



VALEMUS

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# THE BRIEF

Welcome to the  
July 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.

## HIGHLIGHTS

### 03 Brexit - latest

A Brexit Double this month as we provide information on negotiations that could impact your business. First, we report on what might happen if the UK adopts EU external agreements after Brexit, as the UK government seeks to rollover the EU's free and preferential trade agreements covering more than 70 non-EU countries.

Second, we summarise the contents of the White Paper for the Withdrawal Bill, highlighting those points affecting citizenship and rights to work.

### 10 Employment Round-Up

Government does U-turn over staff tips; EU settlement schemes for NHS workers; racial discrimination among male workers concerning pay; Pensions Regulator investigates misleading data.

# 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

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

**MICHAEL ENGLISH**  
 Career History: Simmons &  
 Simmons; Clyde & Co

**PETER FITZPATRICK**  
 Career History: Berrymans

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 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  
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## 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: House of Commons Library publishes briefing paper on UK adoption of EU external agreements after Brexit

**On 24 July 2018, the House of Commons Library published a briefing paper on the adoption by the UK of EU external agreements after Brexit, as the UK government seeks to rollover the EU's free and preferential trade agreements covering more than 70 non-EU countries.**

The briefing paper examines the number of EU international agreements, mixed and exclusive competence agreements, and rollover of trade agreements. Its findings are summarised below.

At present, the UK as an EU member state is party to numerous international agreements with approximately 70 non-EU countries. The UK government has indicated its wish to replicate the terms of these international trade agreements with non-EU countries in new or "rolled-over" agreements after Brexit. It is unclear exactly how many are pertinent to the UK.

Around a quarter of the EU's international agreements are "mixed agreements", which cover competences shared by the EU and member states, are signed and concluded by the EU and are also signed and ratified separately by EU member states. The EU has been categorical that its international agreements (including mixed agreements) will not apply to the UK after Brexit.

However, there is a view that where the UK has ratified a mixed agreement in its own right, aspects of the mixed agreement might remain in force depending on the wording. The Trade Bill 2017-19 seeks to transition all

existing EU trade agreements and other EU preferential arrangements with non-EU countries. There is less clarity regarding how the government intends to address arrangements covered by EU international agreements on non-trade issues.

As part of the draft withdrawal agreement dealing with transitional arrangements, the UK will "be bound by the obligations stemming from" the international agreements concluded by the EU. The EU will notify the other parties to these agreements that during the transition period, the UK is to be treated as a member state for the purposes of those agreements. However, unilateral notifications from the EU cannot ensure the compliance of the other parties to the international agreements. The UK government proposes reaching agreement with all parties to interpret relevant terms of the EU's bilateral international agreements to include the UK during transition.

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# Brexit: ...continued

## Brexit: government publishes White Paper on legislating for the withdrawal agreement between the UK and EU

On 24 July 2018, the government published a White Paper: *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union*. The White Paper confirms that a forthcoming European Union (Withdrawal Agreement) Bill will be the primary means by which the rights of EU citizens will be protected in UK law, will legislate for the transition period and will create a financial authority to manage payments to be made under the financial settlement between the UK and the EU.

### Background

The government announced in November 2017 that it would bring forward primary legislation that would implement into UK law the withdrawal agreement between the UK and the EU, assuming one is reached. This was formerly referred to as the Withdrawal Agreement and Implementation Bill (WAIB). The European Union (Withdrawal) Act 2018 (EUWA) was subsequently enacted in June 2018, which made provisions for Parliament's approval of the withdrawal agreement by primary legislation.

The government's White Paper: *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union* sets out its "early expectations" for what will now apparently be known as the European Union (Withdrawal Agreement) Bill (Bill). The central functions of the Bill will be to:

- ❖ Act as the primary means by which the rights of EU citizens will be protected in UK law.
- ❖ Legislate for a time-limited transition period (also referred to as an implementation period).
- ❖ Create a financial authority to manage the specific payments to be made under the financial settlement with the EU, with appropriate parliamentary oversight.

The Department for Exiting the European Union also confirmed in a press release on 24 July 2018, that the Bill will amend some parts of the EUWA to ensure that the UK statute book functions correctly during the transition period.

On 24 July 2018, the Secretary of State for Exiting the

European Union, Dominic Raab, gave a statement to the House of Commons on the publication of the White Paper. He explained that the White Paper focuses on those parts of the withdrawal agreement where the text has been provisionally agreed between the UK and the EU. It is possible, therefore, that the final content of the Bill will diverge from the intentions of the White Paper, as it is dependent upon the final terms of the withdrawal agreement.

The government intends that the Bill will be introduced to Parliament once the negotiations between the UK and the EU have concluded, and once Parliament has approved the terms of any final deal under the terms of the EUWA.

### Chapter 1: Introduction

The withdrawal agreement will require UK legislation to implement it in domestic law. The Bill will be the primary means of legislating for the withdrawal agreement. The UK's future relationship with the EU will be implemented as necessary in separate legislation.

The Bill will be introduced once Parliament has approved any final deal under the terms of the EUWA. The Bill must be enacted before the UK leaves the EU, in order for the withdrawal agreement to have domestic legal effect.

Negotiations on ongoing parts of the withdrawal agreement, as set out in the UK-EU joint progress statement published in June 2018, are not covered in the White Paper. The final provisions of the Bill are therefore conditional on the outcome of negotiations.

The White Paper identifies areas where the implementation of the withdrawal agreement in domestic legislation may touch on devolved matters. In developing the Bill, the government will seek the consent of the devolved legislatures where relevant.

The withdrawal agreement will apply to the whole of the UK and, to the extent applicable, to the Crown Dependencies, Gibraltar and the other UK Overseas Territories. The government will keep these jurisdictions informed of the Bill's progress. These jurisdictions will implement the withdrawal agreement as required in their own legislation and in line with their ordinary legislative processes.

### Chapter 2: Citizens' rights

The withdrawal agreement will cover all EU citizens legally resident in the UK before the end of the transition period. The rights of individuals within the scope of the withdrawal agreement will be protected and the implementation of these rights will be independently monitored.

# Brexit: ...continued

The White Paper reiterates that the citizens' rights agreed in the withdrawal agreement are without prejudice to the reciprocal rights of British and Irish citizens in the UK and the Republic of Ireland, as associated with the pre-existing Common Travel Area arrangements between the two countries. People of Northern Ireland will continue to have a birth right to hold either or both Irish or British citizenship, as set out in the Belfast Agreement (also known as the Good Friday Agreement). People of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens.

The White Paper states that the government is also in discussions with the countries of the EEA (Norway, Iceland, Liechtenstein and Switzerland) to conclude new agreements setting out the status of citizens from these countries living in the UK, and of UK nationals living in these countries. Domestic legislation will need to be implemented in order to achieve this, which could be done at the same time as legislating for the withdrawal agreement.

## ***Rights related to residence***

The White Paper confirms that the rights of residence for EU citizens living in the UK before the end of the transition period will be legislated for by the Bill and appropriate secondary legislation.

The EU Settlement Scheme allowing EU citizens and their family members to apply to stay in the UK beyond 31 December 2020 will be legislated through Immigration Rules. The Immigration Rules are a form of secondary legislation under the Immigration Act 1971. The reasons for delivering the EU Settlement Scheme in this way are stated to be that:

- ❖ The scheme can be launched sooner than if it was legislated for in the Bill, where it could not be established until the Bill receives Royal Assent.
- ❖ More detail can be provided in the Immigration Rules to cover the full range of individual circumstances covered by the Withdrawal Agreement than is practical under primary legislation.
- ❖ Should the UK's implementation of the scheme need to be modified to more accurately reflect the citizens' rights agreement, changes can be made more quickly through secondary legislation than primary legislation.

The Bill will underpin EU citizens' rights of residence in UK law and provide a means of redress where those rights are not correctly implemented or where other legislation is inconsistent with the withdrawal

agreement. The Bill will also give effect to provisions requiring primary legislation to deliver the withdrawal agreement, such as the right of appeal if an application under the EU Settlement Scheme is unsuccessful.

Any existing legislation which is inconsistent with the withdrawal agreement will also be modified to remove any inconsistencies.

## ***Equal treatment***

In its draft form published in February 2018, the withdrawal agreement would protect the existing rights to equal treatment and non-discrimination for EU citizens residing or working in the UK, UK citizens residing or working in the EU, and their family members.

In addition to equal treatment protections already provided for in UK law, the Bill may include additional, technical, provisions for those in scope of the withdrawal agreement.

## ***Mutual recognition of professional qualifications***

The UK and EU have agreed that there will be a continued recognition of professional qualifications for those resident in a host member state and for frontier workers. The withdrawal agreement will apply where recognition decisions regarding the qualification were received, or where recognition procedures were ongoing, before the end of the transition period.

The Bill will provide that EU citizens and their family members within the scope of the withdrawal agreement who have had a qualification recognised under UK legislation before the end of the transition period will be able to continue to rely upon that decision in the UK. If such a person has made an application but not completed it before the end of the transition period, they will be permitted to complete that application and the applicant will be able to rely upon the decision made.

The White Paper offers a reminder that the recognition of professional qualifications is devolved in Scotland, Wales and Northern Ireland.

## ***Coordination of social security systems***

For those individuals defined under the coordination of social security systems part of the withdrawal agreement (title III of part two) is different to the scope defined for the rest of the citizens' rights part (as in article 9 of the draft withdrawal agreement). For those within the principal scope of title III of part two, the EU Regulations on social security coordination will continue to apply across the whole of the UK at the end of the transition period.

# Brexit White Paper Withdrawal Bill ...continued

Following the end of the transition period, the UK will adopt updates made to the social security coordination regulations at EU level to ensure the operational effectiveness of the system. More substantive changes will be considered by the joint committee process to assess whether to maintain alignment. Any updates to social security coordination regulations will be reflected as additions to an annex to the withdrawal agreement. The Bill will need to provide for any additions to be implemented in the UK; it will therefore give effect to this annex.

### ***Protections for rights and monitoring authority***

The Bill will enable EU citizens within the scope of the citizens' rights part of the withdrawal agreement to rely directly on the rights set out in that agreement. It will also reflect the principle that the rights conferred on individuals by the withdrawal agreement will take precedence over any inconsistent domestic law provision.

The Bill will also make provision to ensure that the withdrawal agreement, including EU law underpinning it, is interpreted consistently in the UK and the EU. If a future UK Parliament decides to repeal any part of the primary legislation implementing the citizens' rights part of the withdrawal agreement, the Bill will provide that Parliament must activate an additional procedural step (the White Paper does not specify this additional step, but states that the approach is consistent with other procedural steps introduced by Parliament, such as the referendum locks of the European Union Act 2011, and creates an additional layer of reassurance to EU citizens in the UK that their rights will be protected).

The Bill will establish a new independent authority, with powers in effect from the end of the transition period, to monitor the UK's implementation of the citizens' rights part of the withdrawal agreement. The Independent Monitoring Authority (IMA) will have the power to receive complaints from citizens and take appropriate action if it believes that there has been a failure on the part of the authorities to implement the terms of the withdrawal agreement. Once established, the IMA will report annually to the Joint Committee on the implementation and application of part two of the withdrawal agreement in the UK, and conduct inquiries into system problems with UK implementation. The Bill is expected to set out the statutory functions of the IMA. The government will work with the devolved administrations where the IMA's functions intersect with areas of devolved competence.

### **Chapter 3: The transition period**

A significant component of the draft withdrawal agreement is the proposal for a transition period (also referred to as the implementation period). This is

projected to take effect from 29 March 2019 until 31 December 2020. The withdrawal agreement would, if it is agreed in the same terms as the draft withdrawal agreement, provide that during the transition period EU law would, with certain exceptions:

- ❖ Be "applicable to and in" the UK.
- ❖ Produce "in respect of and in" the UK the same legal effects as those which it produced in the EU and its member states.
- ❖ Be interpreted and applied in accordance with the same methods and principles as those applicable within the EU.

As the White Paper establishes, under this arrangement, during the transition period "EU law will continue to have effect in the UK in the same way as it does now". This position will cease at the end of the transition period.

The White Paper illustrates the government's intentions to effect the transition period in domestic law, and as part of its wider legislative approach to Brexit.

### **Effects of the European Union (Withdrawal) Act 2018**

Until the publication of the White Paper, the government's approach to achieving the transition period in domestic law had been unclear, particularly after the European Union (Withdrawal) Act 2018 (EUWA) received Royal Assent in June 2018. Amongst other effects, the EUWA will repeal the European Communities Act 1972 (ECA) on 29 March 2019, which is the defined date of "exit day", a term which constructs the post-withdrawal legislative framework.

Beyond permitting the definition of exit day to be amended by the government by regulations, as it was enacted the EUWA did not in itself allow for or accommodate a transition period. The White Paper comments that it was passed "without prejudice to the outcome of negotiations" (at paragraph 68).

### **Amendments to the European Union (Withdrawal) Act 2018**

The White Paper proposes that the Bill will amend the EUWA so that its central constitutional and legislative effects are effectively deferred so that it operates "in the way that Parliament intended at the end of the transition period" on 31 December 2020, and not necessarily upon exit day (at paragraph 70). The White Paper states that the Bill will amend the EUWA with the following effects:

- ❖ Introduce savings provisions so that certain effects of the ECA 1972 will be retained during the transition period, and cease when the transition period ends. These will include the effects of section 2(1) of the ECA 1972, which provides for the automatic "flow" of EU law into UK law and the direct jurisdiction of the CJEU.

# Brexit White Paper Withdrawal Bill ...continued

- ❖ The ECA 1972 will, however, still be repealed on exit day. Exit day will remain 29 March 2019; on that date, the UK will cease to be an EU member state. The UK's "relationship with EU law" will be determined by the withdrawal agreement during the transition period and not status as a member state.
- ❖ The EUWA's conversion and preservation of retained EU law and "domestication" of historic Court of Justice of the European Union (CJEU) case law will take place at the end of the transition period, and not apparently on exit day. It is unclear how this will be achieved without amending the date of exit day in the EUWA given that this acts as a pivot for the pre-withdrawal and post-withdrawal "snapshot" of retained EU law.

## Ministerial powers

The powers afforded by the EUWA to ministers to correct deficiencies in retained EU law by Regulations will be expanded so that they can correct deficiencies arising from the end of the transition period, as well as from withdrawal.

The expiry of the correcting powers under section 8 will also be deferred by the Bill from two years after exit day, on 29 March 2021 (as the EUWA currently provides), until two years after the end of the transition period (31 December 2022). The White Paper states that this is necessary to allow adequate time to correct deficiencies which only emerge after the conversion of retained EU law, and for corrective Regulations to be scrutinised; the period for these measures would otherwise be significantly shortened by the transition period. The White Paper states that this is consistent with Parliament's intention under the EUWA to give the government two years beyond the end of the application of EU law to ensure that the UK has a functioning statute book. The section 8 powers have, however, been in force since the EUWA received Royal Assent; such an amendment would mean that the total period in which the government had been afforded the powers, which include "Henry VIII" powers, would be over four years.

The White Paper indicates that the government intends that these changes to its legislative powers under the EUWA will be reflected in the legislative powers afforded to the devolved legislatures.

The White Paper states that the Bill will also ensure that EU-related terminology in domestic law does not prohibit the effective operation of domestic legislation during the transition period; it states that references that reflect the UK's status as a member state will need to be amended, for example (at paragraph 66). It is unclear whether this implies that the Bill will directly afford ministers correcting powers in this respect, or whether its amendments to the EUWA will ensure this.

## Statutory instruments

The White Paper states that many of the statutory instruments (SIs) the government intends to make as a result of withdrawal may not now be needed until the end of the transition period, as opposed to exit day. As contingency for a "no deal" scenario, or another outcome, however, the government will continue to lay SIs to prepare for withdrawal; it may be the case that these SIs need to be deferred, revoked or amended, and this would "likely" be achieved through the Bill.

## Other provisions of the Bill

The White Paper also states that the Bill will provide for the continued participation of the UK in international agreements during the transition period as a result of or relevant to its membership of the EU, potentially by "saved and repurposed ECA [1972] mechanisms" (at paragraph 94). It is, however, unlikely to make reference to or effect the UK's continued participation in EU institutions, agencies and bodies, or international bodies where it participates in its own right.

Because of the transition period, the White Paper states that the effect of the other legislation that gives effect to the UK's withdrawal from the EU that has been introduced to Parliament already can be deferred until the end of the transition period.



# Brexit White Paper Withdrawal Bill ...continued

## Chapter 4: The negotiated financial settlement

On 19 March 2018, UK negotiators and EU negotiators agreed the text of part five of the draft withdrawal agreement, which deals with the financial settlement (at articles 127-150). The White Paper observes that the financial settlement has been agreed in the context of agreeing a transition period and framework for the future relationship between the UK and the EU, which should be finalised and published at the same time as the withdrawal agreement.

### *The scope of the financial settlement*

The White Paper restates the aim of the negotiated financial settlement, which is to address mutual obligations that arose primarily as a consequence of the UK's participation in the EU budget, and also commitments related to the UK's broader EU membership. It does not address other costs arising as a consequence of the UK withdrawing from the EU. There is no obligation for the UK to pay for the relocation of EU bodies previously located in the UK. The financial settlement also does not cover any costs that might be associated with the UK's future relationship with the EU; these will be addressed as part of any deal on the future relationship.

### *Underlying principles*

The financial settlement was put forward by the UK's negotiators on the condition of an overall withdrawal agreement, taking into account the future relationship, including an agreement on transitional arrangements.

According to the White Paper, the financial settlement is based on three principles:

- ❖ The UK will not finance any commitments that do not require funding from member states, and will receive a share of any financial benefits that would have fallen to it had it remained a member state. The UK's share of the EU budget will be based on actual budget implementation and exclude those parts where the UK has opt-outs. The UK will not have to pay for liabilities, contingent liabilities and assets that would not have to be paid for by member states. The UK will also receive a share of funds that accrue to the EU budget from activities that were agreed during its membership.
- ❖ The UK's share of EU contributions for the transition period will be based on the methodology currently used for determining the UK's annual EU budget contributions. After the transition period, the UK's share will be the average of its share of the EU budget over 2014-2020 (taking into account the rebate).
- ❖ The UK will only be required to make payments as they fall due.

### *Components of the financial settlement*

There are three main components to the financial settlement. These are that the UK will:

- ❖ Participate in the EU's annual budgets over 2019-2020 (the transition period) and get its "fair share" of receipts. It will also receive its rebate in 2019-2020.
- ❖ Pay its share of outstanding EU budget commitments as at the end of 2020; it will get its fair share of receipts from those commitments.
- ❖ Pay its share of the EU's liabilities as at the end of 2020 and benefit from a share of EU assets.

### *Process for making payments*

The withdrawal agreement includes a timeline for honouring mutual financial commitments. The government has negotiated arrangements to provide assurance on payments made under the financial settlement, including the right to appoint auditors working on the government's behalf to assure implementation of the financial settlement.

The White Paper explains that there will be a specialised committee on the financial provisions of the withdrawal agreement co-chaired by the UK and the EU and bringing together UK and EU experts. This committee will meet at least annually and support the joint committee that governs the withdrawal agreement as a whole, to implement the provisions of the withdrawal agreement appropriately.

### *Legislating for the financial settlement*

The Bill will include a provision that allows the government to make payments due under the financial settlement. Any enforcement provisions will also be made in domestic legislation as required. The White Paper states that the payment authority in the Bill will need to be sufficiently flexible to enable the UK to make its payments. As a result, the provision will take the form of a standing service provision in the Bill.

The Bill will only allow payments to meet financial commitments that are required by the withdrawal agreement. It cannot be used for payments relating to any future agreements between the UK and the EU. The White Paper emphasises the importance of Parliament's scrutinising role in relation to payments made to the EU as part of the withdrawal agreement.

The Bill could therefore include a statutory requirement for the government to provide Parliament with regular updates on past and future payments, and receipts, to and from the EU. This may be in the form of a ministerial statement, providing Parliament with an analysis of the required payments and the UK receipts from the EU. The government would also work with Parliament to identify the most effective option for scrutinising these updates.

# Brexit White Paper Withdrawal Bill ...continued

The Bill will also specify that reimbursements from the EU as set out in the withdrawal agreement, will be paid into the Consolidated Fund or the National Loans Fund.

The White Paper reminds that the financial settlement provisions related to the UK's international development programmes contributions are separate from the EU budget. The government expects that these contributions will continue to be paid through the powers provided in the International Development Act 2002.

## **Chapter 5: Procedures for approval and implementation of the withdrawal agreement and framework for the future relationship between the UK and the EU**

Chapter 5 describes the process by which Parliament will be asked to give its approval to the withdrawal agreement and to the framework for the future relationship between the UK and the EU.

### *Overview of sequencing*

The White Paper observes that three parliamentary procedures must take place before the UK leaves the EU:

- ❖ The first step is Parliament's approval of any final deal negotiated under the Article 50 process. The procedure for the vote is set out in the EUWA.
- ❖ The second step is for the government to introduce legislation, which will be the Bill, to implement the withdrawal agreement in domestic law. This is to be introduced as soon as possible after approval of the final deal by Parliament.
- ❖ Thirdly, there will be a final scrutiny process before ratification takes place.

This is provided for by the Constitutional Reform and Governance Act 2010.

### *Approval of the final deal*

Under section 13 of the EUWA, the House of Commons must vote to approve the withdrawal agreement and future framework before the withdrawal agreement can be ratified. These must also be considered by the House of Lords. The EUWA also requires that the House of Commons' vote on the final deal should be held before the European Parliament votes on the withdrawal agreement, so far as this is practicable (section 13(2)).

Section 13 also establishes that the withdrawal agreement cannot be ratified until an Act of Parliament has been passed containing provision for the implementation of the withdrawal agreement. This condition will be satisfied by the enactment of the Bill.

The White Paper reiterates the government's commitment to provide Parliament with appropriate analysis prior to any vote.

The White Paper confirms that, if Parliament approves the withdrawal agreement and the framework for

the future relationship between the UK and the EU, the government will bring forward the Bill to give the withdrawal agreement domestic legal effect, as provided for in the EUWA.

As set out in chapters 1 to 4 of the White Paper, the Bill will be the primary means of implementing the withdrawal agreement into UK law. The government will follow established practices and conventions to seek the consent of the devolved legislatures where relevant.

### **Constitutional Reform and Governance Act 2010**

As an international treaty, the withdrawal agreement will be subject to the provisions of the Constitutional Reform and Governance Act 2010 (CRAG Act 2010), under which it must be laid before both Houses of Parliament for a period of 21 sitting days before it can be ratified.

The withdrawal agreement may be laid before Parliament after it is signed by both the UK and the EU. The 21 day sitting period may take place in parallel with the passage of the Bill, but the Bill must be enacted before the withdrawal agreement can be ratified.

As provided for in section 20 of the CRAG Act 2010, the government may proceed to ratification provided that the treaty is not resolved against.

### **Ratification process**

The government may proceed to ratification of the withdrawal agreement after:

- ❖ The final deal has been approved by the House of Commons.
- ❖ The necessary process has taken place in accordance with the CRAG Act 2010.
- ❖ The Bill has been enacted.

Once the withdrawal agreement has been ratified by the UK and concluded by the EU, it will enter into force when the UK leaves the EU.

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# Employment Round-Up: July 2018

## **Sleep-in workers may not receive back pay following Royal Mencap decision**

Workers revealed to have been paid less than the National Minimum Wage (NMW) may not be receiving back payments following the Court of Appeal's recent decision in Royal Mencap. 835 employers signed up to HMRC's Social Care Compliance Scheme, which allows disclosure of potential underpayments without risk of being fined or publicly named. In its first 6 months, the scheme uncovered £735,494 of arrears owed to 479 workers, many of whom were sleep-in carers. Under the scheme, exposed underpayments must be rectified within three months. However, the Court of Appeal's judgment that sleep-in carers were only entitled to NMW when they were awake for the purposes of working casts doubt on whether these back payments will be received. HMRC is reported to have advised employers that they may suspend their self-review pending further advice.

## **Pensions Regulator to investigate misleading data**

The Pensions Regulator (TPR) has announced plans to carry out 100 checks a month to address the provision of misleading data by employers in their auto-enrolment duties. After reporting that it received over 80 calls per week regarding suspected non-compliance with pensions laws, the pensions watchdog plans to investigate inconsistent data to ensure that employees are provided with the amount they are legally entitled to. It plans to reveal discrepancies such as underreporting of the number of staff enrolled at a workplace. TPR's director of auto-enrolment, Darren Ryder, said that "there are tell-tale signs indicating an employer might not be telling the truth".

## **Deliveroo proposes "charter" to clarify benefits available to self-employed**

Deliveroo has called on the government to create a "charter" to clarify which benefits can be made available to those classified as self-employed, without risking this status. The company claims that this move would allow more benefits to be offered to contractors and decrease the likelihood of gig-economy litigation. Deliveroo claims that maintaining the self-employed status of its riders would benefit customers who would pay an increased rate should the riders be found to be workers. The proposed benefits available to self-employed contractors include paid time off, training and insurance. However, president of the IWGB union, Mags Dewhurst, claims this is an attempt to mislead the public. She said "under British law there is no trade-off between flexibility and worker rights. There is an employment status, 'limb b workers', that allows for both and which Deliveroo has gone to great lengths to deny its riders".

## **Government accused of U-turn on ensuring staff keep tips**

The government has been accused of a failure to act following its 2016 consultation on the issue of companies keeping workers' tips, despite promises to restrict exploitative practices. The issue was brought to public attention when TGI Fridays staff staged walkouts because of the restaurant's gratuities policy. Labour MP Stephanie Peacock said the problem is being prolonged by government inaction as "workers and customers alike are being ripped off by rogue bosses who are grabbing tips that were intended for staff". In 2016, the then Business Secretary Sajid Javid indicated that the government would take legislative steps to

safeguard workers' rights to tips. Although a response to the 2016 consultation is yet to be published, a government spokesperson has said it is "still considering options".

## **New toolkit to help employers communicate the EU Settlement Scheme requirements to staff**

The Home Office has launched a toolkit to enable employers to increase awareness amongst their staff about the EU Settlement Scheme and what EU citizens need to know and do to apply for "settled status". The toolkit aims to allow employers to communicate clear and consistent information about the new immigration status that EU citizens must obtain to stay in the UK after Brexit. It contains information packs, posters and leaflets. It has been aimed at employers as eight in ten EU citizens living in the UK are thought to be of working age. Home Secretary Sajid Javid said the toolkit will offer "security and certainty to EU citizens living in the UK". However, co-founder of the campaign group the3million, Nicolas Hatton claims the move is "premature" as withdrawal agreement negotiations are still underway.

A trial for registering EU citizens will run from 28 August 2018, with the scheme expected to be phased in more widely later this year and fully open by the end of March 2019.

## **EU Settlement Scheme to be trialled by NHS workers and students**

The Home Office has announced that a private pilot for the new EU Settlement Scheme online application process will begin on 28 August 2018. Up to 4,000 EU members of staff and students from 12 NHS Trusts and three universities in North East England have been invited to make real applications for "settled status". After Brexit, all EU citizens residing in the UK will be required to register for settled status to stay in the UK. The live trial will help the Home Office test and improve the proposed application process before it is rolled out more widely. Applicants under the pilot will follow the standard application process, providing proof of identity, proof of UK address and declaring any criminal convictions. Successful applicants will be granted "settled status".

## **Home Secretary changes striking rights for migrant workers**

Secretary of State for the Home Department Sajid Javid has revealed that changes will be made to the guidance and Immigration Rules for migrant workers (under the Tier 2 and 5 immigration routes) and their sponsors. Legal strike action will be added to the list of exceptions to absence without pay for migrant workers. Although this group was not previously precluded from industrial action, the change will resolve uncertainty by clarifying this right, and confirming that there will be no

immigration-related repercussions for striking migrants. Javid said that concerns arose following a recent strike by university lecturers and that "it is not the government's policy to prevent migrant workers from engaging in legal strike action".

## **Black male graduates earning £7,000 less than white peers**

A Resolution Foundation report has revealed that black male graduates earned an average of £7,000 less than their white counterparts between 2007 and 2017, despite the number of black males attending university increasing by 24% in the past two decades (compared to a 15% rise for white males). The pay penalty placed on black females amounts to a £3,000 lower salary than their white peers. The report also highlights that non-graduate black men are typically paid £2 less than non-graduate white men per hour (with a wider gap of £4 for Pakistani and Bangladeshi men).

Research and Policy Analyst at the Resolution Foundation Kathleen Henehan claims that debates surrounding the improvement of education for ethnic minorities largely ignore the existence of barriers and prejudice in the workplace. Race Equality Director for Business in the Community Sanda Kerr suggests that employers should ensure that unconscious bias does not come into play when recruiting for jobs with high progression chances. She recommends regular pay audits as a way of prompting employers to expose and tackle under-representation.

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