

COVID-19 UK BULLETIN – MAY 6, 2020

To Our Clients and Friends:

This bulletin provides a summary and compendium of English law legal developments during the current COVID-19 pandemic in the following key areas:

1. Competition and Consumers
2. Corporate Governance (including accounts, disclosure and reporting obligations)
3. Cybersecurity and Data Protection
4. Disputes
5. Employment
6. Energy
7. Finance
8. Financial Services Regulatory
9. Force Majeure
10. Government Support Schemes
11. Insolvency
12. International Trade Agreements (private and public)
13. Lockdown and Public Law issues
14. M&A and Private Equity
15. Real Estate
16. UK Tax

Links to various English law alerts prepared by Gibson Dunn during this period are also included in the relevant sections.

As always, for additional information, please feel free to contact the Gibson Dunn lawyer with whom you usually work, any member of the UK COVID-19 Taskforce (listed at the end of this bulletin), or one of the taskforce co-leads:

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1. COMPETITION AND CONSUMERS

Antitrust

Relaxation of rules in the dairy industry (UK)

On 1 May 2020 a fifth exclusion order was laid before Parliament, this time concerning the dairy industry. The order, which came into force on the following day, applies to agreements between two or more dairy produce suppliers or two or more logistic service providers. The order permits certain specified information sharing activities and certain specified co-ordination/sharing activities for the purpose of: (i) maximising the processing, transport and storage efficiency and the storage capacity of dairy produce and preventing or mitigating the need for the disposal of milk; and (ii) preventing or mitigating the need for the disposal of surplus milk or limiting the environmental impact of any disposal of surplus milk, in each case resulting from disruption in demand caused by a reason relating to coronavirus. Only certain activities are permitted under the order and conditions apply for the order's application. Further, in no circumstances, does the order permit the sharing of information relating to costs or pricing.

As mentioned in previous briefings, exclusion orders exempt certain types of agreements in specific sectors from competition law. However, they only permit the specified activities and conditions apply. Other orders issued to date have concerned the groceries sector (grocery chain retailers, suppliers and logistics service providers), agreements to assist the NHS in addressing the effects or likely effects of COVID-19 on the provision of health services to patients in England and, separately, Wales and existing ferry transport operators in the Isle of Wight.

Commission adopts package of measures to further support the agri-food sector

On 4 May 2020 the Commission published a package of exceptional measures to support the agricultural and food sectors most affected by coronavirus. The measures include: (i) support for private storage aid for the dairy and meat sectors; (ii) flexibility in the implementation of certain market support programmes and the EU's school scheme; and (iii) temporary derogations from certain EU competition rules allowing operators to self-organise and implement market measures to stabilise the milk, flower and potatoes sectors, subject to certain conditions. The Commission has stated that it will closely monitor 'consumer price movements' and 'any possible partitioning of the internal market' in order to avoid any negative market effects flowing from this derogation.

Further details can be found [here](#).

Remember whilst some co-operation may be tolerated in the current environment, this is not without limits. Careful assessment is required as to whether a particular co-operation will be tolerated and safeguards must be put in place to ensure that the co-operation goes no further than strictly necessary to deal with critical issues. Companies facing issues with supply or distribution or considering co-operating with competitors should consult with counsel.

Consumer protection

CMA statement on law in relation to cancellations and refunds

On 30 April 2020 the CMA published guidance setting out its general views on how consumer protection law operates in relation to the area of cancellation and refunds. The CMA has stated that its COVID-19 Taskforce has seen “increasing numbers of complaints in relation to cancellations and refunds, which now account for 4 out of 5 complaints being received”. The CMA has identified three sectors of particular concern in this respect, including: (i) weddings and private events; (ii) holiday accommodation; and (iii) nurseries and childcare providers. It has stated that it will tackle these sectors as a priority and then move on to examine other sectors. In its statement, it also warned businesses that, where it finds evidence that businesses are failing to comply with consumer protection law, it would take “tough enforcement action” to protect consumers’ rights. The CMA has also advised that businesses should not be profiting during these time by recovering their money twice - once from the Government and once from customers.

The CMA’s guidance can be found [here](#)

If you need advice on the extent to which your refund and cancellation terms, policies or practices comply with UK consumer laws, or receive an information request from the CMA, our lawyers are on hand to assist.

2. CORPORATE GOVERNANCE (INCLUDING ACCOUNTS, DISCLOSURE AND REPORTING OBLIGATIONS)

No update to our COVID-19 UK Bulletin – 29 April 2020.

3. CYBERSECURITY AND DATA PROTECTION

No update to our COVID-19 UK Bulletin – 29 April 2020.

4. DISPUTES

Courts and tribunals data

HMCTS has updated its published data on the number of remote hearings held since the beginning of the lockdown, indicating that 90% of hearings have been held using audio or video technology in recent weeks.

Civil circuit guidance

The Judiciary has published a [civil circuit guidance page](#) gathering guidance and orders issued for different circuits around England.

Operation of the criminal justice system

The Jury Trial Working Group, chaired by Mr Justice Edis and comprised of representatives from across the criminal justice system and legal professions (including the Law Society of England and Wales, Bar Council and Criminal Bar Association), met on 30 April 2020 to progress plans to resume jury trials as soon as appropriate safety arrangements adhering to social distancing are in place. A small number of Crown Courts, identified as potentially suitable due to size or design, are being assessed this week by Public Health England and Public Health Wales.

The final decision to restart jury trials will be made by the Lord Chief Justice—who is in close discussion with the Lord Chancellor—once he is confident that the system as a whole is ready. The Lord Chancellor has previously ruled out judge-only trials, though has indicated that trials with fewer jury members may be a possibility.

HMCTS has [announced](#) that it is rolling out its new Cloud Video Platform to criminal hearings, allowing all magistrate and crown courts in England and Wales to hold secure hearings. The technology will not be used for jury trials.

Operation of the civil justice system

The Judiciary announced on 1 May 2020 the Civil Justice Council has [commissioned an independent review](#) to gather feedback on the impact of COVID-19 measures on the civil justice system. The review will run for the first two weeks of May, and will concentrate on the experience of court users and offer practical recommendations to inform the ongoing response to COVID-19, with a report due by 22 May 2020.

Feedback from the Bar Council

On 27 April 2020 the Chair of the Bar Council, Amanda Pinto QC, issued an [update](#) on the Bar Council’s efforts to support the Bar during the crisis. She expresses a “genuine concern for the delivery of justice and for the sustainability of the profession” prompted by reports that many cases are being adjourned for no apparently good reason, rather than taking place remotely, which should be the default position.

Commercial dispute resolution

Further to our last update, on 27 April 2020 British Institute of International and Comparative Law (BIICL) published a [press release](#) to accompany its [Concept Note](#) on its “breathing space” project (which was introduced by the former President of the UK Supreme Court, Lord Neuberger, on BBC’s Today programme). The press release quotes former members of the senior judiciary who attended the 7 April meeting hosted by BIICL, including Sir David Edward, a former Judge of the European Court of Justice, who has stated that “the law cannot insist that parties’ contracts must continue as if nothing has happened, or simply declare that frustration has brought them to an end. If commercial life is to go

on, a rational and equitable solution must be found.” Echoing the Concept Note, the press release advocates that, as the economy begins to reopen, parties should be encouraged to negotiate rather than to focus on their contractual rights, which are in any event going to be uncertain.

Arbitration hearings

The Stockholm Chamber of Commerce (SCC) announced on 23 April 2020 that it will be offering a version of its SCC Platform (launched in September 2019) to ad hoc arbitrations globally, in a joint pro bono initiative with Thomson Reuters to support the online administration of proceedings during the COVID-19 crisis. The Ad Hoc Platform is a secure digital platform for communications and file sharing between parties and the tribunal, and use and storage of data will be free of charge during the outbreak.

5. EMPLOYMENT

No update to our COVID-19 UK Bulletin – 29 April 2020.

6. ENERGY

Government support packages for the Norwegian and UK Continental Shelf

The Norwegian Government has announced a proposed support package for its oil and gas sector, one of the first packages announced in response to COVID-19 which specifically targets the sector.

The temporary tax relief measures are designed to maintain planned investment in the sector during the COVID-19 pandemic. The measures include an ability to claim immediate tax deductions (rather than over a six year period) for depreciation on investments made in 2020 and 2021 and an ability to receive a cash refund on tax losses in 2020 and 2021.

The Norwegian Government expects the proposals to boost liquidity in the sector by up to £7.7 billion in 2020 and 2021. The proposals will be submitted for parliamentary approval on 12 May 2020. A green restructuring package for business and industry will also be presented towards the end of May.

This temporary shift in the Norwegian tax authorities’ approach to depreciation in the oil and gas sector has certain similarities with the UK’s capital allowances rules for companies in the corporation tax ring fence, which already provide for 100% first year allowances on certain qualifying capital expenditure and decommissioning expenditure, subject to various conditions. For further details please do not hesitate to get in touch with our Tax team (details below).

The Norwegian Government’s announcement comes as Oil & Gas UK (OGUK, the industry body for the UK Continental Shelf) announced that it is working with the Confederation of British Industry (CBI) to develop detailed proposals for an equity-based support package for the UK sector. The scheme would

involve banks or private equity firms making convertible loans (backed by the UK Government) to major supply chain companies. Separately, the Offshore Coordinating Group (a coalition of trade unions representing the UK's offshore oil and gas industry) has proposed convertible loans that would be provided directly by the UK Government.

Energy Industry calls on Government

OGUK has released a report (available [here](#)) detailing a three step plan for preserving and developing the energy industry, while continuing to move towards net-zero emissions. As some companies have struggled to access support from the schemes currently in place, the first step is aimed at supporting the industry now through an equity-based finance solution being developed in conjunction with the CBI, mentioned above. The second concerns stimulating the recovery of the sector and OGUK points to the importance of “international competitiveness and attractiveness for investors”. The third step relates to accelerating net zero and notes that OGUK will be releasing industry-wide targets for mapping the journey to net zero in the near future.

Texas regulator drops proposed production cuts

We previously [reported](#) that the Railroad Commission of Texas (RRC), the state's oil and gas regulator, was considering mandating pro-rata production cuts for all Texas producers. After consideration, the Texas RRC has now dropped this proposal.

Impact of COVID-19 on projects

COVID-19 continues to delay projects and create issues on projects and installations. Some specific items of note include:-

- Owing to a 46% fall in net income for Q1 2020, Shell will cut its dividend for the first time since World War II, from 47 cents to 16 cents.
- UK-based independent EnQuest has warned that it plans to make redundancies in the North Sea. It has begun the consultation period to discuss around 530 potential redundancies.
- Workers at Gazprom's Chayanda gas field onshore Eastern Russian Federation are reported to be protesting the lack of action to tackle the spread of infections.
- Cases amongst offshore workers in Singapore have accelerated to 133 confirmed cases. However some projects and companies continue as planned, including Australia-based Santos's Narrabri coal-seam gas project onshore New South Wales, Australia which is reportedly continuing without any delay.

7. FINANCE

No update to our COVID-19 UK Bulletin – 29 April 2020.

8. FINANCIAL SERVICES REGULATORY

LIBOR transition

The FCA has published a further statement on the impact of COVID-19 on firms' LIBOR transition plans. Among other things, it confirms that the central assumption remains that firms cannot rely on LIBOR being published after the end of 2021.

9. FORCE MAJEURE

No update to our COVID-19 UK Bulletin – 29 April 2020.

10. GOVERNMENT SUPPORT SCHEMES

Coronavirus Business Interruption Loans Scheme (CBILS)

The CBILS has, in the three weeks to 30 April 2020, approved 25,262 loans for approximately £4.1 billion, from 52,807 applications. In addition and following the changes to CBILs that were announced by the Government (and covered in our COVID-19 UK Bulletin – 22 April 2020), the largest accredited lenders for CBILS have announced they will not require forward-looking financial information and will only ask businesses for information and data they might reasonably be able to provide at speed. This measure is intended to enable lending decisions to be approved more quickly following sustained criticism from businesses on access to the scheme.

Bounce Back Loans Scheme (BBLs)

The Government's BBLs for small and medium-sized enterprises (SMEs) launched on 4 May 2020 following announcement of the scheme on 27 April 2020. The scheme is intended to support SMEs with loans of between £2,000 and £50,000 with a UK Government guarantee for the entire loan. On 1 May 2020, the Chancellor of the Exchequer also wrote to accredited lenders on the BBLs to specify that the interest rate for BBLs loans should be 2.5% p.a. in order to ensure that the loans are affordable and accessible. The Chancellor's letter also introduces a number of legislative and regulatory changes that will be made to encourage accredited lenders to advance loans under the BBLs. Finally, the Chancellor's letter goes on to specify that borrowers that have received loans under the CBILS which would otherwise qualify as loans under the BBLs, are entitled to transfer their loan from the CBILS to BBLs before November 2020, in order to benefit from the fixed rate of interest and the Government's 100% guarantee of BBLs loans.

PRA statement on regulatory treatment of CBILS and CLBILS loan schemes

On 27 April 2020, the UK Prudential Regulation Authority (PRA) published a statement on the regulatory treatment of CBILS and the Coronavirus Large Business Interruption Loan Scheme (CLBILS), responding to HM Treasury's changes to these loan schemes.

Particular areas of the statement to flag include:

- the PRA's observations on whether the guarantees provided by the Secretary of State for Business, Energy and Industrial Strategy under the CBILS and CLBILS are eligible for recognition as unfunded credit risk mitigation under the Capital Requirement Regulation (575/2013); and
- the PRA's recognition that it will be challenging for many businesses to provide forecast financial information with a high degree of confidence to support firms' loan underwriting processes. It noted that lenders are expected to use their judgement on what information is required to make credit decisions. They should consider the range of information available to them including, for example, the performance of the business before the COVID-19 outbreak and the overall prospects for the sector in which the business operates once the effects of the pandemic have receded.

FCA statement on regulation of firms regarding CBILS and BBLs

Also on 27 April 2020, the UK Financial Conduct Authority (FCA) published a statement on the CBILS and the new BBLs, outlining its approach to the regulation of firms relating to these loan schemes.

In its statement, the FCA, amongst other things:

- recognises the need to make changes to the CBILS scheme immediately. It notes that, as an interim measure, prior to the roll-out of the BBLs, if firms comply with the relevant requirements of the CBILS, the FCA does not expect them to comply with certain FCA rules where the lending is regulated; and
- recognises that, currently, the need to manage the risks of fraud and money laundering should be balanced against the need for the fast and efficient release of funds to businesses under the CBILS and BBLs. For existing customers, the FCA considers that where a firm has carried out appropriate customer due diligence before it receives an application under the loan schemes, it does not need to make further checks, unless this has flagged potential issues.

11. INSOLVENCY

No update to our COVID-19 UK Bulletin – 29 April 2020.

12. INTERNATIONAL TRADE AGREEMENTS (PRIVATE AND PUBLIC)

Further to our update of 1 April 2020 on export restrictions on personal protective equipment (PPE), on 23 April 2020 the EU issued amended restrictions (Commission Implementing Regulation (EU) 2020/568) following its issue on 15 March 2020 of Commission Implementing Regulation (EU) 2020/402, which prohibited the export of PPE outside of the EU for an initial six weeks. The latest amendments (i) narrow the scope of products affected by the restriction to masks, spectacles and protective garments, (ii) extend the geographical scope of the exemption from the authorisation requirements, and (iii) require Member States to grant expedited authorisations for exports made for humanitarian purposes. The amended restrictions came into force on 26 April 2020 and will remain in force until 25 May 2020. The UK has implemented the latest regulation and provided updated guidance for economic operators wishing to export PPE to destinations outside the EU, EFTA or certain dependent or other territories.

13. LOCKDOWN AND PUBLIC LAW ISSUES

Review of lockdown restrictions

Under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 the Government is required to review the appropriateness of the lockdown restrictions every 21 days, with the next review taking place by 7 May 2020. Although Prime Minister Boris Johnson said on 4 May 2020 that “[t]he worst thing we could do now is ease up too soon and allow a second peak of coronavirus”, a “roadmap” out of the lockdown is expected to be announced on 10 May 2020 with draft rules already having been leaked.

14. M&A AND PRIVATE EQUITY

W&I insurance

Considerations relating to warranty and indemnity (W&I) insurance remain key for M&A deals that progress in the new market conditions resulting from the spread of COVID-19. We have summarised certain of the salient considerations below.

- **Due diligence.** Sellers should anticipate that both buyers and insurers will want to understand the impact that COVID-19 has had (or is likely to have) on the target business(es) and attempt to address related concerns early in any process. Insurers are requiring robust due diligence into the impact of the pandemic on matters such as material contracts, banking arrangements, cash flow position, financial forecasts, supply chain management and employment matters. Buyers should

be ready to discuss with insurers how they are addressing COVID-19 issues in their due diligence process (such as potential inability to conduct commercial / environmental site visits etc.).

- ***Specific disclosure.*** Sellers may be expected to provide specific disclosure on the ways in which COVID-19 impacts the target business, including an assessment of financial losses, events triggered in lending arrangements, termination rights in contracts and potential disputes.
- ***Impact on W&I policy terms.*** As the pandemic progresses, we expect to see the following changes in the W&I policy terms:
 - Insurers are predicted to become more conservative with respect to the maximum policy limits that they are willing to offer on any given deal and more selective with respect to the industry sectors / jurisdictions where they take exposure. With respect to distressed deals involving more challenging targets, insurers will likely require higher premiums and/or deductibles than were generally required prior to the COVID-19 outbreak.
 - Buyers can expect that term sheets provided by insurers will propose COVID-19 pandemic coverage exclusions. Parties to the transaction may decide to allocate the resulting COVID-19 adverse risks/liabilities amongst themselves (for example, through special indemnities, purchase price reduction or deferred payment / earn-out structures).
 - Insurers will expect parties to carefully consider the wording of each warranty, indemnity and/or representation in light of COVID-19. For example, previously negotiated representations and/or warranties may now be untrue or may need to be repeated at completion under the relevant transaction documents.
 - Buyers will likely consider inserting COVID-19-specific representations and warranties into their transaction document(s) to assist with a better understanding of the exposures/risks and associated operational and financial impact of the pandemic on the target business and to get a handle on any safeguards that the seller has already put in place. Sellers should consider ring-fencing warranties most relevant to COVID-19 risks and include appropriate materiality limitations and/or awareness qualifications.
 - Careful thought should be given to the inclusion and breadth of material adverse change (MAC) clauses within transaction documents and particularly the inclusion of specific references such as “epidemic”, “pandemic” or “quarantine restrictions”. It will be important for insurance policies to remain in place even if parties agree to complete the deal following a MAC event (although any loss(es) incurred as a result of the MAC event likely will not be covered under the policy).

Insurers have speculated that COVID-19 may enable buyers (in the short-term) to place increased pressure on solvent sellers to stand behind warranties either in their entirety or to a more meaningful extent than has become customary. This may in turn lead to an increase in the amount of the deductible under buy-side W&I insurance policies or even an increased demand for sell-side policies.

15. REAL ESTATE

More lobbying and new Government measures for commercial real estate

The British Property Federation (BPF), a representative body for UK landlords, met with John Glen, economic secretary to the Treasury, and Robert Jenrick, Secretary of State for Housing, Communities and Local Government to discuss plans to assist landlords. The Government's approach to date has been criticised across the RE sector and the recent tenant-friendly guidance, previously reported on in our [last bulletin](#), came as a major blow to landlords. The measures proposed by the BPF, some of which were put to the Government before its last announcement, include the institution of a Furloughed Space Grant Scheme, similar to those already in place in some other European countries and which we reported on [here](#). The BPF has also encouraged the Government to assist landlords with business rates holidays for empty premises, and to call on lenders to show forbearance to landlords. BPF's chief executive, Melanie Leech, has said that the Government is "considering [the Furloughed Space Grant Scheme] seriously" and is discussing how to "fill the gap" between what tenants can pay and the rent concessions landlords can afford to make.

The Government has now announced grants of £671 million to try to provide for small businesses in shared premises, amidst calls that those in shared premises, which have no rateable value, have therefore been ineligible to apply for the initial Government loans. Adam Marshall, director-general of the British Chambers of Commerce, warns that many of companies "are already on borrowed time" and urges the grants to be paid out swiftly.

Rent payment challenges

Superdrug is the latest in a line of large organisations which has come under fire from landlords for refusing to pay their rent (see our coverage of Travelodge's negotiations [here](#)). In a letter dated 22 April 2020 seen by The Financial Times, Superdrug told its landlords that the company would "reduce our lease payments to 25 per cent of our passing rent", adding that this "is a rent reduction as opposed to a rent deferment". This has led to criticism given that some of Superdrug's stores remain open, although Superdrug has not disclosed the exact number of these. Boots, which also has open shops, has similarly come under fire. Correspondence from LCP, a landlord, to Boots, leaked to The Sunday Telegraph, stated that "it was wholly unfair for Boots to assume that they can transfer all the pain over to the larger landlords" and demanded payment of half of the rent "within 48 hours".

Occupiers thinking on their office space

Analysis of whether lockdown might be eased often hinges on whether office workers can socially distance if back in the office; research indicated that the average worker sits only 4 foot 6 inches to 5 foot 2 inches apart, less than the recommended 6 feet.

Further, as companies have invested heavily in working from home, large employers may be reluctant to continue leasing the same amount of office space they had previously. Barclays CEO, Jes Staley, has

said “there will be long-term adjustment in how we think about our location strategy”; Lord Wolfson, Next’s CEO, has said we “have learnt that there is work that can effectively be done from home” and guesses that “working practices will change irreversibly.”

On the landlord side, Chris Grigg, CEO of British Land, noted that expected levels of air-travel and demand for high rises did not fall after 9/11 and rationalises that the market’s requirement for office space should not be adversely impacted; Marcus Geddes, head of property at Land Securities, says he doesn’t “see the grim reaper falling on the office market just yet.”

New Land Registry measures on signing deeds

The Land Registry has announced updates to its [Practice Guide 8: execution of deeds](#) to facilitate the signing of deeds during social distancing, released on 4 May 2020. The updates to the Practice Guide suggest that witnessing can be done through a window, provided that the witness is “able to see clearly the signatory signing”. It also sets out an 8-step process for signing deeds which it will accept “until further notice” at paragraph 12 of the Guide.

16. UK TAX

Supplies of e-publications

At Budget 2020, the Government announced that it would zero rate certain supplies of e-publications with effect from 1 December 2020 to support literacy and reading in all its forms. Following the COVID-19 outbreak and the need for people to stay at home, the Government announced on 30 April 2020 that it will bring forward the implementation date to 1 May 2020. This is intended to reduce the cost of access to online publications during these challenging times when many people are confined to their homes and schools are closed. For more details, please see [here](#).

VAT zero rating for personal protective equipment (PPE)

From 1 May 2020, PPE purchased by care homes, businesses, charities and individuals to protect against COVID-19 will be free from VAT for a three-month period. One point of interest is that EU law requires the UK to charge VAT on the equipment and the UK is bound by the relevant EU provisions until the end of the transitional period. The Government has said that it is acting under an exceptional basis allowed by EU rules during health emergencies. For more details, please see [here](#) and [here](#).

Impact of COVID-19 on labour taxes

The OECD has published data providing a baseline for measuring the impact of COVID-19 on labour taxes. For further details, please see [here](#).

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COVID-19 UK TASKFORCE LEADERS

Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact your usual contact or any member of the Firm's (COVID-19) UK Taskforce:

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