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Contents

Making a statement on Modern Slavery

A year has barely passed since the provisions of the Modern Slavery Act (MSA) came into force, which required British businesses to lift the lid on their suppliers' ethical employment practices, and Educational .

Who is impacted?

The MSA currently imposes a number of obligations on "commercial organisations", defined as an organisation with a turnover (or group turnover) of at least £36 million and which is either incorporated in the UK or carries on a business in the UK. The government guidance which accompanied these rules indicated that it was irrelevant whether the organisation pursued educational, charitable or purely public functions. For this reason we advised that universities and higher education institutions were, subject to the turnover limits, within the ambit of the MSA.

Section 54 of the MSA requires commercial organisations to publish a statement setting out the steps that they have taken during that financial year to ensure that slavery and human trafficking are not taking place in their supply chains or in any part of their own business.

What next?

We are now looking intently at the House of Lords for the next steps in widening the scope of its application. The Modern Slavery Act (Transparency in Supply Chains) Bill 2016-17 has had a second reading in the House of Lords and has passed to the Committee stage. Under the draft Bill, which is intended to amend the MSA, the statement will have to be included in the annual report and accounts of both commercial organisations and public bodies.

The term "public body" will be defined using the wide definition of any organisation subject to procurement law. There is no limitation by reference to the size or budget of the public body. This means that smaller higher education institutions, as well as FE colleges, maintained schools and academies will also be obliged to consider the impact of modern slavery in their supply base.

In addition, the draft Bill is proposing using the power of procurement in the fight against Modern Slavery. The draft Bill proposes an amendment to the procurement rules to automatically exclude an economic operator from participation in a procurement procedure where that economic operator has not produced a slavery and human trafficking statement.

You can read more on progress on the Modern Slavery Act (Transparency in Supply Chains) Bill 2016-17 **here**.

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Amidst the Brexit turmoil, is the green investment climate stabilising?

Climate change is firmly back on the agenda, with recent global efforts by governments providing a timely reminder that the green economy still has the potential to drive UK economic growth.

Climate change agreement

First up, we had news that the global agreement reached in Paris last December, at the 21st Conference of the Parties of the UNFCCC (United National Framework Convention on Climate Change), is finally to come into force.

With the US, China and India already signed up, it took a symbolic show of unity from the EU (and a legislative fast track approval process) to nudge the landmark climate deal over the double threshold needed for its ratification - at least 55 countries representing not less than 55% of global emissions. The agreement formally comes into effect 30 days later, in early November.

To recap, the agreement binds countries to ensure that the average global temperature rise is contained to 2˚C above pre-industrial levels, with a stated “aspirational” goal to limit temperature rises to under 1.5˚C. It does this through a mechanism of national pledges twinned with a transparent monitoring framework, plus continued financial support for developing countries, including for adaptation measures.

Carbon emission reduction

And if this wasn’t enough, October saw an announcement by the International Civil Aviation Organisation (ICAO) of new rules to curb carbon emissions from the aviation sector. Like shipping – which is yet to announce how it is to clean up its act - the aviation sector has been notably absent from UN climate targets to date, yet is projected to account for around a quarter of the world’s carbon emissions by 2050. This new announcement from the ICAO will see airline emissions continue to grow until 2020, but after that increases will be “carbon neutral”, by offsetting against carbon reduction measures such as tree planting.

And finally, we’ve seen a landmark global deal on hydrofluorocarbons (HFCs). This latest set of amendments to the successful Montreal Protocol on Substances that Deplete the Ozone Layer, which is another international treaty dating back to 1987, should see the eventual phasing out of one of the most harmful greenhouse gases, commonly used in fridges and air conditioning units (although already heavily regulated in developed countries).

So what does all of this mean here in the UK, and specifically for the education sector?

First and foremost, with all the talk about the impact of Brexit on the UK economy and the future relevance of EU law and policy, these global developments are a timely reminder that much of our domestic efforts to combat climate change are founded on international legal frameworks which do not derive from EU jurisprudence.

Furthermore, our own Climate Change Act 2008, enacted some time ago amidst much talk of global leadership, saw the UK embark on its own legally binding trajectory towards decarbonisation, entirely independent of the UK's EU membership.

Set in this context, Brexit does not especially alter some of the crucial climate-related decisions facing the UK, such as the Heathrow airport expansion decision, and the pursuing of shale gas development. This is important, because it is a reminder that the underlying rationale for investment in our green economy – a stable and long term policy framework – actually remains intact notwithstanding Brexit.

However, if the UK is to maximise the opportunities on offer, research and development is critical. Innovations continue to drive the green economy, across the spectrum: from energy storage, electric vehicles and the latest solar and wind technologies, through to smart metering and energy efficiency products and services. A brain drain in reaction to an impending Brexit cannot be allowed to happen.

And, of course, many UK companies continue to cite the skills gap as a big constraint on the creation of green jobs, with all the peripheral political sensitivity that goes with that in terms of immigration policy.

What we need now is Theresa May's government to demonstrate a concerted effort to "join up" policy across the climate change agenda, to demonstrate how in a post-Brexit world the UK can deliver its climate goals and, more particularly, secure the £100bn of investment needed by 2020 to reinvigorate the UK's energy infrastructure and drive forward our economy.

Charter of the Forest

As a postscript on the subject of treaties, academics may be familiar with the Charter of the Forest, which was a complementary charter to the Magna Carta, and provided rights for commoners to access royal forests and other lands, reversing actions by some of the early Plantagenet kings who had prevented commoners from living off increasingly greater areas of land.

To celebrate the continued importance of trees and woodland, not least as a key component of the new Paris climate agreement, a UK campaign is underway to introduce a new Charter for Trees, Woods and People. This will be launched on 6th November 2017, on the 800th anniversary of the Charter of the Forest. The Charter is the work of more than 50 organisations, coming together from across multiple sectors, with the aim of bringing trees and woods back to the centre of life in the UK.

To celebrate the Tree Charter 2017 campaign, the Legal Sustainability Alliance (LSA), of which Shakespeare Martineau is an executive member, has joined forces with the Woodland Trust to launch a brand new debating competition for law students and undergraduates. Each regional heat will be hosted by a leading law firm and judged by senior partners, with a final to be held on 8th December 2016 at the London offices of law firm Linklaters.

The competition is open to teams of 3 students, who must prepare a convincing case in response to the question: *"What role can the practice of law in the 21st century play in achieving sustainability for the common good?"*

Shakespeare Martineau is proud to be hosting the Birmingham heat on 23rd November 2016. For aspiring lawyers, there are few topics of more importance; law students and undergraduates can find out more on how to get involved **here**.

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The VAT cost-sharing exemption – is the game not worth the candle?

The introduction of the cost-sharing exemption ('CS Exemption') is often cited as a significant benefit in the context of shared services between universities. Although the exemption was a mandatory provision of the EU VAT Directive since 1977 its implementation in the UK did not take place until 2012, after years of lobbying for its introduction by universities, charities and other interested bodies, because it was considered to be too unclear.

Practitioners have questioned the viability of the CS Exemption arguing that its implementation entails too much legal and financial complexity and risks. The exemption, as contained in the EU VAT Directive, contains five requirements for it to apply:

- The relative service must be provided by an independent group of persons (a Cost-Sharing Group or CSG);
- The members of the CSG must carry out activities which are exempt from VAT or in relation to which they are not considered to be taxable persons;
- The services supplied by the CSG must be necessary for those exempt activities;
- The services must be supplied by the CSG at cost (exact or direct reimbursement);
- The supply of the services by the CSG must not distort competition.

In the UK, HMRC added a sixth requirement, that for a member to form part of a CSG that member must actually receive a qualifying service (i.e. one that falls within the exemption) from the CSG or must at least have a realistic and genuine intention of doing so. Failure to receive such services within any 12 month period renders a member ineligible to continue its membership of a CSG.

The potential benefits of the exemption were widely debated when it was introduced into the VAT Act. Practitioners generally adopted a "wait and see approach". However, after some years of trial and error, many seem to argue that the benefits of the exemption are outweighed by the risks involved.

This was the conclusion reached by the N8 Research Partnership (the N8) in a report entitled "Implementation of Cost-Sharing Exemption in Universities", published in July 2016 after the conclusion of a two year project supported by HEFCE which explored the viability of utilising a CSG arrangement for sharing equipment between higher education institutions. The N8 Research Partnership is an organisation formed and funded by eight research intensive universities with the scope of promoting collaboration between universities, business and society, establishing research capabilities and programmes and driving economic growth.

The N8 noted that a lack of willingness to form CSGs has resulted from a strict interpretation of the direct reimbursement requirement by HMRC. This contrasts with a briefing which was published by the Charity Finance Group before the exemption was introduced, that this was an uncontroversial requirement. The condition requires that the services are supplied at cost i.e. the CSG cannot make a profit. The Charity Finance Group had reported that HMRC would accept that there may be cases when income and expenditure do not precisely cancel each other out straight away, and that a surplus or loss could be carried forward as long as they are held for the future benefit of members. Compliance with this condition, therefore, would be assessed over a reasonable period of time.

Although the N8 reported concerns about the direct reimbursement requirement, three out of four models proposed by N8 to HMRC were considered to be acceptable by the latter, with objections being raised only in relation to a proposal to share all costs equally (which in effect would mean that some members would pay amounts disproportionate to their use of the services, thus undermining the 'at cost' requirement). This means that in practice the direct reimbursement requirement should not pose much of a hurdle.

What is of concern however is what the N8 reports on HMRC's interpretation of the independence requirement. In an article in the

Tax Journal published on 30 May 2012 when the exemption was still being enacted, entitled "The impact of the VAT cost-sharing exemption", Mark Hampson, Indirect Tax Senior Manager at Grant Thornton, noted the controversy which surrounded this requirement at the time. Critics argued that the exemption could not be easily accessed on a short-term basis, and this was because HMRC proposed to require that CSGs be commercially independent from their members. However, Hampson states that HMRC, before the article was written in 2012, had reviewed its position in order to allow a CSG to be under the control of one of its members.

The N8 report states that HMRC explained that it would not allow a university subsidiary to act as a CSG within the context of a university's VAT group, thus allowing the university to "host" the CSG and provide it with supplies without charging VAT. Instead HMRC suggested that a separate CSG should be formed which does not form part of a member's VAT group. This increases the costs of the CSG and requires its members to allow capital equipment to be purchased by a completely separate entity.

This seems to directly contradict HMRC's position when the exemption was enacted and, more notably, the EU Commission's view in Working Paper 856 of the VAT Committee of the DG Tax and Customs Union dated 6 May 2015, that:

"...it does not stem from the wording of the provision that there should be any restrictions on the nature of the entity that can be used as a vehicle for forming an "independent group". Although exemptions must be given a narrow interpretation, it seems that any such restriction would hamper the purpose of the exemption for no obvious reason."

"A parent company and its subsidiary remain different legal entities and, therefore, they could be seen as independent persons for the purposes of Article 132(1)(f) of the VAT Directive. The subsidiary acting as the cost-sharing group thus seems to meet with the condition that the cost-sharing group must be independent from its members..."

The N8 finally concluded that if the CSG has to be outside the VAT group of its members, this nullifies the effect of the exemption because VAT has to be charged when supplying resources to the CSG. It also adds to the complexity and expense involved in setting up a suitable arrangement and the fear of prosecution for failing to apply the exemption correctly. The report goes on to state *"the benefits of utilising the Cost Sharing Exemption are not seen to outweigh the risks and costs."*

This seems to be an overly pessimistic view of things. We have assisted various institutions to set up relatively straightforward CSG structures and to reap the benefits which the exemption has to offer. The concerns expressed by some practitioners and institutions however should not be ignored. There is a very real need for greater efficiency in the HE sector and the CS exemption is a good tool for achieving this, but if there are institutions which are finding it difficult to implement the right structures then that should be a sufficient motivator to simplify the regulation or at least to adopt a more relaxed interpretation of its requirements.

Following Brexit, the government could opt to clarify and facilitate access to the exemption without having to deal with the EU, despite having left it on the shelf for over thirty years while institutions in other member states benefitted from it. Until then, however, it is unlikely that any changes will be made for fear of criticism by the EU Commission. HMRC has cited the ongoing infringement proceedings against Luxembourg as a source of uncertainty preventing improvements to the exemption's implementation in the UK (although it should be noted that Luxembourg's exemption is much wider than that in the UK, and that proceedings were initiated because after being requested by the Commission to amend its exemption it refused to do so). It is even less likely that the government will engage with EU institutions to improve the exemption seeing that its resources are now focused elsewhere. For the time being, therefore, things will probably just remain the same.

This should not mean that institutions should give up on implementing CSGs in the meantime. Although accessing the exemption could be made easier, the current difficulties can be overcome. Institutions should look to others who have succeeded in creating CSGs as a source of encouragement and should try to replicate existing models which could best suit their needs.

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International Property Measurement Standard – office buildings

The new International Property Measurement Standards ("IPMS") introduced by the Royal Institute of Chartered Surveyors (RICS) earlier this year for commercial property are welcomed by many investors and institutions, despite the current economic uncertainty.

The standard introduces a new way of measuring floor space for office buildings (there is also an equivalent for residential premises). Universities are continuing to invest in capital projects and the change seeks to introduce a universal method of measuring property across the world.

Clear and transparent

The traditional way buildings and floor space are measured is argued to lack transparency. It is alleged that this has led to inaccurate measurements of space as the Net Internal Area ("NIA") measurement includes only accessible/useable floor space in its calculations, which can result in variations of up to a quarter in terms of classification and reporting of building areas.

The new IMPS changes the way in which Gross External Area, Gross Internal Area and NIA are defined. In short, IPMS parallels closely to the current NIA, but it defines floor area as that which is 'available on an exclusive basis to an occupier, but excluding standard facilities and shared circulation areas…'(such as common parts). However, the new IMPS requires columns, party walls and other structural intrusions to be included in the floor area measurements. This is important because extra due diligence is required when institutions enter into agreements for new capital projects, as the amount of rent calculated per square metre can vary depending on what measuring system is used (and this has an impact on capital values).

All change

The introduction of the new standards means that how universities identify, measure, and classify the space offered by their facilities is most likely going to change. The standards are intended to be mandatory, but universities can still opt to use other alternative measurement standards as long as this is agreed in writing. The changes are not universally welcomed, as some argue that they fail to reflect the real value of floor space from the end user's viewpoint. In other words, by including non-accessible/non-usable floor space the IPMS arguably creates a distorted picture of the actual space available. Equally, it is thought that the new IPMS may bring the benefit of producing information which can be used for more consistent benchmarking and making better financial decisions.

RICS is making available a free online convertor tool which allows professionals to automatically convert the new IPMS measurements back into their local measurement standards. Universities need to be able to make direct comparisons to aid their thinking when communicating new capital/development projects.

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Shared parental leave policies and discrimination

In the case of *Snell v Network Rail Infrastructure Limited* (S/4100178/2016) a Scottish employment tribunal has found that Network Rail's shared parental leave policy in respect of pay was discriminatory. The outcome may impact universities.

The facts

Mr Snell and his partner both worked for Network Rail, but while his partner (the mother of the child) received full pay for six months of her leave, Mr Snell (the father) only received the statutory rate.

Mr Snell raised a grievance with Network Rail on finding out about the difference in pay between him and his partner, for what was essentially the same kind of leave. Network Rail dismissed his grievance stating that legally it did not have to pay any more than the statutory rate.

Mr Snell brought a claim in the employment tribunal stating that Network Rail's shared parental leave (SPL) pay policy was indirectly discriminatory. Network Rail subsequently conceded this point.

Mr Snell was awarded approximately £23,000 including £6,000 for injury to feelings and £16,129 for future losses, being the difference between statutory SPL pay and what Mr Snell would have received had he been entitled to the enhanced level of pay.

What this means for universities

Given the outcome of this case and the potential for significant tribunal awards it is prudent to carefully review your policy on SPL pay.

If you offer enhanced SPL pay to mothers then you should consider giving the same enhancement to fathers or partners of the mother.

Interestingly, Network Rail has now introduced a new policy reducing the mother's SPL pay to the statutory rate rather than enhancing the rate for the father or partner.

Universities should assess whether they are able to offer enhanced pay to both mothers and fathers or partners, and to either offer the enhanced rate to both, or to set payments at the statutory rate for both.

What is clear is that any inconsistency in the level of SPL payments between men and women will make organisations vulnerable to (most likely legitimate) discrimination claims.

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