

Welcome to the  
October 2018 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

### KIM HUGGINS

Career History: DLA Piper



## Brexit: Department for International Trade gives update on withdrawal preparations

**The Department for International Trade, on 20 October 2018, updated the House of Commons International Trade Committee on progress made in preparations for the UK's withdrawal from the EU, including preparations for the establishment of separate UK goods and services schedules at the World Trade Organization (WTO), and for the UK's accession to the WTO Government Procurement Agreement.**

In a letter dated 20 October 2018, the Secretary of State for International Trade updated the Chair of the House of Commons International Trade Committee on progress made by the Department for International Trade (DIT) in its preparations for the UK's withdrawal from the EU.

WTO members had until 24 October 2018 to assess the draft UK goods schedule submitted on 24 July 2018 to the World Trade Organization (WTO) members for certification. The DIT:

- Anticipates that a number of WTO members may have reservations about the handling of tariff rate quotas (TRQs), and will continue engaging with them to address any substantive concerns.
- Acknowledges that a move to formal negotiations under Article XXVIII of the General Agreement on Tariffs and Trade would provide a mechanism for completing the legal process. (Note: the government originally aimed to follow the technical "rectification" procedure and proceed straight to certification. In contrast, a more

substantive "modification" requires prior negotiation under Article XXVIII. The EU has already taken steps to start Article XXVIII negotiations on the modification of TRQs in the EU's goods schedule.)

- Confirms that although the UK goods schedule would remain uncertified during that process, this will not affect trade, and the UK would continue to trade on the terms in the draft schedule.

The DIT has shared the draft UK services schedule informally with the WTO members, and is preparing a final version, retaining its rectification approach. The DIT:

- Intends to start the certification process for the services schedule towards the end of autumn 2018, which will include 45 days for WTO members to object.
- Confirms that the draft schedule would form the basis for UK trade pending resolution of any issues.

The UK's market access offer for accession to the WTO Government Procurement Agreement (GPA) was circulated to GPA parties on 5 June 2018. The letter states that:

- The DIT has engaged with all GPA parties since then.
- At a meeting of the GPA Committee on 17 October 2018, parties agreed to return in November 2018 to discuss the UK's accession with a view to providing provisional acceptance should discussions end before the meeting.

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# No deal Brexit? Consumer rights technical notice

**The government has published a technical notice on consumer rights in a no-deal Brexit scenario. The notice considers the impact of a no deal on the wider consumer legislative framework and how this will affect the protection available to consumers. The notice also examines the effect of a no-deal Brexit on alternative and online dispute resolution, package travel, timeshares, textile labelling and footwear labelling.**

## Background

"No deal Brexit" describes the situation where the UK and the EU fail to conclude a draft withdrawal agreement by the time of the UK's exit from the EU. This would mean no transition period, and a sudden "cliff-edge" break in the application of EU rules to the UK at 11pm on 29 March 2019. On 12 October 2018, the government published its fourth tranche of technical notices. These notices aim to provide guidance and information for UK businesses and citizens on how to prepare for a no deal Brexit scenario. One of the notices released as part of this tranche relates to consumer rights, and this update provides a summary of that notice. The notice itself is short and clear and it is recommended that subscribers read the notice in full when advising their clients on the likely effect of a no deal Brexit.

## Consumer protection and cross-border enforcement

The existing cross-border consumer protection framework enables UK consumers to buy goods or services in any EU member state with the knowledge that the protection and safety standards in the member state of purchase will be the same or similar to those they enjoy in the UK. This regime is based on

a reciprocal cross-border consumer enforcement framework, which enables co-operation between the consumer enforcement agencies in different member states, such as the CMA and its counterparts in France and Germany. The civil judicial co-operation framework provides access to redress for consumers where their rights have been breached. So, for example, a UK consumer who buys a defective product from a French trader can use UK law and the UK courts for redress and any judgment in their favour will be recognised in France. The two frameworks also facilitate the ability for consumers to gain access to advice and guidance on their rights and to bring complaints through dispute resolution mechanisms.

The notice states that if the UK leaves the EU without a deal, UK consumers will no longer be able to use the UK courts effectively to seek redress from EU-based traders. If the UK court does make a judgment in favour of the consumer, enforcing that judgment in the EU member state will be harder. Further, there will no longer be reciprocal obligations on the UK and EU member states to investigate breaches of consumer law or take enforcement action.

In the scenario where a UK consumer buys from a UK trader, the government states that its intention is to make the necessary legislative changes through the EU (Withdrawal) Act 2018 to ensure that UK consumers do not lose any protections that they enjoy at present.

The notice also states while consumer rights across the EU, including the UK, are currently similar, this could change over time as UK and EU consumer law may start to diverge. UK consumers will need to get into the habit of considering what levels of consumer protection are

# No deal Brexit... continued.

offered by the EU-based seller in question and the particular state in which they are based.

## Alternative Dispute Resolution and Online Dispute Resolution

Under the existing rules, disputes between consumers and business can be settled by alternative dispute resolution (ADR) procedures outside the court system. (The UK's Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (SI 2015/542) implement the EU's ADR Directive (2013/11/EU).)

Online Dispute Resolution (ODR) is the use of technology to enable dispute resolution via an online platform. The European Commission has established an ODR platform pursuant to Regulation (EU) 524/2013 on online dispute resolution (ODR) for consumer disputes. This offers a single point of entry to consumers and traders seeking to resolve disputes resulting from an online transaction as well as a translation service. Although aimed at cross-border disputes it can also be used by traders and consumers in the same member state. Unlike other forms of ODR, the ODR platform does not resolve disputes: these will be dealt with by ADR providers.

If there is a no-deal Brexit, UK consumers will no longer have access to the Commission's ODR platform. Businesses should continue to provide ADR pursuant to their existing obligations but should remove references to the ODR platform.

## Sector-specific impacts

The notice also highlights implications of a no deal Brexit for four particular sectors:

- Package travel. Customers who purchase package holidays from EU-based traders who are not targeting activities at the UK may be unprotected if the provider becomes insolvent. The notice advises consumers to ensure they are provided with clear information, before purchase, including of the applicable insolvency protection.
- Timeshares. Consumers who buy a timeshare in an EU member state under a contract whose governing law is not UK law will be subject to the timeshare protection available to consumers in that state. They will no longer be able to insist on an English-language version of their contract.
- Textile labelling. The Secretary of State, rather than the European Commission, will be responsible for approving new textile names and manufacturing tolerances for the UK market. The existing EU law on labelling textile products will be retained through the EU (Withdrawal) Act 2018 but will then be amended to ensure its effectiveness within the UK-only market.
- Footwear labelling. The common labelling system for footwear will continue unchanged. However, responsibility for ensuring the accuracy of the labelling of footwear imported from the EU will fall on UK-based businesses.

## Comment

The government has previously been criticised by the House of Lords European Union Committee for what the Committee perceived as a failure to consider the importance of cross-border mechanisms and agencies in enforcing consumer rights after Brexit. The technical notice does not answer those criticisms, nor does it attempt to do so. Instead, the notice goes some way towards acknowledging the legitimacy of those concerns without offering much comfort as to how they can be addressed. The message for consumers is a stark one: they can no longer assume they will enjoy the same level of protection when they buy from a trader in an EU member state (other than the UK) that they enjoy at present. They will need to carry out a measure of due diligence on who they are buying from and the country in which the seller is based.

Finally, the ease of using the ODR platform will no longer be available. Consumers will need to seek redress through an alternative ODR provider for cross-border consumer disputes (if available) or through other forms of ADR, or the courts of the EU member state.

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## Employment Round-Up October 2018

### **NHS announces plans to eradicate ethnicity pay gap**

The NHS has pledged to take action to eliminate the ethnicity pay gap between its staff, with plans for the proportion of black, Asian and minority ethnic (BAME) staff in management positions to reflect the rest of the NHS by 2028. The announcement comes after the British Medical Association and British Association of Physicians of Indian Origin accused the NHS of racial discrimination against black and minority ethnic doctors. Data showed that BAME staff filled fewer managerial positions in the NHS than white staff, with those in senior positions being paid significantly less than their white counterparts. BAME staff make up 17% of the non-medical workforce, but only 6.4% of the most senior managerial roles.

Additionally, several of the Department of Health and Social Care's arms-length bodies including NHS England, Public Health England and Health Education England, have signed up to the new Race at Work Charter launched alongside the government's consultation into mandatory ethnicity pay reporting. The Charter recognises organisations which have signed up to the five calls to action of the McGregor-Smith review which include appointing an executive sponsor for race, capturing data and publicising progress and taking action that supports the career progression of BAME staff.

### **Government responds to Women and Equalities Committee report on older people and employment**

The government has published a response to a report from the Women and Equalities Committee on older people and employment. The report, which was published in July 2018, put forward a series of recommendations to help alleviate the barriers and discrimination faced by older members of the workforce. The government's response acknowledged the issue and stated that it is committed to ensuring that older workers are able to benefit from employment but said that the Equality and Human Rights Commission is better suited to take action. The Women and Equalities Committee has criticised the government's response as "disappointing".

### **Data reveals discrepancies in young people's salaries based on gender and ethnicity**

The Office for National Statistics has published data which demonstrates the disparities in average earnings between young people based on their gender and ethnicity. The data shows that despite holding the same qualifications and all working in London, in 2016, white male university graduates aged 26-29 earned an average of £7,398 more than white female graduates and £15,473 more than black female graduates. The data also revealed that white males aged 16 to 21 and working in the capital earned on average £7,366 more than their black male counterparts in the same year. The data, which covers the UK from the period between 6 April 2011 and 5 April 2016, consists of between 36 and 41 million unique records each tax year.

## **Theresa May: government to improve regulation of unethical non-disclosure agreements**

Theresa May has stated that it is clear that some businesses are using non-disclosure agreements unethically. During Prime Minister's Questions on 24 October 2018, the prime minister said that the government would be bringing forward measures for consideration and consultation to seek to improve the regulation around non-disclosure agreements. She stressed the importance of making the circumstances when non-disclosure agreements do not apply or cannot be enforced explicit to employers.

## **Tax overhaul to tackle falsely-registered self-employed**

The Treasury is reported to be finalising plans to overhaul tax rules that enable individuals to avoid higher tax and national insurance contributions by working through a "personal service company". It says that the levels of non-compliance under the current rules could cost HMRC £1.2billion a year by 2023. The changes, which may be announced in the Budget on 29 October 2018, could put legal obligations on companies which use personal service company contractors to ensure that those not on the PAYE payroll do not deviate from IR35 obligations. However, the suggestions have been met with opposition from the contracting industry. David Chaplin, Chief executive of Contractor Calculator, which gives advice to the self-employed, said "the Treasury's claim that it is losing money is based on an ideological flaw and fails to acknowledge the "freelance premium" that individuals charge for their services, compared to what they earn when they are in full-time employment".

The move follows the introduction of equivalent measures to the public sector and an initial consultation on their further expansion.

## **Acas publishes latest quarterly early conciliation statistics**

Acas has published statistics on its early conciliation (EC) service from April to June 2018. The statistics show that the total number of EC notifications received had increased by 53% to 33,171 from 21,647 in the equivalent quarter of 2017. As 1,180 of the notifications were group claims covering over 14,000 individuals, the total number of individuals covered was around 46,000. The figures also show an increase in the proportion of EC cases which proceeded to an employment tribunal claim, with 23% of EC cases going forward compared to 17% in the same quarter for 2017. In its update, Acas also revealed that just under 5,100 connected cases were submitted for EC in relation to equal pay and other similar issues.

## **Changes to the UK Immigration Rules announced**

On 11 October 2018, the government published Statement of Changes to the Immigration Rules HC1534. The proposed changes affecting businesses and migrant workers in the UK are largely positive. Under the new rules, most of which take effect on 1 November 2018:

- Applicants can be given the opportunity to rectify mistakes on their applications which may previously have led to their automatic rejection.
- Points based system applicants will be able to submit copies of supporting documents rather than originals (unless requested for verification purposes).
- EU nationals and their family members will be able to apply for an administrative review if their application under the EU Settlement Scheme is refused on grounds of eligibility.
- Home Office officials will have greater scope to request documentation which is missing from an application before refusing it.

However, these positive changes were published on the same day the government announced plans to double the immigration health surcharge in December.

## **61% of women look at organisations' gender pay gaps when applying for jobs**

A survey from the Equality and Human Rights Commission (EHRC) has revealed that almost two thirds of women take an organisation's gender pay gap into consideration when applying for jobs. The results of the survey, which was commissioned to help identify whether gender pay gap information has an impact on staff motivation and behaviour, suggest that companies with a smaller gender pay gap will benefit from a broader range of talent. The poll also showed that 58% of women would be less likely to recommend an employer if it had a gender pay gap, indicating the reputational damage that companies could encounter as a result of failing to address gender pay issues. Speaking to employers at the ACAS Future of Work conference, the EHRC Chair Davis Isaac said "it is crucial that all employers think seriously about the issue and demonstrate to their workforce that they are committed to closing the gender pay gap".

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ISSUE 10 :: OCTOBER 2018



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