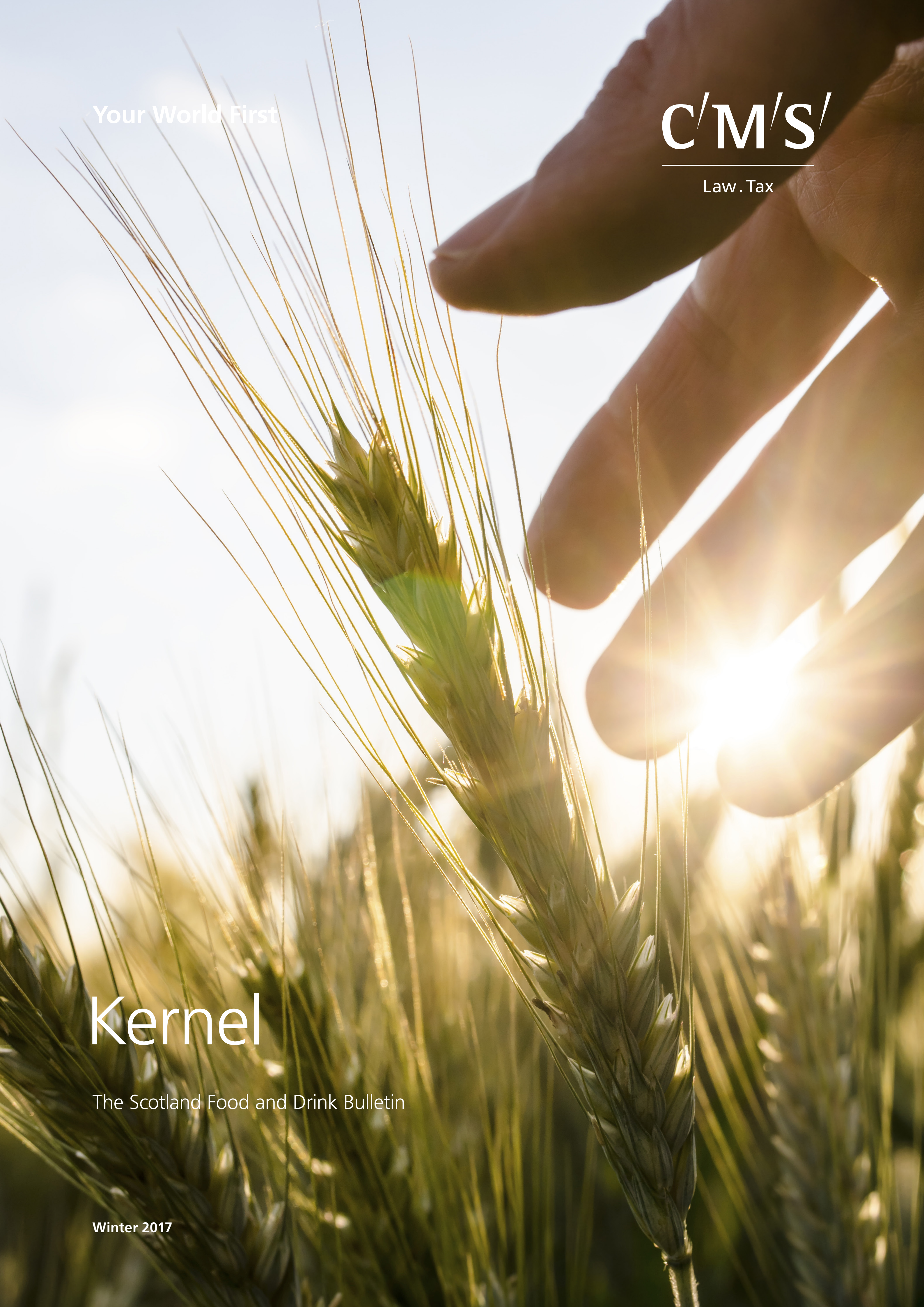


Your World First

Kernel

The Scotland Food and Drink Bulletin

Winter 2017

Kernel

Welcome to the second edition of Kernel, our Scotland food and drink bulletin. In Kernel, we examine current legal issues affecting the Scottish food and drink industry and provide bitesize articles on key developments.

In this issue, we consider the following:

— The Supreme Court decision regarding "minimum pricing" for alcohol in Scotland;

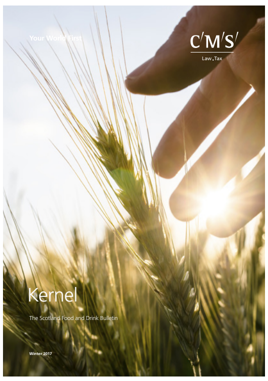
— The General Data Protection Regulation – how its implementation will affect the food and drink industry and what organisations can do to prepare;

— Differentiating between a licence to occupy and a lease and why this is important to the upcoming "Pop-Up" industry;

— The abolition of employment tribunal fees as ruled in the recent case of *R (on the application of Unison) v Lord Chancellor*; and

— New corporate offences for failure to prevent the facilitation of UK and foreign tax evasion.

If you would like to discuss any of the issues in this edition of Kernel or wish to provide any feedback, please contact Alison McCartney at **alison.mccartney@cms-cmno.com**



UK Supreme Court dismisses appeal against minimum pricing for alcohol in Scotland

On 15 November 2017, the UK Supreme Court handed down its judgment in the appeal brought by the Scotch Whisky Association, spiritsEUROPE and CEEV against the Scottish Ministers, regarding their plans to introduce minimum pricing for alcohol in Scotland.

The Alcohol (Minimum Pricing) (Scotland) Act 2012 ("the 2012 Act") amended the Licensing (Scotland) Act 2005 by introducing a new paragraph 6A(1) to Schedule 3, requiring that *'Alcohol must not be sold … at a price below its minimum price'*. The Scottish Ministers prepared a draft order specifying a minimum price per unit of 50 pence but neither the 2012 Act nor the order were brought into force pending the outcome of this legal challenge.

The UK Supreme Court unanimously decided that the 2012 Act did not breach EU law and determined that minimum pricing for alcohol was a lawful means of achieving a legitimate aim.

Reasons for the Court's decision

In reaching their decision, the Court examined the guidance provided by the Court of Justice of the EU ("CJEU"). Earlier in this case, the CJEU had concluded that where a national court examines national legislation for justifications relating to the protection of health, it is bound to consider whether the means chosen, in light of the evidence, are appropriate for the objectives pursued. It also must consider whether those objectives can be obtained by measures which are less restrictive of the free movement of goods and the common market.

The Court found that the objective in this case was not that alcohol consumption be eradicated, nor that its costs be prohibitive for drinkers. The Court found that the Scottish Government's objective through the 2012 Act was to tackle alcohol misuse and overconsumption manifesting themselves, in particular, in the health and social problems suffered by those in poverty in deprived parts of Scotland.

The Court rejected the appellants' arguments that an excise or tax would be as effective, and a less restrictive, means to achieve the objective. While this was possible under the relevant EU Directives, minimum pricing targeted adverse health effects in a way which an increase in excise or tax would not. An increase in excise or VAT, for example, would affect everyone, which was not the focus of the legislation. Minimum pricing, as a concept, was also easier to understand and simpler to enforce.

The Court also found that, ultimately, it cannot second-guess the value that a domestic legislature puts on health. As such, there was only limited scope for criticism about the market impact analysis carried out by the Scottish Ministers, and that the argument that they should have gone further than they did in assessing market impact, was not realistic. In that regard, the Sunset Clause (under which the Scottish Ministers must evaluate and report on the operation of minimum pricing after a period of five years, with it automatically terminating after six years, unless affirmed by the Scottish Parliament) was a further factor in favour of upholding the 2012 Act.

What happens next?

The Scottish Government is expected to announce that the 2012 Act and the order will be brought into force shortly. This will make Scotland the first country in the world to operate a system of minimum unit pricing for alcohol.

With other countries around the world considering introducing similar measures to tackle excessive alcohol consumption in their own populations, observers will be keeping a close eye on both (i) its impact on the drinks market and (ii) how the health of the general population is measured, post-implementation of the 2012 Act. The decision is a historic and significant one. Only time will tell whether the policy has the lasting impact on the public health of Scotland that the legislature hopes for.

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The General Data Protection Regulation – don’t byte off more than you can chew!

Providing a personalised experience for consumers, identifying their preferences and understanding their needs is a way in which many consumer-focused sectors, including the food and drink sector, maintain or grow their market share. The key to providing this personalised experience is through data collection, often via online accounts, loyalty cards, third parties or promotional competitions.

However, following the implementation of the General Data Protection Regulation (Regulation (EU) 2016/679) (“GDPR”), storing and processing personal data will become a more onerous task and could encompass a different kind of “byte” if an organisation is found to be non-compliant.

The GDPR will have direct effect in the UK from 25 May 2018 and will harmonise data protection legislation across the EU. This article provides examples of the key changes which will likely be of relevance to the food and drink sector following implementation of the GDPR.

Consequences of Non-Compliance

At present, the Information Commissioner’s Office (“ICO”) can impose a maximum administrative fine of £500,000 for a serious breach of the Data Protection Act 1998 (“DPA”). Under the GDPR, the maximum fines will increase to the greater of €20 million or 4% of an organisation’s total worldwide annual turnover in the previous year. The ICO will also have wider-ranging enforcement powers such as the ability to impose temporary bans on data processing activities and ordering rectification or erasure of personal data.

Fair processing

Currently, all personal data must be processed “lawfully and fairly”. The GDPR builds on this principle by adding that all personal data must be processed “in a transparent manner”, requiring data controllers to provide significantly more information to data subjects. Organisations should implement external and/or internal policies explaining why and how it handles personal data, what rights data subjects have and how they can exercise these rights.

Consent

In addition to consent being “freely given, specific and informed”, the GDPR adds that it must be “unambiguous” and signified by a “clear affirmative action”. Where sensitive personal data is processed, consent must be “explicit”. This is important for any organisation which currently relies on mere acquiescence (such as failing to un-tick a ticked box) as this will no longer constitute valid consent.

Consumers will also have the right to withdraw consent at any time and must be informed of this right prior to giving consent. If the consumer has had no genuine and free choice to withdraw consent, the consent will not be deemed to be “freely-given” or valid.

Organisations should therefore review their consent forms to ensure that they comply with these stricter requirements.

Rights of the Data Subject

The GDPR creates a variety of additional rights for individuals and strengthens existing rights under data protection law.

For example, under the GDPR, a data subject has the right to receive confirmation that their data is being processed and the right to access this personal data within one month of a request. A data subject has a right to restrict processing and request erasure or rectification of his/her personal data. The right to data portability is also introduced and allows the data subject to request all of his/her personal data to be disclosed and (if desired) transferred to another organisation without having to pay a fee.

Organisations should therefore ensure that their systems are set up to deal with each of the enhanced data subject rights created under the GDPR.

Comment

This article has discussed only a few key changes relevant to the food and drink sector and is by no means a comprehensive guide.

It is essential that organisations in the food and drink sector who are processing personal data take steps to prepare for the introduction of the GDPR by seeking to familiarise themselves with their new obligations, identify any gaps in their data protection compliance and develop a plan for achieving practical compliance.

If you would like more information on the GDPR and how to ensure that your organisation is compliant, please do not hesitate to contact us at CMS.

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Popping up all over - the rise of the "Pop-Up" in the Scottish Food and Drink Industry

"Pop-ups" are quirky, innovative and fast becoming part of the Scottish food and drink landscape. But, as more food and drink operators embrace pop-ups, there are inevitably legal risks. These risks need to be considered both by owners of the buildings/land where pop-ups are located, and by operators responsible for the pop-ups.

Both parties need to ensure that they are clear on what they are signing up to when entering into the temporary licences to occupy which usually accompany pop-ups. It sometimes happens that there is no licence to occupy or similar agreement put in place, and the parties then do not have any written contract to rely on. This can also be hugely problematic as there is then no easy point of reference confirming each party's responsibilities. More often, there is an agreement in place (the content of which may vary) but one or both of the parties to the agreement may not have fully understood its implications and whether the agreement is a lease or a licence.

A recent Scottish Sheriff Court case[1] has once again highlighted the important distinction between a lease and a licence to occupy. While this case concerned a holiday let in the Scottish town of St Andrews, it serves as a useful reminder for food and drink operators and their respective landlords that, even if both parties believe they are entering into a licence to occupy, they may in fact be entering into a lease as was the court's decision in this case. This is the case regardless of what the document calls itself on the front page - simply calling a contract a "licence to occupy" will not automatically mean that it is one. If the hallmarks of a lease are present (parties, property, rent and duration, as well as the "freshly-coined" element of exclusive possession), then it may be treated at law as being a lease.

Lord Templeman had provided an insightful comment on this point in the English case of Street v Mountford stating "*the manufacture of a five pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade*".

Does it really matter whether an occupancy contract is a lease or a licence? In a word, yes! A true licence to occupy will only give a retailer or food and drink provider a personal right to occupy a property rather than a "real right" that would flow from the grant of a lease – a real right means that successors are bound to the contract, not just the parties who signed up to it. Not binding a successor means that on a sale the total rent for the property is reduced and this can have an impact on value. On the flip side, it provides a degree of flexibility for a new owner who may have development plans for example.

It is a common misconception that a licence to occupy offers less legal protection than a lease. This is not the case. A properly drafted licence to occupy can still provide a short, straight forward, user-friendly document without exposing either party to unnecessary legal risk. Unfortunately, DIY versions are not likely to tick all the legal boxes and we recommend that both parties always get legal advice even for short term arrangements.

While not in question south of the border, in Scotland there is an unresolved debate about whether or not it is even possible to create a licence to occupy under Scots law. In practice however, once the parties sign up, neither is likely to dispute whether or not the arrangement is competent and we routinely recommend that clients do enter into licences to occupy in Scotland.

1 St Andrews Forest Lodges Ltd against Jeremy Grieve and Iona Grieve [2017] SC DUN 25.

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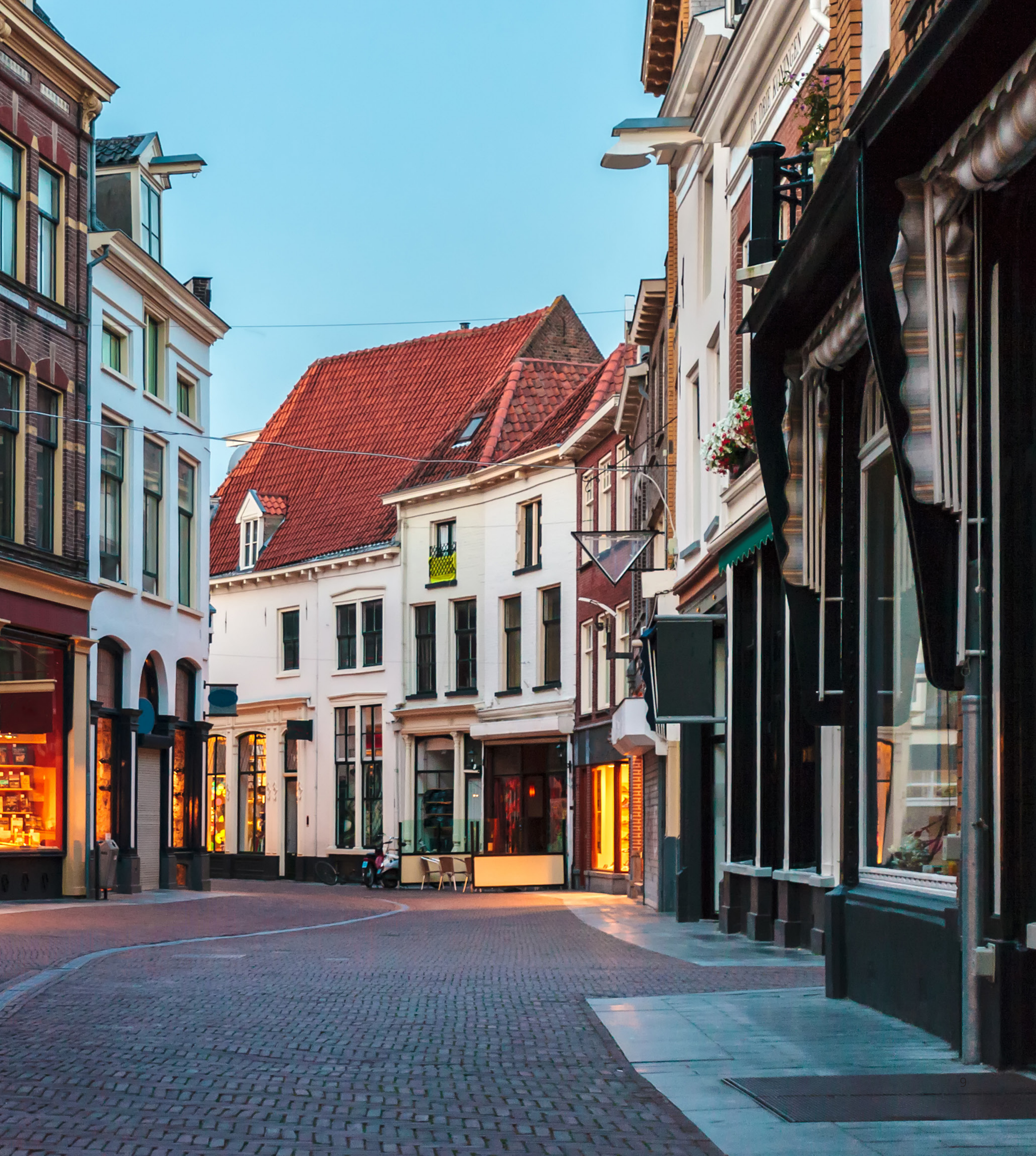

Employment tribunal fees set to be abolished

The Supreme Court in *R (on the application of Unison) v Lord Chancellor* has ruled that employment tribunal fees are unlawful and should be abolished. In a costly decision for the government, all previous fees that have been issued will now be reimbursed. Estimates in the media suggest the repayment costs will reach £32 million.

Although both the High Court and the Court of Appeal found against Unison, the Supreme Court has ruled that the Fees Order was unlawful both under both domestic and EU law because it prevents access to justice.

This decision has been widely welcomed, not only by trade unions and employee lobbies. There had been a 70% reduction in tribunal claims following the introduction of fees.

Background

In July 2013 two levels of tribunal fees were introduced by the Government: £390 for a Type A claim (unlawful deductions of wages) and £1,200 for a Type B claim (unfair dismissal and discrimination). The primary reason for the fees had been to pass the burden of costs to the users of the court service. Additional reasons given were to deter unmeritorious claims and to encourage earlier settlements. Operating alongside the fee regime was a remissions system whereby those on low income would not be required to pay the fee.

Legal arguments

The Supreme Court ruled that tribunal fees were unlawful for three reasons:

- they hindered the common law right of access to justice;
- they were in breach of EU rights; and
- for Type B claims, fees indirectly discriminated against those who shared protected characteristics which was not justified.

Common law

The court considered that fees breached the constitutional right of access to the courts. "In order for the courts to perform that role, people must in principle have unimpeded access to them." Access to justice was not simply a benefit to the individual claimants, but also necessary to establish wider legal principles.

They were particularly concerned that households on low to middle incomes would only be able to afford fees by giving up an acceptable standard of living, and because of this fees could not be said to be affordable. In addition, the remissions system was not effective. Even a couple living on the national minimum wage would not qualify for remission under Type A claims.

In reaching this conclusion the Supreme Court considered evidence from various reports into fees including a consultation paper published by the Ministry of Justice in January 2017 and the impact of fees on different hypothetical claimants.

EU Law

The Supreme Court found that fees breached the principle of effectiveness. Article 47 of the Charter of Fundamental Rights of the EU states that everyone "has the right to an effective remedy before a tribunal." This right may allow the imposition of financial costs but only where proportionate. The Supreme Court ruled that the Fees Order was disproportionate because they are unaffordable by some people and so high as to prevent people who can afford them pursuing smaller value claims.

Indirect discrimination
Unison argued that the higher fees payable for Type B claims are indirectly discriminatory against women (and others with a protected characteristic), an argument which was ultimately successful.

What's next?

This case applies with immediate effect. Claimants will no longer be required to pay fees to bring a claim before the employment tribunal or the EAT. This will inevitably result in an increase in claims coming through the system. We are already seeing an increase in claims against a number of clients in the leisure and food and drink sectors from those on lower incomes/minimum wage. There may also be additional claims from claimants who were deterred because of the fees, or arguing they should be granted an extension in the time limits.

The practicalities around the reimbursement of fees are unknown at this stage. For instance, we do not yet know:

— How will both claimants and respondents recover fees already paid? Will they have to apply within a certain period or will the tribunal service contact the parties?

— How will settled claims be dealt with? If an employer has reimbursed the claimant's fees under a settlement agreement/Cot3, will there be an opportunity for the employer to recover the fees directly? Or will the fees be reimbursed directly to the claimant, possibly leading to double recovery?

We expect further guidance to be issued.

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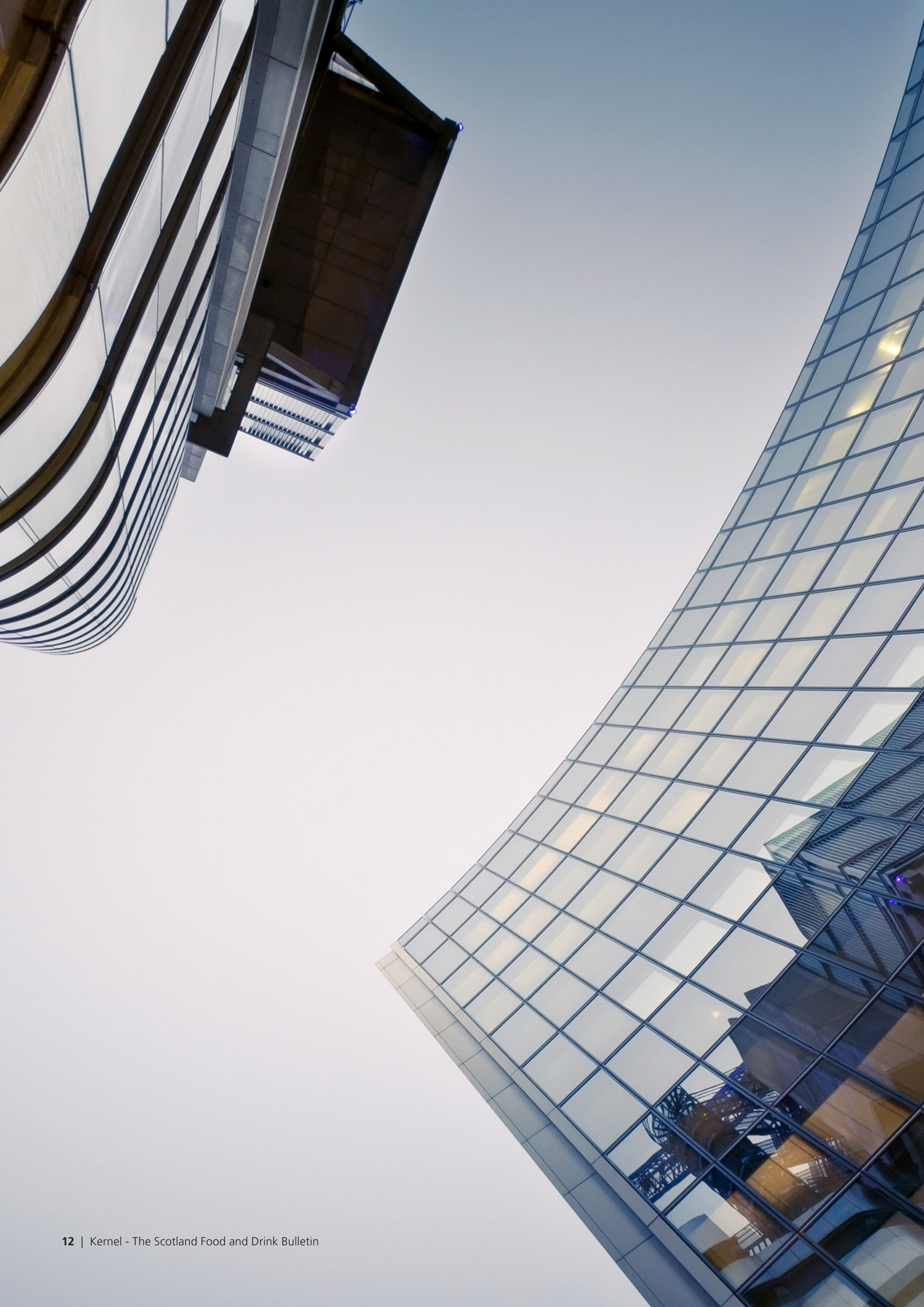

New corporate offences for failure to prevent the facilitation of UK and foreign tax evasion

On 30 September 2017, new corporate criminal offences for failure to prevent the facilitation of both UK and foreign tax evasion under Part 3 of the Criminal Finances Act 2017 came into force.

For those operating in the food and drink sector, both domestically and overseas, this is a key development which all organisations should be alive to. As we outline below, developing "*reasonable procedures*" will be crucial as such procedures may give a defence to the new offences.

Tax evasion v tax avoidance

The new offences are focusing on tax evasion, rather than pure tax avoidance. Tax evasion takes place where individuals or businesses dishonestly omit, conceal or misrepresent information in order to reduce tax liability. Tax avoidance, on the other hand, is not a criminal offence, but involves the exploitation of tax rules by the use of transactions that are designed to gain a tax advantage. It involves operating within the letter, but not always the spirit of the law.

How will the offences work in practice?

An organisation ('X') will be guilty if:

— A person ('Y') evades tax of any kind;

— Another person ('Z') deliberately and dishonestly facilitates Y's evasion while Z is acting as an associated person of X; and

— X fails to prevent Z from doing so.

The offences mean that the organisation is automatically criminally liable where the facilitation of tax evasion is done by someone acting on its behalf. This associated person may be an employee, agent or other person who performs services acting on behalf of that organisation. This could potentially also extend to contractors, sub-contractors, temporary workers and joint venture partners, however this will always be determined on the facts of each case and its relevant circumstances.

Prevention is better than cure

The offences are strict liability offences, unless the organisation can rely on its "reasonable procedures".

Where a business can prove (i) it had such prevention procedures as it was reasonable in all of the circumstances to expect it to have in place or (ii) it was not reasonable in all the circumstances to expect it to have any prevention procedures in place, it can invoke this defence.

HMRC has recently issued guidance on the nature of this defence and what is likely to be considered "reasonable". It focuses on:

i. Proportionality: prevention procedures should be proportionate to the risks faced of an associated person committing a tax facilitation offence;

ii. Top level commitment: prevention procedures should be developed with appropriate commitment from senior management, which will be expected to take responsibility for the development, implementation and endorsement of the prevention procedures;

iii. **Risk assessment:** prevention procedures should be developed following a risk assessment, regularly reviewed and documented;

iv. **Due diligence:** prevention procedures should make provision for appropriate due diligence capable of identifying the risk of criminal facilitation of tax evasion by an associated person. The due diligence procedures put in place should be proportionate to the identified risk;

v. **Communication:** prevention procedures should be communicated, embedded and understood throughout the organisation, through internal and external communication, including training. The nature of internal and external communication should be proportionate to the risk to which the organisation assesses that it is exposed; and

vi. **Monitoring and review:** prevention procedures should be monitored and reviewed periodically and improvements made, where necessary.

When determining whether prevention procedures are “reasonable” and “proportionate”, the HMRC Guidance notes that the size of the organisation will be an important, but not the only, determining factor. The nature and complexity of the business should also be considered.

For those operating in the food and drink sector, both domestically and overseas, this is an important development, which will require all organisations to be vigilant. It potentially affects all organisations, from small producers to distributors to large retailers. Developing a clear and robust strategy for the treatment of tax within your business, and avoiding falling foul of the offences, is key.

Should you wish to discuss the new offences and their implications for your business, please don’t hesitate to contact the CMS team.

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Stay informed: webinars for the Food & Drink sector

Our dedicated Food & Drink team at CMS have designed a series of webinars to support you to stay ahead of the legal issues that impact your organisation.

To register your attendance at these sessions email **spotlightinsight@cms-cmno.com**

Date and time: **31 January, 13.15-14.00**

GDPR - what the Food & Drink sector needs to know

This webinar will provide a high level overview of the General Data Protection Regulation (GDPR) which is due to come into effect on 25 May 2018, modernising UK data protection legislation. We will discuss the key implications of the GDPR for organisations in the food and drink sector in the UK, including what is going to change in terms of data privacy and key actions for your business to take now in order to ensure compliance with the new rules.

Date and time: **28 March, 13.15-14.00**

Health, Food, Safety and Hygiene - the cost of non-compliance

This webinar will look at recent developments in the food and drink sector including: the impact of the Sentencing Guidelines in England & Wales and Scotland, case law update, and top tips to ensure compliance in your organisation.

We would be interested to find out what other topics you would like covered in future webinars. Please email **spotlightinsight@cms-cmno.com** with your suggestions.

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