



CHALLENGES IN THE CONSUMER SECTOR MOVING TOWARDS SUSTAINABLE PLASTIC USE

In the final article in a three-part series, Susan Black and Julie Vaughan of Herbert Smith Freehills LLP examine how the use of plastic is regulated in the UK and the EU, and the responsibilities of businesses in the retail and consumer sectors.

These are complex and fast-changing times for retail and consumer sector businesses. The regulation of plastics is currently evolving at a blistering pace, both within the UK and the EU (see box “Existing and proposed UK and EU plastics regulation”). The focus on plastics also comes at a time when there is increased scrutiny of companies’ wider environmental and sustainability performance from the likes of institutional investors and shareholders (see Briefing “Climate change: turning up the heat on corporate governance”, www.practicallaw.com/w-020-5133).

This article, the final one in a three-part series, examines the regulation of, and responsibility for, plastics, including:

- Single-use plastics.
- Microplastics.
- Producer responsibility.

- Tax measures.

The first two articles in this series examined a range of other issues affecting the sector, including: the impact of new and disruptive technologies; supply chain concerns, employee issues arising from the gig economy; and financial distress (see feature articles “Challenges in the consumer sector: transformative technology”, www.practicallaw.com/w-020-3706 and “Challenges in the consumer sector: adapting to the new reality”, www.practicallaw.com/w-020-8428).

APPROACH TO REGULATION

As with all reactions to a sudden increase in public awareness, it is important that regulation remains properly considered and proportionate rather than being reactionary or creating unwarranted incentives. The approach taken must be future-proofed as far as possible, given that measures addressed

to single products are likely to be quickly outpaced by changing consumer preferences and innovation.

The use of circular economy thinking is capable of being readily applied to plastics and their uses. This approach has two key benefits:

- It is wide enough to consider the whole plastic value chain and the lifecycle of plastic products from design to disposal.
- It is not dependent on national boundaries or jurisdictions.

All new measures ought to be evaluated against the backdrop of this approach. Plastics have enabled huge advances in consumer comfort, enjoyment and safety, and although some consumers now advocate giving them up, in practice, they are far too integrated into the consumer world for this to

Existing and proposed UK and EU plastics regulation

UK

- Single Use Carrier Bags Charges (England) Order (*SI 2015/776*), in force since October 2015 (except for Article 18, in force since April 2015).
- Environmental Protection (Microbeads) (England) Regulations 2017 (*SI 2017/1312*), partially in force since January 2018 and the remainder since June 2018.
- Plastics Bill presented to Parliament in June 2018.
- Department for Environment, Food and Rural Affairs (Defra) consultation on the proposal to extend the single-use carrier bag charge to all retailers to increase the minimum charge to 10p, published in December 2018.
- Defra consultation on introducing a deposit-return scheme in England, Wales and Northern Ireland, published in February 2019.
- Defra consultation on reforming the UK packaging producer responsibility system, published in February 2019.
- Treasury consultation on a plastics tax, published in February 2019.
- Plastic Pollution Bill presented to Parliament in February 2019.

EU

- Packaging Waste Directive (*94/62/EC*), in force since December 1994.
- Regulation 10/2011/EU on plastic materials and articles intended to come into contact with food, in force since February 2011.
- Directive restricting the use of Bisphenol A in plastic infant feeding bottles (*2011/8/EU*), in force since February 2011.
- Directive regarding reducing the consumption of lightweight plastic carrier bags (*2015/720/EU*), in force since May 2015.
- European Commission 2018 strategy for plastics in a circular economy.
- European Chemicals Agency proposal on the restriction of microplastics, published in January 2019.
- Directive on the reduction of the impact of certain plastic products on the environment (*2019/904/EU*), in force since July 2019.

be achieved easily. If consumers, for example, swap their plastic toothbrush for a bamboo one, they will likely still travel to work in a car. Even if they travel by bicycle or train, their mode of transport will incorporate plastic parts, they will use a plastic card to pay for their coffee and communicate on a mobile phone with a plastic casing. While consumers' love affair with plastic may have cooled a little, it is far from over.

Businesses in the consumer goods sector may find it difficult to adjust to the sudden increase in consumer and political interest in reducing single-use plastics in particular, and the welter of regulatory initiatives that it is now spawning. A wide range of measures is being proposed, including outright bans, additional labelling requirements, taxes on importers,

reformed recycling obligations for producers and deposit-return schemes on drinks bottles. Manufacturers may find themselves subject to a cocktail of these measures and, with Brexit approaching, there may also be future divergence between what is needed to comply with goods intended for the UK market and what is required for export to the EU. This could lead to additional manufacturing costs.

SINGLE-USE PLASTICS

A number of initiatives have been introduced in recent years or are currently under consideration.

UK plastics ban

Following a consultation in October 2018, the government announced that it would impose

a ban, with some exemptions, from April 2020 on plastic straws, plastic-stemmed cotton buds and plastic drink stirrers (www.practicallaw.com/w-020-9186). It estimated that 4.7 billion plastic straws alone are used in the UK each year.

This forms part of the government's pledge included in its 25-year environmental plan (the plan) published in January 2018 to eradicate all avoidable plastic waste by the end of 2042 (www.practicallaw.com/w-013-3382). The plan includes the intention to ban further so-called "problematic" single-use plastics where suitable alternatives exist.

EU directive

At the EU level, the Directive on the reduction of the impact of certain plastic products on the environment came into force on 2 July 2019 (*2019/904/EU*) (the Directive). As well as cotton buds, straws and stirrers, it will ban plastic plates and cutlery, plastic balloon sticks, food containers, expanded polystyrene cups and oxo-degradable plastics. Oxo-degradable plastics include additives within the plastic to help the plastic break down to facilitate recycling but, if littered, may instead give rise to fragments of plastic in the environment. The Directive will also set two targets for plastic bottles: a collection target of 90% by 2029; and a 25% target for recycled content in polyethylene terephthalate (commonly abbreviated to PET) plastic bottles by 2025, rising to 30% by 2030.

In addition, the Directive will impose a labelling requirement on the environmental impact of: plastic cigarette filters littered in cigarette butts; plastic cups; and wet wipes. The aim of the Directive is to reduce the amount of litter making its way into the sea, of which, the Directive says, over 80% is made of plastic, adding that 70% of the waste items most frequently found in the sea are specifically targeted by the Directive.

Carrier bags

Action has also been taken over the past few years to reduce plastic carrier bag use with the introduction of charges in Wales in 2011, in Scotland in 2014 and in England in 2015. The expectation is that the money paid for bags is donated to charity rather than being retained by the retailer. Impressive results in reducing carrier bag use have been cited by the government. The government has recently consulted on proposals to increase the charge per bag in England from 5p to 10p

and to extend it to small and medium sized retailers, which are estimated to give out over 3.6 billion single-use bags per year but which, up until now, have not been required to charge for bags (<https://consult.defra.gov.uk/environmental-quality/extending-the-single-use-bags-charge/>).

At the EU level, all EU member states are required by the Plastic Bag Directive 2015 (2015/720/EU) to reduce significantly the consumption of lightweight plastic carrier bags with a thickness of less than 50 microns (www.practicallaw.com/4-616-6087). The choice of measures to achieve this is left to member state governments. There are also labelling requirements for biodegradable and compostable plastic.

Deposit-return scheme

In another product-specific move, the government consulted in February 2019 on the introduction of a deposit-return scheme for soft and alcoholic drinks containers other than milk and plant-based products such as soya milk (<https://consult.defra.gov.uk/environment/introducing-a-deposit-return-scheme/>). Consumers will pay an upfront deposit and be able to redeem it from designated bottle collection points, which may include reverse vending machines in supermarkets and other venues. Drinks producers and importers, but not bottle manufacturers, will be required to join the scheme and pay for a new industry-led body to administer it. Fees paid by drinks producers and importers will fund the transport of containers returned by consumers to recycling facilities, and the circle will be completed by producers buying the resulting recovered materials for incorporation into new containers. The new scheme will cover plastic bottles, may cover Tetra Pak containers and gel sachets but is not proposed to include plastic-lined hot drinks cups.

Other initiatives

On 25 February 2019, a draft private members' bill, the Plastic Pollution Bill (the bill), was presented to Parliament by MP Alistair Carmichael under which plastic would be phased out by 2042, except where it is essential. The bill was drawn up by Friends of the Earth and the National Federation of Women's Institutes, which claim to have the support of a cross-party group of MPs. It includes:

- A statutory long-term target for the significant reduction of plastic waste

Additives regulation

The Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (1907/2006/EC) controls substances used as additives within plastics, although not the polymers themselves. Additive substances that are manufactured in the EU or imported into the EU in volumes above one tonne per year must be registered with the European Chemicals Agency (ECHA). Registration requires a dossier of information to be submitted to ECHA for technical evaluation on the safety of that substance for the environment and human health. The intended uses of substances must be identified and safety information passed along to users.

On 21 February 2019, ECHA published information on 419 substances used as additives in plastics in the EU (<https://echa.europa.eu/mapping-exercise-plastic-additives-initiative>). This exercise involved governments, academics, the European Chemical Industry Council and 21 industry sectors, covering additive manufacturers and end users. 1,000 substance registrations were screened to identify those that are being used as plastic additives. The inventory of additives created includes information on the polymer types that the additives are most commonly found in and the expected concentration ranges. As part of the project, a model was developed to calculate the release potential of each additive into the environment. This information will now be used by ECHA and EU member states to help prioritise groups of substances for further detailed assessment.

ECHA points out in its 21 February 2019 press release that the availability of information on the chances of particular additives being released from plastics can assist producers to substitute safer alternatives (<https://echa.europa.eu/-/high-volume-plastic-additives-mapped>).

and pollution by 2042, by phasing out all but the most essential uses of plastic, with plastic waste and pollution being substantially and progressively reduced in the years leading up to 2042.

- A 2025 target to end the use of non-essential single-use plastic.

It would also create an independent advisory committee, the Committee on Plastics Pollution (CPP), to advise the government. The CPP would assess plastic use, develop a list of essential plastic uses that cannot be phased out, and advise the relevant Secretary of State on policy measures to achieve the statutory targets. The CPP would then monitor progress towards the targets. The bill would also require the Secretary of State to lay before Parliament a strategy based on the CPP's advice for reducing plastic pollution in line with the targets. Friends of the Earth describes the bill as providing tough and timetabled action to tackle the crisis and put the UK at the forefront of efforts to end plastic pollution (<https://friendsoftheearth.uk/plastics/new-bill-cut-plastic-pollution-presented-parliament>). However, few private members' bills succeed in becoming law.

Another private members' bill on plastics is already in the pipeline: the Plastics Bill was presented to Parliament by MP Geraint Davies in June 2018. The Plastics Bill would give the government a duty to set and achieve annual targets to limit the production and use of plastic packaging, and to increase its recovery and recycling. The UK would, under the Plastics Bill, be bound to meet or exceed the equivalent EU targets, even after Brexit. Again, a new body, the Plastics Agency, would be created to monitor the government's performance in setting and taking adequate steps to achieve the targets, and would be able to take the government to court were it to fail in its duties or its targets. Both bills are awaiting a date to be scheduled for a second reading in the House of Commons.

MICROPLASTICS

Small pieces of plastics present particular problems. Microbeads, which are a type of microplastic, were until recently commonly incorporated into facial scrubs and shower gels, acting as exfoliators. However, research has shown that microbeads have been accumulating in the marine environment, where they can be ingested by sealife with uncertain effects and the potential to get into the human food chain.

UK regulation

The incorporation of microbeads in rinse-off personal care products was made illegal in England from 9 January 2018 under the Environmental Protection (Microbeads) (England) Regulations 2017 (*SI 2017/1312*) (2017 Regulations), and sales of these products became illegal from 30 June 2018. For the purposes of the 2017 Regulations, a microbead is any water-insoluble solid plastic particle of less than, or equal to, 5mm in any dimension. The ban applies to the use of microbeads in any substance, or mixture of substances, intended for application to any relevant human body part, from which it is washed off with water rather than being left to wear off.

The 2017 Regulations are enforced by local authorities, which have the power to prosecute offences in the criminal courts, and to issue stop notices and other forms of civil sanctions. It is a defence for a supplier accused of supplying a product containing microbeads to show that it took all reasonable steps and exercised all due diligence to avoid committing the offence. Fines can be imposed on conviction. Equivalent legislation was brought into force in Scotland and Wales from 30 June 2018.

EU measures

The EU is taking steps to control microplastics, which is a wider category than microbeads and includes even smaller particles. It has included commitments to reduce their use in its 2018 strategy for plastics, which forms part of the EU Circular Economy Action Plan, for which plastic is one of the five priority areas (<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0028&from=EN>; www.practicallaw.com/w-013-3371). EU measures are expected with regard to microplastics deriving from tyres and textiles, which are coming under increasing scrutiny over issues such as the release of plastic particles in rainwater run-off from roads and discharges to the drain from washing machines.

The European Chemicals Agency (ECHA) announced on 30 January 2019 a proposal to prevent microplastic particles being intentionally added to mixtures from which they are likely to later be released into the environment (www.practicallaw.com/w-019-1590).

As justification for its proposed ban, ECHA points to the very long periods for which

Specific product safety regulations

In addition to the Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (*1907/2006/EC*), which is the key EU legislation on chemicals regulation, there are specific EU regulations on the safety of food contact materials, and toys and other products designed for children, although these often take time to be introduced.

For example, in the face of temporary national bans introduced by Denmark and France, the use of a suspected endocrine disruptor, Bisphenol A, commonly known as BPA, was banned by the EU for use in baby bottles from March 2011 (*Directive 2011/8/EU*). Products containing BPA had already been removed from shelves in the US and Canada some years previously.

The European Court of Justice has also now confirmed that BPA was properly identified by the European Chemicals Agency as a substance of very high concern for impacts on reproduction even where it is used as just an intermediary step in the plastic manufacturing process (*PlasticsEurope v ECHA T-185/17*)

plastics persist in the environment without biodegrading, with a growing level of plastic accumulating in the environment, much of which is extremely difficult to remove. If the proposal is adopted, it will be illegal to place microplastics on the market on their own or in mixtures for uses where it would result in releases to the environment. For other uses that do not entail the inevitable release of microplastic to the environment, labelling will be required instead.

ECHA is consulting on its proposal before putting forward amendments to the relevant Annex to the EU's flagship chemicals legislation, the Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (*1907/2006/EC*) (REACH) (see also boxes "Additives regulation" and "Specific product safety regulations").

PRODUCER RESPONSIBILITY

Waste regulation started out by focusing on the end-of-use phase, where the person throwing away the plastic has a duty to take care of its proper disposal and the waste management company accepting it into its facility must have the requisite permit. Later, the concept of producer responsibility was recognised, where the producer of the object has a responsibility to design it in a way that takes into account its final disposal and to contribute to the cost of dealing with waste. So far, producer responsibility has only been mandated with regards to certain waste streams; that is, end-of-life vehicles, batteries, electronics and electrical goods, and packaging (including plastic packaging).

Targets are established by EU legislation for the percentage of these types of goods that should be recycled. In the UK, collective schemes have been introduced, which producers join in order to meet national targets.

The existing UK packaging waste producer responsibility scheme (the scheme) was brought into effect in 1997 by the Producer Responsibility Obligations (Packaging Waste) Regulations 1997 (*SI 1997/648*), as amended, which implement the Packaging Waste Directive (*94/62/EC*) (www.practicallaw.com/2-100-2945).

The scheme is credited with driving recycling of packaging waste from 25% 20 years ago to 64.7% in 2016, and at a relatively low cost to business. Under the scheme, businesses handling over 50 tonnes of packaging per year, with an annual turnover of more than £2 million, must meet a share of the UK's annual packaging waste recycling targets. Registration must be with a scheme approved by the relevant environmental regulator; that is, the Environment Agency for England, the Scottish Environmental Protection Agency or Natural Resources Wales.

Extended producer responsibility

The scheme does not require producers to meet the full cost of recycling all of the products that they place on the market. However, producer responsibility is now moving up a gear to extended producer responsibility. In a consultation that closed in May 2019, the government proposes to place the full costs of managing packaging waste on business

users. The proposal set out in the consultation would make the person with the greatest influence over packaging design and choice of materials used solely liable to comply with the revised packaging waste regime, whether this is the pack filler, retailer or importer (www.practicallaw.com/w-019-6022). As an alternative, the consultation proposed that responsibility could continue to be shared through the supply chain, but either smaller producers could be brought within the system or it could be extended to also cover distributors of packaging.

Online sales

Producers based outside of the UK that sell online to UK-based consumers also currently fall outside of the UK scheme. Given the volumes now traded across the internet, in contrast to when the scheme was first introduced, it is not surprising that the government is now looking to include online sellers by imposing on them an obligation to take responsibility for the recycling of packaging of goods sold through their websites. Quite how this would be enforced is another matter.

TAX MEASURES

The government has proposed a plastics tax to be introduced from April 2022 on UK manufacturers and importers of all plastic packaging that is manufactured in the UK, or that is imported unfilled into the UK which does not incorporate at least 30% recycled plastic. The proposals are contained in the plastic packaging tax consultation, which closed in May 2019 (www.practicallaw.com/w-019-6095). The government proposes that this tax will apply not only to fossil-fuel derived plastics but also to bioplastics, as well as compostable, biodegradable and oxo-degradable plastics.

The objective is therefore not to drive innovation in eco-friendly plastic material choices, but to incentivise recycling. The types of packaging within scope for the plastics tax will likely include all levels of packaging from the individual goods wrapper to the packaging used to protect pallets of goods in transit. The plastics tax would apply at the point of sale or supply for packing or filling. The government is not currently proposing to tax imported goods where packaging has already been filled and small operators will probably also be excluded from paying the

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tax. The rate of tax has not yet been decided but is likely to be calculated on each tonne of plastic packaging. However, this may not be easy to assess where the packaging also incorporates other materials.

Businesses registered for the scheme will be expected to self-report and penalties will apply for non-compliance. The government is not proposing to set out a prescribed set of

criteria for reporting so businesses may need to develop their own methods to record the quantities and recycled content of plastics that they use. Businesses will have three years to put this in place if the plastics tax goes ahead.

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