# Thinking Business

## Issue 12

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# Introduction

Welcome to Issue 12 of Thinking Business, a Trowers & Hamlins bi-annual publication in which we share our latest insights and commercial thinking to help business adapt, grow and be successful in a rapidly changing world.

In this edition, we explore the following:

Weathering the storm: the impact of an uncertain economy – It may be some time before there are clearer skies for the economy but what actions can company bosses take to improve their chances of weathering the storm?

Cost of living crisis tests employers – With the increasing cyber threats organisations are facing, what steps can you take to plan and be ready to deal with an attack?

How investing in cybersecurity positively impacts the bottom line? – Investing mindfully in cybersecurity has the ability to shore up the bottom line and minimise the impact of economic fallout. Does this make for money well spent?

Opportunities presented by the new public subsidy regime – As of 1 January 2021, EU state aid law ceased to apply in Great Britain for new subsidies granted from that date. Since then the UK has been in a transitional period to introduce the post-Brexit subsidy control regime. Will the new system will provide public bodies with more flexibility to support businesses through a difficult economic period?

Should you wish to discuss anything in more detail, or ask any questions, please do get in touch with your usual Trowers & Hamlins contact, or feel free to email any of us directly at thinkingbusiness@trowers.com. You can also follow us on Twitter and LinkedIn @Trowers.

#12

# HOW INVESTING IN CYBERSECURITY POSITIVELY IMPACTS THE BOTTOM LINE

The average cost of a data breach continues to escalate over time, with the latest figures from IBM putting the typical cost of such events at $4.35 million in 2022, which is a 13 per cent increase on the $3.86 million typically incurred by a breach in 2020.

These costs are escalating as a result not only of more aggressive regulatory enforcement action pushing up the scale of fines, but also of the longer term impacts seen as a result of reputational damage, business interruption, litigation claims and remedial action.

"One reason it is so important to invest in cyber security and cyber resilience is because of the costliness of a breach," says Charlotte Clayson, partner in the dispute resolution team at Towers & Hamlin. "It may seem like a large cost upfront but it will save you money in the long run. By putting in place the relevant policies, protocols and firewalls to prevent attacks, you create a much better cyber preparedness picture, and that is becoming a real cornerstone of focus for investors, employees and customers."

Clayson says that with data now the currency of life, all stakeholders are paying much more attention to the cyber awareness of businesses and want to make sure that their information is properly protected and secure. Particularly younger generations are viewing cyber as part of the social element of ESG, considering proper cybersecurity to be a key pillar of businesses doing the right thing. This makes proper investment in cybersecurity even more important in the context of attracting and retaining customers and the next generation of employees.

"Employees and customers have a lot of choice," says Clayson, "and the long-term damage to the reputation of a business caused by a cyber attack can be felt in its ability to attract new talent, new investment or new recruits. These things can really add up, and with trust now such a central element of people's interactions with employers and brands, people want to know their personal data is being looked after."

These more enlightened stakeholders are also quick to take action when things go wrong. "We are seeing an increasing number of litigation claims and threatened claims coming into businesses immediately after a cyber breach," says Clayson.

**"People are looking for some kind of compensation in the event of even a trivial breach, and while those claims can often be easily pushed back on, they do take additional resource out of an organisation at a critical time for cyber response."**

The scale of the fines being meted out by the Information Commissioner's Office in the UK continues to grow. The ICO now has the power to issue companies with a fine equivalent to four per cent of their annual turnover, with some of the biggest fines in recent years including a £20 million bill to British Airways and an £18.4 million fine to Marriott Hotels in 2020, plus the £7.5 million fine handed out to Clearview AI earlier this year.

The regulator has spoken a lot about the kinds of things they now expect businesses to routinely have in place to tackle cyber risk, which include secure technology platforms, multi-factor authentication – particularly where people are working remotely – and strong firewall capabilities. In addition, businesses should put a lot of resource into ensuring they have the correct policies and procedures in place and properly train staff, while fundamentally ensuring they maintain a comprehensive understanding of where they are most at risk and why.

Matt Whelan, an associate in the firm's corporate commercial department, says: "One of the key risk areas for cybersecurity is in the supply chain – a vulnerability that is often overlooked because you are only as strong as your weakest link. If you are really secure as a company but your payroll provider is not, there is no point in being cybersecure because if they have access to your system they can give a hacker a route in. Often people just need to take a wider view of cyber resilience."

The regulator is taking a risk-based approach to enforcement, taking into account the size of a business and the resources it has and not expecting everyone to invest in the same level of security as a Google or an Amazon. "Businesses need to appreciate that they are not all being asked to do the same thing," says Clayson. "But everybody does need to invest in identifying where their risks are and then include cybersecurity and data breaches in any risk register so that they are reported on regularly. These are key risks for any business."

A growing area of exposure for companies comes from ransomware, which is now the biggest online threat to the UK whereby cyber criminals encrypt an organisation's files and then demand money in exchange for returning access to them. Ransomware now accounts for one in 10 data breaches worldwide, with the advice from authorities being not to pay ransom demands.

John Edwards, the UK Information Commissioner, recently said: "We've seen cyber-crime costing UK firms billions over the last five years. The response to that must be vigilance, good cyber hygiene, including keeping appropriate back up files, and proper staff training to identify and stop attacks. Organisations will get more credit from those arrangements than by paying off the criminals."

Clayson says it is important to remember that ransomware attacks happen not because of the existence of particularly valuable data, but because of poor cybersecurity: "You will become the victim of an attack not because you have interesting information but because they can exploit a weakness in your systems and use that to extort money from you," she says.

The advice to businesses is therefore to be prepared for when, and not if, they are a victim of an attack, especially at the moment as the outbreak of war in Ukraine has given rise to a spike in cybercrime.

Whelan says: "First, review what data you have and what activities you are undertaking that could give rise to vulnerabilities. That will establish what level of cybersecurity you need, and then you can make sure you have the technology in place, and the training, to make sure everyone is on the same page in terms of understanding where the risks lie. In procurement processes, that means you need to think about what questions you should be asking and make sure they are properly addressed."

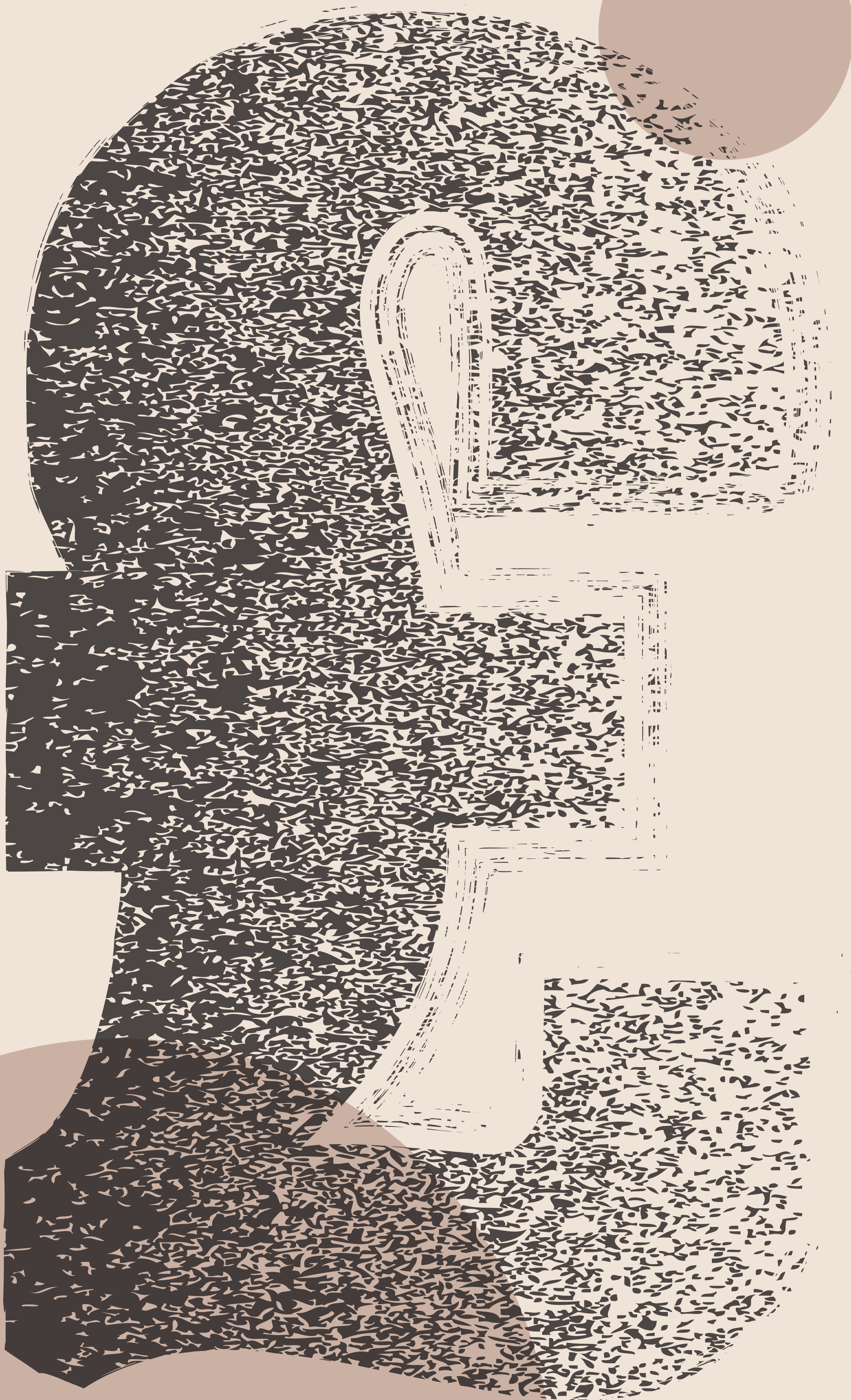
From a practical point of view, Clayson argues there are some low cost easy steps that can be taken to both reduce the chances of an event occurring and show a regulator you are taking the issue seriously.

**"A business that does not perhaps have the best security but is well-prepared to respond to a breach will be in a much better position,"**

she says,advising firms to have clear action plans ready to go, with key advisers on speed dial, so that the business can quickly kick into gear if it becomes necessary to manage the fallout from a cyber-attack.

"That's an easy win because the faster you can deal with an attack and start to mitigate risk, the better," says Clayson. "The first 24 hours after a breach are critical and if you can take good solid steps so that you are not panicking and broader business disruption is minimised, then you can set yourself up well."

What is clear is that investing mindfully in cybersecurity has the ability to shore up the bottom line and minimise the impact of economic fallout, making it money well spent.



# Cost of living crisis tests employers

**As the inflationary effects of rising energy prices start to bite and everyone begins to feel the impact of the rising cost of living, employers cognisant of a hot labour market and their growing responsibilities within it are under pressure to do more to support staff.**

We all know that being a successful employer of the future requires organisations to be innovative and adaptable in addressing their people's needs, whether those relate to wellbeing, social responsibility, agile working or financial health. Many employers are currently prioritising helping staff through the hard economic climate, but that support can be much more than financial.

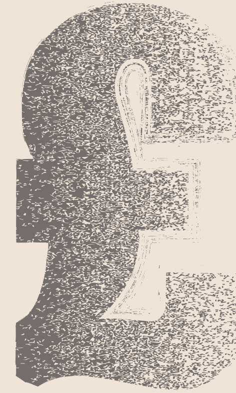
Nicola Ihnatowicz, a partner in the employment department at Towers & Hamlins, says: "Helping employees with their financial wellbeing, and supporting them through the cost of living crisis, often goes beyond simply paying them more money. Financial wellbeing is one of the key pillars of being a responsible employer, and lots of people are also worrying about the mental health of their staff as they deal with this."

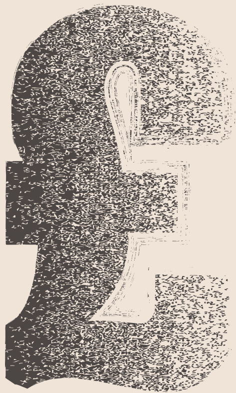
Business owners are facing their own pressures in this period of rising input costs, but many are nevertheless planning to pay unconsolidated bonus payments over the winter to help. Giving wage increases may not always be an option but other ideas might include providing subsidised hot meals at work or running salary sacrifice schemes to help with childcare, cycle to work programmes or additional pension contributions.

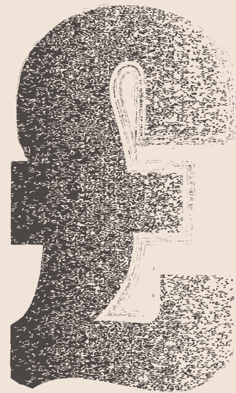
Ihnatowicz says: "We are seeing a number of organisations in a variety of sectors setting up or extending loan schemes for employees who are suffering from particular hardship. That might be to help with an unexpected one-off payment, like the boiler breaking down, or it may be more sustained support to those employees most in need of financial help, protecting them from having to go to pay-day lenders."

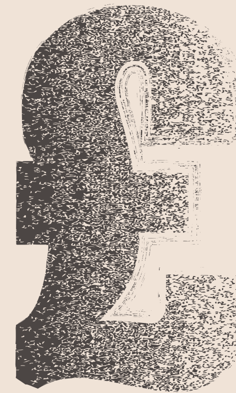
There are legal issues that employers will run into when they start offering employee loans, as these can be subject to consumer credit law. Offering one-off bonuses to help alleviate financial pressures can also have an impact on universal credit or tax credits, which employers will need to keep in mind.

A key element of any financial support package will be a proper financial wellbeing policy, signposting staff to where they can get help if they need it. Some employee assistance schemes provide financial advice, while other initiatives might include engaging with staff on things like money saving hacks.









Where people are working can have a big impact on their finances, so there may once again be reason to revisit flexible working policies. Imogen Reseigh, a managing associate specialising in employment law at Trowers, says:

**"Lots of employers operating hybrid models are now considering opening up their offices more broadly so that people can come into the office more frequently if commuting for them is more affordable than paying the energy costs associated with working from home."**

She adds: "On the other hand, if making people come into the office two or three days a week is causing them hardship, employers might consider relaxing their hybrid policy by allowing people to work from home more to save on the cost of travel."

At a recent Trowers Tuesday event discussing financial wellbeing with clients, one in four employers in attendance said they had introduced new measures to support staff with the cost of living crisis. A similar proportion said they had seen rising food and energy costs affecting their employees' willingness to come to the office, with 7 per cent saying staff were more likely to come to the office, and 17 per cent saying they were more likely to stay at home.

Employers also need to recognise the increased strain that financial concerns place on people's mental health, which means staff might be experiencing stress and anxiety, or existing mental health conditions may be exacerbated. Ihnatowicz says: "Covid has already pushed many people to a position where their mental health is precarious, so employers might consider having mental health first aiders in their teams and making other resources available and well signposted."

Again, employee assistance programmes may step up here, with many offering counselling services, but it is important staff know what's available and work in a culture that removes stigma and barriers from accessing those support networks. Physical wellbeing may also become a concern for some staff who are unable to heat their homes or cook proper meals, and employers will have both a responsibility and a business interest in keeping employees well.

Finally, some employers might need to consider their approach to staff working second jobs. Ihnatowicz says:

**"There are Working Time Directive issues if you know your employees are taking on second jobs to make ends meet. Employers still need to take reasonable steps to make sure people are not exceeding 48 hours work a week, with appropriate rest breaks."**

She adds: “Clearly there is a limit to what you can do, because you can’t really stop your people taking on evening shifts in supermarkets or driving taxis. But you can ask reasonable questions and take steps to make sure they are not overdoing it.”

Whatever support mechanisms are put in place, it is important that employers are seen to act fairly and are aware of discrimination risks. “You need to make sure that whatever measures you put in place are not inadvertently discriminating against particular groups and that decisions are consistent,” says Reseigh. “You might also think about front line versus office staff, to ensure whatever is put in place is properly communicated and you are supporting everyone.”

Making sure that staff feel content and well cared for, and that they can raise issues and get support when required, is all part of being a responsible employer. While times are difficult for everyone, those that step up with meaningful help for their people will be the ones to benefit long term.

# Weathering the storm:
## the impact of an uncertain economy

With the current state of the macroeconomic environment, business leaders face a storm of challenges that will be hard for many of them to weather. The volume of business failures and insolvencies is expected to rise as we move into 2023, but those that are thinking ahead will be the ones best placed to manage risk in the supply chain and in the customer base.

Many businesses are coming into this latest period of uncertainty while still recovering from the challenges and financial impacts of the pandemic. A large number are still repaying Covid loans, but they now find themselves up against rising energy costs, rising inflation and rising interest rates, making it harder to borrow and increasing repayments to put an additional squeeze on cashflow.

Meanwhile, the cost of living crisis is being felt both by consumers and employees, pushing customers to pull back on discretionary spending and putting added pressure on wage bills as leaders are forced to act to help struggling staff.

Such an uncertain economic outlook is fuelling predictions of increased insolvencies and raising concerns of those impacting supply chains and producing a ripple effect.

Dan Butler, a partner in the litigation and dispute resolution team at Towers & Hamlins who focuses on restructuring and insolvency, says:

**“Insolvency levels are already rising, but so far the rises have been in voluntary liquidations where directors have made those decisions, often under significant creditor pressure. We expect that to continue, and if interest rates continue to rise we could see a real tipping point. We are receiving a lot of enquiries and we expect to be busy in the coming months.”**

There are several ways in which businesses can find themselves seriously impacted, not least because so many are already struggling to pass on additional costs to customers.

Energy prices are having a big impact. Katie Farmer, another partner specialising in insolvency at the firm, says: "Some manufacturers are looking to amend their trading arrangements and are doing deals with energy suppliers to use energy at different times of the day in order to reduce cost. The knock-on impacts of that, in terms of reorganising the workforce and potentially changing terms and conditions to accommodate that, and managing productivity in a different way, are considerable."

The risk of supply chain insolvencies creates additional risks for businesses, who may fear that a key partner will cease trading or seek to trade under new terms, causing disruption to their ability to meet customer needs.

Farmer says: "Up until recently, insolvency figures in the UK have been artificially low because of all the corporate support provided by the government during the pandemic. That wide-ranging support is now creating a lag, not least because businesses may be trying to hold out with the expectation that another wave of support will be forthcoming."

The single biggest creditor of UK plc is HM Revenue and Customs, which is likely to come under pressure to ramp up tax collection. "There is = evidence that HMRC is upping its tax collection activities now," says Farmer. "It is presenting more petitions in respect of companies and that is going to be a huge driver of insolvencies."

She adds: "During the pandemic, the Revenue pulled the plug on any kind of enforcement action, but it is now starting to take the first steps towards dialling that up again. It is typically responsible for as many as 80 per cent of winding up petitions presented."

Many businesses took advantage of deferred payments of tax during the pandemic, and some businesses will be able to agree 'time to pay' arrangements with HMRC ifbehind on tax bills, but they can expect short shrift if they fall behind on those payment plans.

There are actions that company bosses can take to improve their chances of weathering the storm, starting with protecting cashflow. Butler says: "Now is the time to focus on ensuring proper credit control procedures are followed and good financial disciplines, including early and decent negotiations with funders and a proper review and engagement with the supply chain."

He adds:

**"In terms of pre-insolvency, it really all comes down to actively managing relationships with stakeholders and being honest about any issues. Early intervention is essential if you think there is going to be a problem."**

Properly managing the risk of insolvency in the supply chain means knowing counterparties well and engaging with them regularly to identify any issues early and create time to react. Leaders should keep a close eye on cashflow and should also take a financial reading of the businesses in the supply chain to assess risks. Monitoring, including credit checking, and good communication is critical.

Farmer says: "Those that run businesses need to think about having contingency plans and make sure they are operating on up-to-date information. If your debtor days are increasing, make sure you speak to customers and find out what the issues are, and then see what you can do to help. Sometimes it is about being flexible in adjusting the provision of the goods and services you require to be collaborative and assist suppliers addressing issues."

On the other hand, a key element of self help remedies involves reviewing contracts to be clear where the company stands in the event of debt going unpaid. "Bluntly, have you got the ability to go in and get your goods out of a warehouse if they have not been paid for," says Butler. "Those types of issues will be more prevalent in the next few months, and if you have all your legal ducks in a row you will be better positioned to secure a good outcome in those difficult situations."

In short, now may be a good time for business leaders to embark on something of a financial health check, making contingency plans in order to give the company the best chance of riding out the economic headwinds.

Butler says: "As a director or a board, if you do leave it late then your options for restructuring or rescue reduce as time passes. Speak to lawyers and accountants at an early stage to assess what is possible, because early discussions are key, not just with suppliers and customers, but up the chain to creditors and other stakeholders in the business as well."

It may be some time before there are clearer skies for the economy. In the meantime, businesses will need to carefully navigate the financial implications of supply chain and customer vulnerabilities.

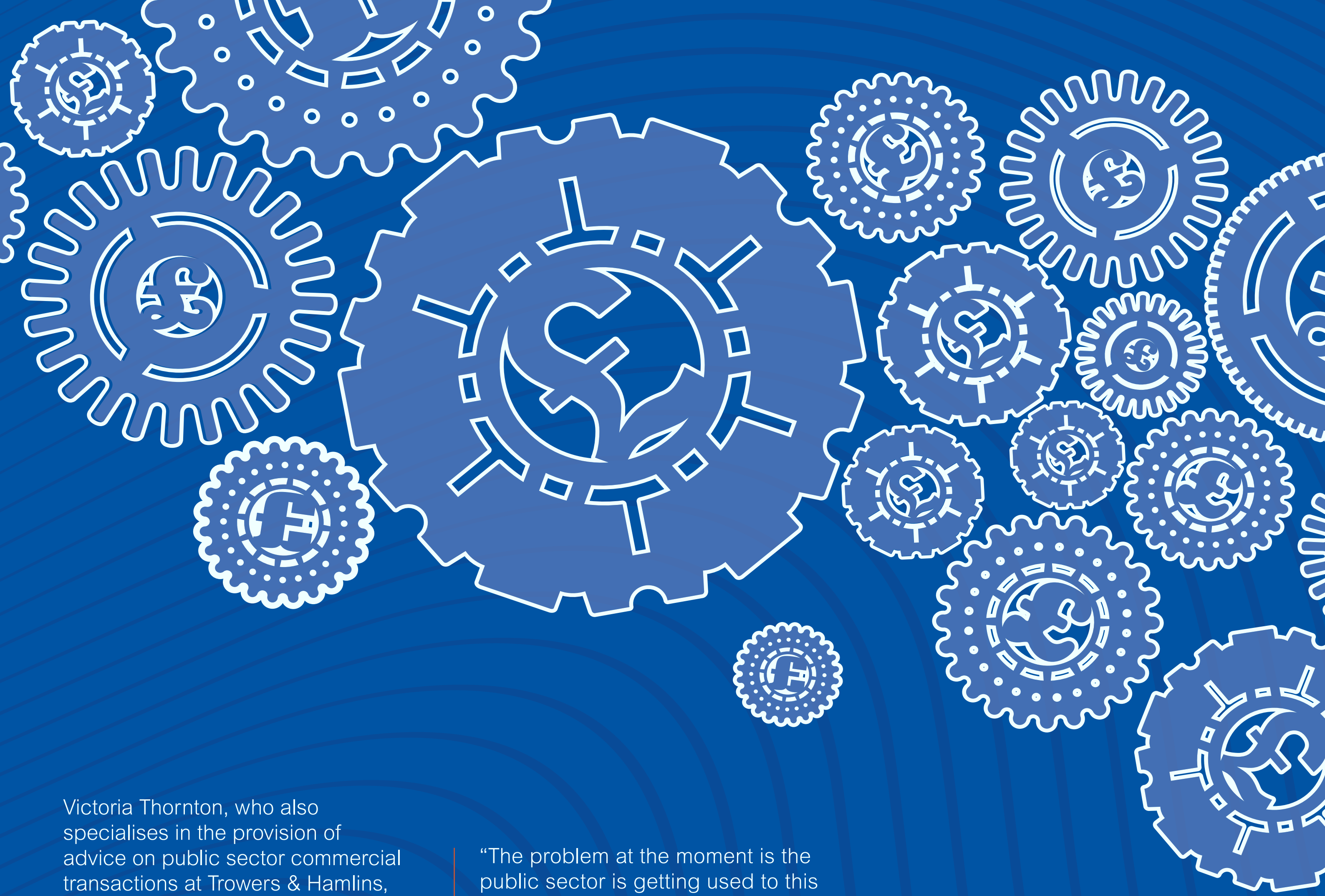
# Opportunities presented by the new public subsidy regime

As of 1 January 2021, EU state aid law ceased to apply in Great Britain for new subsidies granted from that date. Since then the UK has been in a transitional period to introduce the post-Brexit subsidy control regime. A major milestone came when the Subsidy Control Act received royal assent in April 2022 and the transition period will end on 4 January 2023 when the Subsidy Control Act and related statutory guidance comes fully into effect. A major difference introduced by the UK subsidy regime is that local authorities are required to self-assess whether the financial assistance they grant is consistent with key subsidy principles, and they must publish information about most of their subsidies via a new database.

Paul McDermott is a partner at Trowers & Hamlins who specialises in advising on public sector commercial transactions (including subsidy control and public law), and he says the new system will provide public bodies with more flexibility to support businesses through a difficult economic period.

"The old state aid system broadly said that things were not allowed unless there was a regulation that said an authority could give money, to support research and development in local business parks, for example," says McDermott. "Under the new system, there are questions that public organisations have to ask themselves, such as why they are giving the money, is this the most efficient way to give money, does it affect trade with EU countries and does it affect competition in the UK. But at the end of that process, in order to give the subsidy the giver has to conclude that the benefits of giving the subsidy outweigh any negative impact. There is a lot more focus on measured decision making and positive outcomes."

The UK government will also now have more flexibility to set its own priorities in relation to the types of things that should receive public money, whereas the EU regime was much more prescriptive and was based on common European objectives.



Victoria Thornton, who also specialises in the provision of advice on public sector commercial transactions at Trowers & Hamlins, says: “In the past it might have been harder for a public authority to justify a life sciences centre unless it was also located in a designated area, otherwise it might not have ticked some regulatory boxes. Now, we might have a different approach because there may be a national strategy/policy to support life sciences irrespective of location. So, while there won’t be more cash, it is likely that a wider range of things might be eligible for funding than did previously.”

Thornton adds: “This is good news for businesses, and they should have their eyes and ears open for when government bodies start announcing funding programmes.”

The downside of that increased flexibility and shift of decision-making power is that things are less clear, leaving many public authorities concerned about falling foul of the new subsidy regime. A new Subsidy Advice Unit will be established within the UK’s Competition and Markets Authority to have oversight of the regime, and it will be responsible for both advising public authorities on more complex issues and overseeing the new legislation.

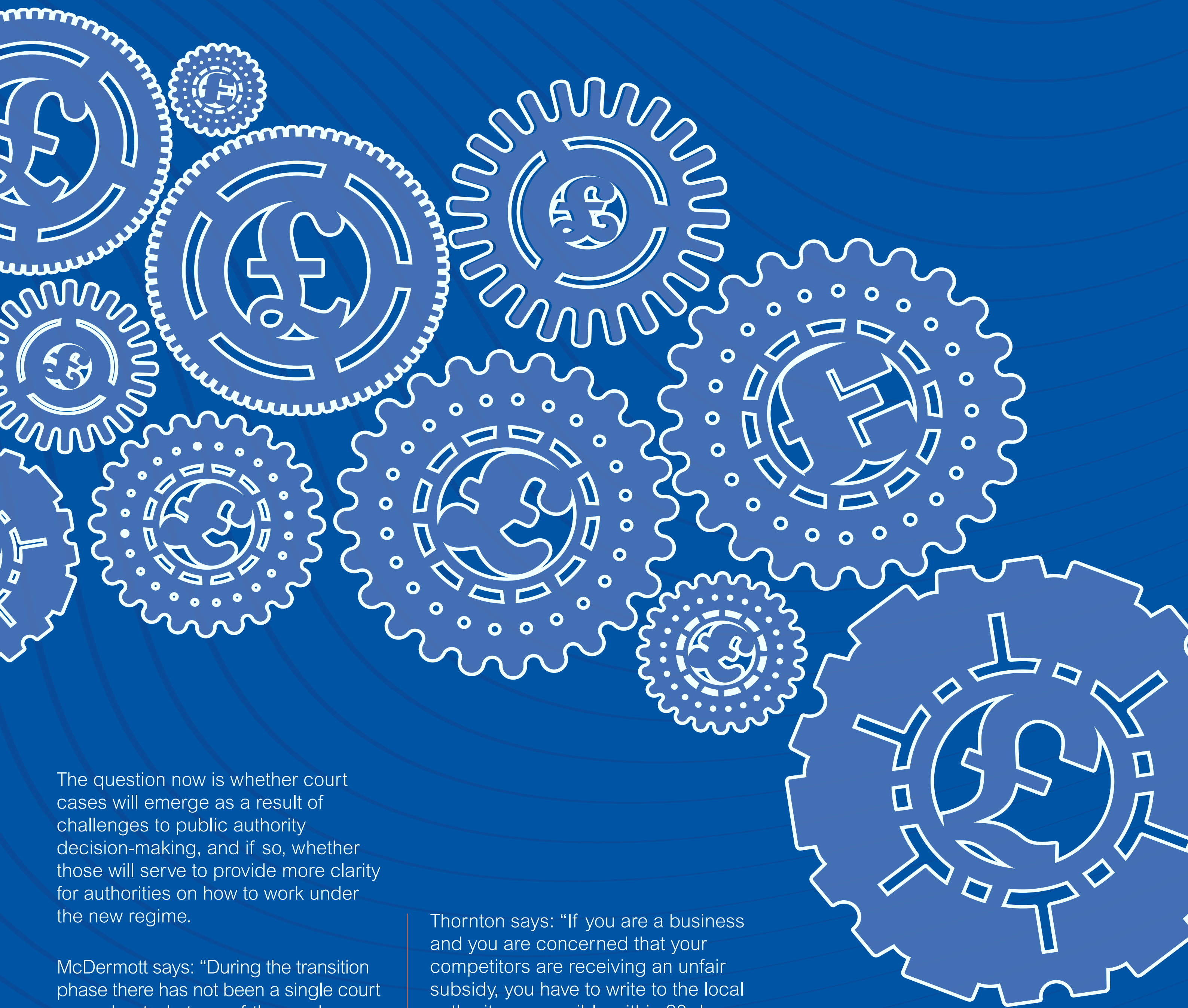
“The problem at the moment is the public sector is getting used to this system and some authorities are currently nervous about making decisions and giving higher risk/value subsidies and support,” says McDermott. “We have signed off on projects and funding definitely hasn’t stopped because of the change, but it is early days.”

The new rules introduce transparency requirements relating to the award of subsidies that mean authorities will have to publish certain information about their decisions in a searchable database available to the public. The transparency rules apply to most subsidies exceeding £100,000 and will capture a lot more than the previous EU notification requirements, making decision-makers more accountable and meaning information is more widely available to third parties that may have an interest in the impact of a subsidy.

The legislation also gives the Competition Appeal Tribunal the power to hear appeals by interested parties based on judicial review principles, but such appeals need to be brought forward quickly, usually within a month of the information becoming public.

There are also positives for local authorities, argues McDermott: “The real positives for the public sector are that it opens up opportunities for them to diversify what they fund/support, because there is more scope. It will just take a bit of time for them to get comfortable with the new regime, and there will be more form filling as they are being asked to provide much more information than they did under state aid.”

Thornton points to an example of a recent mandate for a local authority that is looking to provide more affordable workspaces, because they believe a lack of those is hindering their rural economy. “Before, there would have been a rigid regulation and formula about if and how much they could give to something like that,” says McDermott. “Now, they are more in control about setting a policy and satisfying themselves that giving support complies with the subsidy control principles and if so that they are not giving too much money”



The question now is whether court cases will emerge as a result of challenges to public authority decision-making, and if so, whether those will serve to provide more clarity for authorities on how to work under the new regime.

McDermott says: "During the transition phase there has not been a single court case about what any of these rules mean, so there is no legal decision around about how the principles should apply in practice. That is why public authorities are nervous, but the future tribunal cases will only come if people challenge decisions."

Under the previous EU state aid legislation, challenges to decisions could be made up to a decade after funding was given, but now that local authorities have to publish the details of their funding allocations, there is only a month for people to challenge those subsidies. That will provide a lot more certainty around commercial investment and transactions.

Thornton says: "If you are a business and you are concerned that your competitors are receiving an unfair subsidy, you have to write to the local authority responsible within 28 days to ask them to explain why they feel it is lawful. They then have 28 days to respond, and then you have another month to decide whether you are going to bring a challenge. It will be easier to challenge decisions than it was previously, because there will be a UK based tribunal process, but the timeframe to challenge is very short."

There is now a learning curve to go through for both businesses and local authorities, but the rule changes are being broadly welcomed, particularly as a means for authorities to provide more support to business should the UK head into recession.

McDermott concludes: "Businesses don't really need to worry about this change, though they might expect public bodies to perhaps ask them for more information than they did previously when they apply for public funds. Everyone will have to adjust and the process will be a little more nuanced, but the flexibility that is coming should benefit everyone."

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