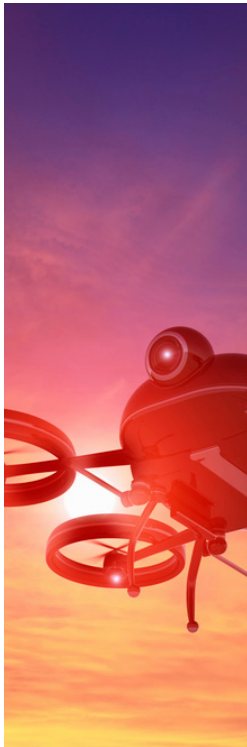


frESH Law Horizons – Key Developments in UK and EU Environment, Safety and Health Law, Procedure and Policy

April 2019



Fine of £1.4 million for a food processor. A food company has been fined for health and safety offences, after a worker suffered crush injuries in 2012, having been struck by a metal stillage. [Reports](#) of the case confirm that the Health and Safety Executive (HSE) commented on the importance of measures to prevent access to dangerous parts of machinery, following the hearing. The case is another example of the very large fines imposed over the past two years for health and safety offences.

Use of drones by local authorities for enforcement. The [national press](#) has reported that at least one local authority has purchased a drone for surveillance connected with planning controls, and that more than 20 district councils also have received commercial drone licences from the Civil Aviation Authority. However, enforcement authorities, including local councils, must consider whether the Regulation of Investigatory Powers Act 2000 (RIPA) applies and respect the limitations on the use of investigatory powers set out in the Protection of Freedoms Act 2012. This includes the requirement for local authorities to obtain judicial approval before using certain investigatory techniques. Government [guidance](#) is available for local authorities on using directed surveillance.

HSE publishes the Annual Science Review 2019. Last month, the HSE published its fourth [Annual Science Review](#). The focus of this review is how the work of HSE's scientists and engineers contributes to HSE's regulatory activities. It covers the "Discovering Safety Programme", the aim of which is to create and exploit a global health and safety knowledge resource to support health and safety decision-making around the world by using new insights from data and analytical techniques relating to incident investigation findings and operational health and safety data; a case study on reducing work-related mental ill health; and a summary of recent events and achievements. Other case studies include how HSE's scientists and engineers support SME's, how they promote ownership of health and safety, how science is being used to simplify risk management, contributions to action to improve health outcomes and keeping pace with change. The case studies are varied in terms of sector and business type, ranging from case studies on whisky spills in distilleries, to managing metal working fluids, securing vehicle loads and fatal incident investigation, improving safety at air displays, hand arm vibration syndrome and many more. For those involved in health and safety management, the review is worth a read, as it helps to identify areas of focus for the HSE and emerging research and other developments that can help with effective risk management.

Sewage pollution leads to a £200,000 restorative charity donation. A [press release](#) from the Environment Agency (EA) reported that Yorkshire Water offered the donation to resolve an investigation into a sewage pollution event near Hatfield Colliery. The donation was secured through an Enforcement Undertaking.



Fines reduced on appeal for a car parts manufacturer and a construction company. Two appeals this month in relation to health and safety cases have resulted in significant fine reductions. Both demonstrate not only the impact of a judge applying the wrong category under the sentencing guidelines, but also the potential for significant reductions in fines if an appeal is successful. In the first case, [Faltec Europe Ltd v HSE \[2019\] EWCA Crim 520 \(28 March 2019\)](#), Newcastle Crown Court imposed fines for three offences that amounted to £1.6 million, the first two offences concerning outbreaks of Legionnaires' disease and the third relating to an explosion. In relation to the appeals against the fines imposed for the Legionnaires' disease outbreak, the Court of Appeal found that the judge had been wrong to conclude there was a high likelihood of level A harm (which includes death, physical or mental impairment resulting in lifelong dependency on third-party care for basic needs, or significantly reduced life expectancy) arising. The court endorsed the view that assessment of likelihood of a particular level of risk arising should be based on scientific evidence rather than supposition or impression, and this must be decided to the criminal standard. The provisional amount of the fine in respect of the Legionnaires' offences was, therefore, reduced from £570,000 to £380,000 concurrent on each count. This case was also of interest because the court indicated that the judge was entitled to have some regard to the resources of its holding company in his assessment of proportionality.

In the second case, *R v Mick George Ltd* [2019] EWCA Crim 519 (7 March 2019), the appellant appealed against a fine of £566,670 for breach of the Construction, Design and Management Regulations 2015. There were two grounds for the appeal: first, the judge was wrong in his assessment of the likelihood of the level A harm occurring, which led to the erroneous conclusion that this was a harm Category 2 case when he should have concluded that it was a harm Category 3 case; and second, even on the findings made, the starting point was manifestly excessive. The Court of Appeal agreed and substituted a fine of £334,000. In particular, the court found that: the recent turnover of the company did not justify a substantial increase from the starting point; there should have been some reduction to reflect the fact that culpability was in the lower part of the "medium" range; and a further reduction to reflect that there were no aggravating and several mitigating features.

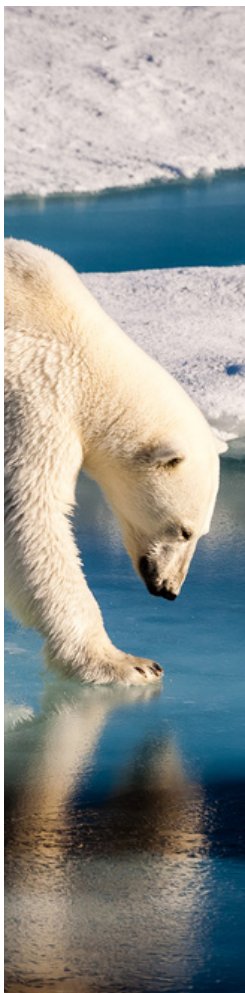
Director of Serious Fraud Office (SFO) commits to publishing guidance on co-operation.

Details of the speech, given on 3 April, are available on the [SFO's website](#). The director, Lisa Osofsky, acknowledges that financial institutions and companies spend significant time, effort and resource on ensuring compliance with money laundering regulations; defending themselves against fraud; and making sure they are not caught by the failure to prevent bribery or tax evasion. However, her comments note that, in order to qualify as cooperating, when carrying out their own investigation, companies must preserve vital evidence, such as first-hand accounts and witness testimonies. There are concerns over the assertion of legal professional privilege over material that the SFO needs to assess individual culpability, and the SFO Director reminded her audience that privilege can be waived. She also stated that the SFO will be issuing guidance for corporate organisations and their legal advisers to provide added transparency about what will happen in the event of self-reporting for fraud or corruption. It is clear from her comments that waiving privilege over initial investigative material will be a strong indicator of cooperation and an important factor that the SFO will take into account when considering whether to invite a company to enter into Deferred Prosecution Agreement (DPA) negotiations, and in considering whether a DPA is in the public interest. Nevertheless, any decision to waive privilege must be considered carefully.

Average food safety and hygiene fines rise by almost £5,000. The trade press has [reported](#) on the findings from the Sentencing Council's impact assessment relating to fines since the relevant Sentencing Guidelines came into force. In addition, the number of organisations in the food service sector that have been sentenced has remained stable at around 130 per year (as opposed to less than half of that in 2013).

Government guidance on impact statements for business (ISB) under Code of Practice for Victims of Crime 2016. The [guidance](#) confirms that under the code, all businesses and enterprises, other than public sector bodies, that have had criminal offences committed against them are entitled to make an ISB setting out the impact of the offence on the entity. The court can then consider that statement when deciding on the appropriate sentence for the offender.





European Parliament approves revision of the General Food Law Regulation during first reading.

The [first-reading position](#), which has been adopted, is intended to ensure that the EU's risk assessment procedure for food safety is more objective, transparent and reliable. The new rules will create a common European database of commissioned studies, to deter companies applying for authorisation from withholding unfavourable studies. They will allow the European Food Safety Authority (EFSA) to make submitted studies public for third-party scrutiny, which may be used to identify whether other relevant scientific data or studies exist, to ensure objectivity. With a view to transparency, applicants must disclose all information relevant for assessing safety; however, they may keep some information confidential, such as the manufacturing or production process. A new pre-submission advisory procedure will enable EFSA to advise applicants on how to submit their application for authorisation correctly, in order to make the process more reliable. Council and Parliament reached a provisional agreement on the revision in February, and the council is expected to formally adopt it at one of its next meetings. In addition to the revision of the General Food Law Regulation (178/2002), there are related amendments to other sectoral legislation (governing the deliberate release of genetically modified (GM) organisms into the environment, GM food and food, feed additives, smoke flavourings, food contact materials, food additives, plant protection products and novel foods).

The EA has issued more than [£1 million of penalties under climate change legislation](#). The largest by far, at over £600,000, was on Growth Power Limited, for failure to surrender allowances under the EU Emissions Trading Scheme, although prospects of this being recovered are very low since the company is in administration. Other penalties were imposed on a number of companies under the EU ETS, both installation and aviation participants. There were also penalties for failures to comply with ESOS totalling over £85,000.

The government issued the final [UK National Air Pollution Control Programme](#) to manage ambient air quality. This is a requirement of the National Emissions Ceilings Directive 2016, and it sets out how the UK can meet emission reduction standards for nitrogen oxides, ammonia, VOCs, particulates and sulphur dioxide by 2020 and 2030. It covers a wide range of sectors including road and other transport, and industry.

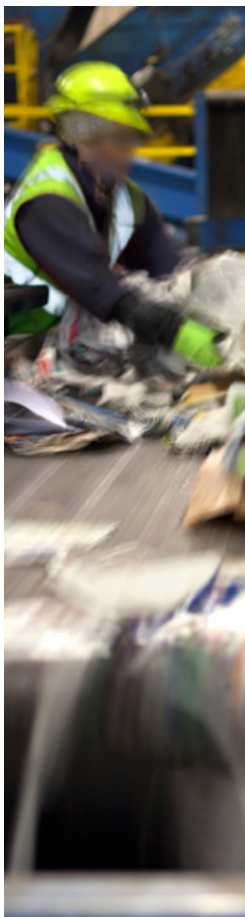
The government has published revised [Environmental Reporting Guidelines](#) containing updates on streamlined energy and carbon reporting, with changes relating to group and public sector reporting, and mandatory greenhouse gas reporting.

A waste operator has been [disqualified as director for six years](#) following repeated breaches of environmental legislation. Lee Averies, through several companies, ran waste treatment and transfer sites in Swindon, and has already been prosecuted and ordered to pay back £200,000 in a proceeds of crime award.

The government has updated its [water abstraction reform plan](#), including delays to the dates for consulting on and then merging water abstraction and impounding into the environmental permitting regime (from 2019 to 2020 for the consultation, and from 2020 to 2021 for the implementation).

REACH Brexit legislation has been further [updated](#) to address key stakeholder concerns raised about imports into the UK from outside the EU where the only representative is based outside the UK, and EU suppliers wanting to appoint new only representatives in the UK after Brexit. The new draft amendments to the regulations cover both points and extend the transitional arrangements to cover them.

The EA will target waste gangs in "Al Capone-style" prosecutions, according to the EA's CEO quoted in an interview for [The Times](#). He comments that organised crime gangs linked to slavery, drugs and firearms are exploiting the waste industry in massive fraud and fly-tipping schemes, and will be targeted in enforcement activities.



Supreme Court case has been [decided](#) regarding UK courts' jurisdiction over a foreign subsidiary. [Vedanta Resources plc v Lungowe](#) is an appeal regarding the liability of a UK plc (Vedanta) for the activities of its Zambian mining subsidiary (KCM), specifically water pollution. The Supreme Court upheld the decision of both the first instance judge and the Court of Appeal that the claimants were entitled to proceed in the English courts against both Vedanta and KCM. This is an important judgment about the principles of liability of parent companies for the acts of their subsidiaries (although only at this stage a decision about where the case can be brought, rather than a decision on the case itself), and the decision that the UK courts had jurisdiction was at least in part based on the fact that Vedanta had substantial involvement in the environmental controls employed by KCM. Please read our [frESH blog](#) article for more details.

The Prime Minister has [warned](#) of the imposition of an incineration tax (in addition to the existing landfill tax) if recycling rates do not improve. In response to questions in the House of Commons, the Prime Minister said: "We want to maximise the amount of waste that is sent to recycling rather than to incineration and landfill, but waste plants play an important role in reducing the rubbish sent to landfill. We welcome work to drive down waste to landfill further but, if wider policies don't deliver our waste ambitions in the future – including those higher recycling rates – then we will consider the introduction of a tax on the incineration of waste, and this would operate in conjunction with the landfill tax and take into account the possible impact on local authorities."

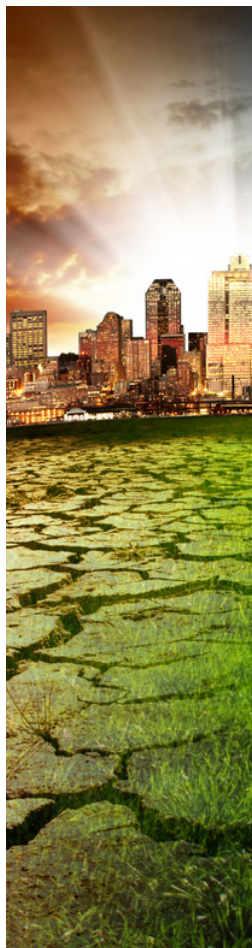
The European Commission has criticised the UK for failures to meet air quality targets in its [EU Environmental Implementation Review 2019](#). The review notes a high number of urban areas with exceedances of the EU air quality standards for nitrogen dioxide. The review also notes issues regarding diffuse water pollution, particularly nitrate related, and nature protection. In the report, the UK has also slipped from fifth to 11th on the EU's "Eco-innovation Scoreboard".

Viridor and Milton Keynes Council [settle a dispute](#) over contamination of recycling waste. The parties agreed a £1.75 million settlement in a dispute related to the high levels of contamination in recycling waste collected from residents, meaning that Viridor incurred higher costs in processing the waste.

Public outcry regarding the netting of trees and hedges by developers, including a substantial petition and media coverage, has led to the government [writing](#) to developers to remind them of the protection of birds under the Wildlife and Countryside Act 1981. It is not illegal for developers to use netting, but if not done correctly, this could lead to birds becoming injured or killed, which would contravene the law. The letter states that "Netting trees and hedgerows is only likely to be appropriate where it is genuinely needed to protect birds from harm during development."

In an [open letter](#), the Bank of England has warned of the potentially catastrophic financial risks caused by climate change. 34 central banks and supervisors – representing five continents, half of global greenhouse gas emissions and the supervision of two-thirds of the global systemically important banks and insurers – created a coalition called Network for Greening the Financial System (NGFS). NGFS' first comprehensive report seeks to translate commitments to act on climate-related financial risks into concrete action and calls on policymakers and the financial sector to take four key actions (integration, leading, collaborating and capacity building).

Environmental Audit Committee hears [evidence](#) that the UK will struggle to regulate chemicals post Brexit. A number of senior experts in the environmental impacts of chemical pollution have stated that the UK would find it very difficult to set up an organisation similar to the European Chemicals Agency (ECHA), and that there are very few experts available in the UK. They went so far as to say the UK had been "denuded" of vital expertise.



A climate emergency [campaign](#) has gathered momentum in the UK. A significant number of local authorities, the largest being the London Assembly, have declared a climate emergency over recent months. The issue has risen further up the political agenda, and central and devolved governments have been pressured to make the same declarations. The Scottish National Party made a declaration at its recent party conference, the devolved administration in Wales has made a declaration which was approved in the Welsh Assembly, and most recently, MPs in the UK parliament have approved a motion to declare an environment and climate emergency. The main intention of these declarations is to provide increased focus on this issues, and provide stronger impetus for spending and action on climate change.

European Parliament approves agreement on recast of POP-Regulation. The parliament's plenary [adopted](#) as its first-reading position the provisional agreement reached with the council in February (as reported in rESH Law Horizons in February 2019). It is expected that the council will formally adopt the recast regulation at one of its next meetings, but by June 2019 at the latest. It will transfer some tasks from the European Commission to the ECHA and add some substances.

European Parliament approves new procedure for changes to the classification, labelling and packaging of substances and mixtures (CLP), amongst many others. As part of a process of aligning legislation that still refers to the regulatory procedure with scrutiny (RPS) with the new procedures for delegated and implementing acts introduced by the Treaty on the Functioning of the EU (TFEU), the European Commission proposed in 2016 to amend 168 pieces of legislation (so-called Omnibus 1), including CLP Regulation 1272/2008. The parliament adopted as its first-reading position to [adapt 63 basic legal acts](#); the [remaining 105 acts](#) will continue to use the RPS for the foreseeable future. With regard to CLP, the commission will be empowered for a period of (initially) five years to amend by way of delegated acts Annex VI, Annex VIII to further harmonise the information relating to emergency health response and preventative measures and Annexes I to VIII in order to adapt them to technical and scientific progress (ATP). The council is expected to formally adopt the draft regulations at one of its next meetings.

EU changes rules for appeals against some ECHA decisions. In order to improve the functioning of the Court of Justice of the EU (CJEU), which has seen a huge increase in the number of cases brought before it, the council adopted a draft [regulation changing the Statute of the Court and approved amendments to the court's Rules of Procedure](#). It will introduce a new filtering mechanism for appeals relating to decisions by certain EU agencies and offices. In cases that have already been considered twice, first by an independent board of appeal, such as the one for the ECHA, and then by the General Court, the Court of Justice (ECJ) will allow appeals only if the appellant demonstrates that it raises an issue that is significant with respect to the unity, consistency or development of EU law.

EU delays work on industrial emission standards for large volume inorganic chemicals (LVIC). The commission's Joint Research Centre (JRC) is expected to start working on the development of the Best Available Technique (BAT) Reference (BREF) for LVIC in 2020 or 2021, according to the work programme recently made available. The work was previously expected to be launched in 2019. The commission's expert group (called the Article 13 Forum) [discussed the work programme in late February](#).

European Parliament adopts resolution on endocrine disrupting chemicals (EDCs). Concluding the last plenary session of its term, the parliament adopted a non-legislative [resolution](#). It calls on the European Commission to "swiftly take all necessary action to ensure a high level of protection of human health and the environment against EDCs by effectively minimising overall exposure of humans and the environment". Specifically, the resolution calls for the commission to develop a horizontal definition of EDCs and make legislative proposals to revise the Food Contact Materials (FCM) Regulation 1935/2004 and insert specific provisions on EDCs into the Cosmetics Regulation 1223/2009 and the Toy Safety Directive 2009/48 by June 2020. The European Commission adopted a [communication](#) on EDCs in November 2018, announcing a "fitness check" of the current legislation applicable to EDCs.



ECHA reports on mapping of substances. The ECHA announced the first [report](#) on its Integrated Regulatory Strategy, which “presents a mapping of the universe of registered substances” and “helps authorities to identify, plan and monitor the progress on identifying and regulating substances of concern”. The main recommendations of the report include further optimising data generation and assessment to ensure regulatory risk management without delay, the prioritisation of harmonised classification and labelling, review of the priority and appropriateness of still pending follow-up actions, and improving the quality of registration information, “in particular for substances with a high potential for exposure and currently lacking hazard data”. To this end, ECHA also urges industry to be “proactive and take all necessary steps to ensure that all their dossiers are compliant”.

ECJ rules on the assessment of waste as hazardous waste. Criminal proceedings had been brought in Italy against defendants who were accused of treating waste as non-hazardous where it could have been assigned a mirror code as either hazardous or non-hazardous. The Italian Supreme Court of Cassation referred questions regarding the interpretation of EU waste law to the ECJ for a preliminary ruling. In *Verlezza and others*, joined cases [C-487/17](#) to C-489/17, the ECJ ruled that this EU law must be interpreted to the effect that a holder of waste that may be classified as either hazardous or non-hazardous waste, but the composition of which is not immediately known, must determine that composition and ascertain the hazardous substances, which may reasonably be found in that waste. He may, for that purpose, use the sampling, chemical analyses and tests provided for in Commission Regulation 440/2008 laying down test methods pursuant to REACH or any other internationally recognised sampling, chemical analysis or test. Pursuant to the precautionary principle, waste must be classified as hazardous if, following an assessment of the risks, which is as complete as possible, it is impossible, in practical terms, for a holder of waste to determine the presence of hazardous substances or to assess the hazardous property of that waste.

EU court dismisses NGO challenge of the authorisation of DEHP in recycled PVC. NGO ClientEarth lost a landmark case to overturn the decision of the European Commission to grant authorisation for uses of the phthalate DEHP in recycled PVC ([T-108/17](#)). In 2016, the Commission granted several permissions to use the chemical in recycled PVC. ClientEarth sought a ruling forcing the commission to change its decision not to carry out an internal review, as well as an annulment or revocation of the authorisation itself. However, the General Court rejected the claims and avoided having to rule on the validity of the original authorisation decision. The General Court rejected ClientEarth’s claims that the EC committed a “manifest error of law” in its assessment of alternatives, the socio-economic impact, deficiencies of the chemical safety report, and by breaching the precautionary principle. At the time of this report, no appeal had been filed.

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, Brussels
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



Gary Lewis
Director, Manchester
T +44 161 830 5373
E gary.lewis@squirepb.com