

# frESH Law Horizons

September 2022





## UK

**Food Company Fined £216,000 After a Sharp Piece of Metal Was Found In a Doughnut.** The company was convicted after pleading guilty to three offences under food hygiene laws and was [fined £216,000](#), based on £72,000 for each offence. Melton Borough Council, the prosecuting local authority, stated that it worked with the Food Standards Agency (FSA) during the investigation. The case highlights the importance of control measures to mitigate the risk of food contamination by manufacturing equipment, such as metal detection and regular checks to identify any damage to elements coming into contact with food. The investigation in this case found that no such controls were in place and that this fell short of the legal requirement for a suitable and sufficient safety management system. Breaches of food safety and food hygiene regulations carry a maximum penalty of an unlimited fine. The amount of the fine must be determined using the factors set out in the [Sentencing Council guidelines for breaches of food safety and food hygiene regulations](#). First, the court determines the offence category by considering the culpability and harm factors. The court must then consider the offending organisation's size by turnover, in order to identify the starting point and range of the fine by reference to prescribed tables. Following this, a number of factual elements providing the context of the offence must be considered, including aggravating and mitigating factors, to allow for adjustments up or down from the fine's starting point. Finally, the offender's guilty plea, if entered, must be taken into account.

**Roofing Contractor Fined for the Death of a Worker Who Fell From a Roof, and for the Contractor Failing To Have Employers' Liability Insurance.** The Health and Safety Executive (HSE) [successfully prosecuted](#) the contractor for breaching Regulation 4(1) of The Work at Height Regulations 2005 and, far more unusually, Section 1(1) of the Employers' Liability (Compulsory Insurance) Act 1969, which creates a mandatory requirement for all employers in Great Britain to have insurance against liability for bodily injury or disease sustained by its employees and arising out of – and in the course of – their employment. An ancillary regulation provides for a minimum coverage amount of £5 million for that insurance. The contractor pleaded guilty to both counts and was sentenced to six months' imprisonment, suspended for two years, and was ordered to pay costs. This case serves as a reminder that all employers in Great Britain should maintain employers' liability insurance with at least the minimum level of coverage (although higher levels may be appropriate for larger companies) and that failure to do so can lead to both corporate and individual criminal liability.

**The Office for Product Safety and Standards (OPSS) Publishes Its Product Regulation Strategy for 2022-2025.** The OPSS is the national regulator and enforcement authority for general product safety, legal metrology (weights and measures), standards and accreditation, hallmarking, and construction products. The OPSS says the [strategy](#) "encompasses the full breadth" of its policy, delivery and regulatory responsibilities. The strategy seeks to strike a balance between the protection of consumers and the environment, and the need for businesses to operate with confidence and without excessive or unclear regulation. However, it is made clear that the OPSS will prioritise protection. While the strategy does not specify any areas of particular focus for enforcement, it states that the OPSS will be "active" in its enforcement approach and will work to deal with non-compliance in a timely and proportionate manner, while working with local authorities and other regulators. It details how the OPSS will seek to operate in a "strong, green economy" and provide environmental protections – for example, by providing frameworks for the safe use, recovery, disposal, and recycling of potentially harmful products and materials, and supporting accurate metering of fuel supply and charging infrastructure for low-carbon and carbon-free transport. The strategy also details how the OPSS will seek to strengthen construction products regulation, which it took responsibility for in June this year. For example, it states that the OPSS has taken early steps to develop the required evidence base to inform its activities, review the regulatory system to identify gaps, and recruit further specialist staff.



**Guidance on Cosmetic Products Enforcement Updated Following Relaxation of UK Conformity Assessed (UKCA) Marking Rules.** The government has published [updated statutory guidance](#) for businesses on Regulation 2009/1223 and the Cosmetic Products Enforcement Regulations 2013, which sets out the requirements that must be met before cosmetics products can be placed on Great Britain's market. There are two statutory guidance notes – one for Great Britain and another for Northern Ireland – to reflect differences in requirements due to the Northern Ireland Protocol. The changes to the guidance take account of the announcement, on 20 June 2022, of changes to make it simpler for businesses to apply the new UKCA marking that we reported on in our [June 2022 newsletter](#), which will be relevant for some cosmetic products, such as those in aerosol dispensers. The guidance note for Great Britain has been updated to reflect that the UKCA marking may be affixed to a label or a document accompanying the dispenser until 31 December 2025, and the recent indication that the transitional period for the name and address of the UK responsible person for cosmetic products has been extended to 31 December 2025.

**Proposed Regulation of Deforestation Free Products Adopted by the European Parliament.** With an area larger than the EU being lost to deforestation between 1990 and 2020, the European Parliament decided, on 13 September 2020, to adopt the European Commission's [proposal](#) for a regulation on deforestation-free products. The proposed regulation will put the onus on businesses to conduct due diligence of their supply chains to verify that:

- I. Goods sold on the EU market have not been produced on deforested or degraded land anywhere in the world
- II. Those goods are produced in accordance with human rights provisions in international law, and respect the rights of indigenous people

The scope of the proposed regulation is expected to be broad, and is expected to cover a range of products, such as cattle, cocoa, coffee, palm oil, soya and wood, pig meat, sheep and goats, poultry, maize and rubber, charcoal, printed paper products, and also products that contain, have been fed with or have been made using these commodities (such as leather, chocolate and furniture). There are also expected to be additional requirements on financial institutions to ensure that their activities do not contribute to deforestation. It is not expected that any country of origin or products will be banned by the proposed regulation. It is anticipated that the European Commission will need to classify countries into low-, standard- or high-risk within six months of the proposed regulation entering into force, and that low-risk countries will be subject to fewer obligations. A press release from the European Parliament can be accessed [here](#).

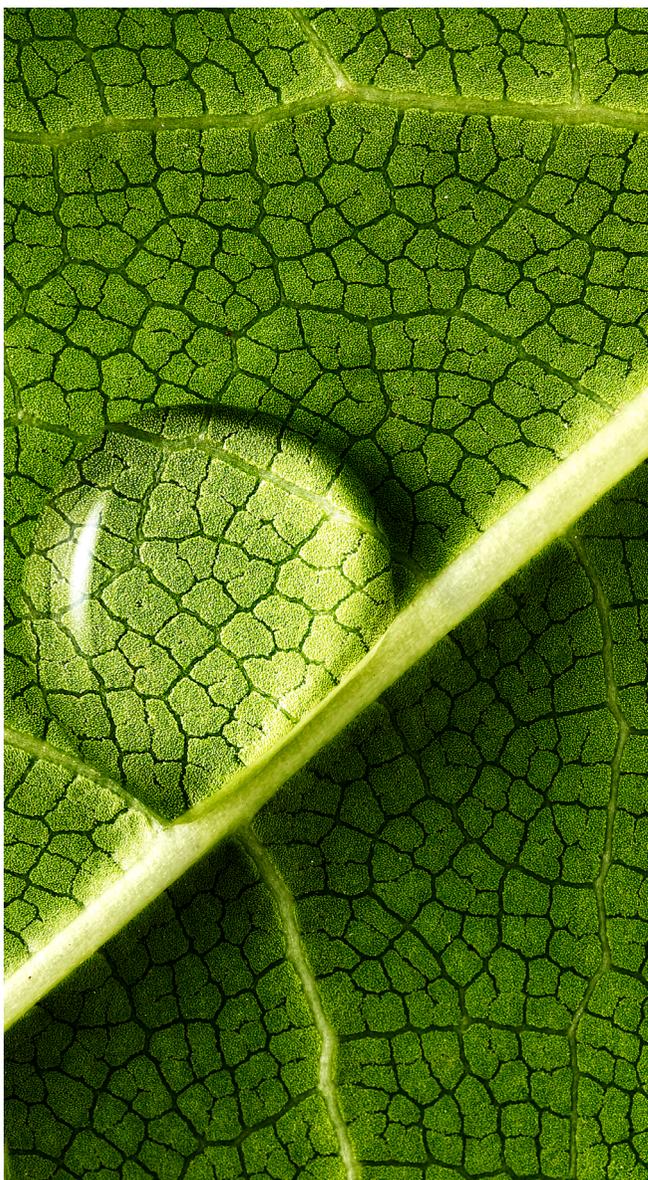
**Section 22 Proceeds of Crime Act 2002 (POCA) Calculations Should Consider All Assets, Including Those No Longer Held by the Defendant.** In the recent case of *R v Wood*, the Court of Appeal determined that any calculations under section 22 of the POCA should consider all assets of the defendant, including those that they no longer hold. The appellant in *R v. Wood* was convicted of mortgage fraud, and a confiscation order was made by the court in 2014. In 2020, the prosecution applied under section 22 of POCA for a new calculation of the available amount, on the basis that the value of property held – and which formed the basis of the available amount – had risen since 2014. The appellant argued that the court should only take into account assets that were still held by the defendant, and, given that the combined value of those assets was lower than the original calculation of the available amount, section 22(4) POCA prevented any increase. Given that the spirit of POCA is to ensure criminals cannot profit from their crimes, the court sought to follow the decisions in *R v. Waya* (2012) and *R v. Ahmad* (2014), and the appeal was accordingly dismissed. In coming to its decision, the court determined that it should take into account what had happened to any of the assets that had formed the basis of the original confiscation order, even if they were no longer held by the defendant.



**Court of Appeal Allows the Use of WhatsApp as Evidence, Provided it Meets the Interests of Justice.** It was decided in the recent case of [R v. Kadir](#) that a Judge in a Crown Court trial during the COVID-19 pandemic could allow a witness in Bangladesh to give evidence through a WhatsApp video call, provided it was in the interests of justice. The witness had experienced technical difficulties with the Cloud Video Platform, and the appellant applied for permission for the witness to give evidence via WhatsApp video call instead. The application was refused, but interesting comments were made on when this practice could be allowed. Under the temporary provisions of section 51 of the Criminal Justice Act 2003 (CJA 2003), which were in force at the time of the trial, the judge had the power to direct a witness to give evidence from abroad on WhatsApp if it was in the interests of justice. WhatsApp did fit within the “other arrangement” and the definition of a “live video link” under the CJA 2003, as then in force. As it met the security requirement – on account of using end-to-end encryption – it was capable of being regarded as sufficiently secure for use, particularly in the context of giving evidence in open court. A judge in similar circumstances at the date of the appeal would similarly have the power to direct a live link via WhatsApp under the statutory provisions now in force. Although in this instance the judge was not satisfied that it was in the interests of justice to allow the WhatsApp link, the case may be of use in future applications of a similar nature.

**Government Publishes Its Response to a Consultation on GB Road Vehicle Approval Scheme.** The Department for Transport (DfT) has published its [response](#) to a consultation on a new road vehicle approval scheme. The scheme would affect Great Britain and end the interim scheme that has been in effect since the end of the Brexit transition period. With sight of feedback from stakeholders, the government has taken three key decisions. Firstly, the full scheme will apply to new types of passenger and goods vehicles from 1 February 2024 and to trailers from 1 February 2025. Next, the continued use of EU certificates of conformity (CoC) will be allowed until July 2026, to give manufacturers sufficient time to prepare. Finally, the provisional schemes for “L” and “T” category vehicles and engines for non-road machinery will continue to accept applications for approval until the end of 2027. The consultation outcome will be followed by a statutory instrument, the Road Vehicles and Non-Road Mobile Machinery (Type-Approval) (Amendment and Transitional Provisionals) (EU Exit) Regulations 2022, to incorporate the above changes.

**“Brexit Freedoms Bill” Introduced to Parliament.** If enacted, the [Retained EU Law \(Revocation and Reform\) Bill 2022](#) (also known as the “Brexit Freedoms Bill”) will end the supremacy of EU law in the UK by revoking certain EU laws that were retained at the end of the Brexit transitional period (Retained EU Law), by making provision relating to the interpretation of Retained EU Law, and by introducing new powers for the modification, restatement, replacement, or updating of Retained EU Law. The bill also seeks to introduce a “[sunset date](#)” of [31 December 2023](#), by which Retained EU Law will either be repealed or assimilated into UK domestic law. However, the sunset date may be extended to 2026 for some laws, according to a separate Government [announcement](#). When announcing the bill, the government stated that “retained EU Law was never intended to sit on the statute book indefinitely”. If enacted, the bill will have major implications for UK law, particularly environmental and product compliance law, as the majority of important parts of the UK’s environmental and product laws and protections come from Retained EU Law. The bill is an enabling law which sets out powers rather than making specific provisions for which legislation within Retained EU Law will be repealed, retained, amended, etc. and the Government has not as yet indicated its intentions as regards any specific laws. It will be interesting to see how this will align with the approach to Northern Ireland, where products still need to comply with EU laws, because of the effects of the Northern Ireland Protocol. We will report further once more details emerge.



**Previously Directly Effective EU Laws Remain Enforceable After Brexit.** In the landmark ruling of *R (Harris) v. Environment Agency*, the High Court decided against the Environment Agency (EA) that some EU conservation laws were enforceable under UK domestic law, even after Brexit. The court applied the legal provision in the Brexit legislation that European directives remain enforceable in the UK against public authorities where those rules were recognised as enforceable before Brexit. The two claimants were concerned that water abstraction was causing irremediable damage to the environment, including ecosystems that are legally protected. The claimants argued that regulation 9(3) of the [UK Conservation of Habitats and Species Regulations 2017](#) still required the EA to have regard to obligations under the EU Habitats Directive. Those obligations were to avoid deterioration of protected habitats and disturbance of certain species. In failing to stop abstraction reducing the flow of groundwater at wetland sites, the EA was in breach. This case could have wide-reaching implications, because it held that – even though the UK has left the EU – if, prior to Brexit, EU rules had been found by a court to be directly enforceable against public authorities, they can still be invoked. Beyond the facts of the case, the decision is significant for post-Brexit environmental law, as it may pave the way for similar decisions to be made about other EU directives (although the Brexit Freedoms Bill discussed above may make that short-lived). It also implies that other public bodies in the UK will continue to be obligated under European laws.

**Government Opens a Consultation on UK Mandatory Water Efficiency Labelling.** The Department for Environment, Food and Rural Affairs (Defra) opened a public [consultation](#) on 2 September 2022, taking views on the introduction of mandatory water efficiency labelling on water-using products. The government has proposed including a standalone label, which clearly shows the water flow rate (in litres per minute). The intention is for water-using products to fall within set bands that show the rate of water efficiency for that product. This is likely to be similar to the energy efficiency labels currently in use. The onus for assessing and labelling a product is expected to fall on the supplier that first puts it on the market, which would be considered to be the manufacturer, authorised representative or importer of a product. The consultation is set to close on 25 November 2022, with development of a water efficiency labelling scheme and drafting of the regulations set to conclude in late 2023. There will then be an implementation period (anticipated to last 18 months) with the changes expected to come into force by early 2025.

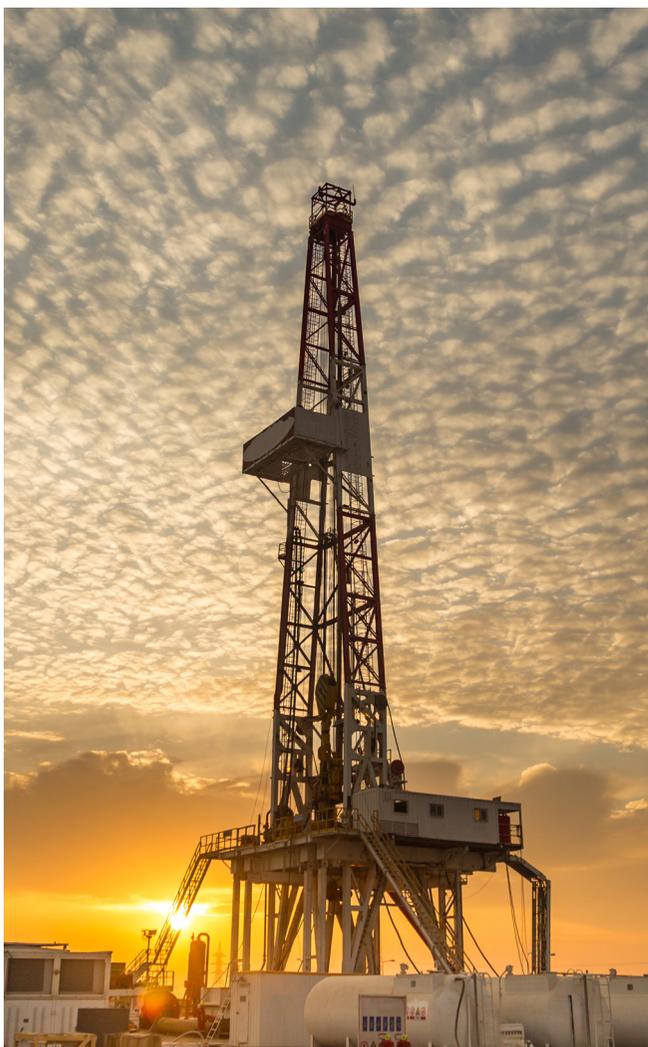
**Welsh Government to Introduce a Bill Banning Single-use Plastics.** Following a 12-week public [consultation](#) in 2020, the Welsh Government introduced the [Environmental Protection \(Single-use Plastic Products\) \(Wales\) Bill](#) to the Welsh Parliament on 20 September 2022. This is accompanied by an [explanatory memorandum](#) and [statement](#) by the Minister for Climate Change. The bill forms part of the Welsh Parliament's action plan to tackle the climate and nature emergencies, contributing to its long-term ambitions of phasing out unnecessary single-use products (particularly plastic) and sending zero plastic to landfill. The bill outlines that it would be an offence to supply or offer to supply (including for free) commonly littered and unnecessary disposable single-use plastic products in Wales. Most of these items are of the type covered by the equivalent EU/English legislation (e.g. cutlery, straws, stirrers and polystyrene cups) but it is the first proposal of this type to include plastic single-use carrier bags, so is notable for that reason. To ensure that new/alternative products do not pose the same environmental concerns, the bill also allows for Welsh ministers to add or amend the list of products that are included in the current draft, subject to the approval of the Welsh Parliament.



**Government Updates Its Guidance on Plastic Packaging Tax.** On 7 September 2022, the government updated its **guidance** on plastic packaging tax to make clear who is liable for the tax when packaging is imported. Under the current tax regime, businesses need to register for plastic packaging tax if they (a) expect to import into, or manufacture in, the UK at least 10 tonnes of finished plastic packaging components in the next 30 days, or (b) have imported into, or manufactured in, the UK at least 10 tonnes of finished plastic packaging components since 1 April 2022. This will change on 31 March 2023, meaning businesses will need to look back over the last 12 months. The updates to the guidance clarify that plastic packaging tax is chargeable when the packaging has cleared all customs procedures. The party importing the packaging is typically liable for the plastic packaging tax; however, if the importer is a consignee and it can show that it is acting on behalf of the distributor, then the tax liability will sit with the distributor as the controller of the order. If a business that acts as a consignee has any concerns, it should raise these with the distributor and carry out its own due diligence to ensure that the distributor is accounting for the tax. If the parties are relying on the Incoterms as part of the import arrangement, it will need to be agreed – outside of these terms – with whom the tax liability will sit.

**Government Announces Net Zero Target Review, Issues a Call for Evidence and Extends the Deadline To Respond to the Climate Change Committee’s Annual Progress Report.** As part of a broader set of measures designed to help people and businesses with their energy bills, the government [announced](#) in early September that it will launch a review to ensure the Net Zero 2050 target is being met “in an economically efficient way, given the altered economic landscape” that is “delive[red] in a way that is pro-growth and pro-business.” The review is expected by the end of this year and will be chaired by Chris Skidmore MP. For more information on the review, please see the [Terms of Reference](#). On 29 September, a [call for evidence](#) was published with questions inviting stakeholders to consider questions including how to balance the UK’s priorities of maintaining energy security with net zero commitments, opportunities and barriers to decarbonisation, and how best to design net zero policies, programmes and funding schemes. The government has also extended its deadline to respond to the Climate Change Committee’s latest annual progress report, which was [published](#) on 29 June of this year. The government’s response had been due by 15 October 2022 (in accordance with section 37 of the Climate Change Act 2008) but will now not be issued until 31 March 2023, following the implementation of the [Response to the Committee on Climate Change Report \(Extension of Period\) Order 2022](#) (and accompanying [memorandum](#)). This extension is permitted under the Climate Change Act 2008, and the government intends to include the outcome and recommendations of the review in its response to the Climate Change Committee’s annual progress report. The new government is coming under increased scrutiny to meet Net Zero objectives. We will continue to report on details of the review as they become available. For more, please see our July 2022 frESH [newsletter](#), in which we discussed the High Court’s [decision](#) that the government’s Net Zero strategy was unlawful.

**Public Consultation on Applications for UK Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Authorisation.** The new standalone UK REACH regime is progressing further, with the HSE continuing to receive applications for authorisation of a number of substances. Substances of very high concern that are subject to authorisation/on the authorisation list are banned unless specific authorisation is applied for and granted. Part of the authorisation application process includes consideration of (safer) alternatives. The UK REACH competent authority (in post-Brexit Britain, this is the HSE), as part of this process, has to consult on the alternatives, and has recently issued a number of these consultations. For details of current and past consultations, please see the [HSE Consultations Hub page](#). An [example](#) of an ongoing consultation concerns alternatives to 2,2’-Dichloro-4,4’-methylenedianiline, used as a reactant in the manufacture of cast polyurethanes at an industrial site. Stakeholders are invited to submit comments online through an online survey until 3 November 2022.



**UK Government Announces an End to the Fracking Ban in England.** With the energy and cost of living crises worsening, the government announced on 8 September 2022 that it would be lifting the ban on shale gas production in England (i.e. fracking). The ban was initially introduced in 2019 following concerns raised about earth tremors, with one site in Lancashire [reportedly](#) recording over 120 tremors in one year. The government confirmed that it would only lift the ban if fracking could be done in a safe and sustainable way, and that it would be led by the science on how possible this would be. Earlier this year, the government instructed the British Geological Survey to advise on the latest scientific evidence around fracking. The [review](#) identified that there was a limited understanding of UK geology and fracking, and that more sites should be drilled to gather the required data in order to assist in that understanding. As a result, the ban has been lifted, and the Government expects shale gas from fracking to start flowing within six months. The government hopes that by lifting the ban, it will also reduce the UK's reliance on imported oil and gas, and will enable it to explore all available options to further the UK's domestic energy security in light of the Russia/Ukraine conflict. The government's press release and a copy of the ministerial statement can be accessed [here](#).

## EU

**European Commission Consults on New Hazard Classes for Chemicals Under Classification, Labelling and Packaging Legislation.** The European Commission made available a draft delegated act amending Regulation 1272/2008 on hazard classes and criteria for the classification, labelling and packaging of substances and mixtures (CLP Regulation). The commission launched a [four-week public consultation](#) on the draft regulation that will be open until 18 October 2022. The draft regulation would amend annexes I, III and VI to the CLP Regulation, to introduce the following hazard classes:

- a. Endocrine disruptors
- b. Persistent, bioaccumulative, toxic (PBT) and very persistent, very bioaccumulative (vPvB)
- c. Persistent, mobile, toxic (PMT) and very persistent, very mobile (vPvM)

This has wide implications for the chemical industry, with needs for updates to labels, safety data sheets and REACH registration dossiers. [The European Chemical Industry Council \(CEFIC\)](#) also identifies a potentially more significant secondary "ripple" effect, because "changes in classification under CLP automatically trigger restrictions and bans of chemicals under the generic approach to risk management (GRA). Being assigned a new hazard class will therefore mean automatic restriction or ban without any substance-specific risk assessment." The number of substances subject to generic bans and restrictions is predicted to grow significantly, and this could also lead to products being discontinued under a "blacklisting" effect.



**European Commission Adopts New Rules on Recycled Plastics in Contact With Food.** The European Commission has [adopted Regulation 2022/1616](#) on recycled plastic materials and articles intended to come into contact with foods. These new rules repeal the regime set in Regulation 282/2008. Earlier this year, the commission presented the draft to member states' representatives (please see [Sustainability Outlook March 2022](#)) and it was later approved and sent to the European Parliament and the Council for scrutiny. None of co-legislators opposed the text, so it was adopted. The regulation sets rules to ensure that recycled plastic can be safely used in food packaging in the EU. It regulates the manufacturing process of plastic with recycled content ("recycling processes") to ensure that decontamination leads to the plastic being safe. The new rules apply to recycled plastic food contact materials (FCMs) produced through the specified processes, both in the EU and imported. It will enter into force on 10 October 2022. The commission has developed a [website](#) with answers to frequently asked questions about the regulation and its application. These are some of the main differences between the previously applicable regime and the regulation:

- Scope includes all kinds of recycled plastic and recycling technologies, including mechanical recycling, recycling of products from a closed controlled product chain, use of recycled content behind a functional barrier, and forms of chemical recycling.
- New rules applicable to novel recycling technologies and the evaluation of recycling processes. The regulation will require that the European Food Safety Authority provides an opinion on whether novel recycling technologies are suitable to be used as a basis for recycling processes based on the kind of plastic input they are intended for
- Union public register of recycling processes, recyclers and recycling installations, providing an increased level of transparency.
- Transitional rules with respect to mechanical polyethylene terephthalate PET recycling processes based on applications already received or subject to an application before 10 July 2023. From 10 July 2023, only plastics containing recycled plastic manufactured with a suitable technology or with a novel technology may be placed on the market.



### **NGOs Start Several Legal Actions on Taxonomy Criteria Classifying Bio-energy and Gas as Sustainable**

**Activities.** The Taxonomy Regulation establishes an EU-wide classification framework to provide businesses and investors with a common language to identify to what degree economic activities can be considered environmentally sustainable. Economic activities are considered taxonomy aligned/sustainable if they meet certain conditions, among them (1) to contribute to one or more of the six environmental objectives and (2) do not significantly harm (DNSH) any of these objectives. The Taxonomy Regulation is complemented by delegated acts that set the specific performance thresholds for each area and for affected sectors. Environmental NGO Client Earth, together with the World Wide Fund for Nature (WWF)'s European policy office, Transport & Environment, and Friends of the Earth Germany (BUND) [announced](#) the request for an internal review on the Taxonomy Complementary Delegated Act (CDA). These controversial rules classify certain gas power plants as sustainable, provided that the technology meets a certain CO2 emissions threshold (please see [Sustainability Outlook January 2022](#)). The environmental groups request that the commission repeal the CDA, arguing that it clashes with the Taxonomy Regulation and the European Climate Law, and does not respect the EU obligations under the Paris Agreement. The commission has 16 weeks to reply from the date on which it received each request. If it does not remedy the issues presented in the requests, the NGOs may challenge that decision before the Court of Justice of the European Union (CJEU). Client Earth also announced that it is taking the European Commission to the CJEU to challenge the Climate Delegated Act on taxonomy technical screening criteria (TSC) for forest biomass and bio-based plastics that classify those activities as sustainable. The legal action follows the first step taken in February 2022, when the NGO filed a request for internal review to the European Commission on the same rules (please see [Sustainability Outlook February 2022](#)). The NGO states that the TSC are unlawful due to the severe environmental and climate impacts of using forest biomass for energy purposes. In addition, the classification of manufacture of plastics made out of biomass does not consider that most of its applications are single use and also release carbon into the atmosphere once they are disposed of.

### **New Regulation Open for Consultation To Introduce New Governance Rules for the European Chemicals Agency (ECHA)**

The European Commission launched a [call for evidence](#) on a basic regulation on the ECHA. Current rules date back to 2006. Since 2008, ECHA has been entrusted with new tasks set out in several pieces of legislation and *ad hoc* agreements. The commission's initiative will aim to strengthen the ECHA's governance and adapt it to its future role, as well as to streamline the working methods of the ECHA's bodies and make their financing more sustainable. The initiative aims to adjust the mandate and structure of the ECHA to its future role. The mandate of the ECHA will be adjusted as a result of the adoption of the proposal for a regulation (re)attributing tasks to agencies. This initiative will also clarify how the agency works with other agencies that are also involved in chemical safety assessments. These include the European Food Safety Authority (EFSA) and the European Medicines Agency (EMA). Additionally, the initiative also aims to introduce a sustainable financing model to ensure flexibility and an optimal use of the combined resources of the ECHA coming from different parts of the EU budget. The call for evidence will be open until 10 October 2022, with an expected timeline for the commission to adopt the basic regulation in the second quarter of 2023.



**European Commission Outlines Priorities for the Year Ahead in the State of the Union Speech.** Ursula von der Leyen, the president of the European Commission, delivered her yearly State of the Union [speech](#) on 14 September. The president highlighted some of the priorities for the commission to undertake in the coming year, such as measures to support citizens in the current energy crisis, cutting the EU's dependency on Russian fossil fuels, investing in renewable energy (in particular hydrogen), and leading globally on climate adaptation. In a [letter of intent](#) to the president of the European Parliament, von der Leyen listed some of the new initiatives that the commission proposes. The upcoming commission work programme, interinstitutional dialogue and the joint declaration of the legislative priorities of the three EU institutions will complement this non-exhaustive list. The list includes a revision of the Waste Framework Directive 2008/98, which will focus on food waste and textiles (please [see frESH Law Horizons May 2022](#)) and a legislative proposal on plants produced by certain new genomic techniques.

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