

# LexisNexis In-house NewsIN

The month's key commercial legal stories that could affect your business

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## June 2017

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Our monthly round-up of key news and trend stories for in-house lawyers includes links to further recommended reading in Lexis®PSL. Non-subscribers can [request a free one-week trial](#) of LexisPSL to view this content.



## Corporate & Commercial

### New anti-money laundering measures in force from end of June 2017

Changes to UK anti-money laundering measures have been **announced** with the aim of preventing money laundering and terrorist financing, and increasing the transparency of who owns and controls companies in the UK. These changes come into effect on the 26th June 2017.

The new legislation will make changes to requirements about people with significant control (PSC) information. From the 26th June 2017, PSC will not be updated on the confirmation statement (CS01). Instead, whenever there is a change, Companies House will need to be informed using the forms PSC01 to PSC09. Companies will have 14 days to update their register and another 14 days to send the information to Companies House.

Further reading: [LNB News 20/04/2017 132](#).

### Businesses must shape up on corporate governance to restore public trust

According to a **report** by the House of Commons Business, Energy and Industrial Strategy (BEIS) Committee, immediate action must be taken by businesses on corporate governance, executive pay—including long-term incentive plans (LTIPs)—and boardroom diversity, in order to address a growing lack of trust by the public in business.

The report makes a number of recommendations, including that the government should set May 2020 as the target date by which at least half of all new appointments to senior and executive management level positions in the FTSE 350 and all listed companies, should be women.

Further reading: [LNB News 05/04/2017 66](#).

### Public beneficial ownership register proposed for overseas entities holding UK property

Proposals to create the world's first public beneficial ownership register to increase transparency of overseas investments in UK property have been set out by the Department for Business, Energy & Industrial Strategy (BEIS).

It has published a [call for evidence](#), asking overseas investors, property and transparency experts for their opinions on how this register could be delivered and its impact. The deadline for responses is 15th May 2017.

Further reading: [LNB News 06/04/2017 54](#).

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## Data Security

### NIS Directive

In 2018, the exposure to fines for data security breaches will be increased by the EU Data Protection Regulation and the lesser known EU NIS Directive. This Directive is intended to ensure that there are minimum cyber security standards for operators of essential services. We are still waiting for clarification on penalties and details of the entities covered.

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## Employment

### Indirect discrimination claims and PCP

Do claimants alleging indirect discrimination need to show the reason why a provision, criterion or practice (PCP) puts them at a particular disadvantage? The Supreme Court gave the answer in the joined cases of *Essop and others v Home Office (UK Border Agency)*; *Naeem v Secretary of State for Justice* [2017] UKSC 27, [2017] All ER (D) 12 (Apr).

The Supreme Court allowed the first appeal and dismissed the second appeal in cases concerning indirect discrimination on grounds of race, age or religion. The court held, in relation to the first case, that claimants alleging indirect discrimination were not required to show the reason why a PCP put one group at a disadvantage when compared with others. It held, in relation to the second case, that the pool of comparators comprised all workers affected by the PCP.

Further reading: [Indirect discrimination claims and PCP](#).

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### Bar on holiday pay deductions claim after three month gap is binding

In *Fulton Baxter v Bear Scotland* (UKEATS/0010/16/JW), the Employment Appeal Tribunal held that in holiday pay cases, the bar on bringing an unlawful deductions claim, if more than three months have passed since the relevant deduction is a binding rule. This is not just a presumption which can be rebutted by evidence but there is an exception if it was 'not reasonably practicable' to bring such a claim in time.

Further reading: [Bar on holiday pay deductions claim after three month gap is binding \(\(1\) Fulton \(2\) Baxter v Bear Scotland\)](#).

### Exploring the use of employment contracts in the gig economy

A parliamentary select committee has been [examining](#) the contracts provided to individuals engaged by Uber, Deliveroo and Amazon and has lambasted Uber's contract as 'gibberish'.

Further reading: [Exploring the use of employment contracts in the gig economy](#).

### Employee liability information need not say if particulars are contractual

In a service provision change under the Transfer of Undertakings (Protection of Employment) Regulations 2006 [SI 2006/246](#) (TUPE 2006), the employee liability information that must be provided by the transferor to the transferee need not state whether the particulars of employment provided in respect of the employees are contractual or non-contractual, according to the EAT in *Born London Ltd v Spire Production Services Ltd* (UKEAT/0255/16/LA).

This judgment concerns an interesting TUPE case on the rarely litigated area of employee liability information and will be of interest to corporate lawyers as well as employment lawyers.

Further reading: [Employee liability information need not say if particulars are contractual](#).

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## Intellectual Property

### Court of Appeal clarifies scope of shape mark protection

In *Société des Produits Nestlé v Cadbury UK Ltd* [2017] EWCA Civ 358, the Court of Appeal dismissed an appeal by Société des Produits Nestlé (Nestlé) against the decision of the High Court in January 2016, upholding a decision of the hearing officer that its UK trade mark application for the shape of the well-known four finger chocolate product sold under the name Kit Kat, was invalid on the basis that it lacked acquired distinctive character.

This marks the latest step in a long running struggle by Nestlé to try and register the mark without success.

The Court of Appeal held that it was clear, based on the case law of the Court of Justice, that, in order to show acquired distinctiveness, the applicant must prove that, as a result of the use that he has made of the mark, a significant proportion of the relevant class of persons perceive the goods designated by that mark, as opposed to any other mark which might also be present, as originating from a particular undertaking.

In other words, the mark must have come to identify the relevant goods as originating from a particular undertaking and so to distinguish those goods from those of other undertakings.

In the circumstances of this case, where the shape had always been used in conjunction with the mark Kit Kat, it was not necessary for Nestlé to show that the public had actually come to rely upon it in the course of their transactional behaviour. However, it was fatal to the application that the public had only come to associate the shape with Kit Kat. It followed that the claim to acquired distinctiveness was bound to fail.

All three Appeal judges considered that the hearing officer was entitled to come to the decision that the trade mark was invalid based on the lack of acquired distinctiveness and dismissed the appeal, in an instructive judgment which sets out helpful guidance on the scope of the monopoly conferred by shape marks.

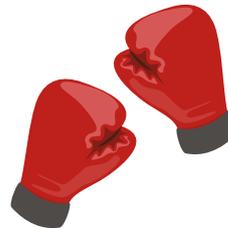
Further reading: [Alert: Court of Appeal clarifies scope of shape mark protection.](#)

## Intellectual property (unjustified threats)—guidance on the proposed Act

After a long journey through Parliament, the Intellectual Property (Unjustified Threats) Bill should come into effect by the end of 2017.

The history of the legislation is explained within the Bill and how it seeks to simplify and add a greater proportion to the process of businesses protecting their IP against either infringement or threats.

Further reading: [Intellectual Property \(unjustified threats\)—guidance on the proposed Act](#)



## Competition

### Facebook fined €110m over 'misleading' WhatsApp information

The European Commission has **fined** Facebook €110m for providing incorrect or misleading information during the Commission's 2014 investigation into the WhatsApp acquisition. This is the first time the European Commission has adopted a decision imposing fines on a company for such infringements since the entry into force of Council Regulation (EC) 139/2004 (EU Merger Regulation).

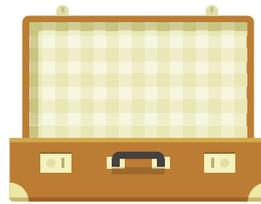
The decision has no impact on the authorisation of the acquisition. Lawyers say while the ruling is not a game changer, there are questions over whether the infringement was indeed non-material.

Further reading: [LNB News 18/05/2017 103.](#)

## European Commission publishes final report on e-commerce sector inquiry

The European Commission has published its [final report](#) on the e-commerce sector inquiry. This follows an interim report that was published in September 2016. The main findings relate to consumer goods and digital content. It allows the European Commission to target its enforcement of EU competition law rules in e-commerce markets and has already prompted companies to review their practices.

Further reading: [European Commission publishes final report on e-commerce sector inquiry](#).



## Corporate Crime

### Criminal Finances Act 2017—corporate failure to prevent the facilitation of tax evasion

The [Criminal Finances Act 2017](#) (CFA 2017) recently received Royal Assent. It imposes strict criminal liability on businesses that fail to prevent their employees, agents or representatives from criminally facilitating tax evasion.

Thomas Webb, the director of Burges Salmon's fraud and white collar crime team, looks at the impact of the new offences created by [CFA 2017](#) and the importance of implementing prevention procedures.

Further reading: [Criminal Finances Act 2017—corporate failure to prevent the facilitation of tax evasion](#).

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