

COVID-19 UK BULLETIN – JULY 1, 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

Abuse of dominance investigations launched in light of excessive pricing practices

On 18 June 2020, the UK Competition and Markets Authority (CMA) launched investigations into suspected breaches of Chapter II of the Competition Act 1998 (concerning the abuse of a dominant position) by four pharmacies and convenience stores. Those under investigation are suspected of charging excessive and unfair prices for hand sanitizer products during the coronavirus (COVID-19) pandemic.

Government widens its transaction intervention powers

On 22 June 2020, the Government laid before Parliament two pieces of legislation to extend its “public interest” intervention powers.

Fight against public health emergencies

The first Order, which came into force the next day, introduces a new ground upon which a public interest intervention can be launched. This is: “the need to maintain in the United Kingdom the capability to combat, and to mitigate the effects of, public health emergencies”.

National security

The second, which will come into force once debated and approved by both Houses of Parliament, proposes an extension of the companies to which the lower thresholds for public interest intervention (as introduced in 2018) apply. This concerns target companies with specified activities connected with: artificial intelligence, cryptographic authentication technology and certain advanced materials (as defined in the legislation).

This second set of proposals is intended to assist with public interest interventions on national security grounds. However, the amendments (due to their configuration) will also lower in a similar manner the UK merger control thresholds for the same transactions (i.e. technically allowing for easier intervention also on competition grounds for such cases). The CMA will, however, only investigate a transaction on competition grounds on its own initiative if there is a reasonable chance that the transaction may give rise to a realistic prospect of a substantial lessening of competition.

A more detailed, separate briefing on the above mentioned changes in the law (and other pending changes in the area of national security intervention) will be issued shortly.

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

The Financial Reporting Council (FRC)'s Financial Reporting Lab has published reports on disclosures in corporate reporting

The Financial Reporting Lab, established by the FRC, has issued two reports to provide practical guidance to companies focusing on the areas of corporate reporting identified as being the most critical to investors during the economic uncertainty caused by COVID-19. The Financial Reporting Lab states that investors require clear, good-quality and timely disclosures which set out the impact of COVID-19 on a company's business and its long-term prospects. Such disclosures will enable investors to identify the companies that require the most attention and support and to make informed decisions regarding capital allocation.

The first report provides practical advice to companies setting out the nature of the disclosures that investors expect to see during COVID-19. The report notes that, while historical information on a company's position is always valuable, reporting on a company's future, its risks and its strategy is increasingly important in the current circumstances. The second report gives specific guidance on going concern, risk and viability disclosures that may be made by a company. The reports include examples of good practice reporting to assist companies and in particular, the reports encourage boards of directors to consider plausible future scenarios and to report on how they intend to respond to these going forward.

The Financial Reporting Lab has produced a summary of the first report and a summary of the second report, as well as some FAQs on the two reports.

For further information, see [here](#).

The Pensions Regulator (PR) has issued updated COVID-19 guidance

The PR has updated its guidance designed to help pension scheme trustees and employers manage the financial impact of COVID-19.

Among the updated guidance is further guidance for trustees of defined benefit (DB) schemes facing employer requests to agree to suspend or reduce deficit repair contributions. Trustees may agree these where it may be necessary to support employers navigating the challenges resulting from COVID-19. However, the updated guidance states that pension trustees should resume reporting key information to the PR from 1 July 2020, including details of suspended or reduced contributions. This will ensure the PR is able to horizon-scan effectively, identify risks and act as necessary to protect savers.

The following guidance has been updated:

- DB scheme funding and investment: COVID-19 guidance for trustees;
- DB scheme funding: COVID-19 guidance for employers;

- COVID-19: an update on reporting duties and enforcement activity; and
- Scheme administration: COVID-19 guidance for trustees and public service.

For further information, see [here](#).

Companies House has updated guidance on company accounts amid COVID-19

Companies House has updated its [guidance](#) on companies applying for more time to file their accounts. Initial guidance in March 2020 stated that companies who had been adversely affected by COVID-19, in circumstances where the company's filing deadline has not yet passed, could apply for an automatic and immediate three-month extension to file their accounts (see our [COVID-19 UK Bulletin - 8 April 2020](#)).

The updated guidance states that if a company's filing deadline falls between 26 March 2020 and 29 September 2020, the deadline will be extended (retrospectively where applicable) to the earlier of 30 September 2020 and 12 months from the end of the company's accounting period. The Government website [states](#) that if a company is eligible, its filing deadline will be updated automatically and it is not necessary to apply for an extension.

Law Society has updated its guidance note on virtual execution and e-signature during COVID-19

The Law Society has updated its [guidance note](#) on its position on the use of virtual execution and e-signature during COVID-19. The update includes the addition of a new section of the guidance note titled "Tips on how to operate in practice". The tips are as follows:

- **Best practice:** follow the practice notes [execution of documents by virtual means and execution of a document using an electronic signature](#).
- **Agree:** make a clear agreement with the lawyers on the other side of any transaction on how to manage the transaction.
- **Verify:** consider what steps (if any) you wish to take to verify the identity and authority of each of the signatories beyond that which is required by law; this may depend on common practice or specific regulatory requirements.
- **Evidence:** ensure that you have the evidence immediately to hand on file in a timely and accessible manner, which may include taking screen shots if it is not possible to save evidence directly to your system.
- **Report:** use electronic means to report back to all parties that the transaction has closed.
- **Understand:** ensure you are aware of the legislature, regulatory or cultural requirements for virtual execution and e-signatures in the relevant legal area.

UK Finance blog discusses why operational resilience is a strategic imperative

UK Finance has published a [blog](#) highlighting the need for financial firms to focus on operational resilience as they adapt to COVID-19. The blog notes that difficult decisions taken by firms in the name of achieving business continuity during COVID-19 may expose firms to risks such as occupational fraud and cyberattacks.

The blog highlights the need for transparency and clear communication with staff members and that firms should have due regard to the opinions of employees in relation to any proposed changes and consider employee well-being in decision making. The blog also includes insights on outsourcing to overseas suppliers and the need to be mindful of the supplier company's ethical and cultural fit.

Corporate Insolvency and Governance Act enacted

The [Corporate Insolvency and Governance Act 2020](#) has received Royal Assent and is now in force. The new legislation temporarily relaxes various statutory obligations in relation to wrongful trading, company filings, AGMs and general meetings (amongst other things) to provide companies and other corporate bodies with greater flexibility in the midst of the current crisis (see our [COVID-19 UK Bulletin – 3 June 2020](#) for a summary temporary provisions).

Impact of COVID-19 on UK AGMs

Lexis Nexis has issued [research](#) looking at the impact of COVID-19 on AGMs in the UK. Data captured from AGM notices issued by 170 FTSE 350 and AIM 50 companies between 1 March 2020 and 31 May 2020 shows the following:

- **Changing the date of AGMs:** The vast majority of the companies in the data set (94%) did not change the date of their AGM. There did not appear to be much take up of recent proposals to enable companies with a December 2019 year end to postpone AGMs until 30 September 2020, as outlined in the Corporate Governance and Insolvency Bill (discussed above). The research notes that there may be more companies opting to take advantage of the extension in AGM notices issued in June 2020 and onwards. However, given that for many companies, shareholder authorities will expire before September 2020, it may be impractical for companies to postpone their AGMs beyond the date on which these expire, especially where companies may need to raise capital quickly.
- **Form of AGM:** The majority of companies (87%) have held physical meetings with the quorum requirements satisfied by alternative arrangements such as the attendance of two shareholder employees with other shareholders told not to attend. This is unsurprising given that virtual meetings raise potential legal issues.
- **Amending articles of association:** A majority of companies (81%) in the data set did not propose amendments to their articles. However there has been a slight increase in the number of companies who have proposed amendments (14% compared to 9% earlier in the year) and there are still companies that have not confirmed their arrangements (5%). Of those companies from

the FTSE 350 and AIM 50 indices that have proposed amendments to their articles, 42% belong to the FTSE 100, 46% to the FTSE 250 and 12% to the AIM 50. The most popular proposed amendments were amendments which allowed a company to hold a hybrid general meeting, allowed the board to change the time, date or place of general meeting after notice had been issued or allowed shareholders to electronically participate in general meetings.

- **Adaptions to the procedure of meetings:** A significant proportion of the companies in the data set made changes to the way their AGM should be conducted (e.g. encouraging voting by proxy and adapting the way that shareholder questions are handled at the meeting). In relation to shareholder engagement, the research states that most companies have taken to welcoming questions in advance of the AGM with companies being split between addressing the questions prior to, at or after the AGM; although, the overall preferred route appeared to be for questions to be addressed after the AGM. Live Q&A sessions were comparatively unpopular with companies.
- **Further adaptions:** Given the rapid developments in the legislative and regulatory backdrop, companies have encouraged their shareholders to monitor their websites for amendments to AGM arrangements and around 70% of companies within the data set provided their shareholders with links to dedicated website areas.

The findings are largely consistent with an interim report issued by Lexis Nexis in April 2020 (see our [COVID-19 UK Bulletin - 29 April 2020](#) for a summary of the interim report).

3. CYBERSECURITY AND DATA PROTECTION

No update to our [COVID-19 UK Bulletin – 17 June 2020](#).

4. DISPUTES

Commercial Bar Association guidance on remote hearings

On 23 June 2020, the Commercial Bar Association (COMBAR) published a revised [Guidance Note on Remote Hearings](#), which sets out “best practice” for remote hearings in the Commercial Court, against the backdrop of the gradual return to business in Court and the emergence of hybrid hearings. It is intended to be read alongside the [Commercial Court Guide](#) (which continues in effect during the COVID-19 pandemic) as well as any relevant advice or guidance issued by the judiciary.

Since early June 2020, four types of hearings have been taking place in the Commercial Court: (i) fully remote hearings with the Judge at home; (ii) remote hearings with the Judge in their office of Court in the Rolls Building; (iii) hybrid hearings with the Judge and some participants in Court, and some participating remotely; and (iv) normal physical hearings in which all the participants attend in person.

The Note reaffirms that interlocutory hearings are likely to be conducted remotely, and recommends that practitioners take certain measures such as arranging practice-run hearings and testing all relevant technology in advance. It also advises that where trials have been listed prior to the COVID-19 pandemic, it is prudent in cases where this has not already been arranged, to propose a pre-trial review prior to the substantive hearing to clarify whether remote trial would be appropriate. The Note provides a specimen pre-trial review checklist with commentary for parties to consider in relation to proposing remote hearings in the Commercial Court, in addition to the usual checklist contained in the Commercial Court Guide. The Note also provides practical advice and considerations for advocates partaking in virtual justice arrangements. COMBAR anticipates that further guidance will be issued on hybrid hearings in the near future.

5. EMPLOYMENT

Coronavirus Job Retention Scheme

On 26 June 2020, the Government issued a further [Treasury Direction](#) on the Coronavirus Job Retention Scheme (CJRS) which sets out the amended CJRS rules, and confirms the details set out in our [client alert](#) of 2 June 2020, including allowing “flexible furlough” arrangements. The amended CRJS rules will apply from 1 July 2020 until the scheme’s winding up on 31 October 2020.

Shielding employees

On 22 June 2020, the Government [announced](#) that, from 1 August 2020, clinically extremely vulnerable people in England will no longer be advised to shield and will be able to return to their workplaces if they need to work and cannot do so from home, as long as their workplace is COVID secure. The government has asked employers to ease the transition for their clinically extremely vulnerable employees by: (i) putting in place robust measures to ensure their workplaces are COVID secure; and (ii) for those concerned about returning to work, agreeing a return to work plan, taking account of any adjustments that may be needed before they return and the employer’s existing COVID-19 policies.

Employment Share Plans

The Finance Bill 2020 now includes a new provision into the EMI legislation which, in effect provides that there will be no “disqualifying event” resulting from an EMI option holder not being required to work for reasons connected with the COVID-19 coronavirus. The explanatory notes state that this includes circumstances where the individual has had to take leave, is furloughed or reduces their working hours because of COVID-19. This clause will have effect from 19 March 2020 to 5 April 2021 (although there is provision for this relaxation to be extended to 5 April 2022, if required).

6. ENERGY

Global demand and “peak” oil?

Though oil prices have rebounded somewhat from the early days of the global COVID-19 shut down, substantial questions remain about the industry in the longer term. Industry analyst Rystad Energy has revised its estimate of the occurrence of “peak oil” (maximum global commercial production level of oil) from 2030 to 2027-8, based on the recent fall in demand and concurrent growth in environmental consciousness. Others, including BP’s CEO Bernard Looney, have previously suggested that peak oil may be in the past already. Moody’s has commented that 2019 oil demand levels may not return until 2025, if at all.

Impact of COVID-19 on projects and companies

The effects of COVID-19 continue to take their toll on transactions, sites and projects globally as second waves of infection are threatened and the effects of a historic glut of oil in storage continue to push prices down. Some specific examples of note include:-

- US-based Chesapeake Energy has filed for a Chapter 11 bankruptcy, with commentators expecting others in the shale space to follow. Lenders appear to have agreed a US \$2.5 billion financing facility to assist in the bankruptcy process. Observers have noted that this reflects a substantial dampening in excitement around US shale sector.
- Occidental Petroleum Corp, the largest US onshore oil producer, is preparing for a write down of up to US \$9 billion after cutting its dividend to a penny earlier this year.
- Energy services company Petrofac saw shares drop 12% after announcing that they have been “materially impacted” by the pandemic and the oil price drop.
- Following its failure to secure debt to fund its share of the Senegalese Sangomar development owing to adverse market conditions, Australian FAR Ltd. has failed to pay the latest development cash call for the development. FAR is also said to be planning a sale of its interest in the project, which currently has Woodside Petroleum, Cairn Energy and Petrosen as partners. Although the Senegalese President has indicated a COVID-impact related delay of between one to two years for various oil and gas projects, Woodside Petroleum, the operator, has confirmed that it is on schedule for its early 2020 projection of first oil due in 2023.

7. FINANCE

No update to our COVID-19 UK Bulletin – 17 June 2020.

8. FINANCIAL SERVICES REGULATORY

Further extension to filing deadlines for certain regulatory returns

On 26 June 2020, the UK Financial Conduct Authority (FCA) updated its webpage on changes to regulatory reporting during the COVID-19 pandemic.

This now states that the FCA will continue to allow flexibility in relation to submission deadlines for certain regulatory returns. Of most relevance to the majority of firms is the inclusion on this list of the complaints return (DISP Annex 1R). The list also includes the credit union complaints return (CREDS 9 Annex 1R) and claims management companies complaints return (DISP 1 Annex 1AB).

For these returns, firms may apply two-month extensions to the deadlines for returns falling due up to and including 30 September 2020. Firms are reminded by the FCA that the flexibility is intended to cover the situation where the impacts of COVID-19 have made it impractical to submit the named returns on time. Firms should, therefore, continue to submit all returns as soon as they are reasonably able to.

9. FORCE MAJEURE

No update to our COVID-19 UK Bulletin – 17 June 2020.

10. GOVERNMENT SUPPORT SCHEMES

No update to our COVID-19 UK Bulletin – 17 June 2020.

11. INSOLVENCY

The Corporate Insolvency and Governance Act 2020 has received Royal Assent and is now in force. See the Corporate Governance section above for an update.

12. INTERNATIONAL TRADE AGREEMENTS (PRIVATE AND PUBLIC)

No update to our COVID-19 UK Bulletin – 17 June 2020.

13. LOCKDOWN AND PUBLIC LAW ISSUES

Lockdown easing

In reviewing the lockdown regulations, the Government announced on 23 June 2020 its intention to introduce further regulations to amend the existing lockdown restrictions in place since 26 March 2020. The changes are expected, *inter alia*, to allow reopening of most businesses in the hospitality sector whilst maintaining appropriate social distancing measures. These changes are expected to come into effect on 4 July 2020.

Planning changes to support economic recovery

The Business and Planning Bill 2019-2021 was introduced in the House of Commons on 25 June 2020. The bill proposes temporary measures for restaurants, bars and pubs to quickly obtain permission to set up seating on the pavement outside their premises and also to extend alcohol licences to all off-sales without fee or application. The measures are intended to counter the effects of social distancing on seating capacity. The bill would also make changes to the Bounce Back Loan Scheme to make it easier to apply for small business loans, would relax the planning system for developers, and would make certain changes to relax commercial vehicle licensing.

14. M&A AND PRIVATE EQUITY

No update to our COVID-19 UK Bulletin – 17 June 2020.

15. REAL ESTATE

Commercial outlook

Last week was a big week in UK real estate. The market held its breath to see how June quarter day (24 June 2020) rent collections would play out. Unfortunately some of the industry's worst predictions came true, with historically low rent receipts: just 18% of commercial rent due was paid, down from 25% in March. Many tenants have insisted on paying a reduced rent, (e.g. Pret a Manger reportedly paid 30%); others (e.g. Waitrose) are paying monthly; some (e.g. JD Sports) are taking the opportunity to renegotiate their leases (often using a prepack administration to leverage their negotiating position); and even more not paying at all.

Intu, the major UK listed shopping centre owner, has entered into administration. Jefferies analyst Mike Prew, predicted that a fire sale would be likely given the lack of willing buyers.

Code of Practice

The Government released its [Code of Practice](#) on 19 June 2020, developed by a working group of large landlords and tenants, and previously reported on [here](#). It is intended to aid in negotiations, particularly with regards to rent, and to encourage cooperation. It will be in force until 24 June 2021 but is not legally binding.

Eviction of tenants

The Corporate Governance and Insolvency Bill, previously reported on [here](#), came into force on 26 June 2020, severely limiting landlords' use of statutory demands. These measures have been extended and are currently scheduled to be effective until 30 September 2020.

The forfeiture moratorium, introduced by the [Coronavirus Act 2020](#) and previously reported on [here](#), will be extended by statutory instrument to last until 30 September 2020. Some commentators argue that ministers have, in effect, encouraged tenants not to pay rent and stopped market forces taking their course, causing substantial disruption for property owners and lenders. Similarly, the new CPR 55.29 will also extend the stay on all possession proceedings issued under CPR 55 introduced by CPR Practice Direction 51Z until 23 August 2020. This means that any proceedings sent to the court for issue will immediately be stayed and cannot continue until after the stay has expired.

16. UK TAX

HMRC confirm DAC 6 reporting deadline deferral

Earlier in June 2020, the European Parliament voted in favour of the proposal for an optional six-month deferral of reporting deadlines under the EU Mandatory Disclosure Rules (DAC6). HMRC has also confirmed that the first reporting deadlines under the UK implementation of DAC6 will be deferred by six months. The Government will amend the International Tax Enforcement (Disclosable Arrangements) Regulations 2020 to give effect to this deferral. HMRC has advised that, as the amendment may not be in force by 1 July 2020, no action will be taken for non-reporting during any period between 1 July 2020 and the date that the amended Regulations come into force. There is therefore no expectation that reports will be made in July 2020. Please see [here](#) for further details.

Anticipated losses may be used to reclaim corporation tax in “exceptional circumstances”

HMRC updated the guidance in its company taxation manual to confirm that companies may, in exceptional circumstances, reclaim corporation tax where the claim depends on anticipated losses in a subsequent accounting period that has not yet ended. Please see [here](#) and [here](#) for further details.

Option to tax land and buildings

HMRC had previously announced that it was extending the deadline for notifying it about an option to tax land and buildings to 90 days due to the coronavirus pandemic. The extension to the time limit now applies to decisions made between 15 February 2020 and 31 October 2020 (extended from 30 June 2020). For further details see [here](#).

Delayed VAT repayments to overseas businesses

HMRC has published a briefing informing overseas businesses that are not established in the EU of the current delay in processing and refunding VAT claims submitted under the Overseas Refund Scheme. The affected claims are those within the prescribed year 1 July 2018 to 30 June 2019, submitted on or before 31 December 2019. The brief also sets out what businesses need to do if they are unable to obtain a certificate of status for the prescribed year 1 July 2019 to 30 June 2020. For further details, please see [here](#).

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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