

frESH Law Horizons – Key Developments in UK and EU Environment, Safety and Health Law, Procedure and Policy

June 2018

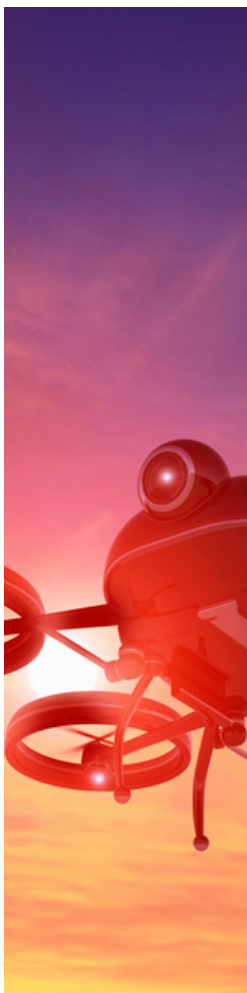


BUPA was fined £3 million after pleading guilty to a breach at a care home. A Health and Safety Executive (HSE) investigation followed the death of a resident who contracted Legionnaires' disease after moving into the home. Failings identified were not only in relation to implementation of control and monitoring measures for safe management of the hot and cold water system, but also a failure to ensure those responsible for overseeing Legionella controls and taking temperature measurements were trained to the required standards, according to a [press release](#) issued by the HSE. Training is, of course, an important part of any due diligence system. There is practical guidance available on Legionella and Legionnaires' disease on the HSE's [website](#) and in the [Approved Code of Practice on the control of Legionella bacteria in water systems](#). Duties under the Health and Safety at Work etc Act 1974 (HSWA) extend to risks from Legionella bacteria and the Control of Substances Hazardous to Health Regulations 2002 (COSHH) provide a framework of actions designed to assess, prevent or control the risk from bacteria like Legionella and take suitable precautions.

Falkirk-based food producer was fined following failure to ensure sufficient segregation between a forklift truck and its employees. An employee was killed after being struck by empty food trays. The HSE has [reported](#) a fine of £176,000 following a guilty plea for breach of section 2(1) of the HSWA.

The Sentencing Council consults on a general guideline for offences not covered by specific guidance. The proposed guideline will replace its 2004 guidance on "Overarching Principles: Seriousness", which sets out statutory provisions governing the five purposes of sentencing, the assessment of culpability and harm and factors that indicate an increase or decrease in the the harm or culpability. It will apply to organisations (as well as individuals) to give a structure to follow when sentencing offences that do not have a specific guideline. Guidelines on sentencing for health and safety, corporate manslaughter and food safety and hygiene offences came into force in February 2016 (2016 Guidelines), but they do not cover, for example, regulatory offences that relate to modern slavery, cybercrime/hacking, data protection, fire regulation, or food information (as opposed to food safety/hygiene). The [draft general guideline](#), which is the subject of the [consultation](#), includes a number of steps, from assessing seriousness by considering culpability and harm (caused, risked and/or intended), to considering aggravating and mitigating factors and other factors, such as guilty plea and the totality principle. The draft guideline does not refer to turnover. The consultation closes in September.

Northampton Crown Court fines a company £566,000 for breach of Construction (Design and Management) Regulations 2015. The company pleaded guilty after a tipper vehicle driven by one of its employees came into contact with overhead power lines during the construction of a waste transfer station. Despite the company identifying the need for permanent protection structures at the site, only one was installed. [Trade press reports](#) confirm that no one was injured. The [Health and Safety, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guideline](#) does, of course, confirm that health and safety offences are concerned with failures to manage risks to health and safety and do not require proof that the offence caused any actual harm. The offence is in creating a risk of harm.



Building company fined £500,000 after exposing workers to risk of Hand-Arm Vibration Syndrome.

Balfour Beatty Utility Solutions Ltd was fined after the HSE found that workers at the company were exposed. There was also a significant cost award of £195,000, following a guilty plea to breach of both the HSWA and the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995. The HSE said this was a particularly serious case because of the extent and duration of the failures, according to its [press release](#). It notes worker exposure is from hand-held power tools, including certain saws, compactor plates, rammers and/or jack hammers, used to access utility services running underneath public highways and to repair/replace street lighting.

[The Breaching of Limits on Ticket Sales Regulations 2018 will come into force on 5 July 2018.](#) The regulations introduce a new criminal offence for the use of software to purchase UK recreational, sporting or cultural event tickets in excess of any maximum ticket sale limits established by the event organiser. The penalty for breach is a fine (unlimited in England and Wales, but a maximum of £50,000 in Scotland).

[Devon construction company fined over a safety risk connected with maintenance of vehicles.](#)

The HSE has [reported](#) that Exeter Crown Court imposed a £60,000 fine (and a cost order of £70,000) on the company, which it alleged placed employees and members of the public at risk of serious injury by failing to suitably maintain its fleet of lorry mounted elevated work platforms (MEWPs). Its investigation (carried out after a fatal incident at the company in 2014) found there was a lack of planned preventative maintenance systems and workers had not been given adequate training or information on how to use or maintain the machines, although there was no suggestion that the failings caused the fatal accident. The HSE has previously included guidance on MEWPs on its [website](#).

Wastepaper company fined £250,000 following the death of an employee inside a compaction chamber of a bailing machine.

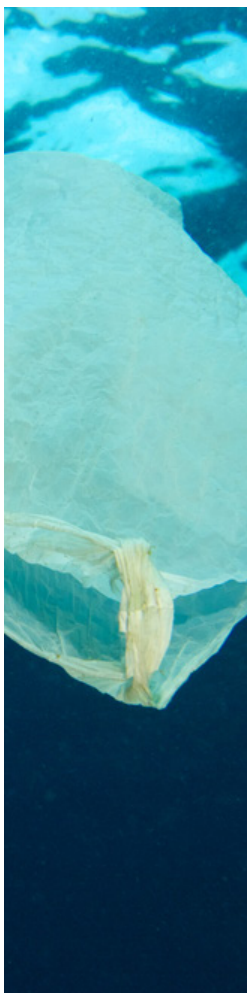
After the hearing, the HSE inspector issued a [reminder](#) that: "Employers should make sure they properly assess and apply effective control measures to minimise the risk from dangerous parts of machinery" and that "maintenance work should only be carried out when the piece of equipment is isolated and confirmed safe."

[New offence of supplying a vehicle with a device to circumvent emissions tests.](#) The [Road Vehicles \(Defeat Devices, Fuel Economy and Type-Approval\) \(Amendment\) Regulations 2018](#) mainly come into force on 1 July 2018 and the offence will be punishable by a fine and/or up to three months' imprisonment. There are also provisions for civil penalties of up to £50,000 per offence. The Department for Transport (DoT) [news story](#) notes that, following allegations in 2015 that a car manufacturer was using software that caused car engines to behave differently during emissions tests, it tested a range of the most popular diesel vehicles in the UK and found that no other manufacturer tested was using a similar strategy.

[International Bar Association launches a report into whistleblowing protections and how jurisdictions can develop and improve legislative frameworks.](#) Their discussions have heard reports of lawyers hampering proper investigations into employee allegations of wrongdoing, according to a *Law Society Gazette* [report](#). There are various whistleblowing helplines to regulators and other organisations in the UK, including [Food Crime Confidential](#), [Action Fraud](#) (for fraud and cybercrime) and [Public Concern at Work](#) (a whistleblowing charity that encourages workplace whistleblowing).

[New laws to restrict drones flying above 400 feet and within 1 kilometre of airport boundaries.](#)

The DoT [reports](#) that the limits are being introduced to help ensure drones are used safely. It recognises that drones are currently being used for a broad range of purposes across different industry sectors, including site and tower inspections and improving track maintenance. The changes will come into effect on 30 July 2018. The new laws will require owners of drones weighing 250 grams or more to register with the Civil Aviation Authority (CAA) and for drone pilots to take an online safety test to ensure the UK's skies are safe from irresponsible flyers. These requirements will come into force on 30 November 2019.



Fines for a construction firm and its director for failure to comply with prohibition notices. An investigation by the HSE found that D & S Building Solutions Ltd and its director had not taken any steps to comply with two prohibition notices prohibiting any work near the open edge of an excavation, and had not taken measures to prevent dislodgement of materials and collapse of the excavation, according to its [report](#). This case is a reminder both that (i) it is an offence under the HSWA to contravene any requirement or prohibition imposed by an improvement notice or a prohibition notice, and (ii) where an offence committed by a company is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, they as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Impact assessment of Fraud, Bribery and Money Laundering Offences Definitive Guideline is published by the Sentencing Council. The [guideline](#) came into force in October 2014 and the [impact assessment](#) concludes that the analysis for a number of offences does show evidence of changes in severity of sentence, but this does not seem to be a causal effect of the guidelines. The impact assessment also notes that over the whole period analysed, there were some notable changes in sentencing practice, in particular, for all the offences considered there was a large increase in the percentage receiving suspended sentence orders, so that by 2015 more than a quarter received these disposals. It is worth noting that whether the Bribery Act 2010 is deterring bribery in the UK and abroad and being adequately enforced (without unintended consequences) is a question being asked by the House of Lords Select Committee's [call for evidence](#).

Circular Economy Task Force presents a [report](#) that recycled plastic could supply nearly three-quarters of UK demand. The UK business-led group, convened by the think tank Green Alliance and including the British Plastics Federation (BPF) Recycling Group, argues that the government's focus on recycling targets, which simply "push" material into the waste management system, fails to develop a market for the plastic collected, leading to waste of valuable resources and pollution problems. It recommends three new measures to complement recycling targets and ensure more plastic is recovered and used in the UK: (1) a market stabilisation fund to de-risk investment in the market, (2) short-term support to kick-start the plastic reprocessing market, and (3) mandatory recycled content requirements for all plastic products and packaging. A long-term strategy should provide certainty for investors and facilitate new collaborative problem solving.

EU Circular Economy Package of waste legislation [published](#) in *Official Journal of the European Union*. It will enter into force on 4 July 2018. EU member states, as well as the non-EU members of the European Economic Area (EEA) Norway, Iceland and Liechtenstein, will have two years from that date to transpose the legislation into national law, with certain exceptions (please also see frESH Law Horizons [January 2018](#) and [February 2018](#)).

European Commission [adopts proposal](#) for Horizon Europe, the (ninth) Framework Programme for Research and Innovation. It foresees €100 billion of funding, including for environmental research. The proposed specific programme implementing it includes an implicit negative reference to plastic. It identifies as one area of intervention: "Strengthened resilience of marine ecosystems thereby ensuring seas and ocean health, combating and mitigating the effects of natural and human pressures like pollution and plastics, eutrophication, acidification, seas and oceans warming, sea level rise, considering the intersection between land and sea and fostering a circular approach". The European Commission made the proposal as part of the next [EU long-term budget](#), the Multiannual Financial Framework.

EU environment ministers in the [Council of the European Union adopt conclusions](#), which primarily react to the European Commission's Plastics Strategy and the Interface between Chemical, Product and Waste legislation. In the policy document, the council also welcomed the European Commission's legislative proposal on single-use plastic and committed "to deploy its best efforts for a rapid examination", using slightly stronger diplomatic language than in a previous draft. The single-use plastic proposal is amongst the last to enter the ordinary legislative procedure before the elections to a new European Parliament (EP) in May 2019. The European Commission has urged the EU co-legislators, council and EP to give it priority in order to conclude the legislative process.



Canada, France, Germany, Italy, the UK and the EU endorsed a [global plastic charter](#) at the G7 Summit in Canada. The US and Japan did not support the document. It includes non-legally binding commitments to work with industry “towards” 100% reusable, recyclable or, where viable alternatives do not exist, recoverable plastics by 2030; to recycle and reuse at least 55% of plastic packaging by 2030; to recover 100% of all plastics by 2040; and significantly reduce the “unnecessary use” of single-use plastic, taking into account the full environmental impacts of alternatives.

European Commission and UN Environment have agreed on a [2018 Roadmap on Healthy, Productive and Resilient Oceans](#). It sets out a timetable for their cooperation over the next year. With regard to plastics, it foresees that the two organisations will cooperate on reducing plastic waste and marine litter activities and organise an event on plastic economy at the Ad-hoc Expert Working Group on microplastics and marine litter (November 2018).

European Parliament’s Environment Committee (ENVI) discusses Rapporteur Julie Girling’s (EPP, UK) [draft report on the European Commission’s proposal for a recast of the Regulation on Persistent Organic Pollutants \(POPs\) 850/2004](#). It welcomed the proposed new role of the European Chemicals Agency (ECHA) in dealing with such substances.

[Commission Regulation 2018/831](#) amends Regulation 10/2011 on plastic materials and articles intended to come into contact with food. It modifies the list of substances authorised for this purpose, adding the following substances: 1,2,3,4-tetrahydronaphtalene-2,6-dicarboxylic acid, dimethyl ester; [3-(2,3-epoxypropoxy)propyl]trimethoxy silane and amends the entries concerning substances no. 822 and 974, now applying to: Perchloric acid, salts, and phosphorous acid, mixed 2,4-bis(1,1-dimethylpropyl)phenyl and 4-(1,1-dimethylpropyl)phenyl triesters, respectively. It also provides that plastic materials and articles complying with the existing legislation may still be placed on the market until 26 June 2019 and may remain on the market until exhaustion of stocks.

[ECHA add eight new substances of very high concern \(SVHC\) to the Candidate List following the identification by the ECHA Member State Committee \(MSC\)](#). The substances include Octamethylcyclotetrasiloxane (D4), Decamethylcyclopentasiloxane (D5), Dodecamethylcyclohexasiloxane (D6), Lead, Disodium octaborate, Benzo[ghi]perylene, Terphenyl hydrogenated and Ethylenediamine (EDA). Two further substances, Benzene-1,2,4-tricarboxylic acid 1,2 anhydride (trimellitic anhydride; TMA) and Dicyclohexyl phthalate (DCHP), were also added to the list, having been identified as SVHC by the European Commission due to their respiratory sensitising properties and reproduction and endocrine-disrupting properties, respectively.

ECHA Forum for Exchange of Information on Enforcement (Forum) [decide to carry out new enforcement project on online sales](#). The Forum is composed of representatives from each member state. The eighth major Forum enforcement project (REF-8) will concentrate on online sales of substances, mixtures and articles because of the high rate of non-compliance detected in the Forum’s pilot project on internet sales. The detailed scope of REF-8 is yet to be defined. It is expected to include restrictions and labelling duties for hazardous chemicals. The project will be prepared in 2019 and carried out in 2020, with the report expected by the end of 2021.

European Commission [propose](#) a directive on the reduction of the impact of certain plastic products on the environment. If adopted, it would ban six kinds of single-use plastic items and regulate other categories in various ways to reduce their consumption. Read [our briefing](#) on the proposal.

Environment Agency (EA) launches a [consultation](#) for new standard rules for medium combustion plants and specified generators. This follows the new legislation introduced in January to implement the Medium Combustion Plants Directive. Anyone likely to be affected by this extension to the permitting regime should consider the permit conditions that are being proposed.





EA updates its [guidance on offence response options](#). The guidance sets out the enforcement options available for the different environmental offences regulated by the EA. The document now reflects the EA's new [Enforcement and Sanctions Policy](#) issued in April and is a useful guide to how the EA is likely to respond to different types of environmental offences and scenarios.

Department for Environment, Food and Rural Affairs (Defra) publishes a [consultation on reducing nitrogen dioxide air pollution in 33 English local authorities](#). The consultation invites comments and evidence on potential measures that could be taken to reduce this pollution to within legal limits in the shortest time possible. The consultation closed on 26 June 2018.

Defra publishes [consultation on new post-Brexit environmental body designed to hold the government to account on the environment, together with plans for a set of environmental principles to underpin environmental regulation and policy](#). Key aspects of the proposals are that a draft bill creating a new statutory policy statement on environmental principles and the new environmental body will be published in the autumn; it is clear that the new body will not be in place by Brexit, but it should be introduced by the end of 2020; the body's enforcement powers will not (at least initially) extend to taking the government to court, but it will instead issue advisory notices; this body will only cover England, but the devolved administrations may adopt a similar approach or choose to be covered by it; and, finally, the environmental principles may not be enshrined in primary legislation, but may only be policy statement. The Environmental Audit Committee has also launched [an inquiry](#) into the proposals for this new environmental watchdog and the environmental principles which it aims to conclude in time to report before the government's consultation closes on 2 August 2018.

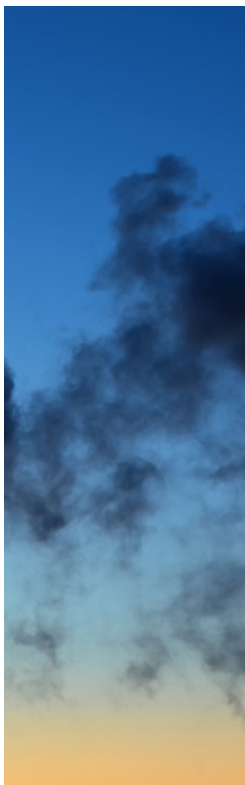
DEFRA publishes a [new Clean Air Strategy](#). Key aspects of the strategy are to halve by 2025 those living in areas where concentrations of particulate matter exceed 10 micrograms per cubic meter of air, new automotive standards at international level to reduce microplastics and new monitoring technologies and messaging systems to provide public information on air quality. The consultation is open until 14 August 2018.

Ten families from Europe, Kenya and Fiji have reportedly filed legal [actions](#) against the EU over global warming threats to their homes and livelihoods. Around 30 claimants insist the EU must do more to limit climate change caused by greenhouse gas emissions, and point to drought, glacier melt, sea level rise and flooding that will worsen as temperatures rise. The litigants are claiming climate protection rather than damages, and have asked the court to declare that various pieces of EU legislation, including the EU Emissions Trading Scheme Directive, are null and void.

EA publishes the [guidance](#) it gives its staff on how to classify permit breaches. The internal guidance document explains how the EA's Compliance Classification Scheme (CCS) works. The EA stated that it published the guidance in the interests of transparency and to help customers understand the CCS scoring system. This could be useful for companies that receive CCS notifications, to check if they agree with the EA's classification.

UK Parliament's Environmental Audit Committee [recommends](#) that the government should make it mandatory for large companies and pension funds to report their exposure to climate change risks. The committee expressed concerns that current rules encourage short-term thinking while neglecting concerns such as sustainability. It recommended that new rules on climate change disclosure should be in place by 2022.

EA plans to revoke four abstraction licences totalling almost 30,000 cubic metres of water a year. As part of its wider review of abstraction licences, the EA plans to revoke or reduce licences where the amount of water allowed by the licence has historically been underused, and where abstraction is damaging the environment. The current revocations relate to four farmers in the Midlands.



European Commission refers the UK to court over [failure to tackle air pollution](#). The European Commission has referred six governments, including the UK, to the European Court of Justice for failing to respect agreed air quality limits and not taking appropriate measures to reduce exceedance periods. The other countries involved are France, Germany, Hungary, Italy and Romania. This is a further challenge for the UK government, which has already faced significant legal battles in the UK courts about this issue.

Thames Water has [agreed to pay £120 million to customers for breaching its legal obligations to manage leakage reduction](#). The payments will be made over the next two years and Thames Water has also committed to meeting the performance commitments set by Ofwat for the remainder of the 2015-20 period.

Defra launches a [review of serious and organised crime in the waste sector](#). The review will look at the types of crimes and groups involved, the impacts of this crime and how it can be tackled. The consultation is open until 8 July 2018 and the review is due to be completed by September 2018.

EA accepts [its first enforcement undertaking for odour pollution that breached an environmental permit for a waste management site](#). The undertaking included a donation of £60,000 to a local environmental charity, compensation payments to several local businesses and individuals, and payment of the EA's investigation costs. The operator has also installed further odour mitigation measures.

The EU Withdrawal Bill gained Royal Assent and is now the [European Union \(Withdrawal\) Act 2018](#). The final text retained compromise wording of the Lords' amendments relating to ensuring that the UK maintains current levels of environmental protections. The compromise text requires the government to issue the draft bill within six months, including a set of environmental principles (including the precautionary principle and the polluter pays principle), and establish a "green watchdog" with the power to take proportionate enforcement action (including legal proceedings if necessary) where the government is not complying with environmental law (which will also be defined in the bill).

European Chemical Industry Council issues a [position paper](#) recommending that the UK continues to participate in REACH after Brexit. However, this approach has been rebuffed by the European Commission in a [Q&A session](#), saying "The UK's decision to leave the single market automatically implies leaving the European agencies."

House of Lords EU Energy and Environment Sub-Committee holds [evidence session](#) regarding future of REACH regulations post-Brexit. Witnesses included Anita Lloyd of our Environmental, Safety & Health Group.



Contacts



Rob Elvin
Partner, Manchester
T +44 161 830 5257
E rob.elvin@squirepb.com



David J. Gordon
Partner, Birmingham
T +44 121 222 3204
E dave.gordon@squirepb.com



Ken Huestebeck
Associate, Belgium
T +322 627 11 02
E ken.huestebeck@squirepb.com



Nicola A. Smith
Director, Birmingham
T +44 121 222 3230
E nicola.smith@squirepb.com



Anita Lloyd
Director, Birmingham
T +44 121 222 3504
E anita.lloyd@squirepb.com