SHE Matters Winter 2023/24

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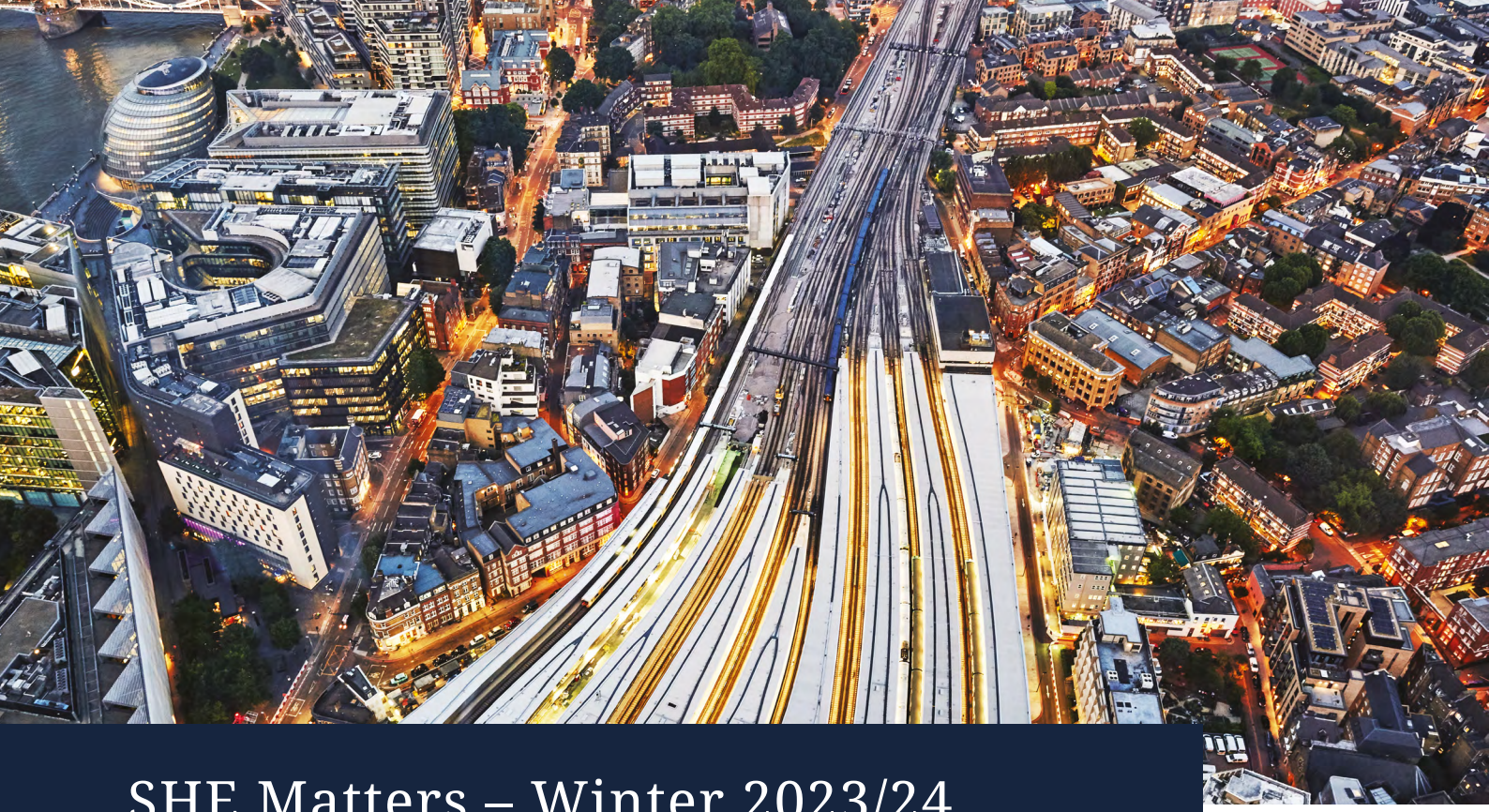

SHE Matters – Winter 2023/24

As the years have now passed since the Brexit referendum and the ensuing negotiations with the EU on its terms, it may be an appropriate moment to take stock of the changes to environmental regulation which have not, occurred in consequence.

In the aftermath of the referendum there was much talk in certain quarters of a bonfire of regulations and corresponding fears in other quarters that this might result in significant divergence between the UK and the EU.

This led not only to treaty provisions on environmental protection under the Trade and Co-operation Agreement, but also to the enactment of significant provisions in the environment Act 2021, including those relating to the Office for Environmental Protection to replace the supervision of the UK Government and its agencies in the field of environmental protection which was previously provided by the EU commission.

Fears of divergence, and an assumed diminution of environmental protection in the UK in consequence, do not seem in fact to have materialised.

That was in any event unlikely given that the UK is a relatively rich European society with corresponding social pressures to put a high value on environmental protection.

Of course, there is even less likelihood of change in that respect if the next general election were to bring about a change in government. Any likely successor to the present administration seems likely to pursue closer alignment with the EU rather than the reverse, and this will necessarily have corresponding implications for legislation on the environment.

As regards what has occurred to date, the point made above is illustrated by the two articles in this edition of SHE Matters relating to respectively to chemicals regulation in respect of PFASs and single-use plastics. A similar point is made in Carbon Matters in an article on the regulation of lithium under REACH in the context of batteries for electric cars.

Plus ça change...

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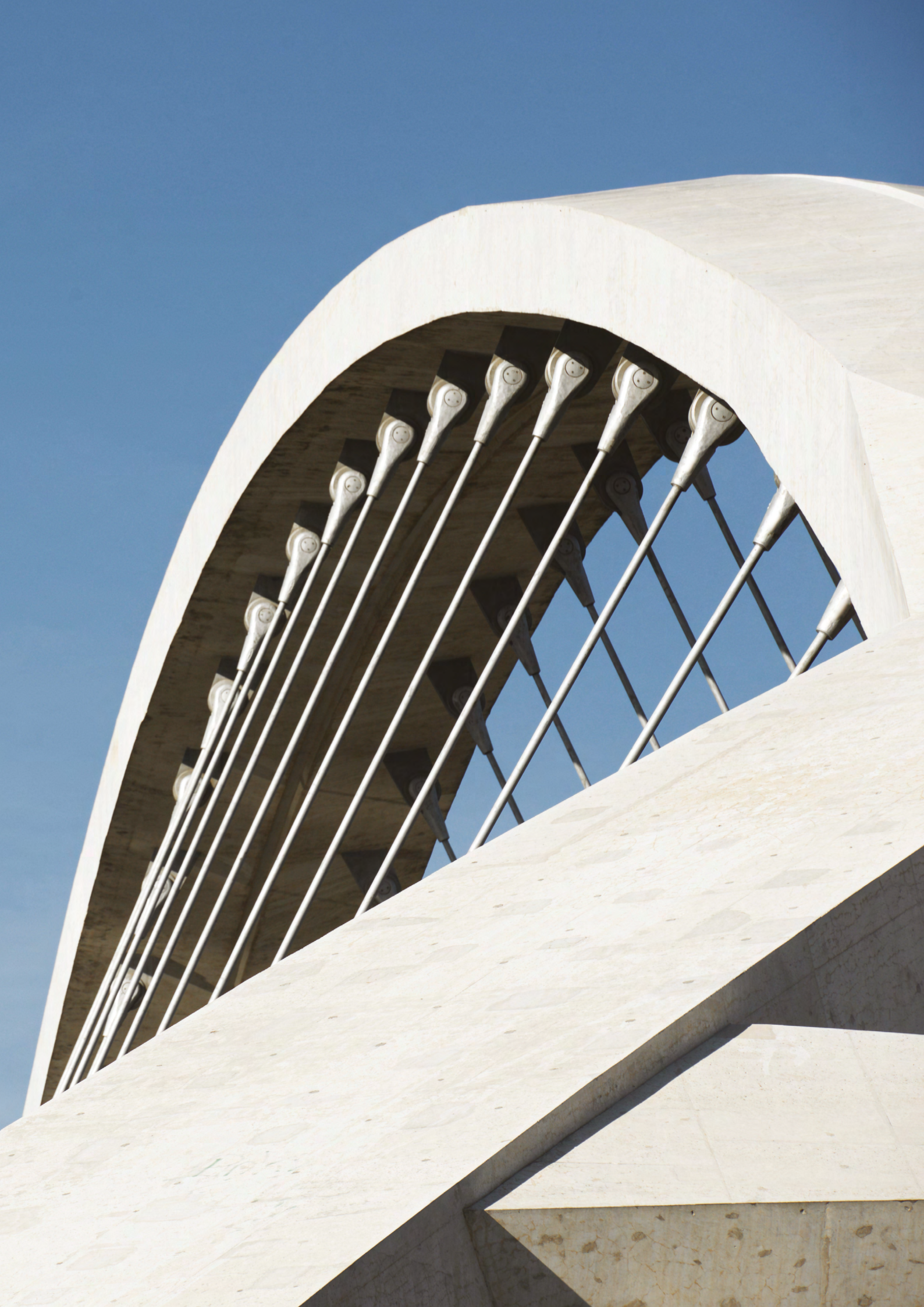

The Protect Duty Stage 2

Terrorism (Protection of Premises) Bill – what will duty holder requirements look like?

Following the 2021 consultation on the Protect Duty, the draft Terrorism (Protection of Premises) Bill has now been published for further pre-legislative scrutiny.

The Government recognises that the UK's approach to protective security at public venues has been entirely voluntary and the aim of the new Bill is to address this by introducing new mandatory security requirements for those in control of qualifying public premises and events.

The proposed regime requires those in control of qualifying public premises and events to properly consider the threat from terrorism and implement appropriate and proportionate preventative and mitigation measures, depending primarily on their public capacity.

Importantly, this includes extensive 'enhanced duties' for qualifying public premises and events with a public capacity of 800 or more people.

DLA Piper's article summarises the key aspects of the new Bill, including which premises and events will be considered qualifying and therefore caught by the new legislation, and the new regulator's comprehensive inspection and enforcement regime.

This article explores what duty holders will be expected to do to comply with the new legislation, and in particular, the duties that will apply to higher risk premises and events i.e. the enhanced duty premises (qualifying public premises with a public capacity of 800 or more people) and qualifying public events (events which are held in non-qualifying public premises that have a public capacity of 800 people or more).

What are the enhanced duties?

The Bill prescribes a number of specific requirements and we anticipate that the new legislation will be supplemented by Regulations which will expand and particularise the means by which a duty holder meets these obligations.

Preparation and renewal of a terrorism risk assessment

A terrorism risk assessment must include an assessment of:

- the types of terrorism most likely to occur at, or in the immediate vicinity of, the premises or event;
- the reasonably practicable measures that might be expected to reduce the risk of terrorism; and
- the reasonably practicable measures that might be expected to reduce the risk of physical harm from acts of terrorism.

This extends to the **immediate vicinity** of the premises or event and in many cases this area will not necessarily

be under the sole control of the operator of the premises or event organiser. As such, it is essential (and a requirement under the new legislation) that duty holders cooperate to ensure overall compliance.

The draft Bill prescribes certain matters that must be considered when conducting the risk assessment including: the **size and characteristics** of the premises; the current use of the premises and any likely **future uses;** and the **nature of an event**.

Importantly, the risk assessment must be kept up to date. For premises, it must be reviewed every 12 months and each time a material change is made to the premises or to the use of the premises. For events, it must be completed at least three months before the event or **as** soon as reasonably practicable after the details are first publicised (if this is less than three months before the event) and it must be kept up to date.

Implementation of all reasonably practicable security measures

The risk assessment process will identify the reasonably practicable security measures to be implemented. They must be aimed at reducing the risk of terrorism occurring at, or in the immediate vicinity of, the premises or event and at reducing the risk of physical harm to individuals if an act of terrorism should occur.

The measures must include monitoring (such as, for example, CCTV and on the ground patrols and observation by licensed security staff), movement of people in and out of a premises or event (such as crowd control and searches), protection of security of sensitive information and procedures to be followed in the event of an act of terrorism (specifically, evacuation, lock-downs and alerting the emergency services and others as necessary).

The new legislation requires duty holders only to take steps that are within their power to take, where there are **multiple duty holders** with control over a particular area, **cooperation** amongst them is expected to ensure overall compliance, which means that **communication** and **coordination** amongst duty holders will be essential.

Significantly, the new legislation only requires duty holders to take proportionate steps and particularly those that would not place a disproportionate burden on them. Proportionality is measured with regard to the duty holder's resources and the premises or event concerned. Conversely, it is anticipated that published Guidance and targeted Regulations will advocate that larger organisations operating higher risk premises or events will be expected to do more to satisfy their obligations than smaller organisations with less resources.

Terrorism protection training for relevant workers

The bill requires staff training which must include:

- the types of terrorism most likely to occur at, or in the immediate vicinity of, the premises or event;
- warning signs that might indicate that an act of terrorism may be occurring; and
- the procedures to be followed in the event of an act of terrorism.

Importantly, reliance on the Government's free online training is unlikely to be sufficient for enhanced duty holders. This is because the training must be specific to the particular premises or event concerned, including: the size, use and characteristics of the premises and/or nature of the event. It must also be commensurate to the responsibilities of the relevant workers. Where the relevant workforce includes groups of workers at varying levels of seniority and responsibility, training may need to be tailored to each of the groups to ensure it is relevant.

In relation to premises, training must be provided before, or as soon as is reasonably practicable after, the relevant worker first assumes responsibilities and every 12 months thereafter. The completion of a new terrorism risk assessment or any material revisions to it will also trigger the need for refreshed training.

For events, training must be provided before the event begins.

Preparation and maintenance of a security plan

Enhanced duty holders must prepare and maintain an up-to-date security plan, setting out information about:

- the duty holder and the Designated Senior Officer (see below); the premises or event;
- the terrorism risk assessment;
- the security measures in place and any additional measures being proposed; and
- the terrorism protection training.

The security plan must be provided to the regulator as soon as is reasonably practicable after the completion or revision of the terrorism risk assessment of the premises or event (and, upon request by the regulator).

Appointment of a designated senior officer (DSO)

The DSO must be a director, manager, secretary (or other similar officer) of the responsible organisation and must have responsibilities for coordination of the risk assessment; coordination, preparation and maintenance of the security plan; and coordination of the response to any notice or other communication from the regulator.

It is imperative that enhanced duty holders ensure that their DSO's are (and continue to remain) sufficiently **competent**, have the **necessary resource** to undertake this role successfully and regularly **report to the board** on compliance matters.

Key messages

Having access to competent security advice will be critical. It is imperative that those who conduct and review terrorism risk assessments and make decisions about security measures have sufficient competency and are equipped and authorised to liaise with other relevant duty holders as necessary.

Whilst the high-level principles of the new legislation broadly mirror those of health and safety law (such as risk assessment and implementation of reasonably practicable measures), anti-terrorism is a specialist and discrete area and should not be treated as an extension of health and safety.

The draft Bill sets out the key requirements, with more expected in the Regulations to follow. How to implement those requirements will present a significant challenge, but further direction and clarification in the Guidance will undoubtedly help in the design and implementation of security measures.

Enhanced duty holders should start the process of planning how they will manage terrorism risks against the anticipated requirements and begin the process of identifying any gaps.

Top five tips

- Seek out advice from competent, experienced and qualified security advisors only;
- Do not rely on your regular health and safety advisor to provide advice on security measures;
- Keep abreast of current awareness and developments in anti-terrorism, including changes in the national threat level, and be prepared to respond;
- Develop and foster a good security culture within your organisation and take steps to avoid complacency amongst staff; and
- Communicate and cooperate with other duty holders, particularly in relation to shared spaces.

DLA Piper has a dedicated team of regulatory lawyers who were instructed by a central Core Participant in the Manchester Arena Inquiry – from which the Protect Duty has evolved. Our team has a unique insight into the development and enactment of the Protect Duty.

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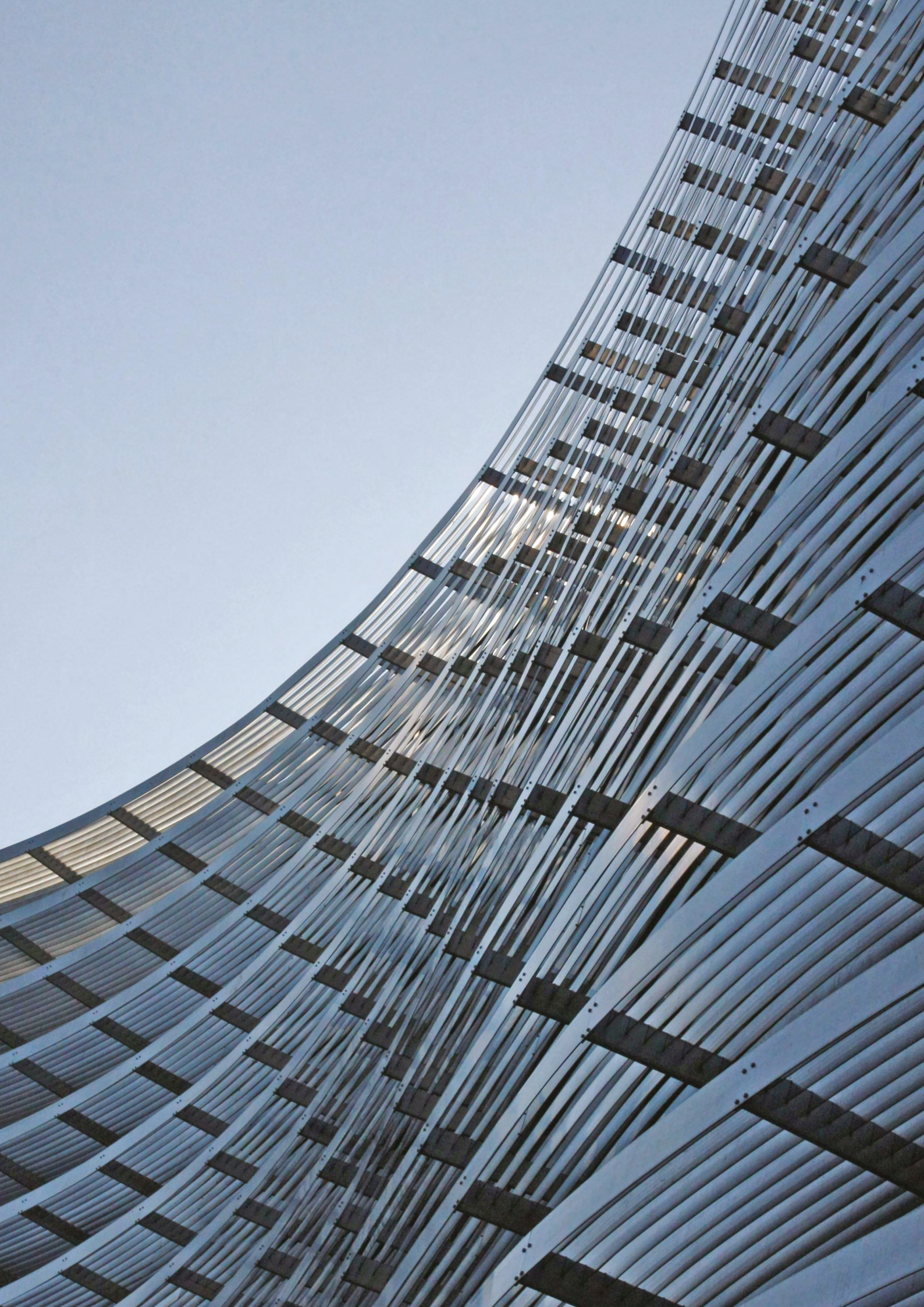

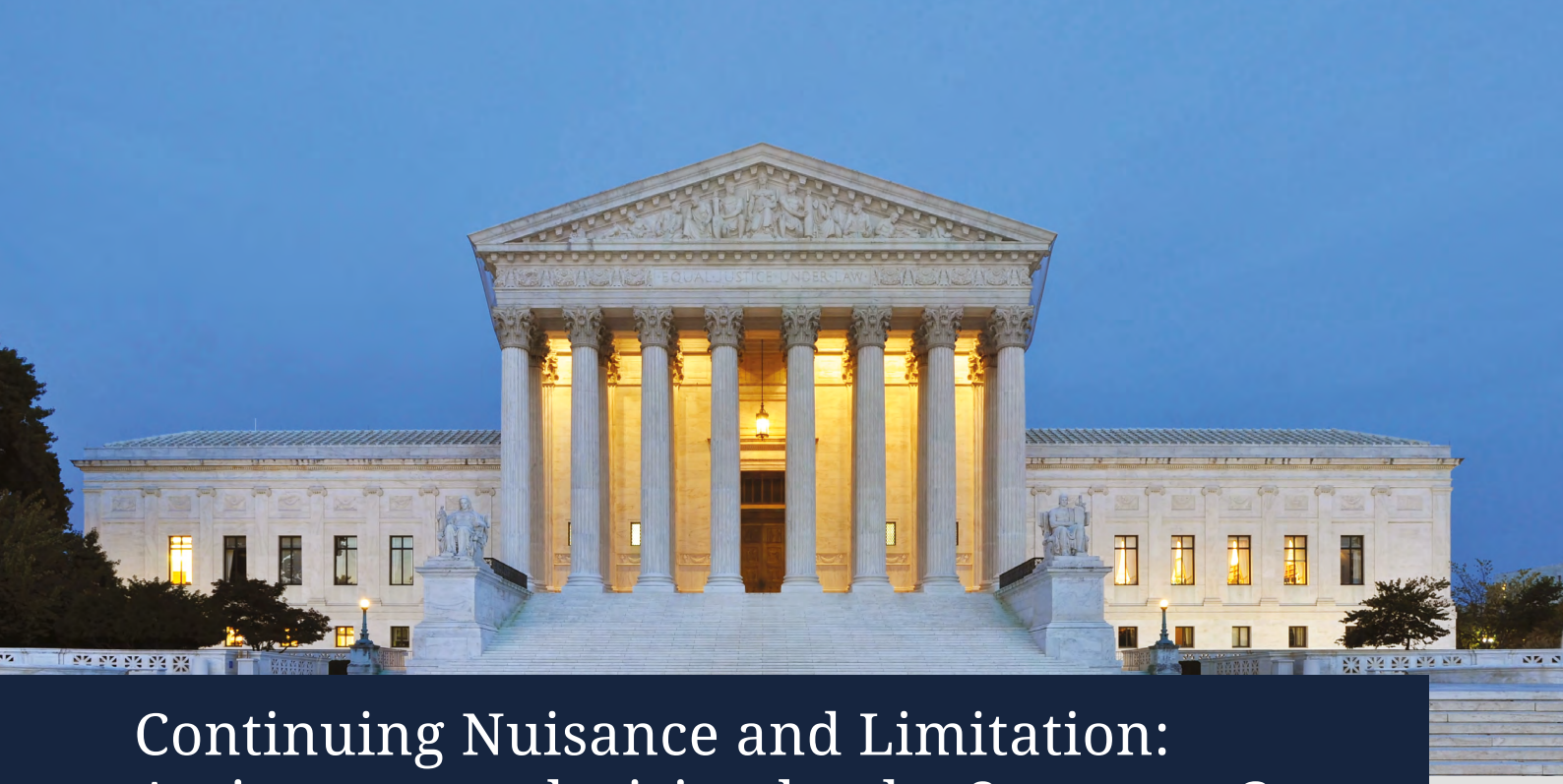

Continuing Nuisance and Limitation: An important decision by the Supreme Court

It has long been a feature of civil litigation in most countries that there are time limits for bringing claims before the courts.

The reason for imposing a deadline is primarily to protect potential defendants against claims which may become more costly to defend as time goes by. Recollections of key pieces of evidence can also deteriorate, with resulting lack of confidence in the fairness of the judicial process. However, deadlines for bringing claims also protect the state and the public interest by providing for an end to civil litigation in the interests of peace and business certainty. They also protect public resources. Not all court costs may be recoverable from the parties in court fees.

The actual time limits imposed by the law in England and Wales vary considerably according to the type of litigation involved. Particularly tight time limits apply for judicial review proceedings due to the need not to interfere with public decision making and in view of the adverse effects of delay on the interests of third parties. Such proceedings therefore need to be brought promptly and in any event within three months of the relevant decision. Personal injury claims need to be brought within three years, primarily because of the need for witnesses to have a clear recollection of the relevant events. The normal limitation period for tort claims (i.e., for civil wrongs) is six years from the date on which the claim could be first be brought (generally this is the date on which the damage occurred). However, in cases of latent (concealed) damage (not involving personal injury) where the claim is based on the allegation of negligent acts or omissions, there is an alternative period (if longer) of three years from the date of knowledge of the damage. That is subject to an overriding 15-year long-stop period from the date of the relevant negligent act or omission, regardless of when the damage was discovered.

The law on limitation of actions is however very complex, due to the need to balance conflicting interests and public policies. Furthermore, the proper application of limitation periods is itself frequently the subject of litigation.

There has been for some time an important and unresolved issue relating to civil claims for environmental damage.

Such claims are generally framed in nuisance, i.e., on the basis that damage has been caused by an unreasonable use of land, or the escape which the occupier should have prevented of an accumulated substance onto the claimant's land. Alternatively, a claim could be brought in negligence, i.e., on the basis that the relevant damage was caused by a breach of a duty of care owed by the defendant to the claimant.

Very often damage to property caused by an industrial process is immediately apparent, as in the cases of a water pollution incident which kills fish. In such cases the operator of the process which has caused the damage can expect civil claims to be brought fairly promptly, in addition of course to regulatory intervention by the public authorities.

However, environmental damage may not be immediately apparent. An example of this is provided

by the celebrated Cambridge Water Company case. In that case solvents used in a leather-making process escaped onto the factory floor, seeped through it into the ground, and over many years passed through the underlying chalk aquifer, causing a plume of contamination to affect a borehole used for public water supply which was situated over a mile away. In that case, limitation was not an issue. However, the claimant water company which operated the borehole was relatively unsuccessful in the courts. While it secured an injunction against further pollution, its claim for damages was ultimately rejected, on the basis that the damage to the supply to the borehole was not in the circumstances reasonably foreseeable.

It is however easier to imagine that contamination might escape from an industrial process, seep through an aquifer and only reach a sensitive receptor some decades later. In such a case, how will the limitation rules operate?

On normal principles, the claimant will have six years from the date when the damage occurred. If, however, the claim is based on negligence, there is an alternative longer period of three years from the date when the damage could reasonably have been discovered, but subject to the overriding 15-year long-stop.

In one case involving environmental damage which is known to this firm, however, the claimant sought to avoid the application of limitation periods completely, by arguing that since the damage to its property remained unremediated, there was a "continuing nuisance" so that the limitation periods did not apply, not withstanding that many decades had passed since the alleged cause of the damage.

The issue raised by that claim has now however been resolved by a recent decision of the Supreme Court. The case of Jalla v Shell International Trading Shipping Company related to a claim for environmental damage alleged result from an oil spillage which occurred off the coast of Nigeria. However, the claim was litigated in England which offers a favourable forum for environmental claims brought on behalf of a very large number of claimants. The claim could be brought in England because although the claim was brought in respect of a Nigerian Shell operating company it was alleged that there was a Shell "anchor defendant" based in the UK against which a claim could properly be brought.

It was the case of the defendant Shell companies that the oil spillage which had occurred was successfully contained and dispersed offshore. Accordingly, it could not have caused any environmental damage onshore.

However, the claimants, having issued their claim form just under six years after the spill occurred, sought to amend the particulars of claim by seeking to substitute a new "anchor defendant" to give the English courts jurisdiction over the claim. Shell sought to dispose of what they regarded as a wholly unmeritorious claim by invoking the expiry of the limitation period. However, the claimants in this case also argued that there was a "continuing nuisance", so that the limitation period did not apply.

The Supreme Court rejected this argument in a unanimous judgment. The judgment of the court was delivered by Lord Burrows.

In the Court's view, a nuisance could only be said to be a "continuing nuisance" where outside the claimant's land (and usually, but not necessarily, on the defendant's land), there is either repeated activity by the defendant, or an ongoing state of affairs for which the defendant is responsible, which in either case causes continuing undue interference with the use and enjoyment of the claimant's land. That however meant that for a nuisance to be "continuing" in that sense, there had to be repeated but distinct causes of damage or interference.

It would undermine the whole purpose of the limitation statutes if it were accepted that a nuisance could be regarded as "continuing", simply on the basis that the damage that had been caused to the claimant's land or interference with its use remained unremediated.

The Court distinguished two earlier cases involving nuisance.

The first was **Delaware Mansions v Westminster City Council** (Damage in the form of cracking to a building continuing to be caused on an ongoing basis by the roots of a plane tree planted in a pavement owned by the Council).

The second case was **Darley Main Colliery Company v Mitchell** (where coal mining extraction operations carried out in the 1860s caused damage to the claimant's land for the first time in 1868, but then caused separate and different damage in 1882 which was held to constitute a new and separate cause of action).

The Court also made it clear that a distinction must be drawn between a defendant "continuing" a nuisance by failing to take steps he was obliged to take to address it, and a "continuing nuisance" in the strict sense.

The first could be a ground of liability. However, for the purposes of limitation a nuisance could only be said to be "continuing" if there were fresh causes of damage or fresh interferences with the enjoyment and use of land.

The moral of this case is that it will be necessary for those contemplating civil proceedings in respect of environmental damage to take steps promptly on discovering the damage to identify the defendant and investigate a possible claim. In doing so they will also need to bear in mind the time it will take for lawyers and technical experts to prepare what is likely to be a complicated case.

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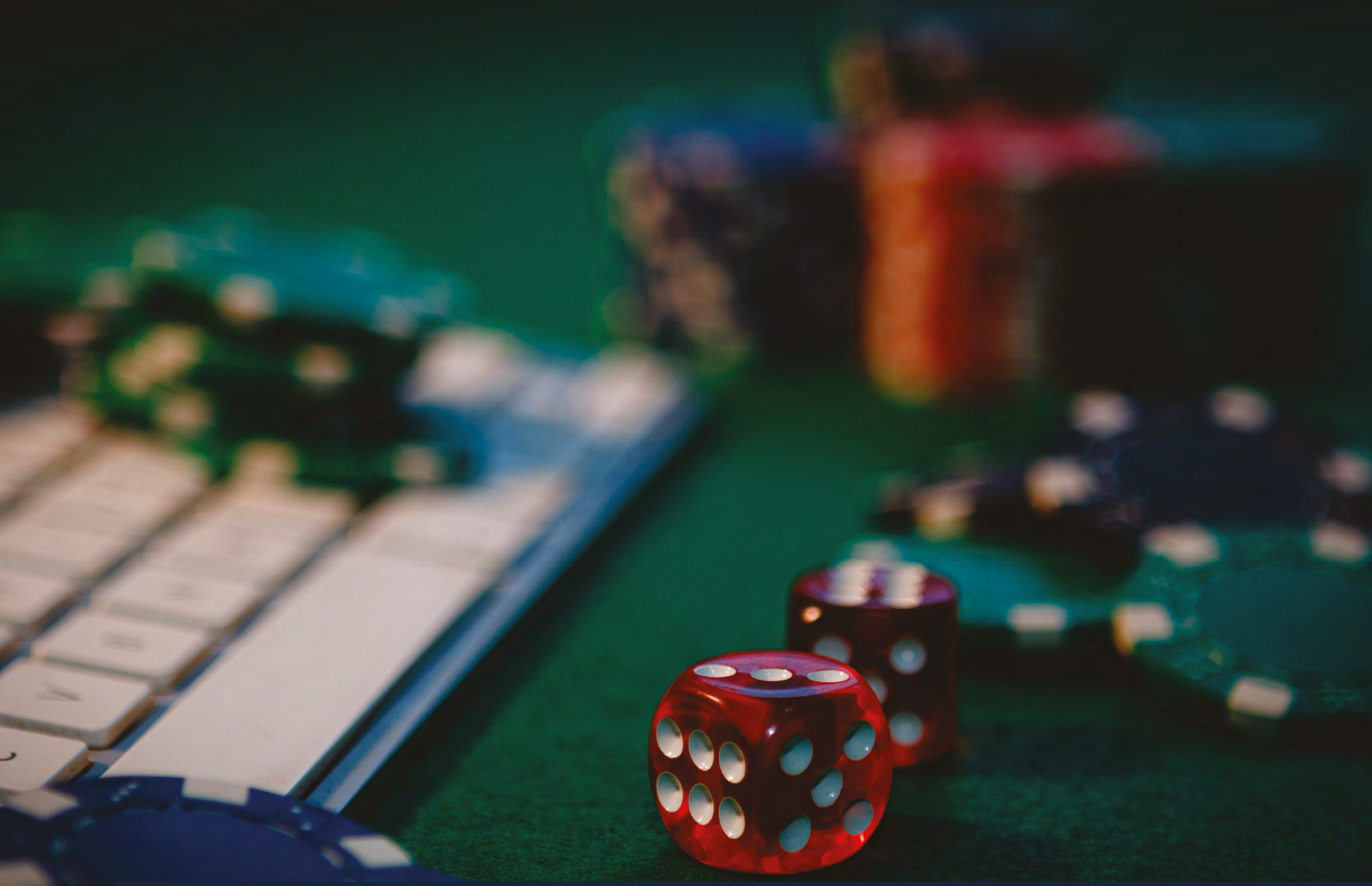

Government aims to reduce harmful effects of gambling (at industry's cost)

Introduction

On 27 April 2023, The Department for Digital, Culture, Media and Sport (**DCMS**) published a 256 page white paper titled **High Stakes: Gambling Reform for the Digital Age** (Paper). The Paper sets out the government's plan for the reform of gambling regulations following a review of the Gambling Act 2005. At the heart of the proposed reforms is the aim of protecting consumers from harm.

DCMS outlined how the major reform of gambling laws aims to protect vulnerable users in the digital age and smartphone era. The measures proposed aim to shield players from harm and addiction and hold gambling firms accountable. Proposals include:

- a statutory gambling operator levy;
- a new online stake limit;
- player protection checks;
- new powers for the Gambling Commission (including enforcement and investigation powers);
- restricting bonus offers;
- a horseracing levy; and
- the removal of loopholes to prevent under-18s from accessing any form of online gambling.

Harm

The Paper sets out that harms associated with gambling can ruin lives, wreck families, and damage communities, with issues including mental health and relationship problems, debts that cannot be repaid, crime, or even suicide in extreme cases. Whilst the best available evidence suggests that the large majority of people who gamble suffer no ill effects, DCMS, estimate there to be approximately 300,000 people across Great Britain who meet the definition of being a 'problem gambler' and approximately 1.8 million people in Great Britain categorised as 'at risk'.

Operators are already required to identify customers at risk of harm and take action, but there have, according to DCMS, been too many cases of interventions coming too late, or in some cases not at all. DCMS consider it necessary to put new obligations on operators to

conduct checks to understand if a customer's gambling is likely to be unaffordable and harmful. A key concern of DCMS is, in a sector with a known addiction risk, the online data-driven targeting of certain individuals with promotional offers to encourage further spending presents risks because it actively encourages individuals to incur larger and larger losses. It will now take forward work to review the design and targeting of incentives such as free bets and bonuses, so they do not encourage excessive or harmful gambling.

Licensing

DCMS will align the regimes for alcohol and gambling licensing by introducing cumulative impact assessments when Parliamentary time allows and will consult on increasing the maximum fees that can be charged for premises licences and permits.

Safeguarding children from gambling-related harm is a priority. There are, according to the Paper, still too many instances of insufficient age verification in some venues, particularly those such as pubs, which can offer adult-only gaming machines but are not adult-only venues like many gambling premises. DCMS intend to legislate to strengthen licensing authority powers in respect of alcohol-licensed premises by making provisions in the Gambling Commission's code of practice binding.

Cost

The Paper confirms that the proposals will likely come with costs to the gambling industry, both in terms of upfront delivery cost but also in reduced revenue compared to current levels. DCMS currently estimate that the key proposals will lead to between a 3% and 8% reduction in Gross Gambling Yield (GGY) across the gambling sector. The expectation is that much of this will be foregone revenue from customers who were being harmed by their gambling. And as stated above – licensing fees are also being looked at and may see an increase in the future.

Timeframe

The Gambling Commission, which will be responsible for enacting much of the Paper's objectives has stated that the implementation of the Paper, which has over 60 areas of work for the Gambling Commission alone, will likely take a number of years to fully complete.

It is hoped that objectives intended to be delivered through the Licence Conditions and Codes of Practice (LCCP) will be published this summer and pre-consultation engagement with stakeholders will have begun in a number of other policy areas. Importantly, these consultations will be sharply focussed on how changes are implemented, so anyone with an interest in the same should watch this space and seek to be a part of any consultations.

This is a reform process we will be watching closely as it develops over the next couple of years.

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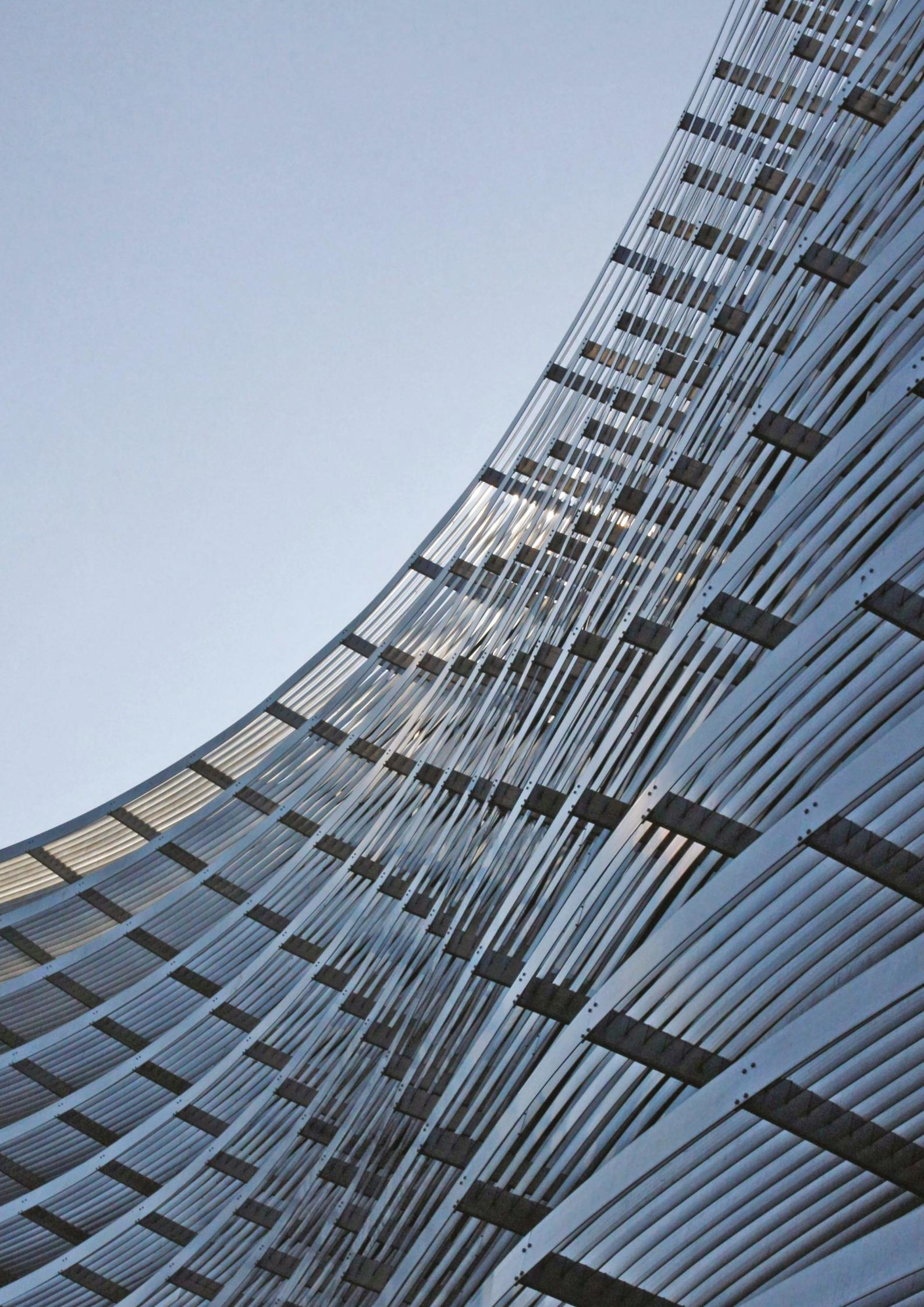

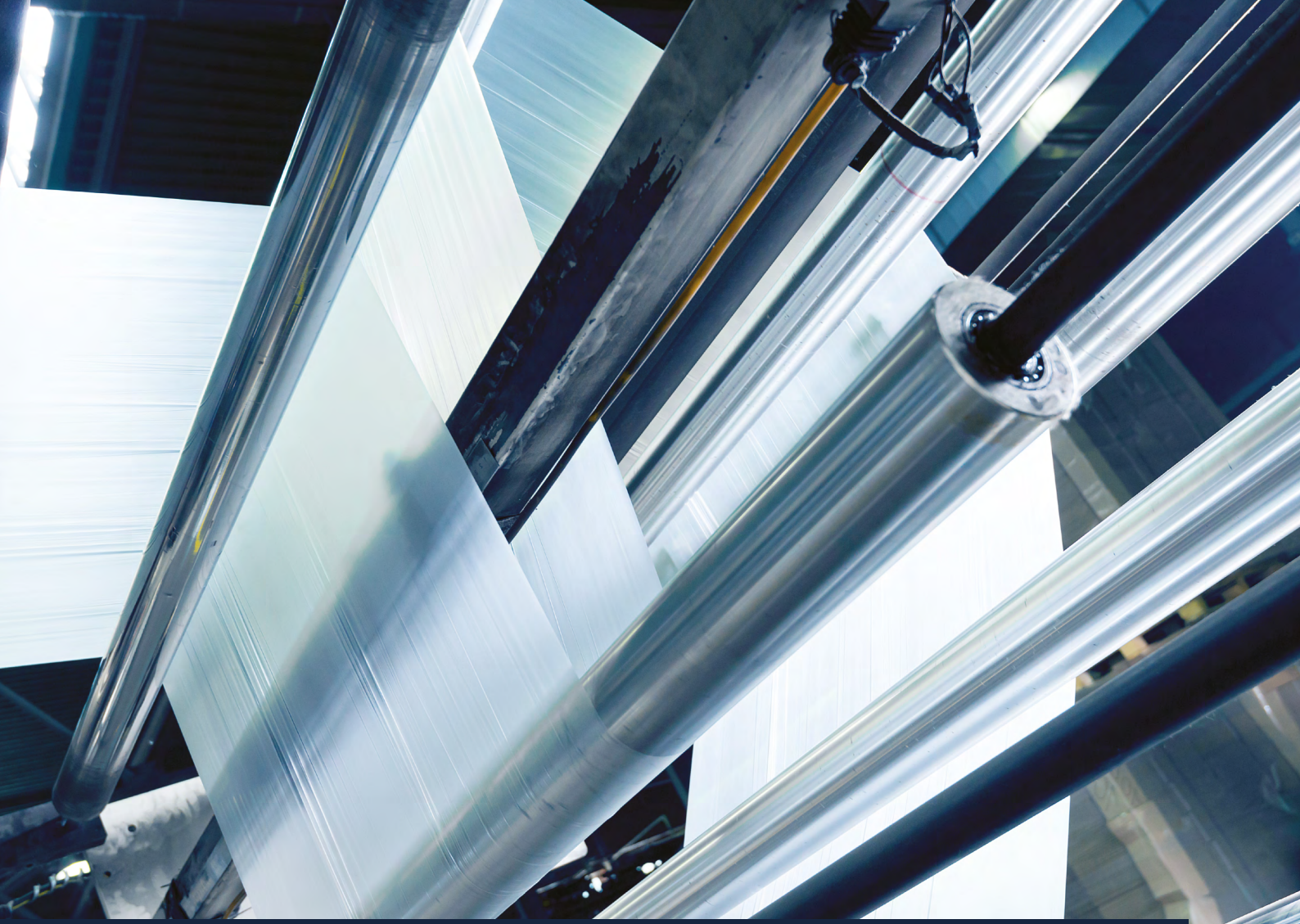

Changes to the supply of single-use plastic, plastic food contact materials, and the regulatory landscape in the EU and UK

Ban on single-use plastics (UK and EU)

In 2021, the UK government, along with the EU Commission implemented new legislation aimed at tackling plastic pollution by addressing the limited use of 'single-use plastic products' (SUPs). The 2021 reforms have acted as a catalyst to continue addressing issues posed by SUPs and to conduct further research into other plastic related products.

In the UK, The Environmental Protection (Plastic Straws, Cotton Buds and Stirrers) (England) Regulations 2020 made it an offence to supply single-use plastic straws, cotton buds, and drink stirrers to end-users. Similarly, the EU implemented Directive 2019/904 on single-use plastics, this focused on the reduction of consumption of certain single-use plastic products such as cups and food containers, but more importantly the Directive imposed a restriction on placing on the market certain SUPs, such as cotton buds, cutlery, straws, plates, drinks stirrers, and various products made from expanded polystyrene.

It can be said that the EU directive went further than the UK regulations with the restrictions imposed by the Directive, as it expanded the scope of SUPs and added focus on reducing consumption where a restriction was not a viable option. However, the UK regulatory landscape on SUPs is set to change again with the implementation of The Environmental Protection (Plastic Plates etc. and Polystyrene Containers etc.) (England) Regulations 2023, which extends the scope of SUPs to include plates, trays, bowls, balloon sticks, cutlery and polystyrene containers and cups. The 2023 regulations, which came into force on 1 October 2023,

make it an offence for someone to supply these SUPs to end-users and is now more aligned with those products in scope of the EU directive.

It is important to note that the UK regulations introduce an exemption to the offence of supplying to an end-user if that plate, tray or bowl is 'packaging', however this is not intended to be a legal loophole to enable the continuing supply of SUPs as the definition of packaging is limited to 'products to be used for the containment, protection, handling, delivery and presentation of goods'. The offences apply to only those which supply 'during the course of a business' and that supply is to an end-user, this aims at preventing those at the end of a supply chain from purchasing and subsequently supplying to an end-user, which has a knock on effect to the full supply chain resulting in an overall reduction of supply of SUPs and prevention of plastic pollution.

Plastics food contact materials which contain bamboo and similar plant-based materials

In addition to these regulations concerning the overall ban on SUPs, regulatory bodies are also investigating the health implications of various plastic products, and in particular plastic food contact materials which contain bamboo and similar plant-based material as additives. The Food Standards Agency and Food Standards Scotland are therefore seeking evidence to gather the required data on the long-term safety of plastic food contact materials and articles containing bamboo or other plant-based material. The deadline is 12 December 2023.

The potential health concerns associated to plastic food contact materials (FCMs) containing bamboo relates to the lack of evidence and the fact that the safety of such products (such as bamboo) in plastic has not been assessed. There are also claims that the presence of bamboo fibres can accelerate the degradation of plastics, the health risk surrounding this is heightened for FCMs given the human contact.

Evidence of the potential risks surrounding plastic FCMs which contain bamboo and other plant-based materials is recognised across the EU as these plastic FCMs are currently banned under regulation (EU) 10/2011, as the materials are not authorised and therefore cannot be used for manufacturing plastic FCMs. An EU coordinated action, which ended in April 2022, aimed to stop the illegal import, trade and advertising of plastic articles sold as food contact materials containing bamboo (specifically bamboo powder) and other unauthorised plant-based additives.

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Cladding Products and the Building Safety Act – What You Need to Know

The Building Safety Act 2022 was drafted following the Grenfell Tower fire – not only did it create a new regulator, but it also contains numerous provisions with the stated aim of securing the safety of people in and about buildings, and to improve the standard of buildings.

This article focusses on the section (section 149) which deals with what are termed "past defaults" relating to cladding products. As such it relates to events which have already happened. Under that section, where certain conditions are satisfied (which are looked at in some detail below), a person can be liable to pay damages to someone with a relevant interest in the building, where they have suffered personal injury, damage to property or economic loss. We will consider who could have liability under the section, and points where there is a lack of clarity in the drafting, leaving uncertainty for those involved with cladding products. After all, this is new untested regulatory law, for which no precedent has yet been set on enforcement or judgment.

What is a cladding product?

A "cladding product" means a cladding system or any component of a cladding system. It is therefore very wide and could capture a whole system (for example insulation, membranes, brackets, cavity barriers, fixings, outer layer), and/or any of the individual parts.

In what circumstances does the section apply?

The Act sets out four conditions which need to be met for the section to apply. These are as follows:

- Condition A – at any time before the coming into force of the section (that is, 28 April 2022):
  - a person fails to comply with a cladding product requirement in relation to a cladding product;
  - a person who markets or supplies a cladding product makes a misleading statement in relation to it; or
  - a person manufactures a cladding product that is inherently defective.
- Condition B – after Condition A has been met, the cladding product is attached to, or included in, the external wall of a relevant building in the course of works carried out in the construction of, or otherwise in relation to, the building.
- Condition C – when those works are completed (a) in a case where the relevant building consists of a dwelling, the building is unfit for habitation, or (b) in a case where the relevant building contains one or more dwellings, a dwelling contained in the building is unfit for habitation.
- Condition D – the facts referred to in subsection (a), (b) or (c) of Condition A were the cause, or one of the causes, of the building or dwelling being unfit for habitation.

Who could be liable under this section?

Claims can be brought against manufacturers of construction products, and all other economic operators (e.g., distributors) involved in the supply and marketing of construction products. It will depend on which party is responsible for the product being mis-sold, inherently defective, or in breach of regulations (i.e., those points in Condition A).

Breaking this down, Condition A paragraph (a) applies to a person who has failed to comply with a cladding product requirement. A "cladding product requirement" is a requirement relating to a cladding product under various Construction Product Regulations (the position on this is somewhat complicated by Brexit, in terms of which regulations are relevant). Whilst this could be a manufacturer, other economic operators could also have obligations (e.g., importers or distributors). This will depend on the cladding product in question and the requirements which apply.

Condition A paragraph (b) applies to those who have marketed and supplied the cladding product and made a misleading statement in relation to the cladding product. This could equally apply to manufacturers and to those in the supply chain, including fabricators who purchase the raw product for fabrication and supply this to developers.

Lack of clarity over the circumstances where liability could arise

Condition A is key in determining who is liable, and establishing whether any of the paragraphs are met will be a question of fact. For example, paragraph (a) relates to a failure to comply with a construction product requirement. The requirement will depend on the product in question, and it is important to note that not all 'construction products' were covered by a harmonised standard, which meant that there would be no prescribed requirements which applied to them. There will be circumstances therefore where it is unclear how paragraph (a) would be triggered. What is clear is that it will be necessary to show that there was a breach of the relevant regulatory requirement as it had effect at the time, and not a breach of a requirement subsequently imposed.

In order for Condition A paragraph (b) to be satisfied, a "misleading statement" must be made. It is unclear how that term is to be understood under the Act, and whether it requires someone to make a false statement in relation to the product, or whether omitting information about the product would be sufficient for these purposes.

In relation to Condition A paragraph (c), a cladding product must be "inherently defective"; however the Act does not define how that term should be understood. A 2018 case relating to the Consumer Protection Act 1987 (CPA) raises an interesting question on this point. In it, the judge held that a defect for the purposes of the CPA cannot be an inherently harmful characteristic, where that characteristic is part of the normal behaviour of the product. On the contrary, a defect is the abnormal potential for harm – that is, whatever it is about the condition or character of the product that elevates the underlying risk beyond the level of safety that the public is entitled to expect from a product of that type (the relevant criterion under the 1987 Act). On that basis, given that a "defect" cannot be an inherently harmful characteristic and is the "abnormal" potential for harm, there is some confusion over how something can be "inherently defective".

However, the courts will be keen to find a way to make sense of what Parliament has enacted. One relatively straight forward distinction that might be drawn here would be between a defect which would be evident in most or all applications of the product, which would be "inherent" and one which would only present a danger in particular circumstances. If, for example, the danger only became evident as a result of a particular use to which the product had been put and for which the manufacturer could not be held responsible, the product would not be "inherently defective".

It remains to be seen how these points will be interpreted by the courts as cases come before them – what is clear is that section 149 will come under real scrutiny, and it is likely to be some time before the issues of concern are resolved. It should also be pointed out that many cladding products have long international supply chains, and it may not therefore always be easy to join overseas producers to proceedings.

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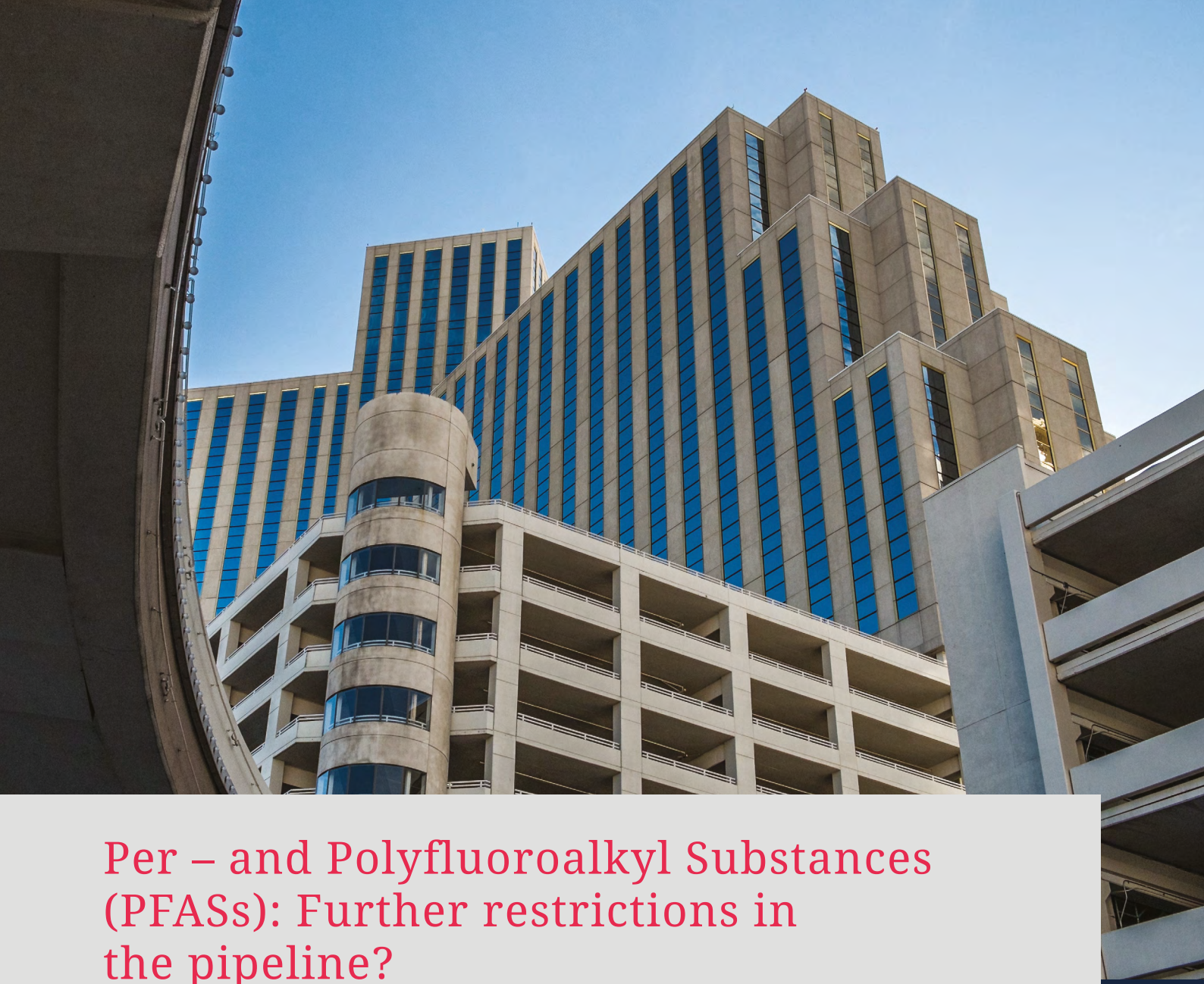

Per – and Polyfluoroalkyl Substances (PFASs): Further restrictions in the pipeline?

PFASs are a group of very widely used organic chemicals in which fluorine atoms are attached to chains of carbon atoms. These substances have a wide range of applications for use in numerous industrial and consumer products. These include surface coatings for textiles, materials used for contact with food, paints, surfactants, water and grease repellent materials, pharmaceuticals, medical devices and cosmetics.

In 2018 the OECD found over 4,700 different CAS numbers for PFASs. The products in which they are made are used in a wide range of different industry sectors as well as by consumers.

Properties

The widespread use of PFASs is due to the very strong chemical bond fluorine atoms make with the carbon atoms in the PFAS molecules. This means that the substances have very low chemical reactivity and the products containing them are therefore resistant to heat but water and oil. Unfortunately, these very properties mean that they tend not to break down in the environment and are persistent, with the result that they have been frequently referred to as “forever chemicals”.

Hazards

They are also frequently created as breakdown products of other substances, such as fertilisers. Waste from the products in which they are made and these other substances can pollute soil, groundwater and drinking water. They can also affect living things which come into contact with them. Some PFASs can accumulate in humans, animals and plants with toxic effects which can be magnified up the food chain. They have been linked to a number of health problems both in humans and animals, including cancer, liver and kidney damage, hypertension and high serum cholesterol levels.

Regulatory responses

In response, a number of initiatives have been taken in the EU and internationally to eliminate the use of PFASs. The international Stockholm Convention has sought to eliminate the use of Perfluorooctanoic Sulfonic Acid and its derivatives (PFOS) since 2009, and the use of those substances has been restricted in the EU under the Persistent Organic Pollutants (POPs) Regulation. Similarly, the Convention seeks the elimination of the use of Perfluorooctanoic acid (PFOA) and related compounds and these have been banned under the POPs Regulation since 4 July 2021.

In June 2022 PFHxS (Perfluorohexanoic Acid), it's salts and related compounds) were included in the Convention and a relatively limited restriction was included in the POPs Regulation which took affect in August of this year.

Under the EU REACH Regulation, the restriction was introduced on perfluorinated carboxylic acids, and their salts and precursors.

ECHA has made a proposal for a restriction on the use of PFASs in firefighting foams which is currently due for consideration by the EU Commission.

However, a much wider restriction which would cover a wide range of uses of PFASs is also currently under consideration following a proposal made by five national authorities in the EU/EEA.

If that proposal were adopted there would be a ban, or severe limitations, on the manufacture, use and sale of thousands of PFASs, though there are various options set out in the proposal with different transition periods applying for different substances.

ECHA held a six-month consultation on the proposal between March and September of this year, in which more than 4400 organisations and individuals responded.

The UK Inherited the existing EU regulatory framework on Brexit. For example, EU REACH was transformed into a parallel UK REACH regulation in Great Britain, though EU REACH continues to have effect in Northern Ireland, under the Northern Ireland Protocol.

A report published by the HSE (the regulatory authority for UK REACH) in April this year made a number of recommendations for further restrictions. These would include the limitation of the use of PFASs in firefighting foams and also in textiles, furniture and cleaning products.

Lobbying

In both the UK and the EU it seems, however that a brake may have been placed in the pace of further restrictions by lobbying from industry.

A recent example of this was provided by press reports of concerns that a number of vital pharmaceuticals would be placed in jeopardy if the wider ban proposed in the EU by the five national authorities were implemented.

A recent article in the Guardian made much of the fact that the proposal does not feature in the EU Commission' s work programme for next year, though perhaps not too much should be read into that.

Further developments

The discussions around the ban on PFAS continue. At this stage it is not possible to anticipate what the final outcome of the restriction will be, and the extent to which the concerns from industry will be taken into account. We have seen restrictions of PFAS substances, notably PFHxA in recent months, where there has been a significant change from intention to outcome. The original intention for PFHxA was to ban the substance subject to some specific exemptions, however the eventual restriction prohibits the substance for specific uses only. Whether a similar shift from intention to outcome will be the case for PFAS as a group remains to be seen, but we can expect further developments on this in the coming months (maybe years).

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