CHALLENGES IN THE CONSUMER SECTOR
ADAPTING TO THE NEW REALITY

In the second of a three-part series, Susan Black, John Chetwood, Miriam Everett, Tim Leaver and Kristien Geeurickx of Herbert Smith Freehills LLP examine some more key issues facing the consumer and retail sectors, ranging from supply chain issues, to employee issues arising from the gig economy, and financial distress.

These are challenging times for businesses that operate in the consumer and retail sectors and in order to thrive, they must continually adapt to changing circumstances. This article, the second in a three-part series, explores some of the key issues facing these sectors today, including:

- Avoiding problems in the supply chain. Particular concerns include reputation management, the use of blockchain technology, data protection compliance and the competition issues associated with pricing restrictions.
- Dealing with the changing working practices of the gig economy.
- Surviving financial distress, with a focus on the position of landlords that are presented with pre-packaged administration sales (pre-packs) and company voluntary arrangements (CVAs).

The first article considered some of complexities introduced by new and disruptive technologies, including: artificial intelligence and virtual reality; the challenges of data commercialisation; and contextual commerce and targeted advertising (*see feature article "Challenges in the consumer sector: transformative technology", www.practicallaw.com/w-020-3706*).

SUPPLY CHAIN ISSUES

Supply chain management is business critical in the fast-moving consumer goods (FMCG) sector. It ensures that the right goods and ingredients get to market when they are freshest, when there is demand, in time for any promotions, and at the lowest cost. Businesses in this sector need to consider some specific issues connected with the supply chain.

Protecting reputation

For many consumer goods businesses, their supply chain can be the weakest link in their reputation armour. Good supply chain management helps to ensure that consumers are getting what they pay for; that is, not only a product that is consistent with its marketing, including where it comes from and what it contains, but also a product that is consistent with the consumer's values. These values increasingly focus on sustainability and business ethics as part of a brand's image.

The challenges involved in preserving the integrity of a business's supply chain are particularly acute where products go through several intermediary stages and jurisdictions.

In 2013, there was public outcry in the UK over the presence of horsemeat in the UK meat industry (*www.bbc.co.uk/news/uk-21335872*). In 2017, the pesticide Fipronil was detected in eggs that were distributed in a number of EU countries, which resulted in significant negative publicity not only for primary resellers of eggs, but also for businesses in the baking segment and other secondary users of egg derivatives (*www.bbc.co.uk/news/world-europe-40878381*).

Both of these scandals undermined consumers' trust in the information provided to them on product labels. However, these are merely high-profile examples of a much broader trend. Consumers now demand transparency not only to ensure that produce is free of contamination, but also to ensure that brands are delivering on their broader value proposition.

Traceability requirements are mandatory in some areas, such as food and feed, requiring suppliers to ensure that, as far as is practicable, products contain no genetically modified ingredients. Similarly, producers of organic food or produce are required to comply with rigorous traceability requirements in order to gain organic accreditation.

A number of consumer businesses have responded to the challenge in recent years by making ever more robust public commitments in relation to the integrity of their supply chains. In effect, they are holding themselves to a higher standard as a means of driving best practice.

For instance, as a major user of palm oil, Unilever founded and co-chairs the Roundtable on Sustainable Palm Oil, a cross-business group that seeks to improve sustainability in the palm oil industry (*https://rspo.org/*). Unilever has also set out a policy with ambitious targets, such as: the goal of achieving 100% physical certified sustainable palm oil and its derivatives for the company's core volumes; mandatory human rights requirements; and a no-tolerance approach to deforestation. By requiring suppliers and their third parties to verify that the palm oil that they supply to Unilever meets this policy, Unilever aims to encourage better practices throughout the supply chain.

Blockchain technology

Blockchain technology may be best known for its implementation as part of the digital Bitcoin currency but it may be the answer to ensuring that supply chains are controlled and traceable (*see feature article "Blockchain and IP: crystal ball-gazing or real opportunity?", www.practicallaw.com/w-010-1622; see Briefing "Blockchain technology: emerging from the shadows", www.practicallaw.com 4-634-8506*).

Traceability. As a decentralised ledger that logs a growing list of ordered records, known as blocks, blockchain technology could be used to record all the transactions that take place from the start to the end of a supply chain. Since each block is time-stamped and linked to previous blocks, the ledger would serve as an irrefutable record of each supply chain stage. This would allow retailers and manufacturers to trace the constituent components of a given product, which would create greater transparency and reduce the costs of current supply chain auditing.

In cases similar to the horsemeat and Fipronil scandals, blockchain technology could also be used to highlight risks of contamination in the supply chain (*see "Protecting reputation" above*). The easier it is for a company to track each ingredient and identify the responsible party at each stage, the better equipped the company will be to engage with, and ask questions of, those parties.

Cost reduction. Blockchain technology could also help to reduce marketing costs. The Co-operative Group, for instance, has been working with blockchain start-up company Provenance to show how and why their tuna is sustainable, and Walmart is working with IBM on a project to digitally track the movement of pork through their Chinese suppliers (*www.cityam.com/co-op-exploring-blockchain-technology/; www-03.ibm.com/press/us/en/pressrelease/53487.wss*). These initiatives will ultimately allow consumers to explore a product's journey themselves, rather than relying on the brand to take them on that journey.

Authentication. Blockchain technology could assist in tackling counterfeits. The pharmaceutical and consumer electronics sectors use the blockchain technology offered by companies such as BlockVerify to improve their anti-counterfeit measures. Businesses are embracing blockchain on the journey to greater transparency and the increased value proposition that comes with it.

However, as with any early-stage technology, there is still uncertainty as to how blockchain will fit into or disrupt the current consumer goods framework. In order to realise the benefits of blockchain technology across the supply chain, it first has to be implemented. This becomes a complicated exercise when products track across multiple jurisdictions. If commodities at the beginning of the supply chain are not recorded on the ledger, the record will remain incomplete. In some cases, there will also need to be continued reliance on physical inspection before a block can be verified, which reintroduces the risk of human error or fraud.

In the diamond sector, London start-up company Everledger has used blockchain technology to prevent so-called "blood diamonds" from infiltrating the market. De Beers has also stated its aim to implement the first industry-wide blockchain to track the stones (*https://diamonds.everledger.io/; www.reuters.com/article/us-anglo-debeers-blockchain/de-beers-tracks-diamonds-through-supply-chain-using-blockchain-idUSKBN1IB1CY*).

In the fashion industry, New York and Shanghai fashion brand Babyghost showcased garments in their spring and summer 2017 collection embedded with VeChain chips, which enabled customers to scan the clothing to retrieve information about it (*https://bravenewcoin.com/insights/anti-counterfeiting-blockchain-app-demoed-at-shanghai-fashion-week*). The principle behind VeChain's cloud product management solution is that a product is assigned a unique identification, which is stored in the blockchain, and placed on the product with a near-field communication chip, a radio-frequency identification tag or a quick response code. VeChain has already been used in respect of various categories of products such as fine wines and tobacco in China.

Weaving in blockchain technology within products could be a useful tool on many levels. As an authentication tool, it may help customers to ascertain whether the products bought are legitimate or counterfeit. The technology may also help customers to track the provenance of the products and the associated supply chain, and provide unique information such as whether goods may have been stolen. Finally, it is likely to provide a useful tool for enforcement purposes and customs authorities may find it helpful to determine whether imported goods are counterfeits.

Data protection

Under the General Data Protection Regulation (*679/2016/EU*) (GDPR), any company that appoints a service provider to process personal data on its behalf is required to ensure that the service provider provides sufficient guarantees to implement appropriate technical and organisational measures so as to comply with the GDPR (*see feature article "GDPR one year on: taking stock", www.practicallaw.com/w-020-0982*). There must be a written agreement between the controller and the processor that must incorporate the specific requirements set out in Article 28 of the GDPR (Article 28).

Subcontracting. A combination of requirements under the GDPR together seek to ensure that controller companies retain control over personal data, even if the service provider wishes to subcontract some or all of the processing to another entity. In addition, the original service provider cannot absolve itself of data protection responsibilities or liabilities by using a subcontractor.

Under Article 28, service providers are prevented from subcontracting without the controller's prior written authorisation, which can be general or specific. On the whole, controller organisations are often unwilling to give general consents, such as a blanket consent to all subcontracting, unless there are clear boundaries or conditions attached to that consent. However, if general consent is given, the service provider must inform the controller of any changes in subcontractors and give the controller an opportunity to object. Whether it is realistic to seek individual consent from the controller for each change in subcontractor will no doubt depend on the complexity of the supply chain and the practicalities of doing so.

Audit. The GDPR requires service providers to allow for, and contribute to, audits (including inspections) conducted by the controller or a chosen auditor of the controller. From a commercial perspective, it is worth considering this regulatory obligation in light of existing information, record-keeping or audit provisions in the commercial services or supply agreement between the controller and the service provider. In negotiating these provisions, it is also worth considering how prescriptive the audit process should be. Issues to consider covering include:

- The frequency with which an audit should be permitted.
- Which party will bear the cost of the audit.
- The scope of the audit.
- Who will conduct the audit and how should the auditor be appointed.
- Whether the controller should rely on the results of an audit carried out by the service provider.

Multi-tenanted platform service providers, in particular, tend to resist audit rights strongly due to the logistical challenges inherent in the nature of the services that they offer. However, parties may seek to compromise by using a jointly appointed or supplier-appointed independent third-party auditor and tightly defining the scope of the audit.

Security. A service provider is subject to the same security requirements as the controller under the GDPR. It must take all measures required under Article 32 of the GDPR (Article 32); that is, to implement appropriate technical and organisational measures to ensure a level of security appropriate to the risk of processing. The GDPR is not prescriptive as to what measures an organisation needs to implement to comply with this obligation, as this will need to be assessed on a case-by-case basis. The issues for negotiation in a supply chain context therefore include:

- What security requirements Article 32 imposes in practice, taking into account: the state of the art; the costs of implementation; the nature, scope, context and purposes of processing; and the risks that are associated with the loss or disclosure of personal data.
- Whether the service provider needs to comply with any detailed security requirements imposed by the controller, and whether this amounts to the controller "blessing" these measures as being appropriate from a GDPR perspective.
- How parties can evidence their compliance with the requirements of Article 32.

Breach notification. A service provider is also required to assist the controller in ensuring compliance with its data breach notification requirements both to the regulatory authority and the individual data subject, taking into account the nature of the processing and the information available to the service provider. Once again, ambiguity remains over how much assistance is required by this obligation; for example, whether reasonable assistance will suffice, whether the service provider should be entitled to charge for its assistance and whether this places additional regulatory responsibility on the service provider for the controller's regulatory compliance.

Gold plating. The Article 28 provisions are very much a minimum set of terms. Market practice has developed to show that controllers and service providers often choose to supplement and negotiate the detail around these provisions. In addition, some privacy regulators in Europe, particularly in Germany, have published template sets of clauses, although it is as yet unclear whether there is an expectation that these templates would always be used.

While controllers continue to have more extensive liability than service providers under the GDPR, they still rely on service providers to assist them in complying with their legal obligations. As a result, there are often certain areas where controllers seek to require service providers to fulfil obligations that go beyond those set out in the Article 28 mandatory provisions, in order to comply with the GDPR. It is often these gold-plated provisions that are the subject of most negotiation in commercial services or supply agreements.

Risk allocation. The provisions on risk allocation are also frequently the subject of a great deal of negotiation between counterparties. Article 28 is silent on liability between the controllers and the service provider. This is unsurprising given the bespoke nature of risk allocation between the parties, and the need to balance and consider on a case-by-case basis a variety of factors, including the nature of the service provision, and the relative exposure and mitigation measures available to each party. The liability regime falls outside the prescriptive mandatory provisions. However, there is starting to be a shift in the focus on, and related negotiation dynamic regarding, liability and indemnity protection. While it will still be some time before the approach to market practice can be determined, one thing is certain: both parties are placing increased importance on liability regimes for breach of data protection provisions.

A position of uncapped liability for data protection breaches is definitely not standard market practice in the GDPR era. Controllers are pushing for data protection breaches to be carved out of any overall liability cap and are instead seeking high-value "super caps", in line with the higher penalties under the GDPR. Service providers, however, are strongly resisting high caps for all but the most complex, high-value and high-risk agreements. This approach is reflected by requests from controllers for more extensive contractual insurance obligations and a need for both parties to review the extent of their existing insurance coverage, including cyber liability insurance in the event of a data breach, given the potential gaps in some traditional insurance policies.

In certain markets, particularly in the US, data loss is starting to be included as a specific head of loss under which a company is able to claim under its commercial services or supply agreement. In addition, specific heads of loss, such as fraud prevention costs and breach notification costs, are being included in the context of indemnities for data protection breaches.

Arguably, the more prescriptive nature of the relationship between the controller and the service provider under the GDPR and the closer scrutiny warranted by both parties, could be seen as a positive step to ensuring supply chain protection, and further building trust and relationships with individual data subjects. The GDPR makes it very clear that while risk may be able to be outsourced to others in the supply chain, overall statutory responsibility cannot be outsourced.

Enforcement. The Information Commissioner's Office (ICO) currently prides itself on its pragmatic and proportionate approach to enforcement, with high fines being regarded a method of last resort (*https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2018/04/data-protection-practitioners-conference-2018-ed/*). To date, it has taken a light-touch approach to investigation and enforcement action in respect of data processing arrangements. It remains to be seen whether this will continue in the GDPR era, where the legislation is more prescriptive with respect to contractual data processing arrangements, although there has already been closer regulatory scrutiny of complex data supply chains in the wake of the ICO's investigation into data analytics in political campaigns (*see News brief "General Data Protection Regulation: first enforcement notice shows extra-territorial reach", www.practicallaw.com/w-017-1278; https://ico.org.uk/media/action-weve-taken/2260271/investigation-into-the-use-of-data-analytics-in-political-campaigns-final-20181105.pdf*).

Due diligence. FMCG companies looking to derive significant value from their customer data through the use of data analytics and complex supply chains will need to ensure that they undertake appropriate due diligence with respect to their service providers and include appropriate and robust data protection provisions to comply with the GDPR (*see feature article "Data assets: protecting and driving value in a digital age", www.practicallaw.com/w-019-8276*).

Pricing restrictions

Pricing restrictions imposed by suppliers on resellers have increasingly come under the spotlight of the competition authorities in a number of jurisdictions. Resale price maintenance (RPM) may be the most obvious risk area in most jurisdictions but other online pricing restrictions such as dual pricing as well as discount and rebate schemes, where the supplier is dominant on the relevant market, should also be carefully scrutinised for compliance. In addition, there is an increased focus on non-pricing restrictions, in particular, in the online sector.

Resale price maintenance. Increased price transparency and easier price monitoring, including the use of automatic software programmes, has made it easier for suppliers to monitor and enforce price restrictions imposed on their retailers. In July 2018, the European Commission (the Commission) imposed total fines of €111 million in four separate decisions on consumer electronics manufacturers Asus, Denon & Marantz, Philips and Pioneer for imposing fixed or minimum resale prices on their online retailers in breach of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) (Article 101), which prohibits agreements between undertakings and decisions by associations of undertakings which have as their object or effect the prevention, restriction or distortion of competition within the common market (*www.practicallaw.com/w-016-3664*).

The manufacturers engaged in fixed or minimum RPM by restricting the ability of their online retailers to set their own retail prices for widely used consumer electronics products. The use of sophisticated monitoring tools allowed the manufacturers to track resale price setting in the distribution network effectively and to intervene swiftly in case of price decreases.

Restrictions relating to online resale pricing also feature highly on the Competition and

Online protection for luxury goods suppliers

In 2017, the European Court of Justice (ECJ) ruled in *Coty Germany GmbH v Parfümerie Akzente GmbH* that a restriction imposed on an authorised retailer in the context of a selective distribution system not to sell the goods through online third-party platforms does not infringe the prohibition on anti-competitive agreements in Article 101 of the Treaty on the Functioning of the European Union (Article 101) (*C-230/16; see News brief "Brand protection: ECJ gives a boost to luxury brand owners", www.practicallaw.com/w-012-8835*).

The ECJ treated the ban as a qualitative restriction that is necessary to protect the image of the goods concerned, rather than as a restriction of the customers to whom authorised distributors can sell the luxury goods at issue or as a ban of passive sales to end users, which would likely be in breach of Article 101 and amount to a restriction of competition by object. In certain conditions, a supplier of luxury goods can prohibit its authorised distributors from selling those goods on third-party internet platforms.

The ruling was welcomed by suppliers of branded and luxury goods, which have increasingly expressed concerns over the potential erosion of the image of their products as a result of the recent growth in online sales, in particular on third-party online platforms. However, suppliers still need to show that their distribution system either meets the thresholds of the Vertical Agreements Block Exemption Regulation (*330/2010/EU*) or otherwise that their product is a luxury or complex product, which requires this restriction to protect its image.

Market Authority's (CMA) enforcement priorities and the CMA has particular concerns over practices that restrict retailers from advertising their selling prices online. Over the last few years, the CMA has imposed fines in a range of sectors where suppliers imposed internet minimum advertised prices which it treats as a form of RPM, and the CMA continues to actively monitor RPM, in particular, in the online world.

Other online pricing restrictions. Under Article 101, a supplier is not permitted to operate a dual pricing regime under which the distributor is, for example, charged a higher price for the product when sold online than when the same product or service is sold in its physical store. The same applies to indirect dual pricing measures that would have a similar effect, such as a discount system in which a lower discount is given if the products or services are sold through an online store. The Commission recognises that there may be efficiency justifications under Article 101(3) for dual pricing in individual cases, for example, to address free-riding (where a business benefits from the actions and efforts of another business without paying or sharing the costs) between offline and online sales channels, but it will be up to the parties to the agreement to demonstrate that the dual pricing is justified.

Online sales restrictions. The starting point under Article 101 and the competition regimes of most EU member states is that every distributor must be permitted to use the internet to sell the products supplied for distribution. This was confirmed by the European Court of Justice (ECJ) in *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la Concurrence* where a requirement that cosmetic brands be sold only in a physical space with a qualified pharmacist present to advise on the products was held to be an absolute ban on online sales in breach of Article 101 (*C-439/09*).

In the UK, the Competition Appeal Tribunal (CAT) similarly held that a ban on online sales imposed by golf club manufacturer Ping was in breach of UK competition law (*see News brief "Online sales ban found anti-competitive: a swing too far?", www.practicallaw.com/w-016-7184*). The CAT concluded that the potential impact of the ban on consumers and retailers was real and material as it significantly restricted consumers from accessing Ping golf club retailers outside their local area and from comparing prices.

Worker status

The Supreme Court recently examined the issue of worker status in *Pimlico Plumbers Ltd and Mullins v Smith* (*[2018] UKSC 29; see News brief "Worker status: still no certainty", www.practicallaw.com/w-015-3980*). In that case, Mr Smith was described in the relevant contractual documents as an independent contractor with no obligation to accept work but a separate provision stated that he should complete a minimum of 40 hours per week. He drove a branded van, wore the company uniform but provided his own materials and tools. There was no express right of substitution but, in practice, there was a limited ability to substitute another Pimlico Plumbers plumber. The court held that he was a worker; the employment tribunal was entitled to find that the dominant feature of the contract was an obligation of personal service.

Similarly, the Court of Appeal upheld the Employment Appeal Tribunal's ruling in *Uber BV and others v Aslam and others* that Uber drivers were workers on the basis that the written documents seeking to establish them as independent contractors did not reflect reality; the drivers were held to be working while they had the Uber app switched on, and were within their territory and ready and willing to accept trips (*[2018] EWCA Civ 2748, www.practicallaw.com/w-018-7055*). However, Underhill LJ, a highly respected and experienced employment law practitioner, gave a strong dissenting judgment that, in his view, the documents were consistent with how the parties worked in practice and the fact that it was one-sided due to the unequal bargaining strength of the parties could not justify setting it aside. He also considered that the drivers should only be treated as workers, if at all, from the moment that they accept a particular trip. Uber has appealed to the Supreme Court.

Luxury goods. In the context of a selective distribution system, suppliers of luxury goods can, however, restrict the resale of their goods or services on certain third-party platforms, such as Amazon and eBay (*see box "Online protection for luxury goods suppliers"*). These platform restrictions are not absolute bans on online sales and allow the supplier to control the luxury image of their products.

Discounts and rebates. Suppliers with a dominant position need to take care how they structure any discount or rebate schemes to avoid infringing the prohibition on abuse of dominance under Article 102 of the TFEU and equivalent provisions in national law. Although discounts may be part of legitimate price competition and lead to lower prices for consumers, there is also concern that they may be used by a dominant company as part of a strategy to exclude competitors and ultimately exploit consumers.

This is the case, in particular, in respect of loyalty inducing rebates, which are seen as a financial inducement to customers to obtain all, or most, of their requirements exclusively from the supplier, thereby denying other suppliers the opportunity to supply those customers. The Commission and the EU courts have traditionally taken a hardline approach to exclusivity rebates, which are presumed to be a restriction on competition without the need for further assessment of their effects on competition, for example, in *Hoffmann-La Roche v Commission*, *Michelin v Commission* and *British Airways plc v Commission* (*C-85/76; C-322/81; C-95/04, www.practicallaw.com/4-314-1953*).

However, the ECJ in *Intel Corporation Inc v Commission* made it clear that it is possible for a dominant company to rebut this presumption of breach for exclusivity rebates (*C-413/14, www.practicallaw.com/w-010-4931*). The dominant supplier will need to submit supporting evidence that its conduct is not restricting competition, which should give suppliers with strong market power some flexibility with their rebate schemes.

THE GIG ECONOMY

The gig economy has had a significant impact on working practices in the consumer sector (*see feature article "The gig economy: shifting sands in employment status", www.practicallaw.com/2-639-5933*). E-commerce and other technology platforms have disrupted traditional business models across the economy, offering consumers new ways of accessing goods and services. Retail companies recognise the opportunities presented through having an online presence, including cost savings on physical buildings and reduced staffing costs. Companies may require fewer shop-floor workers and an increased presence in warehouses and distribution. This, in turn, drives a need for workers on agile, short-term, casual contracts. Many consumer sector businesses demand flexibility from their workforce because they cannot always guarantee hours or benefits.

Categorisation of workers

Some individuals offering their services through digital platforms appreciate the flexibility and freedom that this working arrangement brings. However, others want the best of all worlds: flexibility with job security and the benefits of employed status. Recent litigation and regulatory intervention into the status of workers engaged by technology platforms, such as Uber, Amazon, Hermes and Deliveroo, has seen individuals working in the gig economy argue that they are entitled to minimum protections at work (*see News brief "Workers' status and rights: is the gig up?", www.practicallaw.com/w-017-7360*).

A big issue is worker categorisation. This is particularly relevant in the gig economy where individuals and companies may choose to describe the working arrangement as that of an independent contractor providing services to a client. The contractual arrangements, however, do not always reflect the reality. Some individuals who are closely supervised, controlled and integrated into the business have succeeded in claims for basic protections such as the right to holiday pay and national minimum wage. A genuinely self-employed person providing services to a variety of clients is not entitled to the statutory rights afforded to employees and workers, and is responsible for their own tax and National Insurance contributions.

At the other end of the scale, employees enjoy the full suite of statutory employment protections and job security. However, there is a hybrid category of individuals between the two, generally referred to as workers, who are eligible for some basic protections, such as the right to the national minimum wage and paid holiday, but do not qualify for the wider suite of employment protections such as the right not to be unfairly dismissed. To further complicate this, an individual can be self-employed for tax purposes, but be a worker for employment law purposes and so have the right to basic statutory protections.

The Good Work Plan

There is increasing public and political disquiet about the purported impact of new working patterns on society but there is also a recognition of the risk that introducing too much regulation into the gig economy could impose unsustainable burdens on the technology companies, which would, in effect, break the model.

Public pressure for reform and the Taylor Review gave rise to a series of recommendations, published in December 2018, designed to ensure that all work is fair and decent, and gives individuals a realistic chance to develop and progress (*see News brief "Worker rights: still working on it?", www.practicallaw.com/w-018-7037*). The measures include:

- A new right for workers to request a more stable contract; that is, a more fixed working pattern, after 26 weeks on a non-fixed pattern.
- The extension to workers of the right to be given a written statement of rights on the first day of work, rather than within two months, and the extension of the information required to be given to workers and employees, for example, to cover eligibility for sick leave and pay, and details of other types of paid leave. The draft Employment Rights (Miscellaneous Amendments) Regulations 2019, which will come into force on 6 April 2020, will give workers the right to a written statement of particulars of employment from day one, although some of the information can be provided separately within two months, and require additional information to be included. Employees employed before 6 April 2020 will have the right to make one request for a written statement including the new additional information, and to be notified of changes to terms included in the additional information.
- A new obligation on companies to provide specific information to agency workers, such as the type of contract that the worker is employed under, the minimum rate of pay, how they are to be paid, if they are paid by an intermediary company, any deductions or fees that will be taken, and an estimate or example of what this means for their take-home pay.
- Increased state enforcement protections for agency workers when they have pay withheld or unclear deductions made by an umbrella company.
- Repeal of the Swedish derogation from 6 April 2020, which currently allows agency workers to be paid less than if they were directly hired provided that they have a contract of employment with the agency and are paid between assignments.

Currently, there is no comprehensive statutory test to determine worker status, and the case law for categorising individuals is complex and fact-specific, leaving many unclear about their obligations, rights and protections (*see box "Worker status"*). The courts will consider the reality of the relationship, the context in which the work is being done, all the relevant evidence as well as, seemingly, how the court perceives the respective merits of the case before it.

The government has said that it will bring forward detailed proposals to align the employment status tests used in the employment law and tax contexts to reduce differences to an absolute minimum, and improve the clarity of employment status tests to tackle the problem of businesses misclassifying their staff (*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766167/good-work-plan-command-paper.pdf*) (*see box "The Good Work Plan"*).

Separately, the government is consulting on tax reform for individuals operating in the private sector through personal services companies. Non-compliance with off-payroll working rules in the private sector was estimated to reach £1.3 billion a year by 2023/24. HM Revenue & Customs published a policy paper and consultation document on extending the off-payroll working rules that are already in place in the public sector, to the private sector from 6 April 2020 (*www.practicallaw.com/w-019-6101;*

Challenging a company voluntary arrangement

To challenge a company voluntary arrangement (CVA) requires an application to court within 28 days, and for the creditor to show that there is a material irregularity or that the proposal is unfairly prejudicial.

Material irregularity is largely a question of some failure to comply with the process. Examples include a failure to disclose relevant facts to creditors, flaws in the giving of notice to creditors and the conduct of the decision procedure.

To have a CVA set aside on the grounds of unfair prejudice, a creditor must show that the CVA is not only prejudicial to its interests but also that the prejudice suffered by that creditor, or category of creditors, is unfair. Most CVAs will, by definition, prejudice creditors but most will prejudice some more than others.

The courts will consider horizontal and vertical unfairness:

- Horizontal fairness concerns whether a creditor has been treated less favourably compared with other creditors in a comparable position; for example, where two landlords of stores in broadly the same position are required to take different rent reductions. This does not mean that all creditors must be treated the same, only that any difference in treatment must be justifiable.

- Vertical fairness concerns whether creditors are in a better position than they would be in the event of the company's liquidation or administration.

A classic example of unfair prejudice is seeking to use a CVA to compromise a creditor's claim against a solvent third-party guarantor. Clearly, the creditor would be better off in a liquidation where it could simply claim against that solvent guarantor. This guarantee stripping was rejected by the court in *Prudential Assurance Co Ltd v PRG Powerhouse Limited* (*[2007] EWHC 1002; see News brief "Powerhouse: is your CVA fair?", www.practicallaw.com/0-364-6016*).

www.gov.uk/government/consultations/off-payroll-working-rules-from-april-2020). Draft legislation is due to be published in the summer 2019.

RETAIL DISTRESS

A large number of bricks and mortar retailers continue to face significant headwinds in their businesses, including: reduced discretionary spending by consumers; increased business rates; increased level of online purchases affecting footfall as well as sales; and a gradual shift, in particular in high streets, away from retail towards leisure.

While this is not all doom and gloom for those retailers that have a balanced digital and physical presence, and are increasingly making use of that balanced presence to use their retail footprint to deliver new consumer experiences and to support their online offering, for example, through collections, returns, touching and trying, the challenges in the sector may have a profound effect.

Pre-packs and CVAs

For those commercial landlords that have, over the last 18 months, been presented with a raft of pre-packs and increasingly aggressive CVAs, the changes to the retail sector may start to feel more structural (*see News brief "House of Fraser pre-pack: still a viable option", www.practicallaw.com/w-016-3617*).

At a commercial level, pre-packs and CVAs are two different legal mechanisms to effect a similar transaction; that is, the reduction of a store portfolio (*see feature article "Buyer beware: buying the business of an insolvent company", www.practicallaw.com/6-500-4537*). However, they have different legal characteristics. A CVA involves the rescue of the legal entity and the limiting factor on how deep the portfolio can be cut is the need to obtain the approval of at least 75% by value of those creditors, including landlords, that are present and voting on the CVA proposal.

A pre-pack can cut deeper as the limiting factor is whether the deal accepted by the administrators delivers the best outcome for creditors. This means that provided that it is the best offer available and the administrators have followed the proper process, it is difficult to unpick the sale (*see feature article "Restructuring listed companies: tools of the trade", www.practicallaw.com/4-519-3666*).

On the high street, CVAs in their current form have been a staple since JJB Sports plc carried out the first CVA in 2009 (*see News briefs "Restructuring JJB Sports: new enthusiasm for the CVA", www.practicallaw.com/1-386-1802; and "Stylo CVA: the shoe that didn't fit", www.practicallaw.com/8-385-4049*). Over the subsequent decade, retailers have been increasingly aggressive in the terms put to landlords and other creditors in CVA proposals. For example, retailers are now frequently including terms in CVAs that seek to pass future rates liabilities for stores to be vacated to the landlord, whereas the usual position is that the retailer will remain in rateable occupation even where the rent for that store is reduced to zero under a CVA.

Challenges

These terms may raise the prospect of a challenge, for example, where bringing the tenancy to an end results in the discharge of a previous guarantor of the lease or a disgruntled landlord wishes to challenge certain aspects of the proposal. Perhaps surprisingly, until recently, there have been very few challenges seeking to stem the creep in CVA terms. This has now changed and there have been a number of reported challenges over recent months, including:

- A challenge from a group of landlords to House of Fraser's CVA, which was ultimately dropped before the group collapsed into administration (*www.reuters.com/article/uk-houseoffraser-restructuring-landlords/house-of-fraser-settles-cva-challenge-from-landlords-idUKKBN1KQ0P9*).

- A challenge to Regis UK's CVA, which is still pending (*www.theguardian.com/business/2018/oct/12/supercuts-owner-regis-asks-landlords-to-waive-rent*).

- Two reported challenges to the Debenhams CVA (*www.bbc.co.uk/news/business-48597542*).

At the time of writing, it is not clear if the Arcadia CVA will be challenged (*see News* *brief "Arcadia Group CVAs: given the green light", this issue*).

The reason for this is, perhaps, that once a CVA has been approved by creditors, the challenge mechanism is fairly unattractive and entails a costs risk (*see box "Challenging a company voluntary arrangement"*).

The upshot of succeeding with a challenge may be that the landlord is then faced with a less attractive transaction; that is, an administration, possibly involving a pre-pack sale. The prize, therefore, for a successful challenge may be a less attractive commercial outcome and a costs order against a company in administration.

Arguably, the real opportunity for landlords in the sector is to use their negotiating power at an earlier stage in the process to win a seat at the restructuring table to shape the broader commercial terms of the restructuring, which is a step that a number of landlords took in the Arcadia CVA. This would also help to address the current information gap where landlords have vastly inferior information than the company and its financial creditors.

Change afoot

Aside from the narrow point of whether, on specific restructurings, landlords are maximising their leverage, the number of CVAs and retail administrations in the last 18 months raises the broader question as to whether this is a temporary or permanent change in the sector. Those who take the view that this is a permanent change may argue that it is time to physically reshape the current retail footprint to reflect modern consumer preferences and, perhaps, to repurpose retail sites with alternative commercial or residential uses.

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