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GLOBAL ENVIRONMENT NEWSLETTER

Welcome to the Spring edition of our Global Environment Newsletter. This edition covers the following topics:

We hope that you find this issue of our Global Environment Newsletter of interest. If you have any topics that you would like to see covered in future editions or if you have any comments on previous issues please let us know.

EU

Single-Use Plastics Directive Adopted by European Parliament: *A ban on most single-use plastics, and new requirements to make manufactures fund the costs of waste management*

The Single-Use Plastics Directive has formally adopted by the European Parliament in March 2019, and will overhaul the sale and use of disposable plastic items across the EU. The Directive forms a part of the EU's plastics strategy under its Circular Economy package. Its principal aim is to remove from the market, the most prevalent types of plastic waste found on beaches and in the marine environment.

Arguably the key measure introduced by the Directive is a complete ban (with very limited exceptions) on the sale of a number of common single-use plastic ("**SUP**") items. These are: cotton bud sticks, cutlery (forks, knives, spoons, chopsticks), plates, straws, beverage stirrers, balloon sticks, certain polystyrene food containers, polystyrene drinks containers and cups, and products made from oxo-degradable plastics. The European Commission will publish guidelines on what products meet the definition of SUP.

Specific rules will also apply to SUP drinks containers: sale of these items will only be permitted if the caps and lids remain attached to the containers during the use of the product. By 2025, 90% of SUP drinks bottles must be collected, for example, through deposit refund schemes (see page 10 for the UK's version of such a scheme). From 2025 "PET" drinks bottles must contain at least 25% recycled plastics (calculated as an average for all PET bottles on the market in a Member State) and from 2030 all SUP drinks bottles must contain at least 30% recycled plastic. Other targets for separate collection also apply, namely by 2025, 77% of SUP drinks bottles on the market in a given year by weight need to be collected separately for recycling. This rises to 90% by 2029.

The Directive also contains a number of labelling and awareness-raising measures. In particular, labelling information will be required for sanitary towels, tampons, tampon applicators, wet wipes, tobacco products and beverage cups, informing consumers of appropriate waste disposal options, that the product contains plastic, and the negative environmental impacts of littering or inappropriate disposal. The European Commission will set harmonised labelling specifications.

More broadly, by 2026 Member States will be required to reduce the use of certain SUP food containers (including those used for fast food) and SUP drinks cups (including covers and lids). This can be done by setting national reduction targets, making alternative products available at the point of sale, economic measures such as ensuring that SUP products cannot be provided free of charge, or using sector-specific waste management agreements.

Finally, the Directive contains measures aimed at requiring producers of certain SUP products to cover the costs of managing the waste and litter from those products. Such costs include the costs of awareness-raising measures, collecting products from public waste collection and cleaning up litter. The measures apply to certain SUP food containers, food packets and wrappers made from flexible material, drinks containers and cups, and lightweight plastic carrier bags. Similar obligations apply for wet wipes, balloons and tobacco products. Producers of fishing gear containing plastic will also need to cover the costs of separate collection of waste delivered to ports as part of new extended producer responsibility schemes required by the Directive.

These are substantial changes which producers (and consumers) will need to grapple with quickly but the changes should go a long way to internalising and reducing the environmental costs of disposable plastic on the European and wider marine environment.

The Directive now needs to be formally adopted by the EU Council and officially published. Member States will then have two years to transpose the Directive into domestic law.

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New Renewable Energy Directive: *Establishes an EU-wide 32% renewables target, and contains a major package of measures to facilitate the sustainable development of renewable energy*

Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources entered into force in December 2018. The Directive aims to promote renewable forms of energy, and is key to meeting the 2015 Paris Agreement and EU 2030 energy targets, including the EU's goal of cutting emissions by at least 40% below 1990 levels by 2030.

Article 3 of the Directive sets a binding Union target under which at least 32% of the EU's gross final consumption of energy in 2030 must come from renewable sources, and this is subject to a possible upward revision in 2023.

Member States must contribute, collectively, to the achievement of this binding target through the establishment of national contributions, which have to be set out in new Integrated National Energy and Climate Plans. Unlike the 2009 Renewable Energy Directive, the 32% target set in the 2018 Directive is not broken down into individual targets for each EU Member State. However, as from 1 January 2021, each Member State must continue, at least, to meet its own individual national target for renewable energy for 2020 (these targets range from 10% up to 34%).

In order to facilitate the achievement of its targets, the Directive creates a common policy framework to promote the growth of renewable energy. Key provisions deal with the following:

- **Support schemes for energy for renewable sources regulation**, including the possibility for Member States of opening up participation in support schemes to producers located in other Member States. Support schemes must promote the integration of electricity from renewable sources in a market-based and market-responsive approach, always avoiding unnecessary distortions of electricity markets and considering possible system integrations costs and grid stability.
- **Stability of financial support.** Member States must publish a long-term schedule anticipating their support schemes covering the five next years (three years in case of budgetary constraints). Furthermore, Member States have to assess the effectiveness of their support schemes at least every 5 years.
- **The creation of a Union Renewable Development Platform (URDP)** which aims to enable trading in energy renewable shares between Member States; the price of the transfers will be set on a case-by -case basis based on a URDP demand-and-supply matching system.

- **Organisation and duration of the permit-granting process.** The Directive contains measures to facilitate and shorten of the permit-granting process for power plants. In particular, permit-granting processes should not normally exceed 2 years.
- The establishment by Member States of **a simple-notification procedure for grid connections**.
- **Renewable self-consumers and renewable energy communities**. The Directives requires Member States to ensure that all consumers can become renewable self-consumers producing and consuming energy (otherwise known as 'prosumers') and to participate in renewable energy communities. In particular, the Directive seeks to ensure that households which 'self-consume' from renewable electricity sources without exporting that electricity onto the public grid are exempt from disproportionate procedures or grid charges that are not cost-reflective.
- **The promotion of renewable energy in the heating and cooling sector**. In broad terms, each Member State must endeavour to increase the share of renewable energy used in the heating and cooling sector by an indicative 1.3 % points (as against 2020 figures) as an annual average over the 2021-2030 period.
- **Mainstreaming renewable energy in transport sector.** Each Member State must set an obligation on fuel suppliers to guarantee that the share of renewable energy within the final consumption of energy in the transport sector is at least 14% by 2030. This minimum target is subject to a possible upward revision in 2023. Member States are permitted to exempt or differentiate between different fuel suppliers and when setting the obligation on the fuel suppliers, considering the different degrees of maturity and the cost of different technologies. There are also rules on the contribution of biofuels and biogas to these targets.
- **Specific rules for biofuels, bioliquids and biomass fuels produced from food and feed crops**. For the purposes of the overall renewable energy target and transport targets, the share of biofuels and bioliquids and biomass produced from food and feed crops consumed in transport must be no more than 1% higher than the share of such fuels used in the road and rail transport sector in 2020 in that Member State, and in any event, no more than 7%. There are additional rules in relation to crops from "high indirect land-use change-risk feedstock".
- Detailed regulation on **sustainability and greenhouse gas emissions saving criteria for biofuels, bioliquids and biomass fuels**.

Member States must transpose these provisions into domestic law by 30 June 2021.

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Revised Energy Performance of Buildings Directive: *New requirements for national strategies, and measures to encourage uptake of technologies*

Buildings are responsible for approximately 40% of energy consumption and 36% of CO2 emissions in the EU, and almost 75% of the EU's building stock is deemed by the European Commission to be energy inefficient. In this context, the revised Energy Performance of Buildings Directive (EPBD) entered into force on 9 July 2018. The revised EPBD came as the first of a raft of reforms arising from the Clean Energy for All Europeans package, published by the European Commission in November 2016. The revised EPBD has a range of interconnected objectives, aiming to increase energy efficiency and reduce greenhouse gas emissions from building stock, and in doing so also seeking to improve Europe's energy security, increase the health and wellbeing of residents, and reduce energy poverty.

Key aspects of the revised EPBD include a requirement for Member States to establish a long-term renovation strategy, and measures to encourage the uptake of smart and low-carbon technologies.

Long-term renovation strategy

According to the EC's impact assessment, building renovation would be needed at an average annual rate of 3 % to achieve the EU's energy efficiency ambitions of decarbonised building stock by 2050 in a cost-effective manner. To support this, the revised EPBD requires each EU Member State to establish a long-term renovation strategy to support the renovation of residential and non-residential buildings. This strategy must include a roadmap setting measurable progress indicators and indicative milestones for 2030, 2040 and 2050. It must include measures to encourage the mobilisation of public and private finance and investment to support the aims of the revised EPBD.

Encouraging the uptake of smart and low-carbon technologies

The revised EPBD seeks to encourage the use of smart and low-carbon technologies to ensure buildings operate efficiently. Measures include:

- where technically and economically feasible Member States must set requirements to ensure that new buildings be equipped with self-regulating temperature devices at room level; that non-residential buildings with air-conditioning and ventilation output of over 290 kW are equipped with building automation and control systems by 2025; and that residential buildings are equipped with the functionality of continuous electronic monitoring that measures systems' efficiency;
- the introduction of a common EU 'smart readiness indicator', which will measure a building's capacity to use new technologies and electronic systems to adapt to the needs of the consumer, optimise its operation and interact with the grid. The use of the smart readiness indicator will be optional for Member States;
- support for the rollout of electric vehicle infrastructure through the introduction of minimum requirements for the installation of charging points in car parks over a certain size. This includes a requirement that Member States set requirements for the installation of a minimum number of recharging points for all non-residential buildings with more than twenty parking spaces, by 1 January 2025.

Transposition

Member States will have until 10 March 2020 to transpose the measures into the domestic laws, regulations and administrative provisions necessary to comply with the revised EPBD.

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AUSTRALIA

Climate Case Lodged Against Australia: *Torres Strait Islanders claim infringement of human rights due to climate inaction*

On 13 May 2019, eight Torres Strait Islanders reportedly lodged a complaint with the UN Human Rights Committee claiming that the Australian government has violated their human rights to life, family and culture due to the Government's failure to take measures to address climate change. The Torres Strait Islands are a group of over 270 islands which span the Torres Strait between the Cape York Peninsula in Queensland, Australia and Papua New Guinea. Many of the islands are very low-lying with some being no more than one metre above sea level, and so the Torres Strait Islands are highly susceptible to the effects of climate change, including storm surges, high tides, erosion and water contamination. The Torres Strait Islanders have lived on the islands for thousands of years and they claim that rising sea levels threaten their ancestral homes. It is not the first time that Torres Strait Islanders have initiated ground-breaking legal change in Australia – the historic *Mabo v. Queensland (No.2)* case, which saw the introduction of native title into Australian law and removed the myth of *terra nullius* (meaning uninhabited before British colonisation), was brought by Eddie Koiki Mabo and four other Torres Strait Islander people from the island of Mer.

In a statement one of the complainants said: "*We're currently seeing the effects of climate change on our islands daily, with rising seas, tidal surges, coastal erosion and inundation of our communities*". They reportedly want Australia to stop using and exporting thermal coal for electricity generation and to achieve zero net emissions before 2050; they are also seeking at least $20 million for protective infrastructure such as sea walls, as well as adaptation measures to assist in keeping the islands habitable.

The complainants are being assisted by the non-profit environmental law organisation, ClientEarth. ClientEarth claims that "*Rising seas are washing away Torres Strait Islanders' homes. We're supporting them to bring a world-first climate change case*". This complaint is historic, both in terms of Australian and international human rights law, being the first climate change claim made against the Australian Government based on human rights. It seeks to link failure to take action on climate change with human rights violations, and may pave the way for future actions of this kind.

In a statement on their website, ClientEarth highlight some of the alleged failings on the Australian government including the government's lack of emission reduction policy and continued focus on fossil fuel industries. Tensions have flared and recent Federal election results have shown division amongst Australians regarding coal mining, with the focus being directed towards Adani's proposed new coal mine in the Galilee Basin in Queensland.

Federal approvals for Adani's project have stalled as debate rages regarding the economic benefits of the project and the potential climate change impact. For the Torres Strait Islanders, the approval of the Adani mine would be a devastating blow, and is likely a driving factor behind the timing of the lodgement of their complaint with the UN Human Rights Committee.

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BELGIUM

Flemish Asbestos Decree Approved In Parliament: *New requirements to provide asbestos inventory for buildings and measures to prevent asbestos exposure.*

On 20 March 2019, the Flemish Parliament approved a decree on asbestos management The Decree's main objective is to accelerate the asbestos removal from existing buildings and to reduce the risk of asbestos exposure incidents. Although it will only apply in Flanders, the Decree it may also influence property owners, authorities and investors that are active in the other Belgian regions.

The most significant provisions of the Decree are the following:

Asbestos inventory requirements

Employers are legally required to procure and keep updated an inventory of asbestos present in the premises where their employees work. The Decree significantly expands the scope of application of asbestos inventory requirements.

Requirements at the occasion of property transactions

The Decree requires the seller or transferor of ownership or other property rights (rights *in rem*) in any building constructed before 2001 to provide an asbestos inventory. This inventory must be prepared by a specialised consultant and thereafter certified by the Flemish Waste Agency. The inventory must be provided to the purchaser or transferee *before* entering into a transaction.

Breach of these requirements entitles the transferee to request the annulment of the transaction in Court, unless the transferee receives a copy of the asbestos inventory before signing the notarial deed and waives any annulment claims in that deed.

This requirement applies to all types of buildings, including residential premises, and irrespective of their use or occupants.

General asbestos inventory requirement as of 2032

By 31 December 2031, all owners of buildings constructed before 2001 will need have a valid asbestos inventory certificate.

Preventive measures

The Decree contains a number of measures which seek to prevent asbestos exposure incidents, including:

- an obligation to remove asbestos-containing materials that become easily accessible when carrying out maintenance, repair or refurbishment works;
- a prohibition on cleaning of or removal of moss or lichen from asbestos-containing roofing or façade cladding; and
- a prohibition on covering or attaching equipment (e.g. billboards or solar panels) to, asbestos-containing roofing or façades.

Specific requirements for buildings occupied by public authorities

The Asbestos Decree contains additional requirements for buildings constructed before 2000 and occupied by a public authority:

- by **1 January 2034:** mandatory removal of all easily accessible and non-bound asbestos-containing materials and all asbestos-containing materials on the exterior of a building exterior elements (e.g. in roofing, or façade or in chimneys); and
- by **1 January 2040:** the building must be formally certified as 'asbestos safe'.

The owner of the building (rather than the occupying public authority) is responsible for complying with these requirements.

Entry into force

The Decree was published in the Official Gazette on 17 April 2019. The Flemish Government still needs to set the date of its entry into force, but this will only happen after the installation of the new Government following the regional elections that will take place on 26 May 2019. Even before entry into force, this decree is likely to affect the attitude of property owners, tenants and investors towards asbestos management.

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THE NETHERLANDS

Phasing-out Coal: *Government publishes legislation to accelerate coal phase out, with compensation generally not provided.*

The Netherlands are under substantial legal and political pressure to phase-out power generation by coal-fired power plants.

The current Dutch Cabinet has high political ambitions to reduce CO2 emissions and is determined to go beyond the CO2 reduction targets resulting from the Paris Agreement and the related EU goals. The Netherlands has set a target of reducing emissions by 49% (compared to 1990 levels) by 2030, as compared with the EU target of 40%.

Where political ambitions are sometimes softened when confronted with economic reality, the room to manoeuvre for the Cabinet is strongly reduced by a ruling from the Court of Appeals ("*Gerechtshof*") in The Hague of 9 October 2019. The Court decided that various international agreements and treaties oblige the Dutch State to reduce the emission of greenhouse gases by 25% in 2020.

Faced with this combination of political and legal pressure the Cabinet presented the Bill containing a ban on coal-fired power production ("*Wet verbod op kolen bij elektriciteitsproductie*") on 21 March 2019.

The envisaged ban on coal will be a two-step process:

- Plants with an electrical efficiency of 44% or less will need to cease operating by 31 December 2024;
- Remaining plants will need to cease operating by 31 December 2029.

One facility (the "Hemweg-facility"), which has an efficiency of less than 44% and does not use biomass as a co-fuel, nor produce renewable heat, will need to close by 31 December 2019.

Based on efficiency criteria already five facilities were closed at an earlier stage (three in 2016 and two in 2017).

The Cabinet does not offer financial compensation to the operators of plants which are forced to cease operations under this Bill. It claims it was foreseeable for the industry that coal-fired plants should be phased out, and the transition periods to 31 December 2024 and 31 December 2029 are considered reasonable. Nevertheless, the Bill entitles operators to a government grant in circumstances where the operator can demonstrate that the impact of the ban upon that operator is greater than the impact suffered by other operators. Since the Hemweg-facility will not benefit from a transitional period, it will be offered such a grant.

It can be expected that the Bill will pass smoothly through Parliament. Whether the operators will share the view of the Cabinet that no compensation is needed, however, remains to be seen.

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UK

Environment Bill for the Post-Brexit period: *Draft Bill provides for statute-based environmental principles, long term environmental improvement plans and a new environmental oversight body*.

In December 2018, the UK Government published part of a draft Environment Bill which aims to insert three novel elements in UK law. The Bill has largely been driven by stakeholder concerns over the content and status of environmental laws and principles in domestic law following the UK's departure from the EU. In particular, there is concern that, without new legislation, the current supervisory and enforcement role played by European bodies, and over-arching EU environmental principles guiding EU law, will be lost in a Post-Brexit UK.

Environmental Principles

The draft Bill sets a range of principles of European environmental law on a statutory footing in the UK. These principles are well-established legal norms set out in the European Treaties and case-law (and other international agreements) including the 'polluter pays' principle, precautionary principle, sustainable development, access to environmental information and justice, and public participation in environmental decision-making.

Under the draft Bill, the Secretary of State is required to prepare a policy statement on these principles. With certain exceptions, Ministers would then have to "have regard" to the policy statement when making policy. It is clear that this duty to "have" regard to the statement in making policy falls far short of the role that the environmental principles currently play under EU law.

Environmental Improvement plans

The draft Bill also provides ministers with a framework for drawing up a succession of long-term environmental action plans, with the Government's 25 Year Environment Plan, published in January 2018, to be the first of these. Once designated, the Government must monitor implementation of the plan, reporting to Parliament each year, and must periodically review the report and amend it where necessary.

It is envisaged that these new plans should provide more certainty and stability as to successive governments' long-term strategic approaches to environmental issues.

Office for Environmental Protection

The draft Bill establishes a new regulatory authority, the Office for Environmental Protection (OEP), to replace oversight functions currently exercised by the European Commission, Parliament and European Environmental Agency after Brexit. The OEP's key role will be to monitor the implementation of environmental legislation by public authorities. It will have powers to enforce against breaches of environmental legislation, including formally notifying authorities of breaches of law, to take judicial review action, and to recommend corrective action. It will also have powers to deal with complaints from organisations and the public. Separately, the OEP will be required to monitor implementation of the Environmental Improvement Plan, and have a remit to advise the government, where requested, on environmental matters more generally.

One area of uncertainty is the extent to which the OEP mechanisms could overlap with procedural mechanisms in the planning process, e.g. appeals, call-in of decisions by the Secretary of State, and judicial review challenges. This uncertainty will hopefully be resolved in the complaints and enforcement strategy that the OEP is required to adopt.

The published provisions of the draft Bill have recently undergone a detailed scrutiny process by the Commons' Environmental Audit Committee which has been strongly critical about various aspects. The second part of the Bill, understood to set out firmer targets and a sector-specific breakdown, is still awaited.

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Major Waste Management Proposals: *UK Government has launched consultations on reforming producer responsibilities, a deposit return scheme for drinks containers, and a plastic packaging tax.*

The UK Government has published for consultation three significant proposals for reform of aspects of the waste management regulatory framework, largely aimed at implementing the EU's Circular Economy package.

Packaging producer responsibility scheme changes

The first reforms relate to the Packaging Producer Responsibility scheme under which businesses involved in various aspects of the production, distribution and use of packaging take responsibility for ultimate recycling and recovery costs. Currently businesses only bear around 7% of the costs of the waste from managing consumer use packaging. The reforms will increase that figure to 100% of the net cost (businesses already bear the full cost for industrial use packaging).

Rather than sharing responsibility for compliance between different parties along the packaging chain (as currently), the Government is contemplating various reform options including placing the full obligation on the single business which has greatest influence over packaging design and use of materials. Significantly, online market place operators would be responsible for packaging on products brought into the UK.

The UK will set enhanced packaging targets which go beyond EU minimum levels, for 2025 and 2030, with interim targets set for 2021 and 2022. Under the proposals, packaging would also be required to be labelled as recyclable or not recyclable.

A number of alternative options are floated for dealing with the packaging waste, including moving to management by a single not-for-profit organisation to whom producers would pay fees.

Consultation on a Deposit Return Scheme in England, Wales and Northern Ireland

Secondly the Government is proposing a Deposit Return Scheme (DRS) to encourage consumers to return drinks containers for recycling. In broad terms, the DRS would operate in as set out below.

A deposit would be added to the price of in-scope drinks at point of purchase, and would be redeemed when consumers return the empty container to a designated return point. These points could be vending-type machines e.g. at large supermarkets, transport hubs; or they could be retailers who take back containers over the counter.

A broad range of drinks would be covered including water, soft drinks, juices, alcohol. The consultation seeks views on whether different types of materials should be covered, and whether only certain sizes of container.

Retailers beyond a certain size would have to take back DRS scope drinks containers (even if not sold by them). All producers of drinks within DRS would have to meet high collection rates. A central body would then manage the operation of the scheme, funded by fees from producers and revenue from recycled materials.

Consultation on Plastic Packaging tax

The Government is proposing a new tax on plastic packaging which does not contain at least 30% recycled plastic content.

Composite Packaging material would be treated as made of the material which is predominant by weight, but only charged where that material is plastic.

There may be one or more tax bands depending on the level or recycled content, or different rates for different products. Amounts of tax would be announced at a later date.

Liability for the tax would fall to packaging manufacturers. There may be a more complicated solution where there are different stages in packaging manufacture. Where packaging is imported, the tax would be charged on the entity that imports the goods into the UK and/or the first entity to commercially exploit them in the UK.

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