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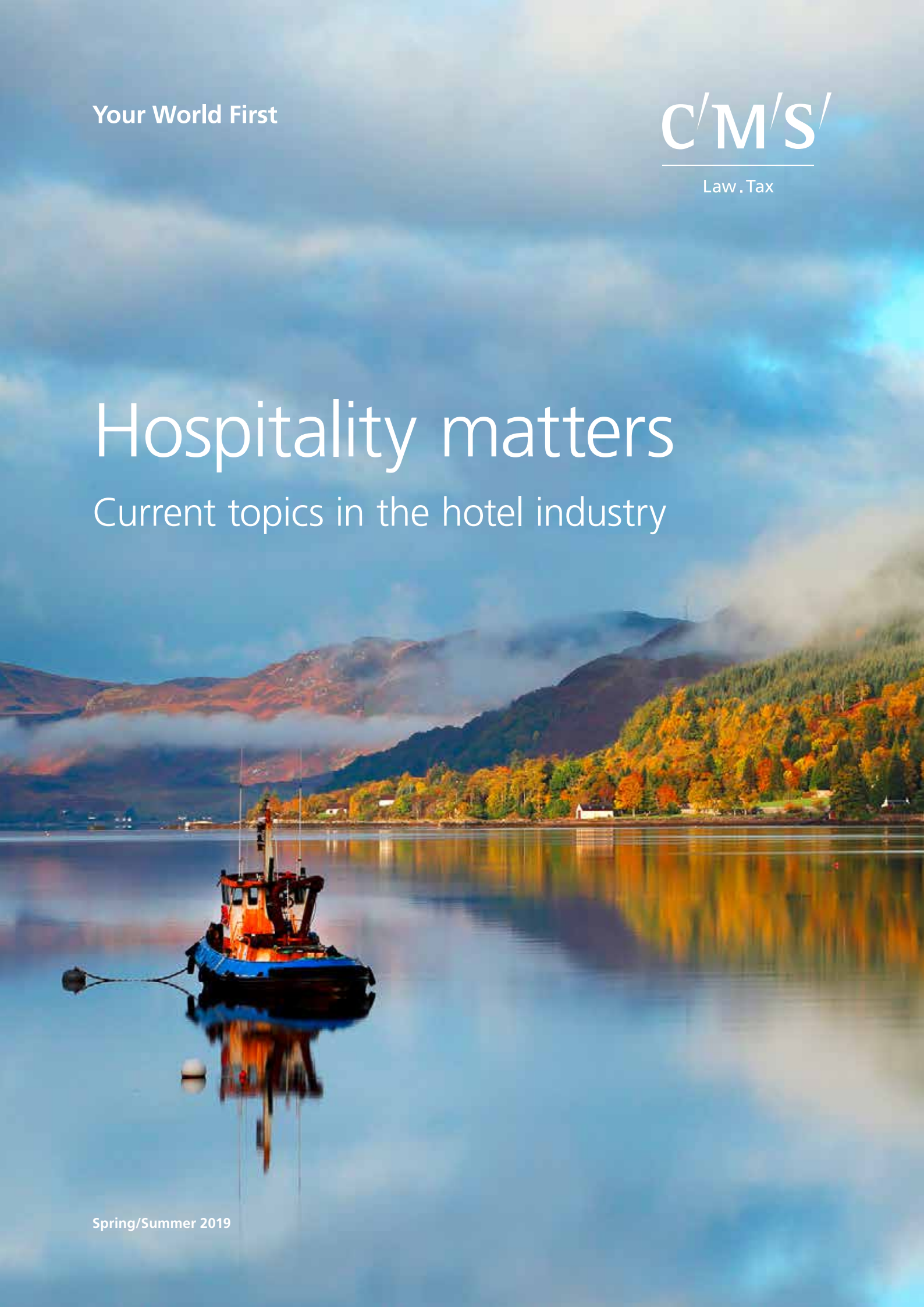
Hospitality matters

Current topics in the hotel industry



Spring/Summer 2019

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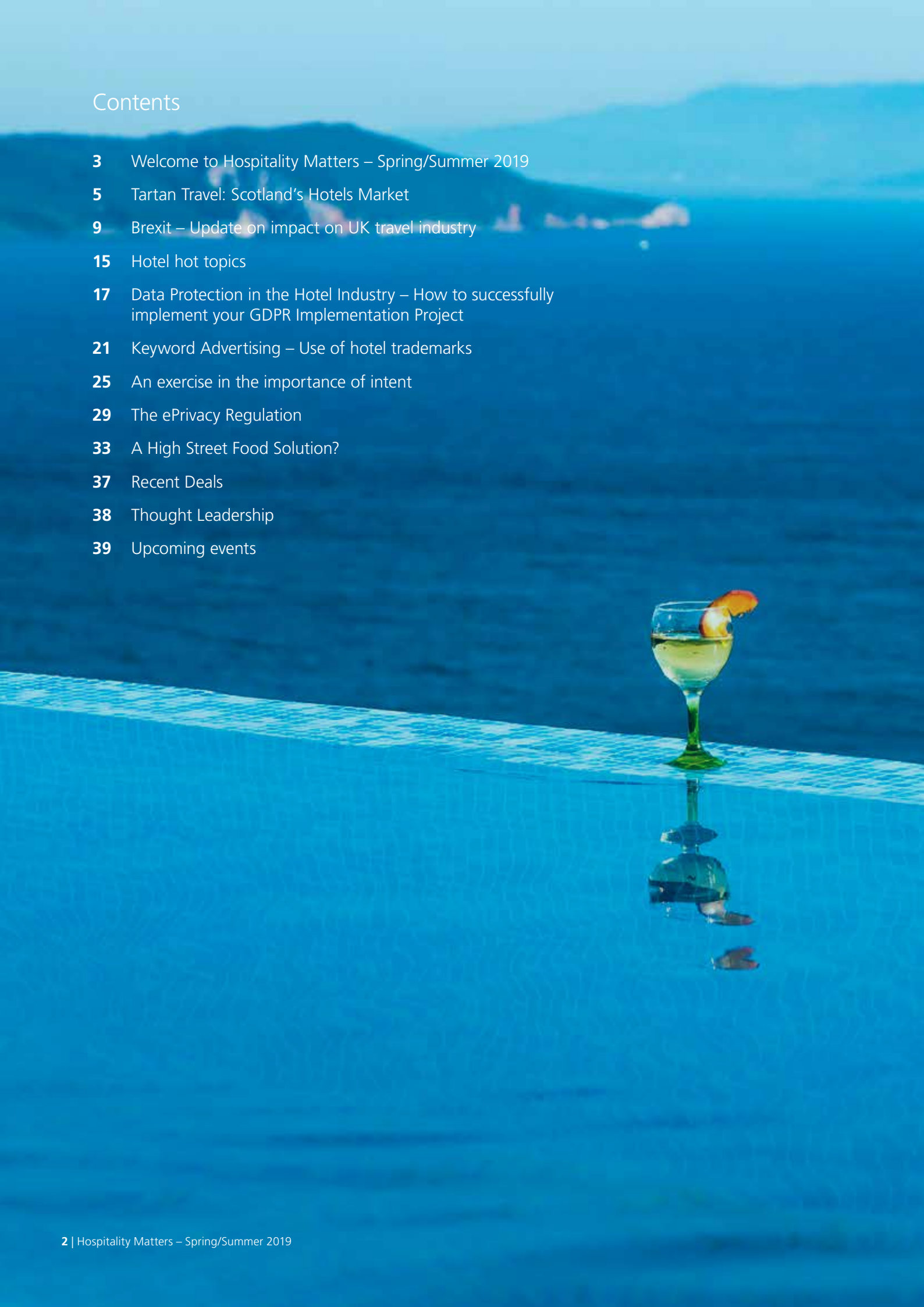

Welcome to SPRING/SUMMER 2019

Welcome to Hospitality Matters, our regular bulletin for the hotels and leisure industry.

In my last introduction I referred to the uncertainty of the future due to upcoming Brexit and US elections and in the last six months, not much has changed – we are still no closer to finding out what form, if at all, Brexit will take. But in case you were unsure what impact it might have on your business, we have updated our 2016 advice on the impact on the sector and the updated advice is set out in this edition. The finely balanced political split in the US legislative houses after the mid-terms continues uncertainty as to what extent Trump will be able to deliver his legislative agenda in the US. Macron has his own problems in France and the regular Saturday protects of les gilets jaunes is having a small but measurable impact on the Paris hotel, restaurant and retail sectors.

Within the hotel & leisure market, it seems clear that we are broadly at the top of the economic cycle. But no one seems to be worried about a hard fall. Some sub-sectors are past their peak, the restaurant sector in particular. On the day of writing this editorial the Jamie Oliver restaurant group has been placed into administration, threatening 1,000 jobs after a potential sale fell through. This follows a number of other groups, many of whom perhaps expended too fast in a rising market and are now struggling to keep up with flat revenues while rent increases, food inflation and wage inflation eat into what were already thin margins.

In the hotels sector, distress is not an issue, but equally trading has plateaued and yields are at record lows, meaning many investors find it hard to finding buying opportunities with growth potential. Low yield investors, such as pension and annuity funds and long term private wealth are still buying, as hotels still generate better yields and cashflow than more vanilla investments like offices and warehouses. And retail and restaurant properties are looking exposed to the higher credit risk of their tenants.

But value and activity can be found in markets with the right metrics for investment. As highlighted in this bulletin, Scotland has been a highly targeted market with record investment into Scottish hotels. We have also seen more activity in markets like Italy, Spain and Croatia through both acquisitions and development.

The other big industry news since our last edition was Marriott's announcement of a very major cyber breach with hundreds of millions of customers' personal and payment data stolen. Fortunately for Marriott, there seems to be little or no reports of customers being subject to fraudulent activity as a result; and the $72m remediation costs they have reported up to March 2019 have been fully covered by insurance. So ultimately the whole industry will pay through increased cyber security premiums. No doubt there will be more costs, and perhaps some fines, still to come for Marriott. So if you haven't already fully completed your GDPR Implementation Project and do not want to suffer a similar fate, then we have an article for you in this edition on GDPR and another on the new EU ePrivacy Regulation.

After all as some have said (and others disputed): "*Data is the new oil*".

Thomas Page
Global Head of Hotels & Leisure Group

REGIONAL FOCUS

Tartan Travel: Scotland's Hotels Market

Scotland's hotels market saw record investment volumes of £902m in 2018 – a four-fold increase on 2017 investment volumes. Research by Savills broke down the 2018 figure into 25 individual transactions and components of 10 portfolios, with one hotel alone – the iconic Caledonian Waldorf Astoria in Edinburgh – selling for £85m.

With international parties remaining the dominant investor group in the market, representing over 75% of the market, why do so many people want a piece of Scotland's hotels sector?

Edinburgh

Colliers' 2019 Hotel Market UK Index recognised the Scottish capital remained as the top location for hotel investment in the UK, thanks to a combination of strong market performance and low building costs.

Recent developments include the Carlton Hotel Collection's new 98-bedroom Market Street Hotel, the first member property of the Design Hotel brand in Scotland. Opposite the city's main train station, and in a UNESCO World Heritage site, it features a rooftop champagne lounge with views across the capital. Meanwhile, autumn 2019 will see another budget sector Travelodge in the city, this time in the South Gyle area and targeted at business travellers and tourists due to its proximity to the city's airport. And the £1bn Edinburgh St James redevelopment, which CMS have now been advising developers Nuveen Real Estate on for over 10 years, will include a luxury lifestyle W hotel (the first W in Scotland and only the second in the UK) and a Roomzzz Aparthotel.

With international parties remaining the dominant investor group in the market, representing over 75% of the market, why do so many people want a piece of Scotland's hotels sector?

Tourism is booming. Spending by foreign visitors to Edinburgh in 2017 was £1bn, up from £822m the year before. But success brings challenges. Concerns about over-tourism and pressures on local government funding have collided, resulting in proposals to introduce Scotland's tourism tax in the city in 2021. The tax is proposed at £2 per room per night for the first week of a stay, and aims to raise £14.6m per year. There are worries the tax will make Edinburgh, already an expensive city, less competitive with other international destinations. Most hoteliers we speak to are opposed, although some are prepared to cautiously welcome the tax if proceeds are ring-fenced for industry-driven tourism initiatives.

There are also few gap sites left in the centre of Edinburgh available for redevelopment – although the local government authority are now encouraging investment along the city's currently under-developed waterfront, with a 187 room Hyatt Regency already in the pipeline.

Glasgow

Although it is Scotland's largest city, Glasgow is first to admit it doesn't have the same obvious tourist attractions as the capital. But things are changing. Its average daily room rate increased by 6.1% over 2018, even with a major increase in supply (up 10.5% between January 2018 and January 2019). And around 1,400 new rooms are set to open in 2019 and 2020.

So what is driving this growth?

The opening of the SSE Hydro concert venue in 2013 has been key to the growth of Glasgow's hotels market. Staging over 140 events annually, the 12,000 capacity venue has become one of the busiest entertainment venues in the world.

Glasgow is also benefitting from more conferences in the city. In 2017, just under a fifth of all visitors came to work, with the city welcoming over 500 conferences, worth £123m to the economy. Organisers also find that the fact that many hotels have large room numbers makes it logistically easier to organise accommodation for delegates.

The city also has good transport links, enabling visitors to explore the rest of Scotland.

Dundee

The coastal city of Dundee is enjoying a moment of regeneration.

The city's hotel sector has grown rapidly in the last five years, primarily due to the opening of the V&A Museum on the waterfront and other tourist attractions such as the RRS Discovery, the ship that took Scott and Shackleton on their first expedition to Antarctica. Many hotel investors and operators have taken advantage, either increasing room numbers at existing assets, such as the upping of the Invercarse Hotel's room count from 44 to 68, or opening new developments such as Percor Capital's conversion of a derelict Dundee jute mill into a 102 room Hotel Indigo and an 85-bedroom and studio suites Staybridge Suites. The city's local government authority has also been investing in hotels, including a 120-bedroom Sleeperz hotel which opened in 2018 as part of a £28.5m redevelopment of Dundee railway station.

Locals hope visitors will use the city as a base to explore nearby locations such as the home of golf, St Andrews.

However many in the UK hotel industry remain to be convinced that the city's wider tourist offering is broad enough to attract sufficient long-stay visitors to fill all the additional hotel room supply due to come online.

Aberdeen

Aberdeen is much more dependent on the oil and gas industry than any other city in Scotland, and the hotels market is no different, with a heavy reliance on business travellers working in the industry. The fall in the oil price in 2014 was reflected by a fall in both average room and occupancy rates with RevPAR hitting "rock bottom" in the first quarter of 2016. However, with oil prices now appearing to stabilise and efforts to diversify the city's economy (sustainable investment in renewables being just one example), positivity is returning to the market.

The Event Complex Aberdeen (TECA) arena, with a capacity similar to that of the Hydro in Glasgow, is due to open in the summer with many major acts already booked to play. It is hoped this will replicate the positive effect the SSE Hydro had on Glasgow's hotels market. Indeed, two new hotels are set to open on the site of TECA, and with an anticipated increase in large scale conferences to the city, they could prove to be an attractive proposition to both music tourists and business visitors alike.

With a lot of Aberdeen's existing hotel stock tending to be older and concerted attempts to build a sustainable tourism industry in and around the city, we could see more developers and investors looking at opportunities to build more new hotels and invest in revamping the existing stock.

Inverness and the North Coast 500

Inverness and northern Scotland are benefitting from a tourism boom, thanks largely to the North Coast 500. Dubbed "Scotland's Route 66", the route of just over 500 miles starts in Inverness and takes in castles, distilleries, breweries and breath-taking scenery as it winds its way around the coastal edges of the North Highlands of Scotland. With an array of hospitality options from family run bed-and-breakfasts to luxury hotels, the route has attracted visitors from all over the world – a welcome shot in the arm to a once declining market. Inverness in particular saw an increased daily rate last year, and investors and operators are planning substantial capital investment in the city.

Challenges going forward are continuing to widen out the infamously short tourist season in the north of Scotland, increasing room capacity in some of the more remote areas along the North Coast 500 route, and providing the infrastructure necessary to deal with increasing visitor numbers (with calls for tourist taxes to help fund that).

The future?

As we went to press, Brexit remained a concern. Scotland's hotels sector relies quite heavily on EU migrant workers. Could a shortfall in available hotel staff drive up wage and training costs?

Over-tourism has been an increasing concern in Scottish political discourse – with perhaps too much focus on the blunt instrument of a tourist tax and not enough on creative solutions to broaden out the tourist footprint and season.

But the future for Scotland's hotels sector remains bright.

In particular, Glasgow's successful positioning as a great international conference destination could encourage the opening of more luxury hotels.

And with Scotland increasingly playing host as a filming location for major movies and tv series such as Fast and Furious 6, World War Z, Avengers: Infinity Wars, Outlaw King, Mary Queen of Scots and Outlander, its unique cities and stunning countryside now rank among the world's best tourist destinations.

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Brexit – Update on impact on UK travel industry

Before the triggering of Article 50 (and the triggering of our historic 3-way merger) in 2017, we included a Brexit Q&A in an issue of Hospitality Matters. Two years later, we have revisited our predictions and updated our analysis in light of recent events.

As we stated at the time, it is still the case that no European Union Member State has ever left the EU. As such, the complex process of untwisting the UK from the intricate web of political, legal, financial, regulatory (and other) relationships and obligations is entirely untested.

This uncertainty may prove particularly troublesome for the hospitality industry, which has considerable cross-border exposure on issues ranging from employment to investment, regulations to revenue. As Europe's largest law firm, CMS brings you analysis and commentary on some of the key concerns facing the sector.

How will exchange rates affect inward travel into the UK?

As we predicted in 2017, the weakened pound did initially make the UK more attractive to tourists as it reduced UK prices relative to their own currencies and there was a short term boost to inward travel to the UK.

Since then the initial bump in spending has flattened out with no clear end to the uncertainty in sight. The Office for National Statistics report that overseas residents made 10.8 million visits to the UK in Quarter 3 2018, a decrease of 3% compared with Quarter 3 2017. While the UN World Tourism Organisation reported a 5% drop in tourist arrivals to the UK in the first 9 months of 2018. This is not reflective of an across the board dip, Europe as a whole was up 6% in that period.

This drop in inbound tourism to the UK has been partly attributed to a Brexit related drop in appetite from fellow Europeans (who account for around two-thirds of overseas visitors to the UK) rather than anything currency related.

Hopefully clarity over the Brexit deal will bring market stability but even then it's impossible to predict how the pound will react.

Areas of law affected: All

How will exchange rates affect outward travel from the UK?

As we predicted, the continued political uncertainty has left the pound volatile – after the referendum result the rate dropped by 13%. Although it has fluctuated over the course of the last 3 years, the rate as of Mid-May 2019 is 14% lower than that pre-referendum rate.

This shift in the UK pound exchange rate has seen international outbound travel more expensive. However, we have not seen the number of outbound trips decrease, with outbound trips increasing by 3% in 2017 over 2016 and a further 1% increase in 2018. But although the number of international trips continues to increase slightly, the rate of growth has slowed significantly. Through 2015 and 2016 total expenditure by UK outbound travellers was increasing by 10% for eight consecutive quarters. Since the start of 2017 this expenditure has been flat, with no net growth.

Earlier in the year booking platforms like Expedia reported a downturn in flight bookings beyond the original 29 March departure date however the push back to October might mean an uptick in summer bookings.

While negotiations rumble on, the European neighbour that will suffer most from a serious downturn in UK outbound tourism, namely Spain is busy trying to take steps to protect its pieces of the pie. It recently approved a decree guaranteeing British residents and tourists access to healthcare for a specific time. It remains to be seen whether other countries will follow suit.

Areas of law affected: All

What effect will a fall in UK GDP have on operational activity?

As we stated in 2017, the hotel market demand curve has traditionally tracked GDP very closely.

PwC's latest UK Hotels Forecast Update report predicts that (assuming a Brexit deal is reached and there is no disorderly 'no deal' exit from the EU) UK GDP growth will remain modest at around 1.4% in 2019 and 1.7% in 2020. As the report admits, taking into account inflation, this is not really growth in real terms.

If GDP growth remains as PwC predict then in the short-medium term, we would expect domestic demand for UK hotel services to follow. If a more disorderly Brexit has an adverse impact on GDP, we would expect a similar effect on hospitality demand.

Areas of law affected: All

What effect will the UK's legislative autonomy have?

The UK will be free to make its own laws on matters previously covered by the EU, such as health and safety, food labelling, energy efficiency and certain employment rights. However, there is no indication that the UK would seek to make any material changes in these areas. The minimum wage and the National Living Wage have had the biggest economic impact of all recent employment laws on hotel and leisure businesses. Both were introduced by the Conservative government rather than imposed by EU legislation. We do not expect Brexit to have any effect on these laws. Any other UK employment laws (except for immigration and GDPR – see below) that change as a result of the UK leaving the EU are unlikely to have a material impact on UK businesses.

Areas of law affected: Employment, Health & Safety

What effect will a loss of freedom of movement have on the industry?

Hotel and leisure businesses in the UK tend to have very high numbers of non-UK employees. This is partly driven by requirements for a steady supply of relatively young, hard-working, low-paid staff and wide-ranging language skills.

It is estimated that between 12-23% of the sector's workforce made up of EU migrants and that the sector currently requires 62,000 EU migrants per annum to be able to maintain current activities and to grow.

The EU Settlement opened earlier this year, enabling EU citizens to apply to stay in the UK after 30 June 2021. Home Office figures reveal that more than 600,000 EU citizens have already applied to stay in the UK post-Brexit.

While the scheme is a positive step forward for the industry, the concern is that the flow of future EU migrant workers that the sector heavily relies on will be stifled. It could be very difficult for hoteliers to recruit workers if the Government follows through on its proposed £30,000 salary minimum for foreign workers seeking five-year visas after the UK leaves the European Union. There is already talk of this proposal being revised.

Areas of law affected: Employment

Are there likely to be any security issues for international travellers?

Despite more European terrorist attacks in the last few years including those in Manchester, London and Barcelona, international tourism remains fairly buoyant. As we predicted in 2017 these attacks have had short-term impacts on city destinations however we do not believe that Brexit will have a major effect on the safety or security of the UK and, therefore, visitor numbers will not be significantly affected in this regard.

Areas of law affected: All

Will Brexit affect cross-border investment from non-UK investors into the UK?

Despite our uncertainty in 2017 over the outlook for inward investment in the hotels market, investor appetite has so far remained robust, driven by solid operational performance and favourable exchange rates for non-sterling investors from countries such as Israel, Singapore, Korea and the Middle East.

PwC's UK hotels forecast update for 2019 and 2020 Report reported transaction volumes to mid Feb 2019 of c. £984m and an expectation for continued inward investment from Europe and the Far East looking for good opportunities and strong returns, especially given the relative low value of the pound. Its report anticipates that the total deal volume in 2019 will decrease by around 10% with a further softening in deal volumes in 2020 to around £5.4bn.

On a positive note, members of our Hotels & Leisure group attended IHIF 2019 in March where the Economic Overview was delivered by Thanos Papasavvas, Founder and CIO, ABP Invest Ltd. *Papasavvas said that there will be opportunities for non-Sterling investors to invest in the UK and for medium to longer term investors, the UK represents a good opportunity. Providing the central banks maintain an ample level of liquidity, Papasavvas is positive about the economic outlook but warns of social and political unrest if the global economy, specifically the European economy, weakens.

*https://ihif.com/news/ihif-2019-the-recap

Areas of law affected: Corporate, Private Equity, Real Estate

How will access to debt from non-UK lenders to fund investment and capital expenditure be affected?

It is still not clear whether the UK leaving the EU will have any adverse impact on European lenders' willingness or desire to do business in the UK, or whether they will seek to keep their activity within EU boundaries. If availability of debt for larger deals were to reduce or if pricing were to go up (e.g. to hedge increased exchange rate volatility) then this would decrease investment activity and hence asset pricing. It may also inhibit existing investors from borrowing to fund capital expenditure and other improvements to UK assets.

Anecdotally, we have noticed some reluctance from EU27 lenders to do deals in the UK until the Brexit uncertainty is resolved.

Areas of law affected: Banking, Financial Services

How will investment decision-making be impacted by the post-referendum political and legislative environment?

The uncertainty of the last two years continues and will do so until an agreement on Brexit is signed including continuing to see deferrals of investment decisions by cautious investors. The UK currently has one of the lowest corporation tax rates in Europe and the UK government has committed to cutting it to the lowest, 17%, by the end of 2020, ensuring that it remains one of the most competitive corporate tax jurisdictions in the G20.

The governments ability to deliver these tax cuts will depend upon the impact of Brexit on GDP and wider economic activity.

Areas of law affected: Corporate, Private Equity, Real Estate, Taxation

What about GDPR?

We did not deal with GDPR in the 2017 article, but since coming into effect in 2018, GDPR has had a significant impact on consumer facing businesses, including hospitality.

If the UK leaves the EU and the EEA, EU businesses operating in the UK will be subject to the EU's rules on the transfer of data to third countries and UK businesses will still be subject to GDPR to the extent they hold information on EU citizens. It is likely that UK domestic legislation will continue to mirror GDPR notwithstanding GDPR's lack of direct application to the UK after Brexit.

Personal data can only be transferred from the EU to third countries (including a post-Brexit UK) if an adequate level of protection is guaranteed. Typically, the EU will make an 'adequacy decision' on this but this seems unlikely in the immediate aftermath of a No Deal Brexit.

This is potentially a big problem for all areas of the hotel & leisure sector. By way of example if you have a UK hotel but rely on reservations through a booking site that is based in the EU27 there could be problems. You could have issues if your corporate group includes any other EU27 entities with which data is exchanged or if you use IT providers (including include and data storage providers) to process data – depending on where they process it. If this issue is relevant to your business you should seek advice now to ensure that you have data sharing agreements in place between UK and EU27 entities that include EU compliant model clauses to allow data sharing to continue even after a no deal Brexit.

A deal will hopefully mean we can continue to process personal data in much the same way as we do today, but there may need to be more formality around processes for UK and EU27 entities.

Hotel **hot topics**

Plastic Packaging and Waste

In February, four consultations relating to packaging, plastic use and waste management were launched with potentially major implications for the hotel and leisure sector.

The consultations are open until 12 and 13 May and relate to a deposit return scheme for beverage containers for England, Wales and Northern Ireland; a UK tax on plastic packaging imported or manufactured in the UK which does not contain at least 30% recycled content; the reform of the UK-wide producer responsibility regime for packaging; and ways to increase the recycling of municipal waste from households and businesses in England. The proposals set out radical measures to overhaul the packaging waste system and trigger behavioural change. More information on plastic, packaging and waste – tinyurl.com/CMSppw.

Air Quality Schemes

Air quality is top of the political agenda in London. Research shows that pollutants such as nitrogen dioxide and particulates are linked to a large number of deaths per year. The UK government (at both the central and local level) are under legal and political pressure to meet EU Air Quality Directive targets.

If you have businesses in any of the UK hotspots where air quality schemes are proposed then you may face a significant impact on access to business for guests, staff and deliveries. Our guide explains the potential risks and impacts and how you can prepare to de-risk the impacts. More information on air quality schemes – tinyurl.com/CMSairquality.

Modern Slavery – a Key Issue for the Hospitality Sector

Modern slavery can take many forms including the trafficking of people, forced labour, servitude and slavery. The hospitality sector is particularly susceptible to issues of human trafficking and sexual exploitation as well as labour exploitation of those working in hotels. More information about modern slavery – tinyurl.com/CMSmodernslavery.

Hotel booking sites to make major changes after CMA probe

The Competition and Markets Authority has concluded investigations into the sales practices of six hotel booking sites. Expedia, Booking.com, Agoda, Hotels.com, ebookers and trivago have all entered into legally binding commitments in relation to: making it clearer as to whether hotels have had to pay commissions to rank higher in search results; displaying all compulsory charges such as taxes and booking or resort fees; and not engaging in identified pressure selling practices or misleading discount claims.

The CMA has said that it will continue to monitor the activities of hotel booking sites to ensure they comply with their commitments. It has also announced that it will be writing to other stakeholders in the industry such as travel agencies, search engines and hotel groups to make sure they meet the same standards as the commitments offered by the hotel booking platforms. If these are not respected, the CMA may take further enforcement action. More information on booking site changes – tinyurl.com/CMAcommitments

Data Protection in the Hotel Industry – How to successfully implement your GDPR Implementation Project

25 May 2019 marks the first anniversary of the entry into force of the EU General Data Protection Regulation (GDPR). Despite being a year on, there are still many problems in its implementation in practice. The new regulations force every company in the hotel industry to examine processes and procedures in order to avoid the risk of a heavy fine due to a violation of the GDPR. This also applies against the background of some "data leaks" in the hotel industry. In addition to measures taken by the supervisory authorities, the GDPR provides 'affected persons' with a "claim for immaterial damages" as a tool, meaning they can claim damages for non-pecuniary loss (a kind of compensation for "pain and suffering"). Not to mention the negative publicity that data protection violations entail.

The numerous fines imposed in Germany – e.g. 80,000 euros due to the unencrypted storage of health data – and in the other EU states – show that fines are not just a theoretical risk. Against this background, we have described how a project to implement the requirements of the GDPR should be structured and implemented in order to avoid data protection violations.

> Especially in the hotel sector, data protection has to be adhered to.

The operation of a hotel generates a large amount of personal data.

> *"Many hotel guest data are personal and sensitive, because the contact between the guest and the hotel is naturally narrow. The hotel is familiar with the eating habits and preferences of the guest, learns about his leisure interests, cleans his bathroom daily and straightens his bed. Often the hotel has even knowledge of the health condition of the guest, of diseases, allergies or diets. The hotel knows which television programs are being broadcasted by the guest, which visitors he receives, which means of payment he uses and what his next destination is. That is why the protection of guest data according to the data protection law is absolutely necessary and the disappointment of the guests with errors are particularly easy to understand…."*
>
> *"Hardly any other merchant gets such a comprehensive insight into the personality of the customer…."*
>
> *(Extract from the publication "Orientation guide 'Data protection in the hotel industry'" of the State Commissioner for Data Protection and Freedom of Information Rhineland-Palatinate (Germany), published 2013).*

In addition to personal guest data, the protection of employee data should also be taken into account. And also data from suppliers or (other) customers, such as companies booking an event, may also be relevant if personal data (e.g. contact person names, names of persons attending an event) is collected. The GDPR applies to all data of natural persons on the basis of which the person can be identified. For the personal data of employees, national data protection legislation may also have to be considered because some EU countries including Germany made use of the so-called opening clause in Art. 88 GDPR and regulated employee data protection using national laws.

Phase 1 – Project Structuring

In the first phase of the project, it should be structured with regard to its scope and the stakeholders involved. Our experience shows that in addition to the actual "core team" – often consisting of a project manager from the hotel,

the head of the legal team and the Data Protection Officer (should one have been appointed) – participants from all business units (e.g. sales, marketing, purchase, IT, HR) should be involved from the outset. This particularly applies to the company's IT department, which will be significantly involved in the project from the start. The priorities of the project are to be defined. For example, special attention should be paid to processes that are visible to the outside world, such as the design of the website for booking hotel rooms or data protection notices for hotel guests, and to processes that involve the processing of "sensitive data", such as health data.

The starting point of the so-called gap analysis, i.e. the comparison of the current situation with the target situation to be reached, which produces the GDPR compliance at the end, is the definition of the relevant processes. The processes should be precisely defined for each of the business units involved. The following questions are of particular interest: At which sources are personal data collected? What type of personal data is collected? What are the purposes of the collection of the data? How is the data processed? To whom is the data disclosed or transmitted and for what purpose(s)? At this point, external service providers (e.g. tour operators, agencies, IT service providers) who handle the data should also be considered. And last but not least and very importantly: What about the IT security of the company?

Our experience with GDPR implementation projects has shown that it is advisable to conduct interviews with business unit stakeholders in order to define the processes. A personal discussion usually delivers better results than confronting stakeholders with questionnaires which are difficult to answer from a purely data protection point of view. The interviews should be combined with training on the most important topics of GDPR.

Since detailed questions on the defined processes have to be clarified within the framework of the gap analysis, it makes sense to develop (online) questionnaires on the basis of the interviews which cover the core data protection issues and record the results in a structured manner. These questionnaires should then be made available to all employees of the business units that deal with personal data. The roll-out of the questionnaires should be accompanied by clear instructions and a deadline as well as (online) assistance from the project team.

Phase 2 – Gap Analysis

The actual gap analysis is carried out by the legal team and is aligned with the defined processes. At the end of the gap analysis it will become clear which GDPR requirements are not yet fulfilled by the hotel company on the basis of the answers to the questionnaires and the interviews with the stakeholders. For later implementation, it makes sense to divide the results found into risk categories.

Phase 3 – Implementation

In this phase the legal team drafts all documents, templates, tools and standards, which are required by the GDPR provisions, including but not limited to: data protection policies for guests, suppliers, personnel and job applicants, consent forms if necessary (e.g. for sending email newsletters to guests), model data processing agreements or data privacy clauses for contracts with external service providers. The basis for this is the record of processing activities of the company,

in which all relevant processes are mapped and which should be prepared on the basis of the gap analysis.

In addition, processes must be introduced to implement the rights of the data subjects, mainly guests and employees (e.g. data access requests). To this end, it is necessary to give the business units instructions on how to deal with such requests and to draft sample replies which can then be adapted to individual cases. This is because GDPR sets a strict time limit (usually not longer than one month) for responding to requests from data subjects. Failure to comply with these statutory requirements risks a considerable fine.

In addition, processes must be introduced that ensure that data breaches in the company are reported immediately to the right place, so that it can be checked which countermeasures must be taken and whether reporting obligations exist according to the GDPR. Here strict time limits apply. Following the gap analysis, the hotel company is informed for which processes a PIA (Privacy Impact Assessment) is to be carried out. This can be the case, for example, with video surveillance. The gap analysis will also give recommendations as to whether and how a data protection officer must be appointed if this has not taken place yet. Finally, a data protection and compliance concept for the hotel company must be developed.

The second part of the implementation consists of co-ordinating of the implementation steps in the hotel company and particularly in each relevant business unit. At this point, the results of the gap analysis should first be discussed with the stakeholders involved in the business units. They must be given concrete guidance on how to use the new templates, documents, tools and standards. It is not to be forgotten that the GDPR also places requirements on the training of the personnel that is engaged with personal data. As well as training on the most important requirements of the GDPR, personnel should be also be trained on the new templates and processes and how they must use these in practice.

What CMS can do?

Working on several GDPR projects in the hotel & leisure sector, CMS has developed a specific Hotel GDPR Action Plan as well as checklists to adapt our dedicated GDPR project approach to your sector specific needs. We have also developed best practice solutions for hospitality specific data protection documents and clauses, e.g. Privacy Policy for Hotelier, Clauses for model contracts, e.g. for event bookings. If you need guidance on these complicated regulations please get in touch.

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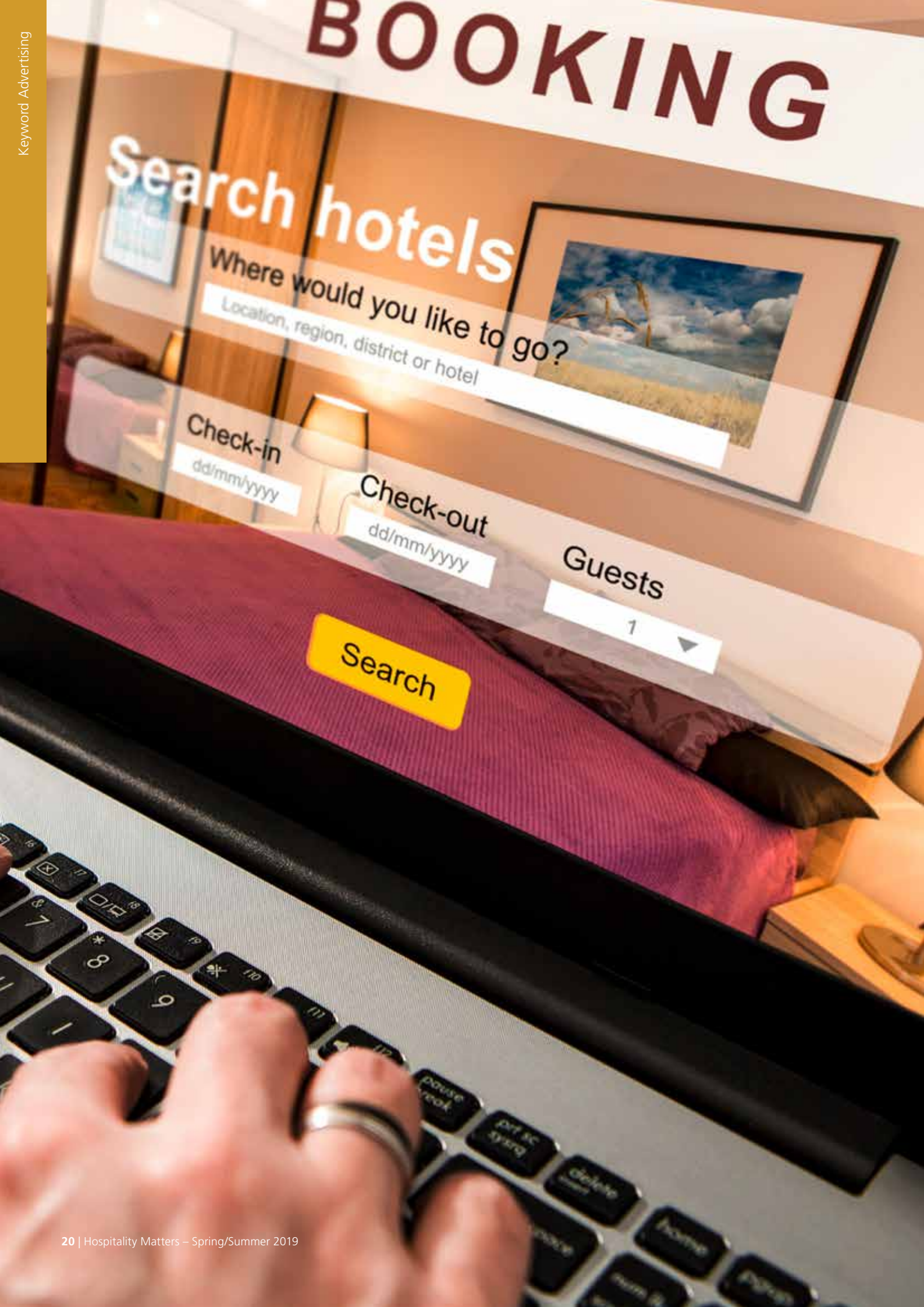
BOOKING
Search hotels
Where would you like to go?
Location, region, district or hotel
Check-in
dd/mm/yyyy
Check-out
dd/mm/yyyy
Guests
1
Search

Keyword Advertising
Use of hotel trademarks

The relationship between hotels and online travel agencies (OTAs) is often described as symbiotic: with each party deriving a benefit from the other's business. The largest OTAs have global marketing budgets running to several billion pounds and as a consequence have developed a considerable level of brand loyalty and trust. Hotel brands help to fund these marketing activities through the payment of commission and in return benefit from increased market exposure and the added consumer confidence that comes from booking through a well-known website.

However, the relationship between hotels and OTAs is finely balanced and there are circumstances where the parties' interests may diverge.

> The relationship between hotels and online travel agencies (OTAs) is often described as symbiotic: with each party deriving a benefit from the other's business.

One issue raised regularly by hotel brands is the ability of OTAs to bid on advertising keywords which include the trade mark of a hotel (whether partnered with that OTA or not). It has been well publicised that the UK's Competition and Markets Authority (the CMA) recently published of a list of 'unacceptable' practices for OTAs, cracking down on hidden charges and the use of pressure selling. However, the CMA's list is focused on protecting consumers rather than any practices relating to the relationship between hotels and OTAs.

Some smaller hotel and B&B brands have called on the Government to go further. A recent petition requested legislation to outlaw the practice of OTAs bidding on keywords that incorporate a hotel's trade mark. The basis for the proposed ban is that such a practice deprives hotels of direct bookings, forcing them to pay commission which either impacts on the hotel's revenue or must be passed on to consumers. Indeed, a 2011 report by brand protection agency MarkMonitor estimated that this practice costs hotels approximately $2.2bn per year due to online traffic lost to competitors and unnecessary commission payments.

The counterargument is that such a practice drives business to hotels. While direct bookings are potentially reduced, bookings as a whole are likely substantially increased because of the increasing popularity of the use of OTAs by consumers. Some studies suggest that while there may be a decrease in the number of clicks on the trade mark owner's own sponsored ads, there can be an increase in the number of internet users clicking through to a hotel's website via its unpaid links in the main search results.

But what does the law say about this issue? Recent case law means that the legal position in the UK is largely settled. Briefly: the practice of bidding on a third party trade mark as a keyword does not, of itself, necessarily constitute an act of trade mark infringement. While the use of such keywords is arguably a form of "free-riding", the keyword user is likely to have due cause to use such trade mark, particularly where such use is for the purpose of engaging in fair commercial competition.

There are a few important issues to bear in mind:

1. **Manner of Use:** The key question will be the context of use in the resulting advertising (i.e. the sponsored search result), and the consequential effect on the user. A court would seek to decide whether the advertisement "enables normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the services referred to in the advertisement originated from the trade mark owner". Most sponsored ads by OTAs will not fall foul of this test because they will be used to advertise the opportunity to book precisely the hotel to which the trade mark relates (albeit via the OTA website). By contrast, one hotel may not bid on the keyword of its competitor, if the resulting ad implies a connection with the competitor hotel.

2. **Price claims:** What if the OTA advert mentions a potential saving which can be derived by booking the relevant room through the OTA service rather than directly with the hotel? Any such advertisement is likely to constitute a comparative advert which must comply with the Comparative Advertising Directive. Any comparison must not be misleading and must "objectively [compare] one or more material, relevant, verifiable and representative features of [the compared goods or services] which may include price". Such requirements are mirrored in the wording of the CAP Code which is enforced by the Advertising Standards Authority. If such a price comparison is not capable of substantiation, then there is a potential basis for a complaint.

3. **Can I complain to Google?** Google operates one of the best-known keyword advertising services and a complaint to Google is a potential route to challenge keyword use or resulting advertisements.

   However, there are two points to bear in mind here. First, where the relevant internet service provider (e.g. Google) has adopted a passive role in the display of advertising resulting from keyword use, it will not personally be liable for such acts. Nonetheless, an ISP loses such legal protection once put on notice of an infringement. A complaint to Google could therefore secure the desired take down, if the resulting advertisement is demonstrably an infringement. As mentioned, that will not always be the case.

   Secondly, the Google Adwords policy was changed in October 2018 to state that "advertisers may use a trademark term in ad text if they are a reseller of, offer compatible components or parts for, or provide information about the goods and services related to the trademarked term". This suggests that hotels which do not like the current state of the law will not encounter a more sympathetic ear at Google.

So how best to manage this issue?

Absent clear misuse, an OTA is broadly free to bid on a third party hotel trade mark as a keyword and then to use such a trade mark to advertise the sale of the relevant hotel's services. Contracts between hotels and the major OTAs may even provide specifically for the OTA to engage in this practice.

So, aside from seeking explicit assurances from OTAs that they will not to bid on keywords containing the hotel's brands, preventing such issues via legal complaints are challenging. Most hotels are considering other approaches, such as offering discounts or other perks for booking direct. Whatever strategy is adopted, there is a fine line to be tread in striking the right balance: enabling a hotel to benefit from the use of an OTA service without running the risk of losing control of its brand in a manner which cannibalises direct sales.

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An exercise in the importance of intent

An update on the relevance of landlord's intentions when considering a tenant's rights of securing of tenure.

In the Autumn/Winter 2017 edition we highlighted a High Court case in which the High Court ruled that a landlord's scheme of development, devised with the sole purpose of defeating a tenant's security of tenure, was effective and defeated a tenant's right of renewal (*S Frances Limited v The Cavendish Hotel (London) Limited*).

We commented at that time that this decision appeared to be further illustration of the low threshold needed for landlords to oppose tenants' purported protections under the Landlord and Tenant Act 1954 (the 1954 Act) and was a reminder that statutory protection is not as secure as you might think.

Since we last wrote, S Frances was granted leave for a leapfrog appeal to the Supreme Court. The case was heard in December 2018 – the first time the 1954 Act has been considered by the Supreme Court. In what has been heralded as a landmark decision, the Supreme Court found in in favour of the tenant and gave guidance on the operation and ambit of the "intention" ground under the 1954 Act.

So what happened, what was the reasoning for the Supreme Court's decision and what are the potential ramifications for hoteliers and operators?

What happened?

S Frances is the tenant of a retail art gallery within the Cavendish Hotel. The tenancy has the protection of the 1954 Act, which permits tenants to remain in their premises following lease expiry and request that the landlord grants a new lease on the same, or similar, commercial terms (subject to reasonable modernisation).
Landlords can oppose such applications on various grounds, including the intention to redevelop.

The owners of the Cavendish Hotel (Cavendish) sought to oppose on this ground, citing proposals to convert the gallery into two retail units. Cavendish argued such a conversion would not be possible without the removal of S Frances. Evidence was provided in writing to show Cavendish's intention to undertake and complete the works which were calculated to cost over £700,000.

However, it was admitted by Cavendish that the scheme of works was devised with the sole intention of satisfying the requirements of the 1954 Act in order to evict S Frances. There was little or no practical or commercial sense to the works, which included demolishing an internal wall to rebuild an identical wall in its place. In the words of Lord Sumption, the works were *"objectively, useless"*.

The High Court took the view that the Court should be concerned only with intention, and not motive: i.e. what does the landlord intend to do, and will he do it and not why the landlord intends to do it. There need not be a genuine motive behind undertaking the works. If a landlord genuinely intends to undertake the works (and can provide suitable evidence of such intent), then this is sufficient for the requirements of the 1954 Act.

On the facts, the evidence of the intention offered was persuasive and the High Court found in Cavendish's favour.

S Frances appealed.

Supreme Court

The Supreme Court was tasked with considering whether "intention" can indeed be satisfied where a landlord's sole or predominant commercial objective in carrying out the works is simply to satisfy the 1954 Act requirements. Would this not counter Parliament's intention to provide protection under the 1954 Act?

The Supreme Court agreed with the High Court that the landlord's purpose or motive in carrying out the works is irrelevant, save for its influence in deciding whether *"a firm and settled intention exists"*.

The acid test is whether a landlord would undertake the works if the tenant left voluntarily. In short, the intention to redevelop must exist independently from the tenant's statutory claim to renew.

On the facts therefore, Cavendish failed. As the works were proposed purely to secure S Frances' removal they did not reach the requisite level of intent to satisfy the 1954 Act. In the words of Lord Sumption *"the commercial reality is that the landlord is proposing to spend a sum of money to obtain vacant possession.…The result is that no overriding interest of the landlord will be served which section 30 [of the Act] can be thought to protect."* The right to obtain vacant possession is not protected by section 30 of the Act. In fact, this is what Parliament intended to restrict.

Impact

It will be some time until the full impact of the Supreme Court's decision can be considered. Whilst a tenant-friendly decision, the facts in this case here were particularly unusual, possibly extreme. We will have to wait and see what happens when the precedent filters into the lower Courts.

For owners with leasehold interests, the decision will mean their landlords seeking to oppose renewal under the 1954 Act may be put to greater proof. Owners who themselves are landlords and have genuine redevelopment plans, should not find the decision unduly troubling. If a genuine intention to undertake works is shown (requiring the tenant vacating) and such works do not hinge on whether or not the tenant wants to stay or go, then it appears that those proposals would not fall foul of the 1954 Act.

> *Schemes of works devised solely to remove tenants may look appealing if other options for obtaining vacant possession are slim. But following from this decision the Courts will be looking more closely at a landlord's intent.*

A word of caution for landlords. Schemes of works devised solely to remove tenants may look appealing if other options for obtaining vacant possession are slim. But following from this decision the Courts will be looking more closely at a landlord's intent. Whilst landlords are undoubtedly less likely to be as open as Cavendish was in admitting the purpose behind the works, landlords should ensure they have robust evidence to provide intent should it become necessary to defend any potential claim from tenants.

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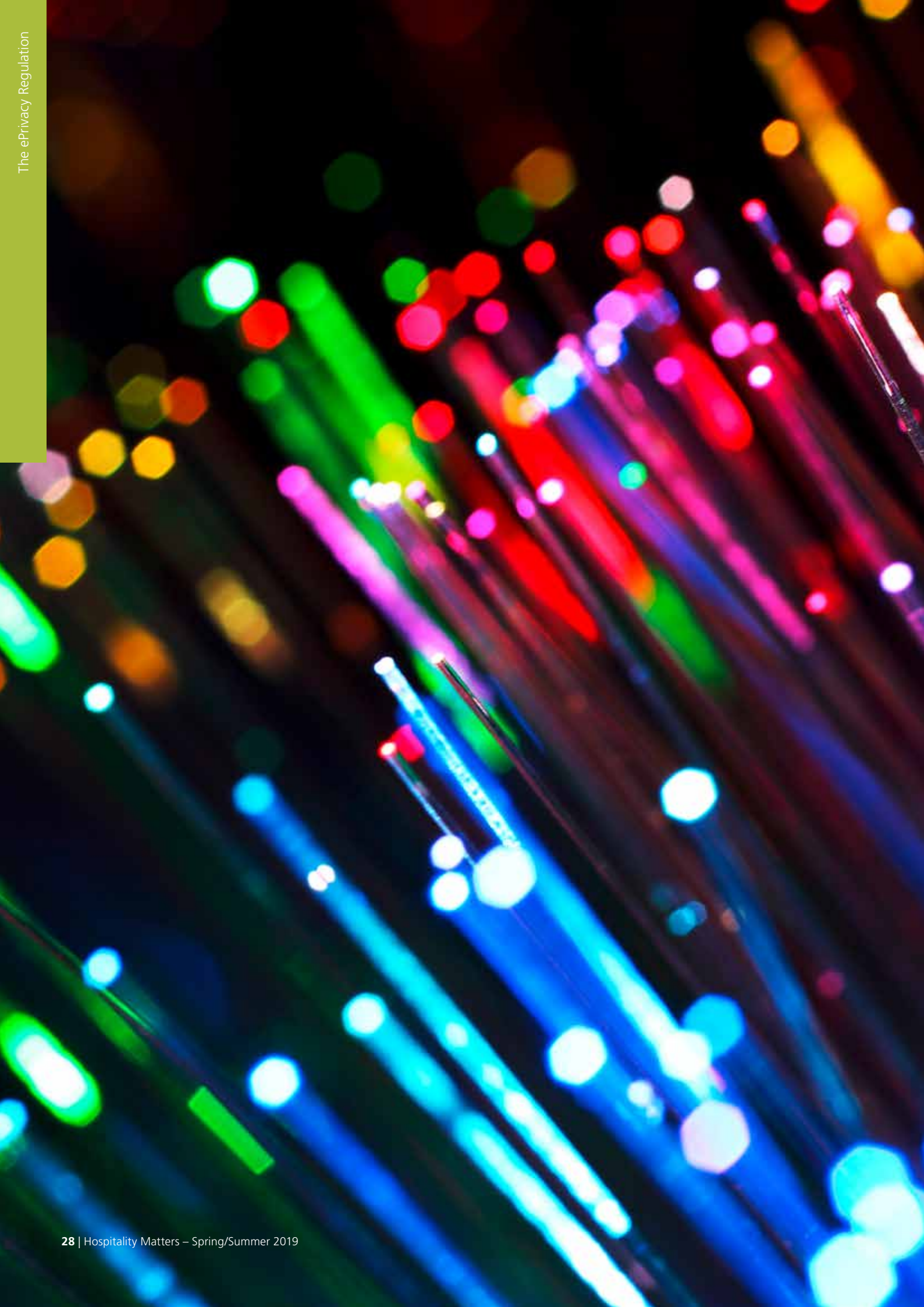

The ePrivacy Regulation

Following last year's major changes brought about by the General Data Protection Regulation (GDPR), the next regulation – the ePrivacy Regulation – is already on its way and lays down further requirements in relation to the processing of personal data. It is particularly relevant in relation to cookies and tracking and thus covers digital marketing in the hotel and leisure industry, e.g. the collection and evaluation of customer data with the intention of targeting customers and generating knowledge about the needs and preferences of guests.

> *The ePrivacy Regulation is particularly relevant in relation to cookies and tracking and thus covers digital marketing in the hotel and leisure industry.*

Negotiations on the draft ePrivacy Regulation continue and it looks like it will come into force in 2020 at the earliest. Nevertheless, it is worthwhile knowing about the framework in order to be aware of the forthcoming challenges. The current draft of the regulation provides for the same fines as for an infringement of the GDPR. Depending on the type of offence, the fines can amount to up to €20m or 4% of the group's worldwide annual turnover.

Key content and current status of the ePrivacy Regulation

The ePrivacy Regulation regulates the use of electronic communications services within the European Union and is intended to replace the Directive on Privacy and Electronic Communications. It is primarily aimed at companies operating in the digital economy and specifies additional requirements they need to meet in relation to the processing of personal data.

Scope of application

The material scope of the ePrivacy Regulation is very wide-ranging. It is not intended solely to regulate the processing of electronic communications data carried out in connection with the provision and the use of electronic communications services. It is also applicable to:

- the processing of information relating to end-user terminal equipment or processed by end-user terminal equipment (such as cookies),
- the placing on the market of software enabling electronic communication, including the retrieval and presentation of information from the Internet (browsers and apps),
- the provision of publicly accessible directories of users of electronic communications and
- the transmission of direct marketing to end-users by means of electronic communications.

In addition to the traditional telecommunications services, the regulation shall also include "over-the-top" category 1 services (OTT-I services) such as Messenger, VoIP services, e-mail services and machine-to-machine communications (M2M).

Tracking under the ePrivacy Regulation

The tracking provisions in the draft of the ePrivacy Regulation generated the most discussion and underwent repeated revision. These provisions primarily cover the targeting and re-targeting of users through cookies for advertising purposes.

Article 8 of the draft ePrivacy Regulation as it stands today protects users' terminal equipment, i.e. their smartphones, computers and other devices, and is aimed at website and app operators. Not all data

processing related to the use of terminal equipment will require consent. For example, the latest draft of the ePrivacy Regulation permits the use of session cookies that are technically necessary and of audience measuring tools without the consent of users. However, all other measures, especially tracking for advertising purposes, do require the user's consent, regardless of whether this tracking is performed using the provider's own cookies or third-party cookies.

Moreover, the ePrivacy Regulation aims to restrict offline tracking. This includes the use of data sent from devices such as smartphones for network connectivity purposes. Such data is required by radio standards like WLAN and Bluetooth in order for devices to establish and maintain connections with each other. These signals can also be used to (re-)identify devices and thus indirectly also their users, and to locate and track them within the range of a network. Parliament's proposal and the Council's current draft provide for the user's consent for the collection of such data unless it is done exclusively in order to establishing or maintaining a connection. The drafts also currently allow data to be collected which is processed solely for statistical purposes and which is anonymised or deleted once its purpose has been fulfilled.

One of the most controversial issues is a possible ban on tracking walls, also known as cookie walls. Under the new ePrivacy Regulation, user consent will be required for the use of tracking cookies. It follows that website operators will wish to make use of their website dependent on the user agreeing to their usage behavior being tracked. A cookie wall is erected to make this possible. This wall denies access to the website if the user does not consent to the use of cookies for tracking purposes such as ad targeting. While the European Parliament's 2017 draft called for an explicit ban on that practice, the current Council draft of February 2019 seeks to strike a balance between the interests of website operators on the one hand and the interests of users on the other. Accordingly, it will generally be permissible to make access to free website content conditional on users' consent to the use of tracking cookies. This will apply in particular if the user has the choice of two comparable offerings and one of them does not require consent to tracking. Different rules apply if the user has no choice but to consent to the use of tracking cookies when accessing certain services for which there are no alternatives.

CMS e-privacy website

Altogether, it remains to be seen which provision will be agreed upon in the final draft of the ePrivacy Regelation. To keep you up with the latest developments in e-privacy, CMS has set up its own e-privacy website where we have compiled the most important information on the e-privacy regulation and the status of the legislative process.

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A High Street Food Solution?

Empty retail spaces in town centres have been all over the news for some time now. But emerging from the doom and gloom of retail collapses, these spaces can provide opportunities for innovative food operators who can tailor their business model to operate without necessitating a change in planning permission.

The sale and preparation of hot food usually falls under either use class A3 "restaurants and cafes" or A5 "hot food take-aways" where this is the primary activity. By way of contrast, retail units will have permission for A1 use, which is reserved for uses such as shops, retail warehouses, hairdressers, undertakers, travel and ticket agencies, post offices, dry cleaners and internet cafes, the retail sale of goods other than hot food, and the sale of sandwiches or other cold food for consumption off the premises. On the face of it, the A1 use class is not suitable for the sale of hot food for consumption on the premises. How then, are operators such as Pret, Canteen, Subway and Itsu trading from A1 premises?

The benefits of operating under A1 use are numerous. Most retail units fall under A1 user, so there is no need to apply to the local authority for change of use. Such planning applications can be time and cost intensive and may ultimately be rejected, or else permitted but with onerous conditions (such as the requirement of technical equipment or restricted opening hours).

> *The expansion of non-traditional sandwich shops operating from A1 sites shows that there is a grey area which can be exploited commercially. We are seeing an increase in brands modifying their offering to fit the A1 mould and reworking their menus so primary cooking is not required.*

Additionally, many A1 sites are taken without the payment of a premium to landlords, unlike properties benefiting from A3 use. The capital injection can therefore be lower for operators whose business model is based on the A1 lease. If an operator can successfully open under an existing A1 user, they can exploit high footfall areas with half the hassle.

Traditional restaurants are not suitable for the A1 format. However, there is some room for food operators to manoeuvre within A1 user. Food can be sold from A1 premises if the primary use of the premises is of a retail nature, but ancillary uses are permitted and here the confusion lies. Primary cooking cannot take place on site but hot dishes can be prepared off site and held at a set temperature or reheated, a model which Eat, Pret, Starbucks and other lunchtime favourites are taking advantage of. The emphasis is on limited seating which is suited to the "grab and go" lunch model, sandwich shops in particular can benefit. However, the expansion of non-traditional sandwich shops operating from A1 sites shows that there is a grey area which can be exploited commercially. We are seeing an increase in brands modifying their offering to fit the A1 mould and reworking their menus so primary cooking is not required.

But when are you crossing the line into A3? How many tables and chairs are acceptable and how much hot food can you introduce? Other factors to consider include décor, the style of seating, the presence of retail displays and the availability of toilets. It is a matter of fact and degree and navigating the fault lines between A1 v A3 uses requires care. Local planning authorities are acutely aware of this grey area, therefore, care needs to be taken to ensure a viable business model is not put at risk due to regulatory

planning blind spots. High street chains have struggled to get the balance right and some councils do not look favourably to those flouting the rules, although not all councils will have the resources to enforce breaches which are marginal in nature. In the past, Caffè Nero has experienced a backlash from local businesses and councils after opening several branches in towns where the units were designed as A1 retail use.

Subsequent applications for A3 use through retrospective planning appeals followed. More recently, Westminster Council issued enforcement proceedings against Paul UK alleging a lawful A1 use had changed to a mixed A1/A3 use. The presence of bench type seating, a dumb waiter to the kitchen below and lighting and décor indicative of a café were all signs that the line into A3 had been crossed. In reality, decisions on whether to enforce A1 use strictly are discretionary and will vary from council to council.

> *Given the woes of the high street, operators able to tailor their models to fit into the A1 mould will have an abundance of sites to choose from without the initial problems associated with applying for change of use to A3 and inconsistent approaches by councils.*

Given the woes of the high street, operators able to tailor their models to fit into the A1 mould will have an abundance of sites to choose from without the initial problems associated with applying for change of use to A3 and inconsistent approaches by councils. This is an attractive option, but planning inconsistencies and differing approaches by councils can be a threat. However, uncertain times are known to encourage entrepreneurial activity and it is no surprise that innovative operators are taking advantage of these blurred lines. With high streets suffering and the predominance of online shopping, local authorities should perhaps be flexible in allowing food operators to grow within the A1 model. Failing that, clear guidelines are required so that food operators are provided with certainty without the fear of repercussions from local councils.

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Recent deals

Ei Group plc

£348m disposal of 370 properties comprising public houses and other commercial properties within its commercial properties division.

Nobu Hotel, Shoreditch

Acting in the High Court proceedings to force an amendment to the first Ultra Low Emissions Zone orders introduced in Hackney to take the streets around Nobu Hotel out of the zone.

The All England Lawn Tennis Ground Plc

Advising the owner of the tennis courts, grounds and buildings on which the Wimbledon Lawn Tennis Championships are staged, on its acquisition of The Wimbledon Park Golf Club and on the latest issue of Centre Court debentures.

Tom Aikens

New joint venture to create a restaurant platform for London including a new flagship restaurant in Fitzrovia.

Deliciously Ella

Series B fundraising for food blogger who was raising further funds to fund their growing FMCG food business.

HolidayTaxis Group

Disposal of this leading provider of transfer and mobility solutions operating in 21,000 transfer routes, spanning 150 countries, to Hotelbeds, the world's leading bedbank.

M&G

Site acquisition and forward funding of 620-bedroom hotel at North Wharf Road, Paddington, London.

AccorInvest

Site acquisition and forward funding of a new 270-room Novotel hotel at Cambridge North.

Bank Leumi

Financing of the acquisition by a JV of HIG Capital and Hamilton Hotel Partners of the BollAnts Hotel and Spa in Germany.

Santander

Financing of the development of a Hilton hotel owned and managed by the Arora group at Terminal 2 of Heathrow Airport.

Al Marjan Island

Advising the owner on an hotel management agreement and other agreements in relation to the Barcelo Al Marjan Island development, a 500+ keys all-inclusive resort.

Deutsche Hypothekenbank (Actien-Gesellschaft)

Advising the London Branch on the secured debt financing of the Holiday Inn Express, Dublin City Centre.

Edition Milan

Advising SMB Milan as developer on the hotel management agreement with Marriott for the Edition Milan Hotel development.

Quest Liverpool

Advising Cycas Hospitality on its hotel management agreement for the Quest Hotel in Liverpool.

Accor

Advising Accor on the hotel management agreement and portfolio agreements for conversion of six Park Inn hotels to Mercure.

Your World First

CMS Law . Tax

In July 2018, we launched our latest thought leadership report examining what technology is expected and valued by millennials when they visit restaurants and hotels. The survey of over 5,000 millennials globally is contrasted with the opinions and experiences of 170 hoteliers and restaurateurs with some interesting results. The report has been very well received with over 30,000 views on our website and over 31,000 views of our report video.

Find out more about our thought leadership - tinyurl.com/CMSfindingbalance.

Finding the balance: human touch versus high tech

Millennials and the future of the hotel and restaurant sector

Upcoming **events**

Jun 5
Annual Hotels Charity Quiz
5 June 2019, Sway, Kingsway, London

Jul 10
European Hotel Finance Forum
10 July 2019, Pennyhill Park, Bagshot

Sept 18
The Restaurant Conference
18 September 2019, London Marriott, Grosvenor Square

Sept 23
Hotel Investment Conference Europe
23 & 24 September 2019, Hilton Bankside, London

Oct 7
Expo Real
7-9 October 2019, Neue Messe München, Munich

Oct 9
The AHC
9 & 10 October, Hilton Manchester Deansgate

Oct 23
HICAP – Hotel Investment Conference Asia Pacific
23-25 October 2019, Kerry Hotel, Hong Kong

Nov 4
World Travel Market, International Travel Trade Show
4-9 November 2019, ExCeL, London

Nov 5
Deloitte European Hotel Investment Conference
5-6 November 2019, London

Nov 13
CMS Hospitality Conference
13 November 2019, CMS Cannon Place, London

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