

frESH Law Horizons

August 2020



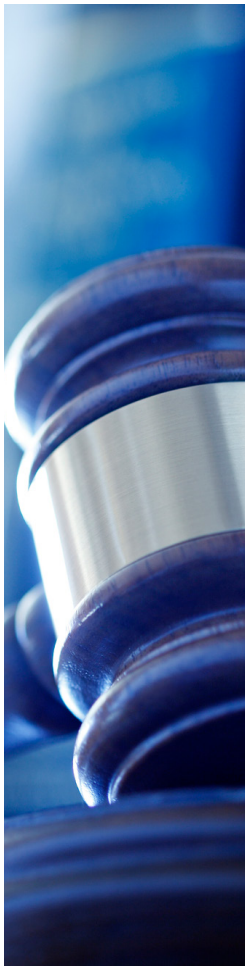
COVID 19: Amendments to requirements for face coverings introduced. On 6 August, further [regulations](#) were introduced in England updating obligations to wear a face covering in public places, to additionally include (amongst others) public areas of hotels and hostels, concert halls, exhibition halls, cinemas, museums, galleries, aquariums and bingo halls (with the exception of employees, children under 11, temporary removal to eat/drink/take medication and those with a “reasonable excuse,” such as a relevant medical condition). Face coverings were, of course, already required to be worn in shops and the definition of shops has now been extended to include premises providing professional, legal or financial services, vets, theatres, nightclubs and conference centres. The government [guidance](#) has been updated to reflect the changes. Changes have also been introduced in Scotland (under separate [legislation](#)).

COVID 19: Health and Safety Executive (HSE) checks Swindon businesses are “COVID-secure”. Following reports of increased cases of infection in the area, the HSE [announced](#) the checks, alongside Swindon Council. The HSE announcement indicates that inspectors are finding some common issues across a range of sectors that include failing to provide arrangements for monitoring, supervising and maintaining social distancing; failing to introduce an adequate cleaning regime, particularly at busy times of the day; and providing access to welfare facilities to allow employees to frequently wash their hands with warm water and soap. It is possible that some businesses are becoming complacent in relation to safeguards introduced and this announcement is a reminder that action can be taken by regulators.

Court of Appeal determines that expert evidence on survival is not sufficient for the jury to conclude causation in a gross negligence manslaughter case. Although the case involved the supply of illegal drugs, the [judgement](#) will potentially be relevant to corporate manslaughter cases, because where a workplace accident has resulted in death, directors can be found guilty of gross negligence manslaughter if there has been a gross breach of a duty of care owed to the deceased (which essentially amounts to knowing that a dangerous state of affairs existed and taking no reasonable steps to stop it). One of the elements that must be proven by the prosecution, as set out in the judgement, is that the breach of the duty caused or made a significant (i.e. more than minimal) contribution to the death of the victim. The prosecution in this case had sought to establish that, at the time when there was a serious and obvious risk of death, the appellant was grossly negligent in failing to obtain medical assistance and that such assistance would have saved the deceased’s life. There was expert evidence relied on by the prosecution, which said that the deceased in this case would have had a 90% chance of survival if medical help had been obtained at the time when the duty existed. However, the Court of Appeal said that of itself was not enough, as in its judgement, that left a realistic possibility that she would not have lived and, therefore, this did not meet the criminal standard. As such, medical practitioners may well be asked in future to give medical opinions addressing the criminal burden of proof on the prosecution.

A concrete manufacturer was fined £285,000 following two separate incidents. The press release from the HSE included comments from the inspector in relation to the first incident, that the company should have identified the risk of crushing between passing machines on the production line and that a safe system of work should have been devised and implemented, including a designated place of safety where operators were required to stand as a machine passed.





The government has launched an independent review of the judicial review process.

The [announcement](#) by the government sets out the intention for an expert panel to examine the need for potential reforms, as part of government plans to balance citizens' rights and effective governance. The judicial review can provide scrutiny over decisions of regulators, such as the HSE and local authorities that impact upon complainants, and indeed decisions of the courts, but is often seen as expensive and time consuming.

Court of Appeal decides that the use of Automatic Facial Recognition by South Wales

Police was unlawful. The [case](#) concerned the use of automated facial-recognition technology by South Wales police. The Surveillance Commissioner has [welcomed](#) the decision and also indicated that current guidance to police forces will be amended to ensure awareness of the potential bias in systems. He also urged the Home Office to update the current [Code of Practice](#).

Proceeds of crime confiscation order quashed by Court of Appeal as disproportionate.

The [case](#) involved an individual who had dishonestly obtained employment and who had pleaded guilty to offences of fraud by false representation and obtaining a pecuniary advantage by deception. The judge had assessed the benefit as being over £640,000, representing the net pay received by the appellant over the 10 years of his dishonestly obtained employment. The Court considered the earlier case of *Waya* and the amendment of the Proceeds of Crime Act 2002 (**POCA**) to refer to circumstances where it would be "disproportionate" to require the defendant to pay the relevant amount. They found that in this case, the order was, indeed, disproportionate, because the defendant had carried out the work that he had been paid for and, therefore, this was full restoration of the amount received (as such the confiscation would amount to "double recovery"). The case is another example of how the correct application of POCA is often unclear and how the amounts involved can be significant (and, indeed, dwarf any fine imposed for the offence itself).

Environment Agency (EA) POCA award also [held not to be disproportionate by Court of Appeal](#).

Two individuals had been subject to a POC award of £276,000 following illegal waste site operations, being the amount the EA considered to be their "criminal benefit" from the illegal activity. They appealed the award on the basis that it was not correct for the POC award to have included the "pecuniary advantage" of having avoided paying the costs of removal of contaminated waste stored on their site. They argued that any such pecuniary advantage was not connected to the offences they had been charged with, and was, in any event, disproportionate. The Court of Appeal gave short shrift to the arguments and dismissed the case and found that the appellants were, indeed, "sparing themselves the costs of removing the waste from the site in accordance with their obligations." The Court did however find a different error in the calculations, related to a jointly owned property. The case will now be sent back to the Crown Court.

Landmark [Irish court decision on climate change](#).

Ireland's supreme court has quashed the Irish government's climate action plan on the basis that it falls "a long way short of the sort of specificity which the statute requires." Perhaps the most interesting aspect of the case related to human rights. The claimants, Friends of the Irish Environment (FIE), cited the recent Dutch "Urgenda" case, which had required the Dutch government to reduce CO2 emissions by at least 25% by 2020 from 1990 levels after finding that ministers were in breach of the European Convention on Human Rights. However, the Irish court found, in contrast to the Urgenda case, that FIE did not have legal standing to make a claim based on a human rights breach because it was a "corporate entity" that does not enjoy the same rights as individuals. That leaves open the possibility that individuals may have sufficient legal standing to claim that "climate change measures (or the lack of them) might be said to interfere with the right to life or the right to bodily integrity," as set out in the Irish constitution.

Chris Packham loses HS2 challenge but Council's case continues. As reported in previous editions, Conservationist Chris Packham has been challenging the government on climate grounds over HS2 proposals. In April, his application for judicial review was refused and his appeal against this decision has now been [rejected](#) by the Court of Appeal. The Court concluded that there was no evidence "that the government either ignored or misunderstood the legal implications of proceeding with HS2 for its obligations relating to climate change." In another case about HS2, the London Borough of Hillingdon (LBH) originally refused planning permission for a HS2 ecological mitigation site, but the Secretary of State (SoS) granted it on appeal, then LBH sought to judicially review the SoS decision and the High Court [dismissed](#) its challenge. However, the Court of Appeal has [allowed](#) LBH's appeal and remitted the case back to the High Court for reconsideration.



The Chemical Industries Association warns that Brexit could cost the sector more than £1 billion unless a data-sharing deal can be agreed with the EU. In an article in the [Financial Times](#), chief executive Steve Elliott highlighted the potential substantial costs for the UK chemical industry in securing duplicate UK-REACH registrations, largely due to concerns about access to the data used for existing REACH registrations. UK and EU chemical sector associations are calling for a data sharing agreement, but the UK's draft negotiating document refers to a memorandum of understanding being reached by the end of 2021, which leaves an extended period of uncertainty on this issue.

Welsh government consults on single-use plastic ban. The proposal is to ban businesses in Wales from providing specified single-use plastic items to consumers – the items being the same ones put forward by the EU single-use plastic directive, namely plastic cotton buds, cutlery, plates, drink stirrers, straws, balloon sticks, expanded polystyrene food containers and cups, and oxo-degradable plastic products. The consultation is open until 22 October 2020, and the proposed ban will take effect in autumn 2021, enforced by local councils and a civil sanctions regime, including fines.

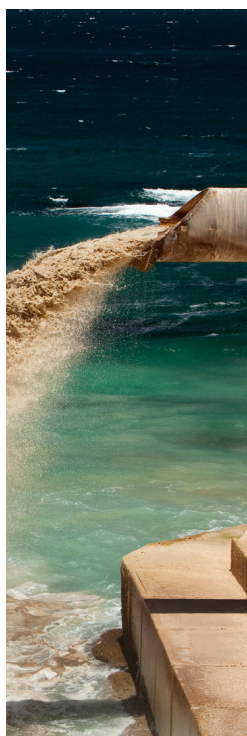
Waste company Biffa calls for environmental permitting reform. On the back of the government's recent announcements on planning reform, Biffa has said there needs to be a review of the EA's permitting system to facilitate development of necessary waste infrastructure to further aid the green recovery. This echoes earlier calls from the Environmental Services Association for the [overhaul of permitting](#) to support economic recovery post-COVID-19, citing the current "significant barriers in the regulatory process caused by a lack of permitting capacity at the [EA], which is currently resulting in vital projects being unnecessarily delayed for months and, in some cases, years".

Climate Change Agreement (CCA) scheme extended until March 2025. The Department for Business, Energy and Industrial Strategy (BEIS) has extended the CCA scheme for two years, until March 2025. This means there will be a new fifth target period from 1 January 2021 to 31 December 2022. Eligibility criteria are not changing. BEIS confirmed this in a [consultation response](#) following a consultation earlier this year. The new closing date for applications is 30 November 2020 and BEIS advises companies to speak to their sector association for advice on the application process, their timescales and the CCA targets for the two-year extension.

EA (temporarily) amends [environmental permitting charging guidance](#) to clarify charges for pre-application advice. The net effect is that those applying for A1 permits for installations will not receive any free pre-application advice between 1 August 2020 and 1 February 2021, due to "high demand on our National Permitting Service and reduced capacity because of the coronavirus pandemic". Until February 2021, the EA will only offer free pre-application services for permit applications on heritage and nature conservation screening and intensive farming ammonia screening. A limited chargeable advice service will, however, be available to answer specific technical questions about aspects of applications. This development has not been very well received by industry commentators!

Court of Appeal holds that the amendment to the London congestion charge racially discriminates, but its aim of reducing pollution and congestion renders it lawful. The Court dismissed the appeal by the Independent Workers Union of Great Britain (IWU) regarding the removal of an exemption to the congestion charge for non-wheelchair-accessible private hire vehicles/minicabs (but it was retained for the official London taxis). IWU's case included claims that the change was discriminatory because London taxi drivers are (according to diversity data) predominantly from white backgrounds, whereas 94% of minicab drivers were from black and minority ethnic (BAME) backgrounds. The Court held that the measure was proportionate and there were no less burdensome means to achieve the aim of reducing congestion. The judgment included the following statement: "The measure and its discriminatory impact on BAME minicab drivers was, in my judgment, justified by the legitimate aim of reducing traffic, congestion and pollution. If nothing were done to stem the growth of minicabs in the zone, overall future traffic increases were inevitable."





National Infrastructure Commission (NIC) says renewables should meet two thirds of electricity needs by 2030.

Its [latest analysis](#) shows sharp falls in the cost of renewable electricity technologies and the relative speed with which they can be built. NIC, therefore, concludes that Britain should aim for renewables to meet 65% of electricity needs by 2030, which can be delivered at the same overall cost as meeting only half of total demand by that date. NIC's report also notes that "renewables alone cannot create a resilient energy system for future decades, and that further work on new storage technologies, efficient interconnectors and other innovations are needed to support renewables and ensure the security of the electricity system. This could include an increased role for low carbon hydrogen generation".

The [Road Vehicles \(Approval\) Regulations 2020](#) on UK type approval have been issued.

They provide for enforcement in the UK of Regulation 2018/858 on road vehicle type approval (which replaces Directive 2007/46/EC from 1 September 2020). The regulations re-enact and enhance the domestic penalties for non-compliance with the requirements or for misconduct during the type approval process. They come into force on 1 September 2020.

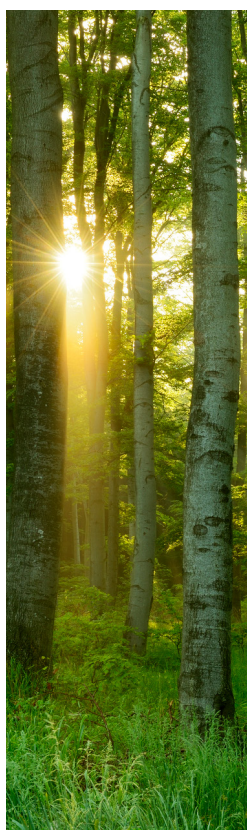
The Department for Food and Rural Affairs (DEFRA) has issued details of how it will monitor and evaluate the progress of its 2018 [Resources and Waste Strategy](#). [Monitoring Progress](#) and the [Resources and Waste Strategy Evaluation Plan](#) detail how the government will monitor its key strategic resource and waste objectives and how policies implemented as part of strategy will be evaluated. Going forward, these documents will be published annually to track and evaluate progress.

DEFRA has launched a [consultation](#) on its [Waste Management Plan for England](#). The Plan is intended to fulfil the requirements of the Waste (England and Wales) Regulations 2011 (for the waste management plan to be reviewed every six years) and it is intended to bring existing waste management policies (e.g. in planning policy and the Resources and Waste Strategy) under the umbrella of one national plan. The Plan focuses specifically on waste arisings and their management, provides an analysis of the current waste management situation in England and evaluates how the Plan will support implementation of the objectives and provisions of the 2011 Regulations. The consultation is open until 15 October 2020.

Government actuary helps produce guide for users of climate-related financial disclosures. An actuary from the Government Actuary's Department (GAD) has helped produce a [user guide](#) for users of disclosures made under the Task Force on Climate-related Financial Disclosures (TCFD) recommendations. The guide can help individuals gain insights from TCFD disclosures. The guide provides an overview of climate-related financial disclosures and TCFD recommendations, outlines how users of disclosures can set effective objectives and provides practical guidance to help users interpret disclosures organisations have made.

Plan B receives [response](#) to its threat to challenge the COVID-19 loans on climate grounds.

As reported in last month's edition, environmental charity Plan B wrote to the prime minister asserting that the economic recovery programme would be unlawful unless the government explains how it is compatible with both the net zero target and the Paris Agreement. The government response indicates that any such challenge would be out of time because the funding was announced more than three months ago. Even if the case was admissible, the government "does not accept that the absence of climate change conditionality in the CCFF is incompatible with its climate obligations". The response also dismisses the human rights arguments raised by Plan B on the basis that this loan fund did not create any new climate risks. It is understood that Plan B is now working on a formal legal claim.



Government sets out priorities for new Environment Bill targets. A new [policy paper](#) provides a roadmap for developing the evidence base, signalling how the government will be engaging key stakeholder groups and how it will provide updates more widely. Once proposed targets are developed, businesses, communities and civil society will have an opportunity to share their views in response to a public consultation that is expected in early 2022. The paper is in three sections: A) The process for developing targets under the Environment Bill Framework; B) Overview of the scope of targets that government is considering; and C) Sources of target information and how you can get involved. In relation to target development, key points to note are that multiple targets are being considered for each of the areas in which targets are required under the Environment Bill (namely air quality (including fine particulate matter (PM2.5)), biodiversity, water, and resource efficiency and waste reduction). The initial targets should be finalised by October 2022.

The Joint Unit for Waste Crime (JUWC) has [raided an illegal waste site in Lancashire](#). JUWC is made up of the UK's four environmental regulators, the National Crime Agency, HMRC and the police, and was established earlier this year in response to the recommendations of the [Serious and Organised Waste Crime Review](#) in November 2018. The site was operated by two skip hire firms and the JUWC press release indicates that an estimated 50,000 tonnes of waste has been landfilled, as well as mixed waste being present in skips. An investigation is ongoing into alleged illegal waste activities at the site, including the handling and storage of scrap metal, the landfilling of mixed waste and illegal burning.

DEFRA has issued a [consultation on due diligence on forest risk commodities](#) seeking views on whether the UK government should introduce a new law designed to prevent forests and other important natural areas from being converted illegally into agricultural land. The proposed law would require some larger businesses to ensure that the "forest risk" commodities they use – commodities that can cause wide-scale deforestation (such as beef, cocoa, leather, palm oil, rubber and soya) – have been produced legally. It would also be illegal for those businesses to use forest risk commodities that have not been produced in accordance with relevant local laws, and they would need to undertake due diligence to ensure this is the case. This consultation will be of relevance to any large UK companies using any of the products mentioned above, or any other product associated with deforestation. The consultation is open until 5 October 2020.

BEIS published updated [guidance on meeting climate change requirements from January 2021](#). On 7 July 2020, the European Commission published a [notice to stakeholders](#) advising on technical issues in relation to the end of the Brexit transition period. BEIS have updated this guidance note to reflect that notice.

Government consults on [taking action on climate risk: improving governance and reporting by occupational pension schemes](#). The consultation seeks views on policy proposals to require trustees of larger occupational pension schemes and authorised schemes to have effective governance, strategy, risk management and accompanying metrics and targets for the assessment and management of climate risks and opportunities. It also invites responses on proposals to disclose these in line with the recommendations of the international industry-led TCFD. Proposals include calculating the "carbon footprint" of pension schemes and assessing how the value of the schemes' assets or liabilities would be affected by different temperature rise scenarios, including net zero/Paris Agreement ambitions. The disclosures would be required to be made publicly available, referenced from the schemes' annual reports and accounts, and pension savers informed of the availability of the information via their annual benefit statement.

EA publishes its [response to consultation on standard rules permits for mattress recycling, tyre recycling, and paper, card and plastic bulking](#). The proposed new standard permits will offer higher storage quantities than previously permitted.



EA publishes its [response to consultation](#) on draft technical guidance on appropriate measures for permitted facilities that transfer or treat chemical waste. The response summarises stakeholder responses and explains the EA's chosen approach, including adjusting parts of the draft guidance in response to feedback.

The [Climate and Ecological Emergency Bill](#) (a private member's bill) is due to be tabled in the first week of September. It has been prepared by the CEE Bill Alliance, and is a team of scientists, academics, lawyers and campaigners calling for urgent, far-reaching and necessary actions from the UK government to tackle the climate and ecological emergency. The Bill will set an emergency path for the UK to follow, including a citizens' assembly, with the objective of ensuring that the UK plays its fair and proper role in limiting global temperature increase to 1.5°C.

DEFRA [confirms](#) increase and extension of plastic bag charging scheme from April 2021. The bag charge will be extended to apply to all retailers (not just large organisations) and will be increased from 5p to 10p. The existing measures, which have been temporarily suspended for bags supplied as part of a grocery delivery or collection service until 21 September 2020 due to COVID 19, have already led to a 95% cut in plastic bag sales in major supermarkets since 2015.

Amendments to the EU poison centre notification rules have been adopted. The amendments are to [Article 25](#) and [Annex VIII](#) of Regulation 1272/2008 on classification, labelling and packaging of substances and mixtures (CLP). The amendments provide special provisions for interchangeable component groups, bespoke paints, certain mixtures that have specified formulas (cement, gypsum binder and concrete) and certain fuels.

Stakeholders comment on plan of the European Commission (Commission) to revise EU packaging rules. The Commission has [received](#) 110 comments on its inception impact assessment to revise the Packaging and Packaging Waste Directive (please see our [June](#) edition). Amongst other things, the Commission intends to make all packaging reusable or recyclable in an economically viable manner by 2030 and considers banning the use of certain materials in certain applications, as well as recycled content requirements for certain applications. The comments reflect the breadth of the packaging value chain from raw material producers and the chemicals industry and packaging producers, packaging users, such as brand owners and retailers, to extended producer responsibility (EPR) organisations, waste managers and recyclers, as well as NGOs. The vast majority of industry organisations focused on maintaining the single market for packaging and packaged products and on packaging functionality, with [FoodDrinkEurope](#) referring to a "freedom of packaging". Representatives of the chemical industry, such as [Cefic](#), promoted chemical recycling. Multiple representatives of the waste management and recycling sectors, implicitly or explicitly, such as [FEAD](#), supported making the use of recycled content mandatory. NGOs, such as the [Rethink Plastic alliance](#), strongly supported packaging waste prevention measures and increasing reuse. The Commission is expected to open a public consultation in the form of a survey later this year.

The Commission is not expected to immediately pursue binding targets for methane emissions. In July, the Commission presented its [roadmap for an EU Methane Strategy](#). The strategy will outline how the EU plans to reduce methane emissions, focusing on three main sources: energy, agriculture and waste. The Commission received 130 comments on that roadmap. According to media reports, including by [Reuters](#), which are based on a leaked draft of the strategy (not publically available), the strategy will not seek binding targets on methane emissions, but will state the Commission's intention to "explore" them in the future. The immediate focus, however, would be on actions to better monitor and report methane emissions, and ways to require that methane leaks are repaired. The Commission wants to establish "an independent and qualified international methane emissions mechanism," which would first cover emissions reductions from the energy sector but extend to the waste and agriculture sectors "once monitoring and reporting methodologies are defined." The leaked draft also encourages farms to collect and use organic waste and convert it into biogas. After a previous leak had reportedly not included any details on how to tackle emissions from the waste sector, the recent document addresses landfill sites, sewage sludge treatment plants and leaks from biogas plants. The Commission is expected to adopt the strategy at the end of September. The Commission could develop a legislative proposal in 2021 to implement it.



The Commission proposes EU position on Basel Convention on Control of Transboundary Movements of Hazardous Wastes.

The Commission has adopted a [proposal for a Council Decision](#) for 15th meeting of the Conference of the Parties (CoP-15). It foresees that the [EU will submit amendments](#) clearly distinguishing the terms final disposal and recovery, and also a clarification that “interim operations” are covered. Further amendments would update and clarify the descriptions of operations in line with scientific, technical and other developments since the Convention was adopted, and ensure that all operations not specifically mentioned are covered. The Convention has 187 parties, including the EU, as well as its member states. As usual, the decision foresees empowering the representatives of the EU (i.e. the Commission), to refine the EU’s position during CoP-15, which will take place in July 2021.

Lead chromate company does not plan to “reapply” for REACH authorisation.

DCC Maastricht, representative of Canada-based paint manufacturer Dominion Colour Corporation (DCC), will reportedly not seek to extend the validity of the authorisation to sell pigments containing lead chromates in Europe beyond May 2022. A spokesperson of the European Chemicals Agency (ECHA) [told Chemical Watch](#) that the company informed it in May: “To our understanding, the decision seems to be based on business strategy. Apparently, the efforts and costs of reapplying are likely to be greater than the benefits of keeping the substances in the company’s portfolio.” The authorisation was [granted](#) by the Commission in September 2016. The review period for two of the authorised uses expired in May 2019; for the other four uses, it will expire in May 2022. Following a landmark case brought by Sweden against the Commission’s decision (case [T837/16](#)), in March 2019, the EU General Court annulled the authorisation, finding that the Commission had not sufficiently examined the absence of suitable alternatives. However, the Commission appealed in July 2019 (case [C-389/19](#)), and [successfully asked](#) the European Court of Justice to stay the effect of the annulment by the General Court until its appeal is decided. Before the end of this year, the Court could hand down the decision which could mean DCC’s authorisation ends even before May 2022. A separate action against the authorisation decision, brought by NGOs, is still pending before the General Court (case [T-436/17](#)).

The Commission is expected to adopt new EU-wide deadlines for updates to REACH registrations,

after representatives of all member states in the REACH Committee [approved a draft](#). It expands on Article 22(1), which requires registrants to update their dossiers “without undue delay”. For the first time, the new implementing regulation will set time limits for adding new information to dossiers. Registrants will have three months to complete updates of a “more administrative nature” and to fulfil the requirements of REACH Annex VII or VIII following the receipt of the study report, if updates include the generation of data. Deadlines of six, nine or 12 months will apply to “more complex” updates, depending on the kind of update, such as those requiring the generation of data based on a testing proposal, changes to the chemical safety report (CSR) or the guidance on safe use. Where a member of a joint submission cannot make a particular update until the lead registrant has first updated, it will have nine months for the update of a CSR and three months for any other update, from the date when the ECHA informs the members of the joint submission that the registration dossier, as updated by the lead registrant, is complete. In comparison to [earlier drafts](#), the Commission has significantly extended certain time periods. The regulation will enter into force 60 days after its publication in the Official Journal.

Contacts



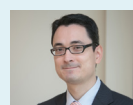
Rob Elvin

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

Senior 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