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Taking Stock

Summer 2015

Consumer Products Bulletin



Taking Stock

Welcome to the latest edition of Taking Stock, our consumer products and retail law bulletin. This publication explores recent legal developments in the consumer products sector which should be of interest for in-house legal and business personnel alike.

In this edition, we have four articles covering the following:

- An update on disability awareness and creating a diverse workforce to influence consumers' brand perception;
- An overview of the Consumer Rights Act and its impact on consumers and businesses;
- Recent government measures requiring major beneficial owners of UK companies to be publicly identifiable; and
- The impact of the circular economy strategy on consumer products companies.

If you would like to discuss any of the issues in this edition of Taking Stock or wish to provide any feedback, please contact me, the author(s) of the relevant article or your usual contact at CMS.

We are holding a European Wine Tasting event on September 3, to celebrate our successful move to Cannon Place and our recognition as European Consumer Products Law Firm of the year. We hope you can join us at this event and look forward to welcoming you to Cannon Place.

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Reasonable adjustments: workplace perceptions have been adjusted

Disability Awareness Day 2015 this summer has coincided with the twentieth anniversary of the introduction of the statutory obligation for employers to make reasonable adjustments in respect of disabled employees, now contained in the Equality Act 2010, ('EqA'). Employers' perception of the duty over the last 20 years has evolved, influenced by the propositions that a genuinely diverse workforce is a more productive workforce and that demonstrable diversity influences consumers' perceptions of brands.

Disability remains the only protected characteristic subject to a reasonable adjustment obligation. Commentators highlight its 'reactive' nature:

'... to respond to the disadvantage experienced by a particular individual and to take account of the particular circumstances of the specific case and the specific person. Such sensitivity to the particular individual and their circumstances is an essential mechanism for ensuring that a countless range of barriers can be removed, on a case-by-case basis, for individuals with a vast range of different impairments, working methods, backgrounds and skills.'

The importance of the focus on the particular is hard to overstate – one size does not fit all.

Positive statements encouraging applications from disabled candidates are important, likewise commitments to using reasonable adjustments to help support and facilitate progression within an organisation.

Consumers are themselves diverse, with increasingly high expectations; and workforces are more commonly expected to reflect the characteristics of their immediate and national communities. Failing to access the UK's talent pool fully, by adopting policies, criteria or practices which do not facilitate the recruitment and retention of disabled workers, is a business risk for all employers, large and small.

The National Autistic Society indicates that in the UK some 700,000 people are diagnosed as being on the autistic spectrum but only 15% are in full time employment; and almost 80% of such people on benefits want to work.

Autism does not automatically exclude people from success in the wider workplace. Some roles may not necessarily be suitable, such as those on the shop floor, but it is increasingly recognised that features of autism may provide opportunities for employers and prospective workers alike. Asperger's Syndrome, for example, may lend itself to very high levels of concentration and acuity when dealing with figures and processing data. Such skills may be deployed very effectively in auditing/accounting, precision design and computer programming.

Adjustments to help support employees with Asperger's Syndrome may focus on how to interact with colleagues and accommodate particular challenges when building an internal network or participating effectively in team meetings. Managers may be encouraged to deliver unambiguous

‘Consumers are themselves diverse, with increasingly high expectations of a reflective workforce’



instructions and identify clear processes to facilitate clarification of instructions. Crucially, colleagues may also need training/information. This is not intended to stigmatise co-workers but rather to explain conditions: presentations to a wider workforce, via internal diversity network and external experts can be very helpful.

Cost is an important but not the sole factor when assessing the reasonableness of an adjustment. The Access to Work scheme remains a potential source of funding to support disabled employees, despite being under increasing pressure. Many of the Equality and Human Rights Commission’s (EHRC) examples of possible adjustments will be familiar to HR practitioners – e.g. allocating aspects of a role to a colleague who may more readily carry out those elements or altering hours and places of work.

Parallels can be drawn with the approach to family friendly policies. The utility and effectiveness of adjustments have to be considered: for example a request to work from home over an extended period may not be suitable for junior employees if there is a need for daily supervision and team working, whereas it may be more feasible for a senior role with greater autonomy.

Similar issues arise for pension and death benefits provided under occupational pension schemes. Attempts to exclude (or restrict) access to benefits may be discriminatory meaning employers bear any extra costs of providing these benefits for disabled employees. Reasonable adjustment obligations also apply so, for example, scheme literature may need to be available in braille.

Ongoing improvements in workplace technology can of course greatly improve the prospect of accommodating both physical and mental impairments. The EHRC states that an employer ‘might have to provide special equipment (e.g. an adapted keyboard for someone with arthritis or a large screen for a visually impaired person), an adapted telephone for someone with a hearing impairment, or other modified equipment for disabled workers (e.g. longer handles on a machine)’. Therefore, employers need to monitor technological improvements and also consider whether there may be scope to transfer an employee to a different role which may be more susceptible to effective adjustments.

It is to be hoped that over the next 20 years the application of the duty will continue ever more increasingly to be viewed less as a defensive form of litigation risk management and more as a positive tool for recruitment and retention.

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The Consumer Rights Act – impact on consumers and businesses

UK consumers spend an estimated £90 billion a month, yet the Law Commission's reports indicate there is a high degree of confusion about their rights. A clear understanding of consumer rights benefits both consumers and businesses that serve them by creating confidence, which increases sales. The Consumer Rights Act, largely coming into force on 1 October 2015, implements the Consumer Rights Directive and aims to consolidate more than 60 pieces of legislation – some of which are over 30 years old.

The major changes are outlined below:

1. Pre-contractual information

Pre-contractual information required to be disclosed under the Consumer Contracts Regulations 2013, including details on payment, delivery arrangement, digital content and after-sales service, are now implied terms – consumers can claim for any costs incurred (up to price of goods themselves) if goods do not conform.

2. Consumer notices

Fairness and transparency tests will apply to written or oral announcements or communications intended to be read by consumers (including promotions and renewal notices), though only where they either relate to the rights or obligations between a consumer and a business, or exclude or restrict a business's liability.

3. Models

Goods must match any model that is examined by a consumer before they enter into a contract unless specific differences are brought to their attention.

4. One attempt to repair and replace

Businesses will have one attempt to repair or replace an unsatisfactory product. If this is not successful, the consumer will have the right to a price reduction or to reject the product. Traders may make a deduction in respect of any use a consumer has had of the goods before rejecting them, in some circumstances.

5. Digital content

Arguably the largest change made by the Act, contracts for the supply of digital content are now treated as a separate category from goods and services with their own statutory rights and remedies for the first time. Content must be:

- of satisfactory quality according to the expectations of a reasonable person – this will vary depending on the usage of the content;
- fit for any particular purpose, and
- as described.

Remedies are now also available where digital content causes damage to a consumer's device (such as their phone or tablet) because of a trader's negligence.

6. Remedies for mixed contracts

The Act clarifies the position on remedies for contracts where goods and digital content are provided together (for example, a CD whose content may be downloaded) – remedies for goods will apply.

7. A new 'grey list' of potentially unfair terms

Disproportionately high charges where a customer cancels a contract, and terms allowing companies to determine the subject matter of contracts after their conclusion, or to determine the price after a consumer is bound by the contract, are now on the 'grey list'.

'The clarification in consumer rights should make disputes less likely and easier to deal with'



8. Private enforcers

The Act will give private enforcers the power to enforce consumer rights. Currently, the only private enforcer is Which?, though more may be added.

9. 'Opt-out' collective actions for infringements of competition law

Consumers can bring a collective claim if they raise 'same, similar or related issues of fact or law' before the Competition Appeals Tribunal rather than rely on private actions in the High Court. This is done on an 'opt-out' basis, meaning members of a class are automatically selected and must opt-out if they do not want to join the action. This is expected to make claims for losses arising from breaches of competition law easier to pursue.

10. Voluntary redress schemes

The Competition and Markets Authority can approve companies' redress schemes, which will allow consumers to get compensation for infringements of competition law without going to court.

Creating a voluntary redress scheme might stand as a mitigating factor when calculating the penalty for infringements, and will allow a business to control the scope and amount of compensation awarded, though parties can still choose to pursue compensation through the courts.

So how will it affect you?

Alongside many other benefits, the clarification in consumer rights should make disputes less likely and easier to deal with when they do occur. However, for many businesses the Act will require a review of the following:

- Terms and Conditions and any engagement letters
- returns policies
- online purchase wording, and/or
- business processes and procedures including complaints handling procedures.

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You will also need to ensure customer service teams and employees fully understand the changes.

The Department for Business Innovation & Skills has developed guidance and has already started business education. The Government will also release guidance to assist businesses before the Act comes into force in October.

All major beneficial owners of UK companies to be publicly identifiable

The Government has introduced a number of measures which are intended to enhance the reputation of the UK as a trusted and fair place to do business, increasing transparency around who owns and controls UK companies and helping deter and sanction those who hide their interest in UK companies to facilitate illegal activities. One of the most significant of those new measures will be the creation of a publicly accessible register of 'people with significant control over a company' (known as PSCs).

From a consumer's perspective these changes will make it easier to obtain redress from those who exercise influence or control over a company via a 'front' or stooge company director, and this transparency will also make it easier for companies to understand who they are doing business with, and who is involved in their supply chain.

As part of these measures:

- PSCs of UK companies will have to be identified and their names, nationality and addresses publicly disclosed
- companies will have a continuing obligation to identify and record details of their PSCs
- PSCs will have a continuing obligation to disclose their identity and certain details to the company, including how their beneficial interest is held, and
- members of the public will be able to inspect both the PSC register kept by Companies House and that kept by the relevant company, subject to certain exceptions.

Who is a PSC?

A PSC or 'beneficial owner' for these purposes will be a person who, directly or indirectly, owns or controls 25% of a company's shares or voting rights or who has the right to appoint or remove a majority of the board of directors of the company or who exercises or has the right to exercise 'significant influence or control over the company': this is broadly the same test as is used in 'Know Your Client' checks done by banks and professional advisers for anti-money laundering purposes. Where a qualifying beneficial interest is held through a trust or a 'firm' (i.e. a body corporate, including a company, partnership or other unincorporated association, whether or not a legal person), the trustees or members of the firm and any other natural persons who exercise control over the trust or firm will need to be disclosed and registered.

Who does this apply to?

The requirement to obtain, hold and file beneficial ownership information at Companies House will apply to UK companies that currently file information on their members at Companies House. Companies will have to confirm that this information is correct at least once every 12 months, or provide details of any changes. The Government is considering whether Scottish limited partnerships – which, unlike English limited partnerships, have separate legal personality – should also be caught. But UK companies with shares traded on AIM or the

‘Companies will have a continuing obligation to identify and record details of their PSCs’



Main Market of the London Stock Exchange, which are already required by chapter 5 of the UKLA's Disclosure and Transparency Rules (DTR) to disclose to the market details of holdings of voting rights at 3% and above, and UK companies with shares traded on an overseas regulated market with equivalent rules, will be exempt. The Government has power to exempt other types of company and is yet to decide which companies should be so exempted.

Is there any guidance?

A working group is being set up to provide guidance on the implementation of the PSC register, as well as an expert panel to draft statutory guidance on what is meant by 'significant influence or control'.

When will this be applicable?

These changes have been put in place through the Small Business, Enterprise and Employment Act 2015 which will come into force in stages:

- from January 2016, companies will be required to maintain a PSC register, and
- from April 2016, companies will be required to file their PSC register (and keep it updated) at a newly created PSC registry held and maintained at Companies House.

Comment

Although it seems clear that the Government's intention is to require public disclosure of each 'ultimate' major beneficial owner of every non-exempt UK company, a particular challenge will be addressing the scenario where a person wants to disguise the fact that he is the ultimate controller of a UK company (UK Co), and arranges for the shares in UK Co to be legally and beneficially owned by a non-UK company (Foreign Co). Where the Foreign Co does not even know who its owners are – e.g. because all its shares are in bearer form, or are held by a trust – it is difficult to see how UK law alone can force disclosure of the ultimate controller of UK Co.

Certainly the new rules will add to the administrative burden and compliance costs of all non-exempt companies. Now that the timing of the implementation of these rules has been confirmed, companies can review their internal process for monitoring shareholdings, identify whether or not they have any shareholders who will be PSCs and assign responsibility for maintenance of their PSC register.

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Becoming circular?

New circular economy developments

After setbacks in early 2015, there are now grounds to believe that the circular economy strategy may be back on track. The strategy has significant impact for companies in the consumer products sector and will be followed closely as the initiatives develop. The rejection of a package of measures supporting a circular economy initiative by the European Parliament and the subsequent withdrawal of the package in February 2015 by the European Commission was met with dismay by many sectors. To limit uncertainty regarding ambitions in this regard a strategy roadmap was launched in May 2015 with two connected consultations launched over the summer.

Having considered feedback on the previous proposals, the Commission has consulted until 20 August 2015 on wide circular economy concepts which, if reduced to specific measures, will affect all businesses in the supply chain. A number of potential areas for intervention are being discussed. As part of this process, on 12 June 2015, the Commission issued a separate consultation due to close on 4 September 2015 on the functioning of waste markets in the EU, including issues such as potential distortion in the waste market. Those responding are asked to provide 'on the ground' examples where possible. There will also be a stakeholder event on 12 November 2015 at which no doubt further views will be expressed.

As the only EU institution empowered to initiate legislation, the Commission has confirmed that following a review of the analysis of the public consultation in September, they should, during October and November, finalise the text of the circular economy proposal which is scheduled to be adopted by the Commission in December 2015. From that point the package will follow a procedure for discussion/adoption by the Council and European Parliament in 2016.

It is significant that on 9 July 2015 the European Parliament plenary session considered proposals on the circular economy adopted by their environment committee and endorsed many of them. It made a resolution ('Resolution') on the same date (P8_TA-PROV(2015)0266) calling on the Commission to report back to Parliament and to propose next steps by 2018. The non-binding proposals and Resolution are wide ranging such as the aim that by 2050 the EU's use of resources needs to be sustainable, requiring an absolute reduction in the consumption of resources.

We highlight below those parts of the Resolution of particular interest to consumer products companies.

Summary of relevant proposals contained in the Resolution

- promote a lifecycle oriented approach in product policies and establish harmonised methods for evaluating products' environmental footprints
- propose a review of ecodesign legislation and other relevant product policy legislation by the end of 2016, to cover all main product groups
- include all relevant resource efficiency features in the mandatory requirements for product design
- introduce a mandatory product passport

‘Improving resource use is estimated to bring net savings for consumers of EUR 600 billion’



- define requirements on durability, reparability, reusability and recyclability
- assess, on the basis of a cost benefit analysis, the possibility of establishing minimum recycled material content in new products
- develop measures against planned obsolescence and develop a set of product standards for the circular economy, which include refurbishment and repair, facilitating dismantling, and the efficient use of raw materials, renewable resources and recycled materials in products
- extending minimum guarantees for consumer durable goods
- appropriate measures on the availability of spare parts
- stepping up efforts to substitute substances of very high concern and to restrict substances that pose unacceptable risks to human health or the environment in the context of REACH and RoHS
- proposals by the end of 2015 of a lead indicator and a dashboard of sub-indicators on resource efficiency; the use of the indicators to be binding by 2018
- proposals by the end of 2015 for a target to increase resource efficiency by 30% by 2030 compared with 2014 levels and individual targets for Member States
- public procurement procedures in which re-used, repaired, remanufactured, refurbished and other sustainable and resource efficient products and solutions are preferred;

By 2030:

- increase resource efficiency by 30% compared with 2014 levels
- binding targets for recycling and preparation for reuse to at least 70% of MSW and 80% of packaging waste.

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Implications

Improving resource use is estimated to bring net savings for EU businesses, public authorities and consumers of EUR 600 billion. Increasing resource productivity by 30% by 2030 is calculated to potentially create two million additional jobs and boost GDP by nearly 1%. At a time when attention is turning to preparation for discussions in Paris in December 2015 on a proposed new global agreement on climate change (COP21), the EU has noted that improving resource use could lead to a reduction in total annual EU GHG emissions by 2-4%.

The proposals which have fundamental impacts on the design of products and use of materials should be monitored closely by all consumer products companies.



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