



VALEMUS

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# THE BRIEF

Welcome to the  
May 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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The ICO reports on teething problems. However, no fines as yet have been issued in the last year.

# 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

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### MICHAEL ENGLISH

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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



## Government responds to House of Lords Committee on regulating in a digital world

In March 2019, the House of Lords Select Committee on Communications published a report on regulating the digital market.

The committee's overall conclusion was that regulation of the digital environment was fragmented, with gaps and overlaps, leading to inadequate responses to concerns. The committee, therefore, recommended establishing a new digital authority to instruct and coordinate regulators, guided by ten principles (including accountability, transparency, openness, respect for privacy and freedom of expression) to inform regulation of the digital world.

### Facts

The government has published its response to the report. Key points from the response are summarised below.

- The government says that the committee's recommendations are "closely aligned" with the government's approach.
- The government also points to its recently published Online Harms White Paper, which it says set out plans for world-leading legislation to make the UK the safest place in the world to be online.

### Principles-based regulation

The report set out ten principles for regulation.

The government says that the principles set out in its Digital Charter, which underpin its approach to protecting citizens, increasing public trust in new

technologies, and creating the best possible basis on which the digital economy and society can thrive, are closely aligned with those set out in the report.

The government also refers to the White Paper and the new statutory duty of care the government will establish to make companies take more responsibility for the safety of users online and tackle harm caused by content or activity on their services.

### Data protection

The report notes that the increased use of data and artificial intelligence (AI) is giving rise to complex, fast-moving and far-reaching ethical and economic issues that cannot be addressed by data protection laws alone. The government has responded to the data protection and privacy issues and recommendations raised in the report, including maximum privacy and safety settings in services by default, accountability, transparency and age-appropriate design.

### Ethical design

The report's recommendations included that:

- **Hardware manufacturers, digital platform operators and games developers should keep records of time spent by each user, accessible to the user, and give periodic reminders to users of prolonged or extended use. They should design user experiences to mitigate the risk of encouraging compulsive behaviour.** The government responds that, as set out in the White Paper, the government and the regulator will continue to support research in this area to inform future action on screen time and

## Regulating in a digital world ...continued

will welcome efforts from the industry to develop tools to help individuals and families understand and manage how much time they spend online. To develop a better understanding of screen time, and the link between different types of screen time and children's development and wellbeing, the government expects companies to support the developing evidence base around screen time, for example by providing access to anonymised data to researchers, as recommended by the Chief Medical Officer, Professor Dame Sally Davies. If the emerging evidence base demonstrates a strong link between different elements of screen time and damage to children's wellbeing or development, companies will be expected to take appropriate action to fulfil their duty of care.

- **Terms of services should be accessible by, and comprehensible to, those for whom the service is intended (including children). They must also be fair.** On this point, the government responds that the regulator, as set out in the White Paper, will assess whether companies have fulfilled their duty of care, including by reference to relevant codes of practice, and compliance with companies' own relevant terms and conditions. Failure to meet these obligations may result in enforcement action by the regulator. The Information Commissioner's Office (ICO) is consulting on an age appropriate design code of practice to provide guidance on the privacy standards that organisations should adopt when they are offering online services and apps that children are likely to access.
- **The ICO should set out rules for the use of algorithms conducting audits and requiring explanations of how algorithms work. The ICO should publish a code of best practice, informed by the work of the Centre for Data Ethics and Innovation (CDEI), and possibly develop a kitemark, for the use of algorithms.** The government responds that the CDEI will play a key role in identifying best practice for the responsible use of algorithms, to enable safe and ethical innovation in the use of data. The CDEI will work closely with regulators (including the ICO) to ensure that the law, regulation and guidance keep pace with developments in data-driven and AI-based technologies. The ICO has powers under section 129 of the Data Protection Act 2018 (DPA 2018) to conduct consensual audits on whether a controller or processor is complying with good practice in processing personal data, including the use of algorithms. Additionally, the GDPR requires controllers to consult with the ICO when a data protection impact assessment (DPIA) indicates

that processing would pose a high risk to the rights and freedoms of data subjects, including via the use of algorithms.

- **At present, a data subject access request under the GDPR and DPA 2018 does not give individuals access to behavioural data generated about them because it is deemed to be the property of the company that acquired it. Users of internet services should have the right to receive a processing transparency report upon request, which contains details of the behavioural data the controller generates on them and any behavioural data obtained from third parties, including details of when and how they are obtained.** The government says that, under the GDPR, companies must be able to demonstrate that they process personal data in a transparent manner. The GDPR includes rules to protect individuals when profiling, which can be part of an automated decision-making process, takes place. However, the increased use of data and AI cannot be addressed by data protection laws alone, which is why the government has set up the CDEI, to provide independent, impartial and expert advice on the ethical and innovative deployment of data and AI. The CDEI has published a Work Programme and has called for evidence on two major reviews on the issue of algorithmic bias and online targeting.

### Competition issues

The report included consideration of issues relating to market concentration, commenting that the modern internet is characterised by the concentration of market power in a small number of companies, and that the ex post analyses used by competition regulators are struggling to keep pace. A particular challenge is the ability of platforms to cross-subsidise their products and services across markets to deliver them free or discounted to users' challenges. In addition, the largest tech companies can buy start-up companies before they can become competitive.

The report commented that large companies should not be allowed to become data monopolies through mergers and recommended that the government should consider implementing a public-interest test for data-driven mergers and acquisitions. The public-interest standard would be the management, in the public interest and through competition law, of the accumulation of data. Further, in reviewing the application of competition law to digital markets, the government should recognise the inherent power of intermediaries and broaden the consumer welfare standard to ensure that it takes adequate account of long-term innovation. The government should also work with the CMA to make the process for imposing interim measures more effective.

## Regulating a digital world ...continued

The government has not responded directly to these suggestions, simply noting that its Modernising Consumer Markets Green Paper sought views on how well equipped the UK's competition regime is to manage emerging challenges, including the growth of fast-moving digital markets. It states that it is considering policy options across the range of measures proposed in the Green Paper, including for digital markets, and is due to report in summer 2019.

The government recognises the potential of data portability to grant consumers greater autonomy and control over their data and several reports have highlighted the role of data mobility in improving competition in digital markets and the government is considering recommendations.

Obligations on online service providers and platforms  
The report's recommendations included that:

- There should be special obligations on online communications platforms, drawn up in accordance with the ten principles, to treat users fairly and act in the interests of society. The government agrees that online communications platforms have special responsibilities of this nature. It refers to the Digital Charter and White Paper, in particular the statutory duty of care set out in it.
- Online platforms now play a key role in curating content for users, going beyond the role of a simple hosting platform. "Notice and takedown" is not an adequate model for content regulation. The E-Commerce Directive (2001/31/EC) may need to be revised or replaced to better reflect its original purpose. The government says that it has reviewed the current liability that platforms have for illegal content they host. Its review found that standalone changes to the content liability regime would be insufficient at driving changes in companies' behaviour, and at tackling online harms. The White Paper proposes a more thorough approach addressing a broader scope of harms, and the internal systems and processes of a company, while also ensuring the effective oversight of the take-down of illegal content.
- A duty of care, enforced by Ofcom, should be placed on online service providers that host and curate publicly accessible content. Ofcom should also have a role in hearing appeals against moderation decisions and imposing fines for breaches of a company's own terms of use. The government responds that this recommendation is closely aligned with the proposals in the White Paper. It says that the government is consulting on a regulator for the new statutory duty of care set out in

the White Paper, including whether this should be a new or existing body.

- A classification or labelling scheme should be created for social media services, similar to that of the British Board of Film Classification, to help users to identify services that have stricter or more relaxed community standards, or which permit adult material. The government refers to the White Paper. In order to fulfil the duty of care set out in the White Paper, companies will be required to take robust action where there is evidence that children are accessing inappropriate content. The regulator will set out codes of practice to make clear that companies must ensure that their terms of service state what behaviour and activity is tolerated on the service as well as the measures that are in place to prevent children accessing inappropriate content. The regulator will assess how effectively these terms are enforced as part of any regulatory action.

### Digital authority

The report recommended that a new authority, the Digital Authority, should be appointed to fulfil a wide remit relating to the regulation of the online environment. The government responds that it supports the committee's view that effective regulation of digital technology requires a co-ordinated and coherent approach across the various sector regulators and bodies tasked with overseeing digital businesses. It refers to the Digital Charter and the wide range of measures being taken to strengthen the regulation of the internet and digital technology in the White Paper, Cairncross Review, Furman Review and Centre for Data Ethics.

The government says that it is carefully considering potential overlaps between new regulatory functions, such as that proposed through the White Paper, and the remits of existing regulators. Consolidation of these functions, or a broader restructuring of the regulatory landscape, could play an important role in supporting an effective overall approach to the regulation of digital, and this is something the government will carefully consider. The government thanks the Committee for their recommendation and says that it will carefully consider this and their other recommendations as it continues to assess the need for further intervention.

### Comment

In relation to many of the issues covered in the report, in particular the regulation of the liabilities of online platforms, the government's response is to point to the White Paper, which sets out an ambitious regime for imposing a statutory duty of care on online service providers.





# Employment Law Round Up May 2019

## **EHRC reveals 47 employers who have failed to report latest gender pay gap figures**

The Equality and Human Rights Commission (EHRC) has revealed the names of 47 employers who are yet to publish their 2018 gender pay gap information. The government requires this information from all employers with 250 employees or more. The deadline for doing so was 30 March 2019 for the public sector and 4 April 2019 for the private and voluntary sectors. This follows earlier action taken by EHRC to name three employers who published their gender pay gap data late.

The EHRC informed the 47 employers, including the Roman Catholic Diocese of Westminster and Gulfstream Aerospace, that it will begin formal investigations into their actions. If the organisations have broken the law through their failure to publish gender pay gap data they will be required to publish their figures immediately. If uncooperative, the organisations will face formal notices and a possible unlimited fine, in accordance with the EHRC's enforcement strategy.

## **Union urges investors to hold Amazon accountable for poor working conditions**

The GMB Union have called on investors in Amazon to use their influence to push for better working conditions for the 27,500 UK employees of the multi-national organisation. Tactics under consideration include voting down director appointments. This follows protests at five Amazon warehouses last November where the GMB highlighted the physical dangers for workers employed by the organisation.

Degrading working conditions were also highlighted in Frank Field MP's push for a new employment rights bill in his position as work and pensions committee chair.

## **Public sector sees dramatic fall in lost working days due to strike action**

The Office for National Statistics (ONS) has revealed that the number of public sector working days lost to strike action in 2018 was 26,000. This is the lowest recorded figure since data collection began in 1996 and is in stark comparison with the 1.2m days lost in 2011. The introduction of the Trade Union Act 2016 may be partially responsible for this sharp decline. The legislation introduced the necessity of a 50% ballot turnout in order for strikes to go ahead. However, economists have suggested that the decline could be attributed to the recent privatisation of formerly public sector industries such as Royal Mail. Indeed, between 2000 and 2016 there were more days lost due to strike in the public sector than in the private sector. Following privatisation this trend shifted. In 2018 the number of days lost due to strikes in the private sector was almost 250,000, the largest number since 1996.

## **TUC survey reveals 70% of LGBT people sexually harassed at work in "hidden epidemic"**

A survey conducted for the Trades Union Congress (TUC) has revealed that almost 70% of LGBT people have been sexually harassed at work. The survey, which interviewed an initial sample of 1,001 people in November 2018 revealed what Frances O'Grady, TUC general secretary, describes as a "hidden epidemic." Data collected regarding instances of sexual harassment, sexual assault and serious sexual assault and rape revealed that BME women and disabled men and women are more at risk. Overall, 21% of women had experienced sexual assault. The figure for LGBT disabled women was 38% and was even higher for LGBT BME women at 45%.

## Employment Round-up ...continued

The TUC has urged the government to introduce a statutory code of practice on sexual harassment at work to create a workplace culture which is safe for everyone. In particular, the TUC argues that the legal onus of preventing harassment in the workplace should be on employers and not victims.

### **Calls for bullies and sexual harassers to be publicly shamed to tackle toxic workplace culture in legal profession**

Retired High Court judge, Dame Laura Cox, has argued that bullies and sexual harassers need to be publicly shamed in a bid to end the legal sector's "endemic" harassment culture, revealed in a report by the International Bar Association. The Association found that more than 50% of legal professionals in the UK have experienced bullying, and 38% of women have been sexually assaulted. This follows Dame Laura's independent inquiry which looked into bullying cultures in the House of Commons and revealed that publicly condemning toxic behaviour is an effective way of ending such cultures.

The report not only revealed high instances of harassment, but also that employees who are victims of sexual harassment do not feel able to approach their employers about their experiences. While 74% of cases were unreported, 71% of cases that were reported received an insufficient response.

The bid to end workplace harassment in the legal sector has been spurred on by the #MeToo Movement.

### **Female BBC manager refuses promotion in equal pay row**

BBC manager Karen Martin has publicly turned down a promotion to become a deputy editor for the BBC radio newsroom, based on a £12,000 pay discrepancy with a male counterpart. In an email sent to hundreds of BBC staff, Ms Martin announced that she would no longer be taking up the role because she had discovered that her male colleague, also newly appointed to the same role, had been offered the substantially higher salary.

This incident follows the resignation of China editor Carrie Gracie in January 2018 for equal pay reasons, and the BBC's subsequent decision to offer her backpay.

Despite this, the BBC asserts that, although the roles and responsibilities of Ms Martin and her colleague would be the same, they stand by the different offers made and believe their principles regarding fair pay have been upheld. This argument is based on differences in the working experience of the two candidates.

### **Minimum wage to increase to £10 for under-18s by 2020, Labour pledges**

Labour are proposing an end to the £4.35 per hour "youth rate" for under-18s by 2020 in a bid to end age discrimination. This comes as part of a pledge to increase the national minimum wage to £10 per hour. The party has stated that, to make this manageable for small to medium sized employers, it will use fiscal savings to offer monetary support.

Despite this, Labour's proposals have been met with some resistance. The independent Low Pay Commission defend youth rates on the basis that they reduce youth unemployment. They offer an incentive to employ under-18s who are likely to have less experience and lower productivity than older counterparts. The Institute of Directors highlighted the value in having an independent, objective commission, claiming that politicians are at risk of overlooking the impact of their policies on employers.

### **Government trials gender-neutral adverts to increase number of female STEM apprentices**

The government body responsible for signing off apprenticeship standards, the Institute for Apprenticeships and Technical Education (IfA), is trialing gender-neutral language. Apprenticeship standards advertise what employers are looking for in potential apprenticeship candidates, from skillset to knowledge.

This comes after WISE, who campaign for gender parity, stated that women represented under 9% of STEM apprenticeship starters in 2017 to 2018. Altering wording in advertisements by removing language that could be off-putting to potential female candidates is championed by Jo Morfee, co-founder of the InnovateHer charity. Morfee claims that Shop Direct received a 40% increase in female applicants for senior data analyst roles when using gender-neutral language.

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## GDPR one year on: some highlights in words and numbers

**25th May marks the first birthday of the EU General Data Protection Regulation (GDPR). While this time a year ago, up to our necks in updating privacy policies, getting subject access procedures up to standard, delivering training and so on, perhaps few of us would have been wishing this complex behemoth of privacy law well!**

But with twelve months on the clock, and safe in the knowledge that the world didn't end on 25 May 2018, it is worth stopping to reflect briefly on how far we have come in such a short space of time. Some key numerical snippets:

- 1,792 breaches were reported to the ICO in June 2018 (compared to 657 in May and 367 in April 2018).
- 12 EU member state data protection authorities (DPAs) have issued fines under the GDPR but there have been no GDPR fines issued so far by the ICO.
- The largest fine in data protection history – €50 million – was imposed by the French CNIL on Google in January of this year for failing to comply with transparency and information obligations and failing to have a legal basis for the processing of personalised advertising.
- 5,518 claimants brought a class action (under the GDPR's predecessor, the Data Protection Directive)

against Morrisons supermarket and won. Subject to the appeal, UK employers are now vulnerable to vicarious liability for GDPR breaches by employees and future class actions.

- 103 monetary penalties were issued in 2018 for failure to pay the ICO's registration fee.

A press release issued 22 May by the European Commission highlights some further statistics which illustrate the significant progress in privacy rights the GDPR has brought for individuals, not least in terms of simply raising awareness.

*"Not only have more than two-thirds of Europeans now heard of the Regulation, new figures show that nearly six in ten people know that there is a data protection authority in their country. This is a significant increase from four in ten people back in 2015."*

This raising of the awareness bar of course has brought with it the raising of data protection as a corporate risk, in many cases right to the top. Certainly many millions of pounds have been invested in state of the art compliance programmes and systems. But anecdotally companies have also reported significant improvements in data governance – through data minimisation as well as anonymisation and other security techniques – leading to improved cyber resilience and better decision-making through overall improvement in



## GDPR ...continued

the quality of the data that is now being retained.

*"The apparent success of the GDPR has seen many copycat laws springing up across the world, perhaps most notably in California, the home of the tech giants, but also in countries as diverse as Japan, Brazil and Kenya."*

On many measures the GDPR has had a good first year and has already changed the landscape but, as it begins to find its feet, we shouldn't gloss over the many teething problems, and baby analogies aside, challenges that will continue to vex us. In a recent article in PLC Magazine, **GDPR one year on: taking stock**, provides a detailed examination of some of these key themes, in particular:

- The state of limbo while we wait for the E-Privacy Regulation.
- The continued emergence of privacy campaigners (such as Max Schrems) and consumer rights groups.
- The real world HR implications of vicarious liability post-Morrisons.
- The big uptick in data subjects exercising their rights, often for reasons that present a risk to the controller and the rise of the third party aggregators helping data subjects.
- In spite of guidance, the continued uncertainties around when parties are acting as controllers, processors or joint controllers and the implication for contracts and transactions generally.
- The circumstances under which to report data breaches and the records to keep to provide a defensible position.

### ICO updates on GDPR: One year on

The ICO has also published [a blog post](#) on the GDPR one year on, linking to a report sharing learnings from the past twelve months. The first year of the GDPR saw people realise the potential of their personal data resulting in a significant increase in individuals exercising their information rights. The focus for the GDPR's second year must be beyond baseline compliance with organisations shifting their focus to accountability.

Resourcing data protection officer roles should be a key priority for public and private sector organisations. The ICO will soon establish a one stop shop for SMEs. The ICO is responsible for creating four statutory codes for data sharing, direct marketing, age-appropriate design and data protection and journalism. The ICO expects to launch the consultation on the data sharing code in June 2019, laying the code before Parliament in the autumn. Consultation on a draft direct marketing code should be opened in June 2019 with the code finalised by the end of October 2019. Consultation on the data

protection and journalism code should also be launched in June 2019 and the code laid before Parliament in summer. The ICO is also developing a draft code on the use of personal information in political campaigns for consultation in July 2019.

The report includes case studies of ICO enforcement. The ICO received about 14,000 personal data breach reports from 25 May 2018 to 1 May 2019. Only 17.5% required action from the organisation. The report includes examples of reported breaches requiring no further action, requiring further action from the organisation and where the ICO took formal action. The ICO is working on data protection cases across the EU and is the lead supervisory authority on 93 cases with cross-border implications.

The ICO has increased in size and a funding model change meant the ICO's fee income increased by 86% in 2018/19 compared with 2017/18.

Many of the investigations launched with new powers are now nearing completion with outcomes expected soon to demonstrate the actions the ICO is willing and able to take to protect the public.

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# Valemus Law. An exceptional business law firm.

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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.




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