SHE Matters
Winter 2022/23

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SHE Matters Winter 2022/23

As readers will know, SHE Matters covers a wide range of legal topics which can be described as *"regulatory law"*, in particular environmental law, the law relating to health and safety at work, product safety law and food safety law.

Virtually all of these areas of UK law were heavily impacted by EU legislative initiatives during the 40-odd years that this country was a member of the European Communities, which then evolved into the European Union. While some of these initiatives involved the copying of features of existing UK legislation, many involved innovation from other legal traditions as far as the UK was concerned. It is fair to say that the UK regulatory landscape was radically transformed during our membership of the European Union.

It seemed unlikely that all of that legislation would simply be jettisoned on Brexit. That was despite the calls of some political commentators for a *"Singapore on Thames"*. The use of that phrase, which has been quite common, is not without a certain irony. Many readers will know that Singapore, as a prosperous city state established on a number of very small islands and one slightly larger one, and with one of the highest population densities globally, is one of the most tightly regulated societies on the planet. The sanctions for breaches of the law can also be severe, Singapore being one of the few states to retain both corporal and capital punishment.

Given the practical difficulties in changing the whole UK regulatory landscape overnight, it was of little surprise that the *European Union (Withdrawal) Act 2018* provided for a snapshot of EU law to be retained in force on an ongoing basis at the end of the Transition Period (31 December 2020).

It was of course, always intended that this snapshot should be subject to review and amendment as the UK gradually adapted to its new post-Brexit freedoms and as it entered into new trading arrangements. However, many politicians of the *"Singapore on Thames"* school, were unhappy with the thought that the UK would not be taking full advantage of post-Brexit freedoms speedily enough. Many of that school were prominent in the Truss administration.

On 22 September 2022, the Retained EU Law (Revocation and Reform) Bill was introduced to Parliament, and last month it received its Second Reading. The Bill empowers ministers to revoke and replace Retained EU Law with such alternative provision as they consider appropriate. The Bill will also revoke EU-derived subordinate legislation (Regulations and Decisions), whether or not properly reviewed and/or amended, by 31 December 2023. This is a *"sunset clause"*, which may however, be extended to 23 June 2026 (the tenth anniversary of the outcome of the Brexit referendum). The Bill would also remove the *"direct effect"* of rights and obligations derived from EU Treaties and Directives. That doctrine of *"direct effect"* gives individuals and companies the right to sue on the basis of those rights and obligations where without there having been specific provision of UK law to that effect. The Bill would also give UK legislation priority over any retained direct EU legislation which remained in force in the case of conflict. Additionally, and perhaps rather cosmetically, the Bill would rename the retained EU law as *"Assimilated Law"* by the end of 2023.

Clearly, it would be sensible for the UK to take full advantage of its post-Brexit freedoms to remove any unnecessary burdens on businesses, particularly, and in the current economic climate, smaller businesses. That would be particularly important as regards burdens on businesses of that size which have limited resources to deal with regulatory issues. Undoubtedly, there is also significant scope for tidying up oddities and inconsistencies inherited through EU legislation and which have often resulted from *"deals in smoked-filled rooms"*. Such tidying up is indeed being carried on by the EU itself as it revises and renews its existing body of legislation. In terms of legal certainty, which is of great benefit for business, there is much to be said for abolishing the doctrine of "direct effect" so as to remove some, though inevitably not all, doubts as to whether or not certain matters are justiciable in the courts.

However, apart from smacking somewhat of Brexiteer triumphalism, undesirable at a time where there is a need for national unity, some of the provisions of the Bill, and in particular the *"sunset clause"*, would seem to demonstrate the excessive haste which had such disastrous consequences for the Truss administration in the field of financial and fiscal policy. The *"sunset clause"* has a deadline which is already very close.

There are already some signs that the new Sunak administration has different priorities and that at the very least, the *"sunset clause"* will have its deadline postponed to the full extent.

Arguably, Government should at this time, have more urgent priorities than a complete review of the UK's regulatory system, which would surely require careful scrutiny both by politicians and civil servants. Without such scrutiny, there is the risk of ongoing legal uncertainty, which would in turn, risk imposing significant unnecessary legal and litigation costs on businesses.

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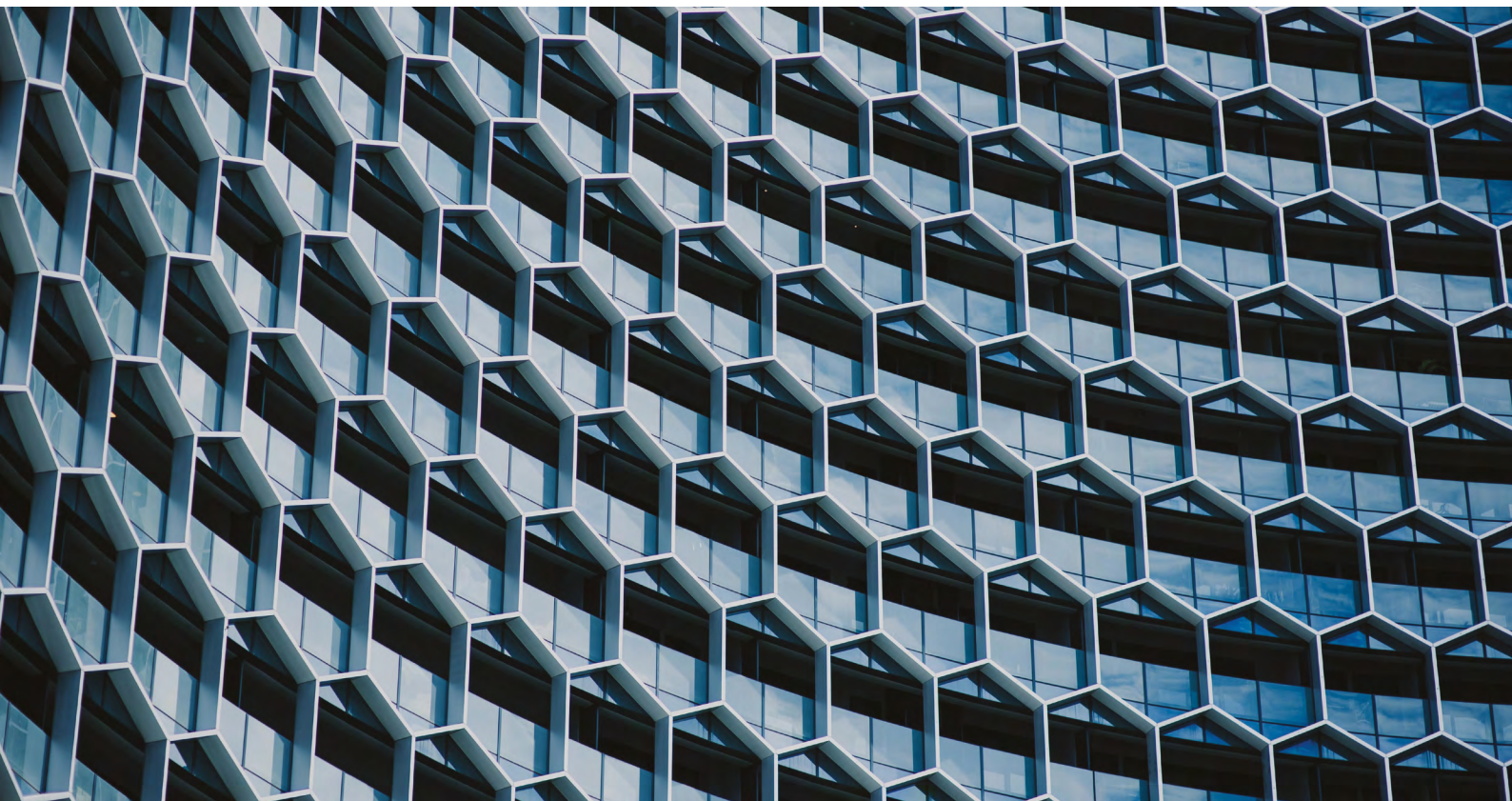

EU Representative Actions Directive

Member States of the EU are currently implementing the EU Directive (Directive EU 2020/1821) on representative actions for the protection of consumers.

This Directive requires Member States to provide a new mechanism for collective redress and injunctions to protect consumers against breaches of a range of EU legal instruments (specified in Annex 1 to the Directive). These items of legislation mainly relate to consumer rights and product safety, as regards products and services likely to be of particular interest to consumers, but in addition, EU legislation on misleading advertising is also included. This throws the field open to litigation on a range of, for example, environmental and similar claims that might be argued to be misleading. The scope of relevant legislation is also open to expansion, as Annex 1 to the Directive could be added to each time the EU adopts a new piece of legislation in the field of consumer protection. Furthermore, the Directive itself permits Member States to decide to apply the mechanism they enact in order to give effect to the Directive in other areas of law.

Member States have until 25 December of this year to transpose the Directive with the new rules they adopt due to come into force in June 2023.

At that time the Directive will replace an earlier and more limited Directive dating from 2009 which provides for the granting of injunctions against certain unlawful trading practices.

The Directive does not require Member States to harmonise their own existing systems of collective redress, but rather to establish a new mechanism to meet the requirements of the Directive, in addition to any existing provision.

The Directive has also been drawn up with a view to Member States avoiding what are seen as the excesses of US class actions litigation. Accordingly, actions for the enforcement of the relevant EU legislation by way of collective redress will need to be brought by a "qualified entity" designated for the purpose (either ad hoc for a particular action, or more generally) by the Member State in a relevant jurisdiction. However, qualified entities established in one Member State may be authorised to bring cross-border proceedings in other Member States, and Member States must mutually recognise qualified entities from other Member States for this purpose.

In relation to cross-border representative actions, qualified entities must be independent non-profit-making consumer protection organisations meeting criteria laid down in the Directive and any supplementary criteria laid down by the Member State. They will therefore need to show that they are independent of non-consumer interests, such as law firms, or competitors of the traders from whom redress will be sought.

Member States are also obliged to adopt criteria for designating qualified entities for domestic proceedings that are consistent with the objectives of the Directive. (They could adopt the same criteria as just mentioned for cross-border proceedings). They are also obliged to designate on request any entity which meets the relevant criteria.

Additionally, public bodies may be designated as qualified entities including those already designated for the purpose of the 2009 Directive.

There are also restrictions on the use of third-party funding, and the provisions on redress for consumers are similar to those under existing EU consumer protection law and do not appear to encompass punitive damages.

There are provisions on disclosure similar to those in common law jurisdictions, and the Directive provides for costs to be paid to the winner, but individual consumers cannot be ordered to pay costs unless, exceptionally, the costs were incurred as a result of the individual consumer's intentional or negligent conduct. This exception therefore appears to refer only to "wasted" costs.

Member States have considerable discretion as to how representative actions may be brought, for example, whether by judicial or administrative proceedings in particular cases. They also have discretion on a number of other matters, in particular whether to provide an opt-in or opt-out mechanism. That would determine the way in, and the extent to which consumers could decide whether or not to be represented by a particular qualified entity in an action and whether or not to benefit from the outcomes of such an action.

Member States are required to ensure that the costs of proceedings do not prevent qualified entities from sing their rights to bring representative actions, for example by public funding, limitation of court costs, or permitting qualified entities to charge consumers a modest entry fee as a condition of participation.

Much will evidently depend on how the Directive is implemented in particular Member States. However, it seems clear that what is envisaged is not a bonanza for claimants' lawyers, but rather an extension of a system of intervention by public or quasi-public bodies to ensure enforcement of consumer protection legislation in the public interest, but which will also provide a means of redress for individual consumers.

A number of Member States already allow group actions, or similar proceedings on terms which may be more favourable to litigants and their advisors than what is envisaged under the Directive, and it is not clear what the extent of the practical impact of the Directive will be in such states. However, the Directive will undoubtedly cause Member States to review their mechanisms for collective redress.

Although the UK will, in consequence of Brexit, not be implementing the Directive itself, the Directive will undoubtedly have some impact on UK companies if they carry on business in EU Member States.

Generally, it would appear to be the best policy for affected businesses to take proactive steps to ensure that they are in regulatory compliance, as that is likely to be more cost-effective than having to defend litigation, even in the relatively restrained form envisaged by the Directive.

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Proposal for a revised Product Liability Directive

On 28 September 2022 the EU Commission published two new proposals for Directives.

The first, which is the subject of this article, is a proposal to replace the current EU Product Liability Directive (Directive 85/374/EEC), that directive introduced into the law of the EU Member States a new system of strict liability for damage, in particular personal injury, caused by defective products. That new system of strict liability was loosely based on a type of tort liability developed in the United States to provide a remedy for consumers against damage, in addition to any contractual claims that they might have against the sellers of products.

The second, and linked, proposal put forward by the Commission is a separate proposal for a new Directive (the proposed AI Liability Directive). This would adapt the rules in Member States governing non-contractual civil liability rules, i.e. tort rules, to developments in the field of artificial intelligence so as to make it easier for claims to be brought for compensation in respect of damage caused by the operation of AI. That second proposal is not the subject of this article. but we will aim to cover it in a later issue of SHE Matters.

The proposal for a new Product Liability Directive will repeal and replace the existing Product Liability Directive as it currently applies in the continuing EU Member States.

It would retain the essential framework of the current Directive but introduce significant amendments to take account of the importance of software and AI in the functioning of many products now placed on the market. The new proposal is also intended to reflect developments in the area of collective redress (see for example for example, the proposal discussed in the previous article), and also the importance of the Circular Economy, the EU policy encouraging the repair and reuse of products rather than their disposal as waste.

Central to the existing law is the concept of liability of producers to pay compensation, without need for proof of fault on their part, for damage caused by products which are “defective”. The new proposal would extend the concept of “defect” to ensure that defects in software count as defects for the purpose of strict liability. In particular, in assessing whether or not a product is defective, the proposal would provide for account to be taken of the effect of the product of any ability on the part of the product to continue to learn after deployment, an AI aspect, and also the effect on the product of other products that can reasonably be expected to be used together with it.

Under the proposal the Directive would now use somewhat new terminology, in that the word “manufacturer” is now generally substituted for the word “producer” used in the current Directive. However, that has not changed the essential meaning of the concept, because the term “manufacturer” is defined in a broadly similar way to “producer” under the current Directive, so as to include “own branders” of the product, for example.

The new proposal would also extend the scope of the existing rules for ensuring that claimants can obtain redress where a manufacturer is based outside the EU. Accordingly, there are provisions to ensure that where no authorised representative or importer is available and based in the EU to step into the manufacturers shoes to carry liability, claims can be brought against a wider group of actors in the supply chain for the product, and notably against "fulfilment service providers".

The expression "fulfilment service provider" does not include the providers of postal services or freight transport services. However, subject to that, it includes economic operators who provide two or more specified categories of service relating to the particular product, namely warehousing, packaging, and addressing and dispatching it.

There are also provisions for the operators of online platforms on which a product might be sold, as well as distributors, to incur liability in certain cases where they have failed to identify their suppliers. That expands and updates a provision existing under the current Directive.

Under the new proposal, the concept of "damage" is extended beyond the traditional concepts of damage to property and personal injury, to include medically recognised harm to psychological health. The concept will now also include the loss or corruption of data which is not exclusively used for professional purposes.

Claimants are to be assisted by new provisions for courts to order disclosure of evidence, but subject to rules for the protection of trade secrets. While these new provisions are similar to those which would apply in comparable circumstances in common law jurisdictions, they are likely to be an innovation in a number of jurisdictions with a civil law system.

In cases where a defendant fails to comply with its disclosure obligations there is provision for the burden of proof to shift from the claimant to the defendant.

Furthermore, new provisions would similarly shift the burden of proof where the product does not comply with relevant mandatory safety requirements under Union or national law. The burden would also shift where the claimant has established that damage was caused by an obvious malfunction of the product during normal use, or under ordinary circumstances.

The proposal would also create a presumption of a causal link between defect and product, where the product is shown to be defective, and the damage is of a kind typically consistent with that defect.

In certain cases, defect and causation may also be presumed where a court judges that a claimant "faces excessive difficulties due to technical or scientific complexity".

While the general position is maintained that manufacturers will only be liable for defects which existed when the product was first sold, they will be liable under the strict liability regime for related services which they may provide thereafter, and in respect of software updates or upgrades they provide and also for any failure to provide such updates and upgrades, where they are necessary to maintain safety.

On limitation periods, the proposal would continue to provide a 10-year longstop period for claims under the Directive running from the date the product was first placed on the market or put into service. However, there is provision for time to run again from any subsequent substantial modifications made to a product. That is intended to reflect the operation of the Circular Economy. There is also a new 15-year longstop period where an injured person has not been able to initiate proceedings within ten years due to latency of the personal injury.

If adopted, the proposal will have significant implications for manufacturers whose products are sold in EU Member States. That will include a large number of UK manufacturers, as well as their counterparts based in the EU, notwithstanding that the UK itself is under no obligation to make corresponding amendments to the liability rules under the Product Liability Directive as it applies in the UK.

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The Protect Duty

Protect Duty – an update

The new Protect Duty Bill was announced in the Queen's Speech on 10 May 2022, following the Government consultation which ran in 2021. It was confirmed that the new Protect Duty legislation will become law in the 2022-23 Parliamentary session. In the meantime, organisations should start to consider their role in protecting the public from terror threats and how the new legislation will affect their business.

1. Aim of the Protect Duty

There have been an increasing number of terrorist attacks in public spaces in the UK – most notably, the Manchester Arena bombing. Currently, there is no legislative requirement for the vast majority of organisations to consider or employ security measures to help prevent such incidents occurring. The devastation caused by the Manchester Arena bombing has provided impetus for much needed legislative change.

The Protect Duty aims to enhance national security by introducing new security requirements for those in control of certain "publicly accessible locations" to ensure preparedness for and protection from terrorist attacks.

A new framework will be established that requires those in control of certain publicly accessible locations to consider the threat from terrorism and implement appropriate and proportionate mitigation measures. It will also introduce an inspection and enforcement regime, which will seek to educate, advise, and ensure compliance with the Protect Duty.

2. Who will the Protect Duty apply to?

The definition of "publicly accessible location" is wide and is likely to encompass a vast range of locations including sports stadiums, music venues, pubs, nightclubs, shopping centres, supermarkets, schools, universities, hospitals, places of worship, transport hubs, open air venues, sports facilities, restaurants and cafes.

It is anticipated that the Protect Duty will apply to venues with a capacity above a certain threshold (a capacity of 100 or more was considered in the Government's consultation).

However, it is also anticipated that the Protect Duty will apply to large organisations with 250 employees or more that own or occupy publicly accessible locations. This includes organisations with multiple premises with regular public footfall, such as chains of betting shops, takeaways, cafes, petrol stations and chemists. There may be no equivalent capacity threshold for such large organisations.

Where there are multiple dutyholders in respect to one venue, such as a shopping centre, the Protect Duty is likely to require dutyholders to consult and cooperate with one another to ensure that suitable security plans are agreed and implemented.

Even if your organisation or venue falls outside the scope of the Protect Duty, the Government has emphasised that *all* locations should consider implementing the security measures, in a way that is proportionate to reflect the risk.

3. What will the Protect Duty require from organisations?

Owners and operators of relevant publicly accessible locations will be required to use available information and guidance provided by the Government and the police to consider terrorist threats to the public and staff at locations that they own and/or operate.

Such organisations will be expected to consider and implement "reasonable" security measures with the aim of preserving life. These measures could include training staff on how to identify and respond to threats, implementing robust security policies, and/or introducing physical safety elements such as barriers.

The Government has emphasised that these measures do not need to be expensive. Specialist physical security products are only likely to be installed at larger sites and prevention is seen as a combination of physical and behavioural interventions "deployed in a complementary manner".

While measures that organisations are expected to take will be proportionate to the size of the organisation and footfall, larger organisations should anticipate much more onerous requirements. It is clear that the scale and complexity of a dutyholder organisation is going to be particularly important in determining the action and the control measures an organisation should take.

However, regardless of the size of a dutyholder organisation, suitable risk assessments and training will be a core requirement for all organisations to which the Protect Duty applies.

We are anticipating Government guidance on the Protect Duty to provide more clarity on what is expected of dutyholders. Guidance is set to be "clear and detailed", "sector-specific" as appropriate and will highlight dedicated points of contact for dutyholders.

4. Consequences of non-compliance

Given the severe and devastating impacts that could occur as a result of non-compliance with the Protect Duty, the Government has proposed that a new offence is created for organisations who persistently fail to take reasonable steps to reduce the potential impact of terrorist attacks.

The Government has proposed an enforcement regime, with penalties primarily based on civil sanctions (such as fines) for organisations in breach of the Protect Duty. This is considered by the Government to be an appropriate framework for a regime that is seeking to encourage more effective organisational security cultures, rather than a system of criminal sanctions.

We anticipate that the guidance will dictate larger fines for larger originations, as we have seen in other regulatory regimes.

All organisations, regardless of size, should begin to consider how the Protect Duty will impact their organisation and start taking steps to assess the threat from terrorism, train staff and implement appropriate security measures to keep the public safe from potential terrorist attacks at their venues.

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Mental Wellbeing in the Workplace: Time for Action?

In 2022, the topic of mental health and wellbeing is more pertinent than ever; last year saw a record 4.3 million referrals to mental health services in the UK, which according to the Royal College of Psychiatrists, represents the "unprecedented demand" driven by the Covid pandemic[1]. The increased urgency for action on mental health is mirrored in the theme for World Mental Health Day 2022, held on 10 October, which is *"to make mental health…a global priority"*[2]. Against this backdrop, the time is more than ripe for businesses to consider what actions they should consider taking to protect the mental health and wellbeing of their employees.

At the outset, it is useful to consider what we mean by the terms "mental health" and "work-related stress". The World Health Organisation (**WHO**) defines "mental health" as *"a state of mental well-being that enables people to cope with the stresses of life…[and] to learn and work well"*[3]. The term "work-related stress" refers more narrowly to a direct response to *"work demands and pressures…which challenge [the individual's] ability to cope"*[4]. Accordingly, companies may need to think about how they can support both (i) individuals who are dealing with existing or non-work related mental health issues in the workplace, and (ii) those whose mental health has suffered as a direct result of their employment.

Of course, these considerations presuppose that businesses *should* be interested in the mental wellbeing of their staff, and it is worth setting out why mental health is a genuine business concern. On this point, figures published by Deloitte calculate the overall cost of poor mental health to employers in the UK to be between GBP53 billion and GBP56 billion[5]. These figures take into account both absenteeism and "presenteeism", whereby workers attend work but are less productive due to poor mental health, sickness absence and staff turnover. Conversely, active intervention by employers can yield an average return of GBP5.30 for every GBP1.00 invested, making investment in employee wellbeing the "smart" business decision[6].

[1] See this article by the British Medical Journal for further commentary on these figures.

[2] For more information about World Mental Health Day 2022, see here.

[3] For full definition, see page 18 of WHO Guidelines on Mental Health at Work, available here.

[4] The WHO definition of stress can be reviewed in full here.

[5] For full report, see Deloitte – mental health and employers – the case for investment beyond the pandemic – March 2022, available here.

[6] As above at 16.

Further, the importance of mental health in the workplace is becoming increasingly recognised on a global level, for example just last month saw the WHO release its *"Guidelines on mental health at work"*[7]. This only goes to compound the pressure on employers to ensure the wellbeing of their employees, or else risk adverse media attention and the potential to stray into non-compliance.

What does the law say?

Employers must have regard to their legal duties towards employees; employers in the UK have a statutory duty under the *Health and Safety at Work etc Act 1974* to ensure, so far as is reasonably practicable, the health, safety and welfare of their employees[8]. This duty gives rise to more specific obligations contained in other regulations on employers to take actions such as undertaking risk assessments, applying principles of prevention, and providing information to employees about the risks to their health and safety at work[9]. Non-compliance with these obligations can lead to prosecution and an unlimited fine based on turnover.

While these obligations have traditionally been associated with physical risks and hazards in the workplace, the Health and Safety Executive (**HSE**) has made clear that they apply equally, and with just as much vigour, to mental health issues[10].

What should employers be thinking about?

With these considerations in mind, businesses should be turning their attention to the question of how they can support the mental wellbeing of their employees. There are several useful resources on this topic, including the HSE's *"Mental health conditions, work and the workplace"*[11] and WHO's *"Mental Health at Work"*[12] guides, both of which suggest practical methods for reducing risks to mental health at work. The following non-exhaustive list sets out just a few of these suggested actions, by way of example:

- **Risk assessments:** Ensure that your workplace risk assessment covers mental health and stress.
- **Produce a mental health at work plan:** Implement and communicate a plan that promotes the good mental health of all employees and outlines the support available for those that need it.
- **Mental health training and awareness:** Provide managers with training to recognise and respond to supervisees experiencing emotional distress, and provide training for workers to improve mental health literacy and awareness.
- **Interventions for individuals:** Build skills to manage stress, including psychosocial interventions where necessary.
- **Reasonable accommodations:** Adapt work environments to the needs of a worker with a mental health condition, for example by offering flexible working hours or extra time to complete tasks.
- **Return to work programmes:** Combine work-directed care with ongoing clinical care to support workers meaningfully in returning to work after an absence associated with a mental health condition.

There is now considerable momentum for action on mental health and wellbeing at work, and businesses should act now, if they have not done so already, to avoid straying into non-compliance.

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[7] Available in full here.

[8] Section 2 (1) HSWA 1974.

[9] Management of Health and Safety at Work Regulations 1999 (SI 1999/3242).

[10] See, for example, the following guide.

[11] As above at 21.

[12] Accessible here.

The Department for Environment, Food and Rural Affairs review of the Office for Environmental Protection

The new Office for Environmental Protection (**OEP**) was legally created in November 2021, under the *Environment Act 2021*, sponsored by the Department for Environment, Food and Rural Affairs (**Defra**). The OEP is an independent non-departmental public body whose primary purpose is to protect and improve the environment by holding Government and other public authorities to account. Since it became fully operational in January this year, the watchdog has begun to advise Government on potential breaches to environmental law and to investigate such occurrences.

From May 2022 to July 2022, Defra initiated a review of the OEP as part of the Government's Public Bodies Review Programme. The reason for the review was to check that the OEP is both well governed and properly accountable for what it does as well as being effective, efficient and aligned to the Government priorities.

The outcome of the Stage 1 review was that the OEP is in good health and is on track to meet the minimum requirements for an arm's length body. The review did not identify the need for a further, more comprehensive review to be carried out.

As part of the review process, recommendations have been made which focus on the enhancement of administration and governance processes. There are 12 recommendations in total which can be summarised as falling under matters relating to efficacy, efficiency, governance and accountability.

In relation to efficacy it was identified that: a memorandum of understanding should be developed in collaboration with the relevant bodies in Scotland and Wales by March 2023; Defra agreed performance metrics should be in place by April 2023; internal guidance ensuring project compliance with HM Treasury's Green Book and associated business case guidance should be in place by January 2023; and Defra should review the OEP's budget and headcount ahead of the next three financial years to monitor the deliverance of the OEP's statutory objectives.

The recommendations relating to efficiency require the development of a benchmarking strategy so data can be used to compare costs and to improve efficiency by April 2023, together with the requirement to develop a digital, data and technology strategy by December 2022.

The governance related recommendations require the OEP chair to: consider the skills and diversity needs of the board to provide for a clear strategy for board appointments by January 2023; to ensure appropriate training for board members on financial management and reporting requirements is carried out; publish its board's declarations of interests; and to work with Defra in relation to post-employment rules and procedures for board members.

Under the topic of accountability, the recommendations require Defra and the OEP to agree the Common Framework document by August 2022 and to take into account the guidance on risk management provided by the Government, in order to agree a common approach to risk by April 2023.

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OPSS Product Regulation Strategy 2022 to 2025 published

The Office for Product Safety and Standards (**OPSS**) is the national regulator for construction and consumer products (except vehicles, medicines and food), and the UK Government's enforcement authority for numerous regulations spanning the product lifecycle. A departmental office within the Department for Business, Energy and Industrial Strategy, their purpose is to protect people and places from product related harm to ensure products can be bought and sold with confidence. Their objectives are to:

- deliver protection through responsive policy and active enforcement;
- apply policies and practices that reflect the needs of citizens;
- enable responsible businesses to thrive;
- co-ordinate local and national regulation; and
- inspire confidence as a trusted regulator.

The OPSS' 2022 to 2025 Product Regulation Strategy entitled *"Delivering protection and confidence in a strong, green economy"* has been published. This document provides a useful insight into how the OPSS regulate. The Strategy also emphasises the fact product regulation is evolving due to issues such as changing technologies, supply chains, products and markets, all of which are being considered as part of the OPSS' horizon scanning activities.

The Strategy states the OPSS has taken on new functions to help realise the *"opportunity to review domestic laws and regulation"* following the UK's exit from the EU. This is evident not least in the OPSS' role in the UK's Product Safety Review, the initial call for evidence

for which was issued in 2021. The OPSS is leading the UK Government's consultation on changes to the EU derived framework for product safety regulation. Notably, within the Strategy there is no mention of the impact any EU-UK regulatory divergence will have on those exporting from the UK to the EU, nor is any further detail provided in respect of *"new opportunities for trade agreements across the globe"*.

The response to the Product Safety Review call for evidence, issued by the OPSS in November 2021, noted three recurring issues arising from numerous responses, namely that:

- the UK's system of regulation was not designed with today's models of supply and products in mind i.e. consumers buying directly from abroad, and online (including third party listings on online platforms);
- future regulation must be more adaptable and responsive to avoid the development of gaps in enforcement, and to facilitate safe innovation (the need for confidence in the safety of energy efficient products was emphasised); and
- there is a need for greater simplicity, proportionality and consistency across legislation and powers, as product safety legislation is large and complex.

The Strategy clearly focuses on these highlighted key issues in the Strategy, in particular when discussing delivery priorities and the role of product regulation. For example, in the Strategy the OPSS:

- explains that the Product Safety Review aims to update the legislative framework to provide a flexible foundation that can adjust easily to change, make the legislation easier to follow, reduce the availability of unsafe products online, support climate conscious product markets, update enforcement powers and ensure consumers always have a route to seeking compensation;
- acknowledges that the significant growth in online trade has been accompanied by changing business models (such as the significant growth in online platforms acting as marketplaces for third parties) and notes that regulations must adapt to these new realities;
- make clear they intend to clarify roles and responsibilities for online sales to provide consistency with traditional retail trade, and claim they have challenged online platforms to improve their performance when ensuring non-compliant items are delisted; and
- state they are facilitating the innovation of eco products and technologies, supporting product repair, reuse and recycling whilst maintaining protections (the OPSS note Government has introduced or amended regulations aiming to reduce energy consumption and support repair rights), informing policy development and enforcement for energy related products, and supporting the development of standards to help achieve net zero.

The key issues in the OPSS 2021 Strategic Intelligence Assessment are also set out in the Strategy, indicating that the OPSS are aware of the following ongoing problems:

- models of supply for products sold online continue to present significant enforcement challenges (this is similar to the first key theme identified in the Product Safety Review);
- persistent issues with the import of certain products, in particular cosmetics, toys and electrical appliances;
- chemical safety risks in relation to non-compliant products, notably toys and cosmetics; and
- supply chain disruption and economic shocks may lead to an increased risk of non-compliant and unsafe products entering the UK.

In short, the Strategy provides an insight into the OPSS' priorities over the next three years and demonstrates the OPSS' awareness of certain issues (such as the complexity of the product safety legislation framework) and a willingness to update legislation to address such issues. Businesses should therefore remain alert to any developments in respect of the Product Safety Review as and when they arise, to ensure they are able to adapt quickly to any changes in product regulation.

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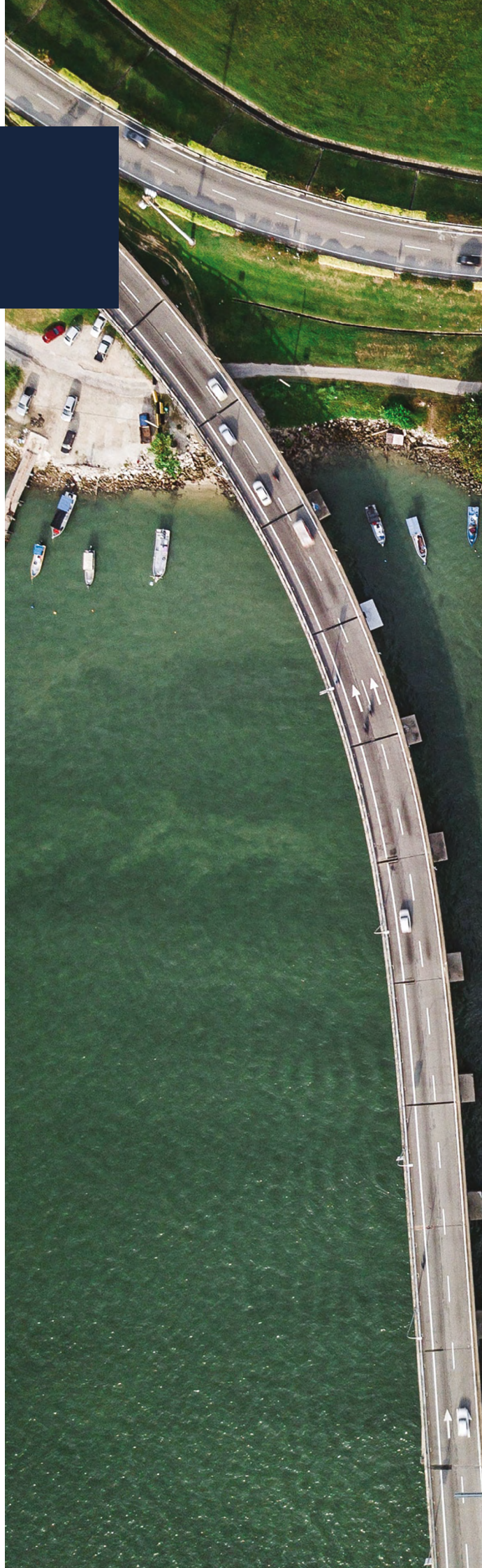
New Product Labelling Requirements?

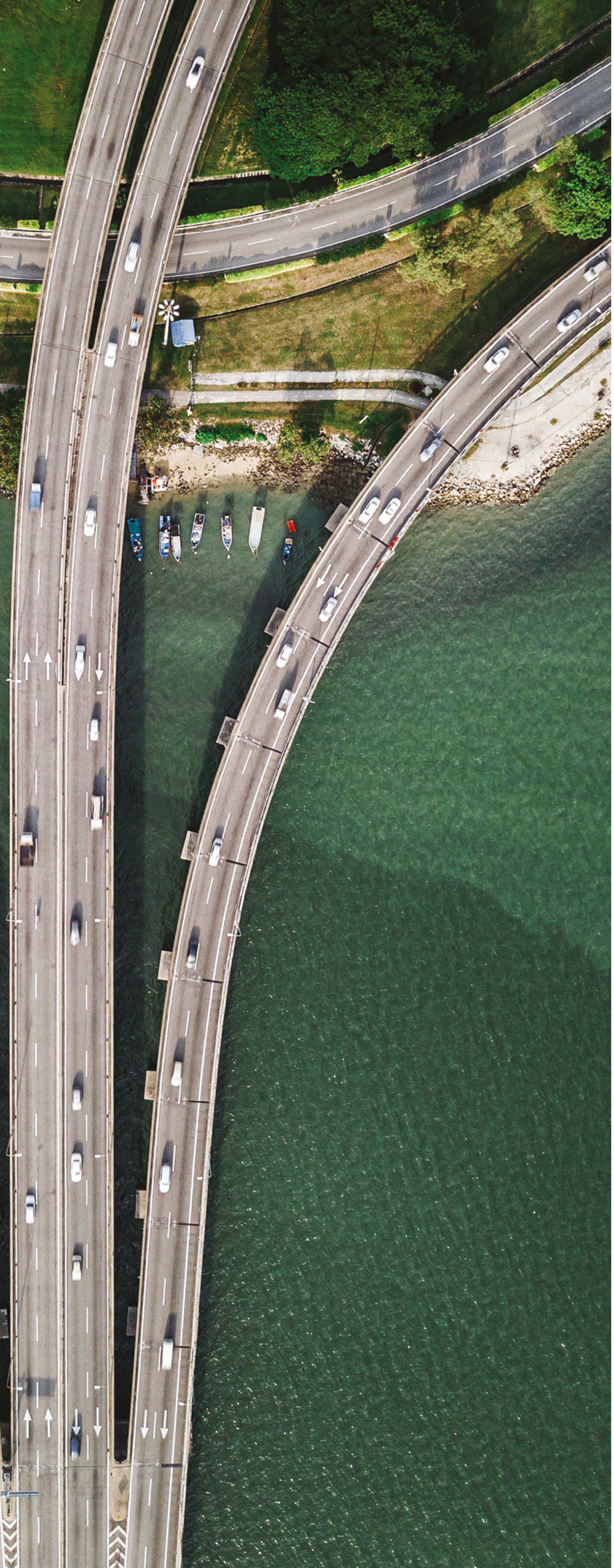
Government consults on UK mandatory water efficiency labelling it hopes will save consumers GBP270 million over the next ten years.

On 2 September 2022, the Department for Environment, Food and Rural Affairs (Defra) and the devolved governments published a consultation on proposals to introduce mandatory water efficiency labelling on water-using products in the UK. The label is at the centre of Defra's policy pathway to deliver their proposed Water Demand Target under the *Environment Act 2021.*

Defra state that climate change and population growth are increasing pressure on our water resources. The UK Government's 2021 Written Ministerial Statement on reducing demand for water included an action *"to make regulations to introduce a mandatory water efficiency label to inform consumers and encourage the purchase of more water efficient products for both domestic and business use"*. A Mandatory Water Efficiency Label will give consumers the information they need to make informed decisions when purchasing new water using products for their home. It will also help developers and water companies to improve water efficiency in buildings. Defra estimates that, over a decade, the new labels could save households in the region of GBP125 million on water bills and GBP147 million on energy bills because less water will need to be heated. The Government's expectation is that the measure will save 1.2 billion litres of water a day.

The consultation, which closes at midday on 25 November 2022, proposes labelling toilets, urinals, kitchen sink taps, bathroom basin taps, non-electric shower outlet devices and shower assembly solutions, dishwashers, washing machines and combination washer-dryers as defined in the ISO standard 31600:2022 (Water efficiency labelling programmes: requirements with guidance for implementation). The consultation proposes a simple standalone water efficiency label showing the water flow rate or consumption per cycle (x litres/min), which will be similar to the energy efficiency label design. Defra is considering banded (tiered) labelling that shows various rated levels of water consumption. The supplier that first places a regulated product on the market, or puts it into service, will be responsible for assessing and labelling. A supplier is the manufacturer, authorised representative or importer of a product. Dealers and retailers will be required to clearly display the label.





Defra wants to hear views on these plans.
The consultation sets out:

- the proposed approach
- products covered by the label
- label design and features
- label display
- standards to support the label

Anyone interested in taking part in the consultation can find it here: Consultation

Responses to the consultation will shape the development of processes, guidance and secondary legislation. Defra have also asked water companies to set out how they can help promote this label and use it as part of incentive or rebate schemes. Defra expects to conclude the labelling scheme development and draft regulations later in 2023. There will be an implementation period from the regulations coming into force (for example, of 18 months) to allow suppliers to adapt. Defra estimate that the changes will come into force by early 2025.

A detailed enforcement regime will form part of the new legislation with the 3 main functions of the enforcement authorities being to: monitor compliance, investigate compliance and impose sanctions when a breach has been identified.

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Overview of the proposed new obligations on large undertakings and non-EU parent companies under the draft Corporate Sustainability Reporting Directive

The upcoming Corporate Sustainability Reporting Directive (**CSRD**) forms one of the key pillars of the EU non-financial reporting ESG regime.

When it comes into force, the CSRD will implement new laws on mandatory non-financial reporting by certain companies in the EU, superseding and significantly expanding those previously put in place by the Non-Financial Reporting Directive (2014/95/EU) (**NFRD**) and enforced through the Accounting Directive (2013/34/EU).

Current NFRD requirements

As the law currently stands, the NFRD provisions implemented under the Accounting Directive require certain large "public interest entities" (meaning EU-based listed companies) with more than 500 employees to report on specified non-financial data annually. This data must be included as part of an entity's annual management report, and should contain (at a minimum) information on the entity's development, performance, position and impact as it relates to environmental, social and employee, human rights, anti-corruption and bribery matters, including:

- a brief description of the undertaking's entity's model;
- a description of the policies pursued by the entity in relation to those matters, including due diligence processes implemented;
- the outcome of those policies;
- the principal risks related to those matters linked to the entity's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the entity manages those risks; and
- non-financial key performance indicators relevant to the particular business.

Upcoming expansion under the CSRD

For reporting on financial years commencing on or after 1 January 2025 (i.e. for reports due in 2026), Article 19a of the CSRD will broaden these obligations, including by establishing sustainability reporting obligations for both listed and non-listed entities which are *"large undertakings"*, defined as an undertaking that meets two out of three of the following criteria:

1. balance sheet of EUR20 million;
2. turnover EUR40 million;
3. 250+ employees.

The EU Commission has indicated that this will significantly increase the scope of non-financial reporting, from approximately 11,600 companies to 49,000 companies within the EU.

The information to be reported is also set to be expanded, and includes information as it relates to sustainability on a range of matters, such as:

- the reporting undertaking's business model and strategy;
- any time-bound targets in place;
- the role and expertise/skills of the undertaking's administrative, management and supervisory bodies;
- the existence of incentive schemes offered to members of the administrative, management and supervisory bodies;
- due diligence processes implemented;
- the principal actual or potential adverse impacts connected with the undertaking's own operations and with its value chain; and
- any actions taken by the undertaking, and the result of such actions, to prevent, mitigate, remediate or bring an end to actual or potential adverse impacts.

Proposed Article 29b of the CSRD empowers the EU Commission to produce detailed binding reporting standards, elaborating on the above information to be reported and the structure that reporting should take. The first set of standards are due to be published in their finalised form by 30 June 2023, with drafts currently being developed by the European Financial Reporting Advisory Group (**EFRAG**).

Proposed new requirements impacting non-EU parent companies

In what has been a particularly controversial development, proposed Article 40a of the most recent version of the CSRD also adds an entirely new reporting obligation. This covers sustainability information relating to large non-EU parent companies with a significant presence in the EU (specifically, where such a non-EU company generates a net turnover of more than EUR150 million in the EU for two consecutive financial years). This obligation is set to apply slightly later than the Article 19a obligation discussed above, with the first reporting requirement to take place in 2029, covering financial years commencing on or after 1 January 2028.

The actual reporting obligation does not technically rest on those non-EU parent companies, but instead is placed on their qualifying EU-based subsidiaries and/or branches. Article 40a appears to have been drafted in this way to avoid any suggestion that the EU Commission is exercising extra-territorial jurisdiction by placing obligations on entities based outside the EU. Despite this, Article 40a requires that specified information should be reported at the *"consolidated level"* of the ultimate third-country parent undertaking.

Although not confirmed, the use of the word *"ultimate"* here strongly suggests that the obligation is intended to apply to the highest-level non-EU entity in a group, capturing information relating to every entity that sits underneath the top parent undertaking in qualifying companies.

Under new Article 40b, the Commission is required to adopt (by June 2024) sustainability reporting standards that specify the information to be included in Article 40a reports. These standards are expected to provide additional information on exactly how the obligations under Article 40a should be interpreted, and many of the world's largest companies will be watching with great interest to see how the matter develops.

Status of the CSRD

The latest version of the CSRD reflects an agreement reached through Trilogue discussions between the EU Parliament, the Council and the Commission.

The agreed text is yet to be formally adopted by the Commission, but this is expected to take place within the next few months once it has been finalised and translated into the language of each of the EU Member States.

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Legislative Obstacles for plant-derived meat substitutes

With effect from 1 October 2022, a recently-published French decree has banished the use in France, in connection with the sale of food products, the use of terminology traditionally associated with meat or fish to designate products that do not derive from members of the animal kingdom.

The effect of this legislation, the result of lobbying by meat and fish producing interests, is however less drastic than might at first appear. The legislation does not apply to products from other EU member states, or from Turkey. No doubt this exception has been made in order to avoid potential difficulties with EU Single Market Rules.

It has accordingly been suggested that the lobbying interests who obtained the French legislation may now press for similar legislation to be adopted at EU level.

In fact, several efforts have been made in the past to persuade the EU as a whole to adopt similar legislation, however, these efforts have so far failed. No doubt this is in part because one of the thrusts of the EU's "Farm to Fork" strategy is to encourage the use of alternative plant-based proteins in place of meat, particularly red and processed meats.

The one area where the approach of the French legislation, in banning the use of specific types of expression with traditional associations in the context of food products has been successful at EU level, has been in the field of dairy products.

Partly as a result of EU legislation, in particular the *Agricultural Products Regulation,* and partly as a result of a decision of the European Court of Justice in 2017, it is unlawful for purely plant-based product to be marketed with designations such as "milk", "cream", "butter", "cheese" or "yogurt".

There is however a more general principle laid down in Article 7 of the *Food Information to Consumers Regulation.* This regulation, like most EU food legislation, continues to have effect in the UK despite Brexit. Article 7 of the Regulation requires that food information shall not be misleading, particularly *"by suggesting by means of the appearance, the description or pictorial representations, the presence of a particular food or ingredient, while in reality a component naturally present, or an ingredient normally used in that food has been substituted with a different component or a different ingredient"* (Article 7(1)(d)).

It would therefore be prudent for the producers of foods which substitute plant-derived substitutes for meat to avoid the use of terms or expressions which might be considered misleading.

A further potential hurdle which producers of such products face lies with the *Novel Food Regulation*. This requires that "novel Foods" obtain authorisation before being sold as a food stuff within the EU. A food stuff can be considered "novel" if it was not consumed by humans within the Union to any significant degree prior to May 1997. That will apply to some plant products, but not to others, and decisions will need to be made very much on a case-by-case basis.

The reference to consumption by humans in the Union or (any other particular country or jurisdiction) may also raise problems given differences in custom. Such differences might be similar to those which gave rise to the famous quip by Doctor Johnson that oats is *"a grain which in England is generally given to horses, but in Scotland supports the people"*.

However, producers of plant-based food stuffs can take some comfort from the fact that both economics and also health concerns are on their side. This will no doubt over time lead to the emergence of acceptable expressions for plant-based substitutes for meat products which will not be considered misleading, and which will facilitate the marketing of those products, which it is increasingly the policy in the EU and elsewhere to encourage.

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EU Court annuls Regulation on Titanium Dioxide

The EU General Court has recently annulled a Commission Delegated Regulation (Regulation (EU) 2020/217 which sought to amend the EU Classification Labelling and Packaging Regulation in relating to Titanium Dioxide by classifying it as a carcinogenic substance in its powdered form.

The applicants in the case were manufacturers, importers and users of Titanium Dioxide, and various trade associations of which they were members.

The background to the case was that in 2016, the European Chemicals Agency (**ECHA**) received a dossier from the French competent authority. The RAC (the Committee for Risk Assessment within ECHA) then adopted an opinion on classification. The Commission adopted the Regulation in question on the basis of the RAC opinion.

The applicants argued that the classification and labelling proposed under the legislation was vitiated by manifest errors of assessment, in particular regarding the acceptability and reliability of a study (known as the Heinrich study) on which the RAC opinion was based. The French authority had already considered this study was unreliable, as regards the rat population used for testing, and used a single excessive dose testing.

The applicants also claimed that the contested classification and labelling in the regulation were based on carcinogenicity due to the effects of a lung overload of titanium dioxide particles and that the RAC committed manifest errors in the assessment of the degree of lung overload which occurred during the Heinrich study by wrongly concluding that it was not excessive.

The Court held that:

The requirement to base the classification of a carcinogenic substance on reliable and acceptable studies (as required in CLP Regulation) was not satisfied.

In assuming that the results of the scientific study on which it based its opinion on the classification and labelling of Titanium Dioxide were sufficiently reliable, relevant and adequate for assessing the carcinogenic potential of that substance, the RAC committed a manifest error of assessment.

The Commission based the regulation on the RAC Opinion and followed its conclusions, and therefore made the same manifest error as the RAC.

There was a further "manifest error of assessment" because the labelling and classification of the substance did not relate to an "intrinsic property to cause cancer" as required by the relevant rules.

The ability of the Court to annul the Regulation in this case depended on there being one or more "manifest errors of assessment".

Generally speaking, in the evaluation of scientific studies, as in carrying out any assessment or making a decision, EU institutions enjoy a broad discretion.

However, the (EU) Courts may, under general principles of EU administrative law, intervene where there has been a "manifest error of assessment". Under the case law this may take the form of:

(1) Failure to assess the material facts of the case

(2) Failure to take into account a relevant factor

(3) Taking into account an irrelevant factor that distorted the analysis

(4) Failure to satisfy the burden of proof (where this is relevant)

The Court annulled the offending Regulation, because in making it the Commission had adopted an opinion of the RAC, which in the view of the Court was based on two such *"manifest errors of assessment"*.

These proceedings represent a significant victory for the applicants,. The substance is used in a wide variety of products such as paints, coating materials, varnishes, plastics, laminated paper, cosmetics, medicinal products and toys. It would clearly have had significant adverse implications for manufacturers of those products if the substance had to be treated as intrinsically carcinogenic, if in fact it is only in very specific circumstances, which are highly unlikely to be relevant to the users of the products in question, that carcinogenic effects can be observed.

There may well be pressure for an appeal to be brought on the Titanium Dioxide case, as there would appear to be very strong feelings as regards the TD issue on the part of campaigners – commentators on this case have already sought to argue that the outcome was a result of industry lobbying. However, on the face of it the Court appears to have had very strong grounds for annulling the act in the case and accordingly the Commission may well seek to follow some other approach on that particular issue.

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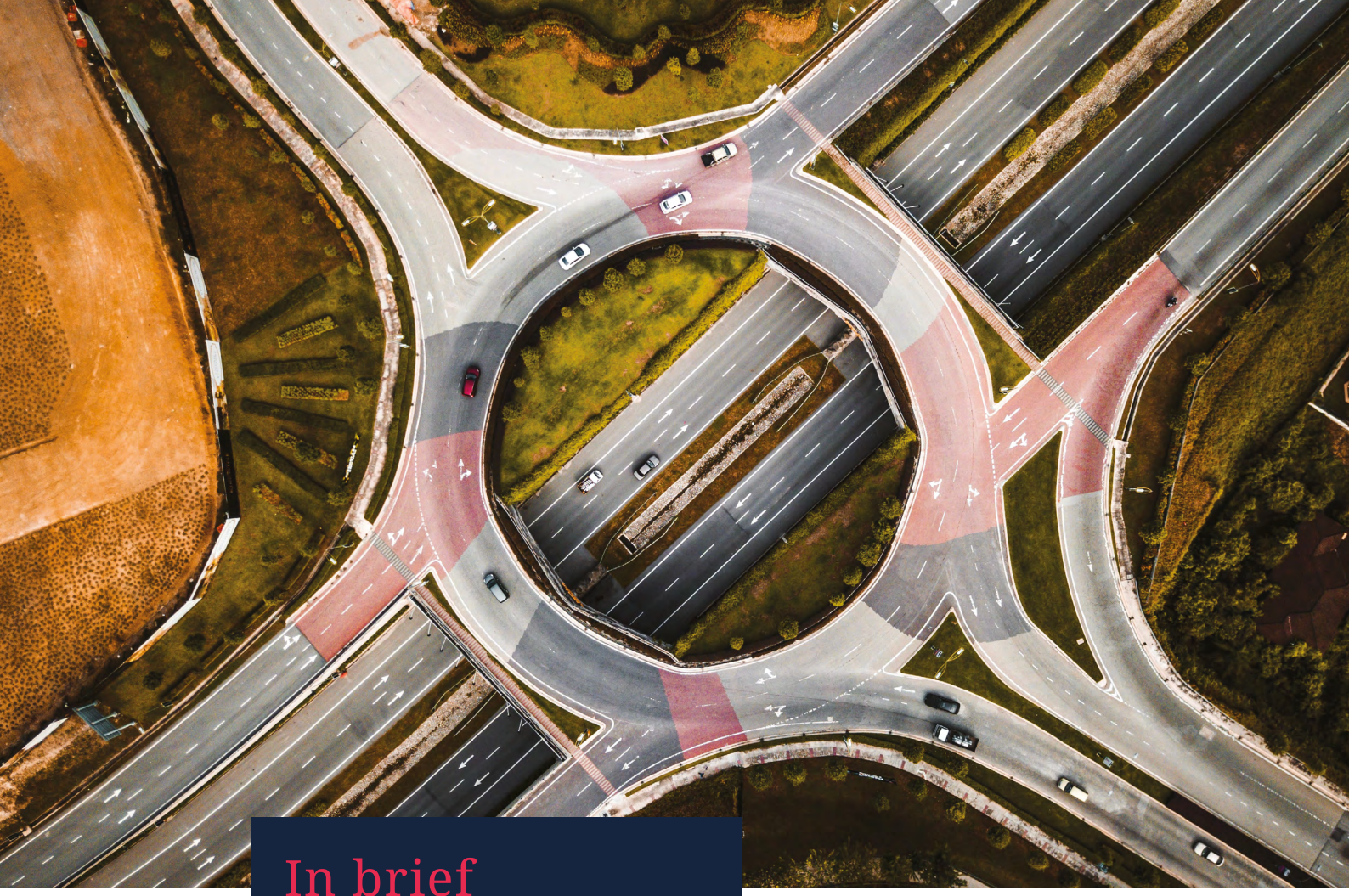


In brief

Consumer Protection

The Supreme Court decision in *Hastings v Finsbury Orthopaedics Ltd* has re-affirmed the test relating to the question of whether a product is defective. Statistical evidence alone, the issuing of official notices or the decision to voluntarily recall a product do not determine that a product is defective. The test remains whether, objectively, a product fails to meet the level of safety persons are reasonably entitled to expect.

The ASA has responded to the Welsh Government's proposed ban on the sale of energy drinks to under 16s observing that it may need to carefully introduce jurisdictional-specific advertising requirements, should such a ban come into force. Also in Wales, legislation banning single use plastics has been laid before the devolved Parliament.

Enforcement & Sentencing

A draft sentencing guideline (at consultation) has the potential to significantly increase penalties particularly for retailers involved in the inadvertent sales of knives to underage customers. Should the guideline come into force, it raises the prospect of GBP million fines for the worst offenders but perhaps more strikingly a very high probability of 6 figure fines even for organisations convicted on the back of an isolated breach with ostensibly reasonable precautions in place. This would represent a marked change from the generally low fines handed down at present, driven in part by the absence of a specific sentencing regime.

Leave to appeal was refused by the Court of Appeal in a fatal trespass case which resulted in a GBP6.5 million fine (which remains the highest under the 2016 Sentencing Guideline). The Magistrates Court now has the power to impose periods of 12 months imprisonment for either-way offences.

A large international food manufacturer has been handed a very significant fine after supplying a food product to a consumer containing a foreign object which had resulted from issues relating to its machinery. The case underlines the importance of (equipment) monitoring in the context of food safety/hygiene systems.

A review of recent safety cases in the criminal courts reveals a notable uptick in prosecutions brought against directors and officers. Whether this is part of a longer-term trend remains to be seen but it does tell us that enforcing authorities are seemingly more prepared than ever to invest resources into proceedings against individuals where they identify more serious failings.

Trading Standards has reported on a notable trend in the sales of unsafe consumer products including vaping products, various electronic goods and e-bike chargers.

The Court of Appeal has confirmed that save for in the most exceptional circumstances, when sentencing for health and safety offences, questions relating to the conduct of an employee is irrelevant when considering an uplift in a fine based on causation. The same case at first instance (endorsed by the Court of Appeal) had seen the starting point for a fine doubled from GBP500,000 to GBP1 million based on the company's turnover and previous conviction.

The Health and Safety Executive (HSE) has announced that there will be 500 unannounced site inspections in the waste and recycling sector which will focus on machinery safety, guarding and workplace transport.

DEFRA is bringing forward proposals which would give the Environment Agency (EA) the power to hand down civil penalties of GBP250 million to offending water companies.

Environmental Law

Scotland is the most advanced of the four nations in relation to single use plastics, having introduced prohibitions on products such as cups and containers (made from expanded polystyrene), plastic straws, plastic cutlery, etc. with Wales now following a very similar path with its recently proposed legislation. Whilst England has already prohibited e.g. plastic straws and stirrers, it remains in consultation about next steps as well as potential extended producer responsibility legislation and product labelling.

Parties who are currently only acting as consignors (by virtue of sending dangerous goods or by virtue of contract) of dangerous goods must from January 2023 appoint a Dangerous Goods Safety Adviser (DGSA). The remaining months of the year represent a good opportunity to review arrangements in respect of dangerous goods transportation.

Food Law

Legislation prohibiting the placement of HFSS products in prominent in store or online locations (e.g. checkouts, aisle-ends; home or payment pages) will come into force next month (October 2022) creating requirements for retailers and considerations for suppliers to trade. However, the UK Government may be prepared to "bonfire" very recent food law central to its anti-obesity drive e.g. laws mandating calories on menus and the sugar tax, despite the former only coming into force this April.

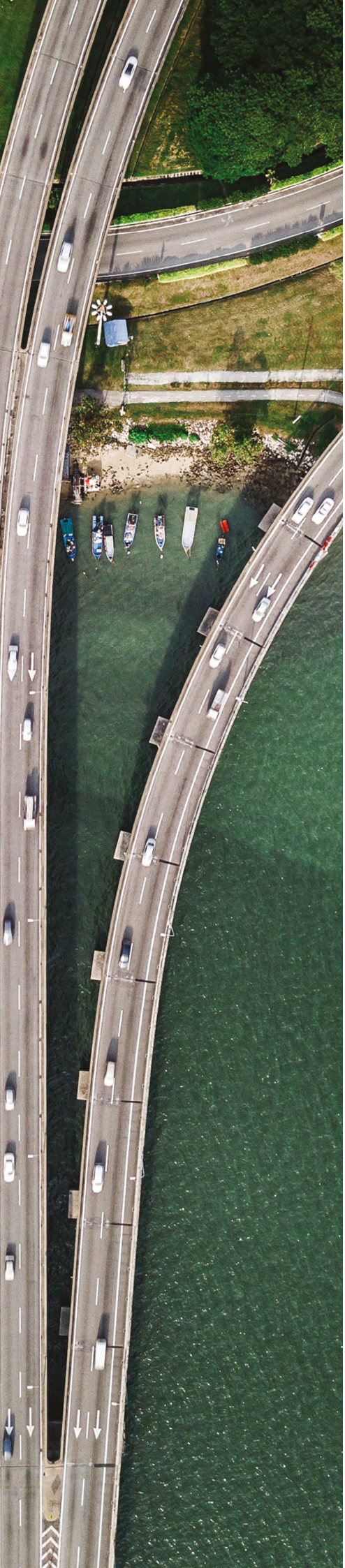
A new EU regulation on recycled plastic materials will enter into force on 10 October 2022 regulating the safety of recycled plastic intended to come into contact with food, including food packaging. It remains to be seen whether a similar position is taken in Great Britain.

A prevention of future-deaths report has been made will invite considerations as to whether there should be mandatory ingredient testing/certification in products which make "free from" claims in order to offer greater protection to allergy sufferers.

Food Waste

Customers of a well-known relatively up-market food retailer in the UK will recently have noticed that on many of the retailers' product lines, particularly unwashed vegetables, the packages on offer no longer display *"Best Before Dates"*. The purpose of this is to discourage food waste. This is on the basis that consumers frequently confuse the different expressions *"Best Before"* and *"Use By"*, with the result that perfectly usable food is unnecessarily consigned to waste, as soon as the date stamped on the package or label has been reached.

Instead, customers are being encouraged to take an "organoleptic" approach i.e. use the evidence of their senses, as well as their own common sense, to judge whether or not food which has passed that date remains fit for consumption.



The move is part of a general trend to discourage food waste, evidenced by the collaboration of some of the UK's most important food producers, manufacturers, and retailers, who have signed up to voluntary food waste reduction measures to help the UK play its part in meeting the United Nations Sustainable Development Goal 12.3. This goal includes in its targets make per capita food waste at a consumer level halve on 2015 levels by 2030.

Product Compliance

Legislation has been brought forward to allow for further easements in relation to UKCA marking which will (amongst other things) allow the UKCA mark to be placed on labels and accompanying documentation until 2025

The UK's October 2022 deadline requiring prepacked foods (and other specific foods) to name a UK-based food business operator or importer has been delayed until 1 January 2024, meaning an EU name and address will be sufficient for a further 15 months.

UK suppliers of cosmetic products can continue to include only the details of an EU responsible person (there is no need for the details of a UK responsible person to be provided) until 31 December 2025.

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