TRAVERS SMITH

Retail Digest

WINTER 2015/16

"The Travers Smith team excelled in all they did. At critical times they provided the quality of advice you can only get from an adviser who is fully immersed in the market. They were also a pleasure to deal with."

Chief Financial Officer, Radley

Retail Digest

WINTER 2015/2016

Welcome to the Retail Digest, a round-up of developments this year which have affected businesses in the retail sector.

Changes to consumer law, a greater emphasis on corporate transparency and social responsibility and a recognition by governments of the increasing value that personal data holds for many businesses have resulted in a number of challenges to businesses within the retail sector.

Topics we have examined in this edition include:

- cyber crime and how retail businesses can better protect personal data
- the new transparency rules introduced by the Modern Slavery Act
- the effect on retailers of the Chancellor's decision to introduce the National Living Wage
- airport retailers failing to pass on VAT savings to passengers
- October's Consumer Rights Act and how it might impact on retail businesses
- the EU's decision to remove the "safe harbor" for personal data transfers to the US
- the effects of tax cuts on online retail

2015 has been a strong year for the Travers Smith retail sector team advising clients on legal developments in the sector as well as continuing to advise clients on corporate transactions including mergers and acquisitions, IPOs and refinancings. If you need assistance or have suggestions in relation to any issues raised in this publication, please do not hesitate to contact any member of our retail sector team as described on page 30.

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Contents

06 HACKS, CYBER-ATTACKS AND SIMPLE HUMAN ERROR: PROTECTING PERSONAL DATA

08 CORPORATE TRANSPARENCY AND THE MODERN SLAVERY ACT 2015

12 NATIONAL LIVING WAGE – FOR RICHER OR POORER?

16 AIRPORT VAT AND THE MEDIA

18 COULD NEW RULES ON CONSUMER SALES AFFECT YOU?

20 DATA PROTECTION: "SAFE HARBOR" NO LONGER SAFE

22 BEPS AND THE CHALLENGES OF THE DIGITAL ECONOMY

OTHER TOPICS:

26 ENERGY SAVING OPPORTUNITY SCHEME

26 VOUCHER SCHEMES AND ADVANCE PAYMENTS

26 ADR AND ODR REGULATIONS

Hacks, cyber-attacks and simple human error: protecting personal data

As the uses to which personal data is put have become greater and more sophisticated, so have the risks of something going wrong.

We are seeing many more deliberate attacks and regularly advise clients on containment and mitigation in the aftermath of security breaches, including data theft involving malicious hacking. And this isn't just confined to users of "Big Data". Attacks can be very sector specific and frequently exploit weaknesses in small businesses.

The legal consequences are also multiplying e.g. larger fines levied by authorities, potentially more claims for damage by individuals whose data has been lost, misused or taken (as a result of a current landmark case) and the introduction in the next year or so of new and more onerous European data protection legislation. Of course legal liability for loss isn't automatic, and you are in a much better position to defend against regulatory attack if you have taken diligent preventative steps; an aspect the regulators are focusing on to improve good practice. Here are three of the more common issues that we have seen recently – and some of the steps regulators have recommended to protect your systems and the personal data which you hold.

Hacks and cyber-attacks

TalkTalk is just the latest high profile example of a business which has suffered at the hands of cyber-attackers with the resulting loss of 1.2 million email addresses, names and phone numbers as well as 21,000 unique bank account numbers and sort codes.

Preventative steps

- Adopt, keep up to date and enforce a data security and retention policy, including regular review of whether any of the data you are holding has become historic or unnecessary
- Don't ask for any personal data that you don't need
- Consider engaging a professional technical security firm to review your encryption strength and system security
- Mobile devices can be more vulnerable than traditional computer hardware – consider whether it is necessary/appropriate for your staff to use mobile devices to access your systems
- Consider taking out insurance against cyber-attacks and data loss

Theft or loss of laptops/ memory sticks

North East Lincolnshire Council was fined £80,000 after an unencrypted memory stick containing data relating to children was lost.

Preventative steps

- Make sure that laptops and mobile devices do not contain full copies of all databases, unless access to that quantity of data is absolutely necessary
- Routinely review the physical security of your offices and server rooms
- Have (and enforce) staff system access policies
- Regularly train staff about the importance of data protection and security

Loss or misuse of data by service provider

In March 2015 the Daily Mail reported that salesmen at data broker companies are claiming to have "access to the salaries, investments and pensions of a million people" and that this information is "being sold for as little as 5p". Many companies are dependent on some form of outsourced service provision which requires personal data to be transferred to the provider.

Preventative steps

- Carry out proper due diligence on all service providers who may process data on your behalf
- Make sure that you have data processing contracts (including appropriate non-disclosure provisions) in place with all service providers who may handle personal data, as required by law
- Don't give service providers copies of all of your data when they only need part of it
- Prohibit sub-contracting by your service providers, unless your consent is first obtained and the sub-contractor demonstrates appropriate security
- Consider asking for rights to audit service providers' data protection compliance, and use those audit rights.

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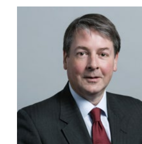

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Corporate Transparency and the Modern Slavery Act 2015

Under new rules, which have just come into force, large organistaions (including retailers) operating within the United Kingdom will now need to make a public statement outlining how they keep their supply chains free from slavery and human trafficking.

This new corporate reporting obligation is brought in by s.54 of the Modern Slavery Act 2015 (the "Act") and the recent implementing regulations.

The Act demonstrates the UK Government's clear intention to keep the spotlight on corporate behaviour both at home and abroad. This legislative trend of forcing corporates to be more open about their business activities is central to what some refer to as "new wave" regulation.

Following yesterday's release of the Government's long awaited guidance, this briefing considers how the new supply chain transparency obligation is likely to affect you and what steps you should be taking.

Who is caught by the new transparency rules?

A retailer will fall within the supply chain transparency provisions of the Act if it:

1. is a 'commercial organistaion' (a company or partnership)
2. supplies goods or services
3. carries on a business or part of a business in any part of the United Kingdom
4. has a total annual turnover of not less than £36 million

How much of the business needs to be undertaken in the UK?

There is no minimum amount. The Government has suggested that it is sufficient that any part of a business is taking place in any part of the United Kingdom. Organisations which carry out only a small part of its business within the United Kingdom may still be affected by the Act. In determining whether or not the organisation "carries on a business" in the UK, guidance suggests that it will be determined by a common sense approach, considering whether or not there is a demonstrable business presence in the United Kingdom.

The turnover threshold

Any retail organisation with a total annual turnover of not less than £36 million will need to comply with the Act.

The total turnover of an organisation is the turnover of that organisation and the turnover of any of its subsidiary undertakings. This will include subsidiaries incorporated outside of the United Kingdom. Therefore, the turnover threshold refers to global turnover and not just turnover in the United Kingdom. "Subsidiary undertaking" has the meaning given by s.1162 Companies Act 2006.

Turnover is calculated by "the amount of revenue derived from all sources, after deduction of trade discounts, value added tax and any other taxes." This is the same calculation as per s.474(1) Companies Act 2006.

The thresholds correspond to the Companies Act 2006 threshold for determining the size of a large company. Therefore, companies that qualify as small or medium under the Companies Act 2006 will not have to prepare a statement.

What must qualifying retailers do?

A retail organisation falling within the Act must prepare a slavery and human trafficking statement ("Statement") at the end of each financial year.

The Statement should set out the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains and/or in any part of its own business. Alternatively, the Statement could simply state that the organisation has taken no such steps. This second option is unlikely to be a realistic compliance route given the potential for reputational damage.

As the guidance makes clear, the organisation does not need to guarantee that its entire supply chain is slavery free, but rather, it must set out the actions it has taken to ensure that no slavery is taking place in its supply chains.

Content of the Statement

A retailer's Statement may include information about:

- the retailer's structure, its business and its supply chains
- its policies in relation to slavery and human trafficking (namely the "core" offences under the Act – see below)
- its due diligence processes in relation to slavery and human trafficking in its business and supply chains
- the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk
- its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate
- the training about slavery and human trafficking available to its staff

These requirements are non-mandatory and are offered as guidance only. The Government has stated that they "fully expect slavery and human trafficking statements to differ from business to business".

The Government's guidance, although not comprehensive, at least provides some additional direction on how to prepare these Statements.

Approving and publishing the Statement

The Statement must be approved in the correct way. For companies, it must be approved by the board of directors and signed by a director.

The Statement must be published. If the retailer has a website, it must post the Statement on that website and include a link to it in a prominent place on that website's homepage.

If the retailer does not have a website, it must provide a copy of the Statement within 30 days to anyone who makes a written request for one.

Do subsidiaries also have to produce a Statement?

A subsidiary will only be required to produce its own Statement if it falls within the above four tests in its own right (i.e. the subsidiary is a commercial organisation, supplying goods or services, carrying on business in the UK, and it exceeds the turnover threshold of £36 million).

Where a parent company and a subsidiary company are both required to produce a Statement, one Statement may be produced as long as it covers the full business and the supply chain of the parent and the subsidiary and is placed on both the parent's and the subsidiary's websites.

Which supply chains?

If a parent company qualifies, it will only need to report on its own supply chains, not necessarily the supply chains of all group companies. However, the guidance makes clear that if the activities of a (foreign or UK) subsidiary form part of the supply chain of the parent, then the parent's Statement will also need to report on the supply chains of the subsidiary. This will be the case even if the subsidiary does not need to make its own Statement.

It is likely that the reporting obligations will apply to upstream supply chains only; however, there is significant uncertainty surrounding issues such as how far up the supply chain organisations are expected to investigate. Unhelpfully, the guidance suggests that "supply chain" should be given its everyday meaning.

Where retailers are dealing directly with the manufacture, import or supply of 'goods' the relevant supply chains should be fairly obvious; however, with organisations that supply 'services', it may be far from clear.

Core offences

In addition to the above corporate obligation to provide a Statement, the Act restates and introduces a number of "core" offences. These cover:

- slavery, servitude, forced or compulsory labour and
- human trafficking

The subject matter of these "core" offences form the focus of investigations which are to be carried out as part of the corporate Statement.

Next steps

This reporting obligation came into force on 29 October 2015.

However, further to transitional provisions, commercial organisations with a financial year that ends before 31 March 2016 do not have to make a Statement in respect of that financial year. Note, however, that subsidiaries (such as portfolio companies) which qualify in their own right may have different financial year ends from their parents and may have to start preparing a Statement in early 2016.

Going forward, failing to make a Statement when required can lead to enforcement via an injunction, and continued breach could result in fines.

The main impact on retailers that fail to comply (or whose statements are weak or misleading) will, however, be reputational (be it with investors or customers or by becoming the target of NGOs).

To ensure retailers are able to comply, the following questions should be considered now:

- Whether or not the requirement to report will apply to your organisation (either directly and/or to any of your subsidiaries)?
- If so, whether you are likely to make a positive or negative Statement?
- What information you already have regarding existing supply chains?
- What further due diligence is necessary to gather the relevant information for the Statement?
- Are your procedures, for example corporate policies and staff training, adequate?

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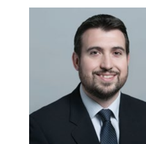

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National Living Wage – for richer or poorer?

There has been much debate over the impact of the Government's plan to introduce a new National Living Wage (NLW) from April 2016. George Osborne announced the plan as part of his July 2015 Budget, and presumably had hoped for a more positive response from businesses. The move has instead been met with very mixed reactions.

What is the National Living Wage?

The NLW is a new hourly rate that will apply to workers aged 25 or over from April 2016. The new rate, which will be compulsory, is to be set initially at £7.20 per hour. This is expected to rise to over £9 per hour by 2020. By contrast, the National Minimum Wage (NMW) for workers aged 21 and over is currently £6.70 per hour. The NMW will continue to apply to workers aged 24 and under, so that the two types of rates will run concurrently.

The Low Pay Commission, an independent body that was set up to monitor the NMW, has been consulting on the impact of the introduction of the NLW (along with NMW rates). They will be asked to make recommendations to the Government on future rate rises for both the NLW and the NMW.

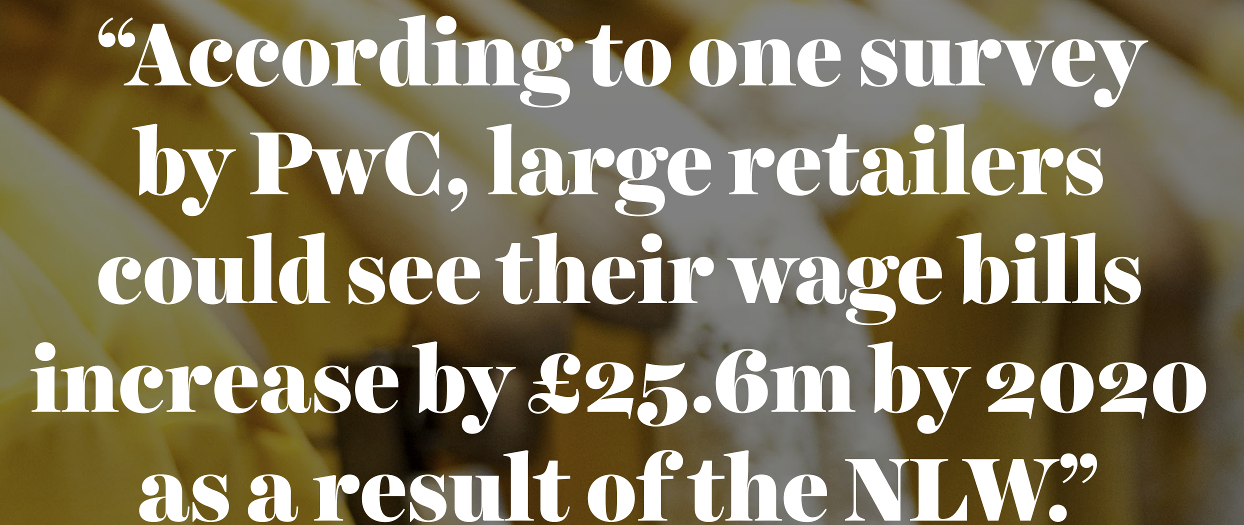
The NLW should not be confused with the voluntarily Living Wage, an hourly rate that organisations can sign up to voluntarily, and which has been set annually by the Living Wage Foundation since 2011. It is calculated according to the basic cost of living in the UK, and is currently £7.85 outside London and £9.15 in London.

What does this mean for the retail sector?

Whilst the Government hopes that around six million workers could benefit from the new NLW, it is impossible to ignore the fact that the NLW will also likely mean job losses for others. The Office for Budget Responsibility has estimated that the increased labour costs could result in around 60,000 job losses, but added that this could be affected by "labour demand elasticity", and that as many as around 110,000 job losses could be possible. According to one survey by PwC, large retailers could see their wage bills increase by £25.6m by 2020 as a result of the NLW.

The response to the NLW has varied depending on the size of the retailer. A survey of by the British Independent Retailers Association found that 63% of its member employers believed that the NLW would result in fewer jobs being available, demonstrating that, unsurprisingly the NLW is likely to have a greater impact on smaller businesses.

In contrast, the British Retail Consortium has pointed out that many employers in the retail industry are already paying above the new NLW, and those who are will not be affected. Instead some larger retailers are facing pressure to pay the voluntary living wage, and many are already responding. Aldi has announced that it will pay all of its staff £8.40 per hour from February, whilst Lidl and Morrisons have committed to increase pay for their staff to £8.20 per hour. Other retailers, including IKEA and Oliver Bonas, have committed to pay the voluntary living wage.



"However, taking age into account when recruiting would amount to unlawful age discrimination, leading to potentially unlimited compensation in the Employment Tribunal."

What can retailers do?

Unfortunately it will be difficult to avoid the impact of the NLW for those retailers currently paying below this level. Businesses with a younger workforce will be less affected since workers under the age of 25 would continue to be paid on the lower NMW rates. However, taking age into account when recruiting would amount to unlawful age discrimination, leading to potentially unlimited compensation in the Employment Tribunal. Reducing staff bonuses or benefits may be an option, provided employers have the discretion to do so (which will not always be the case). In any event such a move is unappealing from an employee relations point of view. Some businesses may ultimately have to absorb the cost by reducing the number of staff, or alternatively reducing their hours or shifts.

Whatever your business' view, it's clear that the NLW will be here to stay. With BIS also announcing that it intends to implement harsher penalties for employers who breach NLW and NMW requirements (including disqualification from being a company director for up to 15 years and doubling penalties for non-payment), it makes sense for retailers to start scrutinising pay structures and planning for the increased hourly rate sooner, rather than later.

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Airport VAT and the media

As the weather starts to get a little chilly this autumn and the drizzle inevitably descends for its seasonal residence, many of us will look back fondly to warming memories of summer trips abroad. We should perhaps spare a thought, however, for those retail executives whose holiday memories may forever be marred by flashbacks to headlines describing the "Airport VAT Scam" and yet another example of "rip-off Britain".

It remains to be seen how long it will take the public to allow the retailers concerned back in from the cold, but with the new shadow chancellor John McDonnell already promising to "force people like Starbucks, Vodafone, Amazon and Google and all the others to pay their fair share of taxes", it is clear that tax will remain firmly on both the policy and media agenda. It is therefore becoming increasingly important for consumer facing businesses to consider not only their technical obligations in relation to tax but also to reflect on how their tax affairs may be construed should details make their way to the front pages. The airport VAT tale provides some useful insight as to the current climate.

Background

VAT is an EU-wide tax (although rates vary across the EU) on consumption ultimately intended to be borne by the end consumer of the relevant goods and services. It is the business making the supply of goods, however, who is responsible for accounting for any tax to the authorities.

A key aspect of the VAT legislation is that businesses are able to deduct VAT they are charged by their suppliers (input tax recovery) from the VAT payable on their own 'taxable supplies' to consumers – businesses then only account to HMRC for the difference. Most businesses in the UK therefore have a legal obligation to account to HMRC for VAT on their supplies (subject to various exemptions/nuances).

The upshot is that the final consumer pays VAT in respect of the total value of the goods and services, with the suppliers of the raw materials and production processes recovering their input tax at each stage of the supply chain.

Position in Airports

As ever with tax (and VAT in particular) the rules are not straightforward nor, unsurprisingly, are the nuances widely appreciated by consumers.

Tucked away in an HMRC Notice there is an extra-statutory concession which allows air-side "duty-free" and "tax-free" shops to treat supplies of goods to passengers departing to destinations outside the EU as direct exports of goods. These direct exports can be 'zero-rated' for VAT purposes, such that no VAT needs to be accounted to HMRC on the supply but retailers can still recover their input tax.

The net outcome is that retailers in UK airports can retain the full amount paid by those travellers bound for destinations outside the EU and only account for 20% VAT in respect of supplies made to intra-EU passengers. In order to do so retailers must retain sufficient evidence of the export. Many airport retailers therefore require customers to provide their boarding passes at the point of sale so that they can distinguish between EU and non-EU passengers and log the necessary evidence. Stringent regulations apply to duty-free shops (who are entitled to sell goods free from excise duty and customs duty as well as VAT) which effectively require any customers purchasing goods to produce transport documentation. There is however no requirement in the VAT legislation for (i) passengers to produce their boarding passes in other shops; or (ii) crucially, for stores to pass on the benefit of the zero-rated VAT treatment to their customers.

The main suggestion from the national newspapers (other than perhaps for travellers to boycott showing their boarding cards in air-side stores) was that retailers should operate a dual pricing model to explicitly pass the VAT saving on to non-EU travellers at the point of sale. This would be achieved, for example, by charging an EU traveller £6 for a bottle of sun cream (and accounting £1 of VAT to HMRC), but charging a non-EU traveller only £5 for the same bottle. With an average of 200,000 passengers using Heathrow airport alone each day it's not difficult to see how, in the absence of dual pricing, the pounds could add up to significant sums for airport retailers.

The recommendations (and disapproval) were not only received from the press, with the Financial Secretary to the Treasury, David Gauke, also widely reported as saying that "while many retailers do pass this saving on to customers it is disappointing that some are choosing not to. We urge all airside retailers to use this relief for the benefit of their customers."

Realities of airport retailing

There may of course be a number of reasons why airport retailers take the approach they do (such as administrative simplicity or time savings), or that the benefits of zero-rated VAT treatment are passed on to airport consumers in other ways.

For instance, the VAT saving on non-EU exports may well be a cost saving which ultimately results in lower overall prices in the airport stores than would otherwise be the case in such a captive market (with limited rental units available for retailers and limited retail options for consumers). The fact that some retailers do not explicitly pass the saving on to non-EU travellers does not necessarily mean therefore that the saving is not passed on to consumers more generally. Alas a deeper economic analysis was notably absent from the mainstream press coverage.

Some retailers did present the argument that a dual pricing system would be complex and costly to implement and so may result in higher prices for all customers, but unfortunately for them the spin of the story was already framed within the increasingly familiar "tax dodging" or "rip-off" lexicon. Considering too that many goods sold by airport retailers, such as books and newspapers, are zero-rated under general VAT legislation (both inside and outside the airport), the ire directed at shop assistants by customers purchasing their favourite newspaper may have been misplaced – even had differential pricing been in place, the cost of these zero-rated goods would likely have been the same for both EU and non-EU travellers. As we are now so often seeing, perception is becoming just as important as the technical/legal analysis.

Advice

The events of this summer all serve as a reminder to consumer facing businesses to ensure they not only seek technical advice in relation to their tax affairs, but also consider the potential commercial and PR implications of their tax choices. In the current climate, with tax frequently the subject of media attention and wider public discourse, even decisions around the pricing of bottles of sun cream can leave retailers feeling burned.

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Could new rules on consumer sales affect you?

On 1 October 2015 large parts of the Consumer Rights Act 2015 took effect. It changed the law regarding sales of goods and services to consumers, both in store and on-line.

What were the changes?

- They re-stated (with slight changes) and brought into one place existing rules on the sale of goods and services, and concerning unfair terms in consumer contracts
- They changed the rules relating to consumer remedies. The changes shouldn't have caused much surprise, and existing complaints and redress procedures may already offer what the new rules require
- They introduced new consumer rights relating to sale of "digital content". This is the most prominent change, but in practice is unlikely to be that onerous on suppliers
- Terminology has changed – you may need to adjust the language of your terms of sale, web-notices and related materials to keep them up-to-date
- Probably the most important point to remember is that how suppliers (and their sale staff) describe the service provided now forms part of the contractual promise to the customer, and any qualifications need to be very clearly and understandably set out. The same applies to certain key statements about goods

New remedies?

If a product or service isn't up to scratch, what you have to offer the consumer varies depending on whether it is goods, services or digital content.

Goods:

- The consumer may, within 30 days, reject the goods (and must receive a refund)
- The consumer can require you to repair or replace the goods
- If they still don't work the consumer is entitled to an "appropriate" price reduction (which can be 100%) or can reject the goods and receive a refund

Services:

- The consumer may require repeat performance within a reasonable time (and without significant inconvenience to the consumer). If this isn't or cannot be performed a price reduction/refund must be given

Digital Content:

- The consumer may require repair or replacement. If neither is possible, or repair isn't properly effected, an "appropriate" price reduction/refund (which can be 100%) must be given

Keep in mind that while the cost of repair may, in practice, exceed the original price, the obligation to give a refund will never exceed the price paid. That said, the customer can also sue for damages, but cannot recover twice for the same loss.

"Digital Content"

For the past 20 years or so, it hasn't been clear whether the supply of software and other forms of digital content constituted "goods" or "services". Now we have a clear statement of the law that:

- When you sell digital content, the consumer has rights as if they were buying goods (the content must be of satisfactory quality, fit for purpose and comply with its description)
- "Sell" includes free content provided as a package with goods, services or other digital content which is paid for
- Digital content delivered on a physical medium (such as a compact disc) is treated as goods
- Where the content is a streaming service, or depends on access to a website, you will need to be clear in your contract about how long the consumer will continue to have access to such facilities. Otherwise the time period must be "reasonable"
- As an extra obligation, if your content damages other data or a device of the consumer (e.g. on which it is downloaded) because you didn't exercise reasonable care and skill, you have an obligation to repair the damage or pay "appropriate" compensation

Can I restrict liability under the contract?

Generally "no". The core obligations implied under the CRA cannot be excluded or limited.

However, other terms and related remedies can be limited to the extent that they are "fair". This test replaces the old "reasonableness" test which applied under the Unfair Contract Terms Act ("UCTA").

A term is "unfair" if "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations ... to the detriment of the consumer".

The best course is to make sure that the customer has sufficient material drawn to their attention before sale in order to understand both the benefits of what is on offer, and its limits.

New enforcement powers

The CRA also introduced new enforcement powers for consumer regulators including Trading Standards and the Competition and Markets Authority.

Regulators have new powers to seek much broader orders from the civil courts. These include requiring businesses to pay compensation to consumers who have suffered loss due to an infringement of consumer law (e.g. where products have been mis-sold) and/or to take active steps to comply with the law in future. The new powers apply to all consumer protection law infringements, not just breaches of the CRA.

This raises the stakes for businesses found to have infringed consumer law; whereas in the past, the main concern was often reputational damage, businesses are now more greatly exposed to potentially significant financial liabilities as well (as illustrated by the amounts paid in compensation by banks for mis-selling of PPI).

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Data protection: "safe harbor" no longer safe

As widely reported in the press, the Court of Justice of the European Union (CJEU) has declared invalid the European Commission's earlier decision approving the existing data transfer "safe harbor" arrangements with the US. EU data protection regulators have since provided further guidance on what this means for EU businesses.

Safe harbor arrangements are important because the EU Data Protection Directive prohibits the transfer of personal data to countries outside the EEA without consent of the data subject unless certain conditions are met – but many European businesses need to be able to transfer data to the US (for example, because they use cloud storage services which are based on servers located in the US).

Is there a way around it?

Other methods of legally transferring personal data outside the EEA include signing up to "binding corporate rules" for intra-group transfers, entering into an agreement with the transferee based on model clauses approved by the European Commission, obtaining consent from the individual data subject, or making the data anonymous (so that it can no longer be linked to particular individuals). Binding corporate rules must be approved by national data protection regulators, which takes time; they therefore only offer a solution in the longer term and only in relation to intra-group transfers (not, for example, for European businesses which use third parties based in the US to process their data). Getting consent (probably by building it into terms of trade with customers) is unlikely to provide a quick fix and anonymising data is not always possible (although it is worth exploring where practicable).

In view of these difficulties and unless it is practical to simply stop transferring personal data to the US altogether, most businesses affected by the safe harbor decision are likely to put in place agreements using the Commission's model clauses in order to achieve compliance. Some businesses might consider this to be an administrative burden, but for most it is relatively straightforward. Keep in mind that the model clauses may be vulnerable to the same objections which caused the CJEU to declare the safe harbor arrangements invalid. (The CJEU was referred to the issues flagged by Edward Snowden regarding the surveillance activities of the US government. These could apply just as much to the model clauses). But for the time being the EU data protection regulators recommend their use. In some cases, there may also be exceptions in the legislation which help; for example, personal data can be transferred where it is necessary for the performance of a contract.

Is there a deadline to act?

EU data protection regulators have made clear that the safe harbor arrangements are not currently usable, and that businesses need to put in place a viable alternative now, though co-ordinated enforcement action won't be taken until the end of January 2016. But this won't protect you if someone complains in the meantime and you haven't got that alternative in place. This doesn't just stop at putting the necessary paperwork in place – it also means complying with the clauses in real terms. The more you can demonstrate at a practical level, a commitment to effective data security, the better placed you will be for dealing with complaints of any nature.

It is also worth bearing in mind that the entire EU data protection framework is also under review, with new legislation expected to be agreed next year for implementation in 2017/18. The new laws are anticipated to increase the burden on businesses to ensure data security compliance, so any measures which you take now to ensure data security, both at home and when transferring personal data outside the EEA, should only help to put you in a better position to comply with new laws going forward.

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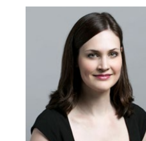

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BEPS and the challenges of the digital economy

Following the global financial crisis, governments and political leaders began to express a growing concern that tax planning by multinational enterprises was making use of gaps in the interaction of different tax systems to artificially reduce taxable income or shift profits to low-tax jurisdictions where no or little economic activity is performed. In response to this, and at the request of the G20, in July 2013 the Organisation for Economic Co-operation and Development (OECD) launched an ambitious 15-point action plan on Base Erosion and Profit Shifting (BEPS). The OECD's final report was published on 5 October 2015.

In its report, the OECD emphasises the benefit which the digital economy has had on the retail sector, by enabling retailers to allow customers to place online orders, and by making it easier for retailers to gather and analyse customer data, and to provide a personalised service and advertising. The digital economy also enables retailers to manage logistics and supplies, which can have a significant and positive impact on productivity.

However the OECD also addresses the tax challenges of the digital economy and highlights its concern that some features of the digital economy do exacerbate the tax risks outlined in the BEPS report. One such challenge is the impact of the digital economy on the collection of VAT, particularly where goods, services and intangibles are acquired by private consumers (as opposed to businesses) from suppliers abroad. This briefing note outlines the OECD's findings on this subject and the interaction of these findings with the change which took place from 1 January this year to EU cross-border business-to-consumer (B2C) supplies of digital services.

Possible options

The Task Force on the Digital Economy (TFDE), a subsidiary body of the Committee of Fiscal Affairs, on whose findings the OECD based its report, has discussed and analysed a range of potential options to address this challenge. The options they have considered include imposing a withholding tax on certain types of digital transactions, levying tax on the basis of a nexus of significant economic presence, or imposing an equalisation levy. However in its final report, the OECD decided not to pursue a new tax regime for the digital economy for the time being, which would have been a very significant development. Instead, the OECD has recommended that countries should continue to apply the principles of the International VAT/GST Guidelines and consider introducing the tax collection mechanisms which those guidelines propose. This approach is aligned with the OECD's view that the overarching purpose of VAT is to impose a broad-based tax on consumption.

The 'destination principle' and the challenge of collecting VAT

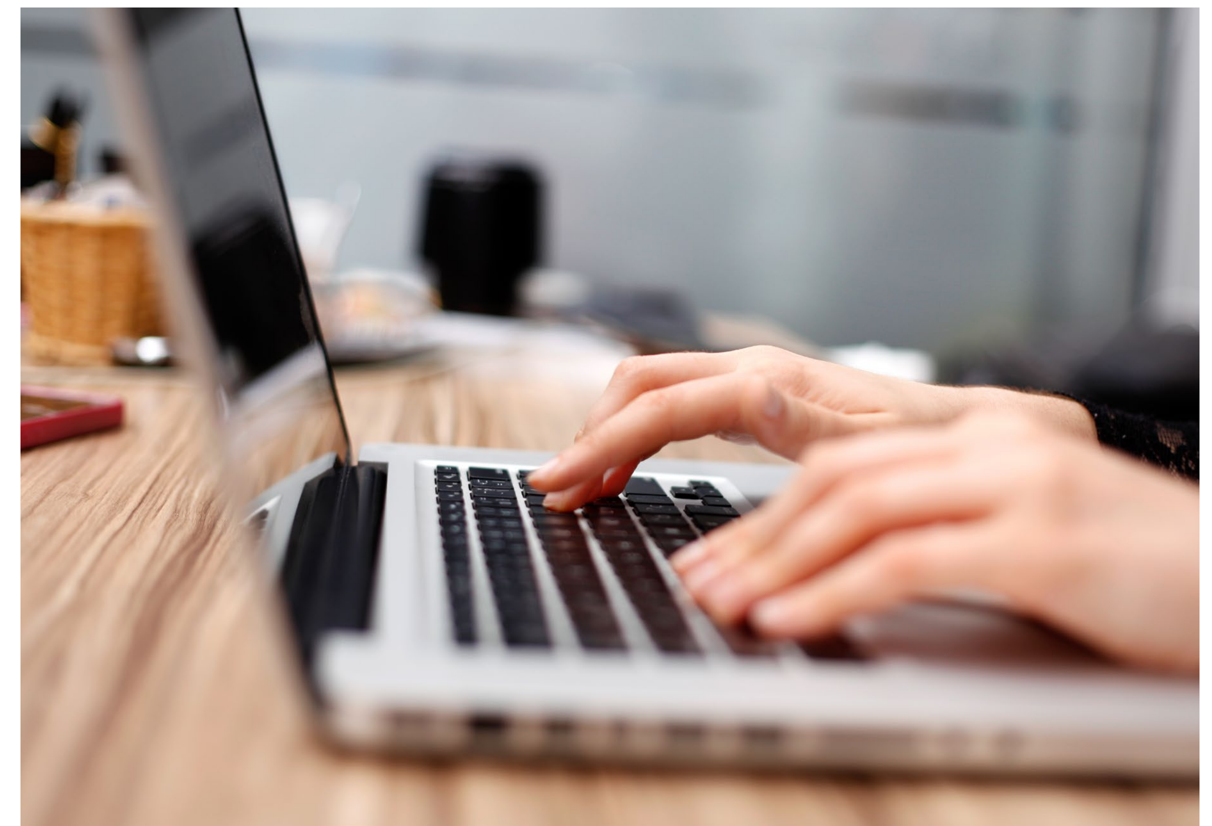
In line with this approach, the OECD's report recommends that cross-border B2C services should be taxed using the 'destination principle'. This means that the supply should be taxable in the country of the end consumer, rather than the country from which the supply originates.

However this approach poses practical challenges to tax collection: a self-assessment obligation imposed on the consumer is unlikely to be effective, so a system is needed which requires the supplier to collect and remit the tax in the country where its customers are based. This would require non-resident suppliers who make supplies to customers in a range of countries to register and account for tax in each of those countries, which may have significant administrative and cost implications. To address this, the OECD in its report reiterates previous recommendations which it has made, that countries should consider using simplified registration regimes and registration thresholds to minimise the potential compliance burden on businesses.

MOSS

The most notable example of this for supplies of digital services is the EU's 'Mini One Stop Shop' scheme (MOSS). Since 1 January this year, EU cross-border B2C supplies of digital services have been treated as taking place in the member state in which the consumer is located. This means that suppliers of digital services to customers in EU member states are subject to VAT in each consumer's member state, and are required to register and account for VAT there. Businesses outside the EU that supply digital services to consumers in one or more EU member states are also affected by these changes.

However under the MOSS scheme, a business supplying customers in the EU can choose to register for VAT electronically in a single member state of choice, and account for VAT on its sales of electronic services to all EU customers in that member state,



on a single quarterly electronic VAT declaration which contains details of VAT due in each member state in which the business has made supplies.

The MOSS scheme is not compulsory and only applies to digital services. Broadly, 'digital services' include:

- Radio and television broadcasting services for simultaneous listening/viewing and live streaming
- Telecommunications including access to the internet, fixed and mobile telephone services, and telephone services over the internet
- Electronically-supplied services including supplies of downloaded software, online magazines, access to electronic databases, the supply of websites and web hosting, supplies of films, music and games, downloaded images, text or information, access to the internet and the supply of electronic books and other digitised publications

However the guidance which sets out which services are, and are not, digital services are detailed and specific, and there is a fine line in some situations as to whether a supply is, or is not, a supply of digital services. For example, if a customer receives a publication in PDF form which was sent to them automatically from a retailer's online system, this will be a digital service. However if the same PDF document is attached to an email and sent to them manually by the retailer, this will not.

Other supplies which are not supplies of digital services include when, for example, the internet or some other electronic means is used to facilitate trading, or - in the case of supplies of goods - where the order and processing takes place electronically. Supplies of physical books, newspapers etc., and the supply of booking services or tickets electronically (for example, booking hotels or tickets to events) are not digital services.

As such, retailers who have not already done so should take advice to determine whether they are making supplies of digital services. If so, whether the MOSS scheme is available, and suitable, for a particular retailer, will depend on their business and the location of their customers.

Data protection

A related obligation on retailers making supplies of digital services is that if a retailer keeps customer records electronically, they are required to register as a data controller with the Information Commissioner's Office (ICO). This registration requirement is determined by the retailer's place of business, not where their customers are based, so UK businesses registered under MOSS are only required to register with the ICO in the UK, and not with the equivalent registrar in any other member state.

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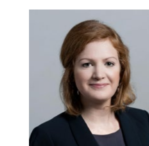

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And finally

Energy Saving Opportunity Scheme

In July 2014, the Energy Savings Opportunity Scheme ("ESOS") Regulations 2014 came into force, implementing the requirements of Article 8 of the EU Energy Efficiency Directive ("EED") into UK law. ESOS is a new UK scheme that requires 'large' UK undertakings and their corporate groups to carry out mandatory energy assessments and report compliance to the Environment Agency every four years (starting from 5 December 2015).

ESOS applies to any 'large undertaking' (including companies, trusts and partnerships) that carries on a trade or business as at the 'Qualification Date' (31 December 2014 for phase one) and any corporate group where at least one member of the UK group meets the ESOS definition of a 'large undertaking'. A 'large undertaking' is a single entity that either employs at least 250 people or has an annual turnover in excess of €50 million and annual balance sheet in excess of €43 million. The extent of the wider participant group will be determined using relevant Companies Act 2006 tests.

Qualifying participants must undertake an 'ESOS Assessment' and notify the Environment Agency of compliance by the 'Compliance Date' for each four year phase (5 December 2015 for phase 1). There are three main requirements of an ESOS Assessment:

1. measure the organisation's total energy consumption for buildings, processes and transport
2. conduct energy audits to identify cost effective energy efficiency recommendation
3. report compliance to the Environment Agency and maintain an evidence pack of compliance

In the event of non-compliance, an enforcement notice or civil sanctions may be issued, including financial penalties up to £50,000 (for failure to undertake an ESOS Assessment) and, potentially, an additional penalty of £500 per day of non-compliance, up to a maximum of 80 days.

For further information, please see the briefing note on our website: www.traverssmith.com

Voucher schemes and advance payments

In response to concerns raised by government, the Law Commission is investigating whether consumers who have paid in advance for goods or services could be better protected when retailers become insolvent. Among other things, it is looking at deposits payable in relation to big ticket items such as furniture and voucher schemes. The concern is that when a retailer ceases trading, consumers are left out of pocket because, for example, they are unable to spend their vouchers or reclaim their deposits. Options being considered include the possibility of retailers holding deposits on trust, taking out insurance or entering into bonding arrangements (as is common in the travel sector as a protection for consumers against insolvency). If such measures became mandatory requirements, they would be likely to increase some retailers' costs. However, the investigation is at an early stage and the Law Commission has indicated that it would only see increased regulation as appropriate where there is clear evidence of significant consumer detriment.

ADR in consumer disputes

The Alternative Dispute Resolution (ADR) for Consumer Disputes (Competent Authorities and Information) Regulations 2015 came into force on 1 October 2015 and apply to all businesses in the UK which sell goods, services or digital content to consumers, with some limited exceptions.

ADR encompasses any process to resolve a dispute without recourse to courts (eg. mediation or arbitration).

Under the Regulations, a trader who is obliged by law, or its trade association rules, or the terms of a contract to use ADR services must make the name and website address of an ADR provider, approved by the Chartered Trading Standards Institute under the Regulations, available on its website and in its general terms and conditions.

In addition, under the Regulations, any trader, including those who are not obliged to use ADR services, who receives a complaint from a consumer about a contract, and is unable to resolve the complaint with them using its own internal complaints procedure, must inform the consumer in writing: (i) that it cannot settle the complaint; (ii) the name and address of an ADR provider that would deal with the complaint, if the consumer wishes to use ADR; and (iii) whether it is obliged or prepared to make use of the ADR provider. In other words, the trader has to give a consumer details of an ADR provider but doesn't have to agree to use ADR.

So, notwithstanding the Regulations, it remains the case that whilst providing ADR information is now mandatory, actually using ADR continues, in many situations, to be voluntary, as long as the trader is not separately obliged to do so. Having said that, traders may feel compelled to adopt an ADR process if their competitors are seen to be doing so, and if there is widespread take-up, then it may generate bad PR for a trader to inform consumers of the existence of an ADR provider but to state that it is not prepared to use it.

ODR Regulations

From 9 January 2016, those traders who are obliged by law, or otherwise, to use ADR services will also have to include in any email offers and in their terms and conditions information about the existence of the EU's new online dispute resolution (ODR) platform pursuant to the EU Consumer ODR Regulation ((EU) No 524/2013). Email offers must include a link to the website.

Further, every online trader will, in any event, have to provide a link to the ODR platform on its website regardless of whether it is obliged by law or otherwise to use an ADR service. This requirement will also apply to online market places.

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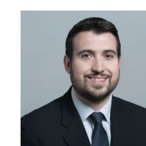

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A selection of our retail clients:

trainline
hobbycraft
Hamleys

LE CHAMEAU 1927
OFFICE
HOBBS LONDON

Agent Provocateur
SHEPHERD NEAME MASTER BREWERS
BYRON PROPER HAMBURGERS

fat face
Waitrose
pets at home

Cath Kidston
Jack Wills

Sainsbury's
Shoe Zone
McColl's

L'ORÉAL
wiggle
PRET A MANGER

CAFFÈ NERO
M&S SIMPLY FOOD
moto

L.K.Bennett London

Tyrrells
EAT.
MUSTO

Our retail team

We have taken time to understand the retail sector and build lasting relationships within it allowing us to provide focussed and high quality commercial advice to our clients.

We have a wide ranging experience across the retail sector, with a client base ranging from food retailers to luxury brands, from domestic and electronic consumer goods companies to online retail businesses, as well as private equity and other investors in the sector.

We are market leaders for M&A in the retail sector, ranked #1 by Mergermarket by volume of deals. However, our experience goes far beyond M&A, IPOs and refinancing. Our lawyers have the requisite depth of experience to advise on all issues facing retailers.

We have leading lawyers in all areas relevant to the sector: corporate, commercial, real estate, employment, tax and many more.

Our retail work is handled by a dedicated team led by Adrian West.

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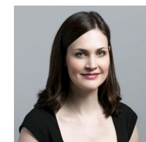

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"Travers Smith understands our business and, in particular, the quirks of being a private equity investee company. They consistently provide on-point, sophisticated advice which is always commercial and delivered with confidence and precision. A reassuringly bespoke service."

Charlotte Dencer, Head of Legal at LK Bennett

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