

A black and white photograph of three business professionals in an office setting. A man in the foreground is pointing upwards with his right hand, looking towards the top right. Behind him, a woman with glasses is smiling and looking in the same direction. To the left, another man with glasses is looking down. They are gathered around a glass wall or partition that has several sticky notes attached to it. The overall atmosphere is collaborative and professional.

# COMMERCIAL BULLETIN

January 2022

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## Corporate & Commercial

### Mandatory climate-related disclosures coming soon

The Government has confirmed that, subject to Parliamentary approval, new Regulations will come into force on 6 April obliging large private and publicly quoted companies to make annual climate-related disclosures. Detailed information is included in the Consultation Response available on the [Government website](#).



### Non-executive liability.

It's a common misconception that non-executive directors do not bear the same liability as executive directors, but actually the liability is the same. In a recent case<sup>1</sup>, a non-executive director of a company being investigated for VAT fraud was *disqualified as a director for four years*. It was acknowledged that he had no day-to-day involvement in the company, but he signed off the company's financial statements without investigating the auditor's concerns about the fast growth of the business.

### Effective Corporate Compliance - Training Course

We'll explain the rules (to keep you out of jail) and how to make a behavioural shift required to create an 'unstoppable culture of good compliance' – a culture that moves from box ticking to just 'what we do around here'

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### Law Commission's paper on smart legal contracts

The Law Commission has [confirmed](#) that *'the current legal framework is clearly able to facilitate and support the use of smart legal contracts'*

A smart legal contract is a legally binding contract, which some or all of the obligations are recorded in and/or performed automatically by a computer program.

The Law Commission has acknowledged that there will be some obstacles to navigate with deeds which must be witnessed and attested and determining jurisdiction and applicable law – so recommends that express choice of law and jurisdiction clauses are included.

In responding to concerns about interpreting coded terms, the Law Commission has stated that the appropriate legal test is 'what a person with knowledge and understanding of code would

understand the coded term to mean’.

Appendix 3 of the Law Commission Paper helpfully includes a non-exhaustive list of issues that parties may wish to address in their smart legal contracts.

The meaning of ‘all reasonable endeavours’.

Contracts will often state whether a party is to use ‘reasonable’ or ‘best endeavours’ to do something. It is commonly understood that a ‘reasonable endeavours’ obligation will be discharged if one reasonable path is taken, whereas ‘best endeavours’ requires all reasonable actions to be exhausted, even if that means sacrificing a party’s own commercial interests.

Sometimes there are twists on these well understood terms including obliging a party to use ‘all reasonable endeavours’. A judge in a recent case<sup>2</sup> that concerned a contractual obligation to use ‘all reasonable endeavours’ explained that it is a high standard and any *‘passivity or inactivity is likely to be construed as a breach’*

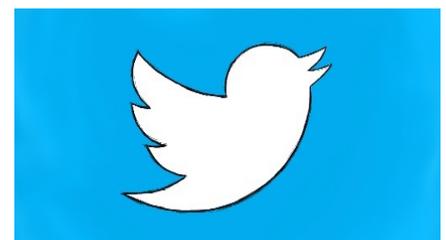
The judge found that the defendant had not met this obligation even when, conceptually, this may have involved a commercial sacrifice on its part.

## Data Security

### Fines

There has been a recent flurry of data protection fines or notice of fines.

- Amazon has been fined €746 million by Luxembourg’s data protection authority. The specifics are not publicly available, but it is understood to relate to Amazon’s advertising targeting system being carried out without ‘free consent’. Amazon has filed an appeal.
- The UK Information Commissioner (ICO) has issued a notice of intent to impose a £17m fine on Clearview AI Inc. It is alleged that Clearview holds a **10 billion image database** that it has scraped from the internet and that enables subscribers to ‘face search’ using biometric and facial recognition searches. A final decision from the ICO is not anticipated until mid-2022.
- The Irish Data Protection Authority (the DPC) has fined Twitter €450,000 for failure to give a proper notice of a data protection breach to the regulator within the 72-hour required time. In addition, the notice failed to explain the reasons for the delayed reporting.
- The ICO has fined the Cabinet Office £500,000 for uploading the 2020 New Year’s Honours recipient list which accidentally included a ‘supposedly’ deleted field that contained the addresses of more than a thousand people, including those with a high public profile.



## Supreme Court rejects class action against Google

The case of *Lloyd v Google*<sup>3</sup> concerned a 'opt-out' class action for Google's alleged tracking of users' internet activity without their consent. The claim sought a uniform sum *on behalf of 4 million Apple iPhone users*. The claim was brought under the old Data Protection Act 1998 and the Court determined that this law does not provide a right to compensation without evidence of material damage. Also, as the individual effect of the breach would differ from person to person, with each individual experiencing different levels of financial loss or mental distress, the claim would not meet the 'same interest' requirement for class actions. Future similar claims are likely to be more successful as the revised law states that a mere loss of control of personal data may amount to the right to compensation

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- to explain what needs to be documented;
- to facilitate the discussions – providing options and explaining what's normal
- to document what's agreed – with the necessary legal detail.

## Advertising & Marketing

### ICO issues opinion on adtech

At the end of November, the ICO published its Opinion on 'Data protection and privacy expectations for online advertising proposals'. This is a continuation of the ICO's broader adtech and real-time bidding ('RTB') report. RTB is the process where web adverts are sold at the 'blink of an eye' based on the user profile.

The opinion has a tone of frustration of the lack of progress since the ICO first expressed privacy concerns about the adtech sector in mid-2019 when it stated that it considered *all current real time bidding practices to be non-compliant with GDPR*.

The ICO notes some of the industry's proposals aimed at improving user choice and users' ability to express preferences with online tracking but does not seem satisfied that any of them have been successful.

It also mentions Google's Privacy Sandbox – a proposal to move away from tracking cookies but notes that none of these proposals are fully developed yet.

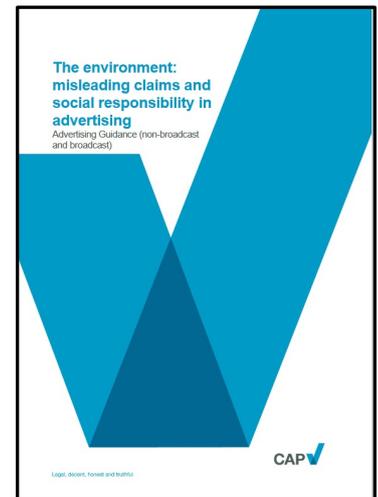
The Opinion states the principles which the Commissioner expects any adtech solution to meet to comply with data protection:

- **Data protection by design** should be incorporated during the design phase of any initiative;
- **User choice** - must allow meaningful control and the ability to exercise data subject rights;
- **Accountability** must exist across the processing supply chain and include transparent responsibilities for market participants;
- **Purposes** of data processing must be clearly explained, necessary and proportionate; and
- **Reducing harm** by ensuring that privacy risks are addressed (such as through DPIAs).

## Guidance on environmental claims and social responsibility

New [guidance on misleading environmental claims and social responsibility](#) in advertising has been published by the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP).

This new guidance aims to assist marketers and agencies with interpreting the rules concerning environment-related advertising issues and provides a general overview of the principles underpinning the ASA's rules more generally.



## Employment

### Guidance from ACAS warns employers that the practice of fire and rehire should only be used a last resort

To change contracts of employment some employers have resorted to *fire and rehire tactics*, which involves terminating an employee's contract of employment and subsequently offering alternative terms of employment (often less favourable).

ACAS has now published advice to employers, which warns against the practice of fire and rehire and encourages them to consider the following to make changes to contracts of employment:

- the necessity of amending contracts of employment in the given circumstances;
- consultation requirements;
- how to deal with changes to employment contracts where variations are agreed; and
- how to deal with changes to employment contracts where variations are not agreed.

## SMEs can claim back sick pay from Government

To support businesses during the recent surge in coronavirus cases, the Government is reintroducing the Statutory Sick Pay Rebate Scheme. The previous scheme ended on 30 September 2021.

This means small and medium sized businesses with fewer than 250 employees can seek reimbursement for Statutory Sick Pay for up to two weeks where staff have been off sick due to a coronavirus related absence.

## New UK guidance on hybrid working

The Chartered Institute of Personnel and Development (CIPD) has, on behalf of the government's flexible working taskforce, published [new practical guidance on hybrid working](#). The guidance covers areas as varied as recruitment, health and safety, and ensuring policies and practices are inclusive and fair.

## Ownership of employee-created IP

A recent Court of Appeal decision<sup>4</sup> has highlighted some key issues for any business which uses software developed by employees.

The employer claimed that it was the owner of software that had been developed by the employee because it was mostly created in the course of his employment and any earlier software was assigned to it by an agreement between the parties in 2008.

Whilst the employer was ultimately successful the court case caused it much disruption and unrecoverable costs spanning over three years. The employee's key argument was that if the intention of the contract had been to capture software that was partly developed before his employment and outside normal working hours it would have been much clearer on this point.

## Ruling on dismissing a disabled employee

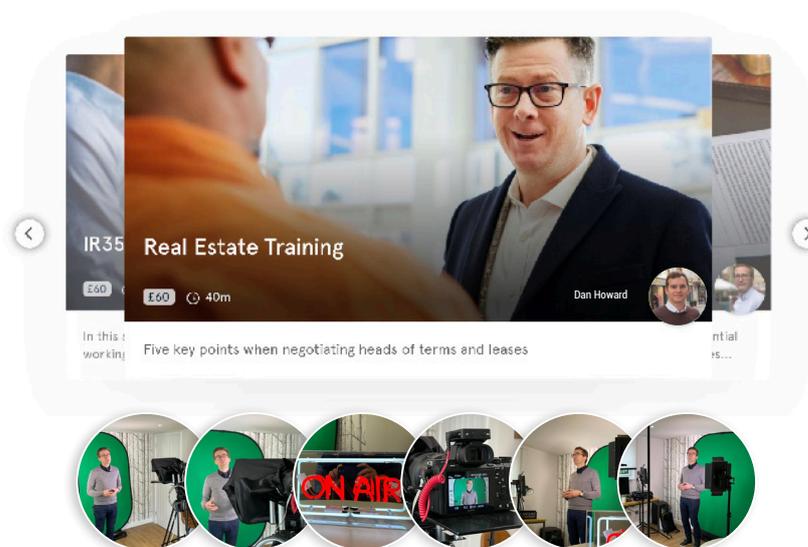
A recent Employment Appeal Tribunal (EAT)<sup>5</sup> ruling concerned a disabled employee who following a two-year long period of sickness absence, was dismissed on the grounds of ill-health capability. The employer considered that the dismissal was a proportionate means of achieving the legitimate aim of the efficient running of the department, but the EAT ruled that before resorting to a dismissal *employers must consider other less discriminatory measures*. In this case, for example, it was not clear why the employer was unable to appoint a temporary replacement for the Claimant

## National Minimum Wage - EAT decision muddies the waters.

It had generally been understood that for the purposes of calculating whether an employer has complied with national minimum wage ('NMW') that it is the net pay after the employee has paid for items *required for the work* such as a compulsory staff uniform, but the EAT has ruled in a recent case<sup>6</sup> that it is the net pay after any expenditure *'in connection with employment'*. In this case the employee, a mini-cab driver, purchased an optional uniform and at his choice hired a car from a company connected to the employer rather than using his own car. The EAT ruled that his wage after these optional costs must meet or exceed the NMW.

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

1	The Secretary of State for Business, Energy & Industrial Strategy v Bamford & Ors [2021] EWHC 3261(Ch)
2	Brooke Homes (Bicester) Limited v Portfolio Property Partners Limited and Others [2021] EWHC 3015 (Ch)
3	Lloyd (Respondent) v Google LLC (Appellant) Case ID: UKSC 2019/0213
4	Penhallurick v MD5 Ltd ([2021] EWCA Civ 1770
5	Gray v. University of Portsmouth EA-2019-000891-00
6	Mr W Augustine v Data Cars Ltd: EA-2020-000383-AT (previously UKEAT/0254/20/AT)



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