

Q2 Commercial Forecast

Welcome to the spring of our [Commercial Forecast](#) for 2017.

Our forecasts help businesses to stay in the know about current and future legal developments which might affect them and the markets in which they operate. In this edition we look at insider threats to organisations, opportunities to claim tax credits for research and development expenses, protection of online brands when using Google advertising services, employment law changes following the Spring Budget, and an update on developments in the UK fintech industry.



The insider threat

Morrisons, Three Mobile and Royal & Sun Alliance - three high profile examples of organisations affected by serious information breaches. In all of these cases internal vulnerabilities played a role. They are examples of the so-called "*insider threat*" where the actions of an employee, contractor or other third party with access to information, cause data to be compromised in some way. It may involve activities that are variously intentional, negligent or simply inadvertent. Whatever the reason, the fall out can be disastrous from a financial and reputational perspective.

As more and more sensitive information is stored electronically, the threat becomes increasingly acute regardless of whether your business is large or small. The stakes are also increased by the approach of the General Data Protection Regulation (GDPR), which will come into force in May 2018. The GDPR creates a more stringent framework than that already in place under the Data Protection Act 1998. Organisations will face much larger fines (up to the higher of 20 million euros or 4% of total worldwide turnover) should they fail to comply with the obligation to take appropriate technical and organisational measures to keep personal data secure. These financial penalties will be in addition to any compensation claims advanced by those whose personal data has been compromised. In most cases, organisations will also be required to report any personal data breach within 72 hours of becoming aware of it.

All organisations should be getting their house in order as soon as possible given the imminent nature of the threat and the need is crystallised further by the GDPR framework. The following are just some of the key considerations for the purposes of addressing the regulatory and reputational issues posed:

- direct responsibility for information security at a Board level;
- crisis and risk planning that includes data breaches and/or cyber attacks as a key area of focus;
- regular updating of the organisation's systems to ensure technical resilience;
- appropriate due diligence conducted on employees and contractors, along with specific confidentiality and cyber security provisions in contracts of employment/service; and
- regular internal training sessions highlighting the risks of information security breaches and how to avoid them.

For further information please contact [Tom Rudkin](#).



R&D tax credits - a secret saver for SMEs

Research and development (R&D) is on the Government's agenda, with an additional £4.7 billion of funding promised by 2020-21. However, recent data suggests that many small and medium-sized enterprises (SMEs) are missing out on the opportunity to claim tax relief for their R&D costs. In its green paper on industrial strategy, the Government commits to increasing certainty and simplicity around claims and improve awareness.

Who can claim R&D tax credits?

To be eligible for the R&D tax credits, a company must:

- employ fewer than 500 employees;
- ≤ 86 ;
- be independent - meaning, broadly, that the SME has no non-SME shareholders with 25% or more share capital or voting rights; and
- meet a 'going concern' accounts requirement.

How much are R&D tax credits worth?

An SME can deduct 230% of its qualifying expenditure when calculating its taxable profits, thereby reducing its profit or increasing its loss. Furthermore, in exchange for surrendering a

7

6

particular project.

Which expenditure qualifies?

R&D is defined by reference to generally accepted accounting practice (GAAP). Under UK GAAP:

- research is "*original and planned investigation undertaken with the prospect of gaining new scientific or technical knowledge and understanding*".
- development is "*the application of research findings or other knowledge to a plan or design for the production of new or substantially improved materials, devices, products, processes, systems or services before the start of commercial production or use*".

Too complicated?

The process of checking eligibility is proving a burden for many SMEs. For smaller companies (those with less than £2m in turnover and fewer than 50 employees), Her Majesty's Revenue and Customs (HMRC) currently offers an advance assurance process to confirm that they are conducting qualifying R&D. Where assurance is given, the first three years of R&D claims will not be subject to further enquiry by HMRC.

It is not yet clear how significant changes to the R&D regime will be, but in the meantime we would encourage SMEs to ensure they take full advantage of the benefits available.

For further information please contact [Charlotte Black](#).



Protecting your brand online: Google advertising, domain names and trade marks online

The recent case of *Argos Limited v Argos Systems Inc* [2017] has brought the issues of Google advertising and online brand protection into the spotlight again. The case highlights the importance of seeking domain name registration for your brand as early as possible, and paying close attention when contracting for online advertising services.

The case centred around adverts appearing on a website owned and operated by Argos Systems (AS) – "www.argos.com". AS is a US company providing computer-aided architectural design services. Adverts were placed on AS's website by Google via its AdSense programme, under which AS had made advertising space on its website available to Google.

Some of the adverts which were placed on AS's website included adverts for products sold by Argos – the UK catalogue retailer. They appeared on AS's website because Argos had signed up to the Google AdWords service which places adverts on third party sites based on keyword searching.

Argos brought legal proceedings. It accepted that it could not object to AS's use of ARGOS in its domain name in connection with its own architectural design services - AS had in fact lawfully registered the domain name back in 1992. However, Argos claimed that when combined with the presence of adverts for Argos's own products (obviously advertised under its own name and brand) the inclusion of ARGOS in the domain name took unfair advantage of Argos' own registered rights in the ARGOS name, and infringed its unregistered rights.

The judge dismissed Argos' claims, and found that by signing up to Google AdWords, Argos had essentially consented to the use by AS of the name ARGOS in its domain name together with the adverts. The judge also found that AS's website was not in any case targeted at the UK, meaning that Argos' rights had not been infringed.

While the facts of the case are unusual, it is a reminder of the importance of taking a proactive approach to protecting your brand online:

- had Argos managed to secure rights in the "www.argos.com" domain name before AS, the claim would not have arisen; and
- separately, advertisers signing up to Google AdWords should be careful to specify any particular third party sites on which they do not want their adverts to appear (and indeed use the optimisation tools which Google makes available as part of the AdWords service to monitor and manage this proactively).

For further information please contact [Emily Arnold](#) or [Paul Jones](#).



The Spring Budget: employment matters

A number of changes were introduced in the Spring Budget which will have an impact on employment law and regulation. To summarise:

- **Personal allowance increase:** the personal allowance will be raised by £500 to £11,500. This increase exceeds the rate of inflation.
- **Dividend allowance reduction:** the tax-free dividend allowance will be reduced from £5,000 to £2,000 from April 2018 with the aim of reducing the tax differential between the employed and the self-employed on the one hand and those working through a company on the other.
- **Taxation of remuneration consultation:** the government will consult on:
 - the taxation of benefits in kind generally;
 - accommodation benefits provided to employees; and
 - the taxation of employee expenses.

Recapping other changes taking effect this month and in April 2018:

6 April 2017 - deduction of legal expenses for employees on termination of employment.

As things currently stand, if an employer pays for or reimburses an employee for legal costs incurred in connection with legal action relating to an employment matter, these are only deductible (ie not subject to tax as a benefit) if they relate to allegations against the employee personally. From April, legal support provided by an employer will no longer be taxable provided the expenses are incurred in connection with an employee/former employee giving evidence about matters relating to the employment, or with a proceeding in which acts of the employee relating to the employment are considered.

6 April 2018- two changes:

1. Termination payments:

- With effect from 6 April 2018, where a termination payment (including a non-contractual PILON) is made to an employee, the employer will be required to identify, using a new statutory formula, the amount of basic pay that the employee would have received if they had worked their full notice period. This amount will then be treated as earnings and be subject to income tax and Class 1 NICs. *The £30,000 exemption does not apply in respect of the amount calculated using this formula.*
- Any excess of total payments made, and benefits provided, over this amount, will be chargeable to income tax to the extent it is over £30,000.
- The current foreign service exemption will be abolished (except for seafarers). A new exemption will apply w tax year of non-residence.

2. PAYE Settlement Agreements (PSA)

PSAs are arrangements under which employers can, in a single payment, settle their certain benefits and expenses. From 6 April 2018, the administrative burden currently involved in a PSA will be reduced. Employers will be able to submit a request at the year-end (as opposed to in advance of the year-end) and make ad hoc requests during the year.

For further information please contact [Michal Chudy](#).



Fintech update

Over the coming weeks there will be two main developments in UK fintech. The Financial Conduct Authority (FCA) will be contacting successful applicants for the second cohort of the FCA sandbox, and the Bank of England will soon call for applications for the second cohort of its Fintech Accelerator.

As a brief refresher, the sandbox and the Accelerator are technological environments developed in order to provide a safe space in which new fintech projects can test their ideas. While products and services are tested on real consumers, there are a number of thresholds applicants have to meet in order to use these facilities, and the consumers taking part do so with "informed consent". Examples of sandbox users range from HSBC and Lloyds Banking Group to Issufy (a platform which streamlines the IP distribution process) and Oval (an app which helps users pay off loans).

The demand for a second cohort speaks to the success of the first, and the UK's enthusiasm to encourage innovation in the financial sector. For the next quarter, it will be interesting to see which entrepreneurs and firms have been successful in their applications and what new services may become available to consumers.

The bigger picture here is of course how the increasing popularity of fintech, from mobile banking to apps for mortgages, will impact on legacy banks. Our team has identified how important it will be to bear the fintech factor in mind when giving legal advice, whether to longer-established institutions or new start-ups.

There are currently around 100,000 people in the UK who identify themselves as working in fintech and this figure is growing quickly. The general consensus is that the optimum result will be for banks and fintech to work together. However the industry as a whole will be keen to see how the more traditional world of banking and the fast-paced younger fintech industry manage their collaboration.

For further information please contact [Grania Baird](#).



Tell me more...

If you'd like to discuss any of these issues further, please contact the authors or speak to David Fletcher on 020 3375 7117 or email him at david.fletcher@farrer.co.uk

© Farrer & Co LLP 2017. All rights reserved.