

## frESH Law Horizons

January 2021



### **Businesses in Wales are required to carry out a specific COVID-19 risk assessment.**

The rules came into force on 20 January 2021. The Welsh government's [press release](#) explains that the assessment is the "starting point for implementing the reasonable measures that are required to be taken to minimise exposure to the coronavirus on premises open to the public and in workplaces." The Health and Safety Executive (HSE) has published [advice](#) as to what to include in a COVID-19 risk assessment.

### **London Borough Council is fined £330,000 after playground equipment caused the death of a girl.**

The fine was ordered against the London Borough of Tower Hamlets for breach of the Health & Safety at Work etc. Act 1974 (HSAW) and the HSE commented on the lack of a suitable inspection in its press release on the case.

**New regulator for construction products.** The government has [announced](#) that the new construction products regulator will operate within the Office for Product Safety and Standards (OPSS) to ensure homes are built from safe materials. It will work with the Building Safety Regulator and Trading Standards to encourage and enforce compliance, and will have strong enforcement powers, including the ability to conduct its own product-testing when investigating concerns.

**Poundstretcher is fined for allergen labelling offences.** The trade press has [reported](#) on the fines totalling £24,000 after incorrectly labelled products, including bread and cakes, were identified during an inspection in Wales. According to the reports, Swansea magistrates' court found the products to be unsafe. It is, of course, the case that foods which are not properly labelled as to allergens will generally be in breach of the Food Information Regulations 2014, as well as food safety provisions, and may result in a civil claim for monetary damages, if they cause a reaction in an individual with an allergy.

**Proposed financial investigatory powers for new bodies under POCA.** The Home Office has opened a [consultation](#) on changes to the bodies that have these powers, to include the Maritime and Coastguard Agency, the Department for the Economy, the London Fire Brigade, the Information Commissioner's Office and the Service Police. Currently, each of these agencies either rely on other agencies designated with financial investigation powers, such as the National Crime Agency or police forces, or have no access to recover proceeds of crime within their jurisdiction. The consultation closes on 19 March 2021.

**Modern Slavery recommendations for financial services.** The Independent Anti-Slavery Commissioner has published a [report](#) on the need for the UK's financial sector to address forced labour and exploitation of workers. Key findings include a low level of awareness of Modern Slavery and Human Trafficking (MSHT), and that only a small number of financial services companies are actively managing their risk and engaging with clients and suppliers on issues relating to MSHT. The report also commented on the lack of procedures in place and the lack of training. The Modern Slavery Act 2015 includes a requirement to publish an [annual modern slavery statement](#) for businesses with an annual turnover over £36 million. The Home Office produces [statutory guidance](#) in relation to this obligation. The full report on the financial services sector provides a number of case studies, looking at matters such as banks that routinely identify and manage the MSHT risk, investments in companies, banks that support victims and bank account arrangements in modern slavery cases. The case studies include findings against garment suppliers; Operation Fort, which identified victims trafficked from Poland and bank account use; and investment in China.



**Possible manslaughter charge following a Smart Motorway death.** There have been [reports](#) that a coroner is considering referring Highways England to the Crown Prosecution Service over a death on the M1. The Corporate Manslaughter and Homicide Act 2007 provides that an organisation commits an offence if the way in which its activities are managed/organised by senior management causes a person's death and amounts to a gross breach of a relevant duty of care. Some [reports](#) on this case refer to data from the AA showing that, on average, it takes more than 17 minutes for a stationary vehicle in a live lane to be identified.

**Government updates post-Brexit guidance on waste classification and restrictions on hazardous substances in electrical and electronic equipment (RoHS).** The government has updated its technical guidance [WM3, Waste Classification – Guidance on the classification and assessment of waste](#) in light of chemical regulation changes applicable from 1 January 2021. It has also published updated [RoHS guidance](#), including coverage of the now different requirements applicable in Great Britain and Northern Ireland.

**The Department for Environment, Food and Rural Affairs (DEFRA) published a consultation on updating the UK Plan for Shipments of Waste.** This plan implements the UK government policy of self-sufficiency in waste disposal, by prohibiting imports and exports of waste to and from the UK for disposal, subject to some limited exceptions. It was last updated in 2012. DEFRA proposes updates to reflect the UK's departure from the EU in addition to certain policy and minor technical changes. The four main updates are to align the plan with the government's Naturally Occurring Radioactive Material (NORM) waste strategy; clarify that interim disposal operations should be carried out within the UK where possible; remove the existing exception relating to export of contaminated river sediment waste for disposal; and insert a new exception relating to the export of mercury and mercury-contaminated wastes for disposal. The consultation is open until 1 March 2021.

**The HSE updated its chemicals Brexit guidance.** The HSE updated its guidance in early January in relation to UK REACH, the prior informed consent for import/export regime (PIC), biocidal products, classification, labelling and packaging of hazardous substances and mixtures, and plant protection products. DEFRA has also updated its [UK REACH guidance](#), adding the ability to start a submission on the "Comply with UK REACH" service and providing further guidance on registering a business or organisation (including instructions on how to name "child" accounts).

**NGO leads HSBC shareholder resolution over climate action.** ShareAction (an NGO on sustainable investment) coordinated the resolution filed by 15 institutional investors with a combined US\$2.4 trillion in assets under management, alongside 117 individual shareholders. The resolution calls on HSBC to publish a strategy and targets to reduce its exposure to fossil fuel assets, starting with coal, on a timeline consistent with the Paris climate goals. ShareAction and the other investors argue that HSBC's zero-carbon target (which it announced in October 2020) does not include any commitment to reduce the bank's funding of fossil fuels. If the resolution receives more than 75% of the votes at HSBC's annual general meeting in April 2021, it would require the bank to publish a strategy and short-, medium- and long-term targets to reduce its exposure to fossil fuel assets on a timeline aligned with the goals of the Paris agreement.

**EA has published updated offence response options documents (ORO) for chemicals, climate change and waste.** OROs set out the options available to every offence the EA regulates. They incorporate the provisions of the Regulator's Code and the EA reviews them on a regular basis to reflect changes in legislation, government policy or ways of working. The chemical sector ORO has been updated to update references to the new (2019) persistent organic pollutants regulation and reflect new offences in relation to PCBs. The climate change ORO has been updated to refer to the new UK emissions trading scheme. The waste ORO has been updated in relation to the countries to which waste export offences apply under the waste shipment legislation.





**The Department for Business, Energy and Industrial Strategy (BEIS) adjusts climate change agreement (CCA) targets due to COVID-19.** BEIS has amended the [technical annex](#) to the umbrella CCA to adjust targets affected by COVID-19, as well as to make some minor amendments needed as a result of Brexit. Operators can notify the administrator up to 31 January 2021 that they need a target adjustment if their CCA performance has been affected by measures taken during 2020 to control COVID-19. Operators will need to provide evidence to accompany their notification.

**EA issues a position statement to allow increased storage of plastic waste following export rule changes.** The EA published a regulatory position statement (RPS), [Exceeding storage limits at permitted sites for waste plastic](#), to allow, until 30 April 2021, waste operators to store more waste plastic than their environmental permits allow if they cannot remove it because of disruption caused by changes to the Basel Convention (and with the prior written agreement from the EA). This RPS only applied to non-hazardous waste plastic that is a mixture of polymers, falls within Basel waste code B3011 and is destined for export to non-OECD countries. Changes to Basel waste export rules mean that exports of waste plastics under the “green list” procedure have become considerably more limited, and more consignments have to follow the notification and consent procedure.

**BEIS and the EA confirm [Energy Saving Opportunities Scheme \(ESOS\) thresholds](#).** The update to guidance confirms the “large organisation” qualification thresholds for the third compliance period (qualification date of 31 December 2022), which were previously expressed in euros. For the third compliance period, the thresholds are employing 250 or more people (no change), has an annual turnover in excess of £44 million and has an annual balance sheet total in excess of £38 million.

**The EA has updated its [Quality protocols and resources frameworks: rules for all end of waste frameworks](#).** The updates mean that the guidance now applies to all resources frameworks. This guidance provides details of the rules and regulators that are relevant to determining end of waste issues, including details on when waste rules apply to your material, import and export implications and the UK environmental regulators.

**President Joe Biden commits the US to re-joining the Paris Agreement.** The new presidency signed and deposited to the UN a new instrument agreeing to be bound by the Paris Agreement. The Paris Agreement will, therefore, enter into force for the US on 19 February 2021. The US must submit a new nationally determined contribution (NDC) prior to the UNFCCC COP26 conference being hosted in Glasgow in November 2021. President Biden has also revoked a number of climate-related decisions made by his predecessor, including an oil pipeline permit.

**Court of Appeal [dismisses](#) the ClientEarth Drax appeal.** The court dismissed this appeal, which was brought against the High Court’s earlier dismissal of ClientEarth’s judicial review claim against the government in relation to granting permission for Drax Power Ltd to construct and operate new gas-fired generating units. ClientEarth has announced that it will not appeal this decision, so this appears to draw a line under this particular strand of the recent climate-related legal challenges.

**Government publications and consultations issued on low-carbon buildings.** The Ministry of Housing, Communities and Local Government (MHCLG) published the [response to its consultation on the Future Homes Standard](#) (FHS) and a new [consultation on the Future Buildings Standard](#) (FBS). Highlights from the FHS response are that new homes will need to be “zero-carbon ready” by 2025 and reduce carbon emissions by around 80% from current standards. There will be changes to aspects of buildings regulations that deal with fuel and power, and with ventilation. The FBS consultation, which is open until 13 April 2021, is similar to the previous FHS one, and proposes changes to building regulations regarding heating and ventilation, in order to improve energy efficiency and reduce carbon emissions.







**EA extends the duration of [COVID-19 RPS](#).** The EA has extended a number of temporary RPS in view of the continuing COVID-19 situation. These relate to monitoring emissions and reporting emissions for permitted installation (RPS C20 and C21, extended to 30 June 2021); incinerating healthcare waste (RPS C23, extended to 31 July 2021); and a replacement RPS (C24) relating to urban wastewater treatment monitoring, which is in place until 30 April 2021. Also in relation to RPs, although not COVID-19 related, the EA has updated the [RPS on the use of unbound incinerator bottom ash aggregate \(IBAA\) in construction activities](#). RPS 247 replaces RPS 206, which expired on 29 January 2021.

**Environment Bill is delayed again.** The government announced that in light of exceptional pressure on the parliamentary timetable, as a result of COVID-19, the Environment Bill would not return to the House of Commons in late January as planned, but will not now return until at least May. This means the bill will not receive royal assent before autumn, which further delays things like the official launch of the Office for Environmental Protection (OEP). Interim measures for the OEP are being put in place, including an Interim Environmental Governance Secretariat, which is already [open for submission of public complaints](#), and DEFRA has written on its [blog](#) about the intervening period and what work it will do in the meantime on issues covered by the bill, such as air quality, waste and resources, and nature. Many commentators have expressed frustration over this further delay and uncertainty regarding post-Brexit environmental governance in the UK. A useful reference document, to explain the current content and evolution of the bill, can be found in the [House of Commons Library Research Briefing – Environment Bill 2019-21: Report on Committee Stage](#).

**DEFRA [consults](#) on the regulation of genetic technologies.** The consultation is in two parts. The main focus is part one on the regulation of gene edited (GE) organisms possessing genetic changes that could have been introduced by traditional breeding. Part two is intended to start gathering views on the wider regulatory framework governing genetically modified organisms (GMOs). Depending on the results of part one, DEFRA may change the legislation to amend the definition of a GMO in England, so as not to apply to organisms produced by GE and other genetic technologies if they could have been developed using traditional breeding methods. The responses from part two of the consultation will be used to inform policy development and stakeholder engagement plans on any potential wider GMO reform. The consultation is open until 17 March 2021.

**[EU Court requires](#) the European Investment Bank (EIB) to review a decision to finance a biomass power generation plant.** ClientEarth had submitted a request to the EIB (under EU access to justice (Aarhus) legislation) for internal review of the EIB resolution approving a financing proposal of a maximum amount of €60 million for a project to construct a biomass power generation plant in the Spanish municipality of Curtis. EIB refused the request as inadmissible on the grounds that the request did not relate to an act amenable to an internal review, namely an “administrative act” within the meaning of the Aarhus Regulation. The EU General Court disagreed, concluding that the concept of “a measure of individual scope” adopted “under environmental law”, included in the Aarhus Regulation, must be interpreted broadly, and did apply to the EIB resolution. This is the latest example of ClientEarth using different and innovative legal routes and techniques to challenge decisions relating to the environment and climate change.

**Government consults on “[Best Available Techniques](#)” – A future regime within the UK [preventing or minimising impacts on the environment from industry](#).** Following the UK’s departure from the EU, it has more flexibility in relation to how it benchmarks environmental permit standards. The government is, therefore, consulting on its proposed approach for deciding the “Best Available Techniques” (BAT) for tackling industrial emissions. The government states that it intends to work openly with industry, using evidence to develop BAT, which will be used in environmental permitting for certain industrial activities. Views are particularly being sought on the proposed organisation and governance process; public participation; scrutiny; policies on implementing BAT; and how the process will be evaluated. If you have an environmental permit for an installation, this consultation will be relevant to you, and it is an important opportunity to input into UK policy development in this area. The consultation is open until 18 April 2021.



**Government issues its [consultation response on the waste management plan](#).** The government welcomed the responses and reported that the majority of the 79 respondents agreed that the plan as drafted meets the requirements of the applicable regulations (i.e. comprehensively sets out waste management policies that, taken together, protect the environment and human health by preventing or reducing the generation of waste, the adverse impacts of the generation and management of waste, and by reducing overall impacts of resource use and improving the efficiency of such use). The government, therefore, adopted the version of the plan that was consulted on, subject to some changes (we reported on the original consultation in [frESH law Horizons August 2020](#)) as the [Waste Management Plan for England 2021](#).

**European Chemicals Agency (ECHA) is to revoke at least 2,900 REACH registrations held by UK companies.** ECHA has issued a [press release](#) confirming that registration transfers that have been started in December but not yet completed have until 31 March – after that, they will be void. At least 2,900 UK registrations are already void and will be revoked, as their transfer was not initiated by the end of 2020. This is approximately 3% of the total number of REACH registrations, and about 20% of UK registrations. 268 of those voided registrations were for substances where the only registrants were from the UK – leaving no existing REACH registrations for those substances (although we understand that over half of these were only registered as intermediates, so the impact may be more limited than first anticipated). If UK companies missed transferring their REACH registrations to an EU entity before the end of 2020, that is likely to lead to supply chain interruptions or enforcement action.



**European Environment Agency (EEA) publishes a report on [Plastics, a growing environmental and climate concern: how can Europe revert that trend?](#)** In this circular plastics economy report, the EEA analyses the need and potential for a shift to a circular and sustainable approach to our use of plastics. It highlights that the ever-increasing amount of plastic, its impact on biodiversity and contribution to climate change, and how to deal with it in a circular economy perspective, have been on the EU's policy agenda for years, and that the COVID-19 pandemic has only increased the attention for plastic waste with images of masks in our seas, and large amounts of single-use protective gear. The report looks at plastics production, consumption and trade, the environmental and climate impact of plastics during their life cycle and explores the transition towards a circular plastics economy through three pathways involving policymakers, industry and consumers.

**EU Legal Affairs Committee MEPs [call for a new law on supply chain due diligence](#).** The draft legislative initiative (adopted by 21 votes in favour, one against and one abstention) calls on the Commission to urgently present a law that ensures companies are held accountable and liable when they harm – or contribute to harming – human rights, the environment and good governance. The law would require all companies that want to access the EU internal market, including those established outside the EU, to prove that they comply with environmental and human rights due diligence obligations. It would also guarantee access to legal remedies for victims. The committee states that binding EU due diligence rules would oblige companies to identify, address and remedy aspects of their value chain that could or do infringe on human rights, the environment and good governance.



**UK company sues the EU over the Single-use Plastics Directive.** The Single-use Plastics Directive 2019/904 (SUPD) obligates member states to prohibit the placing on the market of products made from oxo-degradable plastic, among other things, from 3 July 2021. It defines oxo-degradable plastic as plastic materials that include additives, which, through oxidation, lead to the fragmentation of the plastic material into micro-fragments or to chemical decomposition. Symphony Environmental produces what it describes as oxo-biodegradable plastic. It [announced](#) that it has sued the Parliament, Council and Commission for damages, as the EU ban had frustrated the success of its material, because it was confused with oxo-degradable plastic. It points to a process that the Commission started prior to proposing the SUPD, by mandating ECHA to prepare a [restriction dossier for oxo-degradable plastic under REACH](#). The Commission did not propose the restriction of products made from this material in the SUPD, but Parliament and Council, as the EU co-legislators, agreed to amend the Commission's proposal to that effect. ECHA then withdrew its intention to develop the REACH restriction dossier, following a request from the Commission due to the SUPD already including the restriction of oxo-degradable plastics. The company said that the discontinued procedure was designed to avoid the kind of arbitrary action that had occurred in the case of the SUPD. The EU General Court has registered the case under number [T-745/20](#).

#### **European Parliament committee calls for waste reduction and recycled content targets.**

The Environment Committee (ENVI) [adopted](#) a report on the [New Circular Economy Action Plan](#) (CEAP 2.0), which the European Commission adopted in March 2020. Generally, the report welcomes CEAP 2.0 as one key initiative to reduce the overall environmental footprint of European production and consumption, while ensuring a competitive and innovative economy. The parliamentarians believe that chemical recycling has the potential to contribute to closing the material loop in certain waste streams, where it fulfils certain criteria, as well as the existing legal definition of recycling, and after evaluation at industrial level. It urges the Commission to take into account the required industrial changes and the investment cycles in each sector and stresses the need for policy coherence across existing and future measures at the EU and member state levels in order to provide economic and investment certainty. The report calls (among other things):

- On the Commission to propose science-based binding EU targets for the reduction in the use of primary raw materials
- On the Commission to propose binding environmental footprint targets for the whole product life cycle for each product category, product-specific and/or sector-specific binding targets for recycled content
- For economic incentives such as CO2 pricing, extended producer responsibility (EPR) with eco-modulation of fees and tax incentives; it also encourages voluntary initiatives such as the Circular Plastics Alliance and the European Plastics Pact
- On the Commission to reduce, through new mandatory measures, the unintentional release of all microplastics at source
- On the Commission to consider an extension of the SUPD in the context of its review (by 2027)

The plenary of the Parliament is expected to finally adopt the content of the report without significant changes as a non-binding, non-legislative resolution in February. The Council, in which the EU member states are represented, had already reacted to the CEAP 2.0 in December 2020 (please see [frESH Law Horizons December 2020](#)). The reactions by both EU institutions are meant to inform the further implementation of the CEAP 2.0 by the Commission.





**EU member states develop a position on the Chemicals Strategy.** The Council, the EU institution composed of the member states, has been discussing its reaction to the [Chemicals Strategy for Sustainability](#) (CSS), with which the European Commission set the agenda for changes to chemicals regulation in October 2020. [Draft](#) Council conclusions generally welcome the CSS as a central component of the EU Recovery Plan and a key initiative of the [European Green Deal](#), while being complementary to other EU strategies, e.g. the CEAP 2.0 (please see above). They expressly support the amendment of REACH in a targeted manner. Among other things, they stress the importance of a life cycle approach for chemicals and the importance of clear legal provisions in EU product law ensuring that products containing chemicals are safe and sustainable by design. However, they also recognise the need to simplify, strengthen and secure greater cohesion of the policies and legal framework. The Commission should develop, without undue delay, clear and precise definitions of, and criteria for, the concepts that are crucial for an effective implementation of the CSS, prioritising “essential uses”. The draft Council conclusions support an interim solution to prioritise restrictions for the most harmful substances until the generic approach to risk management, which the Commission has proposed, is fully implemented. The Council is expected to adopt the conclusions in March. Together with the resolution of the European Parliament (please see [frESH Law Horizons July 2020](#)), they are to inform the further implementation of the CSS.

**European authorities to check compliance with authorisations and regarding recovered substances.** ECHA [announced](#) the start of its Enforcement Forum’s ninth coordinated REACH project (REF-9). It involves customs, occupational safety and health (OSH) and environmental protection authorities from all 30 EU and EEA countries. Inspectors will check whether duty holders comply with REACH authorisation requirements to protect the safety and health of workers, the general public and the environment from substances of very high concern (SVHCs). This includes whether SVHCs subject to authorisation have actually been granted one, and whether their use complies with the authorisation conditions. A report is expected towards the end of 2022. ECHA also announced that inspections have started in a pilot project on recovered substances, in the forum’s first project to examine the interface between REACH and the EU Waste Framework Directive. It focuses on the exemption from registering substances recovered from waste, which have end-of-waste status, but will also consider exemptions and awareness of REACH and labelling and packaging (CLP) duties. A report is expected during summer 2022.

**European Commission says that half of green claims lack evidence.** The Commission [announced](#) that website screening, an exercise carried out each year to identify breaches of the EU consumer law in online markets, had, for the first time, focused on “greenwashing”. The “sweep” analysed 344 seemingly dubious “green” claims from business sectors such as textiles, cosmetics and household equipment. The authorities considered that in 42% of cases, the claims were exaggerated, false or deceptive and potentially unfair commercial practices under the Unfair Commercial Practices Directive. More than half of the cases lacked sufficient information for consumers to judge the claim’s accuracy. National authorities will contact the companies concerned to ensure that these are rectified where necessary. The findings will feed into the impact assessment for the new legislative proposal to empower [consumers for the green transition](#) (please see [frESH Law Horizons July 2020](#)).

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