

frESH Law Horizons

April 2020



Health and Safety Executive (HSE) issues open letter to the food industry on shortages of personal protective equipment (PPE) due to the COVID-19 pandemic. The [letter](#) is in response to concerns raised by bakeries, namely in relation to issues with obtaining masks (used in flour mills and bakeries to protect against flour dust), but is stated to be applicable to the entire industry. As well as specific guidance on options for using PPE with an assigned protection factor (APF) of 10 (HSE guidance is that the APF should be at least 20, e.g. FFP3 masks, but there is a recognised shortage of these masks), the HSE reminds operators of the requirements for reporting under RIDDOR and compliance with COSHH, as well as suggesting that stocks of suitable PPE should be conserved where possible. The recognition of shortages will not, however, be “carte blanche” for operators, with the HSE commenting: “During the COVID-19 outbreak we do not anticipate an increase in cases of occupational asthma. Employers that effectively control exposure to flour dust using good working practices, engineering controls and PPE will not see an increase in cases. However, whenever cases are reported, in line with our publicly available Incident Selection Criteria, we will investigate them to understand the circumstances.” However, the HSE also recognises that, in accordance with its Enforcement Policy Statement, prosecution must be both proportionate and in the public interest. Businesses using PPE should ensure they understand the guidance, keep a record of the steps they have taken to secure and/or conserve PPE, the shortages faced and resultant decisions they have taken in relation to use of alternative safeguards/equipment, so that this can be demonstrated if required in future.

HSE advice on the importance of fitting PPE correctly. The HSE has also issued general [guidance](#) on the importance of fitting PPE. It’s Chief Scientific Advisor has warned that any gaps between the wearer’s face and the mask face seal, whether through incorrect moulding of the nose clip or by facial hair, will compromise the protection of the wearer. This guidance should be taken into account in any assessment of risks relating to the provision of PPE.

Exemptions/guidance on hand sanitiser and PPE announced for duration of COVID-19. In light of shortages to healthcare workers and others, the government has announced various measures in relation to PPE and sanitiser, but exemptions will depend on matters including the formulation/specification of the relevant product and the intended recipient. Operators who intend to manufacture or import should also be aware that there are various regulatory requirements which will still apply. We have previously produced guidance on key issues relating to both [sanitiser](#) and to [PPE](#).

Novel food: reports that insects likely to be approved in the autumn. The national press has [reported](#) that the European Food Safety Authority (EFSA), which assess scientific evidence in connection with EU novel food applications, is expected to endorse mealworms, locusts, crickets and grasshoppers as being safe for human consumption. Nicola Smith delivered a webinar on novel foods and cannabidiol (CBD) developments for the Food and Drink Federation (FDF) in April, which is still available for download on their [website](#).

Review of authenticity of coconut water. The government has reported on a collaboration between the Government Chemist and the Institute for Global Food Security at Queens University Belfast to review methods and issues with determining the authenticity of coconut water. The findings recognise that global increases in demand may impact authenticity. In light of this report, suppliers of coconut water may want to take steps to verify the products they are supplying are authentic.



UK government issues guidance for businesses on modern slavery reporting during COVID-19, with deadline for statements extended for six months, where necessary.

The [guidance](#), issued by the Home Office, confirms that businesses should continue activity to identify modern slavery risks, including risks within their supply chain, and in consideration of how fluctuations in demand and changes in operating models may lead to new or increased risks of labour exploitation. However, businesses which need to delay the publication of their modern slavery statement by up to six months due to coronavirus-related pressures will not be penalised.

Court service expands guidance on telephone and video hearings and publishes data on use of audio and video technology in courts and tribunals. This includes [guidance on joining telephone and video hearings](#) and updated [general guidance on telephone and video hearings](#) (including information on communications between lawyers and clients). The [published data](#) on use of this technology indicates that, by early April, approximately 85% of cases were using audio and video technology, with a dramatic increase in the numbers (increasing from around 100 to 1,850 cases using audio from 19 March and from 150 to around 1,100 using video in the same period).

High Court confirms that offering food for sale after expiry of use-by date is an offence.

The [decision](#) followed an appeal by a supermarket against a decision of a district judge that food offered for sale beyond its use-by date was unsafe (and that expert evidence as to whether the food was, in fact, safe, was therefore inadmissible). The sale of unsafe food is an offence under the Food Safety and Hygiene (England) Regulations 2013, which provide for the enforcement of EU legislation, including general principles of food safety under the EU General Food Law Regulation (178/2002/EC) and the EU Food Information for Consumers Regulation (1169/2011/EU)(EU FIC). The EU FIC provides that where a use by date, rather than a best before date, is required, shall be deemed to be unsafe, but some commentators had previously considered that it should be possible to demonstrate that it was, in fact, safe. There is, however, a “due diligence” defence available.

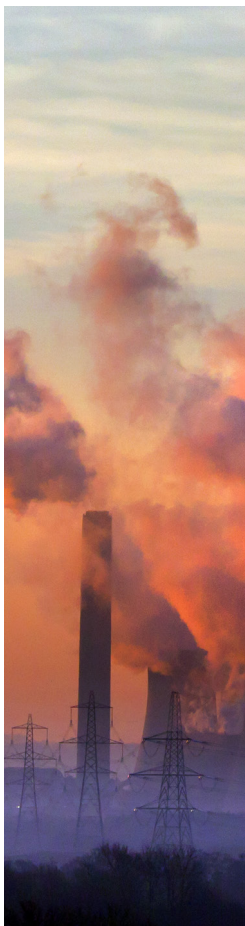
Court of Appeal holds that trial judge was wrong to admit guilty plea of co-defendant.

The [case](#) was a trial for a closed conspiracy of perverting the course of justice. The trial judge directed the jury that the plea of the co-defendant was some support for the prosecution witnesses accounts, but was not otherwise of significance, but nevertheless, the court held that the plea should not have been admitted into evidence and the conviction was unsafe. The decision will also be relevant to other conspiracy charges, although it does not provide a clear test for identifying those cases where a co-defendant plea should be and those where it should not.

The UK Medicines and Healthcare Products Regulatory Agency (MHRA) is [Investigating 14 Cases of Fake or Unlicensed COVID-19 Medical Products](#). An increasing number of bogus medical products being sold through unauthorised websites claiming to treat or prevent COVID-19 are being investigated by the MHRA, including self-testing kits, “miracle cures,” “antiviral misting sprays” and unlicensed medicines. MHRA has pointed out that, as yet, there are currently no medicines licensed specifically for the treatment or prevention of COVID-19 and there are no CE marked self-testing kits approved for home use. The MHRA has also disabled nine domain names and social media accounts selling fake or unauthorised COVID-19 products.

The UK Government published its first [Modern Slavery Statement](#). The statement says that modern slavery is so pervasive that it is likely to exist in the supply chains of the goods and services purchased by governments across the globe, from technology that they buy to the construction projects they fund. It recognises that all governments have a responsibility to ensure taxpayers’ money does not inadvertently fund criminal activity and to protect vulnerable workers in their supply chains from exploitation. This new statement explains the steps that the UK government took in 2019 to identify, prevent and mitigate modern slavery in its operations and supply chains. Ministerial government departments will publish their own modern slavery statements annually, starting from financial year 2020/21. These first individual departmental statements will be published by 30 September 2021.

European Automobile Manufacturers Association and others ask EU to delay new CO2 emissions rules. Their [letter](#) to Ursula von der Leyen, President of the European Commission, calls, amongst other things, for the timing of incoming EU laws and regulations to be adjusted in light of the impact of COVID-19 on the motor industry. This would include the upcoming [CO2 emission standards for cars and vans](#).



COP 26 climate meeting [postponed](#) until spring 2021 due to COVID-19. In an anticipated announcement, the government recently confirmed that the climate conference that was due to take place in Glasgow in November 2020 has been postponed until next year. However, the business secretary, Alok Sharma, who will chair the meeting, has since confirmed that the UK will be proposing an “ambitious” nationally determined contribution (NDC) to the Paris Agreement “to complement our net zero commitment.” This is different to the previously announced position that the NDC would be based on the fifth carbon budget, which requires emissions to be cut by 61% by 2032 but was set when the 2050 target was for an 80% reduction by 2050 rather than the target of 100% which is now in place.

Environment Agency (EA) issues COVID-19 enforcement relaxations. At least 13 new [Regulatory Position Statements](#) (RPS) have been issued by the EA representing a relaxation of requirements in a variety of areas affected by the pandemic, such as environmental permitting and waste management. These include temporary lifting of the requirement to sign waste transfer forms, delays to permit reporting deadlines, extension of waste storage rules, relaxing rules for waste disposal of infectious waste and removal of penalties for packaging producers who were unable to re-register with a compliance scheme. If a company follows the terms of an RPS, it does not mean that the action is not a breach of the law, but the EA has determined that the issue is of a low risk to human health and the environment and will not normally take enforcement action. The EA has also extended the expiry date on existing [RPS 211](#) regarding classification of waste from unplanned utility works (not requiring hazardous waste classification) from 30 April to 31 October 2020.

Government issues [Decarbonising Transport – Setting the Challenge](#), a document stating the current challenges and steps to be taken when developing the transport decarbonisation plan, including the challenge the UK needs to meet to reduce transport emissions and ensuring it reaches net zero transport emissions by 2050. The transport decarbonisation plan itself will be published later in 2020 and will set out the policies and plans needed to tackle transport emissions. This document marks the start of this process and is intended to describe where we are today and the size of emissions reduction we need. One key aspect is the shift to active and public transport: “Public transport and active travel will be the natural first choice for our daily activities. We will use our cars less and be able to rely on a convenient, cost-effective and coherent public transport network.”

There have been many reports on COVID-19 and air pollution. On the one hand there have been marked drops in air pollution in many urban areas, and discussions about how the pandemic will affect air pollution in the short and long term, including this [ENDS](#) article by Anita Lloyd (subscription required). On the other hand, there is a growing concern about the possible link between COVID-19 and air quality, with [research](#) showing that air pollution can exacerbate the virus’ spread. A group of independent government advisers, backed by the Department for Environment, Food and Rural Affairs (DEFRA), is calling for evidence about the ongoing changes in UK air quality due to COVID-19. Other air quality developments include widespread postponement of planned clean air zones in large cities, including [Manchester](#), [Birmingham and Leeds](#), again due to the COVID-19 crisis.

Court of Appeal rejects claim against solicitors over largest ever environmental fine imposed on an individual. In [Day v Womble Bond Dickinson](#), the court rejected businessman Philip Day’s claim that his solicitors had been negligent in representing him in criminal proceedings under the Wildlife and Countryside Act 1981. Those proceedings related to unlawful felling of trees and damage to a site of special scientific interest (SSSI), on land owned by Mr Day, in which he was fined £450,000 in 2013. He unsuccessfully appealed that fine and then turned his attention to his legal team claiming breach of contract and/or negligence. This claim was struck out in 2019 and he appealed, again unsuccessfully (except in one respect). One key message from the court was that “it is a rule of law and a manifestation of public policy that a civil court will not award damages to compensate a claimant for a disadvantage which the criminal courts have imposed on him or her by way of punishment for a criminal act for which he or she was responsible.” Only one aspect of Mr Day’s claim survived – an alleged increase in his own legal costs as a result of alleged negligent advice to elect Crown Court trial, so this aspect will potentially continue.



European Commission published [guidance on waste shipments during COVID-19](#)

pandemic. The practical guidance for member states addresses how to keep waste shipments moving during the pandemic while maintaining a high level of protection of public health and the environment. This includes priority “green lanes” at customs, using electronic documents where possible and taking account of current challenges when applying the usual rules on requirements for information to be provided in advance. It has also published guidance on [waste management in the context of the coronavirus crisis](#), which addresses the need to prevent and reduce disruptions in the provision of waste management services whilst ensuring a high level of protection of human health and the environment.

The OECD published a [briefing](#) on how to incorporate environmental gains in to the economic recovery following COVID-19.

It calls on governments to evaluate the environmental impact of new fiscal measures, commit to maintaining environmental standards, and to equate environmental health with individual health. The EU has already announced that it will seek to stimulate the green economy in its post COVID-19 recovery measures.

HSE sets out its [arrangements for regulating chemicals during the coronavirus pandemic](#).

This covers administrative changes about the best way to contact HSE and links to other pages with further information about specific provisions for different chemical regulatory regimes. The HSE also issued [guidance on social distancing, keeping businesses open and in-work activities](#) and a [joint statement](#) with the Trades Union Congress and the Confederation of British Industry, clarifying that many businesses are not required to close, but must implement safe working practices.

European Commission [consults](#) on its 2030 climate target plan, as part of the EU Green Deal. The Green Deal committed the Commission to present a plan by this summer to increase the EU’s 2030 greenhouse gas reduction target to at least 50% and towards 55% of 1990 levels. This consultation seeks comments on the opportunities and challenges associated with an increased 2030 target and the policies and actions needed to achieve it. The consultation is open until 23 June 2020.

Permission refused for judicial review of HS2. Environmental campaigner Chris Packham made the application ([Packham v Secretary of State for Transport](#)) to challenge the government’s decision to proceed with HS2 on various environmental grounds, including climate-related issues. The High Court refused permission to proceed with an application for judicial review and found all four grounds of the claim to be unarguable so the claim did not have a realistic prospect of success. It is understood that Chris Packham is going to apply for permission to appeal the High Court’s decision.

Department of Business, Energy and Industrial Strategy (BEIS) has published a [consultation](#) on extending the Climate Change Agreement scheme.

The scheme, due to end in 2023, gives qualifying companies substantial discounts on climate change levy rates if they meet energy efficiency targets. As indicated in the government budget in March, BEIS is proposing to extend the scheme to 2025, and also to open it to new entrants (no new entrants have been allowed since 2018). The consultation requests views on various proposals, including changing the energy-use baseline year from 2008 to 2018, to take into account “significant changes to facilities other than energy-efficiency improvements”, and altering eligibility criteria.

DEFRA has published an updated version of its [core environmental permitting guidance](#).

The main changes are to the layout (a new template), update to Chapter 9 (operator competence) and minor updates to legislative references in rest of document. Annex 2 is also deleted (which was a tabular summary of the requirements for different activities, installations and operations)

DEFRA has [delayed](#) the ban on plastic straws, stirrers and cotton buds until October

2020. The ban was due to take effect in April 2020, but is being deferred to avoid additional burdens on businesses during the COVID-19 pandemic. In reality, many of the businesses that would be affected by the ban, such as pubs and restaurants, are closed because of lockdown and social distancing rules.



Draft legislation would give the EA powers to access mobile phone data to help it fight serious and organised waste crime. [The Investigatory Powers \(Communications Data\) \(Relevant Public Authorities and Designated Senior Officers\) Regulations 2020](#) have been laid before Parliament and would expand the scope of the Investigatory Powers Act 2016 to add the EA (and four other bodies) to the list of public bodies with powers to obtain communications data. This development follows the [2018 review into serious and organised crime in the waste sector](#) which recommended “regulations under Part 3 of the Investigatory Powers Act 2016 to allow the [EA] to acquire communications data to tackle serious and organised waste crime, mobile phone records being an example”.

European Commission takes further measures addressing the COVID-19 crisis. As member states have started to gradually lift confinement measures, the European Commission has continued to issue practical guidance on the application of EU law during the crisis, including on [testing methodologies](#) and [data protection rules](#) for apps used in the fight against COVID-19. A [Temporary Framework Communication](#) helps companies, in particular in the pharmaceutical sector, which are willing to temporarily coordinate their activities to avoid supply shortages, with assessing antitrust issues. A dedicated [webpage](#) is available for companies seeking informal guidance on specific initiatives. There is also a [Joint European Roadmap](#) introducing a set of criteria and sanitary measures that countries can use when lifting their national lockdowns. In the Roadmap, the Commission announced it would develop a recovery plan based on an updated proposal for the next long-term EU budget.

EU discusses the impact of COVID-19 on the European Green Deal. Some members of the European Parliament (MEPs) [called](#) on the European Commission to “radically scale back its pre-crisis regulatory ambition and re-examine its political priorities” to allow for an economic recovery after the crisis. However, many policymakers see recovery as an opportunity to implement a paradigm shift in line with the [overarching climate and environment agenda](#) that the European Commission has committed to. [Seventeen](#) member states [called](#) for a “green recovery,” which would entail strengthening the “EU’s effective regulatory tools [...], environment standards and sectoral policies, and mak[ing] them more effective at reducing emissions in the most cost effective way while providing a path for European businesses into the future green and circular economy.” The European Parliament adopted a [resolution](#), which calls for a post-COVID 19 recovery with the European Green Deal “at its core”.

European Commission to update its 2020 Work Programme. In light of the COVID-19 crisis, the Commission is [preparing](#) an update of its Work Programme for 2020. Most policies under the European Green Deal should remain on track, whereas initiatives considered “less essential” could be postponed. Possible delays might notably affect the Farm to Fork Strategy (initially planned for Q1) and the Chemicals Strategy for Sustainability (initially planned for Q3). The legislative initiative on empowering consumers will likely be postponed to 2021.

European Commission amends REACH to increase the number of registration compliance checks. With the adoption of [Regulation 2020/507](#), the Commission has increased the percentage of REACH registration dossiers to be checked by the European Chemicals Agency (ECHA). ECHA will have to check 20% of dossiers by 2023 for substances registered in very high volumes (over 100 tonnes per year) and 20% by 2027 of dossiers for substances registered in lower volumes (1 – 100 tonnes per year). This amendment follows the assessment that a significant number of registration dossiers do not comply with the REACH Regulation (please see [frESH Law Horizons](#) September 2019).

European Commission prohibits PFOA as POPs. The Commission adopted a delegated regulation placing PFOA, its salts and PFOA-related compounds, on the list of prohibited substances, i.e. Annex I of Regulation 2019/1021 on Persistent Organic Pollutants (POPs). It establishes a limit value at 0.025 mg/kg for PFOA and its salts and at 1 mg/kg for PFOA related compounds, when occurring as an unintentional trace contaminant in substances, mixtures and articles. The derogations allowed under the REACH regulation will continue to apply until 3 December 2020, to allow for a transitional period. The POPs regulation implements a decision by the Conference of the Parties to the Stockholm Convention to ban the substance, with some exceptions. It is supposed to apply from 4 July 2020, pending its entry into force, which is subject to neither the European Parliament nor the Council raising objections within two months.





European Commission authorises uses of chromate under REACH. The Commission adopted decisions authorising certain uses of [pentazinc chromate octahydroxide](#), [dichromium tris \(chromate\)](#) and [potassium dichromate](#), which are included in Annex XIV of the REACH regulation. The authorised uses are mostly in the aeronautic and aerospace sectors. The Commission must review the authorisations for pentazinc chromate octahydroxide and dichromium tris (chromate) by January 2026, and by September 2024 for potassium dichromate.

CARACAL debates inclusion of hazard class for endocrine disruptors in CLP. In February 2020, the last meeting of the sub-group on endocrine disruptors (CASG-ED) of the Competent Authorities for REACH and CLP ([CARACAL](#)) discussed the inclusion of endocrine disruptors (EDs) as a new hazard class in the Classification, Labelling and Packaging (CLP) Regulation 1272/2008. The group did not agree on several issues, including whether the EU should incorporate EDs into CLP before or after the international system for classification of chemicals (GHS) includes them. Some member states remained reluctant to have ED recognised as an intrinsic hazard property. Discussions are expected to continue over the coming months, including at United Nations level. In the meantime, the Commission is expected to present the results of its evaluation of EU legislation on EDs during the second quarter of 2020 (with possible delays due to COVID-19).

ECHA makes recommendations for biocidal active substance used in disinfectants. The European Chemicals Agency issued [recommendations for](#) the composition of the biocidal active substance chlorine released from sodium hypochlorite, hydrogen peroxide and peracetic acid to be used in disinfectant products. Their objective is to ensure that these products are used safely and prove optimal efficacy in the context of the COVID-19 sanitary crisis. ECHA recently relaxed its rules on biocidal products used in disinfectants. An [FAQ document](#) provides further details.

European Court of Justice clarifies waste holders' obligations regarding possibly hazardous waste. In joined [Cases C-487/17- C-489/17](#), the European Court of Justice issued a preliminary ruling clarifying that, under the Waste Framework Directive, the holder of waste whose composition is not immediately known is responsible for determining its hazardous properties. If the assessment does not lead to a certain conclusion, the waste must be classified as hazardous, following the precautionary principle. Commission Decision 2000/532 clarifies that, in order to identify whether waste is hazardous or not, account must be taken of the origin and composition of the waste. According to the Court, this implies that the responsibility falls on the waste holder as the party responsible for its management. The Court answered the request of the Italian Supreme Court in relation to criminal proceedings brought against a large number of people accused of treating waste as non-hazardous where it could have been assigned a "mirror code" as either hazardous or non-hazardous.

Contacts



Rob Elvin
Partner, Manchester
T +44 161 830 5257
E rob.elvin@squirepb.com



David Gordon
Partner, Birmingham
T +44 121 222 3204
E dave.gordon@squirepb.com



Ken Huestebeck
Associate, Brussels
T +322 627 11 02
E ken.huestebeck@squirepb.com



Nicola A. Smith
Director, Birmingham
T +44 121 222 3230
E nicola.smith@squirepb.com



Anita Lloyd
Director, Birmingham
T +44 121 222 3504
E anita.lloyd@squirepb.com



Gary Lewis
Director, Manchester
T +44 161 830 5373
E gary.lewis@squirepb.com