



VALEMUS

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THE BRIEF

Welcome to the
January 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.

HIGHLIGHTS

03 'No deal' and Exit Committee

House of Commons Exiting the European Union Committee published a report on the implications of a no-deal Brexit and Parliament's options following the rejection by the House of Commons

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07 Employment round-up

Workplace happiness takes priority, with government guidance on mental health first aid, and Lord Price's opinion on statutory obligations.

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

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Career History: Berrymans

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SUZANNE COE

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LARA AKINLUDE

Career History: Havillands Solicitors

COMMERCIAL PROPERTY

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CHRISTOPHER PEDDER

Career History: Mace, Trowers & Hamlins

INTELLECTUAL PROPERTY

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Career History: Olswang; Rowe & Maw

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Career History: Linklaters; Shoosmiths

JANE BUNCH

Career History: Olswang

EMMA NUTBEEN

Career History: Olswang

ALEX JOHNSTONE

Career History: Olswang



Brexit: House of Commons Exiting the EU Committee considers implications of a no-deal scenario

On 28 January 2019, the House of Commons Exiting the European Union Committee (committee) published a report, Response to the vote on the withdrawal agreement and political declaration: assessing the options. This follows the “meaningful vote” in the House of Commons on 15 January 2019, in which MPs voted by 432 votes to 202 not to approve the withdrawal agreement and political declaration on the framework for the future UK-EU relationship.

In compliance with statutory requirements following this rejection, the government tabled a joint motion which is scheduled to be debated in the House of Commons on 29 January 2019. The committee’s report is intended to inform assessment of the available options as MPs put forward alternative plans in the form of amendments to the government’s joint motion.

The report includes an assessment of the options for potentially renegotiating the withdrawal agreement and political declaration, the feasibility of extending Article 50 and the possibility of holding a second referendum.

Of particular interest is the committee’s analysis of the issues surrounding a no-deal outcome.

Implications of a no-deal outcome

The report notes that, although there appears to be no majority in the House of Commons in favour of a no-deal exit, that remains the default outcome if the UK and the EU do not ratify a withdrawal agreement by 29

March 2019 and there is no extension or revocation of the Article 50 process.

The committee expresses deep concern about the readiness of businesses for a no-deal exit and, in particular, the readiness of small businesses. The report explains that a no-deal outcome would result in an abrupt change in trading circumstances. In the committee’s view, the government’s efforts to engage with business and provide guidance are unlikely to be sufficient to mitigate the worst effects of a no-deal scenario because:

- This is being provided so late in the day.
- Much of the guidance is based on assumptions about how the EU might respond in a no-deal scenario, which could turn out to be unjustified.
- Many small businesses do not have the capacity to fully engage with what is required.

Implications for trade and the UK’s border

The committee observes that in a no-deal scenario:

- Non-tariff barriers under WTO rules would be more significant for most UK exporters than the introduction of tariffs. These include increased product standard checks and checks on rules of origin, which would increase costs and reduce the competitiveness of UK exports to the EU. Many UK goods exporters with no experience of customs processes are likely to withdraw from these markets.

No deal... continued

- Many operators exporting services to the EU would lose authorisation to conduct business.
- The absence of any agreement on the transfer of data would be particularly significant. Without either a comprehensive agreement or an adequacy decision from the European Commission, it will be illegal to transfer personal data from the EU to the UK without separate contractual arrangements.

The report concludes that there is scope for major disruption at the UK's borders. Changes to trading arrangements, requiring increased checks, could lead to very significant delays. This could create serious disruption to supply chains, particularly those that are time critical such as fresh produce, pharmaceuticals and components in just-in-time manufacturing processes. Even where the UK government has successfully prepared for potential disruptions, the committee observes that avoidance of disruption is also dependent on EU member states taking reciprocal effective steps.

Implications for the border with the Republic of Ireland

The report notes that maintaining an open border on the island of Ireland would be problematic in a no-deal scenario, for reasons that include the following:

- International law requires both the UK and Republic of Ireland to enforce rules at the border. The EU would also expect the Republic of Ireland to enforce its external customs border.

- Maintaining an open border would be problematic in the long-term for making new trade deals because there would be a lack of clarity about border arrangements and access to UK markets for goods from other countries.

Conclusions on managed no deal

The report:

- Observes that while the EU might agree to side deals to mitigate the worst of the disruption of a no-deal outcome, this cannot be guaranteed.
- Expresses concern about the extent to which assumptions of an ongoing co-operative relationship underpinned the government's no-deal planning.
- Concludes that, since these assumptions could not be guaranteed, a "managed no deal" "cannot constitute the policy of any responsible Government."

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A series of amendments, enforcements and opinions

Draft Drivers' Hours and Tachographs (Amendment etc.) (EU Exit) Regulations 2019: Brexit SI

The draft Drivers' Hours and Tachographs (Amendment etc.) (EU Exit) Regulations 2019 (draft Regulations) together with an explanatory memorandum were published on 14 January 2019. The key provisions will come into force on exit day.

For road transport operations undertaken exclusively within the UK after exit day, the rules currently set out in the EU Drivers' Hours Regulation (561/2006) and the EU Tachograph Regulation (165/2014) (together the EU Regulations), relating to drivers' hours and tachographs will continue to apply, as set out in retained domestic versions of those Regulations.

For road transport operations between the UK and EU Member States, Switzerland, or non-EU EEA Member States, the rules contained in the European Agreement concerning the Work of Crews of Vehicles engaged in the International Road Transport of 1 July 1970, as amended ("the AETR"), will apply, in place of the EU Regulations, after exit day. The AETR is a United Nations Economic Commission for Europe (UNECE) Agreement and the UK, the 27 EU Member States, and a further 21 countries (including EEA Member States Norway and Lichtenstein, but not Iceland), are contracting parties to it. As the EU Regulations and the AETR contain the same rules, international road transport operations will be subject to the same drivers' hours and tachographs requirements from exit day as before exit day.

Part 2 of the draft Regulations, which comes into force 22 days after the draft Regulations are made, amends existing legislation to fully implement the existing provisions of the EU Regulations and the AETR, including

by creating three new offences, amending two existing offences and making various other consequential amendments.

Misleading faux fur advertising claims: CAP issues enforcement notice and advice to online marketplaces

On 17 January 2019 the CAP Compliance team issued an Enforcement Notice: Misleading "FauxFur" claims in clothes and accessories. The notice follows two 9 January rulings by the ASA that advertisements for faux fur products were misleading and contained unsubstantiated claims because the products contained real animal fur (ASA Ruling on Boohoo.com UK Ltd and ASA Ruling on Zacharia Jewellers). The notice contains compliance tips including that retailers should test each batch of faux fur products they sell, preferably using a laboratory service or, if this is not feasible, using a three-step test outlined in the notice. CAP asks advertisers to take immediate action to ensure that their advertising is compliant by 11 February 2019, after which date CAP will take targeted enforcement action.

The notice includes comments specifically directed at online marketplaces and platforms. CAP recognises that it is difficult for marketplaces to examine all the products which are sold through them but states that they are responsible for ensuring that such products are correctly described. If a marketplace has announced a "no animal fur policy", consumers expect this to apply to all products sold, including those sold by third party sellers. CAP encourages marketplaces to educate third party sellers on how to tell real fur from faux fur. Encouraging marketplaces to get involved is in line with the ASA's

...continues

Amendments, enforcements... continued.

statement in its 5 year strategy, as announced in November 2018, that it wishes to work more closely with large online platforms, to improve advertising compliance, including by micro and SME businesses using such platforms.

Consumers' obligations to return defective goods for repair or replacement (AG's opinion)

Advocate General (AG) Wahl has given his opinion on issues around the return of defective goods for repair, under the Sales and Guarantees Directive (1999/44/EC) (Directive), as implemented in the UK by the Consumer Rights Act 2015.

The AG considers that whether the consumer must return defective goods to the seller in order to allow the seller to repair or replace them should be determined on a case by case basis. Relevant factors include whether it will be faster and easier for the seller to inspect them at its place of business, or at the consumer's home, and the ease with which the consumer can return the goods to the supplier. Where the goods have been bought in a physical shop and do not require installation, there is a presumption that the consumer can return them there. Under the Directive, defective goods must be brought into conformity with the contract "free of charge" and the Directive specifically refers to the costs of postage, labour and materials.

The AG gave his opinion that this does not necessarily mean that the seller must make advance payment to the consumer for any return costs (noting that his opinion here is contrary to the ECJ's assumption in Joined Cases: Gebr. Weber GmbH v Jürgen Wittmer; Ingrid Putz v Medianess Electronics GmbH [2011] C-65/09 and C 87/09). However, consumers should not have to pay return costs out of their own pockets (and wait for subsequent reimbursement) where the shipping costs are a financial burden which might dissuade them from asserting their rights. Each case must be determined individually, factoring in relevant matters such as the shipping costs, the value of the goods and the consumer's means of redress if the seller fails to reimburse them subsequently.

Finally, the AG gave his opinion that a consumer who wants to exercise their right to rescind a contract because a seller has failed to repair or replace defective goods within a reasonable time must have:

- Informed the seller the goods are non-conforming (demonstrating that this is the case but not necessarily identifying the cause).
- Indicated whether they wanted a repair or replacement.

- Made the goods available to the seller. However, it is the seller who, within a reasonable time, should suggest how to make the goods available.

Can a parent company enter into a contract that binds all members of its group?

It is not uncommon to structure an agreement so that one member of the corporate group, typically the parent, enters into the contract in its own capacity and also as agent for other members of the group. This can be a convenient way of bringing group members into a contractual relationship. Very broadly, an agency relationship can arise where Party A deals with Party C on Party P's behalf. The effect is to establish a contractual relationship between Party C and Party P (in this case, the subsidiaries). The agreement to this arrangement between Party A (the agent) and Party P (the principal) may be express or implied.

There are no general rules deeming a parent company an agent of other companies within the same group. The question as to whether one company is acting as agent for another is a question of fact and subject to the normal rules on agency. If there are doubts as to whether the parent (Party A) has authority to bind the subsidiaries to the contract, you might request sight of a letter of authority.

The signature block would need to distinguish between the parent signing in its own capacity and as agent for the subsidiaries (in the latter case, wording such as "signed for and on behalf of ABC", or "signed as agent for ABC" should suffice).

This structure outlined above would save the time-consuming alternative of producing a series of agreements or side letters to be entered into by each subsidiary with a view to establishing a direct contractual relationship between your client and each of the subsidiaries, although this is a valid way of proceeding.

You will need to consider the position in respect of future subsidiaries (i.e. those yet to be incorporated or which join the group as a result of future corporate acquisitions). Clearly, they cannot have authorised the parent to bind them to the agreement as their agent. The simplest course in these cases may be to include a provision in the agreement that the parent will procure that future subsidiaries agree to adhere to the agreement.

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Employment round-up January 2019

House of Commons debates mental health first aid in the workplace

On 17 January 2019, the House of Commons debated the issue of mental health first aid provision in the workplace. The debate, which was introduced by Luciana Berger MP, comes after Secretary of State for Business, Energy and Industrial Strategy, Greg Clark, urged employers to promote mental health awareness. It also follows an open letter to Theresa May signed by 50 executives of large companies asking her to deliver on her pledge to give mental health the same legal status as physical health at work.

Luciana Berger MP's main proposition was that the Health and Safety at Work Act 1974 should be amended through secondary legislation to require a trained mental health first aider in every workplace.

New research reveals "shocking" ethnic minority discrimination in labour market

A new study has revealed "shocking" discrimination towards black British people and those of south Asian origin in the labour market. The research, which was carried out by experts at the Centre for Social Investigation at Nuffield College, University of Oxford, found that these groups had to send 80% more applications before receiving positive responses from employers than their white British counterparts. The study was carried out between November 2016 and December 2017 and involved almost 3,200 job applications being sent to employers from a variety of industries. 24% of white British applicants received a positive response, compared to 15% of minority ethnic

applicants with identical credentials.

Deputy director of race equality thinktank Runnymede, Dr Zubaida Haque, argues that more needs to be done to hold employers to account. She said, "there are no real consequences for employers of racially discriminating in subtle ways, but for BME applicants or employees it means higher unemployment, lower wages, poorer conditions and less security in work and life". Source: Minority ethnic Britons face 'shocking' job discrimination, theguardian.com, 17 January 2019.

Wellcome Trust set to trial four-day week

The Wellcome Trust is considering the introduction of a four-day week for its head office staff. The move could be trialed in autumn 2019 and would affect 800 employees. Should plans to implement the new working week go ahead, the research charity would reportedly be the largest organisation in the world to adopt it. It is thought that the extra day off would provide employees with more time to get things done at home, which would boost motivation and productivity at work. Unions had also argued that the benefits from a surge in productivity caused by technological developments should be shared with staff. The Wellcome Trust has said it is also considering other methods to improve productivity and well-being.

Government scraps £65 settled status fee for EU citizens

The government has announced that it is scrapping the £65 settled status fee for all EU citizens who wish to apply for permanent residence post-Brexit. The move comes after campaigns for the government to pay the fee for

Employment round-up... continued.

The government has launched a smartphone app through which applicants can upload documents, answer questions and submit photographs. However, experts have warned that even though the settled status fee has been scrapped, applicants still face a myriad of obstacles and requirements to qualify.

Law Commission launches consultation on simplifying Immigration Rules

The Law Commission has proposed that the Immigration Rules should be redrafted in order to be more user-friendly. The Rules, which are currently around 1,100 pages long, have also been criticised by senior judges for being too lengthy and containing repetitions. The Law Commission says that the current version has an adverse effect on both applicants and Home Office caseworkers, and that its simplification would not affect any substantive immigration policy.

The Law Commission has launched a consultation which seeks views on its proposals to make the Rules clearer and more accessible. These include an audit of overlapping provisions and a standardisation of wording, reconsideration of how frequently the Rules should be added to in the future and an investigation into whether technology could also assist in simplifying the process for applicants.

The consultation closes on 26 April 2019. Responses to the consultation can be submitted using the Law Commission's online portal.

Employers urged to stop using criminal record "tick box"

New research published in a paper for the Scottish Centre for Crime and Justice suggests that the criminal record "tick box" common to job applications may be unnecessary and act as a deterrent for jobseekers. The research, which was carried out by Dr Beth Weaver of Strathclyde University, suggests that criminal record declarations are not indicative of the likelihood of an applicant reoffending and that many people with previous convictions are being dismissed without consideration at an early stage in recruitment processes.

Dr Weaver argues that a range of possible positive contributions are overlooked and believes that a potential employee should not be defined by an old conviction. 11 million people have a criminal record in the UK and 75% of employers admit to discriminating against those who do.

Virgin Trains is among several employers which have banned the criminal record declaration section on their application forms. Scottish communications manager for Virgin Damian Henderson, says "there are better ways

to talk to people about their offending background rather than just simply putting them off with a ticked box exercise at the start of the application process".

Workers expect skills-shortage will be biggest issue faced by companies in 2019

YouGov has published findings from a survey in which employees were asked to select what they predict will be the three biggest issues faced by their current workforce in 2019. The survey, which was commissioned by Acas and surveyed 2035 employees below senior-manager level, found that 53% of respondents believe that finding the right people with the right skills will be the biggest challenge. The other two most popular responses were technological change (36%) and productivity (36%). Tackling sexual harassment was much lower down the list, with just 3% of respondents selecting it as a top-three choice.

Acas Chief Executive, Susan Clews, said the results "could be attributed to uncertainty around our relationship with the EU at the moment or general concerns around skills shortages".

Lord Price calls on government to help boost workplace happiness

Lord Mark Price has urged the government to focus on improving employee happiness post-Brexit. The Conservative peer has been measuring workplace happiness on his website Engaging Works for the last few years, and over 10,000 people from around the world have taken its survey so far. The survey asks a series of questions such as "do you feel empowered to make decisions at work?" and a scale of one to ten is provided for responses.

In an opinion piece, Lord Price noted that, according to his research, the UK workplace happiness is ranked tenth worldwide. He pointed to a strong correlation between happiness at work and the overall productivity of a country and partly attributes this to the number of sick days taken and staff turnover rates. He suggests that a nationwide "happiness strategy" initiated by government could help mitigate these causes and improve employee engagement on an individual level. He also speaks of the benefits which improved productivity would bring in helping the UK become more globally competitive post-Brexit.

Lord Price's recommendations for the government include placing obligations on companies to share profits with employees, putting employees on boards and making information on company performance more accessible for workers. He also suggests that employers should be required to facilitate career development through up-skilling workers and retraining for roles.

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To guarantee that demand can be met without diminishing the quality of our business legal advice, Valemus Law only engages partner-level lawyers with at least 10 years experience. Our lawyers all hail from the Top 50 UK law firms and blue chip organisations and their exceptional expertise is recognised across the commercial sector. As a result, we include among our clients some of the biggest names in the automotive, air transport, oil and gas, defence, energy and environment and publishing industries. We also enjoy a reputation for helping to launch a number of successful start-ups in a range of industry sectors.



VALEMUS

Valemus Law provides access to all the business legal services offered by regular commercial law firms, but we go the extra mile to deliver value. From litigation advice to contract drafting, whether you are a sole trader or an executive within a global corporation, our goal is the same as yours: success.

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