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Advertising, Media and Brands Global Compliance Challenges

Strategic Global Legal and Regulatory Issues Facing the Advertising, Media and Brands Industry

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Introduction

The last few years have provided unique challenges for businesses operating across the advertising, media and brands industry. Aside from the impact of the pandemic and now the conflict in Ukraine, we are seeing a changing and challenging landscape due to increasing economic, consumer, regulatory and compliance pressures.

With increased exposure as a result of these pressures, we present our Global Compliance Challenges series to bring you a range of webinars, podcasts and articles to help your business navigate this new complex compliance landscape.

In this report, our legal specialists summarise the regulatory landscape at present relating to global data technology and tax, the M&A landscape, due diligence, anti-counterfeiting and brand protection, the rise of environmental, social and governance (ESG) initiatives, and global workforce challenges, as well as presenting upcoming challenges and important considerations for businesses.

All of our webinars and supportive resources are available on our website.

Please note that the information in this document does not constitute legal advice. For legal guidance, please contact one of our legal or tax specialists, whose contact details can be found on whose details can be found throughout this report.

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Advertising, Media and Brands Sector Forecast

In the last 24 months, the world has experienced a series of unprecedented events that have had social, economic, legal and regulatory consequences. Today, businesses are still grappling with, and navigating, the resulting consequences.

Brexit, a global pandemic and a profound change in US government administration are just a few of the key events that have created a dynamic and challenging landscape for businesses to navigate.

Businesses are grappling with heightened regulation of data and advertising standards, mandatory reporting and a pending change in global taxation. In addition, the rise in ESG concerns, which are changing the nature of business operations and business cultures, accelerated changes in consumer behaviour and a new hybrid or even fully remote working model mean businesses are facing significant changes.

Navigating a Dynamic Landscape

The COVID-19 pandemic is very much still with us, and will be for several years to come, but we are getting better at managing it, and this has strong positive implications for business. In recent years, we have seen unprecedented levels of government intervention in the economy and that has broadly worked – most would agree that the economy has come out of what has been an incredible shock in better shape than expected as we were going into the pandemic. Moreover, the bounce back has been strong in most countries.

Yet, there is still fragility. There is fragility caused by the pandemic, but also in the supply chain, and in global trade as a whole, which is affecting the pace of recovery in a number of economies.

Fragility in the supply chain is causing businesses to rethink their supply chain, with resilience and locality becoming more important, and a focus on the integration of technology.

We have also been through a profound social test. Our societies have been put under incredible stress and have responded well, but it has led to a greater scrutiny of economic actors and businesses, and the greater expectation that businesses need to demonstrate how they are acting consistently with the phrase "we are all in this together".

Developing Policy

UK and EU

The UK and the EU have several similar policy initiatives, including a heavy legislative agenda in relation to digital activity.

The two main themes of economic recovery post-pandemic will be digital and environment, where a more digital economy will inevitably lead to a greener economy. Within these themes, there are some major legislative initiatives going through the legislative processes at present:

- The Digital Services Act, which is focused on content, protection of vulnerable people and editorial responsibility, to name just a few of the issues.
- The Digital Markets Act looks at the role of major platforms in a competitive economy and will seek to regulate the way in which platforms operate to ensure that competition remains at the heart of the economy.
- The Data Act looks at how large businesses, in particular, should be sharing data in order to stimulate the growth of the economy.

There is a proposal coming shortly for greater due diligence in the supply chain and a greater understanding of the impact that businesses have in areas such as human rights.

In addition, we have the world's first attempt to write new codification of legislation for artificial intelligence (AI), with a sophisticated risk management framework within this. This will apply to all industries and businesses that use AI, which is virtually all industries in the future, and will have important implications for how they manage their technology.

Evidently, there is a great deal on the legislative agenda, all of which has an impact for the advertising, media and brands industry.

Sitting alongside this, we have the recent developments between Russia and Ukraine, which is very much on policymakers' minds. This is having two impacts on the economy. One is on energy prices and volatility in the energy market, which could destabilise economic recovery. The other, which all businesses will need to pay a lot of attention to, is in the evolving sanctions legislation.

We are likely to see packages of sanctions in the US, the UK and the EU that will go considerably further than sanctions have in the past as far as Russia is concerned. Given the role of many Russian businesses in our industries, that could have important implications for how businesses think about the way they manage their relationships.

US

The issues that these legislative acts aim to address are at the forefront of US businesses minds and echoed in the legislative changes taking place in the US, particularly in the advertising, media and brands space.

At present, the US Congress is focused on the impact of social media on young users, calling for greater transparency and considering the need to implement stronger laws to police social media platforms. In recent months, we have seen CEOs of the largest platforms being called to testify before Congress, each answering questions about how social networks operate, spread information, and potentially harm the mental health of young users.

There is an increased and sustained focus on data security and privacy measures, with a continued absence of federal privacy legislation. In light of this absence, individual states are creating their own privacy laws. California, Colorado and Virginia have each adopted their own privacy laws, which generally regulate the collection, use and disclosure of personal data. They also provide consumers with several rights, and businesses expect that more states will be following suit by enacting their own laws, and several have consumer data privacy laws already in progress.

Additionally, there has been a shift in where the regulatory enforcement powers lie. Members of Congress have called upon the Federal Trade Commission (FTC) to enact rules in the absence of federal privacy legislation, and the FTC recently announced that it may begin commercial surveillance rule-making to curb lacking security practices, limit privacy abuses and ensure that the algorithmic decision-making used by the platforms does not result in unlawful discrimination. This rule-making process can be quite lengthy, but would have far-reaching impacts, as the rules aim to limit privacy abuses and limit targeted advertising, given the focus on commercial surveillance.

Under the governance of its newly appointed chair Lina M. Khan, the FTC has demonstrated that it has a renewed focus on enforcement, and aims to use its entire arsenal of tools and authorities, including its penalty powers. This was demonstrated in recent months, when the FTC issued its penalty offence power for the first time since the Raegan administration as a way to seek monetary damages, as it targeted hundreds of household names for advertising and endorsement practices.

Similar to the EU, US policymakers remain active in response to the use of AI. The FTC is poised to issue new rules on AI, in particular algorithmic decision-making, imminently. A range of focus areas were detailed in the FTC announcement of December 2021, but bias will be central to its forthcoming rule-making, as it has decided algorithmic rule-making is a focus of its enforcement and resolutions.

In addition, dozens of state legislators have introduced AI directed legislation in a variety of ways – first, in general privacy bills that would broadly regulate profiling and automated decision-making based on an individual's personal information, including targeted advertising; second, bills that are more broad and generally regulate AI; and finally, more specific legislative acts to address very specific types of AI applications, such as the use of facial recognition technology. Furthermore, a number of states have proposed to convene task forces on AI, with the goal of identifying issues and framing future regulation on the topic. Needless to say, AI is top of mind for regulators across the world.

Opportunities for Growth in the Advertising, Media and Brands Sector in Light of Policy Developments

It is evident that there is a lot happing in the regulatory agenda on a global scale. It is important that businesses look closely at this agenda and identify whether it will bring any opportunities for them. Some obvious areas are transparency about how ad platforms operate, the use of algorithms and algorithmic bias, etc. These will be a few of the key areas to look at.

It is likely that the effect of some regulation in this area will shift the balance between big internet platforms and the opportunities for advertisers. Changes in the editorial area will lead to greater accountability of brand messaging and the presentation of brand values.

This leads us on to social accountability, ESG and the role of business in society, which is of significant importance. We have clearly seen that consumers care about ESG. We are seeing customers make decisions around ESG credentials of the companies that they are buying from, but companies need to walk the fine line of avoiding "green-washing" while being truthful and transparent about their sustainability goals.

Companies that can embrace ESG responsibility, and do it, will stand to make considerable gains. There will be a premium in this area on finding ways to communicate that are not seen as "green-washing", but actually address the impact that brands and corporates are having in tackling the issues that our societies face.

Businesses that can seize these opportunities in regulation that put them in greater control of the presentation of their message, and where the content of their message addresses popular demand in society, could see a substantial increase in impact in coming years.

Trends in Emerging Technology

The number one trend that we need to address is the Metaverse.

What is the Metaverse? Broadly speaking, it is a virtual world that we access through virtual reality, augmented reality and other hardware or software. The term was coined in a 1992 sci-fi novel called *Snow Crash*, in which the Metaverse was embodied as a single immersive virtual reality world where people interact through avatars. In reality, the current Metaverse comprises a number of distinct virtual worlds, such as video games like Fortnight and Roblox. Ever since Facebook rebranded to Meta in 2021, the Metaverse has been subject to significant hype and criticism.

The Role of Non-Fungible Tokens (NFTs) in the Metaverse and Brand Engagement

In the Metaverse, NFTs play a number of roles. First, virtual items minted as NFTs on blockchain technology are wearable by avatars in games such as Roblox. For example, Gucci sold virtual NFT sneakers in Roblox. There are also virtual Metaverses where you can purchase land. NFTs provide a secure chain of ownership via a property record or certificate of authenticity. There is a lot of hype and criticism surrounding NFTs, and yet the market is flooded with people trying to join the action.

The Metaverse provides a significant opportunity for advertisers and brands to engage with consumers, and for creators, media and entertainment providers to monetise content and capitalise on the trend in order to drive brand growth and engage with customers. It is evident that NFTs are here to stay and are not the fad that we thought when they first emerged. (You can read more information about NFTs on page 24.)

Consumer Behaviour

The other key part of the puzzle in the advertising, media and brands space is consumers. Undoubtedly, during the pandemic, businesses and consumers all moved online.

The seismic shift to online shopping has been one of the biggest changes that we have seen as a result of the pandemic. To provide context, in the UK, the proportion of online sales in 2019 was 19%, which rose to 28% in 2020 – an accelerated increase of approximately five years of transition time condensed into 12 months. As we have seen the economy open up again and non-essential retail return to trading, there has been a rebalancing of online sales, landing at 26% in 2021.

Research from Retail Economics shows that the move towards online has been most apparent in apparel, home products and groceries. Online groceries used to account for approximately 5.5% of online activity, but now 10% of grocery shopping is online. We have seen that online grocery sales have remained at the elevated level. We have also seen the explosion of activity in other parts of the industry, in particular rapid delivery. Companies like Get Here and Gorillas have seen aggressive growth over this period, and this has also been disrupting the grocery sector.

The shift towards online consumerism has taken place across the whole digital eco system, with lots of investment made by retailers and services in automating the customer journey.

Advertisers, manufacturers and businesses in general have responded to the move online by increasing their use of direct-to-consumer channels. Online sales have become of paramount importance, as the figures above demonstrate. In turn, this has created an impetus for brands to sell directly to consumers now.

We have seen significant growth in the direct-to-consumer space by big brands. For example, Adidas now sells approximately 41% direct to consumer, Nike approximately 35%, and Under Armour approximately 40%. However, the digital shift has been felt across the entire customer journey, not just the point of purchase.

The shift to digital starts at the beginning of the customer journey in raising awareness of brands and products, through to researching goods to purchase, to fulfilment and the returns process. In many ways, brands are increasingly fighting for consumers' attentions online, and a lot of this fight has been across the big digital platforms (Google, YouTube, TikTok, Instagram, etc.) because the consumer is spending so much time online, and this is where the battle for customer attention is fought. In turn, this has changed the economics of online retailing. It is becoming increasingly expensive to reach out to existing customers because the space is more competitive and is pushing up the cost for acquisition.

The other side of this shift towards online is the resulting excess of stores and too much real estate. Retailers are adapting their business models to account for these shifts in consumer behaviour and that is changing the economics of store retailing as well. The brands that are looking to sell direct to consumer are utilising this as an opportunity to take up more physical space. However, the role of the store is changing from a brand perspective – it is now a marketing tool, designed to create an experience, merging digital and physical spaces together as an effective customer acquisition tool.

This digital shift is impacting the relationships that brands have with their consumers.

This is an interesting change in strategy for many retailers, particularly for the big brands that are looking to establish a better direct-to-consumer relationship and for those who have not previously had data for their consumers. Now they are able to build a better relationship through a combination of direct-to-consumer data and in-store analytics, which allows the brand to have a holistic view of the customer journey. Hence, the bounce between physical and digital is a key component of brand strategies.

Data is at the centre of this evolving relationship. If brands can understand the customer journey better, they can curate and communicate a story with consumers more effectively.

Conclusion

With the shift towards digital, the importance of data and the regulatory changes that we are seeing, businesses are operating in a different landscape.

In the following report, legal, policy, accounting and industry experts share their insights into what businesses in the advertising, media and brands sector should be preparing for in the near future.

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Global Data, Technology and Tax

Data Privacy and Technology

US Update

The California Consumer Privacy Act (CCPA) is now in effect with the exception of HR and B2B data subjects, which will come into effect on 1 January 2023. On this date, we will also see the introduction of new consumer rights and obligations under an amended CCPA as a result of the California Privacy Rights Act ballot initiative. In turn, there will be changes to behavioural advertising and third-party cookies, as well as more complex contracting requirements and operational requirements on processors.

As for inter space advertising and cookies, under the current do not sell regime of the CCPA, the California attorney general has been very active in bringing enforcement actions against publishers that are not providing an opt-out of inter space advertising cookies using this do not sell mechanism.

In 2023, there will be opt-outs for things known as cross-contextual behavioural advertising in California and targeted advertising in Colorado and Virginia. The latter will look very much like the current Networking Advertising Initiative (NAI) and Digital Advertising Alliance (DAA) sub-regulatory programmes, but the California regime will be much more broad. Both are not necessarily restricted to cookies, which is important as we move into a cookie-less advertising ecosystem.

Closely related are restrictions on service providers and processors. Moving forward, any obligations and restrictions will be required to be set out in contracts, meaning data protection agreements (DPAs) will need to be re-worked next year. The bigger issue, however, is that many marketing vendors will not qualify as service providers or processors given their own use of personal data.

Europe and the UK Update

Beginning with recent guidance from the French government, cookie banners must now provide three options: (i) agree, (ii) reject and (iii) make choices. This change has arisen as a result of rising complaints from citizens and non-government organisations about the function of cookies in capturing consumer data. In turn, authorities are encouraging businesses to make this change, and many businesses are following suit.

Data transfers have become a staple of everyday business operations, and five years since the introduction of GDPR guidelines, businesses are aware of the restrictions that have been put in place. One way that businesses try to overcome data transfer restrictions is to implement standard contractual clauses (SCCs).

In June, the EU Commission adopted a new SCC and established a transition period for companies to move from the old to the new clause by the end of 2022. There is an increased demand for businesses to update their master service agreements (MSA) as a result.

An SCC should be accompanied by a data impact assessment (DIA). This document, drafted by the data importer, explains that there is no national law, local law or law enforcement that will prevent the importer from abiding by the contractual obligations that have been undertaken by the SCCs, in addition to explaining what technological and technical measures have been implemented to make privacy stronger.

Competition

In response to rising government and regulator concerns about the power of big tech companies and the weakening of digital market competition, a number of studies have been conducted by the EU Commission and the UK Competition and Markets Authority (CMA). The conclusion of these studies is that:

- Digital markets are now dominated by a few large companies. Authorities have become concerned that these companies have built and entrenched their market power on the back of powerful network effects, which make them extremely difficult to challenge. This makes new entry to market extremely difficult.
- With specific regard to the UK, the CMA found that in the online platforms and digital market study, big tech firms can gather and make use of vast quantities of data and use this data to target their products and services in a way that their competitors cannot.
- Authorities are concerned about the ability of big tech firms to leverage their power in adjacent markets, and to acquire competitors through “killer acquisitions”, where competitor businesses are acquired with the intent to suppress challengers.

These are just some examples of the concerns being raised about the use of data for big tech platforms in digital markets, and will influence future market regulations.

Tax

The Big Picture

International tax policy has become headline news in recent months. This has arisen from a collision between the traditional international tax framework, based on the physical presence of a business within a sovereign border, with an increasingly globalised and digital economy. As a result, the traditional tax policy that was established in the 1920s is deemed no longer fit for purpose, and the development of a new more appropriate tax policy is underway with the G20 and the Organisation for Economic Cooperation and Development (OECD).

The need for a new tax policy is exacerbated by the growing power of big tech companies, sovereign nations seeking increased revenue in order to recover from the pandemic, and changing consumer behaviours.

At present, governments are trying to redesign taxes in a way that fall outside the constraints of the existing framework. One possible solution is to tax based on revenue rather than profit, but this creates a challenging environment for businesses, as it creates a high risk for double or multiple taxation. Furthermore, this method can be distortive where it does not take into account the maturity of a business or whether the business is profitable. Hence, such measures will put tension on existing business models.

There are questions as to whether the framework will be effective in terms of who bears the tax. There is a view that foreign businesses are being taxed in an environment where there is a recognised need for revenue, with these taxes often badged as the "google-tax" or "taxes on big tech". These taxes prove extremely popular from a political perspective and we have seen them being implemented or in the advanced stages of consideration in more than 40 countries.

Unfortunately, the US has not responded well, as it believes it is being targeted by the developing tax policy. There is some truth to this, where policies have been modelled on large US businesses. It has responded with the threat of potential impositions and tariffs, which, in turn, has put pressure on international trade.

Where Are We Now?

In early October 2021, 136 countries announced that they had agreed on a high-level set of proposals for each country to implement in their domestic laws over the next couple of years. The G20 leadership signed off and approved its two-pillared plan:

Pillar 1 deals with the physical presence issue by allowing countries to impose corporate income tax on non-resident multilaterals that are selling to consumers in their jurisdiction without any physical presence, if their sales exceed a certain threshold. It would have a new formulary approach to allocating a certain amount of the global profits of the company to each of those markets. These are radical departures from existing tax law and will require significant changes in the country's existing domestic tax laws.

Pillar 2 says that the global minimum tax (not directly related to digital business) of these 136 countries will be an effective 15% corporate income tax rate. The unilateral rate prevents any country offering tax holidays for extended periods of tax. This is an attempt to level the playing field for corporate income tax for large multinational businesses.

Part of this deal is that the unilateral digital services taxes will be repealed and the plans to create new ones will be put on hold in an attempt to escape the chaos of different countries having different taxes.

At present, there has been a preliminary deal between the US, the UK, France, Spain, Italy and Austria about the timing of the repeal of the digital services act and about how payments under pillar 1 will be managed, but uncertainty remains about the other countries with digital services taxes in place that are not part of this deal.

Questions remain about the practicalities of all these countries simultaneously making tax changes in the next 12 to 18 months, as this will likely incur big challenges in the months ahead.

Potential Challenges

- Previously, taxation of companies has been on a company-by-company basis. This new approach under pillar 1 requires group-based taxation. There is a formulary allocation of profits, but there is not yet any clarity about which countries and entities will be yielding up profits that can be shifted to other countries.
- There is still no clarity about which tax base will be used to compute the 15% effective rate on minimum tax globally. There is a need for a multilateral tax treaty.
- There are serious questions as to whether the US Congress can pass the changes into US law. The US has been a leader in this process, so if it is unable to lead these changes, it poses doubt on the ability for the rest of the world.

For now, companies need to wait and see what will happen, as we do not have enough information to model the implications of new tax policies. The corporate world should keep a close eye on how this develops for the next year onwards.

Key Issues Currently Facing Businesses

The coordinated tax policy approach is preferable for businesses, as it will help to simplify a currently complex compliance landscape. However, if or when the new policy is passed into law, it is unclear as to how the policy will evolve over time. At present, it is pitched at the largest multinationals, but undoubtedly, overtime, we will see this filter down to smaller businesses. Thus, businesses should be anticipating their strategic response to the implementation of the new framework.

In parallel to the evolution of the new tax framework, we are seeing the evolution of new types of business models, which, in part, are driven by the pandemic. Changes such as hybrid working present new tax and legal challenges for businesses to grapple with.

We are seeing more changes to business model structures as a result of changes in the way that businesses go to market. This has been accelerated by the pandemic. We will see businesses restructuring to react to the changes in the international tax framework, including thinking differently about transfer pricing, what their holding structure looks like, and how entities within a group interact with each other.

Shared Insights

What have been the hot issues for regulators over the last year, and what do you see as the hot issues for the data protection authorities in 2022?

GDPR has successfully been in place for five years, but moving forward we can expect to see an increasingly robust enforcement of the regulatory framework in the EU/the UK regardless of sector. To date, the authorities have the ability to enforce a fine of up to 4% of a company's global turnover for failure to comply, but have not done so, yet. This more stringent approach is driven by increasing consumer and NGO complaints relating to the use of consumer data.

From a US perspective, data security and data breaches are receiving increasing scrutiny. The new private right of action for data subjects to bring claims relating to data security issues are increasing, where individuals are now able to bring these claims without proving actual harm, and there is an availability of statutory damages to support their case. This trend is fuelled by entrepreneurial lawyers who file actions on behalf of all affected data subjects any time a significant data breach is reported.

What has your experience been in the EU with data breaches now that GDPR brings a security mandate and a breach notification that was not present under the initial directive?

If there is a breach, you are required to notify the authorities immediately. To lessen the repercussions of such a breach, it is important that businesses can demonstrate the security measures in place, that the security measures are recently renewed or up to date and that the workforce is sufficiently trained, as well as demonstrating due diligence. If businesses are able to demonstrate they have not been negligent, the authorities are more understanding.

The EU has been more robust in its enforcement of antitrust laws than the US. What is the state of this in relation to the advertising, media and brands industry? Do you see the US moving to a more aggressive enforcement of antitrust under the Biden administration?

It is fair to say that the EU was perceived as leading the way in using competition rules to curb the perceived market power and abuses of such market power by big tech companies. In fact, a number of such cases have been lost by the European Commission. These cases indicate the difficulty of applying competition rules to digital markets and to practices that may well have an economic justification and, in some instances, be required by other statutes including privacy and security regulations. Hence, there is potential tension and perceived difficulty in enforcing competition rules on digital markets. It will take time, the outcome is uncertain, and any decision is likely to be challenged.

It is for this reason that the European Commission proposes to impose ex ante rules that complement general competition laws, hence the development of the Digital Markets Act. This is a proposal that, if adopted, would black list a number of practices that have been the subject of competition law investigations in Europe by big tech companies. The act is still going through the legislative process – hence, we do not know what the outcome will be, and there are a number of proposed amendments from member states and EU Parliament for consideration. Nevertheless, the trajectory is set and we will have the EU Digital Markets Act (in some form), if not this year then next year.

The US is rising to the challenge, like other jurisdictions; there are proposals to implement legislation that would complement competition rules through ex ante regulations. It is a changing world and we are monitoring all of the changes being made by jurisdictions around the world (not just the UK, the EU and the US). All of these initiatives are available on our website, where you will find a dedicated page for global digital markets regulation, where we are monitoring this evolving framework with which big tech companies and the users of digital platforms will have to grapple with.

With the consideration of state taxation, federal taxation and recent Supreme Court decisions, how is tax evolving in the US in relation to the advertising, media and brands industry? What do you predict for the future?

Here, we see a scaled down version of the global picture, but reflected across state borders rather than sovereign borders. In the same way that sovereign nations want control over their tax policy, individual states want control over taxation in their states. There is a movement to push back against state tax laws, especially in light of the global agreement the US Treasury has entered into. Hence, we expect to see ongoing court battles and political battles at state level.

Key Takeaways

Global Data

(i) It is very easy for authorities to see if your cookie banner is correct, so try to define it in line with current requirements.

(ii) Prepare for data breaches, have an incident response plan and prepare your due diligence.

(iii) Make sure all your contractual agreements have moved to the new SCCs.

(iv) The time has come to start thinking globally about your information governance programme.

Competition

We are seeing an increasingly complex regulatory framework. Therefore, when advising clients as to whether they are complying with competition rules, we will also advise on additional regulation that we see coming down the pipeline. This requires a joined-up approach, not only in terms of different subject matters that need to be reconciled (data privacy, sector-specific regulation in competition law and a global approach), and this is where a global law firm that can leverage experience in multiple jurisdictions can be very valuable.

Tax

(i) Stay up to date on evolving tax policy in order to best prepare over the next 12 to 18 months.

(ii) Make sure you are aware of how your own operating model will adapt to the tax landscape as it stands today and as it evolves.

(iii) Have robust procedures in place to stay compliant but also start thinking about what the future might look like and what your strategy might look like.

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The M&A Landscape, Post-COVID-19 Transaction Trends and Due Diligence Risks

The M&A Landscape

M&A Market Overview

The M&A market has experienced some turbulence of late. Figure 1 neatly summarises the volume of deals transacted from Q4 2017 to Q3 2021 in the UK. Prior to 2020, the M&A landscape was steady, but the impact on the pandemic on M&A activity is clearly evidenced by the significant drop in M&A activity in Q2 2020. M&A does not work well against a backdrop of uncertainty, hence, during this period, a lot of deals collapsed or were put on hold.

Nevertheless, by Q3 2020, M&A activity was on the rebound, largely driven by activity in the US where buyers returned to the market much faster and with more certainty than in the UK. Since this time, M&A activity has continued to grow, reaching a higher volume of deals than pre-COVID-19 in Q4 2020, for both trade deals and private equity deals.

Figure 2 details the fluctuations in price over the same period. It should be noted that the multiples on figure 2 understate M&A activity in the advertising, media and brands sector, which is currently a very hot market – as we will discuss in due course.

How Do We Rationalise This Data in a World Where Everything Remains so Uncertain?

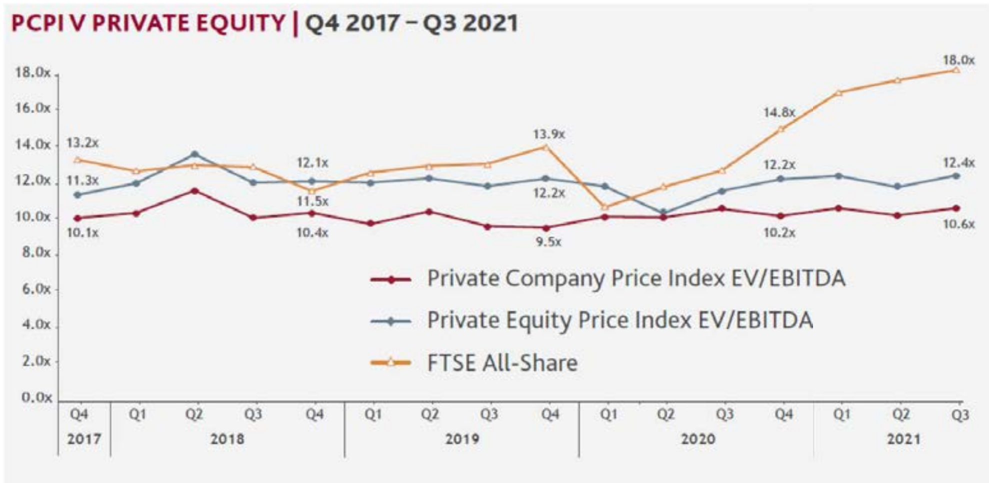
For trade buyers, organic growth is difficult to come by but M&A can provide an easier route to growth. At present, the UK is relatively cheap compared to the US, which is attracting overseas buyers, and there is plenty of money available. So, with the current low interest rates meaning the cost of money is almost nil, almost all asset prices are inflating, and the volume of M&A activity reflects that.

Similarly, for private equity (PE), there are currently healthy funds available and ready for investment. The typical private equity structure consists of five years selling and five years buying. Due to the lack of M&A activity in Q2 of 2020, PE houses now have some catching up to do, and this activity is driving a the high volume of M&A activity that we are currently experiencing.

Some traditional areas of PE investment (hospitality and leisure) are currently difficult to invest in due to the impact of the pandemic on these sectors. In turn, PE houses have turned their attention to tech, marketing, brands and life sciences, which are also popular areas for investment. However, M&A opportunities in these sectors are currently scarce. Hence, sellers in these sectors are commanding higher prices.

Figure 1

Figure 2



This newfound PE attention in the advertising, media and brands sector is largely the result of the sector's resilience during the pandemic, but also because:

(i) Many businesses in the sector are starting to look more like tech businesses, introducing new technologies with scalable capabilities

(ii) These businesses are increasingly less reliant on people, a factor that has made the advertising, media and brands sector difficult to invest in in the past

(iii) There is strong organic growth in the sector, with opportunities to expand into new geographies or add specialisms

(iv) Businesses in the sector are increasingly using data, which is a highly valuable commodity

Given the Backdrop of Deal Activity, How Are These Trends Manifesting in Deal Structures?

- There is a big disparity between the different sectors in terms of activity and price. Hospitality and leisure are an obvious target for reduced activity compared to the advertising, media and brands sector. Within the advertising, media and brands sector, there is a disparity between the businesses that are more digitally focused, and, therefore, insulated from the effects of the pandemic, versus those businesses that are more traditional. Digitally focused businesses are achieving higher prices than we have experienced previously, and fortunately, we see this price increase as sustainable where transactions are commanding higher prices repeatedly, rather than for one-off transactions.
- We are also seeing a huge increase in warranty and indemnity insurance being utilised, significantly more so than we have in the last four to five years. Of late, warranty and indemnity insurance is a common feature in deals of all sizes. Furthermore, insurers are more willing to insure known risks, where this was previously a challenge.
- The M&A process is becoming shorter in length, most especially for hot assets. A few years ago, businesses came to markets with the intention of getting a deal done in six to eight weeks. It is not uncommon now for businesses to try to complete in two to three weeks. This is a reflection of humanity evolving and wanting to do things quicker but it is also to reduce due diligence risks, and to get a deal struck commercially so they can move on with finalising the due diligence, finalising legal terms, and getting the document signed as soon as possible.
- Private equity is readily available and currently dominating the M&A landscape. Prior to the pandemic, 70-80% of PE houses involved in deals were household names. Today, there is an increased number of PE funds that are able to raise significant amounts of capital and they are all competing with each other for the hottest assets.
- The pandemic forced many businesses to reassess their risk registers, as it was unlikely that any had considered the impact of a global pandemic prior to 2020. Today, businesses are considering what other risks they may have failed to anticipate, and in order to reduce some of these risks, they are looking to sell as a means of taking their own money off the table, hence the increase in M&A activity.

The US Perspective

On the whole, the M&A trends that we are seeing in the UK align with the trends that are emerging in the US market.

- The US continues to be a very active and friendly M&A market. Corporates increased their liquidity in 2020 and investors are now pushing companies to look for acquisitions where there are significant growth opportunities. PE funds continue to remain active in the market both as a buyer and as a seller. When you couple that with the aggressive strategic buyers, it leads to a competitive market and seller-favourable terms.
- The representation of warranty and indemnity insurance remains a heavily used tool. Sellers are retaining little to no liability and this has created a greater need to perform adequate and robust due diligence that confirms the value of the transaction. Although insurers are willing to insure areas of risk that they have not been willing to insure in the past, it still requires the buyer to demonstrate thorough due diligence. If they are not able to do so, the underwriter will not provide a meaningful insurance policy, and this leads to the deal falling apart or significant exclusions from the policy, and the buyers taking on unknown risk.

Due Diligence

Preparing for M&A

Typically, preparation for a deal can take approximately six months, but for a smooth and efficient M&A process, we recommend starting earlier, especially for tax. Below, we detail the due diligence factors that should be top of your agenda.

PHASE 1	PHASE 2	PHASE 3	PHASE 4
Investor Readiness	PREPARATION	MARKETING	DEAL COMPLETION
6-12 WEEKS	4-6 WEEKS	4-6 WEEKS	6-10 WEEKS
TOTAL PROCESS UP TO 34 WEEKS			
▶ Develop the business plan ▶ Market and customer analysis ▶ Pre due diligence review	▶ Build a financial model ▶ Assess financial and operational data ▶ Compile a funder/investor shortlist	▶ Prepare and give management presentations ▶ Consider and compare the offers ▶ Agree the due diligence scopes	▶ Negotiate exclusivity ▶ Support legal negotiations ▶ Support the due diligence process

Financial Due Diligence

Financial due diligence is a common concern among businesses going through an M&A transaction. However, our experience tells us that financial due diligence will rarely end a deal. Honest financial disclosures may affect the price, but an attempt to disguise financial histories or failure to disclose will have a far more detrimental effect on the erosion of confidence and trust from the vendor, and this is more likely to temper the success of the deal.

Similarly, an inability to achieve budgets and targets can be a red flag for vendors. If you are planning to go through the M&A process, it is important to monitor your financial targets and ensure these are achieved because it demonstrates the management team's ability to deliver. So, set yourself realistic goals and monitor delivery of these goals.

Information Management

Due diligence is about using evidence to demonstrate your key value drivers. Prior to embarking on the M&A process, identify what your key value drivers are, and implement monitoring and reporting processes to ensure you can demonstrate a track record of the value that these drivers provide.

An emerging due diligence trend that is increasingly popular in the market is the production of an information pack that can be presented to potential vendors. There are several benefits to producing this due diligence pack, including:

(i) An ability to conduct due diligence in a sheltered and controlled way and on your own terms.

(ii) You only need to complete the process once rather than repeating the process with multiple bidders.

(iii) Potential vendors will not endure the expense of due diligence costs and it speeds up the M&A process, in turn, more vendors will stay in the M&A process for longer, thereby increasing the competitive nature of the process and driving price increases.

(iv) If any due diligence issues were to arise, then you have the opportunity to address these discreetly, or disclose the issue in an honest and upfront matter.

(x) Finally, it makes you look good because it demonstrates your awareness of the business and your honesty, which helps to build confidence and trust.

Data Privacy

GGiven the increasingly stringent regulation of data, many buyers are interested in how a business manages personal data and evidence of compliance. In the UK and EU, the relatively straightforward statute of GDPR applies across the board, but data compliance in the US can be more complex where each state has its own guidelines for data protection.

For the advertising, media and brands sector, navigating multiple compliance regimes poses a significant challenge. Not only are you required to assess which regulations apply to your business, you must also stay compliant with the regulations of 49 other states. Adding to this complexity is the speed at which data privacy laws are rapidly evolving. To avoid risk, stay abreast of policy developments, review your data management processes regularly and act quickly to maintain compliance across all jurisdictions in which you operate.

Intellectual Property (IP)

Intellectual property is a key due diligence risk for advertising, media and brands industries, and there are lots of different aspects to consider.

(i) Define what the intellectual property of the business is. It is often difficult for buyers to explain and vendors to understand the distinguishable IP of the transaction.

(ii) Identify how the IP is protected, including whether it has been registered, how it has been registered, where it has been registered, what class it is registered to, and whether there are any historical claims or IP conflicts with competitors.

(iii) Establish how the IP was created. The contractual position from a legal perspective is that if you are an employee that has created IP during your employment, then the IP is automatically owned by the company. This applies across most jurisdictions. If the IP was created by a consultant, then the starting position is that the IP is owned by the individual consultant, unless they have formally assigned the IP to the company.

IP issues typically arise where there is no contract, the existing contract does not include assignment of IP language, or the IP language is not sufficient to assign IP ownership. Such issues can lead to delays where third-party involvement is required for to assign IP, and also infers additional cost.

The Grant of Options and Shares

Wherever there has been a relatively complicated movement in the shareholding of a business, it is not surprising that issues can arise. Typically, these relate to the incorrect transfer of shares, lack of compliance with pre-emption provisions, or the buyback of shares. If you plan to start the M&A process, assessing your share options and historical buybacks should be near the top of the agenda, as where issues crop up they can take four to six months to resolve in court.

ESG Factors

ESG is an area of increasing focus for buyers. They will want to know what actions the business is taking towards fighting climate change and neutralising the carbon footprint, as well as whether any policies are in place relating to modern slavery and tax evasion, etc. Expecting warranty and indemnity insurance to cover you for these risks is no longer acceptable, and instead businesses should actively demonstrate what steps they have taken towards achieving ESG criteria. In doing so, you demonstrate awareness to potential vendors, which helps to create an open and trustworthy transaction process.

Tax Due Diligence

Tax is one of most important areas of due diligence, as on most transactions there will inevitably be a tax issue raised during the process. Tax due diligence requires a considerable amount of forward planning. We break the planning process down into four key areas of focus when preparing to sell:

- **Tax hygiene** – You need to ensure there is a tax payment record, and all your filings are up to date. Whenever a business has taken tax advice, it should be documented and there should be an audit trail for the due diligence process.
- **Optimising assets** – Similar to managing the message around due diligence issues, it is important to manage the message around tax assets within the business. The business may have tax valuable assets that should be included in transactions. These assets should be identified upfront and you should understand how they can be utilised and drive value for the business.
- **Incentivising management** – This refers to the key individuals that need to be retained in the business post transaction. Incentivising management can be quite difficult to do in a tax efficient way, so consider what options you have to ensure you retain these individuals in the business.
- **Business structure** – When thinking about what your transaction event looks like, consider if the business is structured in the right way, and whether you need to make any changes before you go through the process.

The Top Five Tax Due Diligence Risks

The following are a sample of tax due diligence risks commonly identified in recent projects.

Risk	
Share Schemes and Equity Awards	Employment tax risks can arise when share schemes/equity awards have been entered into, for example: • When no valuation support was obtained • When schemes were implemented without tax advice, or were not implemented in accordance with advice received
Payments to Consultants	Employment tax risks commonly exist where businesses make payments to individuals (including directors) without the deduction of PAYE/NIC. What support is available for the position taken?
Permeant Establishment	Businesses that expand overseas rapidly can crystallise a taxable presence overseas (in terms of tax payments and filings) without realising. People have also been displaced as a result of COVID-19. This can result in missing corporate, employment or sales tax registrations/ filings/payments either nationally or locally (e.g. US states taxes).
Transfer Pricing	A common area of risk with international groups where policies are out of date (e.g. more than five years old), absent, or have not kept pace with the growth/change in the business.
Pricing -related Deals	Have tax issues related to financing been considered, e.g. timing and availability of tax deduction and withholding taxes? Has consideration been given to the tax implications of upstream loans?

Shared Insights

What is the M&A landscape expected to look like in 2022?

We do not expect the fundamentals of the M&A landscape to change. We predict 2022 to be another very strong year, with a healthy monetary supply and plenty of deals. There is a risk of inflation, which will likely cause issues, but this will likely be a temporary readjustment to COVID-19. Alongside volume, we expect pricing to be resilient.

We anticipate a greater focus on ESG, with ESG criteria forming a significant part of due diligence surveys. Companies are not expected to have all the answers to ESG-related matters, but it helps to demonstrate the company is thinking about how to mitigate these risks.

What do you predict for the advertising, media and brands sector beyond 2022?

The outlook for the advertising, media and brands sector is better than the outlook for the whole M&A landscape. This is particularly true at the tech-end of the sector where there is more data. The concentration of power around key market players is a growing concern and poses uncertainty to future regulation of the ad-tech market, although new regulation will not necessarily be a bad thing for the market. Overall, prospects for the M&A Landscape and the advertising, media and brands sector are promising, but it is difficult to look beyond two years in any market or sector.

How quick and easy is it to get a warranty and indemnity policy in the US?

Warranty and indemnity policies are more popular today than they have been previously, thus insurers are adept at moving quickly in producing these policies. The overall process would usually take approximately two weeks, but due to their recent rise in popularity, and the influx of M&A deals at present, there can be a slight delay. This also applies to UK warranty and indemnity policies in the UK.

Are warranty and indemnity insurers paying out?

Yes. Initially there were concerns around the value of these policies in terms of the cost versus the likelihood of pay out, but recent activity shows insurers are reliably paying out where necessary. Furthermore, underwriters are keen to demonstrate the percentage of claims that they are paying out on, in order to build confidence and encourage businesses to purchase these policies.

Can you signpost any documents or reports relevant to the ad-tech sector that can be shared with potential shareholders or investors?

Please follow this link to BDO's Global Media M&A Report.

Is there an increased focus on IR35 from buyers?

Yes, but also people are more aware of IR35 given recent publicity about changes to the policy that came into effect in April 2021. The IR35 changes mean that there is more risk on the business, and businesses have to do more work to assess the activity of individuals and whether these individuals represent a risk to the business.

Similarly, during the height of the pandemic, many businesses utilised the furlough scheme – a scheme that saw regular changes in policy. At present, we are seeing a tightening of HMRC investigating historical claims and issuing penalties. We recommend conducting due diligence into your use of the scheme in advance of the M&A process and making voluntary disclosures.

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Anti-counterfeiting, Brand Protection, and Top Advertising, Media and Brands Hot Topics

Anti-counterfeiting and Brand Protection

Is counterfeiting a big issue?

The movement from traditional retail to digital has been accelerated by the COVID-19 pandemic, pushing advertisers and manufactures to increase their use of digital sales channels, and ramp up their sales direct to consumers.

While various consumer protection measures have been implemented by governments across the world, we, nonetheless, see that the production and sale of counterfeit goods remains, and is increasingly, an issue.

From an economic point of view, there is the loss of sales and loss of jobs, but there are also political consequences as the revenues derived from counterfeiting go towards funding organised crime and terrorist organisations.

We have been involved in cases where the targets have been organised in a very professional way, using sophisticated technology and other tools to protect their business. Thus, counterfeiting has grown into a global industry that everyone should be aware of.

Are there any trends in the flow of counterfeit goods? Although we are reluctant to point fingers, are there any particular jurisdictions where the problems are most apparent?

In terms of the main origin of counterfeiting, it is, has always been, and probably will be for the foreseeable future, China. China has an increasing availability of factories that are willing to produce counterfeit products, exacerbating the problem and making it difficult to handle.

We have been working with a number of clients across different industries to monitor the shipping of goods to see where they are being purchased. We have seen a significant increase in imports and exports to the Middle East and Northern Africa (MENA) region, and found that the United Arab Emirates (UAE), in particular, is a huge shipping hub for counterfeit goods to every region of the world. Over the last 12 months, we have seized more than 500,000 counterfeits for different clients in Dubai alone.

We recommend that brands check the registration of their trademarks across these jurisdictions, and be aware of their options to enforce their intellectual property (IP) rights. Although it remains difficult to tackle counterfeit goods at the Chinese border, brands have better options to enforce their IP rights in jurisdictions elsewhere in the world.

The Scale of Counterfeiting

In terms of the scale of the problem of counterfeit sales, the official figures are as follows:

- The UK Intellectual Property Office says counterfeiting and piracy cost the UK economy £9 billion, plus 80,500 job losses, each year
- EUIPO research estimates that counterfeits such as bags, clothing and electrical goods cost the EU €60 billion, as well as 434,000 job losses, each year
- The International Chamber of Commerce says governments across countries miss out on around US$89 billion per year through the loss of sales tax on counterfeit products

As retail transitions into a new digital arena, brands need to be monitoring online activity rather than traditional market stalls. Are there any technological solutions in monitoring the sale of counterfeit goods on websites and social media, and what challenges do brands face in regard to this?

During the pandemic, all of our lives moved online, and this includes the livelihoods of counterfeiters. Digital platforms have made life easier for consumers, as well as counterfeiters. Fortunately, there are monitoring and AI software solutions available to help brands detect counterfeit products in the online ecosphere.

The challenge in tackling counterfeit goods is that an online anti-counterfeiting monitoring programme needs to adopt a multipronged approach. Finding where your products exist on the ecosphere is just one aspect of this multipronged approach.

In the last few years, we have seen that anti-counterfeiters online are marketing masters, as they use and employ the same legitimate advertising and marketing techniques that a legitimate business would use. They are well versed in using search engine optimisation tactics, spam, social media and keywords or links to drive consumers to their website, where products look very realistic, but are, in fact, counterfeit goods.

AI software has previously been helpful where it uses price comparison tools to identify counterfeit goods, but it is important for brands to also monitor promotional tools that counterfeiters are using, in order to prevent sales at both promotional and distribution points. Once identified, brands can consider taking legal action against the counterfeiter.

Finding online sales of counterfeits has also become increasingly challenging in recent years because sales channels are more diverse, in turn, requiring sophisticated technological solutions.

We recently had a case involving the online sale of counterfeit watches. We worked with EU enforcement authorities to identify the origin of the website. We found that the website changed the server through which it goes online every six hours, which is four times a day. Moreover, each server was in a different country, which made it impossible to locate where the counterfeit goods were located. This demonstrates how sophisticated counterfeiters have become, and how this problem is ever evolving.

Moreover, we recommend that brands develop tools and gather data in order to link online activities with targets on the ground and connect the dots outside of the online ecosphere.

Top Tips for Brands

- Register your brand trademark in various jurisdictions
- Obtain your .com or .co.uk domain name
- Purchase AI and technology that can help you locate counterfeit products

What help is available to brands that need to enforce their rights?

UK

In the UK, authorities such as the police and trading standards have the power to take action against counterfeiting, but their power and resources are limited to the most large-scale and serious fraud cases, or where the products being sold are demonstrably dangerous to consumers. For that reason, the responsibility falls to individual advertisers to take action against infringers, and taking down an infringer on one channel or website can be somewhat of a "whack-a-mole" game because they quickly pop up again under a new domain.

There have been developments in the UK with block injunctions against ISPs, and this is certainly an area to monitor in the coming months.

US

Over the last year, there has been a lot of debate in Congress and federal courts about the extent to which liability should or could be imposed on online marketplaces. Historically, online marketplaces have not been liable because they are not considered sellers of a specific product, but rather mere facilitators. Nevertheless, the idea of imposing liability on online marketplaces for the sale of counterfeit goods by third parties is an idea that has been gaining traction in the last year.

In addition to the difficulties mentioned above relating to enforcement, brands that try to tackle counterfeiters know that getting a liability against third-party sellers on online marketplaces is difficult. This is not only because counterfeiters are so good at evading detection, but also more fundamentally because they are sheltered from legal accountability in US jurisdictions where they do not reside in the US.

Recently, we have seen a few courts in the US recognising that the online marketplace plays a pivotal role in bringing products to consumers, which is starting to develop a narrow pathway for other courts to start considering third-party liability.

It is a spectrum, with some courts looking at the level of activity in a given online marketplace, and how the marketplace is managed. The more activity and involvement there is, the more likely there is a case and the marketplace will face liability. We reiterate that this legal pathway is only just starting to emerge, so we wait to see what 2022 brings in terms of court rulings on the issue.

EU

Similar to the US, taking legal action against online marketplaces has its challenges in Europe.

France is ahead of most in terms of legislation, where it has an existing process for tackling online counterfeit goods. The process is as follows:

1. Identify very precisely where the counterfeiting goods are sold

2. Send a cease and desist letter

3. If the platform does not act promptly, it is liable and brands can bring an action before the court to get an injunction and obtain damages

Although seemingly straightforward, in practice, this becomes a game of whack-a-mole, because the counterfeiter can sell the same counterfeit goods somewhere else on the internet, and the brand will need to repeat the process again.

What about criminal enforcement against counterfeiters?

On behalf of brand owners, lawyers can cooperate with the authorities or public prosecutors, and this is usually an efficient and successful way to tackle counterfeiters. However, authorities often complain that they do not have the resources to tackle counterfeiters, and it takes a lot of persuasion to convince authorities to investigate on behalf of the brand.

Criminal procedure laws have been changed in recent years. Now, as a brand owner, you can be awarded damages in the criminal courts and although this has been the case for a few years, it is only recently that courts have started using this option.

Advertising, Media and Brands Hot Topics

Non Fungible Tokens

Primarily, NFTs are unique tokens based on blockchain technology. Unlike cryptocurrency (such as Bitcoin), they are digitally unique, which means they provide an indisputable record of ownership that is cemented on the blockchain. The second component of an NFT is the visual asset element, so it comes in the form of virtual goods, such as a form of media, GIF, sound byte, etc. The virtual artwork is not necessarily unique or original, but the token is always original.

One key point that consumers need to be aware of is that the purchase of an NFT does bestow ownership of the token, but not usually ownership of the underlying IP of the digital asset.

How are NFTs being used?

Many powerhouse brands are using NFTs to build hype in order to drive growth and engage new customers. There are already a number of success stories, including:

MBA Top Shot

Adidas Into The Metaverse Collection

Stella Artois and ZED RUN

Nike's virtual sneakers

Many see NFTs as the key to the virtual economy in the Metaverse, where the possibilities are endless. Hence, many brands are already capitalising on this, including Gucci, Vans and Fortnite, to name a few, by creating virtual collections for use in the Metaverse. Although NFTs are a relatively new concept, they are not going anywhere soon.

What are the legal risks associated with NFTs?

NFTs are rife with risks. First, the use of a company's IP assets or a third party's IP assets presents the same or similar risks as traditional tangible or digital goods, but there are some unique aspects and nuances to NFT risks:

- Companies need to ensure that if they are using third-party IP or celebrity likeness, they have a sufficient licence, as traditional licences may not apply.
- NFT deals largely depend on a number of third parties, such as developers, artists, agencies and marketplaces that are established to sell NFTs, etc. Hence, formal legal contracts are required to address associated risks. In order to do so, businesses will need to understand the factual and technical issues that are associated with NFTs.
- Smart contracts, the latest buzzword associated with NFTs, are not legal contracts. They are programmes stored on a blockchain that run when pre-determined conditions are met. They are more like a software code than a legally binding contract.
- There are a number of NFT cases that walk the line of securities laws. As NFTs continue to grow in popularity, we expect regulation will be developed and implemented in the near future, although the US Securities and Exchange Commissioner is yet to comment on NFTs.
- Many organisations that are planning an NFT release spend a significant amount of time and resources promoting them on social media. Some would argue that this is conditioning the market and could, therefore, be in line with activity regulated by the SCC (at least in the US).
- People are starting to fractionalise NFTs and sell the pieces to investors. This activity toes the line of securities laws, but regulators have not yet spoken on these issues.

A Cookieless Future

What is the role of a cookie in advertising?

A cookie is a small file that a company places on consumer devices to monitor browsing behaviour and record browsing activity in order to improve website service. There are different types of cookies:

- First-party cookies are used by a company to monitor visitor behaviour on its website. These are considered the less harmful version.
- Third-party cookies collect information about website visitor activity, but the information is provided to third parties (advertisers, ad agencies or analytics systems) instead of the website owner. These are considered a greater risk due to the level of information that is obtained about a single individual.

Nevertheless, cookies remain an important tool in the advertising industry in order to efficiently target the correct audience, and cater to the needs of said audience.

Why is a cookieless future a possibility?

EU

The EU Privacy directive says that when you use cookies, you have to obtain the consent of the user. GDPR adds an additional layer of complexity to this by stating that the consent of users needs to be explicit. This has been problematic in the advertising industry and has given rise to large fines for big brands. In the last few weeks (31 December 2021), two big industry players received fines of US$150 million and US$60 million for making the process of rejecting cookies more difficult than accepting cookies.

There are talks of moving away from cookies towards new technologies that collect less personal information. However, despite the growing number of consumer complaints about the use of cookies, we do not anticipate cookies being eliminated any time soon due to the value they provide to the advertising industry – although regulatory bodies may get stricter in the meantime.

US

The US is in a similar position. Google is removing third-party cookies from its browser, and Apple has made moves to comply globally with its app tracking transparency in the latest IOS 14 update, for which the opt-in rates are only 20% to 25% globally. These decisions by big tech are making it harder worldwide for businesses to reach their audience and collect data. In turn, alternative technologies are emerging that have privacy compliance and operational impact. Companies are accelerating their first-party data collections programmes, such as loyalty programmes, buyer incentives, etc. We expect regulatory development in this area in the near future.

Influencers

Influencers are people, typically celebrities (but not necessarily when we are talking about micro-influencers), who promote a brand's goods or services, typically with social media postings on platforms like TikTok and Instagram.

There are a huge number of influencers, and using an influencer to promote a brand's products or services is a prevalent form of marketing. It is not new, but it has grown exponentially in the last five years.

How are influencers regulated?

In terms of the UK regulatory regime, when a brand makes a payment to an influencer (monetary, but also including freebies, among other incentives), any resulting posts that promote the brand will become subject to regulation. This includes, among others, consumer protection from unfair trading regulation that is enforced by the Competition and Markets Authority (CMA). Where the brand has also had some form of editorial control, the Advertising Standards Authority's Committee of Advertising (CAP) code will apply.

The overarching requirement for advertisers and influencers under the CAP code is that all advertising must be obviously identifiable as such. Essentially, this means that when a consumer sees an advert, it should be apparent to them that what they are looking at is an advert. It is also important that the advertisement is not misleading.

In the UK, the ASA and the CMA have published various guidance, including a joint guide on influencer marketing and endorsements. This is intended to help both brands and influencers comply with the rules. The guidance contains a lot of useful information, and it is recommended that brands looking to engage in influencer marketing familiarise themselves with the guidelines beforehand. The resources are freely available online.

How are the ASA and the CMA cracking down on influencers, and are there any examples of influencers breeching the rules?

Both the ASA and CMA are getting stricter with influencer marketing rules. The ASA is now challenging adverts of its own accord, without a third-party complaint being made. It is also monitoring and reporting on compliance of the rules.

In March 2021, the ASA published its Influencer Monitoring Report. In order to collate the report, it analysed more than 24,000 social media posts by more than 100 UK-based influencers. The conclusions of the report were that (a) there has been inconsistent disclosure of advertised content and (b) even where that content had been labelled as an advert, those labels were often difficult to spot.

Subsequent to the report, the ASA launched a dedicated page on its website where it names and shames influencers who are repeatedly failing to disclose where their post is an advert. The consequence of being on the list is that their name will remain there for three months and they will be subject to an enhanced period of monitoring and spot-checks from the ASA.

Similarly, the CMA has been paying close attention to social media endorsements. Its investigation focused on greater transparency of disclosures relating to paid-for endorsements. On the back of this investigation, a group of high-profile influencers, including Ellie Goulding, Rita Ora, Michelle Keegan, Millie Macintosh and Megan McKenna, gave voluntary undertakings that they would clearly disclose any paid-for or incentivised endorsements in their posts.

As you can see, it is an area that the regulators are paying close attention to and will likely do so for the foreseeable future.

US

The Federal Trade Commission (FTC) is taking action against big names in the US in regard to influencers. What is the current position in the US and what should brands do as a result?

The FTC recently sent out notice letters to hundreds of well-known brand name companies about fake reviews and other misleading endorsements. It is flexing its penalty power by imposing penalties on companies that use endorsements that the FTC deems to be deceptive, and has said it will hold brands responsible using every tool at its disposal.

Frustratingly, the letters that went out did not specify what the FTC specifically found to be offensive or fake, but in the same press release, the FTC said that it considers the violations so obvious that ongoing violations must be knowing and entitle the FTC to seek full penalties for the violations.

It is, therefore, recommended that companies undertake a comprehensive review of their general advertising practices, including any endorsement testimonials with urgency, to prevent falling short of the FTC standards. Through these letters, that FTC has shown that it will be a lot more active under this administration, and that it will be seeking monetary compensation from companies that run afoul of its rules.

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The Rise of ESG and Global Workforce Challenges

The Rise of ESG

ESG issues have been on everyone's agenda recently. The concept derives from the idea that corporations should serve social purposes rather than only financial purposes, and the definition is amorphous and evolving.

ESG Overview

- **Environmental** considerations can include energy efficiency, greenhouse gas reductions, deforestation, biodiversity, waste minimisation, water resource management, etc.
- **Social** issues can include labour standards, wages and benefits, workplace diversity, racial injustice, etc.
- **Governance** concerns managing how a business tackles the above-mentioned environmental and social issues, and a business' overall conduct.

The interest in ESG has not slowed down since the start of the pandemic. If anything, the pandemic has demonstrated a fragility that demands us to think harder about ESG, and this is fuelled by government policies, consumer behaviour and the war on talent, to name just a few of the drivers.

Many companies are unsure of what ESG means to them. What trends are you seeing in the way that companies are approaching ESG programmes?

ESG is an enormous subject matter to navigate, and many companies struggle with where to start when adopting ESG programmes. There is no one-size-fits-all model that we can pull from the shelf, and so we are seeing a huge variation in approach to adoption across different businesses.

This variation depends on a wide range of factors, including sectors, the complexity of the organisation and its operation, company culture, company structure (particularly relating to where the board/overall governance is located), stakeholder interest in ESG and the level of resources, as it is not always the company with the biggest pockets that shows best practice in ESG.

The companies that are leading in this area are the ones that have successfully addressed three fundamental steps:

1. They have put a suitable governance framework in place.
2. They have broken down ESG as a topic in order to identify the components of ESG that are most relevant to their business.
3. Having completed steps 1 and 2, they start to embed these ESG matters into their business strategy and operations. Failure to complete step three results in ESG becoming a superficial matter, with no meaningful change being made.

Is the continued interest in ESG is changing the nature of risks that a company faces?

With the growing momentum of ESG, the risks faced by a business are inevitably changing, but the core nature of the risk remains unchanged.

The scientific community have been telling us for a long time that an over dependency on fossil fuels and excessive release of carbon dioxide into the atmosphere would lead to the adverse effects of global warming. We also know that resources are finite and that over consumption would lead to shortages, rising costs, bio diversity loss, etc. It is not possible to argue that we have not known about these risks for quite some time.

We used to look at these issues with a long-range lens, thinking they were far into the future, and would not occur in our lifetimes. Yet, these problems are here now and we are currently experiencing the adverse effects of global warming that scientists have warned us about for such a long time.

In turn, we are experiencing a newfound focus and energy around these environmental risks that we have not encountered before. This new buzz around tackling climate change is exposing businesses to enhanced risks concerning increased levels of stakeholder engagement and scrutiny of environmental factors from investors, the workforce, customers and regulators.

Regulators are particularly animated around these matters. With recent announcements of net-zero ambitions, there is an increased level of scrutiny around ESG related matters and a significant rise in the level of corporate reporting. With this comes risks in terms of potentially reporting misleading information by overstating environmental and sustainability credentials. Similarly, "greenwashing", which involves using exaggerated environmental and sustainability credentials in marketing campaigns to attract customers, is on the rise and being closely monitored by advertising standards agencies.

Consumers and customers are increasingly making purchase decisions on the basis of environmental and sustainability credentials. Today's workforce is selecting their employer based on the actions they are taking to benefit the planet and society. In the war on talent, businesses will lose out if they are not able to put their best foot forward and explain how they are tackling ESG related matters.

In 2021, the UK government stated that any company that does not have a net-zero reduction plan in place would be unable to bid for government contracts, resulting in the loss of profitable opportunities for businesses that are not engaged with these issues.

Thus, the fundamental issues of protecting the planet, helping society and well-behaved businesses are evolving in a way that expose businesses to the risk of a loss of profit, a diminished workforce, more stringent regulation and heightened scrutiny from consumers. Moreover, we anticipate that ESG-related risks will continue to evolve and will likely accelerate.

What role does the board or senior executive team have in mitigating ESG risk?

The board or senior executive team have a significant role in mitigating risk, but that is not to say that elements of the ESG programme cannot be delegated.

In our experience, the best ESG programmes are led from the very top, where the board or senior executive team is demonstrating genuine leadership on ESG and a commitment to incorporating ESG matters into company strategies and operating models. It is important for the board to set the tone and focus for the rest of the organisation, as well as empower individuals within the organisation to lead on ESG-related matters. Furthermore, these businesses implement robust processes to enable effective decision-making and ensure there are audits in place to monitor progress. In many organisations, it is increasingly common to see ESG board committees or an ESG representative on the board of the senior executive team.

Without doubt, ESG programmes are less effective where there is a disconnect with the board. We receive a lot of questions from large international corporates where local country managers are alive to ESG matters in their given location, but they do not have guidance, leadership or empowerment from the board to enable them to take appropriate action.

Therefore, the board or senior executive team plays a key role, and we do not believe that an ESG programme can be effectively implemented without the full support of leadership.

Global Workforce Challenges

What are we seeing employers prioritising diversity, equity and inclusion (DEI)?

The focus on DEI began pre-pandemic, but as with ESG, the pandemic certainly amplified this by forcing employers to engage with DEI matters across a range of issues, both internally and externally. Pre-pandemic, prioritising DEI initiatives was considered "the right thing to do", but today, it is almost considered mandatory.

Lockdown forced employers to engage with home working, in turn, changing the working landscape for the foreseeable future, where many employees have demonstrated their ability and productivity in working from home. Similarly, school closures also meant that businesses had to make allowances for working parents. As a result, many businesses have since adopted hybrid-working models to pre-emptively stave off the flood of flexible working applications.

A further evolution of the working landscape is the adoption of a four-day week. This has been implemented in Japan, Iceland and the UAE, and is now being trialled in the UK on a six-month basis with just 30 companies.

Linked to these adaptations, is The Great Resignation, a trend that is present globally, but is particularly prominent in the UK. Numerous recent surveys show that 25% of employees are considering leaving their job in the next three – six months, and this is driven by a range of factors.

COVID-19 plus Brexit has resulted in a reduction in talent due to worker mobility, and the war on talent is the hottest we have ever seen. This is forcing employers to engage with DEI issues in ways that they have not previously needed to, and it is evident in the way that employers are engaging with sectors of the workforce that that have not engaged with previously. Today, there are more programmes to help those that have been on career breaks get back into the workforce, there is a higher employment rate among the neurodiverse community and there are more reformed criminals returning to work.

The other side of The Great Resignation is The Great Reflection. Workers are looking for greater purpose and meaning in their jobs and they are expecting employers to deliver on this. Employees are scrutinising the DEI credentials of their existing and potential employers. Often, this is with very specific questions relating to the representation of minorities at board level, or the opportunities available to minorities, in turn, showing that DEI is not just a superficial concern for today's workforce. This means that businesses have to put their DEI credentials front and centre to both attract and retain talent.

What risks do employers face if they do not implement policies and practices related to DEI or to account for a diverse workforce?

From a legal perspective, without stringent policies and procedures in place, businesses open themselves up to harassment, discrimination and retaliation claims. Where such cases arise, investigators will first look at what policies and procedures an organisation has implemented relating to DEI. Where there are none, they are not sufficient, or the business cannot show that they took sufficient action to prevent the harassment, bullying or retaliation, etc. then the business may be held responsible.

From a business perspective, DEI policies and procedures are important for team morale, recruitment and retention. Employees will and are voting with their feet. If they are not convinced of a business's DEI credentials then they will leave or turn down roles.

As companies are more global in their outlook, what trends or best practice in relation to policies, procedures and investigations are we experiencing?

Global uniform policies are challenging. We are frequently contacted by clients asking for the rollout of global policies and procedures, but in reality, they are difficult to implement because each jurisdiction has its own legal framework. While we can support in establishing high-level concepts and principles, every jurisdiction will inevitably apply the framework in a different way with various nuances.

We were recently asked to help with a home working policy for a multinational client. They wanted the policy to work in 14 countries across Europe. The actual policy was three pages long, but had 10 pages of appendices that dealt with the various jurisdictional variations for each country. Thereby demonstrating that global policies can be unwieldly and challenging to implement.

Similarly, we are frequently asked to roll out equal opportunities monitoring, which brings with it issues relating to data protection, and differences in data categories across jurisdictions, etc. to name just a few of the challenges.

However, there are some things that companies can do to help establish uniformity across global companies. This includes companywide messaging that relays the importance of the DEI initiatives, making information about company policies easily accessible to employees, and offering some form of helpline. Essentially, the company needs to show that it prioritises DEI.

What are the challenges that an international company has with remote working from an immigration perspective?

As previously mentioned, there is an increased need for flexibility in working practice. The War on Talent has put an increased pressure on businesses to not only be flexible in domestic working arrangements, but also international arrangements, where employees are looking to go overseas and work in a different country of their choice. Where employers are increasingly desperate to attract or retain talent, they are forced to agree to these flexible working arrangements.

If an employee is returning to their home country, then they are not subject to immigration concerns in the country that they are returning to. However, there are an increasing number of employees looking to travel to a better climate, or wanting to travel and work from anywhere in the world. In such cases, an individual can only go and work in another country if they are able to obtain the correct visa status.

Some countries have remote working visas, or "digital nomad visas", for example Bali, Croatia and many of the Caribbean islands. However, if a country does not offer this type of temporary working visa, then it is very difficult to get a visa in a country where the employer does not have a presence.

Some employers put the responsibility of the immigration status on the employee, but this is a risky approach because if the employee breaches local rules, it can raise various legal issues for the employer.

If the employee is returning to their home country, then a visa to work in said home country would not be needed. However, if the employee is leaving a country of employment where they have a permanent resident status, then their prolonged absence from the country of employment could risk a loss of their permanent resident status.

Thus, there are many considerations to take in to account before an employer agrees to flexible working arrangements.

What are the technical tax issues that business need to be aware of in this environment?

1. Not allowing enough time for the process. This has been a significant problem for UK businesses post-Brexit. With the end of free-movement, EU citizens coming to the UK need status and UK citizens going to the EU need permission to work. To date, UK employers are not experienced in having to assess the ability for UK citizens to work in Europe.
2. Looking at the duration of the work trip rather than the activity. Now, businesses have to apply for employees to have permission to work in the EU on business trips that last just a matter of days. Many businesses think that because it is only a brief trip that a visa will not be required but this is not the case.
3. Each country has its own immigration rules, practices and procedures, which is an additional hurdle to consider if your employee is travelling around Europe. You cannot get a visa that allows you to work anywhere in Europe, or anywhere in the world. Typically, if you are fulfilling a role then you need a work visa. If you are attending meetings then a visitor visa will more likely be suitable. However, it is critical that you check the immigration rules for the countries that you are visiting.

COVID-19 put a hold on these immigration problems, but as people start to travel more, the problem will be exacerbated.

What are the technical tax issues that business need to be aware of in this environment?

As previously mentioned, under the war on talent, businesses are increasingly allowing their employees to work remotely, and in some cases internationally. These businesses need to be careful of the tax implications in doing so.

There are some scenarios, depending on circumstances relating to the company, the country and how the individual is paid, in which an individual can be in a country for six months and would be exempt from tax. Equally, there are circumstances in which there is a tax liability from the day an employee arrives in a given country.

Employers also need to be aware of:

- Social security – this cost varies from country to country depending on where the employee is living, it may be more expensive than the home country in which the company operates.
- A single employee working remotely in another country may create a taxable presence for the company in said country.

Thus, it is imperative that a company conducts tax due diligence before implementing international flexible working policies.

How are you seeing businesses manage these issues?

The changing working landscape is evolving faster than the development of corporate polices, to the extent that there may not be policies available where we are encountering new and novel scenarios. Businesses need to be aware that in such cases, the risks have not been analysed.

Tax experts are seeing polarised views around tolerance to remote practice. Some are publically embracing flexible working in an attempt to tackle the war on talent, while others are retreating to a more traditional working pattern once they realise the additional tax and administration burden.

We are helping businesses reshape their existing mobility policies in the new evolving landscape, which is largely driven by millennials who want international experiences.

What are the special considerations that end users and services should consider when engaging employees?

The war for talent means that employers of workers providing services are looking at new ways to structure supply chains. If you have a UK-headquartered group or a UK subsidiary that is employing off-payroll labour, wherever it might be situated, then there are some complex tax guidelines to navigate.

At present, a lot of contracts say the worker is responsible for their tax or the worker's personal services company is responsible for the tax. In the UK, this is no longer the case. Businesses can no longer contract their way out of their employer responsibility or withhold income tax on certain worker services in the UK.

There are two different ways of engaging off-payroll labour: direct or indirect.

Direct – If you directly take on a freelancer, it has always been the case in the UK that you need to assess whether they would be treated akin to an employee for tax purposes (tax only, employment law would be a separate issue). With employee status, it becomes a matter of case law and there is no statutory test. It is very unclear and uncertain, and you have to go through a lot of tests with HMRC to establish how to manage the tax in each case. Essentially, each case is nuanced and an employer needs to establish how tax law applies to them.

If the worker would be an employee, then the employer needs to operate wage withholdings (PAYE) to apply social securities. You will also need to look at various levies (apprentices, or health and social care, etc.) with regard to each employee, and their residency status should be looked at in exactly the same way.

Indirect – If you have a supply chain (end engager taking on services, one or more agencies, perhaps a personal services vehicle that might be a company in which the worker has a stake, and the worker), then you need to look at the engagement with the worker, and establish how the end user and worker work together, and whether it is akin to an employee.

If yes, it is akin to an employee, then the end user needs to provide a status determination statement. The worker can either accept or appeal. The employer then needs to let the next UK-based party above the worker in the supply chain know, as they are responsible for operating PAYE. If they do not do so, then the taxation responsibility moves back up the supply chain to the end user. Again, this demonstrates the importance of due diligence on your supply chain.

If the end user is not a UK resident, then it is the worker's responsibility to manage their tax. If the worker is in the UK but no other part of the supply chain is, then it is not relevant.

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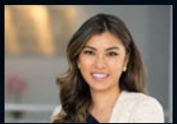

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