SHE Matters Summer 2021

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When it comes to the terrible global impact of the COVID-19 pandemic and its often debilitating consequences, it is only human to seek someone to blame. There has been a tendency to blame the government for its handling of the pandemic. Some criticisms have been voiced, for example, over the reluctance to close borders to protect the UK. In many respects the UK has a population which is one of the most vulnerable in Europe to COVID-19 because of its age profile, a relatively high incidence of obesity and comorbidities, and a striking diversity of economic circumstances. For some, this means that different generations mingle in crowded conditions which promote the spread of the disease to those who are most vulnerable. Criticism has also been made over the decision to protect the National Health Service at the cost of sending infected patients away from hospitals and into care homes for the elderly.

However, discussion of these issues is perhaps best left to some form of public inquiry, which will no doubt be organised at a future date to ensure lessons are learnt.

In the meantime there are some grounds for hope. Most obviously, the government's skills in mobilising the scientific commercial and human resources of the country, and participating in coordinated international efforts, seem to be leading to a successful rollout of the vaccination programme. This will benefit not only the most vulnerable in this country but also the population as a whole. It may also lead to the supply of vaccines to protect the populations of overseas countries.

However, that is not the only example of a decision which seems to have had beneficial consequences. A small one relates to one of the topics discussed in this edition of SHE Matters. Lockdown has apparently shown that it is possible to live without severe air pollution in urban areas. It has also become clear that something must be done to prevent tragic events such as the deaths from an asthma attack of the nine-year old girl Ella Adoo-Kissi-Debra, and indeed the more general ill health of many others. One of the key actions of the government on air pollution was the announcement in November of last year that the date for the prohibition of the sale of any but electric and hydrogen vehicles was being brought forward by ten years to 2030. Initially, manufacturers suggested that it would be impracticable to change their whole model ranges on such a short timescale. However, it now seems that the UK motor industry is planning actively to do exactly that.

If their plans can be put into practice, it would seem that the problem of air pollution in areas of heavy urban traffic congestion will have been solved, one small mercy at least.

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Human rights, governance and environmental due diligence for supply chains: Recent EU initiatives

During the last year, there have been two significant initiatives at EU level relating to sustainable corporate governance. If progressed, they may have a significant impact on companies that are established, or do business, in EU Member States.

In October 2020, the EU Commission launched a consultation with a questionnaire, seeking views on measures to encourage businesses to consider environmental, social, human and economic impacts on their business decisions.

This initiative might, at first glance, appear concerned with a fairly familiar issue to UK company lawyers: whether the directors of companies should only have regard to the interests of their main shareholders, or also have at least some regard for the interests of other stakeholders in the company, such as employees or the community at large. The EU initiative is, however, somewhat broader.

It is concerned with the possible enactment of an EU-wide corporate due diligence duty requiring companies to prevent, mitigate and account for human rights, health and environmental impacts of both their operations and activities, and their supply chains.

The Commission's initiative in October followed a recommendation from the Legal Affairs Committee of the European Parliament that had been under consideration for some time, but was finally voted on in January of this year. The European Parliament as a whole adopted the recommendation in March by a large majority, but the draft Directive appended to the recommendation was made subject to some amendments.

The draft Directive, as amended by the European Parliament, would require the enactment of a regulatory framework applying to all large undertakings, and also publicly listed SMEs and some others in "high-risk sectors" either governed by the law of a member state or, if not, established on EU territory. It would also apply to similar undertakings governed by foreign laws or established elsewhere, where they operate in the EU's internal market by selling goods or providing services.

Undertakings subject to the proposed Directive would be required to carry out due diligence with respect to potential or actual adverse impacts on human rights, the environment or good governance in their operations and business relationships.

"Human rights" will be defined very widely, by reference to instruments to be set out in an annex. A previous draft listed virtually all of the existing international and regional human rights conventions and charters, a range of ILO conventions, and "national constitutions and laws recognising and implementing human rights".

This wide range of instruments appears to have been chosen on the assumption that the instruments concerned are all congruent and mutually compatible.

Environmental impacts will also be widely defined to include violations of standards to be set out in a further annex.

Similarly, "governance risk" means any potential or actual adverse impact on the good governance of a country, region or territory, again with further details to be specified in an annex.

Undertakings will be required to identify and assess whether their operations and business relationships cause or contribute to any human rights, environmental or governance risks, and establish a due diligence strategy, with risk assessments extending over their whole "value chain."

The concept of "value chain" is wider than that of supply chain, and includes direct and indirect business relationships, both upstream and downstream, and investment chains.

There are extensive provisions on consulting and involving stakeholders, including, for example, indigenous peoples and more obvious and proximate stakeholders such as the company's employees.

The provisions also relate to the establishment and maintenance of a due diligence strategy that must be published and communicated, for example, on websites and be subject to ongoing evaluation and review.

Undertakings will be required to establish grievance mechanisms to allow stakeholders to voice concerns regarding the existence of human rights, environmental and governance risks. Extra-judicial remedies must also be provided, in the form of compensation apologies, or a contribution to an investigation, without prejudice to any right to bring civil proceedings.

Member States are to encourage sectoral due diligence action plans to coordinate the due diligence strategies of undertakings within particular economic sectors.

There are provisions for investigations by competent authorities, which are to have power to require remedial action and, in cases where failure to comply could led to irreparable harm, order interim measures or the temporary suspension of activities.

There is at least some acknowledgement of the burden this will all place on undertakings, in that the commission is required to prepare and publish guidelines on compliance.

Member States are required to provide a portal for the support and guidance of SME and micro-undertakings, and there is to be provision for financial support to them under EU programmes.

However, it would appear little consideration has been given to whether these very extensive requirements are proportionate, given that in the EU there is a completely free press well able to publish details of risks to human, environmental and governance rights and encourage the intervention of a range of political and governmental agencies.

Naturally, the draft Directive contains provision for effective, proportionate and dissuasive penalties for non-conformity including criminal sanctions for repeated infringement committed intentionally or with serious negligence.

The carrying out of due diligence is to be without prejudice to any civil liability under national law.

There are requirements for a strict civil liability regime to provide compensation for potential and actual impacts on human rights, the environment, and good governance, which are caused or contributed to by the relevant undertaking, or by undertakings under its control.

The proposal has not emerged simply in a vacuum created by reduction in general EU legislative activity as a result of COVID-19. It is the result of longstanding concerns over the impact of global supply chains on labour conditions and the global environment.

In particular, concerns have been raised over events such as the Rana Plaza factory collapse and the Tazneem factory fire in Bangladesh. There have also been concerns over deforestation that have led to the imposition of due diligence requirements under the EU Timber Regulation, and concerns over conflicts in developing countries, leading to the EU Conflicts Minerals legislation.

At Member State level, the UK enacted its Modern Slavery Act in 2015. More recently, in France, a law was adopted in 2017 imposing a "duty of vigilance" on holding companies and companies that are significant purchasers of goods and services. It is understood that similar initiatives are being considered in the Netherlands and Germany.

As regards the French legislation, while it does, like the European Parliament's proposal, follow a cross-sectoral approach, its scope is limited to cover only relatively large companies and groups likely to have the resources to prepare the required strategies and risk assessments in addition to carrying out their actual business activities.

Further, its scope as regards the risks to be addressed is limited to underlying grave threats to human rights, fundamental liberties, the health and safety of persons and the environment resulting from the activities of the group or company concerned and its supply chains. Presumably, the question of the rights to be protected will fall to be determined primarily by reference to rights set out in the national legal order.

Another national development, is UK legislation, currently proceeding in Parliament, providing for the government to make "Forest Risk Rules" under secondary legislation. (See the article on this topic in *Carbon Matters*).

It remains to be seen whether the very wide-ranging proposal advanced by the European Parliament significantly influences the proposal ultimately adopted by the EU Commission. The Commission typically jealously guards its right of initiative in proposing EU legislation.

Businesses might well have a number of representations to make on the practicality of the European Parliament's proposals, particularly in terms of the scope of the undertakings to be made subject to the requirements of the proposed Directive, and also the costs to be borne by both larger and smaller undertakings.

It is one thing to expect businesses to behave responsibly as regards their own significant purchasing decisions. It is quite another to expect them to monitor and police the whole range of economic social and environment governance in developing countries where they are doing business.

In that connection, businesses might point to the difficulties caused by the growing practice of "impact washing." This is a growing practice under which investors are urged to invest in businesses on the basis of exaggerated claims of beneficial impacts on threats to the environment and human rights.

There has been considerable recent criticism of prospectuses that exaggerate claims of beneficial impact. Very often, the claims cannot be shown to be false, because impacts cannot easily be measured. This criticism points to the advantages of focussing the scope of due diligence requirements onto what can reasonably easily be measured and reported on.

There are further arguments as to whether it is the right time now, as economies emerge from the scourge of COVID-19, to impose heavy bureaucratic requirements on any enterprise.

Another point is that some at least of the pressures for this type of legislation represent a disguised protectionism that may risk harming the very peoples which the initiatives proport to benefit.

The risk here is that businesses might prefer to shorten their supply chains to have an easier life. That could have an adverse impact on living standards in developing countries.

Arguably, the best protection for human rights and the environment in such countries rests in raising living standards. That means that the inhabitants of those countries will increasingly themselves demand better working conditions and higher environmental and health and safety standards.

But even if the Commission decides to develop its own proposals in a significantly watered-down form, we will likely hear significantly more of human rights, environmental and governance due diligence in the near future.

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The EU collective redress directive: A new scheme for class actions to be pursued by consumer groups and public bodies across the EU

On 24 November 2020, the European Parliament adopted the Collective Redress Directive (Directive). The legislation forms part of the European Commission's "New Deal for Consumers" and reflects concerns raised by recent mass harm scandals with significant cross-border implications. The adoption of the Directive occurs at a time when businesses, particularly those operating within the manufacturing and industrials sector, are already facing heightened claim activity from increasingly litigious consumers.

Our analysis highlights the five new risks posed by the Directive and how to best prepare for increased mass claim activity in the EU.

Class action litigation risk will become a reality for the majority of EU businesses

- First, the Directive is designed to implement a straightforward and cost-efficient scheme for mass consumer claims to be pursued by (a) consumer groups and public bodies both (b) domestically and at EU-level in response to a violation of EU law. The implications of the Directive are therefore clear: the majority of businesses operating within the EU will face significant class action litigation risk where consumers are breached in a protected sector (see section below). Businesses should therefore expect to see heightened class action activity across the EU when this legislation comes into force.[1]

A fast-track for claims related to product liability, food safety and cosmetic products

- Second, the new scheme enables mass claims for (a) redress (to obtain compensation for harm caused) and (b) injunctions (to halt unlawful practices) to be pursued in response to a trader's violation of EU law set out within Annex 1 of the Directive. EU consumers will therefore be indirectly empowered to pursue redress for (a) product liability (including agricultural and fishery products), (b) food safety requirements (including nutrition and health) and (c) cosmetic products, as well as (d) general consumer law. Given that manufacturing and industrials businesses already face a significant portion of these claims (which constitute the bulk of consumer actions), the additional impact of the Directive cannot be overstated as it will make these types of claim far easier to pursue.

[1] The final text of the Directive will need to be formally adopted the EU Council following which the Directive will published in the Official Journal of the EU and come into force twenty days later. Member States will then have 24 months to transpose the Directive into their national laws, and an additional six months to apply it.

- Separately, manufacturing and industrials businesses should be equally cautious with regard to environmental claims. While these do not fall within the scope of the Directive, certain Member States may include this category when transposing the Directive into domestic legislations (for example, France already has a collective redress scheme for claims relating to environmental protection).[2]

Claims will be led by experienced and militant consumer groups

- Third, consumer groups are central to the operation of this new scheme because these are the only legal persons (along with public bodies) with the standing to pursue actions for trader violations under the Directive. More relevantly, consumer groups are also directly responsible for informing consumers (as putative and/or current claimants) about (a) any prospective representative actions as well as (b) the state of play of actions underway. Experienced and militant consumer groups, who frequently target the manufacturing and industrials sector, are therefore increasingly likely to deploy representative actions in parallel to their campaigns as a means of pressuring businesses for wider political purposes.

Claims will be larger, more organised and very targeted

- Fourth, the scheme functions as an instrument for compliance by providing consumers with an ancillary redress mechanism to pursue traders for breach of EU law (a) in addition to and (b) without prejudice to their substantive rights under EU law. This means that consumers with a potential product liability claim can opt to either (a) actively pursue a private law claim against the trader in the courts of their Member State, or (b) passively join an action for collective redress under the Directive. In response, businesses should prepare for the future landscape of consumer claims to be (a) larger, organised and targeted consumer group-led actions as opposed to (b) solitary actions pursued by a limited number of claimant consumers.

Consumers will flock to the most "consumer-friendly" jurisdiction for claims

- Finally, the Directive fundamentally alters the European landscape of mass consumer claims by requiring Member States to provide at least one representative action mechanism at both domestic and EU-level. This two-tier approach to collective redress provides an "opt-in" mechanism for consumers not residing within the Member State in which the action is brought to join the proceedings in the relevant Member State. Whereas, domestic actions will be determined by reference to the particular collective action mechanism adopted by each Member State. Consumers will therefore be able to "forum shop" across the EU in order to seek out the most consumer-friendly jurisdiction for a putative action. Sectors such as manufacturing and industrials, with significant cross-border exposure, should therefore prepare to face targeted, organised consumer group claims in (a) the courts of relatively few Member States but potentially (b) on behalf of consumers from all across the EU.

[2] Law No. 2016-1547 of 18 November 2016

Preparing a global strategy for mass claims across the EU and the UK

In any event, the manufacturing and industrials sectors should expect an increase in class actions, irrespective of the Directive given that claimant law firms and third-party funders are not waiting idly for the advent of these new rules. As demonstrated by Brexit, the wave of mass claims in the UK for breach of consumer rights, data privacy rights, employment law and competition rules is symptomatic of wider trends and not solely the fruit of new legislation. This is all the more pressing in the context of COVID-19, which is widely expected to generate significant class action activity across most industries within the EU and the UK.

For this reason, it is very important for businesses to now prepare for the risk posed by class action litigation. Our firm's Global Class Actions Risk Briefing addresses COVID 19 related market activity.

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New guidance on lone working

Introduction

In March last year, the Health and Safety Executive (HSE) issued new guidance on protecting lone workers (INDG73(rev4)). This is more relevant than ever in light of the social distancing measures which employers are introducing to ensure that their employees can work in a "COVID-secure" manner, involving for example employees working from home and changes to shift patterns.

What is a lone worker?

This is defined as "someone who works by themselves without close or direct supervision," and the guidance gives examples of those who:

- work alone at a fixed base, for example in shops, petrol stations, factories, warehouses or leisure centres;
- work separately from other people on the same premises or outside of normal working hours;
- work at home;
- work away from a fixed base (for example, workers involved in construction, maintenance and repair, engineers and delivery drivers); or
- are volunteers carrying out work on their own.

It is easy to see how the COVID-19 pandemic has given rise to a real increase in numbers of relevant people, and employers must ensure that they consider the health and safety implications of lone working.

What does the law require?

The general obligations of employers to ensure the health, safety and welfare at work of their employees (and others who may be affected by their business, such as contractors) apply whether individuals are working alone or not, and there is no separate legislation which applies in respect of lone workers. Employers must, therefore, include consideration of the risks to lone workers in their risk assessments, and introduce measures to remove or reduce those risks in the usual way.

The guidance is helpful here, as it suggests some issues to consider when doing this, such as:

- assessing areas of risk including violence, manual handling and the medical suitability of the individual to work alone;
- requirements for training, levels of experience and how best to monitor and supervise lone workers; and
- having systems in place to keep in touch and respond to any incident.

New focus

The guidance includes a new focus on the potential for lone working to negatively impact on the work-related stress levels of employees and their mental health. It references the feelings of isolation and disconnection which poor contact can lead to, and notes that being away from colleagues and managers can make it difficult for support to be provided. It is therefore clear that arrangements must be put in place to ensure lone workers can share any concerns they have, and to include them in team meetings for example.

Next steps

Assessments of the risks to lone workers should be carried out before lone working commences, and relevant preventative and precautionary measures implemented. Over the coming weeks and months as some of those who have been working at home start to transition back into the office, employers will need to carefully monitor the situation, so individuals are not left out. As with all risk assessments, those which encompass lone workers cannot remain static, and need to be reviewed as relevant changes occur.

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Air pollution in the UK

Air pollution poses a threat not only to the natural environment (including the climate) but to human health and property. The World Health Organisation records that an estimated 7 million people die as a result of air pollution every year. With the speed at which air pollutant and emissions significantly reduced earlier this year, going forward we may see national and local authorities set reduction targets that are greater than may previously have been anticipated.

It has long been recognised that air pollution in the form of particulates, and sulphur and nitrogen oxides, has an extremely detrimental effect on health, particularly in heavily populated urban areas with high traffic densities. In February 2016, a joint report by two Royal Medical Colleges found that outdoor air pollution was contributing to some 40,000 early deaths a year in the UK.

The general nature of the problem has also been recognised at European level, and over the years the UK government signed up to a number of EU initiatives on ambient air quality, culminating in an Air Quality Directive in 2008. This Directive required Member States to secure improvements in ambient levels of various pollutants in selected areas, to ensure that the population at large is not exposed to long-term health effects from those pollutants, which include nitrogen dioxide. However, successive governments were tardy in implementing the requirements of that Directive.

This may have been partly due to the cost and the fact that governments may have had other economic priorities, and partly due to the political risk of the unpopularity of the measures which might be required to restrict traffic flows in the relevant areas. In respect of nitrogen oxides in particular, the problem was exacerbated by UK government policy favouring the use of diesel power, for example by the use of fiscal incentives, in the interests of reducing overall carbon emissions in order to combat climate change. Environmental problems rarely have simple solutions.

In response to the delays in implementing the Directive and improving air quality, an environmental pressure group, ClientEarth, brought judicial review proceedings against the UK government for its failure to implement the 2008 Air Quality Directive. These proceedings led to a judgment of the Supreme Court in April 2015, which ordered the government to prepare new air quality plans for submission to the EU Commission, in order to ensure compliance. However, those later plans were the subject to further litigation by ClientEarth, and in May 2018 the UK government was one of a number of Member States referred by the EU Commission to the EUJ for breaches of requirements of the Directive in respect of ambient levels of NO2.

While it is clear that high levels of ambient air pollution have detrimental effects on public health generally, it is not so straightforward to attribute the ill-health or

indeed deaths of any individual to them, in the way that would be required, for example, in order to bring a civil claim for damages.

Shortly before Christmas, however, a Coroner's Court in South London found that excessively high levels of NO2 in the vicinity of a stretch of the South Circular Road in Lewisham, South East London, has made a "material contribution" to the death from asthma in 2013 of a nine-year old girl, Ella Adoo-Kissi-Debra, who had lived some 25 metres away from the road.

This was of course primarily a personal tragedy for the little girl and her family. Her mother had not been aware at the time of the very high levels of pollution affecting that stretch of the South Circular Road, but subsequently campaigned and pressed for the background to her daughter's death to be recognised at the inquest. The coroner's narrative verdict was therefore a vindication of those efforts.

This case has highlighted the need for further action, and has reinforced a point which had emerged from data published following lockdown in the UK and around the world. At one stage in early April of last year, studies show that global human CO2 emissions fell by up to 17%, and further data reveals that some parts of the capital saw up to a 50% drop in air pollution during the first lockdown.

The Environment Bill, which was introduced into Parliament in January 2020, provides a vehicle for setting more stringent targets. Under the Bill, the Secretary of State is required to set at least one legally binding long-term target in four priority areas to deliver environmental improvements, including air quality, biodiversity, water, and resource efficiency and waste reduction, as well as a requirement for the Secretary of State to make regulations setting a legally binding target to reduce fine particulate matter in ambient air (PM2.5.– being atmospheric particulate matter that has a diameter of less than 2.5 micrometres). On 19 August 2020, the Department for Environment & Rural Affairs (DEFRA) published a policy paper setting out the scope of 18 environmental targets under consideration.

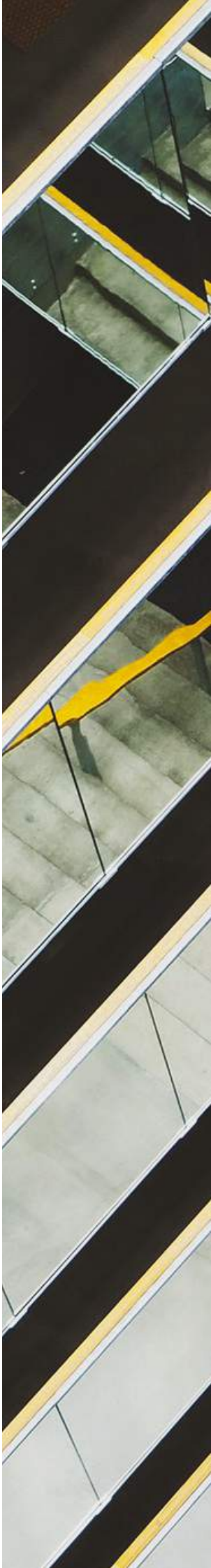
In relation to air quality and PM2.5. DEFRA has proposed the following targets:

- In line with the requirements of the Environment Bill 2019-2021, reduce the annual mean level of PM2.5. in ambient air.
- in the long term, reducing population exposure to $PM_{2.5.}$

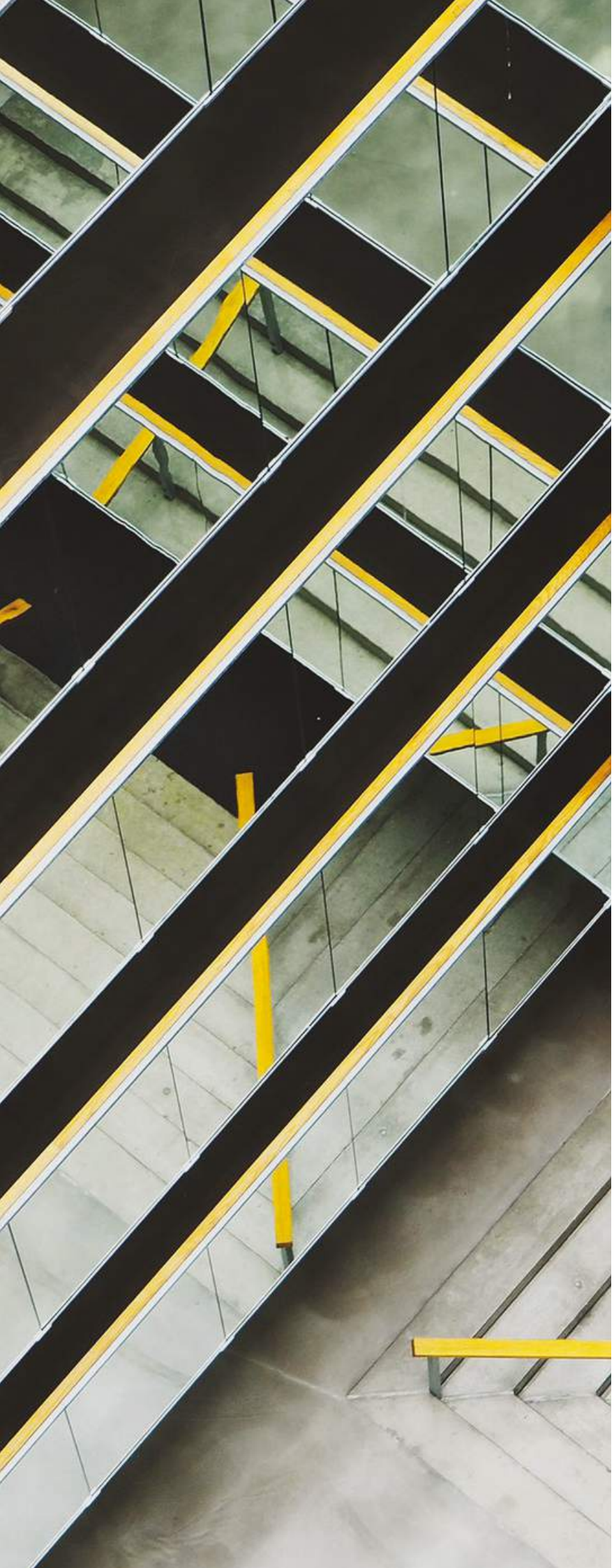
In considering the second, long-term target, the government recognises that setting a threshold alone will not drive change in areas which already achieve the threshold value and so the latter is intended to drive continuous improvement across all areas of the country. There is an existing obligation for the UK to reduce average PM2.5 exposure by the end of 2020 by 15%, and so such a target would provide statutory obligations for reductions in this area to continue. The next steps include setting the standards and metrics of the targets and public consultation, with statutory instruments setting out the targets to be laid before Parliament by 31 October 2022.

Following the end of the Brexit transition period on 1 January 2021, the EU regime on emissions and fuel consumption and emission performance standards regulating cars, vans and heavy duty will transfer into UK law[3]. On 10 July 2020, the Department for Transport published two consultations on implementation and operational procedures for the two new CO2 emissions regulatory schemes. The consultations are to stay open for just over a year and outline the government's approach namely to:

- create and retain policy that supports the delivery of the UK's wider ambitions to reduce CO2 emissions from transport in support of net zero emissions by 2050;
- provide certainty to vehicle manufacturers on plans for regulation following the transition period and minimise additional reporting burden;
- ensure that the UK regulation is at least as ambitious as the EU regulatory regime. In the government's 2018 Road to Zero Strategy, it set out that the new



[3] Heavy Duty Vehicles (Emissions and Fuel Consumption) (Amendment) (EU Exit) Regulations 2019 *(SI 2019/846)* and the Road Vehicle Emission Performance Standards (Cars and Vans) (Amendment) (EU Exit) Regulations 2019 *(SI 2019/550)*



regime is aimed at ensuring "a future approach as we leave the EU that is at least as ambitious as the current arrangements for vehicle emissions regulation"; and

- establish mechanisms to enable the UK government to assume the obligations and functions, currently performed by the European Commission, to ensure the regime continues to function in a UK-only context.

We may also see stricter emissions targets at a local level. Oxford City Council has announced that its draft Air Quality Action Plan for 2021-2025 proposes to set an annual mean NO2 target of 30 µg/m3 by 2025, going beyond the current legal annual mean limit value for NO2 set by the government at 40 µg/m3. It proposes to achieve this through 30 actions and measures across four priority areas, including developing partnerships and public education; increasing uptake of sustainable transport; reducing emissions from domestic heating, industry and services and reducing the need to travel. The plan was presented to the Council's scrutiny committee on 1 September 2020 and will be discussed by the Council's cabinet on 9 September 2020, with public consultation to follow. The scrutiny committee reported that the first couple of months of lockdown saw up to a 60% reduction in NO2 in Oxford, with levels at the lowest ever recorded in the city since monitoring began. With lockdown statistics such as these starting to emerge, it would not be surprising if other local authorities followed this approach.

As can be seen above, further and increased targets are continuing to be proposed to improve air quality, and such targets may come with obligations on businesses to amend their operations accordingly. This is an important space to watch and businesses should consider whether they wish to respond to government consultations so as to ensure the practicalities for business in implementing various measures is considered and keep these in mind when making long-term decisions regarding operations, plant, equipment and vehicles.

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The Draft Building Safety Bill

The draft Building Safety Bill (draft Bill) was published in draft form on 20 July 2020.

This is a government Bill, which is intended to give effect to recommendations of Dame Judith Hackitt's Independent Review of Building Regulations and Fire Safety, which was carried out in response to the Grenfell Tower Fire.

The draft Bill will ensure that there will always be someone responsible for keeping residents safe in high rise buildings. This will apply to buildings which are 18 m or more or taller than 6 storeys from the design phase to occupation.

This person, known as the Accountable Person (AP), will have to listen and respond to residents' concerns and ensure their voices are heard. The AP must appoint a Building Safety Manager to support the AP in the day-to-day management of fire and structural safety in the building.

Both residents and leaseholders will have access to vital safety information about the building in which they live and new complaints handling requirements will be introduced to make sure effective action is taken where concerns are raised.

A new "building safety charge" will make it easy for leaseholders to see and know what they are being charged for in respect of maintaining a safe building and there are numerous powers included to limit the costs that can be re-charged to leaseholders.

To oversee all this and to make sure that the AP is carrying out their duties properly, the government has requested the Health and Safety Executive to establish a new national regulator for building safety – the Building Safety Regulator (BSR).

The AP will be responsible for registering the building and applying for a Building Assurance Certificate. Existing buildings that are already occupied will also need to be registered. Any existing unoccupied buildings, at the time the new regime is introduced, will have to be registered by the point the building is occupied. Once registered, the AP must apply to the BSR for a Building Assurance Certificate and this will only be issued if the BSR is satisfied that the AP is complying with its statutory obligations.

The BSR will oversee the safe design, construction and occupation of high rise buildings and will have new powers to raise and enforce higher standards of safety and performance across all buildings. The BSR will also appoint a panel of residents who will have a voice in the development of its work.

The BSR's three main duties are to:

- implement and enforce the new, more stringent regulatory regime for higher risk buildings;
- oversee the safety and standard of all buildings; and
- assist and encourage competence of those working in the built environment industry and in building safety.

The draft Bill sets out the provisions for new regulations that will apply during the design and construction phase of higher risk buildings. A new duty holder regime will be incorporated across the lifecycle of these higher risk buildings. This is based on the principle that the person or entity that creates a building safety risk should, as far as possible, be responsible for managing that risk. These duty holders will include those appointed under the Construction (Design and Management) Regulations 2015 (CDM 2015).

A new Gateway regime will also be introduced to ensure building safety risks are considered at each stage of a building's design and construction. The BSR will be able to oversee the building work and ensure appropriate measures are being implemented to manage risk. The Gateways are key sign-off points:

- before planning permission is granted;
- before construction begins; and
- at the current completion/final certificate phase.

The draft Bill includes provisions to help create a "golden thread" of information – to ensure the right people have the right information at the right time to ensure buildings are safe and building safety risk are managed throughout the building's lifecycle.

The draft Bill also provides for Mandatory Occurrence Reporting which is the obligatory reporting of structural and fire safety occurrences which could cause a significant risk to life safety to the BSR. Duty holders in design and construction will be required to establish a framework for mandatory occurrence reporting to enable workers onsite to report potential occurrences. This mandatory occurrence reporting continues in occupation. The AP must set up a similar framework and the Building Safety Manager will be required to report occurrences to the BSR.

The draft Bill extends time limits contained within Sections 35 (penalty for contravening building regulations) and 36 (correction of non-compliant work) of the Building Act 1984 to apply formal enforcement powers. The time limit for prosecution will be extended from two to ten years in respect of Section 35 and from one year to ten years in respect of Section 36.

The BSR will have powers to prosecute all offences in the draft Bill and Building Act 1984, including Section 35. In addition, for all offences in the Building Act 1984 and the new legislation, where an offence is committed by a corporate body with the consent or connivance of a director, manager etc or is attributable to their neglect, that person will be liable to be prosecuted as well as the corporate body.

The BSR will be able to issue compliance notices (requiring issues of non-compliance to be rectified by a set date) and, in design and construction, stop notices (requiring work to be halted until serious non-compliance is addressed). Failure to comply with these notices will be a criminal offence, with a maximum penalty of up to two years in prison and an unlimited fine.

The draft Bill proposes that the BSR will establish and maintain a register of building inspectors (individuals) and building control approvers (either organisations or individuals). It will hold to account building control bodies; for example, where they haven't registered or are performing below the set standard. The BSR will be able to suspend or remove inspectors from the register and prosecute where necessary.

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Product laws post-Brexit

Now that we have reached the end of the transitional period, the UK is a third country. Companies that manufacture and distribute products intended for the UK and EU market should have taken steps to ensure any necessary changes have been made to their products to ensure continued compliance with product safety laws.

The UK is now a third country to the EU. While the technical requirements contained in the various product laws (including legislation which regulates toys, electrical equipment, and machinery, for example) remain unchanged, the change in relationship between the UK and the EU has triggered additional obligations.

Brexit will add an additional layer of complexity to an already heavily legislated area. The obligations of economic operators have changed, and companies will need to ensure that they comply with two similar, yet different regimes when placing products on the market in the UK and the EU.

Some of the key changes for are as follows:

Change in the status of economic operators

UK-based companies who import products into the UK from EU-based manufacturers were previously treated as mere distributors. From 1 January 2021, however, they are deemed "importers" as defined under product safety legislation. This change brings with it additional statutory obligations. For example, the name and address of the UK-based importer will need to be labelled on the product, and they will need to hold the relevant technical information which demonstrates compliance with product laws.

Conversely, UK-based manufacturers who supply products in the EU will need to consider their supply chain, and ensure that an EU-based importer is labelled on the products. Will the EU-based company that imports their products be willing (or indeed able) to take on importer obligations? Will the UK-based manufacturer need to alter their supply chain in the event that this is not the case?

CE marking and UKCA marking

From 1 January 2021 the UKCA mark could be used on products placed on the market in the UK, as a replacement for CE marking (other than in Northern Ireland: see below). The UK government has issued guidance which states that, to allow companies time to adjust to this process, they will still be able to use the CE mark until 31 December 2021, in most cases.

From 1 January 2022, however, the UKCA mark will need to be affixed directly to the product when it is placed on the market in GB. Businesses are being encouraged to start using the UKCA mark as soon as possible, and manufacturers should take steps to implement changes to their design process to allow for this.

Many companies may still have stocks of products which carry the CE mark, and steps should be taken to ensure that these goods are placed on the market as soon as possible, if they are intended for the GB market.

"Placing on the market" is the most decisive point in time concerning the application of product law. A product is "placed on the market" when it is made available for the first time. "Made available," means the product is supplied for distribution, consumption or use on the market in the course of a commercial activity, whether in return for payment or free of charge. If the business supply a product to a distributor or an end user for the first time, this is always considered "placing on the market," and companies should ensure that any CE marked products in GB make their way into the supply chain before the 31 December 2021 deadline.

The UKCA mark will of course not be recognised in the EU, and those businesses wishing to sell products in both the UK and the EU will need to consider whether their products will have both the CE mark and the UKCA mark.

Market surveillance

In the event that a product which has been placed on the market poses a safety risk, manufacturers are obliged to submit a notification to the relevant market surveillance authorities. Previously, in the event that a UK authority were notified of such a safety concern, they would need to inform EU authorities via the Rapid Alert System. This, however, will no longer be the case. The concern here is that this may slow down the process for recalling any unsafe products on the EU market, in the event that such has been notified in the UK.

Furthermore, if the EU authorities are notified about an unsafe product in the EU which has also been placed on the market in the UK, the UK authorities will not be made aware of this. Reliance will need to be placed on manufactures updating the authorities separately, putting an additional burden on businesses.

As can be seen from the above, Brexit will add an additional layer of complexity to an already heavily legislated area. The obligations of economic operators has changed, and companies will need to ensure they comply with two similar, yet different regimes when placing products on the market in the UK and the EU.

There are also special provisions in place in relation to Northern Ireland-based manufacturers and products which are placed on the market in Northern Ireland, which should be considered separately. The UK government has issued guidance on this.

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Registration deadlines for UK reach regime post-Brexit

Registration, evaluation, authorisation and restriction of chemicals (REACH)

The UK left the EU on 31 January 2020 and entered into a transition period that lasted until 31 December 2020. During the transition period, EU REACH continued to apply in the UK.

From 1 January 2021 the UK put in place its own independent chemicals regulatory framework, UK REACH (Established by the REACH etc (Amendment etc) (EU Exit) Regulations 2020), to replace the previous EU regime that had been in place since 2007. The new UK REACH covers England, Scotland and Wales (GB). Northern Ireland remains within the scope of EU REACH.

Under UK REACH there is a general obligation on manufacturers and importers based in GB to register their products with the HSE. Any company manufacturing relevant products in GB does not automatically hold a UK REACH registration (even where they previously held an EU REACH registration). In addition, GB companies procuring chemicals directly from EU/EEA suppliers have changed from downstream users/distributors (with no EU REACH obligations) to importers under UK REACH and will therefore have UK REACH obligations (such as registration).

In order to mitigate any impact on existing business and to allow GB-based companies to continue to manufacture and to import substances or mixtures from the EEA, or indeed the rest of the world, UK REACH provides for transitional arrangements from its introduction on 1 January 2021 covering the period up to first registration. These arrangements essentially buy companies time before they are required to complete the registration process of submitting full dossiers of information on their products to the HSE. They allow companies to continue trading for a limited time period after giving initial information only to the HSE. There are two routes to registration taking advantage of transitional arrangements, these are Grandfathering and Downstream User Import Notification (DUIN). The different routes relate to the role the company plays in the market:

- Grandfathering: If you are a GB-based company with registrations which were granted under EU REACH, or if you transferred registrations to an EU-based company any time after 29 March 2017 and before the end of the transition period, you can take advantage of Grandfathering. This essentially means that existing EU REACH registrations are carried across directly into UK law once a company has provided sufficient information to the HSE. While registration is still required, there is no registration fee.
- To take advantage of Grandfathering you must provide initial submissions to the HSE within 120 days of the end of the transition period. So by 30 April 2021. At this point you will be given a UK REACH registration

number. In order to complete the registration a full dossier of information is required at a later date (October 2023, 2025 or 2027). The date is dependent on the type and quantity of chemicals you are handling.

- Downstream User Import Notification (DUIN). If you are a GB-based company that was previously a downstream user/distributor who did not have your own EU REACH registration, you can take advantage of the DUIN route to registration to comply with your new importer obligations under UK REACH. This route allows downstream users and distributors under EU REACH, that are now importers under UK REACH, to notify the HSE regarding the substances that they wish to continue importing into GB from the EU/EEA and essentially buys them time to put together dossiers of information before having to undertake full registration.

  To take advantage of DUIN, you must provide initial submissions to HSE within 300 days of the end of the transition period. So by 27 October 2021. As with Grandfathering, a full dossier of information is required at a later date (October 2023, 2025 or 2027), which is again dependent on the type and quantity of chemicals you are handling. However, unlike grandfathering, a new registration will be required upon sending the full dossier to the HSE and a fee will be paid for this.

For businesses that these deadlines apply to it is of vital importance that they are met otherwise continuing to handle relevant chemicals would be in breach of UK REACH.

If you were not previously a registrant, downstream user or distributor under EU REACH, and you wish to import chemicals into GB for the first time, no transitional provisions will apply. You will be required to follow the processes for submitting a new registration under UK REACH.

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New database and reporting requirement for SVHCs from 2021

Substances of concern in articles, as such or in complex objects (products) (SCIP)

A substance of very high concern (SVHC) is a substance identified as having certain characteristics that pose a risk to the environment or human health; for example, they are carcinogenic or toxic. SVHCs are regulated under REACH and producers or importers of articles (products) containing SVHCs above a concentration of 0.1% w/w are under a duty to provide sufficient information to professional users to allow safe use of the article. The same requirement also applies when a consumer asks for such information. Additionally, in certain cases there are notification requirements to ECHA.

Following an amendment to the EU Waste Framework Directive, from 5 January 2021, suppliers of articles containing an SVHC above 0.1% will have an additional obligation to notify ECHA about such products and the SVHC present.

ECHA has developed a "SCIP database" to record this information and is designed to ensure that information about SVHCs is available throughout the whole lifecycle of products, including when it comes to their disposal. The information in the database is made available to waste operators and consumers. It allows consumers to find out about any SVHCs in the product they buy and in this respect is seen as a tool to encourage the substitution of harmful substances. The SCIP database does not place obligations on waste operators but rather is designed to provide additional data to support the waste sector in improving waste management practices.

Information that is required to be notified includes details of the SVHC, product identifiers and characteristics and information on its safe use. There is no fee to submit the notification but there will be management time in gathering the required information and submitting it.

If you import or manufacture articles in the EEA we recommend the following steps are taken:

- Assess your role in the supply chain and confirm whether or not you could have a notification obligation.
- Confirm whether any SVHCs are included in your products above 0.1% w/w, paying close attention to those products that are "complex articles."
- If SVHCs are present, understand what information needs to be provided to ECHA. Collect and review your data.
- Prepare and submit your notification.
- Keep notifications under review and update ECHA as required; for example, if an SVHC is no longer used in the product.
- Keep up to date with the candidate list of SVHCs, which is generally updated twice a year, as you may be required to make additional notifications.

A prototype of the SCIP database is currently available for those who wish to familiarise themselves with the form of the notification and to test the functionality of the system. Any "test" notifications will be deleted before the process is officially launched at the end of October 2020.

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