



VALEMUS

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# THE BRIEF

Welcome to the  
February 2019 edition of  
Valemus Law's monthly  
news bulletin.

The Brief brings you topical legal updates affecting business as well as news of developments in Valemus Law's services.

Valemus Law is a full service, cost effective commercial law firm with nationwide coverage achieved through the use of modern technology.

Valemus Law's solicitors are senior commercial lawyers specifically selected for their exceptional strategic commercial knowledge and entrepreneurial spirit.

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# WHO'S WHO AT VALEMUS LAW



**Oliver Brice**  
**Managing Director and  
 Solicitor, Company  
 Commercial and Corporate**

Prior to founding VLaw Limited in April 2007, Oliver was the Group Legal Director of the Macmillan Publishing Group. A commercial solicitor, Oliver specialises in general commercial contracts; supply, distribution and agency agreements; asset/share sales and purchases; joint ventures; investments; and IP assignments.



**James Hilsdon**  
**Director and Solicitor,  
 Commercial Litigation**

James specialises in commercial litigation and contentious insolvency. He joined Virtual Law in November 2009 from City of London firm, DAC. He specialises in contract breaches, shareholder and director disputes and specialist insolvency measures.

## COMPANY COMMERCIAL AND CORPORATE

### OLIVER BRICE

Career History: Taylor Wessing

### SUZANNE DIBBLE

Career History: DLA Piper

### REBECCA POWELL

Career History: Garretts; DJ Freeman

### TESS BEAUMONT

Career History: Olswang

### SARAH HUGHES

Career History: Trowers & Hamlins

### TRACEY BICHENO

Career History: Price Waterhouse; Norton Rose

### EMMA NUTBEEN

Career History: Olswang

### NEIL SIBLEY

Career History: Sibley Law

### ALEX JOHNSTONE

Career History: Olswang

### CHARU BABEL

Career History: Simmons & Simmons; Fieldfisher

## COMMERCIAL LITIGATION

### JAMES HILSDON

Career History: Clifford Chance; Harneys; Appleby Global; Davies Arnold Cooper

### MICHAEL ENGLISH

Career History: Simmons & Simmons; Clyde & Co

### PETER FITZPATRICK

Career History: Berrymans

## EMPLOYMENT AND IMMIGRATION

### MICHAEL ENGLISH

Career History: Simmons & Simmons; Clyde & Co

### KATHERINE MUNN

Career History: Stephenson Harwood; Pinsent Masons; Maxine Cox

### JANE MOORMAN

Career History: DJ Freeman; Pinsent Masons; Howard Kennedy

### SUZANNE COE

Career History: Pinsent Masons; Andersen Legal

### LARA AKINLUDE

Career History: Havillands Solicitors

## COMMERCIAL PROPERTY

### DAVID BARNES

Career History: Speechly Bircham; Lawrence Graham; Alsop Stevens

### CHRISTOPHER PEDDER

Career History: Mace, Trowers & Hamlins

## INTELLECTUAL PROPERTY

### LIZ SPROSTON

Career History: Olswang; Rowe & Maw

### TRACEY HUXLEY

Career History: Linklaters; Shoosmiths

### JANE BUNCH

Career History: Olswang

### EMMA NUTBEEN

Career History: Olswang

### ALEX JOHNSTONE

Career History: Olswang



## Brexit: Will it? Won't it? A commercial perspective.

While a no-deal Brexit may be less likely, following the prime minister's announcement that parliament will have the chance to veto such a course, the government must necessarily continue to prepare for it.

Brexit legislation passed in February includes regulations providing for Rome I, Rome II and the Rome Convention to continue to determine applicable law post-Brexit and those revoking the UK law that implements the Mutual Recognition of Professional Qualifications Directive (2005/36/EC), which will affect a wide range of regulated professions including lawyers.

February saw BEIS publish two new collections of no-deal resources, one for the consumer sector and another for manufacturers. BEIS has also issued guidance on how and when to use the new UKCA mark that will replace CE marking in the UK post-Brexit and HMRC has published the fourth version of its high level guidance on post-Brexit customs processes and procedures.

As to those international trade agreements from which the UK currently benefits as an EU member state, the Department for International Trade has issued an update on which the UK has signed up to in its own right and which it is still negotiating, such as that with Canada.

Businesses transferring personal data to the UK from the EU will need to review the European Data Protection Board's five-step guidance on how to continue transfers after a no-deal Brexit. For those transferring personal data from the UK to the US, new draft exit regulations flag the need to check that any recipient Privacy Shield organisation has updated its privacy policy to refer to personal data transfers from the UK.

In a keenly anticipated decision the High Court has held that the European Medicines Agency's (EMA) 25-year lease of premises in Canary Wharf will not be frustrated on the UK's departure from the EU. Despite an EU regulation requiring the EMA to move its headquarters to Amsterdam, and there being strong political reasons for the EMA not to remain in the UK, the court held that the EMA could continue to perform the lease. The EMA's alternative argument, that the lease should be discharged due to frustration of a common purpose, failed because the parties had divergent purposes.

Online businesses should consider reviewing guidance published by the CMA for the online accommodation booking sector, as the CMA has flagged that the principles it sets out, addressing practices such as failure to disclose the effect of payments on search results and misleading popularity statements, will apply more widely. The compliance deadline for the online accommodation booking sector is 1 September 2019.

Meanwhile the CMA has written to BEIS with proposals for reform of the competition and consumer protection regimes. These include giving the CMA the right to decide that there has been a breach of consumer protection law, order the cessation of offences and fine offenders, including directors.

## European Commission publishes notice to stakeholders on chemicals regulation after Brexit

On 26 February 2019, the European Commission published a notice to stakeholders on chemicals regulation after Brexit. The notice clarifies the following points on registration and authorisation:

- Subject to any transition period agreed if a withdrawal agreement is concluded, the UK will be a third country (that is, not a member of the EU) from the withdrawal date (30 March 2019, 00:00 hours Central European Time). REACH registrations held by manufacturers, producers, importers or only-representatives (ORs) based in the UK will not be valid from the withdrawal date. To continue to access the EU market, UK registrants will need to either transfer their registration to manufacturers or importers in an EU-27 member state or appoint an OR in an EU-27 country as the registrant for the substance. European Chemicals Agency (ECHA) have produced guidance on how to transfer registrations.
- Manufacturers or importers in a third country currently using a UK-based OR will need to transfer their registration to an OR in an EU-27 member state.
- Importers based in the UK supplying substances in EU-27 member states must ensure that the manufacturer or producer in the third country from which they are importing appoints an OR in an EU-27 member state as a registrant for the substance.
- Downstream users will need to check if the substances they use are registered by a registrant based in the UK or an EU-27 member state. If the registrant is based in the UK, the downstream user will need to identify an alternative supplier based in an EU-27 member state, check with the UK-based registrant that it intends to appoint an OR based in an EU-27 member state or register the substance themselves as an importer or OR appointed by the UK-based registrant. ECHA has published a list of substances that are only registered by UK-based registrants.
- Where the joint registration of a substance is by a lead registrant based in the UK, it will become invalid so that either one of the other members of the joint submission that is based in an EU-27 member state will need to take over as lead registrant or the UK-based lead registrant will need to transfer the registration to a manufacturer or importer in the EU-27 or appoint an EU-27 OR.
- From the withdrawal date, applications for authorisation made by, or authorisations held by

UK-based entities will not be valid. This means that downstream actors in the applicant's or authorisation holder's supply chain will also no longer be authorised to use these substances. There are no adopted authorisation decisions that come within this scenario. Where pending authorisation applications fall within this scenario, the UK-based applicant must either transfer the application to an EU-27 OR or to an EU-27 entity. In the latter situation, the transfer must be the result of a change of legal entity (for example, as the result of a merger, a demerger or an asset sale), and the person to whom the application is transferred qualifies as manufacturer, importer or downstream user of the substances within the scope of the application for authorisation. ECHA must be notified of the changes.

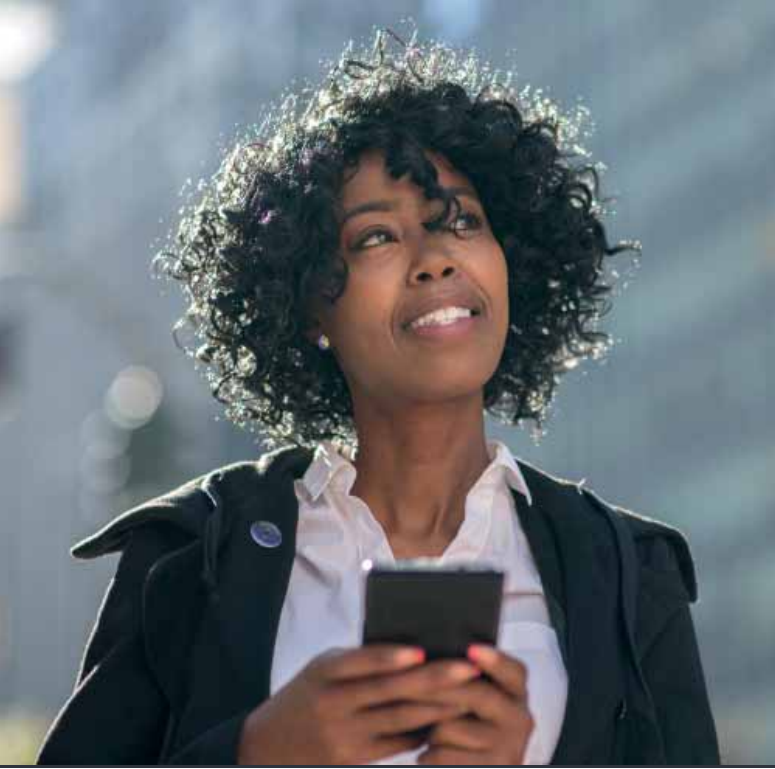
- Downstream users subject to authorisation will need to check if the applicant for authorisation that they rely on to cover their use is UK-based. Where they are, the downstream user needs to ensure that the application will be transferred to an EU-27 entity or EU-27 OR as described in the bullet point above.

The notice complements the guidance issued by ECHA in February 2019 (see Legal update, ECHA publishes guidance on EU chemicals (REACH) regulation in no-deal Brexit).

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# Employment Round-Up February 2019



## **BEIS: new holiday pay guidance after “alarming” lack of awareness revealed**

The Department for Business, Energy and Industrial Strategy (BEIS) has published guidance and an online calculator on how to calculate holiday pay for workers whose hours or pay are not fixed. The guidance, which is not binding, complements pre-existing government guidance on holiday entitlements for the majority of workers.

BEIS has also published data from a recent poll, conducted independently by Kantar Public. The poll surveyed 2,154 UK workers, 320 of whom were atypical workers, about their perceptions and understanding of holiday pay entitlement. 84% were employed on full or part-time permanent contracts. There was generally good knowledge among the participants that they were entitled to holiday pay, although less knew specifically how it is accrued and which types of workers receive it. 75% of participants believed that all workers (other than the self-employed) were entitled to holiday pay. This figure was slightly lower among atypical workers, at 69%. According to the data, 35% thought that only those in permanent roles are entitled to holiday pay.

A BEIS spokesperson said, “We want to see more businesses getting holiday pay right for their workers, helping to maintain a fair working environment for all. The onus is on you, as a responsible employer, to check your workers are receiving the correct amount”

## **TUC and GMB “passports” to support disabled workers**

The TUC and the GMB union have unveiled a new model disability “passport”. This is accompanied by a model policy, to be agreed between union representatives

and employers. The initiative is designed to promote compliance with employers’ duty to make reasonable adjustments under the Equality Act 2010. The passport document is intended to record a worker’s agreed reasonable adjustments and to prevent the worker from having to explain their requirements to new managers, or when they start new roles within their employing organisation. The passport also promotes regular review of adjustments, to ensure that they continue to work. Commenting on the new passport, GMB general secretary Tim Roache said, “No matter where they work or who their boss is, this document will support the reasonable adjustments a disabled worker is legally entitled to. It’s a short policy that could improve the lives of millions of workers”.

## **Labour announces plan to give workers right to choose working hours**

Shadow Women and Equalities Minister Dawn Butler has revealed new plans from Labour to give workers a day-one right to select their working hours. The plan encompasses job-sharing, working from home, part-time, annualized or compressed hours or flexi-time. It would place the onus on employers by only allowing them to reject requests if done so “in a reasonable manner”. The announcement comes as part of a plan to create a “presumption in favour of flexible working”.

## **Chair of National Police Chiefs’ Council calls for positive race discrimination**

Outgoing chair of the National Police Chiefs’ Council Sara Thornton has called for the introduction of positive race discrimination for new recruits. In an interview to mark 20 years since the Macpherson report into Stephen  
...continues

# Employment round-up continued.

Lawrence's death, Thornton spoke about an existing "unconscious bias" in the police force. Attempts for the proportion of ethnic minority officers to reflect the proportion in the populations they work within have failed, with not a single one of the 43 forces in England and Wales having achieved this. Just 7% of police in England and Wales are from an ethnic minority, despite making up 14% of the population. According to Thornton, the police could remain overwhelmingly white for several decades if positive discrimination laws are not adopted.

Commenting on the issue, Thornton said "If you want to do something to give a shock to the system and say we can't wait to 2052, I think we need to do something different. It is a political judgment, isn't it? How important is this? If it's important, then I think you need to look at a different approach."

## Parliament staff unprotected against sexual harassment, says report

On 26 February 2019, the Fawcett Society and Hogan Lovells published a new report highlighting gaps in equality legislation which leave Parliament "above the law" on sexual harassment. The report explained that MPs and Peers are exempt from Part 5 of the Equality Act 2010, meaning that volunteers and staff who experience sexual harassment are not protected by the legislation. The same applies for those sexually harassed by a third party. The report also found that 73% of men and women believe that the actions taken to tackle unwanted sexual behavior in politics needed to change (opinions were generally equal across gender, political affiliation and age). It also found that a significant portion of people (70%) supported removing guilty MPs from office as a sanction for such behavior. 23% said the way sexual harassment is currently dealt with in politics has made them less likely to vote.

Among other things, the Fawcett Society is calling for legislative reform to ensure protection for all employees in Parliament, with the report referencing the laws in Australia, Denmark and New Zealand as exemplary. It also calls for independent complaints policies within political parties to successfully address sexual harassment.

Counsel at Hogan Lovells, Jo Broadbent, said "As a national legislature, making laws about employment, Parliament should itself be setting an example for all those responsible for the working environments of people in the UK."

## Unite brings case against construction worker "blacklisting"

Construction union Unite is launching a High Court case against the original chairman of the Consulting Association and a director of Sir Robert McAlpine, Cullum McAlpine, after a "blacklisting" file was discovered in 2009 containing the names of over 3,123 "undesirable" people. Individuals were placed on the list for reasons such as raising safety issues or being part of a union. The trial, which is reportedly set to commence on 4 June 2019, is intended to hold the key individuals behind blacklisting workers to account in the public arena of a court. The fresh legal action follows legal proceedings in 2016 which saw trade unionists receive compensation totaling over £250 million.

## Home Office: new Independent Anti-Slavery Commissioner announced

The Home Office has announced that the current Chair of the National Police Chiefs' Council, Sara Thornton, will become the new Independent Anti-Slavery Commissioner. Home Secretary Sajid Javid made the final decision to select Thornton for the role which was created as part of the Modern Slavery Act 2015.

The Independent Anti-Slavery Commissioner is expected to improve the identification of instances of modern slavery and ensure high levels of protection and support for victims, as well as driving the prevention of future offences. In her new role, Thornton will also communicate with the private sector to help eliminate forms of slavery across supply chains.

Thornton said, "The Independent Anti-Slavery Commissioner was created to spearhead the UK's fight against human trafficking and modern slavery and has a key role in preventing these vile crimes and supporting victims. I am looking forward to bringing my long experience as a chief constable and in national policing to bear in this important role."

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# Brexit: House of Commons amends government motion to address citizens' rights

On 27 February 2019, the House of Commons (HoC) debated and voted on a government motion to take note of the Prime Minister's statement to the HoC on 26 February 2019.

During the debate, a government minister reiterated to the HoC the Prime Minister's political commitments of 26 February 2019, confirming that if the HoC has not approved the government's Brexit deal by 12 March 2019, the government will:

Table a motion to be voted on by 13 March 2019, asking if the HoC supports leaving the EU without a deal on 29 March 2019.

If that is rejected, bring forward a motion on 14 March 2019 on whether the HoC wants to seek a short, limited extension to the Article 50 period.

If the HoC votes for an extension, seek to agree that extension with the EU, and bring forward the necessary legislation to change the statutory definition of exit day. The minister also provided additional confirmation that the HoC will get a chance to approve whatever final extension length is agreed between the government and the EU, if different from the one to which the HoC had previously consented.

In response, supporters of the European Union (Withdrawal) (No. 4) Bill 2017-19 (which would impose similar, legal obligations) saw no reason to move their amendment (which could have made time for the Bill) or to proceed with the Bill. Despite this apparently negative outcome, their proposals had significant political effect in prompting government commitments that would

achieve a similar result, although these commitments are not legally binding.

The HoC also voted in favour of amending the government's motion to:

- Note the Prime Minister's commitments.
- Require the Prime Minister to seek a joint UK-EU commitment to ring-fence the agreement on citizens' rights in the withdrawal agreement, whatever the outcome of negotiations. Although this amendment had government support, the government considered it a challenge, noting the EU's view that if these issues are not addressed in the withdrawal agreement, some would fall within the competence of EU member states and not the EU institutions.

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