

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.

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COVID update

End of suspension to wrongful trading laws

From 1 July, the suspension of the wrongful trading laws will end, and UK Directors may be personally liable if they continue to trade knowing that there is no reasonable prospect of avoiding an insolvent winding up/ administration and fail to take every reasonable step to minimise potential losses to creditors.

Corporate & Commercial

New Block Exemption

The CMA has published a [consultation](#) on a replacement to the existing Vertical Agreements Block Exemption Regulation ('VBER'). Here's a quick summary:

- VBER exempts certain competition law rules from supply chain agreements – such as franchise agreements.
- The current VBER expires on 31 May 2022. Expect a 1-year transition period.
- There are unlikely to be any fundamental changes but there will be some important changes.
- To deal with concerns about the death of the High Street, it's likely that there will be allowances for suppliers to:
 - charge higher prices for goods that are intended to be sold online; and
 - to allow suppliers to impose different standards for online to 'bricks and mortar' sales;
- Wide parity clauses whereby a product or service may not be advertised on better terms on any other channels will continue to be outlawed, but there will be an allowance for narrow parity clauses (where the restriction is limited to the retailer's own published price).
- The CMA will provide more guidance on agency agreements – particularly for instances where a retailer acts both as an agent and as an independent distributor for different products of the same supplier (dual role agents).
- Interested parties have until 22 July to respond to [the consultation document](#).

Unfair contract terms

In the recent case of Phoenix Interior Design v. Henley Homes¹, Henley Homes refused to pay the final instalment Phoenix's fee alleging quality issues. Phoenix defended stating that its standard terms excluded liability if the total price of the goods has not been paid by payment due date. The

Court ruled that this clause was void; it did not meet the reasonableness requirement in the Unfair Contract Terms Act 1977, because:

- it was an unusual clause, tucked away in the standard terms and conditions;
- Phoneix had not explained why an anti-set off clause would not have sufficed instead;
- the effect of the clause was potentially exorbitant - the slightest delay in payment meant that any claim could be avoided and the timing of payment was complicated in this case as it was linked to completion rather than a fixed date.

This case is a reminder that the more prominent, heavily negotiated and well understood the clause, the more likely it is to be upheld.

Proposed climate-related disclosures for standard listed companies.

The FCA has proposed to extend the application of its 'comply or explain' climate-related disclosure requirements to all standard listed issuers – for financial years beginning on or after 1 January 2022. The [FCA Consultation Paper](#) will close on 10 September with finalised rules being published by the end of this year.



General Counsel Event – 21 July 2021

Attenborough, ESG and Net Zero: How GCs are driving the sustainability agenda

[Register Now](#)

Businesses are facing increasing pressure to align with Environmental, Social and Governance (ESG) criteria. Much of this is related to the climate crisis, which isn't going away.

We are delighted to welcome Lawyers for Net Zero to our senior counsel event to explore this further.

Data Security

UK data adequacy decision.

In June, the EU delivered a data adequacy decision for the UK. This means that *personal data may continue to flow freely from the EU to the UK*. Legal challenges are however expected.

Standard contractual clauses.

The new [EU standard contractual clauses](#) ('SCCs') came in to force on the 27th June. SCCs allow personal data to be lawfully transferred to third countries - that's countries that have not been approved by the EU as having adequate data protection laws.

The new EU SCCs apply to businesses that process personal data of EU citizens or residents and export that data to a third country – often for marketing or data storage purposes. *Applicable businesses must transition to the new SCCs by 27 December 2022.*

The new SCCs are clear that (following the Schrems II decision that we have previously reported on), data exporters cannot blindly sign the SCCs; they *must complete a transfer impact assessment* ('TIA') – to consider whether the laws of the country of the data importer are adequate and whether any 'supplementary measures' are needed. [Final guidance](#) on the on TIAs was also issued last month by the European Data Protection Board.

The new EU SCC's will not apply to UK businesses that process personal data about UK individuals – but the UK Information Commissioner will consult on the UK SCCs this month.

GDPR Article 27 Representative Enforcement

The GDPR requires organisations that process personal data of EU citizens or residents but who are located outside of the EEA to appoint a data protection representative (DPR). This often-overlooked provision is now more likely to be noted following a **€525,000 fine** being issued to LocateFamily.com for breaching this rule. There is similar requirement to appoint a UK DPR for organisations that process personal data of UK individuals but are not based in the UK.

ICO's New Data Sharing Code of Practice

In May, the [ICO's Data Sharing Code of Practice](#) was laid before Parliament. It is a guide for organisations about how to share personal data in compliance with data protection law.



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Advertising & Marketing

Directors may be liable for a company's IP infringements.

The recent case of *Lifestyle Equities v Ahmed*² has sent a worrying message to directors that they may be *personally liable for intellectual property infringements* committed by their companies. Unlike many of the previous cases where directors had been personally liable, the directors in this case had not acted in bad faith and the company was not a 'one man band' business. The personal liability of the directors was, however, relatively modest being 10% of their salaries (representing the profits made by them, rather than all the profits made by the (now dissolved) company).

Employment

Deliveroo riders not entitled to worker rights protection.

We recently reported on the Supreme Court Uber decision – that confirmed Uber drivers are 'workers' and therefore entitled to worker rights including holiday pay and national minimum wage. The Court of Appeal has now ruled³ in the Deliveroo case finding that the *Deliveroo riders are not workers*. The critical difference being that Deliveroo riders can substitute themselves whereas Uber drivers are required to personally perform the services.

Employees can be transferred to multiple new employers under TUPE.

In a recent case, a council engaged a contractor to fit kitchens in social housing. The contractor had two teams completing this work. Following a re-tender, the work was awarded to two different contractors – one for the North and one for the South. The outgoing contractor decided that the team that had worked mostly in the South would transfer to South based contractor and vice-versa. The Employment Appeal Tribunal⁴, following a Court of Justice of the European Union decision⁵, determined this simplistic approach was wrong and, instead, each employee must be considered individually *even if this led to an employee transferring to both incoming contractors*.

Gender Critical belief

A recent Employment Appeal Tribunal case of *Forstater v CGD Europe*⁶ concerned Ms Forstater's claim that she had been discriminated against because of her held belief that a person's sex remains the same regardless of a person's stated gender. The EAT, overturning an earlier Tribunal

decision, agreed that her belief was capable of protection as a philosophical belief in the Equality Act 2010. To be protected as a philosophical belief it must meet criteria including that it is:

'..worthy of respect in a democratic society, not incompatible with human dignity and not conflict with the fundamental rights of others'

The Tribunal had decided that her belief did not meet this criterion but the EAT disagreed saying that as her belief does not 'get anywhere near to approaching the kind of belief akin to Nazism or totalitarianism' it does still meet the requirements of being a philosophical belief.

UK Government publishes 1 July right to work guidance.

The Home Office has published its revised [Code of Practice on Preventing Illegal Working](#) covering the changes to the right to work check requirements for EEA citizens which came into effect on 1 July. Failure by an employer to undertake the correct right to work check **can lead to a criminal penalty**.

Long COVID

Cases of 'long COVID' in the UK are increasing. [ACAS has now published guidance for employers in response to the growing impact of long COVID](#). The new ACAS guidance acknowledges that it is not possible to say yet whether long COVID will be a disability but recommends making 'reasonable adjustments' to allow for workers who are suffering with the condition – such as allowing flexible working hours or temporary redistribution of duties or allowing workers to work from home.



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Consumer

New right to repair rules.

Products such as washing machines, TVs and fridges should become easier to repair and cheaper to run under new rules that came into force on the 1st July and require manufacturers to make spare parts available to people buying such appliances although they have a grace period of up to two years to make spare parts available.



Cases, laws, decisions referred to in this Bulletin

1	Phoenix Interior Design Ltd v. Henley Homes PLC [2021] EWHC 1573 (QB)
2	Lifestyle Equities v Ahmed [2021] EWCA Civ 675,
3	R (on the application of the IWGB) v CAC and Rooffoods Ltd t/a Deliveroo [2021] EWCA Civ 952
4	McTear and Mitie v B Bennett and others UKEATS/0023/19/SS
5	ISS Facility Services NV v Sonia Govaerts & Atalian NV, formerly Euroclean NV Case C-344/18
6	Forstater v CGD Europe (2021) UKEAT/0105/20/JOJ

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