



COMMERCIAL BULLETIN

Your guide to the latest legal updates
from the team at Radius Law.

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COMMERCIAL & CORPORATE

Agreements to agree

A recent High Court decision¹ held that part of a contract for the sale of goods was unenforceable due to the uncertainty of a term stipulating that the price for a portion of the contract volume was an ‘open price to be fixed’.

The contract only allowed the price to be set by mutual agreement; there was not any mechanism to determine the price if the parties were not able to agree. In other words, **it was an agreement to agree and therefore unenforceable.**

Post Office scandal – A failure of Governance

The IoD has published a Policy Paper in October: [The Post Office Scandal – A failure of governance.](#)

The paper specifically noted that:

- The board ignored numerous red flags concerning the Horizon system and exhibited a lack of curiosity.
- Directors failed to challenge the established narrative and relied too heavily on senior executives’ perspectives, which led to a culture of ‘groupthink’.
- Several directors lacked training and had a weak understanding of statutory duties, despite their track record as experienced directors.
- The Post Office board lacked IT expertise so was not equipped to understand the complexities of a major I.T. system.



Recommendations include:

- Ensure directors have specific training and understand their roles and responsibilities individually and collectively.
- Cybersecurity and AI literacy should be prerequisites for directorship to tackle emerging tech challenges.
- Complex issues may require a mix of skills, so consider appointing directors with expertise in areas such as finance, operations, and law.

Also, in October the Institute of Directors launched a revised [code of conduct for directors.](#)



EFFECTIVE CORPORATE GOVERNANCE

12th December, 2024

10:00AM – 4:00PM

LEARN MORE

New laws on social impacts

New EU laws have been implemented concerning the management and disclosure of corporate social impacts. They fall into three categories:

- **Mandatory ESG disclosure requirements:** The EU Corporate Sustainability Reporting Directive (**'CSRD'**) affects large companies based in or with significant turnover in the EU. CSRD will apply to many large EU-based companies from financial years starting on or after 1 January 2025, with reporting in 2026. The Commission has published a [FAQ document](#).
- **Mandatory standards for due diligence:** The EU Corporate Sustainability Due Diligence Directive (**'CS3D'**) came into force in July 2024. The requirements will start to apply for the very largest companies in 2027. It requires companies to conduct due diligence on their operations and business partners to identify and mitigate social and environmental risks. Companies must periodically assess impacts and ensure the effectiveness of their due diligence. Failure to comply can lead to significant fines and liabilities.
- **Import/export bans:** New regulations, such as the EU Forced Labour Regulation, prohibit products made with forced labour from being placed on or exported from the EU market. This reinforces the CS3D's standards.

Companies must now prioritise social issues, incorporating them into Board agendas and governance structures.

Government introduces measures to ensure prompt company payments.

The Government [has announced measures to address late payments](#). These measures include introducing a 'Fair Payment Code' to replace the Prompt Payment Code. The new Code features 'fair payment principles' for which companies will be awarded Gold, Silver, or Bronze status based on payment timeliness. The Gold status requires 95% of suppliers to be paid within 30 days.

Additionally, new legislation will mandate large businesses to report payment practices in their annual reports, promoting transparency and accountability.



CONSUMER

Digital Markets, Competition and Consumers (DMCC) Act

The Digital Markets, Competition and Consumers (DMCC) Act is the groundbreaking new law that will make significant changes to the UK’s competition and consumer landscape. We previously reported on the detail of some of the changes in our [July Bulletin](#).

On the 9th September, the [UK Government announced its expected timeline](#) for implementation of the Act.

December 2024, January 2025	<ul style="list-style-type: none"> December 2024, January 2025 April 2025 Pro-competition regime for digital markets to promote more dynamic markets and ensure the most powerful tech firms treat consumers and business fairly (Part 1). New powers to enhance the CMA’s ability to target anti-competitive behaviours and focus on significant potential harm (Part 2).
April 2025	<ul style="list-style-type: none"> New consumer law enforcement powers for the CMA (Part 3); New consumer rights/protections (including tackling fake reviews and drip pricing) (Part 4, Chapter 1).
Not before April 2025	<ul style="list-style-type: none"> New rules for consumer saving schemes (Part 4, Chapter 3).
To be confirmed	<ul style="list-style-type: none"> Reforms to alternative dispute resolution (‘ADR’) for consumer contract disputes (Part 4, Chapter 4).
Not earlier than spring 2026	<ul style="list-style-type: none"> New rights and obligations relating to subscription contracts (Part 4, Chapter 2).

COMPETITION

The dangers of a competitor information exchange.

In 2019, the Portuguese competition authority fined 14 banks €225m for a decade-long information exchange of confidential and strategic information. The banks appealed, arguing that the information exchange had not caused any harmful effects. The Portuguese court sought clarity from the Court of Justice of the European Union (‘CJEU’). The [CJEU ruled](#)² that even a single information exchange can be a restriction of competition by ‘object’ if it reveals confidential and strategic information. In other words, ***the mere fact that there has been such an information exchange will be unlawful; the regulators do not need to assess the effects.***

DATA SECURITY

Cookies

The ICO has issued a reprimand against the company behind Sky Betting (SkyBet) in relation to cookie practices. This is another case in the ICO's crackdown on the misuse of Cookies. As a reminder the ICO has previously provided guidance that:

- Users must give consent, before non-essential cookies are placed on a user's device (SkyBet breached this requirement); and
- Cookie banners must not make it harder for a user to withhold consent than to give it.

Although Sky Betting was reprimanded by the ICO for cookie misuse, no fine was issued due to prompt compliance, lack of deliberate misuse, and existing protections for vulnerable users.

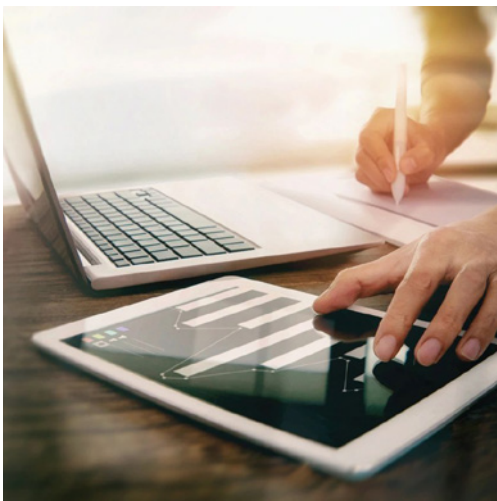
Interestingly, the Department for Science, Innovation and Technology has recently published a report which evaluated the public's attitude to browser-based cookie settings. The report found most users accept all cookies when presented with a 'neutral' option. When customisation is allowed, there is no significant change in behaviour if 'accept all' is recommended.

Russia fines Google more money than there is in the entire world

Finally, if you think the price of regulation is too high, you may be pleased to know, the biggest corporates are suffering too.

A Russian court has fined Google more money than there is in the entire world - a two followed by 36 zeroes - for restricting Russian state media channels on YouTube.

It's understood that Kremlin spokesman Dmitry Peskov admitted he 'cannot even pronounce this number' but urged 'Google management to pay attention.'



Don't miss our upcoming webinar...

COMMERCIAL LAW UPDATE

27th November, 2024

10:00AM – 11:00AM

[REGISTER HERE](#)

EMPLOYMENT

New Legislation

Acts in force from October

The following Acts came into force in October:

- The Employment (Allocation of Tips) Act ('Tips Act')
- The Worker Protection (Amendment of Equality Act 2010) Act 2023 ('Worker Protection Act').

The Tips Act **obliges employers to ensure that 100% of tips are paid to workers and that tips are allocated fairly**. The accompanying [Statutory Code of Practice](#)³ also in force and [non-statutory guidance](#)⁴ has been issued.

The Worker Protection Act introduced **a duty on employers to take 'reasonable steps' to prevent sexual harassment of workers within the workplace**, which means:

- employers must conduct a risk assessment to identify the specific risks of sexual harassment and take action to prevent it, and
- if sexual harassment takes place, the employer should take action to stop it from happening again.

Failure to comply with the duty may lead to **enforcement action by the Equality and Human Rights Commission** ('EHRC') and **to up to 25% increase in compensation** awarded to a worker who succeeds in a claim for sexual harassment.

The [EHRC](#)⁵ and [ACAS](#)⁶ have updated their guidance on sexual harassment to cover the new duty.

Employment Rights Bill and consultation exercises

The Government has published the **Employment Rights Bill** and related [factsheets](#)⁷ and launched a series of consultation exercises on some of the changes contained in the Bill, including on:

- creating a [modern framework for industrial relations](#)⁸
- [collective consultation and 'fire and rehire'](#)⁹
- [extending zero hours workers protections to agency workers](#)¹⁰ and
- [strengthening statutory sick pay](#)¹¹

Most reforms in the Employment Rights Bill will not take effect before 2026. Reforms of unfair dismissal will take effect no sooner than Autumn 2026.

Recent Cases

Supreme Court decisions on IR35

The Supreme Court ('SC') has recently considered **whether IR35 applied to two cases where individuals were engaged on a self-employed basis**.

The first case¹² concerned the **employment status of part-time football referees** engaged by Professional Game Match Officials Ltd ('PGMOL'). PGMOL offered matches to the referees. If accepted, the referee agreed to officiate and submit a match report, in return for a fee. Referees could cancel an agreed match commitment without sanction.

The SC ruled that:

- the individual engagements were enough to satisfy the test of mutuality of obligation, and
- PGMOL exerted sufficient control over the referees because they had to pass a fitness test and attend an introductory seminar and could be disciplined by PGMOL.

The SC remitted the case to the First-Tier Tribunal to decide on status.

The second case¹³ concerned Stuart Barnes, who provided journalistic services to Sky through his personal service company, S&L Barnes Limited ('SLB'). The **Upper Tribunal concluded that there were factors indicating an employment relationship between Mr Barnes and Sky**, including:

- the engagement was for a fixed term of four years
- there was no right of substitution
- the annual fee was payable in monthly instalments, regardless of airtime
- Mr Barnes worked for Sky for over 20 years.

SLB should have, therefore, withheld PAYE and NICs from Mr Barnes' Sky income and paid them to HMRC.

Fire and re-hire

The Supreme Court has **restored an injunction against Tesco Stores Limited ('Tesco') preventing it from using fire and rehire to remove a permanent employee benefit**¹⁴

Comments about baldness were harassment related to sex

Mr Finn ('F') was called a "bald [expletive]" and twice threatened with physical violence by a colleague. F was later dismissed for gross misconduct concerning another matter. F claimed sex-related harassment.

The Employment Tribunal and the EAT decided¹⁵ that:

- baldness is more prevalent in men
- males were much more likely to be subjected to remarks regarding baldness, and
- the comment on F's baldness was harassment related to sex.

Cases, laws, decisions referred to in this Bulletin

1	KSY Juice Blends UK Limited v Citrosuco GmbH [2024] EWHC 2098 (Comm)
2	Banco BPN/BIC Português SA and others and Autoridade da Concorrência, CJEU Case C-298/22,
3	Code of practice on fair and transparent distribution of tips
4	Distributing tips fairly: non-statutory guidance for employers
5	EHRC Sexual harassment and harassment at work: technical guidance
6	ACAS Preventing sexual harassment guidance
7	Employment Rights Bill: factsheets
8	Making work pay: creating a modern framework for industrial relations
9	Consultation on strengthening remedies against abuse of rules on collective redundancy and fire and rehire
10	Consultation on the application of zero-hours contracts measures to agency workers
11	Making Work Pay: Strengthening Statutory Sick Pay
12	Commissioners for His Majesty's Revenue and Customs (Respondent) v Professional Game Match Officials Ltd (Appellant) [2024] UKSC 29
13	The Commissioner's for HMRC v S & L Barnes Ltd [2024] UKUT 00262 (TCC)
14	Tesco Stores Ltd v USDAW [2024] UKSC 28
15	British Bung Manufacturing Company Ltd and Another v Finn [2023] EAT 165



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