

## frESH Law Horizons

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### Key Issues During the Coronavirus Disease 2019 (COVID-19) Crisis

The escalation of the COVID-19 crisis and measures adopted by governments in response have meant that many businesses, including, in particular, many retailers and hospitality and leisure operators, are making difficult decisions to plan for reduced activity and reduced demand for several weeks, including, in some cases, temporary suspension of activities and/or enforced closures. There are clearly health, safety and environmental considerations in relation to such decisions, including risk assessments for different working patterns/working from home, complying with guidance from the government and the World Health Organization (WHO) and safeguards in relation to closed premises (such as security, alarm arrangements, CCTV monitoring and waste arrangements). We have a [COVID-19 Resource Hub](#) with 24/7 monitoring and regular updates on current COVID-19 legal and business continuity issues across our global platform, including how business is responding to potential new and existing ramifications. We also have a complimentary [COVID-19 Contingency Planning Self-Assessment Tool](#), which provides you with, within 24 hours, a summary mapping factors your business has not yet considered, together with benchmarking information collated from assessments completed by other businesses (a contingency plan template is also available).

**Trials during the COVID-19 outbreak are likely to be delayed.** [Guidance](#) has been published by the government in relation to the operation of the court service (which is updated daily). Although jury trials that are already underway continue, there are no new jury trials and both Crown Courts and magistrates' courts are only covering urgent work. Physical hearings are being avoided wherever possible, with video and audio hearings being used (guidance has also been issued on such hearings).

**Health and Safety Executive (HSE) issues guidance on facemasks, the extension of driver's medical certificates, driver welfare and hours, health/medical surveillance and the protection of homeworkers.** The guidance is available on the HSE's website, on a [coronavirus updates](#) page. There are also links to specific government [guidance for staff in the transport sector](#), and general [advice for employees, employers and businesses](#).

**Landlord failures to maintain gas appliances and undertake gas safety checks results in a suspended prison sentence.** Plymouth Crown Court imposed the sentence following a guilty plea for breach of the Gas Safety (Installation and Use) Regulations 1998. The HSE [press release](#) reminds landlords of the requirement to obtain a landlord's gas safety record and they maintain all gas appliances.

**Health and safety breaches by a company that manufactured gates, which fell on a schoolgirl.** Section 6 of the Health & Safety at Work etc. Act 1974 imposes general obligations on manufacturers in relation to articles for use at work. The company pleaded guilty to this offence in respect of its failure to fit suitable end stops onto the sliding gate that it had produced, according to the HSE report.

**Fine of £600,000 for a yoghurt manufacturer after a faulty valve led to the release of an acidic cleaning solution.** [Press reports](#) indicate that the company pleaded guilty in Telford magistrates' court. An employee was injured, not from the solution itself, but because he fell from a ladder while trying to avoid the solution. The HSE investigation indicated that the company had not formally trained the two engineers in lock-off and isolation procedures, use of permits to work and safe removal of valves, and there was no assessment of the risks in place for the safe removal of valves.



**The Court of Appeal overturned Heathrow expansion plans on climate grounds.** Plan B and Friends of the Earth appealed the decision of the High Court on their judicial review of the planning decision in relation to the third runway at Heathrow. The High Court's decision pre-dated the government's commitment to net zero carbon emissions by 2050 and the more increased focus in all areas of life on climate issues. In [R \(Plan B Earth and others\) v Secretary of State for Transport and others](#), the Court of Appeal allowed the appeal and declared the Airports National Policy Statement (NPS) to be illegal because it was inconsistent with the government's decarbonisation commitments. Various other groups have taken this as a greenlight to begin their own challenges on similar grounds. Naturalist Chris Packham has [initiated legal action](#) (a pre-action protocol letter at this stage) against the government's decision to build the HS2 high-speed rail system, on the basis that it is incompatible with Paris Agreement climate change commitments. Another group, which includes the founder of renewable energy firm Ecotricity, has written a [letter before claim](#) to the government calling for a review of energy NPS' in light of the recent significant changes to climate commitments and confirming that if this is not agreed then they will seek a judicial review.

**Financial Conduct Authority (FCA) consulted on climate-related and other environmental social and governance (ESG) disclosures.** The [consultation paper](#) sets out proposals to enhance climate-related disclosures by listed issuers and clarify existing disclosure obligations. FCA is proposing to introduce a new requirement on companies with a UK premium listing to include a statement in their annual financial report regarding setting out whether they have made disclosures consistent with the Task Force on Climate-related Financial Disclosures (TCFD's) recommendations, and if not then why, and to signpost where in the report the relevant disclosures are located. Further requirements are proposed regarding how to determine if disclosures are consistent with TCFD recommendations. These would apply for accounting periods beginning on or after 1 January 2021, and are considered by FCA as a first step towards formal adoption of the TCFD's recommendations. The consultation also includes a proposed new technical note, "Disclosures in relation to ESG matters including climate change". The consultation was originally open until 5 June 2020, but has now been extended to 1 October 2020.

**The Bank of England (BoE) launched the COP26 private finance agenda.** The agenda is intended to help private finance support the whole economy transition to net zero, with the objective that "every professional financial decision will need to take climate change into account". BoE highlight that the right framework for reporting, risk management and returns will embed these considerations and help finance a whole economy transition, and that "every company, bank, insurer and investor will need to adjust their business models for a low carbon world". Outgoing governor of the BoE, Mark Carney launched the agenda at a press conference, and the full strategy will be published after he takes up his roles as UN Special Envoy for Climate Action and Finance, and the UK prime minister's finance adviser for COP26.

**The COP26 climate talks could be another casualty of the coronavirus pandemic.** The 2020 UN climate change conference (COP26) is scheduled to be held in Glasgow in November. [Speculation](#) began about this in early March, but more recently the foreign secretary has confirmed in response to questions in parliament that he cannot give a 'cast-iron guarantee' that the meeting will continue as planned, due to potential continuing travel restrictions. He did however confirm that COP26 is the government's "top international priority for the year", and that "if anything, coronavirus ought to reinforce this sense that with some of these global challenges we really need to step up to the plate". Shortly before the major coronavirus restrictions took effect, Anita Lloyd appeared before the House of Lords EU and Environment Committee in relation to the steps to be taken by the UK government in the run up to COP26. The session is available on [Parliament TV](#).



**Meanwhile, the effect of Covid-19 on air quality, carbon emissions and longer term progress towards climate change goals is being widely debated.** The Covid-19 outbreak seems to be leading to [sharp falls in air pollution and CO2 emissions](#) all over the world as flights are grounded, fewer people travel by car, and some industrial production reduces. However, this will rebound, as is already happening in China as it starts to increase activity levels and travel again. In the longer term, concerns are being expressed about the impact this global pandemic will have on low carbon technologies and renewables. With falling oil prices, many are predicting that fossil fuel consumption is likely to increase when the global economy is recovering, and this could have a negative impact on investment in renewables and electric vehicles. Others have identified it as an opportunity to [speed up global energy transition away from fossil fuels](#), saying that governments can use the current situation to step up their climate ambitions and make sure that any stimulus measures are sustainable and focused on low-carbon and clean technologies.

**The [Environment Bill](#)'s progress has been suspended until further notice due to COVID-19.** The bill was at committee stage, with various aspects being debated, and amendments being considered. The suspension happened prior to the committee's final report, which would ordinarily have been followed by the third reading in the House of Commons, and then further scrutiny in the House of Lords. To date, the government has largely rejected calls to amend the bill, including on issues such as the powers and independence of the new Office for Environmental Protection (OEP), the adoption of the WHO air quality target on fine particulate matter (PM 2.5), and an outright ban on fracking. However, it has proposed its own amendment to clarify the OEP's role in climate change matters (stating that the OEP "must not monitor the implementation of, or report on, a matter within the remit of the Committee on Climate Change"). The delay in finalising this new legislation could, in particular, have serious implications for the establishment of the OEP by January 2021, when it is intended to start its role as the environmental watchdog following the end of the Brexit transitional period.

**The legislation to ban plastic straws, cotton buds and drink stirrers has been [laid before Parliament](#).** The Environmental Protection (Plastic Straws, Cotton buds and Stirrers) (England) Regulations 2020 were laid on 3 March and would ordinarily have been debated and approved by Parliament during March, to come into force in April, but the timetable for approval is now uncertain due to the recent suspension of general parliamentary business. Following a public consultation in autumn 2018, which was widely supported, the government announced that the ban would come into effect from April 2020, with exceptions to ensure that those with medical needs or a disability are able to access plastic straws. Given the current situation, the implementation of this ban may now be delayed.

**UK and EU chemical industry bodies have called for "high regulatory alignment" on chemical regulation after Brexit.** The Chemical Industries Association and CEFIC issued a [joint statement](#) calling for "a strong future partnership comprising a deep and comprehensive free trade agreement. While noting the challenges ahead, including the timing of the negotiations, this agreement should secure, at the minimum, frictionless trade in chemicals and a high degree of regulatory alignment between the UK and the EU-27." This would include "a maximum degree of cooperation implying that the UK remains part of the EU-REACH framework, still accessing the services of ECHA." Cabinet Office Minister Michael Gove, however, dismissed this suggestion when questioned by the Commons' Future Relationship with the European Union Committee, saying that "we will not be dynamically aligning with the EU" or "subject to any EU agency", which rules out continuing regulation using EU REACH.

**The courts could recognise air pollution as a cause of death for the first time.** A new inquest into the death of a nine-year-old girl, who lived near one of London's busiest roads, may lead to the courts recognising air pollution as a cause of death for the first time. For more details, please see this article in [CIEH](#), written by Rob Biddlecombe.





**The 2020 budget confirmed and extended the proposed plastic packaging tax from 1 April 2022.** The previous consultation [response](#) was published, and new HMRC [policy design consultation](#) has been issued, and is open until 20 May 2020 (although we anticipate this may be extended). The government will introduce a new tax to incentivise the use of recycled plastic in packaging, set at a rate of £200 per tonne of plastic packaging that contains less than 30% recycled plastic. The original proposal applied to the manufacture of plastic packaging in the UK, or the import of unfilled plastic packaging. Following consultation responses, the government has now announced that the tax will also extend to cover plastic packaging around imported goods. A threshold of 10 tonnes of packaging was also announced, meaning those who manufacture or import below this quantity will not have to pay the tax, but those who are over this threshold will pay it on their total tonnage of plastic packaging. Biodegradable/compostable plastics will be covered by the tax, the only exception being “cellulose-based polymers that have not been chemically modified.” The regime will operate on a “joint and several liability” basis, meaning that companies further down the supply chain from the tax point (including operators of online marketplaces and fulfilment houses) can be required to pay if they knew, or had reasonable grounds to suspect, that the tax had not been paid.

**Other budget environmental measures were announced**, including a green gas levy to help fund the use of greener fuels, an increase in the climate change levy on supplies of gas, and confirmation that the climate change agreement (CCA) scheme will be extended by two years, so will now run until 2025. The government was intending to consult on the terms of the extended scheme and longer-term options shortly after the budget, but this is likely to be delayed. Details of post-Brexit carbon taxation and emissions trading, to support the UK’s progress towards its net zero 2050 target, were also announced, giving some much-needed detail on this topic. The government confirmed that there will be a [UK emissions trading system](#) (ETS), which could be linked to the EU ETS and a [carbon emissions tax](#) as a fall-back carbon pricing policy. Further details of both measures should ordinarily be available shortly, but current timescales are unclear.

**European Commission responds to the COVID-19 crisis.** The [European Commission has been taking multiple measures](#) to support the EU member states in the fight against the spread of COVID-19 and for limiting its impact on public health and the economy. More measures are expected in the coming weeks. On 13 March, it [announced](#), among others, the activation of the [general escape clause](#) from EU rules on budgetary discipline and a [temporary state aid framework](#) to give member states more flexibility to further support their economies. As some member states have started closing their borders to avoid the spread of the virus, the European Commission issued [guidelines](#) to ensure continued movement of goods within the EU, especially food and medical supplies, including by establishing priority “green lanes” for freight transport. The measures taken to combat the spread of the virus and the attention that the crisis requires from EU policymakers are expected to lead to delays in the development of other policies. For example, the European Commission has postponed the adoption of the Farm to Fork and the Biodiversity Strategies to 29 April, according to its recent [indicative agenda](#). However, a European Commission spokesperson [told the press](#) that “the long-term work on the Green Deal (the European Commission’s [flagship umbrella initiative on climate and environment](#)) continues in parallel and continues to be one of the priorities.”

**The European Chemicals Agency (ECHA) has also issued COVID-19-related announcements.** ECHA announced that together with the European Commission, it will [support](#) member states and industry faced with disinfectant shortages by relaxing the rules on disinfectants under the Biocidal Products Regulation 528/2012, as well as by handling certain deadlines flexibly, including for the payments and comments on ECHA’s draft decisions on non-compliant registrations. Further details still have to be published.

**European Commission adopts a new Circular Economy Action Plan.** Following its first 2015 Circular Economy Action Plan, the [umbrella strategy](#) implements the European Green Deal. It is designed to scale-up the circular economy “from front-runners to the mainstream economic players” and contribute to “decoupling economic growth from resource use”. Among the multiple legislative and non-legislative measures that it announced or confirmed are a sustainable product policy, which will widen the Ecodesign Directive 2009/125 “to the broadest possible range of products” and possibly include sustainability principles, such as recycled content requirements. [We have published a client alert](#) with further pertinent detail.



### **European Commission publishes a plan for the revision of the Industrial Emissions Directive (IED).**

In its inception impact assessment, the European Commission notes that the recent [evaluation](#) of the IED has identified a number of broad areas where it might be improved to better contribute to the major transformation of the EU's economy to become climate neutral and circular. This includes aspects like high pollution sectors outside the current scope of the IED, comparable implementation in the member states, emissions to water, public access to information, participation in decision-making and justice, as well as the IED's contribution to the circular economy. The European Commission plans to put forward a legislative proposal in 2021 after a public consultation and impact assessment. Stakeholders can [comment on the plan](#) until 21 April.

### **European Commission publishes a plan for the revision of the Waste Shipments Regulation (WSR).**

In January 2020, the European Commission completed a three-year [evaluation](#) of the WSR. It identified various problems with the implementation of the regulation, including paper-based procedures, non-harmonised interpretations of the rules and a lack of uniform enforcement across the EU. In line with the objectives of the European Green Deal and the new Circular Economy Action Plan, the European Commission concluded that more guidance and deeper harmonisation are required. The "thorough review" of the WSR is also presented in the newly published Circular Economy Action Plan as a means to address waste exports from the EU, as well as enhancing preparation for re-use and recycling in the EU. Following a public consultation and an impact assessment, the European Commission plans to present a legislative proposal at the end of this year. Stakeholders can [comment on the plan](#) until 8 April.

### **European chemical industry association Cefic says chemical recycling accelerates safe plastic recycling.**

In its [position paper](#), Cefic presents chemical recycling as complementary to other plastic recycling options. Chemical recycling would be "capable of processing contaminated and/or mixed plastic waste which would otherwise end up in incineration". The necessary scaling-up and full deployment of chemical recycling requires that industry increases collaboration to boost innovation and investments; improves transparency and develops uniform standards "for a mass balance approach"; as well as quality standards for sorted/pre-treated plastic waste; and relies on life cycle assessments (LCAs) to measure environmental impacts. Cefic calls on policymakers to put into place a "holistic" enabling framework and ensure access to feedstock so that chemical recycling plants can effectively function.

### **European Commission is preparing a PFAS action plan.**

According to meeting notes from the Risk Management and Evaluation Platform Meeting on 11 – 12 February, submitted to [CARACAL](#), the meeting of the competent authorities for REACH and CLP, the European Commission is preparing an action plan to follow the council conclusions on PFAS. It is expected to be launched soon and finalised in summer 2020. A regulatory management options analysis (RMOA) to collect further information, explore restriction options and define scope is expected to be finalised by the end of 2020.

### **ECHA's committees conclude on five restrictions.**

ECHA's Committee for Socio-economic Analysis (SEAC) and its Committee for Risk Assessment (RAC) [adopted opinions](#) on REACH restriction proposals for siloxanes ([D4, D5 and D6](#)), widely used in personal care products. SEAC agreed on its draft opinion on a restriction of [five cobalt salts](#). RAC adopted its opinion on a proposal to restrict [skin-sensitising substances](#) in finished textile, leather, hide and fur articles, placed on the market for the first time, while SEAC postponed its draft opinion until June 2020. Both RAC and SEAC supported a proposal to restrict the manufacture or placing on the market of [PFHxS](#). SEAC supported a proposal to restrict articles releasing [formaldehyde](#), while RAC has proposed in its opinion several modifications to the scope and conditions of the restriction. Consultations on the draft SEAC opinions (cobalt salts, PFHxS and formaldehyde) will begin soon and the committee is expected to adopt its opinions at its June 2020 meeting. The committees did not reach agreement on ECHA's proposed restriction of intentionally added microplastics, and will continue discussions in June.





**ECHA adds seven chemicals to its priority evaluation list.** ECHA's updated [Community rolling action plan](#) (CoRAP) includes seven new substances, in addition to the 67 chemicals in the previous version. They are scheduled for evaluation by 17 member states in the years 2020 to 2022. The substances include 3-aminophenol and 4-aminophenol, used in personal care products, due to concerns over their skin-sensitising and mutagenic properties, and renal toxicity. Phenol isopropylated phosphate, notably used in adhesives and sealants, has also been added to the list for suspected persistent, bioaccumulative, toxic (PBT) and endocrine disrupting properties.

**ECHA compliance checks on REACH registration dossiers increased by 50% in 2019, while UBA finds at least 24% non-compliance.** ECHA [conducted](#) 301 full checks on almost 3,000 dossiers, covering 274 chemicals in 2019, an increase of more than 50% compared to 2018. Last year, ECHA and the European Commission adopted a REACH [Evaluation Joint Action Plan](#) in which ECHA set itself the goal to check all registration dossiers submitted before the 2018 deadline by 2027, with the most heavily used chemicals (over 100 tonnes a year) screened by 2023. However, in related news, the German Federal Environment Agency (UBA) found that, on average, only 45% of the data included in the registration dossiers for specific endpoints were "compliant"; an average of 24% were "non-compliant," and an average of 31% were too "complex" to reach a conclusion on compliance.

**Industry launches legal proceedings against European Commission over the ban of flame retardants.** The International Bromine Council (BSEF) [announced](#) that it is challenging the restrictions of halogenated flame retardants (HFRs) under a European Commission [regulation on ecodesign requirements for electronic displays](#), adopted in October 2019, before the EU General Court ([Case T-113/20](#)). The industry body underlined HFRs are "safe substances for their intended use, essential to preventing/delaying the start of fires especially from electronic displays, and for ensuring human safety." BSEF argues, in particular, that the European Commission failed to conduct a proper impact assessment before imposing the restriction, and exceeded its competence by restricting an entire class of chemicals. Considering that HFRs are "a major issue in the recycling of plastics of electronic displays," the regulation prohibits their use in enclosures and stands of electronic displays from March 2021.

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