

A person wearing a blue suit jacket and a black watch is holding a brown leather briefcase. The briefcase has a gold-colored clasp and handle. The background is a light, textured surface.

# RADIUS LAW

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## Brexit Watch

### Brexit Bulletin—option to extend the transition period has expired

Following the UK's departure from the EU on the 31st Jan, the UK entered a transition period until 31st December. There was an option to extend the transition period but the deadline for that has now passed (on the 30th June) – which leaves the UK with just **six months to agree new trading terms**. With such little time, it will be important that companies re-start preparations for a no-deal Brexit.



**Our COVID-19 interactive virtual sessions** are an opportunity for in-house counsel to share experiences, insights and best steps to protect your organisations.

[Please register now](#) to join us.

**28 JULY, 10:15am**

## Corporate & Commercial

### COVID 19 – Business Interruption insurance

The Financial Conduct Authority (FCA) has instigated a High Court action challenging insurers that have **refused to pay out business interruption insurance** – claiming that pandemics are excluded. The case is progressing at speed and it is expected that the case will be heard in July, although an appeal to the Supreme Court seems inevitable.

#### **Failure to notify 'as soon as possible'**

It's common for contract terms to state that any claim for an indemnity must be notified to the other party 'as soon as possible'. A recent High Court<sup>1</sup> decision has clarified that the term '**as soon as possible**' is **sufficiently certain** to be enforceable and that a party that then delays notifying the indemnity claim for over a year will be time-barred from making its claim.

### **A signed signature sufficient for a valid Deed.**

The High Court has ruled<sup>2</sup> that a signed signature page of a Deed being returned by email was sufficient. It's worth noting however that the [Law Society guidance](#) recommends that if a document is being returned by email that, at least, the whole document is also included in the email with the signed signature page.

### **Exceptions to without prejudice**

The without prejudice (WP) rule allows parties to negotiate freely with the assurance that WP documents will not be admissible as evidence in a Court. **This rule is not however absolute** and the High Court has recently ruled<sup>3</sup> that using WP documentation to rebut an allegation of fraud was a logical extension of the existing exceptions to the WP rule<sup>4</sup>. The exceptions include:

- to demonstrate that a settlement has been concluded;
- to assist with construing the settlement agreement that was subsequently reached;
- to provide evidence of misrepresentation, fraud, undue influence or blackmail; or
- where there is a real risk that the Court will be misled if the WP material was not admitted.

### **Corporate Insolvency and Governance Act 2020**

The Corporate Insolvency and Governance Act 2020 introduces **new protections for insolvent companies**, some temporary (as a response to the global coronavirus pandemic) and others permanent.

#### **The permanent reforms are:**

- termination clauses in supplier contracts will cease to apply on insolvency;
- an insolvent company will be able to benefit from a moratorium from creditor action without entering into administration; and
- a new restructuring procedure will be introduced.

#### **The temporary reforms are:**

- prohibition on the presentation of winding up petitions until 30 September 2020 (that arise because of COVID-19);
- suspension of liability for wrongful trading; and
- General meetings of companies can be held by 'any other means', whether permitted by its articles of association or not.



#### **Are you an in-house lawyer?**

Do you want to share ideas, make connections or get inspiration from other in-house lawyers?

If so – join our in-house lawyer Slack group. [Register here](#), its free!

## Data Security

### easyJet suffers a cyber attack

easyJet has confirmed that nine million customers details were accessed (including full credit card details in some case) by a cyber-attack. The Information Commissioner's Office (ICO) has not issued any fine yet, but it follows similar breaches by British Airways that has been fined £183m. It's also anticipated that easyJet's fine may be increased due to its delay in reporting. easyJet first noticed suspicious activities in January, but did not inform customers until April. To add to easyJet's woes an £18bn group litigation claim has been filed against it for the data breach.

Meanwhile the group litigation claim against Google for allegedly tracking the personal data of four million iPhone users is now heading for the Supreme Court. It's estimated that the claim value is between £1bn and £3bn.

### UK adequacy decision

The European Data Protection Board has stated that it has 'doubts' about safeguards contained in a UK-US law enforcement data-sharing agreement and that this could **block a data adequacy decision for the UK**. Without an adequacy decision, the free flow of personal data from the EU to the UK must stop at the end of the Brexit transitional period on the 31st December. EU businesses that wish to transfer personal data to the UK will need to find alternative data security safeguards.

### AdTech

The ICO has previously stated that it considers **all real time bidding practices to be non-compliant with GDPR**. RTB is the process where web adverts are sold at the 'blink of an eye' based on the user profile.

The ICO has however paused its investigation into RTB due to the COVID-19 pandemic. Meanwhile, the Data & Marketing Association (DMA) and the Incorporated Society of British Advertisers' (ISBA) have published 'The Seven-Step Ad Tech Guide' to provide a voluntary framework for those involved in RTB and hopefully avoid any regulatory action.

## Advertising & Marketing

### Purely functional designs do not have copyright protection

It's well known that a design that's purely dictated by technical function cannot attract copyright protection – that's what patents are for. There can, however, still be **uncertainty about when something is purely functional**. That's the conundrum that the Court of Justice of the European

Union (CJEU) was recently asked to consider in the Brompton Bicycle case<sup>5</sup>. The Court did not make a final decision but was clear that:

- copyright may still apply to parts of the bicycle that display free and creative design choices; but
- copyright cannot prevent third parties using the technical solution itself, even if this is dependent on the shape of the product.



### Risks of registering trademarks in bad faith

It's common practice for large brands to seek very broad trademark protection, but the UK High Court (following guidance from the European Courts) has ruled that if brands seeks such broad protection without an intention to use trademarks in the classes that they have sought protection then the registrations are likely to be **deemed to be made in bad faith and liable for revocation**. This is significant break in practice by the EU, where previously it seemed to allow 5 years after registration before allowing an application to strike out a trademark.



### How to Maximise the Opportunity of Distance Sales in the Automotive Industry.

[Please register now](#) to join us for this free webinar, in partnership with the Motor Ombudsman and GForces.

**21 JULY, 11:00am**

## Employment

### Flexible Furlough

Since the 1st July, the flexible furlough scheme has been available allowing employers to bring employees back on a part-time basis but furloughed for the remainder. The employer can claim a grant to cover a proportion of the wage costs of the furloughed hours. This is subject to detailed rules that are available on the [Government website](#) which also contains guidance on managing annual leave during the COVID-19 pandemic.

### Ethnicity pay gap

A petition calling for the introduction of mandatory ethnicity pay gap reporting for large companies will now be considered for debate in parliament, following the petition reaching the 100,000-signature threshold. Separately, ACAS has produced new guidance on [equal pay](#).

### Settlement agreements: breach of confidentiality clause

The High Court has ruled<sup>6</sup> that despite an employee breaching a confidentiality provision in a settlement agreement, **the employer was still obliged to honour its obligations** and pay the agreed settlement sum. To counter this risk, we recommend employers expressly state in settlement agreements that the relevant confidentiality clause is a condition of the contract and detail what will happen if there is a breach of it.

### Gig economy

We have reported on the long line of cases concerning the gig economy. The nub of most of these cases is whether the person engaged is self-employed or has the status of being a worker entitling him or her to paid holiday, amongst other protections.

The European Court<sup>7</sup> was recently asked to provide guidance on the Yodel courier case and whilst the ultimate decision will be for the national courts, it suggested that the Yodel courier driver was genuinely self-employed. The following factors were relevant in this opinion:

- the driver could use a substitute (providing the substitute has suitable skills);
- there was no obligation for Yodel to provide work or for the courier to accept the jobs;
- the courier could decide the exact time, order and route for deliveries (within parameters set by Yodel);
- the courier could also work for other delivery companies, including potentially Yodel's competitors.

The Supreme Court is due to hear the Uber case later this year – which is likely to provide further guidance on the line between self-employed and worker status.

## Consumer

### **New regulation paves way for GDPR-size fines for consumer law breaches**

New consumer regulations came into force in the UK on 2 June 2020<sup>8</sup> that pave the way for fines for consumer law breaches of at least 4% of annual turnover across the EU from May 2022. The impact of this on the UK is still to be determined in light of its withdrawal from the EU. It seems likely, however, that the UK will be willing to agree to some form of bi-lateral arrangement in-line with these penalties as the Government has already put forward proposals for fines of up to 10% of a trader's worldwide turnover for consumer law breaches.

## Competition

### **UK merger control: greater scope for government intervention**

On the 23rd June, some emergency changes in response to the COVID-19 pandemic were made to UK merger control to provide the Government with more scope to intervene in corporate transactions on a wider range of public interest and national security grounds. These are short-term modifications pending the anticipated introduction of a much wider-ranging National Security and Investment Bill later this year.

### **Director disqualifications for cartel activity**

On 15 June 2020, the Competition and Markets Authority (CMA) announced that two directors have been disqualified for six and a half years for the role they played in a price fixing cartel amongst local estate agents in Berkshire. These disqualifications bring the tally of directors disqualified for competition law breaches to 18; half of these were in the last 12 months alone.

**Cases, laws, decisions referred to in this Bulletin**

1	Towergate Financial Limited v Hopkinson [2020] EWHC 984 (Comm)
2	Umrish Limited v Gill [2020] EWHC 1513 (Ch)
3	Berkeley Square Holdings v Lancer Property Assets Management Ltd [2020] EWHC 1015 (Ch)
4	Unilever Plc v Proctor & Gamble Co [2000] 1 WLR 2436 and Oceanbulk Shipping SA v TMT Ltd [2010] UKSC 44).
5	Brompton Bicycle Ltd v Chedech/Get2Get C-833/18
6	Duchy Farm Kennels Limited v Steels [2020] EWHC 1208 (QB)
7	B v Yodel Delivery Network Ltd C-692/19.
8	Consumer Protection (Enforcement) (Amendment etc.) Regulations 2020

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