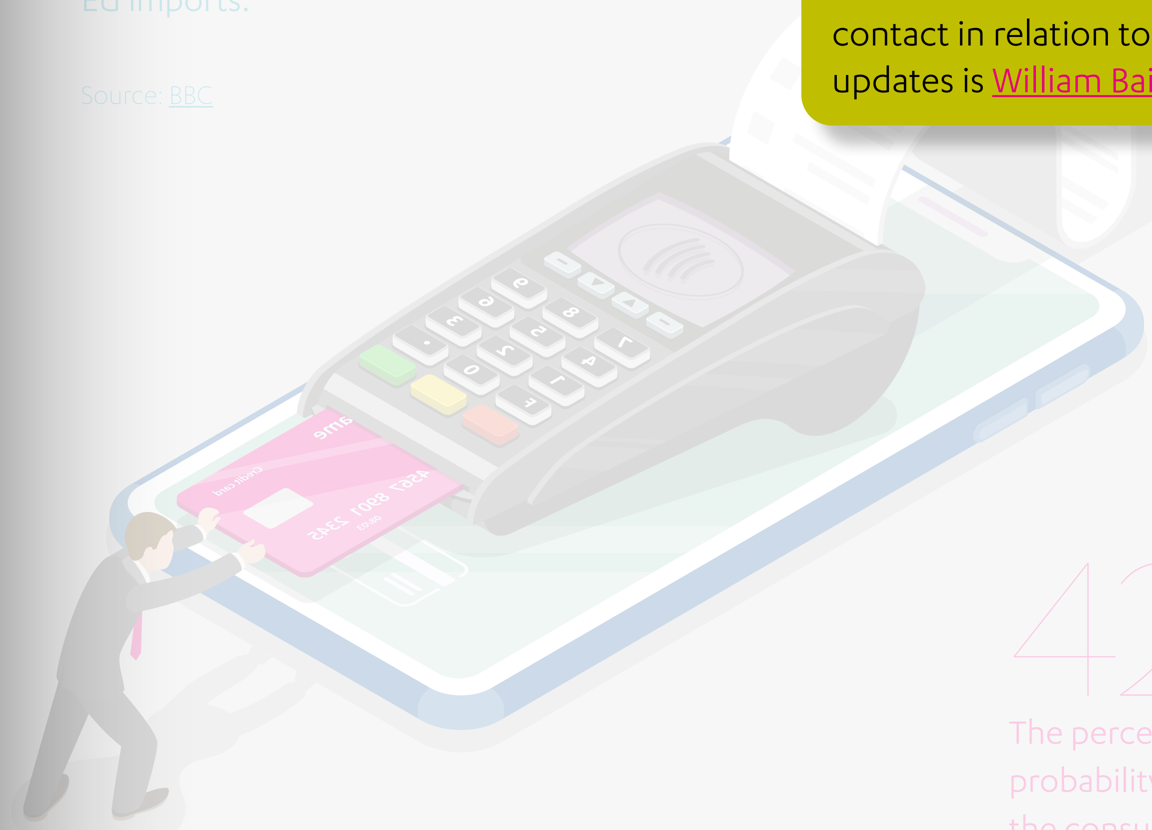
The UK-EU Trade and Cooperation Agreement (TCA) – Four key dates for retailers to watch

As retailers get to grips with the detail of the TCA, the British Retail Consortium (BRC) has published a handful of key dates in 2021 (below) relating to the new developments, which retailers might want to consider as part of their ongoing TCA-related workstreams. For those interested in the BRC's latest work with retailers on the TCA, the BRC's key contact in relation to Brexit-related updates is William Bain.

270m

The estimated number of additional customs declarations made to HMRC per year from UK companies for EU imports.

Source: BBC



42%

The percentage increase in probability of default across the consumer products sector over COVID-19. See page 8 for more.

Source: Moody's Analytics

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Horizon scanning (continued)

Key national minimum wage considerations for employers ahead of Supreme Court judgment

by Charlotte Reid, Senior Associate and Alessandro Cerri, Associate

EXPECTED EARLY 2021

WHAT IS HAPPENING?

The Supreme Court is turning its sights on the extent to which NMW legislation applies to time spent at work but not performing tasks. Employers should be alert to the amount of time their employees spend at the workplace, not working – for example when opening and closing, or when critical machinery is broken. If employees have to pay for their own uniform or equipment, or pay for benefits using a 'salary sacrifice' scheme, this may have consequences on compliance with NMW legislation.

WHY DOES IT MATTER?

HMRC has a range of enforcement measures where there is non-compliance with the legislation – and workers are free to report employers who they suspect aren't complying. HMRC's powers include: service of notices of underpayment, civil penalties (eg a fine), recovery of underpayments and criminal prosecution. Workers can also bring a claim against their employer for unlawful deduction from wages or breach of contract.

The government has now reintroduced its practice of "naming and shaming" the employers who fall foul under the NMW Naming Scheme. The latest list of employers was published on 31 December 2020 after the scheme was paused in 2018 for a review. Employers who owe £500 of arrears can be named; those who underpay by less than £500 will still have to pay back workers and the associated fines.

139

Number of companies named in December 2020 for failing to pay NMW to their employees.

Source: gov.uk

WHAT ACTION SHOULD YOU CONSIDER?

We'd suggest it is good housekeeping for retailers to regularly review working practices to assess compliance with NMW/NLW legislation. Of course, working patterns and practices develop over time but where possible, changes should be assessed "in the round" with current practices – with the legislation in mind – to avoid retailers being inadvertently non-compliant. Below are practical considerations which a retailer may want to ask itself in assessing its compliance with NMW/NLW legislation.

1. **Uniforms and mandatory equipment** – There may be issues relating to employees being required to wear specific clothing, uniforms or other equipment. Retailers should think about whether any of their employees have to purchase their own equipment, or if it is provided for them. If the employer foots the bill, is it paid for through salary sacrifice payments or a lump sum payment from the employee?
   When looking at mandatory equipment (think PPE), are employees required to spend time at the beginning and/or end of their shifts putting on and taking off such equipment? Are employees required to keep such equipment on during their rest breaks? All of these questions may affect an employer's calculations in assessing its compliance with the relevant legislation.
2. **Breaks and 'working' time** – We all know how important it is for employees to use their rest breaks and management should be mindful to ensure that these are treated as such for the purposes of the NMW/NLW rules. For example, are employees required to take rest breaks on site, or within a certain area of the workplace?
   Equally noteworthy, employers ought to remember that their employees may be required to be 'on call' when they're not actually working. This may be the case where an employee is on holiday but is still expected to respond to emails. Alternatively, may a situation arise where employees are at their posts but not actively working because, for example, there is a technical fault at the workplace, or they are waiting on the delivery of critical items such as materials, equipment or machinery? If so, how is this time being treated?
3.
4. 'clock out' at the beginning and end of their shifts. If this is the case, employers should know the systems in place to record time entries and whether such systems are programmed to round amounts up or down.
5. An additional consideration is to ask whether there are systems in place to track employees' ages and apply the appropriate NMW/NLW bands accordingly.

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Speed read

Key national minimum wage considerations for employers ahead of Supreme Court judgment

An upcoming Supreme Court judgment is expected to provide clarity on National Minimum Wage (NMW) entitlement for time not spent performing specific activities. Several household retailers have fallen foul of the relevant rules. In most cases, the failures are rarely intentional but are a result of not appreciating the potential impact of small changes to staff working practices that can lead to non-compliance. As good housekeeping, retailers should regularly review working practices to assess compliance with NMW/National Living Wage (NLW) legislation and ensure that any changes over time do not cause them to be inadvertently non-compliant (particularly bearing in mind that the COVID-19 pandemic has likely shifted the way that some retail employees are required to perform their tasks).

Horizon scanning (continued)

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Tighter regulations on pre-pack administrations

The government has announced plans to reform pre-pack administration regulations. This will require administrators to seek independent evaluation or creditor approval before transferring an asset to a connected party. If approved, these regulations are likely to come into force in June 2021.

Tighter regulations on pre-pack adm

by Tim Moynihan, Senior Associate

EXPECTED JUNE 2021

WHAT IS HAPPENING?

The UK government remains concerned about pre-pack administrations. Proposed draft regulations were released in October 2020 which will require greater creditor scrutiny of pre-pack sales to connected parties within eight weeks of the retailer entering administration. The change in regulation should give comfort to arms-lengths bidders for retail assets out of administration where there may be a perceived unfair advantage (by some stakeholders) obtained by the connected party during pre-pack processes. It will also be of interest to unsecured creditors whose interests are subordinate to secured creditors who often could be connected.

The government is now seeking to protect the interests of creditors following rising criticism of pre-packs. In 2015, a voluntary scheme known as the Pre-Pack Pool was introduced to address concerns about pre-pack transparency – in particular those involving connected parties. However, as this regime remains entirely voluntary it has been of limited impact.

WHY DOES IT MATTE

The draft regulations will prevent an administrator f disposing of all or a substa part of the company's ass to a person connected with the selling company in the first eight weeks of administration, unless they have first obtained either creditor approval or an independent (and suitably qualified) evaluator's report. This report must include a statement on whether the evaluator is satisfied that the price paid for the asset is reasonable in the circumstances. The evaluator must also believe that they have the requisite qualifications and level of knowledge of the assets to make their report.

prices should take into account the evaluation and approval requirements.

2. **Beware: the potential for challenge** – It's worth noting that an unfavourable evaluator report will not prevent the administrators from going ahead with the pre-pack, but may lead to criticism and challenges by creditors. However, the regulations do not clarify how easy it will be for creditors to launch a challenge.
3. **Consider alternatives** – Consider an alternative to pre-packs, such as schemes of arrangement or the new restructuring plan procedure brought in by the Corporate Insolvency and Governance Act 2020 (**CIGA**) under which debtors and creditors can look to agree a path out of financial distress.

8 weeks

Key period of time following a retailer going into administration which is affected by the proposed regulation on pre-pack administrations.

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So much for zero tariffs: changes to customs duties under the TCA

Only goods of 'UK origin' are to be exempted from the EU's Common External Tariff on goods when they arrive in the EU. Retailers who buy or sell goods from or to Europe should examine the goods involved to establish their origins (and therefore their exposure to customs duties on import/export).

So much for zero tariffs: changes to

by Robert Waterson, Partner and Harry S

1 JANUARY 2021

WHAT IS HAPPENING?

Prior to the end of the Brexit transition period on 31 December 2020, the UK operated as part of the EU/EEA single market. Exports from the UK to EU Member States were on a duty-free basis, and vice versa. On a similar but slightly distinct note, goods imported from the rest of the world into the UK could then be shipped to EU Member States without further payment of customs duties.

The eventual agreement, at the proverbial eleventh hour, of the TCA between the EU and the UK was greeted with relief among those who engage in trade between the UK and the EU. It was heralded as preserving free trade between the UK and the EU. In the simplest of cases, where goods are manufactured in the UK from UK-source materials and then exported to a final destination in Europe, it achieves it. However, modern commerce rarely fits within these neat boundaries, and upon further examination, the TCA fails to live up to the billing it has been given – especially for retailers.

WHY DOES IT MATTE

Only goods of 'UK origin' ar EU's Common External Tari in the EU. Unless some subs undertaken in the UK, good will not have a UK origin for details of when this can happen are set out in the TCA). This means that UK retailers who import goods from overseas to a warehouse in the UK (and pay import duty on importation into the UK) before selling them to customers in Europe face the inconvenience and cost of further tariffs being imposed when the goods are imported in Europe; in practice, this makes British retailers less competitive when selling to the continent, since there is no mechanism to relieve this double taxation. On the face of the TCA, these tariffs apply whether or not the original importation of goods into the UK occurred before the end of the transition period.

Indeed, some retailers, particularly in the food sector, have expressed concern that this situation also applies even where the goods were originally imported to the UK from EU Member States before re-exportation to the EU. While there have been calls for a derogation to address this point, it remains far from clear that this will be granted – and it is most unlikely that it would extend to goods originally imported from third countries.

customs duties on import/export). It may be possible to mitigate against the potential for double customs charges by rerouting supplies (so that goods with origins outside the UK/EU are sent directly to their destination market); in due course it is to be hoped that the proposed Freeport arrangements may also provide a way of reducing customs exposure, but for the moment these look to be some distance in the future.

The share of UK exports accounted for by the EU has generally fallen over time from 54% in 2002 to 43% in 2019. The share of UK imports accounted for by the EU fell from 57% in 2006 to 52% in 2019.

Source: Parliament.UK, November 2020

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Horizon scanning (continued)

New measures to eliminate plastic waste

by Henry Priestley, Partner and Brendan Collar, Associate

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New measures to eliminate plastic waste

With another lockdown continuing and TCA-related challenges to deal with, the start of 2021 may not have seen the environment at the top of the agenda for retailers. However, when the COVID-19 storm eventually passes, we expect environmental considerations to be firmly back in the spotlight this year, particularly as consumer sentiment towards environmentally conscious brands continues to grow. We recap some key legislative updates happening in 2021.

APRIL TO JULY 2021

WHAT IS HAPPENING?

The government is set to introduce measures to further reduce the circulation of single-use plastics and encourage the use of recycled plastic. The measures are expected to influence all aspects of the retail supply chain and have a particular impact on the food and drink sector.

WHY DOES IT MATTER?

Aside from the obvious environmental benefits, it is likely that retailers that don't comply with legislative changes will find consumers are increasingly voting with their feet as environmental factors become a more defining feature of where they spend their money. Though it may be more costly for retailers to comply in the short term, there may be possible sanctions for non-compliance and we expect more stringent measures and/or monitoring to be introduced over time – so retailers may wish to get ahead now to the extent that they are not doing so already.

Single-use plastic ban fines

The sale of single-use plastic such as straws and drink stirrers to consumers has been banned in England since 1 October 2020. Surplus single-use plastic products purchased before 1 October 2020 can be sold until 1 April 2021 and drinks products with single-use plastic straws attached to the packaging can be sold until 3 July 2021. Any sales made after these dates risk local authority fines. Whilst catering establishments can continue to provide single-use plastic straws at the request of customers, these cannot be offered to customers or stored in customer view.

Single-use carrier bag charge extended

Following a reported 95% reduction in the sales of plastic bags in major supermarkets after the introduction of the plastic carrier bag charge in 2015, the government has announced that from April 2021, the charge will be extended to all retailers and increase to 10p.

Although yet to announce what specific or new enforceability measures will be put in place to police the increased charge, the Department for Environment, Food and Rural Affairs (**DEFRA**) has stated that it will take into account suggestions made at the consultation stage. These suggestions varied from self-regulation (as retailers could stand to gain from the increased price), to an auditing regulatory authority.

Plastic packaging tax

There is now an economic incentive for businesses to use recycled packaging materials as plastic packaging produced in or imported into the UK, containing less than 30% recycled plastic, will be taxed from April 2022. Draft legislation has now been published for technical consultation (and also see the draft explanatory note) setting out who it is proposed will be liable to pay the tax and will need to register with HMRC, how the tax will be collected, recovered and enforced and how the tax will be relieved on exports. Further information may be found in the following: the government's latest Policy Paper (from November 2020) and: Plastic Packaging Tax: policy design consultation and summary of responses.

Deposit Return Scheme (DRS)

As part of the government's Resource and Waste strategy, last year DEFRA launched a consultation on the introduction of a DRS in England. Effectively generating a financial motivation for recycling, the scheme would require consumers to pay a deposit on drinks containers which would be returned to them once their empty container is disposed of at a collection point. Whilst the DRS was initially expected to be implemented in 2023, implementation has now been pushed back to 2024 due to the COVID-19 pandemic.

W

1.

2. legislation is published, and watch out for government announcements for final details on the PPT.
3. With the DRS still in its early stages, affected retailers may wish to monitor this development to understand the legal framework and possible effects on operations, such as who will be responsible for DRS operational costs. Packaging producers will likely be seeking to ensure that they are not unfairly expected to meet the requirements of the DRS as well as future packaging regulations.
4. Finally, at some stage, in-store protective plastic and screens will become surplus to requirements as COVID-19 restrictions are lifted – are there sustainable ways that this plastic can be reused or disposed of?

Horizon scanning (continued)

Retailers supplying goods: what to know about your trade credit insurance policy by Naomi Vary, Partner and Paul Baker, Legal Counsel

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Speed read

Retailers supplying goods: what to know about your trade credit insurance policy

If you are supplying goods or services and seeking to rely on trade credit insurance, there are some key aspects to understand about your policy (below) – before the risk of non-payment by your customer becomes acute.

APRIL 2021 AT THE EARLIEST

WHAT IS HAPPENING?

In December 2020 the government announced that a number of CIGA protections, some of which support supply customers, would be extended to March/April 2021 to give businesses what the government termed "much needed breathing space". With the imposition of the latest national lockdown, it is difficult to predict with certainty when the protections afforded under CIGA will cease and it is possible that they will be extended further. However, it appears clear that they cannot continue indefinitely. We expect customer payment defaults and insolvencies to increase when the protections are removed. This will bring the role of trade credit insurance under the spotlight.

Trade credit insurance can be an effective risk mitigation tool for suppliers, including those in the B2B retail space. Policies, in summary, indemnify a supplier for losses caused following non-payment by its customers, whether through default or following insolvency. Many suppliers who never previously needed to claim on their trade credit insurance may find themselves in a position where they now need to do so.

"Trade credit policies operate within strict parameters, as insurers need to be comfortable with the insured supplier's business practices and confident that these will be followed. Stepping outside these practices can lead to claims failing."

WHY DOES IT MATTER?

Although nobody wants to expect the worst, it is sensible for suppliers to be prepared, so that they are in a position to take the benefit of the protection offered by their trade credit insurance. Trade credit policies operate within strict parameters, as insurers need to be comfortable with the insured supplier's business practices and confident that these will be followed. Stepping outside these practices can lead to claims failing.

WHAT ACTION SHOULD YOU CONSIDER?

Any supplier with the benefit of trade credit insurance operating in today's stressed economic environment should consider familiarising themselves with the following, all of which are likely to be found in their policy in some form – and compliance with which is important in respect of any claim(s):

- the maximum credit terms that the policy allows it to offer to its customers. These may not be the same for all customers, so it is important to ensure that credit terms offered for every transaction with any covered customer comply with the policy provisions
- the maximum extension period that the supplier can agree without seeking insurer consent. There is an attraction to seeking to push repayment dates down the road in the hope that fortunes will improve, but this is likely to require agreement from insurers
- the total credit limits available for customers, and the effect of exceeding those limits. At best for the supplier, any trade over the credit limit will be at its own risk. At worst, overtrading may lead to there being no cover at all in respect of the relevant customer
- the Stop Shipment period and the requirements triggering this. The policy will generally provide that there is no cover for shipments made after the customer has failed to make payment for previous supplies in accordance with agreed terms, or is otherwise giving cause for concern. Again, trade outside the Stop Shipment period will commonly be at the insured supplier's risk, and
- the need to seek insurers' consent before entering into any settlement of an outstanding debt with a customer.

If a … pro… of a clear and well-documented claim, and full responses to any additional questions from insurers.

Suppliers should also consider other means to mitigate their exposure to distressed customers. Such measures might include (bearing in mind the above) shortening payment periods or even moving to advance payment, bringing in or strengthening contractual protections such as retention of title which may allow a recovery of unpaid-for goods and obliging customers to provide financial information so that any distress can be spotted easily. Finally, CIGA has brought in restrictions on the ability of suppliers to terminate contractual arrangements with customers who enter formal insolvency processes – in order to preserve those rights you might consider having earlier, pre-formal insolvency, termination events.

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Snapshot of retail statistics #1

GOING LOCAL: REOPENING RESULTS

Footfall at UK retail parks was only 3.1% lower in December 2020, when they reopened after the second lockdown, compared with 2019. Footfall increases (of almost double in some cases) could be seen in smaller towns and high streets, compared to cities.

Source: Springboard

RISING RETAIL SUBSCRIPTION SERVICES

39% of UK shoppers have signed up for a paid delivery or retail subscription pass (up from 31% over the last two years).

Source: Mintel

RETAIL M&A: 2020

Retail M&A activity decreased by only **35%** in 2020, less than financial services (**53%**), property (**42%**) and hospitality (**47%**).

Source: Experian

OVERSTOCK SOLUTIONS

Fashion executives plan to employ several strategies to avoid overstock in the future:

Source: McKinsey-BOF

ONLINE SALES AS A PERCENTAGE OF OVERALL SALES

In November 2020, online sales accounted for 36% of all UK retail sales.

Source: Statista

USA

The use of click-and-collect services grew by over 60% in 2020.

Source: Statista

M&A RECORD: START 2021

$38.8bn (£28.2bn)

The value of takeovers involving a UK company from 1 January to 5 February 2021: the busiest start to the year for takeovers since the 2008 crash.

Source: Dealogic

FOOD AND DRINK M&A

15 Transactions which took place in food and drink between May and August (less than half year-on-year)

27 Food and drink transactions in Q2 2020

34 Food and drink transactions in Q3 2020

Source: Ogmha Partners

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Other developments

UK and Europe

Here, we round up some other developments which have occurred since our last publication of Retail Compass (in July 2020). In the first few developments we look at hot topics for retailers in the UK and also recap on some changes since the Brexit transition period came to an end which will be of interest to retailers with UK-European operations. The final few developments should be of particular interest to retailers operating in (or considering operations in) South Asia/China and the US. 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.

Redundancy flags in the time of COVID-19

CJRS entered its third phase in November 2020 and will remain open until 31 March 2021, supporting 80% of an employee's salary up to a maximum of £2,500 per month. This mirrors the support levels available back in August 2020 (though employers may soon be asked to contribute more). It has been clarified that the support also applies to those who are unable to work due to caring responsibilities, or because they are clinically extremely vulnerable. In November 2020, the Chartered Institute of Personnel and Development (**CIPD**) released its redundancy guide, which provides a much needed steer for both employers and employees on how the CJRS might affect redundancies going forward.

The guidance has confirmed that, as expected, an employee's redundancy rights are not affected by their furlough status. Where an employer elects to make redundancies, it must observe the relevant statutory or contractual notification periods and usual redundancy consultation procedures. As always, employees with two years' continuous employment are entitled to a statutory redundancy payment, which is calculated using a set formula based on age, pre-furlough salary and length of service (see the government redundancy calculator here).

Employers should take note – ensuring that redundancy pooling and selection criteria are fair will remain important. Selecting furloughed staff for redundancy because of their furlough status, or making furloughed staff redundant in a situation where they could remain employed and furloughed, could give rise to a claim for unfair dismissal, and/or potentially a discrimination claim. In particular, questions could be asked about how staff were selected for furlough to begin with (eg if staff have been put on furlough because they have caring responsibilities, or are shielding for health reasons, subsequently pooling and/or selecting these employees for redundancy on the basis of furlough status would seem likely to cause problems).

The turnover rent conundrum: tips for retailers

Protections provided to commercial tenants under CIGA and the Coronavirus Act 2020 are due to end on 31 March 2021 and now, more than ever, landlords are having to explore the possibility of entering into non-standard leasing arrangements.

Whilst moving to a turnover lease or a hybrid turnover lease may help to address the sales volatility in retail at the moment, which has only been exacerbated by the pandemic, this approach is not without its difficulties and retailers may wish to consider the following when negotiating with landlords:

A standard lease cannot simply be 'converted' to a turnover lease; significant redrafting is usually required. Landlords may want to add a break option where the rent does not hit a given threshold, and "keep open" requirements become important where a landlord is relying on turnover for its income (perhaps coupled with a fixed rent on any days when a property is not open for trade). For retailers, ensuring that obligations can be complied with in all hypothetical circumstances is important. For instance, the effect of seasonal turnover should be considered to ensure there is no disproportionally high rent payment after Christmas, Black Friday or other 'shopping-heavy' times of the year.

Tip: it is important that a specialist solicitor advises on the terms of the new arrangements.

Most landlords are likely to be keen to capture all sales generated from a set of premises, even those online, while we expect that tenants would typically want to exclude VAT and items with no margin such as stamps or lottery tickets.

Landlords who do not have the infrastructure in place to capture and analyse their tenants' sales data in real time (electronic point of sale or "**EPOS**" systems) will be reliant upon the turnover data provided by their tenants, including any returns made by their customers. Historically, there has been a reluctance between landlords and tenants to share data. The landlords may insist on including reporting clauses, such as in-store turnover and footfall.

Tip: Retailers should be cautious when accepting any reporting obligations and limit shared data to that strictly required for the rent calculation.

Moreover, any shared information about a retailer's sales and business finances should be subject to suitable confidentiality obligations.

The lack of rent certainty can also have a significant impact on portfolio valuation and the pricing of debt. Valuing turnover leases requires an analysis of previous years' sales evidence rather than a guaranteed rental income over the life of the lease, meaning the debt is typically more expensive. With the retail market changing, we expect that valuers will inevitably be forced to change the traditional yield based valuation methods and find alternative approaches.

Tip: Minimum rent thresholds and priority receipt of landlord success fees for good performance can assist in making turnover rents more palatable for lenders.

In the multi-channel age another hot topic is which sales should be attributed to a store, and this will depend very much on the specific store and the types of goods being sold. The true value of a specific store often goes beyond the physical sales from that one leased property as often it will also be used for brand building, showrooming, click-and-collect, or returns.

In any event, the direction of travel is clear – turnover rents are the new normal in retail.

Changes to taxation post-Brexit

Remember, the following key tax changes came into force for businesses from 1 January 2021:

The EU Common External Tariff, which was in force during the transition period, was replaced in the UK by the Most Favoured Nation tariff. It will apply to all goods imported into the UK unless there is a preferential arrangement (such as those in place with the EU and Japan currently, with more countries in the pipeline) or if a tariff suspension applies. Goods exported to the EU will be subject to the EU Common External Tariff, unless they are of UK origin in which case the Trade and Co-operation Agreement between the UK and EU should operate to eliminate customs duties (but not paperwork).

Businesses that trade in certain goods will now need to make customs declarations when importing goods from or exporting goods to the EU, in the same way as they currently do for the rest of the world. If the goods are classified as of UK origin (in the case of goods being imported into the EU) or EU origin (in the case of goods being imported into the UK), import duty should not be payable – but the rules to determine goods' origins are complex and restrictive.

The UK Government abolished the VAT Retail Export Scheme, meaning that visitors to the UK from overseas can only purchase items VAT-free if the retailer arranges shipping to their home address. This could influence tourists to purchase goods online rather than in-store during their visit to the UK.

You can keep an eye on the government's Brexit transition webpage here.

Other developments | UK and Europe (cont.)

Reminder of key changes to IPR from 1 January 2021

In the previous edition of Retail Compass, we reported on how IP rights would be affected by Brexit. In the first edition since the changes took effect, it seemed timely to provide a refresher of the key issues to be aware of.

Trade marks and design rights

On 1 January 2021, existing European Union trade marks (**EUTMs**) and Registered Community Designs (**RCDs**) were automatically converted into comparable UK rights. This was not so for pending applications. If protection is required in the UK, an application to register a comparable right must be filed in the nine months after 1 January 2021 (ie before 30 September 2021).

Unregistered design rights (**UDRs**) also received a notable makeover. Unregistered Community Designs (**UCDs**) ceased to have effect in the UK from 1 January 2021. To plug the gap, two new UK specific UDRs were introduced: Continuing Unregistered Designs (**CUDs**) and Supplementary Unregistered Design (**SUDs**), both of which mirror the characteristics of UCDs. CUDs provide protection, in the UK, for pre-existing UCDs for the remainder of their three-year terms. SUDs likewise provide three years of protection for designs that are first disclosed in the UK after 1 January 2021 and which would previously have attracted protection as UCDs. SUDs and CUDs supplement the existing UK unregistered design rights regime, rather than replacing it.

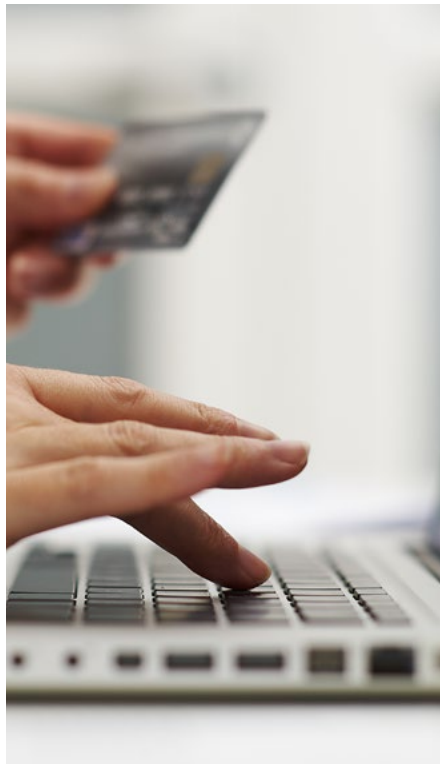
Exhaustion of IP rights

One of the most significant changes for retailers is that since 1 January 2021, the rights in goods placed onto the UK market are no longer considered 'exhausted' in the EEA. If they have not done so already, businesses which export branded goods to the EEA should consider whether any additional permissions are required from rightsholders.

Post-Brexit checklist

Did you have any pending EUTM or RCD applications as at 1 January 2021? If so, action must be taken before 30 September 2021 to secure protection in the UK.

Do you export branded goods to the EEA? If so, have all rightsholder permissions been secured?



Possible measures to deal with late payments to suppliers

Smaller businesses often experience significant cashflow issues due to late payment of invoices. The government has stated that "UK business needs to embed in their DNA that late payment and unfair payment practices are not acceptable" and accordingly has given the Small Business Commissioner (**SBC**) additional powers to provide effective mechanisms for redress in respect of late payments.

The proposals are set out in the Consultation Paper. The SBC is now able to:

- investigate instances of suspected poor or unfair payment practices following receipt of a complaint from a third party or at their own initiative
- require disclosure of information connected to the investigation of a complaint
- issue a monetary award or payment plan as a result of an investigation, and
- review and report on the effect of relevant legislation, policies and practices on small businesses (which may consider issues beyond payment practices), following an instruction by the Secretary of State.

Larger retailers should therefore prepare for the SBC to wield more robust powers to inspect payment practices and enforce timely payment of invoices in respect of their dealings with smaller businesses.

Rising D&O insurance premiums

D&O insurance premiums are rising rapidly across the board – a 178% increase in the first half of 2020 alone (Source: Marsh JLT). Directors and officers of companies can face myriad claims against them personally arising from their role and so require this coverage to protect them from the costs of fighting potentially ruinous litigation. Key drivers of these claims include shareholder dissatisfaction and insolvency.

These events are on the rise (particularly given the economic downturn and fallout caused by the COVID-19 pandemic) – which in short is why the policies are becoming more expensive, but is why the cover is more important than ever.

It is imperative that retailers, as an industry particularly affected by the pandemic, continue to purchase sufficient levels of D&O cover to protect their executives and senior employees. Indeed, without the cover in place, retailers may find it difficult to fill directorships and struggle to find and retain executive talent.

However, it may be that through smart broking, premium rises can be kept lower than would otherwise be the case – eg if retailers are purchasing aspects of the cover that are not required these can be removed to keep premiums down. There are many optional extensions and the like that may not be truly required or necessary for any given company, bearing in mind the nature of its operations, business and particular circumstances. Subject to an appropriate assessment, cover could be honed back to keep premium levels manageable.

Alternative order fulfilment: dropshipping

The demand for e-commerce along with limited in-store and warehouse operations following COVID-19 means that retailers may need to consider more efficient order fulfilment options. One option that we have seen gaining significant traction with some of our clients is dropshipping, whereby the retailer steps away from the order process once the online order is placed with them, and the manufacturer is responsible for order fulfilment, direct to the consumer.

Whilst dropshipping might not be suitable for all retailers, a potential benefit is it that it can reduce certain cost pressures. For example, a retailer should not need to purchase or physically hold large amounts of stock and can instead purchase as and when sales are made. This ought to have a positive impact on cashflow.

There are also associated potential cost savings, for example reduced pressure on packing, warehousing and logistics costs. A non-cost related benefit is that, with the current unpredictable trading conditions, the dropshipping approach potentially de-risks accumulating stocks that aren't selling so well – and takes advantage of trending products.

By effectively outsourcing the delivery function, there is an element of risk to a retailer's reputation if the dropshipper does not perform to the consumer's expectations. Obviously, those cost savings have to be balanced against whatever terms you can negotiate with the dropshipper.

Other developments | UK and Europe (cont.)

UK data protection update: International data transfers – what retailers should know

International transfers of personal data are undergoing big changes, after two key developments in the data protection world in the last few months.

First, the European Commission published in November a draft of the new Standard Contractual Clauses (**SCCs**) for transfers of personal data from the EU to third countries. Once approved, the new SCCs will replace the previous SCCs used by companies as an appropriate safeguard for transferring personal data outside of the EEA. The draft SCCs can be found here and the final version is likely to be adopted in early 2021.

Secondly, following the CJEU's "Schrems II" decision in July 2020, the European Data Protection Board (**EDPB**) published in November guidance on what companies should do to ensure that data transfers outside of the EEA are in line with the GDPR. The EDPB's guidance can be found here. The steps that companies should take when transferring data internationally, as per the recommendations, are:

- map data transfers
- identify the data transfer mechanism that will be relied upon
- assess the sufficiency of the legal system of the non-EEA country
- identify and adopt supplementary measures, such as:
  - technical measures
  - additional contractual measures, and
  - organisational measures
- take any necessary procedural steps, such as adopting protections into formal company policy
- re-evaluate the data transfer arrangements at regular intervals.

Retailers will need to map their data transfers to overseas affiliates and service providers and from a Brexit perspective, UK-based retailers who receive personal data from the EEA (eg from affiliates) will need to keep data transfer mechanisms on their agenda in the coming months. The extension period for data flows, agreed under the TCA, expires on 1 July 2021, and if no "adequacy" decision is forthcoming by then, mechanisms such as SCCs will need to be adopted to ensure data flows are not interrupted.

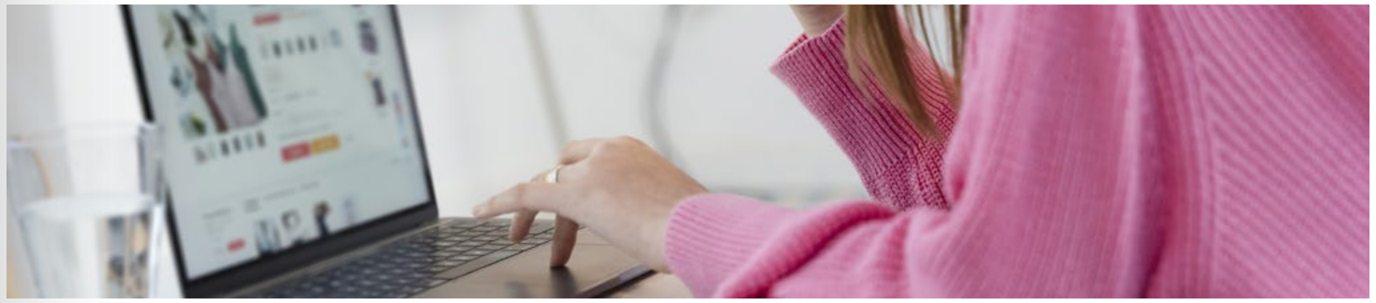
Extended regulation of Buy Now Pay Later

On 2 February 2021 the FCA published the Woolard Review. This is a review into the unsecured consumer credit market which was conducted by the FCA's former interim CEO, Chris Woolard.

The report sets out how better regulation can better support a healthy market for unsecured lending. One of the key recommendations was that all Buy Now Pay Later (**BNPL**) products should be regulated, including those that are currently exempt.

HM Treasury has already announced that it will be putting forward this recommendation to Parliament to discuss legislation as a matter of urgency to implement such regulation. The FCA will publish its 2021/22 Business Plan in April, and will give further details of the response to the Review.

This will impact retailers who are currently operating unregulated BNPL products and also BNPL firms operating in the market such as Klarna, LayBuy and Clearpay.



Retailers seek to redress the balance with online giants

Bricks-and-mortar retailers have called on chancellor, Rishi Sunak, to "level the playing field" between online and store-based retailers. Retailers wrote to the chancellor on Friday 5 February 2021 requesting a new tax on online sales and a reduction in business rates in an attempt to put traditional stores and online stores on an equal footing.

Current headline business rates (not taking account of the temporary reliefs offered to certain sectors during the COVID-19 pandemic) are around 50% of market rent, which according to lobby group Shopkeepers' Campaign, catapults business rates into the lead as the largest fixed cost paid by UK retailers. This isn't the case for online retailers who pay a lower proportion of their income in business rates as they do not need to acquire retail property out of which to sell.

The retailers' requests follow the Treasury's July 2020 Business Rates Review: Call for Evidence (**Review**), in which the Treasury sought consultees' views in relation to the introduction of an online sales tax at 2% on all goods purchased online; the first of its kind in the UK. The review also identified a more drastic option in the abolition of business rates in favour of a "capital values tax" payable by property owners rather than tenants.

Critics of the proposed tax include the British Retail Consortium, who warn that consumers would bear the brunt of any tax. However, by the same token, higher prices online could help to push consumers to stores, potentially injecting a much-needed surge into the high-street following a year of recurrent COVID-19 restrictions.

The chancellor is expected to provide an update on the Review in the AutumnBudget.

As some leading figures in retail have pointed out, however, it seems unlikely that one measure alone (ie a new tax) will truly help to "level the playing field" given that it doesn't deal directly with the underlying issues being faced by the high street – following what many feel has been a lack of investment in high streets by governments over the years. It would seem that for a real "balancing" to happen, where offline stores are boosted too, the proposed new tax would need to be combined with other measures or parameters. One option suggested to a Government select committee tasked at looking at UK high streets back in 2018, was that if an online tax is introduced, it only kicks in at a certain threshold of revenue from online sales. This could encourage omnichannel retailers to invest in their bricks and mortar to boost sales from stores rather than losing revenue to an online tax. Similarly, the tax could be implemented so that retailers have to pay less if they can demonstrate that they are investing revenue from their online sales into UK high streets. Again, this should encourage further investment to make shopping "offline" more attractive and in turn, boost sales generally.

As most large UK retailers have a mixed online/offline presence, a holistic approach such as the above is likely be more favourable to them – especially if this is delivered through a combination of government, councils and retailers working together to address the issues affecting high streets, rather than simply punishing retailers' online sales.

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Other developments | Rest of the world

Catching up – data privacy laws in Asia are changing

In Asia, the data privacy landscape is varied, complex and evolving. Many, but not all, jurisdictions in Asia have some form of data protection regime, comprising of data protection and/or data security laws (or a combination of both).

To add to these differing approaches, many Asian jurisdictions are in the process of substantially updating their data protection regimes to reflect more closely the European data protection regime.

Our recent article provides a brief overview of some of the key changes which companies can expect to see coming into force in Hong Kong, Singapore, Japan and Taiwan in the near future.

Since these upcoming changes are increasing the level of protection afforded to data subjects, retailers operating in Asia markets should consider assessing the impact of the changes on their business (eg how the use of retail customer data might be affected – this and consumer marketing have been the "hotter" areas of data protection in Europe for retailers) and take steps to ensure compliance.

To find out more, read our full article here.

Asia: How staying-at-home has driven retail F&D collaborations

Recent social unrest and the COVID-19 pandemic have accelerated the emergence of a new "stay-at-home economy" for groceries and fresh produce in Hong Kong. In the first half of 2020, sales from supermarkets, livestock, poultry and frozen products experienced double digit year-on-year growth, while overall retail sales declined by over 33% compared with 2019 (Source: Census and Statistics Department).

In Hong Kong, close proximity between supermarkets and retail outlets with residential estates has traditionally limited the demand for online grocery shopping. However, since the implementation of social distancing measures and flexible work arrangements, a substantial part of retail sales, including groceries, is now being conducted online. In order to capitalise on this consumer shift, grocery retailers had two choices: either invest heavily to expand their own digital platforms and build a logistics network from the ground-up, or form new partnerships with existing service providers to increase their online capability in a much shorter time frame.

We have therefore seen numerous new partnerships pop up, including between retail giants such as M&S Foods and 7-Eleven, who have partnered with online delivery platforms Deliveroo and Foodpanda to offer on-demand grocery delivery. Many grocery stores and supermarkets have also signed up to Foodpanda's new "Foodpanda Mall", giving them immediate access to the benefits of an established online platform. With an existing distribution infrastructure including thousands of couriers on standby, on-demand services such as Deliveroo and Foodpanda serve as attractive partners for traditional retailers and are likely to continue to be in demand.

US: Potentially harmful substances to be phased out of food packaging

The US Food and Drug Administration (**FDA**) has announced that starting in 2021, manufacturers of certain Polyfluorinated Alkyl Substances (**PFAS**), used widely in food packaging, will begin to phase out sales of these substances for use in food packaging. This development is due to questions raised regarding the potential health risks from exposure to PFAS through food consumption.

Three of the largest food packaging manufacturers have agreed to a three-year phase-out of sales of products which contain the substances. After this time, it is expected to take up to a further 18 months to exhaust existing stocks of the materials.

So, what does this mean for businesses in the food packaging production industry and for the end users of these products?

This is a voluntary halting of sales by the chemical manufacturers, so at the moment no action is required by users further down the supply chain. However downstream users of these products should begin to identify alternative packaging materials which meet their quality and performance standards in order to avoid any disruption to their supply chains and the risk of being caught short in the future.

Additionally, in a fast-moving market where more and more consumers are choosing eco-friendly and sustainable alternatives to traditional products, we may see end users moving away from PFAS products prior to their full phase out by manufacturers.

In the UK, an independent scientific committee which provides advice to the Department of Health and the Food Standards Agency (**FSA**) on the toxicity of chemicals, including PFAS, is undertaking a review of the European Food Safety Authority's scientific opinion on PFAS in food packaging. The results will be published in the next few months. This could result in the FSA taking a similar approach to that adopted by the FDA in the upcoming months/years.

Snapshot of retail statistics #2

GOOD SPORTS

Only 9% of sporting goods shops expect to reduce their store footprint as a result of the COVID-19 pandemic as opposed to 30% of fashion and apparel executives.

Source: McKinsey-BOF

HONG KONG

- A **22.8%** decline in shopping centre rental changes year-on-year (more than a **40%** decrease from its peak in Q2 2018).
- A **23.4%** decline in prime street shop rental changes year-on-year (a **74.3%** decline from its peak in Q1 2013).

Source: Savills

CHINA

Total retail sales on consumer goods in Q4 of 2020 will achieve a growth rate of around 3% year-on-year, and annual consumption will be close to the level of the same period in 2020.

Source: Experian

Consumer spending is expected to be on the up

£304bn
2020 Q3

£327bn*
2020 Q4

£337bn*
2021 Q4

*Projected

Source: Retail Economics

AUTOMATION AND WAREHOUSING

Global warehouses considering plans to invest in automation:

65% conveyors/automatic sortation

56% shuttle systems

49% AS/RS (Stacker Crane)

48% AGVs (traditional point-to-point)

37% pick to light/put to light

Source: Forbes

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In this edition, we spotlight on the latest in retail in the US – as it begins a new era in 2021. We hear from David Kaufman and Staci Jennifer Riordan of Nixon Peabody LLP which is a member of the global TerraLex network of law firms, of which RPC is a founder-member and co-chair of its Retail Sector Group.

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Speed read

Coming to America: United States market entry tips

"The US is very open to in-bound expansion"; as a new era in the US begins, David Kaufman and Staci Jennifer Riordan consider tips for entering the US market, from a regulatory standpoint. Retailers should pay attention to employment and contractor contracts, transfer of data within and between states and other varied commercial requirements across states.

Coming to America: United States market entry tips

by David Kaufman and Staci Jennifer Riordan, Nixon Peabo

Most global retailers have contemplated entering the United States market – possibly just because of the sheer scale of the market. American retailers rang up almost $5.5 trillion (£4.1 trillion) in sales in 2019. Plus, for luxury sellers, the US market makes up a huge portion of overall global sales. Additionally, the impact that American consumers have on worldwide traditional and social media is tremendous, which amplifies the value of their purchases of your products. The country, however, has some challenges when it comes to market entry. Most notably, there is already stiff competition in most retail sectors and key geographies. From a regulatory standpoint, the US is very open to in-bound expansion. However, we have noticed a few areas where retailers have been tripped up in entering the market.

Employment

Hiring and firing workers is relatively easy to do in the US as employees are typically "employees-at-will" and, therefore, don't require written contracts. However, many retailers will often attempt to pay some of their staff (especially early on) as consultants or "independent contractors". That has put some global companies in hot water as these workers are later classified by regulators or the courts as employees.

Privacy and the Web

International companies often assume if they are GDPR compliant, they are OK in the US, too. Unfortunately, many successful online retailers are tripped up because their policies run afoul of privacy laws, the overwhelming majority of which vary state-by-state (notably California) and other laws/regulations that impact websites and virtual activities.

United "States"?

Global retailers sometimes get intimidated when pondering doing business in several or all of the states of America. However, while there are differences across geographies, the bulk of what companies entering the US market need to worry about is similar in each state. Companies often tweak things to comply in each state or endeavour to comply with the most restrictive jurisdictions.

DAVID KAUFMAN

STACI JENNIFER RIORDAN

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Speed read

Dealing with the last mile: delivery curbside and in-store

US retailers have boosted their distribution strategies to respond to changing consumer patterns as a result of the COVID-19 pandemic but physical retail has not become a thing of the past (and some e-tailers are even considering taking leases to offer click and collect). How are US retailers adapting their strategies to take advantage of the convenience of curbside collection?

Dealing with the last mile: delivery, curbside and in-store

by David Kaufman and Staci Jennifer Riordan, Nixon Peabo

The COVID-19 pandemic has required retailers across the globe to rethink their distribution strategy. Lockdowns early in the pandemic, for example, shuttered all but those very essential stores. Consumers, naturally, gravitated to online shopping and retailers scrambled to rethink how they delivered products to consumers. Now, traditional delivery services are overwhelmed with demand – leading to service disruptions. Retailers are looking at innovative solutions to solve their distribution headaches. Never before has the figurative "last mile" been so important.

Delivery

A mammoth shift has occurred in terms of online shopping and having goods delivered to consumers' homes. It is not just the quantity of merchandise – but the type of merchandise that has rapidly expanded. Shoppers are purchasing products, especially consumables, including food, drink, cosmetics, office supplies, cleaning supplies, etc, which many typically purchased in-store before. Plus, the expectations of consumers about the speed of delivery has increased in recent years as a result of the "Amazon effect". This has stretched the entire system to its breaking point. Retailers are responding by turning to a hybrid fulfilment model – shipping products from warehouses and their retail stores. Some retailers are turning to third-party on-demand shopping delivery services like Instacart, Shipt, and goPuff. Out-of-the-box innovative solutions include retailers utilising their own fleet of trucks, employing autonomous vehicles, and flying drones. Although these delivery platforms are still mostly in the experimental stage, they do give us some insight into a possible future. No matter how the product is delivered, consumers are demanding transparency like never before – real-time information about the status of their order.

Curbside

A powerful tool many US retailers have to combat delivery issues is to not deliver an item at all. Make the customer come pick it up. Brick-and-mortar retailers have the advantage of having well-positioned locations near population centres. During the COVID-19 period, there has been the rapid evolution of curbside pick-up. Customers love the convenience of ordering a product online thereby avoiding the store, and then just pulling up to a store that same day, or later at their convenience and picking it up – all without ever leaving their car. The heavy adoption of contactless, curbside pick-up by consumers, believed to be driven by the restaurant industry, is very likely to keep this delivery option an active part of every retailer's repertoire well after the pandemic. Even e-commerce retailers, who don't currently have physical locations, are contemplating leasing spaces to simply provide pick-up. Curbside pick-up does create its own logistical challenges for stores. Customer access often requires accommodations from landlords and even public authorities. Also, stores need to re-configure their staffing and storage to handle the service, with some looking to change the ratio of front of the house shopping space and stock room space, or converting some locations to pick-up only.

In-store

The physical stores themselves still play a crucial role in the delivery process for retailers. Being able to go in-store and picking out (and picking up) your products has always been an advantage for traditional sellers. However, store configuration and buying patterns have impacted that experience as well. Retailers selling essential products are trying to cram as many everyday items onto their shelves as possible. For specialty items, some retailers are turning their stores into showrooms – displaying merchandise which can be special ordered and delivered back to the store or directly to the customer. Being able to return or exchange an item in-store, regardless of purchase or delivery method is also a potent brand loyalty tool for those with physical locations, not to mention a cost savings compared to return shipping.

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Time for action on abusive card charges

Eyes will be on the British government in 2021 to start paving a new and substantially different pathway for the UK which holds enough merit to justify the upheaval, bitterness and loss caused by its advocacy and delivery of Brexit. One relatively uncontroversial area is the reform of regulation governing retail payments in the UK.

by Andrew Cregan, BRC, Director of Payments and Finance

For most of us payments usually involve cash and (plastic or virtual) cards. Cards made up almost 80% of retail purchases by value in 2019, or nearly two thirds by volume. The remainder was accounted for by cash. We are yet to see just how much the pandemic has shifted retail payments for the long-term towards cards, but there is little doubt that the share of card payments has grown substantially further in 2020.

> *"It's vital then that the government takes action to tackle excessive card costs."*

Without action we will see businesses put under further pressure and it will be consumers who are forced to pay the price.

While card payments account for four in every five pounds spent in retail, they also incur the largest charges for shops. Retailers spend at least £1.1bn annually to be able accept payments from their customers, of which the vast majority (£950m) is for cards. Ultimately these costs, at almost £40 per household, are reflected in consumer prices.

The international card schemes – a duopoly controlling 98% of the UK market – levy hundreds of fees on transactions across countless variables making it impossible for even the largest merchant to accurately forecast card costs. Complex billing structures have further become a powerful tool to bamboozle political, regulatory or legal attempts to rein in increasing abuses of the schemes' dominant market positions, which has seen scheme fees billed to merchants double in less than five years.

Evidence from annual BRC Payment Surveys has shown that card scheme fees rose 39% in 2017 and 56% in 2018, measured as a percentage of retailers' turnover, with businesses having also received notices in the past year of new fees that will now be charged to accept payments online.

Last year the British Retail Consortium, British Independent Retailers Association, Association of Convenience Stores, Federation of Small Business, UK Hospitality and Which? came together to call for decisive action to protect Britain's businesses and consumers from excessive card fees. Among the measures urged are investigation of card schemes for breach of competition law, expanding existing regulation to simplify card fees and cap scheme fees, and abolition of card fees paid to the customer's bank – as advocated by the UK Supreme Court in 2020.

The organisations are also calling for further measures to protect consumers' access to cash, which remains an important method of payment, particularly for many vulnerable people.

The calls come amidst a series of reviews underway by the government and the UK's Payment System Regulator into cards and payments more widely. Much of the rulebook on payments was forged in Brussels but following the UK departure from the EU there is now greater scope for national action in the UK card market.

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Speed read

Time for action on abusive card charges

Andrew Cregan, Director of Payments and Finance at the British Retail Consortium (**BRC**), considers the latest in the calls for action from the industry for reform of regulation governing retail payments in the UK.

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annually to be able to accept payments from their customers.

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UK consultations, inquiries and bills 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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