CMS Law . Tax

Consumer Products Annual Report

June 2012

Dear Reader,

We are delighted to present our CMS Consumer Products Report for 2012. On the following pages you will find several articles from many different countries in which CMS is present. We have tried to address recent developments and trends in the regulation of this sector. Each article has been prepared in anticipation of the requirements and interests of our clients. We hope that you will find this useful and relevant for your day to day business.

Should you require further information on any of the articles featured in this report, please do not hesitate to contact the authors or your lawyer at CMS.

Best regards

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Cross Border Mergers

An alternative way to restructure UK and other European consumer product businesses

An increasing number of European consumer product businesses with group companies in the UK and another European jurisdiction who wish to streamline their organisation and reduce costs are taking advantage of a merger procedure in the UK which enables a UK company to merge with a company in a different European Economic Area ("EEA") state.

The merger, under The Companies (Cross-Border Mergers) Regulations (the "Regulations") is an alternative to an asset or share transfer. Using the procedure under the Regulations, two different European companies can merge their businesses. The Regulations apply to both public and private companies with limited liability and apply to a merger between at least two companies from different EEA states.

Pure mergers (as opposed to acquisitions), whilst very common in Europe, have not historically taken place in the UK. However, the Regulations set out a clearer mechanism for the merger of companies across Europe where a UK company is involved and provide an additional tool for consumer product companies looking at their options for restructuring.

Forms of merger

The Regulations provide for three types of merger:

— Merger by absorption – where one (or more) companies in an EEA state or states are absorbed by a company in another EEA state.

— Merger by absorption of a wholly-owned subsidiary – where an existing EEA company absorbs one or more of its subsidiaries in a different EEA state or states.

— Merger by formation of a new company – where a new company absorbs two or more companies in different EEA states.

In each case, the assets and liabilities of the companies being absorbed are transferred by law to the transferee, and the transferor(s) is dissolved without going into liquidation. The merger involves a Court process run in parallel in the jurisdictions of the transferee and transferor companies.

Why are consumer product businesses choosing to use this method?

There are a number of reasons why European consumer product corporate groups are considering this route when contemplating restructuring:

— *No third party consents* – except to the extent that the Court requires shareholder or creditor approval, there is generally no requirement to obtain third party consents to the transfer. All assets and liabilities transfer automatically by law.

— *Transferor automatically dissolved* – under the Regulations there will be no need to liquidate the transferring company as the transferor is automatically dissolved when the merger takes effect and all liabilities are transferred, avoiding costly and burdensome run off issues.

— *Tax relief* – in the UK, re-organisation tax reliefs may also apply to cross-border mergers of UK companies making them tax neutral.

— *Cost savings* – the creation of a single corporate entity following a merger may help to generate business efficiencies.

Our experience

There have been an increasing number of cross-border mergers sanctioned by the English Courts and CMS has extensive experience of advising on cross-border mergers. Due to the number of our European offices, we are well placed to assist companies with the merger procedure. We have helped consumer product companies such as Fujifilm merge its Belgian entity into its French parent company,

Nissan on the completion of the cross-border merger of its Belgian and Dutch entities into a French company, Siemens Enterprise Communications on the absorption of a Spanish company into a Dutch holding company and Alkor-Venilia on the cross-border merger of various subsidiaries into their German parent company.

Given the depth of our knowledge and experience we have produced a guide to cross-border mergers across Europe. The CMS Guide to Cross-Border Merger comprises a comprehensive overview of the legal and tax requirements and consequences of cross-border mergers in 17 countries highlighting:

— the types of company that can participate in a cross-border merger;
— the documents to be prepared, their material content and formal requirements;
— internal responsibilities, competent authorities and consents (if any) required from other external parties involved;
— essential timing and publication requirements;
— major tax consequences; and
— implementation of the applicable scheme of employee representation on supervisory boards, as well as other notification and consultation requirements vis-à-vis employee representation bodies.

Additionally, to make the process of planning a cross-border merger transaction easier, we have produced an Online Planner which provides the opportunity to visualize selected timelines on screen and to harmonise timing for milestones according to the need of the specific project across Europe.

Contact details

The ability to be able to remove a corporate entity from a consumer products group by way of merger should result in a reduction in the administration costs associated with running these entities in different jurisdictions, together with the potential for increased harmonisation of contractual terms, business principles and policies in the single entity.

If you would like to speak to us about cross-border mergers please contact the following or your usual CMS contact.

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What’s not in it may not be on it

The new EU Food Labelling Regulation

Strawberry yoghurt without strawberries? Pizza without cheese? “Yes, but…”, say EU lawmakers. And this in future only if the product’s packaging does not feature ingredients that were in fact not used and at the same time provides information concerning substitutes such as imitation cheese. The new Regulation of the European Parliament and of the Council on the provision of food information to consumers, which has been in force since December 2011, provides for this and much more.

The broader public became aware of the Regulation during the legislative procedure because of the long-discussed, but now not implemented, traffic-light labelling of pre-packed food. There will be a lot of work for the food industry because of the Regulation. There is hardly any product packaging that may be used in the market in its current form after the transition period.

Whereas the current rules concerning trade names, manufacturer’s specifications, lists of ingredients and information concerning amounts remain largely unchanged, food producers should expect major changes with regard to nutrition labelling, the graphic design of the mandatory information and the requirements regarding the fairness of information practices.

Mandatory Nutrition Information

Previously, producers could choose whether to provide any nutrition labelling – they no longer have this choice. The Regulation requires for the first time mandatory nutrition labelling for almost all food products; the only products exempted from this rule are those such as spices, herbs, salt, additives, flavourings, enzymes and chewing gum. The previously well-known catchphrases “BIG 4” and “BIG 8” belong to the past; in addition to energy value, information concerning fat, saturates, carbohydrates, sugars, protein and salt (“BIG 7”) must be provided in the future. The information must be expressed per 100ml or 100g; in addition, it is possible for information to be provided to consumers on the energy value per portion and/or per consumption unit.

Presentation

The new rule concerning the font size of the mandatory particulars provides more legal certainty. Whereas it was hitherto possible to debate when the requirement “clearly legible” in the currently applicable Food Labelling Regulation was met, it will be clear in the future that the so-called x-height of the font size must be at least 1.2mm; for smaller packages the largest surface of which has an area of less than 80cm, 0.9mm is sufficient. The other rules concerning presentation provide room for discussion, however: when is mandatory information “obscured” or “interrupted” by other material? Does this apply to an overlapping seam flap? Does the requirement that mandatory information may not be interrupted mean that all information must be presented on one visible side of the packaging? This would contradict the provision of the Regulation that the trade name, the net weight and, if applicable, the alcoholic strength (but in future no longer the best before date!) must appear in the same field of vision. The requirement that the consumers’ view may not be distracted from the mandatory information comes as a surprise to any marketing expert. Does this mean that gimmicky elements on product packaging are passé because they might distract the consumers’ view from the sometimes boring mandatory information?

Fairness of Information Practices

The new rules concerning the fairness of information practices will be far-reaching. Even if the principle “information concerning food may not be misleading”

has been applicable for years and decades, the detailed rules contained in the Regulation emphasise important requirements: specifically laid down, for instance, that it is not permissible to emphasise the fact that an ingredient is not included when this is true for all of the comparable food products. This form of misrepresentation, known to German lawyers as "advertising with self-evident facts", applies to popular cases of "clean labelling" in which products are advertised as "without preservatives" or "without flavour enhancers".

The Regulation is now explicitly supposed to prevent one of the "outrages" in the area of food labelling in recent years: if the existence of an ingredient is suggested by the appearance, designation, image or even the type of presentation in the shop, this ingredient must be included in the food. Therefore, a picture of a piece of cheese may not be presented on the packaging of a pizza that is made with imitation cheese. At the same time, consumers must be actively educated: a mention of the substitute ingredient directly next to the product name in almost the same font size is required. Nevertheless, the text of the Regulation leaves many questions unanswered: may persipan (marzipan substitute made from apricot kernels) be "offered" next to marzipan on the supermarket shelf? Is there still "strawberry yoghurt" without strawberries – or is this then strawberry-flavoured yoghurt? What happens when the expected ingredient is only partly replaced?

In most cases, the Regulation grants food companies transitional periods of three to five years to adjust to the new labelling requirements. For example, food products that have been produced and packaged in compliance with the previous rules within three years after the Regulation comes into force (thus until December 2014) may be marketed until the stocks are exhausted. If, however, businesses implement obligations arising from the Regulation prior to the end of the transitional period, the new law will apply without restrictions.

To date, the Regulation does not have many proponents: for consumer protection agencies, the Regulation does not go far enough; food businesses feel they are too restricted; and law scholars criticise the lack of clarity in the text of the Regulation and the, in some cases, obvious loopholes. For all concerned, however, there remain three years to become familiar with the Regulation and flesh out its provisions.

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Consumer Rights Directive

New Restrictions to On-Line trade

A new Consumer Rights Directive was adopted on October 2011 and was published in the European Union's Official Journal on 22 November 2011. Incorporation measures have to be adopted by Member States before 13 December 2013 and shall apply as from 13 June 2014. Nathalie Petrignet, partner at CMS BFL (Paris) and Andreas Schwab, member of the European Parliament, reported on this Directive during the CMS Annual Conference.

The Directive which applies to contracts concluded between consumers and traders strengthens consumers' rights in all 27 member states. Article 3 of the Directive describes the scope of the new provisions. Contracts for the supply of water, gas and electricity and district heating by public providers to the extent that these commodities are provided on a contractual basis are covered by this Directive. However, it does not apply to some other contracts such as contracts for social services, gambling, financial services, etc. The Directive introduces some changes concerning off-premises and distance contracts.

First of all, the right to make an informed choice is strengthened in order to eliminate hidden charges and costs on the Internet, and to increase price transparency. Article 3 of the Directive establishes a list of information that must be provided to the consumer before he decides to enter into a contract. Such information requirements are meant to ensure a greater protection for consumers – e.g. the total cost of the product including taxes, the reminder of the existence of a legal guarantee of conformity for goods and contact details of the trader.

Article 8, which relates to distance contracts concluded by electronic means requires the button that is used to contract to be labeled in an easily legible manner only with the words 'order with duty of payment' or a corresponding unambiguous formulation indicating that placing the order entails an obligation to make a payment to the trader. Thus, consumers will also be protected against "cost traps" on the Internet. Moreover, pre-ticked boxes on websites - such as those often seen to buy plane tickets – are banned across the European Union under Article 22 forbidding the use of "default options which the consumer is required to reject in order to avoid additional payment".

Regarding sales contracts in general, traders who operate telephone hotlines allowing the consumer to contact them in relation to the contract must not charge more than the basic telephone rate for telephone calls. Furthermore, traders are prohibited from charging consumers fees that exceed the cost borne by the trader for the use of certain means of payment.

The right of withdrawal for distance and off-premises contracts is set out in Articles 9 to 16 of the Consumer Rights Directive. In the case of services contracts, the withdrawal period expires 14 calendar days from the conclusion of a contract – compared to the seven days legally prescribed by former EU law provisions. In the case of sales contracts, the withdrawal period expires 14 days from the day when the consumer acquires physical possession of the goods – rather than at the time of conclusion of the contract, which was the case under former EU directives. This period is extended to 12 months from the end of the initial period in the case where the trader has not clearly informed the consumer about the withdrawal right (Article 10). Article 16 mentions a few exceptions to the right of withdrawal such as the supply of goods which are liable to deteriorate or expire rapidly or the supply of a newspaper, periodical or magazine for example. The new Directive provides a model withdrawal form (Annex I. B.) which is valid throughout the territory of the European Union. Its use by the consumer remains optional.

However, this withdrawal period does not concern digital content – such as video or music downloads – unless the download has not started. Indeed, member states shall not provide for the right of withdrawal as regards the supply of digital content which is not supplied on a tangible medium if the performance has begun with the consumer's prior express consent and his acknowledgement that he thereby loses his right of withdrawal (Article 16 m.). Concerning digital content, the Directive offers a better protection for consumers. It requires the trader to provide clear and precise information about the digital content – e.g. about the functionality and the relevant interoperability of the digital content.

Article 13 specifies that once the withdrawal right has been exercised, the trader must reimburse all payments received by the consumer – including the costs of delivery – no later than 14 days from the day on which he is informed of the consumer's decision to withdraw from the contract. This leads to a better refund. Moreover, under Article 14, the consumer must send back the products within 14 days unless the trader has offered to collect the goods himself. The consumer shall only bear the direct cost of returning the goods unless the trader has agreed to bear them or the trader failed to inform the consumer that the consumer has to bear them (cf. Article 14).

As for the delivery of goods, Articles 18 and 20 of the Directive mention that unless the parties have agreed otherwise on the time of delivery, the trader must deliver the goods to the consumer without undue delay after, but no later than 30 days from the conclusion of the contract. The trader bears the risk of loss or damage to the goods until the consumer acquires the physical possession of the goods.

More specific rules also apply to small businesses and craftsmen, such as plumbers. For example, the right of withdrawal cannot be exercised for urgent repairs and maintenance work.

At last, common rules for businesses will make it easier for them to trade all over Europe. Indeed, a single set of core rules for distance and off-premises contracts in the EU creates a level playing field and reduces transaction costs for cross-border traders.

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Brief update on recent Italian legislation concerning consumer protection

The Italian Government led by the former EU Commissioner Mario Monti has recently issued a law (L. 27/2012 dated March 24, 2012) which includes some important rules for consumers' protection.

A first rule refers to the so called "unfair terms" contained in contracts between professionals and consumers. Under Italian Civil Code (Article 1341), unfair terms are those providing:

(i) limitations of liability;
(ii) rights to withdraw from the agreement;
(iii) rights to suspend the performance of the agreement;
(iv) rights to penalties in case of non compliance of the other contracting parties;
(v) limitations to raise objections;
(vi) limitations to freely enter into contracts with third parties, non-compete clauses;
(vii) implicit renewal or renewal of the agreement;
(viii) arbitration clauses;
(ix) jurisdiction clauses.

If such unfair terms are included in a contract drafted by only one contractual party (the professional), such clauses must be specifically approved by the consumer by means of a double signature, as per the above mentioned Article 1341 of the Italian Civil Code. The consequences of non-compliance with this provision are to be established on a 'case-to-case' basis. However, in general terms, it can be said that such non-compliance does not invalidate the entire agreement but it may well result in the unenforceability of some of its clauses.

According to the new law, the Competition Authority (Autorità Garante della Concorrenza ed il Mercato), upon a consumer's or consumers' association notice or even *ex officio*, shall declare null and void those terms included in contracts between a professional and a consumer, whenever the contracts are unilaterally arranged by the former.

In this respect, the AGCM may open a procedure, with the power to ask the professionals to file brief defenses, documents and to provide any required clarification as to the *ratio* of the contested terms. Failure to comply with the AGCM's request may be sanctioned with a fine up to EUR 20.000,00; in addition, if the information provided or the documents filed by the professional are untrue or deceitful, a fine up to EUR 40.000,00 can be imposed.

This power is intended to have a great impact, as the finding of the unfair nature of terms unilaterally arranged by professionals shall be published on the institutional website of the AGCM, on the professional's webiste and made public by any other means.

However, professionals willing to use some terms – which could be considered unfair – in their commercial relationship with consumers may consult the AGCM in advance. The Authority may therefore provide the concerned professionals with a preventive opinion as to the validity of contractual clauses. Such preventive assessment is binding for the future: therefore, a clause which the AGCM has formerly assessed as "fair", shall not hereafter be considered unfair anymore by the AGCM itself. Consumers may, in any case, still challenge the validity of unfair terms before the court.

Before exercising the granted power to assess terms, the AGCM shall enter into agreements with the relevant professional unions.

A second important rule relates to the already existing legislation on class action.

The previous legislation required that the consumers' rights jeopardized by professionals had to be "identical". Since the "identity" of the consumers' rights very often does not occur, most of the class actions, presented so far, have been rejected. The new rule has replaced the concept of "identity" with the idea of "homogeneity", meaning this

that consumers being in similar, even non-identical situation, may now be members of the same class action; it will therefore be possible to have recourse to a class action to protect similar (and non-identical) contractual rights of a plurality of consumers damaged by professionals.

A further rule, making easier the former method for the recognition of the *quantum* due to the claimants, provides that if the claim for compensation for damages is recognized, but the court only determines the criteria for the compensation for damages without awarding a specific amount, parties may try to reach a settlement agreement within a 90-day term; in such a case, the settlement agreement is certificated by the court. In default, upon request of even one member of the class, the court determines the amounts due to all claimants with an order immediately enforceable.

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Deregulation of shop opening hours in Spain

As is the case in many of its neighbouring countries, in Spain the regulation of shop opening hours and allowing shops to open on public holidays has been subject to intense debate.

In recent years, this issue has been the cause of a continued confrontation between small independent traders and retail giants (particularly large supermarket chains, although not exclusively). Whilst small and medium scale retailer associations insist that excessive deregulation will inevitably be to the detriment of small workforces and will erode job security, large retail chains point to greater flexibility and improved customer service.

Due to the Spanish State's particular federalised structure, known as the "State of Autonomies", the regulation of retail hours is divided between the state government and the Autonomous Communities ("AC").

Spanish Act 1/2004 on Opening Hours for Retail Establishments sets a minimum threshold of 72 hours per week across business days, and eight Sundays or public holidays per year, which Autonomous Communities may not reduce, but may increase. Moreover, the Act establishes total freedom of opening hours for the areas defined by Autonomous Communities as "hosting large numbers of tourists", which has effectively freed opening hours for all establishments in key coastal areas, and for those with a sales floor under 300 m^2. The ACs may amend and limit this *special opening hours scheme, but may not restrict it for establishments under 150m^2.*

With the exception of the Autonomous Communities of Madrid, Ceuta, Murcia and the Canary Islands, the majority has adhered to the minimum established by law. Effectively, due to pressure from trade unions and retailer associations, autonomous regulations have been rather restrictive with regard to opening on public holidays and the total deregulation of retail opening hours.

In particular, the Community of Madrid, which is purported to be the most liberal of all, has recently overhauled its retail laws by approving total freedom with regard to opening hours and days of the week, which has come into force this Spring (in addition to having labelled significant areas of the city centre and periphery, such as exhibition grounds and airport zones, "tourism interest areas"). As a result of such reform, the debate on deregulation of opening hours has snowballed in cities such as Bilbao, Barcelona and Palma de Mallorca.

The debate on the benefits or detriments of the system has reached the National Competition Commission itself which, in its recent *Report on manufacturer-distributor relations in the food sector* [in Spanish], clearly advocates full freedom of opening hours on the premise that this would favour competition among enterprises and would quell opportunities for colluding between retailers, thus increasing consumer choice and creating a positive knock-on effect for productivity, employment and prices[1].

From an employment point of view, the new regulation will have no bearing on labour obligations stipulated in employment contracts, the Spanish Workers' Statute or the collective bargaining agreement applicable to a given company.

Consequently, if the company in question were to proceed to Sunday opening throughout the year, it shall take into consideration that the following rights remain in force for the employee:

— The maximum annual working hours permitted shall not be amended due to the number of days on which the establishment is open to the public.
— Minimum daily and weekly rest periods established by law shall be respected, wherein (i) a period of twelve

hours must elapse between the end of one work day and the beginning of the next, and (ii) employees shall be entitled to minimum weekly time off of one and a half days uninterrupted.
— The option of working on Sundays shall be covered by the employment contract or, in the absence thereof, by collective agreement with the workers' representatives.

In light of the above, retailers who do wish to open every Sunday throughout the year must take into account the stated provisions, and must have at their disposal a sufficient workforce to meet such commitments. That said, the recent labour reform 3/2012, which came into force on 12 February 2012, greatly eases a company's ability to change the working conditions of its employees in line with its own needs.

However small retailers are not going down without a fight. Altercations and protests have already taken place among retailer associations and trade unions in an attempt to halt these changes which now, seem inevitable.

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[1] Autonomous competition authorities have already ruled in this respect in *a survey carried out by the Competition Council Promotion Working Group* [in Spanish], indicating that restricting retail opening hours entails *"an unfounded restriction of competition put in place in order to favour certain retail formats, yet with no advantage to consumers"*. It also includes clear stances in favour of deregulation by competition authorities in communities that have traditionally been more reticent, such as Catalonia or Galicia.

Company directors and competition law

The OFT has recently introduced new guidance on what directors are expected to know about competition law, and how the OFT will assess the extent of an individual director's responsibility for competition law infringements.

You are the Commercial Director of a toy manufacturer. You have a successful new product and are keen to maximise Christmas sales. You ask your sales manager to increase high street retail distribution during this key period. Arrangements are concluded with three new major retailers. The sales manager has kept you updated on the terms agreed including a commitment from two retailers not to sell your new product below GBP 12.99. You have signed off the new arrangements but you have been busy and not paid close attention.

Are you aware that this situation, in which your sales manager has negotiated anti-competitive resale price maintenance agreements, could result in you being disqualified from being a director? Possibly not, but you should be. Recent OFT competition law guidance indicates that this is the risk that results from directors failing to monitor closely the activities within their business where they lead to a competition law infringement. In June 2011, the OFT introduced new guidance on what directors are expected to know about competition law, and how the OFT will assess the extent of an individual director's responsibility for competition law infringements.

The guidance forms part of the OFT's ongoing initiative to help companies achieve competition law compliance, and also follows changes to the OFT's approach on competition disqualification orders (CDOs). A CDO, which disqualifies a director from being involved in the management of a company for up to 15 years, can be granted by a court where it is satisfied that a breach of competition law has occurred and the director's behaviour in connection with that breach makes him unfit to be involved in the management of the company. A director may now be considered "unfit" where he contributed to the breach, had reasonable grounds to suspect the breach but took no steps to prevent it, or where he did not know but ought to have known that the conduct in question constituted a breach.

This approach and the new guidance set a high standard for directors. The OFT does not expect directors to have detailed competition law expertise. However, it does expect all directors, whether executive or non-executive, to be committed to competition law compliance and to have an understanding of the most serious forms of infringement of competition law (such as price fixing, bid rigging, market sharing, limiting production, sharing commercially sensitive information, resale price maintenance) and in particular, that directors ought to have sufficient understanding of the principles of competition law to be able to recognise risks and to realise when to make further enquiries or seek legal advice.

Determining the appropriate level of knowledge for a director, and the steps a director is expected to take to detect and prevent infringements, will depend on a number of factors including:

— The director's specific role: executive directors are expected to have better knowledge of the day-to-day affairs of the company than non-executive directors. Some areas of business will be more exposed to the risk of competition law infringements than others and those directors are expected to take greater steps to prevent, detect and bring to an end infringements of competition law. For example, a director responsible for sales and marketing will be expected to have a developed understanding of the competition law risks that may arise from entering into contracts with customers and establishing distribution arrangements.
— The size of the company: directors in small companies have a more intimate knowledge of their company's

day-to-day activities and therefore are more likely to be aware of actual or potential infringements. Directors in larger companies may not have such an intimate knowledge, but are expected to take steps to ensure that there are appropriate systems in place to prevent, detect and bring to an end infringements of competition law.

— Direct and indirect responsibility: where a director has direct management responsibility, the OFT considers the director ought to have greater awareness of the activities of his personnel and any anti-competitive behaviour within his business area.

Whilst many companies now have compliance programmes in place, companies should ensure that all directors are regularly trained on competition law with particular focus on the specific risks which may arise in their area of responsibility. This may involve the provision of dedicated training. Directors themselves are advised to review internal procedures and reporting lines to ensure they are fully aware of the activities of their teams and to identify any areas of risk.

Turning a blind eye, failing to keep informed or claiming lack of knowledge is no defence.

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EU: Food supply chain under scrutiny, commerce in the crosshairs

The food supply chain keeps Brussels busy – The European Parliament has called on the Commission to propose robust regulation and adjustments to competition law to tackle problems in the distribution chain. Parliamentarians in particular flagged the concentration of buyer power and potentially unfair trading practices as a serious concern. Antonio Tajani, EU-Commissioner for Industry seems to prefer self-regulation but has made clear that he expects stakeholders in the so-called "High Level Forum" to agree on a proposal for action to solve the problems in the relationship between suppliers and buyers by the end of June. The Commission has further announced that a communication concerning unfair business-to-business practices will be introduced in the second half of 2012. Meanwhile the Commission's competition watchdogs have set up a special task force for the food sector.

Rapid increase in consumer food prices in the second half of 2007 alarmed the European Union. As a reaction the European Commission conducted a market monitoring exercise on food prices in the Single Market and investigated the functioning of the food supply chain. The results were published in a 2008 interim-report on "Food prices in Europe" which suggested making efforts to improve the functioning of the food supply chain. The objective was described as nothing less than to promote "fair earnings of agricultural producers, competitive prices and improved competitiveness of the food processing industry as well as greater choice, better affordability and higher quality of food products for European consumers".

To further pursue the matter Günter Verheugen, then Commissioner for Industry, set up a "High Level Group" composed of representatives of different Commission service groups, member states, as well as stakeholders from the agro-food industry, producers, retailers and consumers to work out recommendations to policy makers at the Community. On the basis of the High Level Group's results the Commission provided at in the end of 2009 the communication for "A better functioning food supply chain" and presented different policy initiatives.

The job to implement these initiatives was assigned, again, to a working group, this time called the High Level Forum. Membership of the Forum was opened to all member states and a larger number of stakeholders (though the maximum number of members of the group is 45). Beside Commission officials and representatives from the national administrations in particular the European associations of producers and retailers play a strong role in the Forum. Major players from the consumer products sector such as Danone, Nestlé and Unilever as well large retailers such as Ahold, Metro and Lidl have also sent representatives.

Work of the B2B-platform and proposal for Principles of Good Practice

The High Level Forum has set up different platforms, corresponding to priorities described in the Commission communication. Arguably the most interesting and also the most challenging topics are dealt with by the platform in charge of questions related to the envisaged promotion of sustainable business-to-business (B2B) relationships in the food chain (so-called "B2B platform"). The group's mandate has been defined to assess unfair contractual practices, identify best practices and propose Community action when necessary.

Discussions in the framework of the B2B platform quickly focused on finding a solution to the problem of possible

misuses of bargaining power. Naturally the positions of the different stakeholders in the group have been quite conflicting.

The Commission nevertheless indicated that non-regulatory instruments could be suitable to remedy the problem of unfair practices. Stakeholders were invited to engage in a dialogue and present a solution for addressing unfair practices in a consensual and effective way. As a result of this stakeholders dialogue, a group of members of the B2B platform representing producers (e.g. the Association des Industries de Marque/European Brands Association – AIM) and retailers (e.g. EuroCommerce) published, in November 2011, a proposal for (voluntary) rules to govern vertical relationships in the food supply chain. This proposal contains a list of unfair practices which mentions in particular:

- Unilateral termination of a commercial relationship without notice or without an objectively justified reason;
- Imposition of unjustified or disproportionate contractual sanctions or application of contractual sanctions in a non-transparent manner;
- Retroactive unilateral changes of prices;
- Inappropriate contractual allocation of risks;
- Disproportionate upfront access payments;
- Threats of disruption of business to obtain advantages from the other party.

First reactions on the proposal have been quite positive; however, at this stage the proposed principles should be considered work in progress. The B2B platform is now expected (and has promised) to agree on a formal position for enforcement options by the end of June at the latest. It is reported nevertheless that producers and retailers are pulling no punches in the internal discussions in the core group to push their position through. Mr Tajani, who is overseeing the exercise, has made clear, however, that he will definitely move forward in July. That would mean that the Commission will come up with a proposal of its own if stakeholders fail to deliver a joint position in time.

European Parliament resolution of 19 January 2012

Apparently EU-Parliamentarians were not too impressed by the progress reached so far in the policy making process: on 19 January the Parliament adopted a "resolution on the imbalances of the food supply chain".

While the resolution stresses that Parliament would support the "good work" of the High Level Forum, it nevertheless urges the Commission to propose "robust EU legislation". The resolution further calls strongly on the Commission to bring forward a clear definition of abusive and unfair practices. In this context the resolution non-exhaustively lists 32 practices which have been brought to the attention of Parliamentarians and which could give rise to concerns. That list clearly shows who is in the crosshairs of the Parliament: only buyers' (i.e. retailers) practices are mentioned.

Issues eyed by the Parliamentarians include:

- Fees for access to supermarket shelves (listing fees, entry fees, shelf space pricing etc.);
- Certain conditions which allegedly are increasingly forced upon suppliers (contribution for private label, margin recovery, payments for promotions etc); and
- Retroactive changes to contracts as well as payment delays.

The resolution highlights in particular the issue of payment deadlines. It stresses that producers of perishable goods with short shelf-lives face major cash flow difficulties because of extensive payment deadlines.

While resolutions of the European Parliament have no binding character, a strong message was sent out with this one. Parliamentarians have made very clear that they expect the Commission to deliver a proposal soon and they will certainly put any proposal to the acid test.

Retailers so far do not appear too worried too much. They refer to the good working relationship they have with the

Commission service groups in this matter and appear convinced that Mr Tajani is no trigger happy cowboy. However, there can be no doubt that it is the big players in the retail market who are in the crosshairs of Parliamentarians. It is unlikely that the Commission will ignore this when proposing action to the law makers.

DG Markt Communication on unfair practices in business-to-business relationships

Another service group of the European Commission is in the game. The Internal Market and Services Directorate General (DG Market) had monitored the retail markets in general (not limited to the food markets) in the Union and published a report in 2010. This Retail Markets Monitoring Report inter alia identifies the existence of unfair practices and describes law enforcement problems as well as problems stemming from the diversity of national laws applicable to such practices. The European Parliament asked the Commission in response to the report to identify the scope and scale of the problem and propose solutions. DG Market was therefore instructed to produce a communication mapping the legal situation in the member states and present possible options for action in the context of the Internal Market policies where necessary.

While the work of DG Market is complementary to the High Level Forum's action, they are waiting for the results of the B2B platform to feed them into their communication. In any event the publication of the communication is scheduled for the second half of 2012. If the Commission proposes Community action in the communication, which is rather likely, this will trigger the consultation process. Lobbyist on all sides will then have to sharpen their pencils (again).

ECN subgroup Food & Retail and DG Competition Task Force Food

The food sector has not only been in the focus of EU lawmakers and administration but has also attracted the attention of the national competition authorities in different countries in the last years. Besides numerous proceedings concerning breaches of competition law which are led by competition watchdogs against individual companies, several countries have conducted market monitoring exercises or have even initiated deep going sector inquieries (in particular Finland, France, Germany, Italy) to shed light on the market structures. To exchange experiences in this field the authorities formed a sub group on Food & Retail in the European Competition Network (ECN). A comprehensive description of the activities of the members has been published in a report on May 23 (available on the European Commission's website).

Until recently it appeared that the European Commission considered competition law issues in the food market best placed with the national competition authorities and ignored calls from the European Parliament to take action in this area. That seems to have changed in January 2012 when the Directorate General for Competition (DG Comp) formed a new Internal Task Force Food. The task force is headed by Philippe Chauve, a very experienced Commission official and former Deputy Head of Unit in the Energy and Environment Unit, and has been assigned five case handlers. Commission officials said the formation of the task force was in response to the growing workload in the sector.

Against the background of the strong political will demonstrated by the formation of the Task Force Food it can be assumed that DG Comp will pick up an antitrust case in this area sooner or later. On the other hand there are no signs that Mr Almunia's men are inclined to get involved in a half-baked case just to please the public: the formation of the Task Force has been communicated rather hesitantly (there has been no press release so far). It could well be that the members of the Task Force will first work on their knowhow by supporting national competition authorities and on merger cases.

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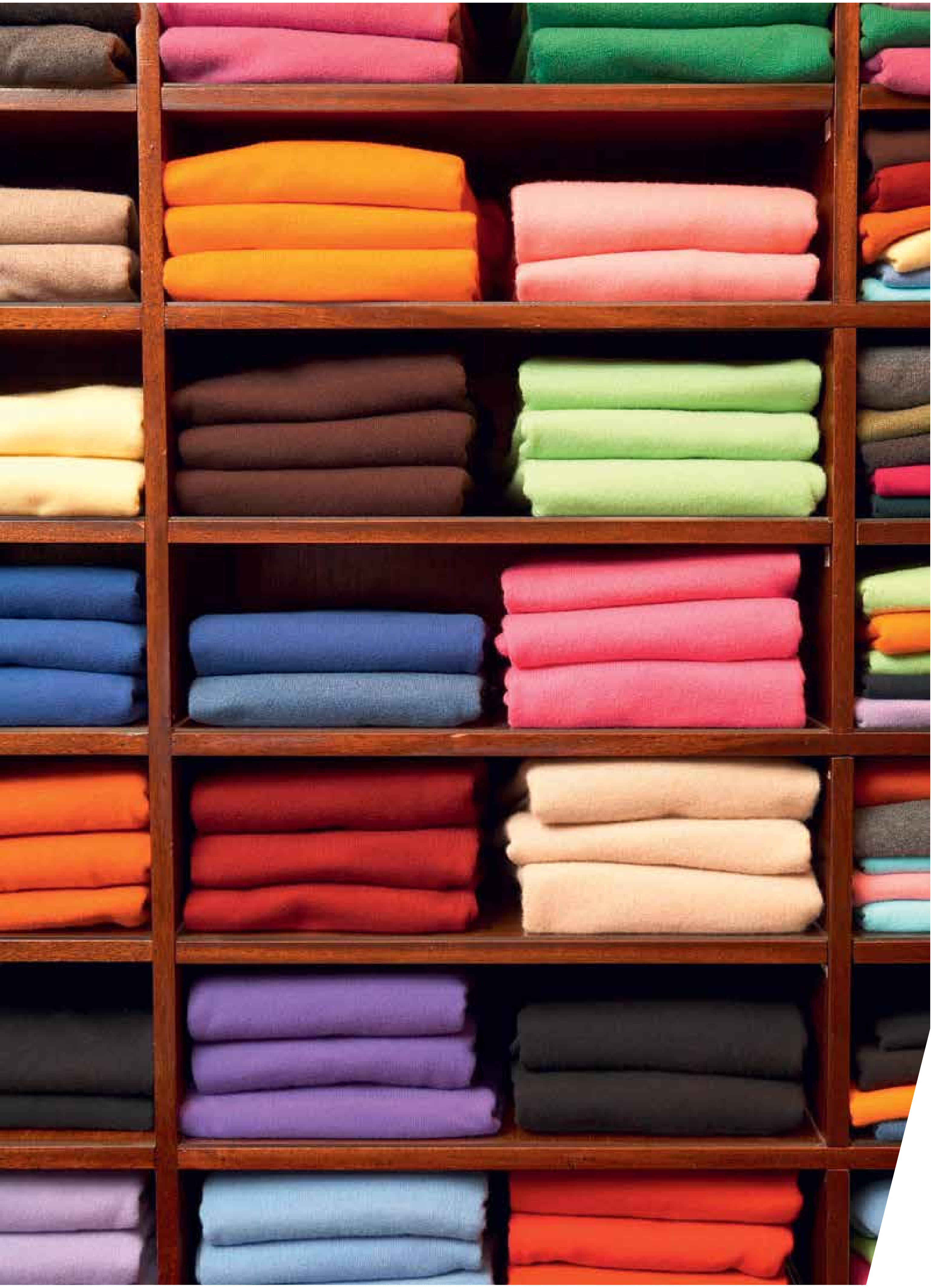

Suppliers vs. retail chains

Amended Hungarian regulations for the distribution of food and other agricultural products, blacklisted market practices, potential effect for non-food products

After lengthy negotiations and debates, a new Hungarian act on the prohibition of unfair practices against suppliers of food and agricultural products (the "Act") has come into force. In line with the governmental objectives, it primarily aims to establish a commercially balanced relationship between retailers and suppliers. Although the Act's scope is limited to food and other agricultural products, retail chains tend to use the same general terms in the relation to all of their suppliers, means that the provisions of the Act also affects the relations with suppliers of non-food sectors. A new administrative authority has been appointed to control the implementation of the Act (the "Authority").

The Act generally prohibits unfair distribution practices against suppliers and also specifies the practices considered to be unfair, such as (in particular):

- imposing conditions resulting in a disproportionate allocation of risks between retailers and suppliers;
- imposing the obligatory take-back of products (save for defective performance);
- charging costs
  - to the supplier serving solely the business interest of the retailer (e.g. operational costs);
  - for services not ordered by the supplier;
  - for services in relation to the sale of products to consumers not resulting in any additional service for the supplier;
  - for entering their products within the range of products sold by the respective retailer and for the continuous distribution of the products;
  - for the position (on the shelves for sale) of the products in the retailers' shops not resulting in any additional service for the supplier;
- imposing a payment deadline exceeding 30 days from the delivery of the products;
- imposing an exclusive supply-obligation without proportionate compensation.

All contractual clauses contrary to the prohibitions set out in the Act are null and void. If the violation of the Act is established, the Authority may impose a fine up to HUF 500 million (approx. EUR 1.8 million) (maximum 10% of the last year's turnover) and up to HUF 2 billion (approx. EUR 7.2 million) for "recidivists". In addition, a "blacklist" with the names of the retailers infringing the prohibitions set out in the Act is published on the website of the Authority. However, in order to avoid the sanctions, it is possible to undertake obligations to comply with the provisions of the Act, where the execution of the obligations shall be controlled by the Authority (in case of non-compliance a fine may be imposed).

After a couple of months of interim period, the Authority started to actively enforce the requirements set out in the Act. The Authority reviewed 26 general terms and conditions submitted and produced a summarizing document sumarizing its general comments and observations. Further, seven big retail chains such as Lidl and Tesco were fined in the total amount exceeding HUF 780 million (approx. EUR 2.8 million).

Reflecting the first year's experience, the Act was amended early this year. Inter alia, amendments:

- provided the possibility for selling below the purchase price for certain, limited cases (e.g. selling out or selling products close to their expiry date);
- prohibited the application of fixed rebates and certain progressive rebates;
- introduce some further obligations relating to invoicing.

The same Legislative trends as those in Hungary are to be noted in other CEE jurisdictions as well.

Despite the fact that this is a hot topic in Poland, the exact content, the adoption and the entry into force of the planned act (according to the press, quite similar to the Hungarian Act) is yet uncertain. In December 2010, the Romanian Parliament amended the law on the commerce of food products. Amongst the the most important amendments was the elimination (except for certain products) of fixed payment terms alleged to be blocking the parties' cash flow. In Ukraine the suppliers (producers) and the retailers (as well as wholesalers) are prohibited from entering into any agreements whereby any financial obligations, other than those of sale and purchase of the products, are imposed on the parties. Further, for these specific products, the payment deadline may not exceed seven banking days.

To sum up the above, we can clearly say that, although the current legal framework may differ in relation to the supplier-retailer relationship, very similar trends are to be noted in the other CEE jurisdictions. All these recently adopted and amended laws raise a great number of legal questions and uncertainties; in addition, they lead to a very significant change both the suppliers' and the retailers' commercial and business attitude.

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New legal requirement to automatically enroll eligible workers into a pension scheme

Nearly half of the population in the UK who should be saving for retirement are failing to do so adequately. The Government has introduced legislation which requires all employers, starting from October 2012, to automatically enrol what is likely to be most of their workers into a pension scheme which satisfies minimum requirements and to pay employer contributions.

Preparation is vital as this change has HR, pensions, finance and payroll implications.

Who?

The legislation introduces varying degrees of employer duties depending on the type of worker.

The centrepiece of the proposals is the requirement to automatically enrol certain workers, known as eligible jobholders, into a pension scheme that meets specific conditions. Eligible jobholders are workers who (i) earn more than the minimum earnings threshold (currently proposed to be GBP 8,105); (ii) are aged between 22 and state pension age; and (iii) work in the UK. Any UK worker between 16 and 74 who earns above GBP 5,564 (in today's terms) will also have the right to join such a scheme.

It will be necessary for employers to carry out an assessment of their workforce to determine what category an individual worker falls within and whether a particular worker is classed as an 'eligible jobholder'.

When?

Employers will each be allocated a specific date by which the required changes have to be in place (this is known as the *"staging date"*). The first staging dates will be in October 2012 with the dates being phased through to 2016.

The staging date allocated to an employer will depend upon the number of people in the employer's Pay As You Earn (PAYE) scheme. The largest employers (all those with more than 250 people in their PAYE scheme) are staged in line with their size from October 2012 to February 2014.

The Government plans to consult on the staging dates for medium-size employers (with 50–249 people in their PAYE scheme), small employers (with 1–49 people in their PAYE scheme) and new employers setting up business from 1 April 2012 to 30 September 2017. It is currently proposed that medium-size employers will have staging dates between 1 April 2014 and 1 April 2015, small employers will have staging dates between 1 June 2015 and 1 April 2017, and new employers will have staging dates between 1 May 2017 and 1 February 2018. The Government is expected to publish a consultation document on these proposals later in 2012.

Employers are afforded some flexibility with staging dates and may choose a different staging date, as long as it is earlier than their originally allocated date.

What?

Employers are required to automatically enrol eligible jobholders into a qualifying pension scheme, provide the required information to these individuals and the Pensions Regulator and pay employer contributions.

When choosing a pension scheme, employers should consider whether to use an existing scheme (if so, it must comply with minimum requirements) or whether they want to set up a new scheme. If the employer decides to use an existing scheme, the minimum requirements for compliance differ depending on whether a scheme is a defined contribution or a defined benefit scheme.

If the employer opts to set up a new scheme, it should consider whether to use a trust-based or contract-based scheme; each of which may have different advantages depending on the needs of the employer. Another option for employers is to use National Employers Saving Trust (NEST) which is a low cost multi-employer defined contribution scheme which meets the qualifying scheme requirements.

This legislative change is likely to have significant cost implications for employers. This is because (from October 2018) all employers will be required to contribute at least 3% of earnings with the worker paying the rest of the required contributions so that the minimum amount of total contributions will be 8%. However, the contribution requirements are being phased in over a period of time from the staging date onwards.

Given the current economic climate, it is possible that eligible jobholders may decide to opt-out of the pension scheme (although they will still have to be re-enrolled at around three-yearly intervals). Therefore, a system needs to be in place both to implement the opt-out and also to re-enrol the worker at a later date.

Failure to auto-enrol

Employers must comply with the requirements and must be careful not to provide inducements to workers to opt-out, take any action which will mean the scheme ceases to be a qualifying scheme without providing an alternative, or take any action whereby the jobholder ceases to be an active member of a qualifying scheme without putting them into a suitable alternative scheme.

The Pensions Regulator has a range of new powers to enforce compliance with the new requirements. Initially the Regulator will try to correct behaviours by discussing any breaches with the employer to remedy these. If this fails to work, the Regulator will issue the employer with a Compliance Notice (a formal requirement to take corrective action). If neither of these sanctions are effective, the Regulator is able to take corrective action which can be in the form of penalty notices for non-compliance of up to GBP 50,000. There are also potential criminal sanctions; officers of the employer company could receive a prison sentence for wilful failure to comply with the requirements.

Conclusion

Starting in October 2012, there will be a greater burden on employers to ensure that their workers are enrolled into a suitable pension scheme and to make minimum employer contributions. The sanctions for failing to comply with these requirements are potentially severe and employers should begin considering the steps they need to take to ensure they are ready for auto-enrolment.

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