SQUIRE PATTON BOGGS

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

August 2018

Home Office Launches Independent Review of Modern Slavery Act 2015. The announcement follows publication of a report on the economic and social costs of modern slavery, which estimates the total cost of modern slavery in the UK in the year ending March 2017, to be between £3.3 billion and £4.3 billion, with the physical and emotional harms to victims representing by far the biggest component of the cost. Under the legislation, organisations which carry on business in the UK and have turnovers of £36 million or more are required to produce a statement each year setting out the steps they have taken to ensure that their business and supply chains are slavery free, or a statement that they have taken no steps to do this. We published a blog last year following research by the Chartered Institute of Procurement & Supply, which showed that more than one third of organisations required to complete a statement had failed to do so. The Crown Prosecution Service (CPS) has also published a Modern Slavery Report for the first time, which sets out its responses to modern slavery during 2017 to 2018. The report concludes that dealing with the crime at source through prevention and disruption means there will be fewer and fewer opportunities for criminals to operate here with impunity.

No Segregation of Vehicles and Pedestrians, Inadequate Lighting and Unsafe System of Work Leads to £150,000 Fine and £250,000 Costs Order for Haulage Company. The HSE press report includes comments from its principal inspector. The case is a stark reminder that costs awards can dwarf fine amounts in some cases and the potential cost award should be taken into account when assessing whether to defend a case to trial.

National Product Safety Strategy Published. The Office for Product Safety and Standards (OPSS) has reported on the Strategy document and that it sets out how OPSS will analyse, inform, enforce and build. It will provide a number of specialist services centrally to support consistent national enforcement, including aspects of product testing and technical expertise.

Press Reports of Failed Safety Inspections and Interviews Under Caution in Connection With Grenfell Public Inquiry. Coverage of the case is widespread, with reports last month suggesting that enforcement authorities are considering whether offences (including corporate manslaughter, gross negligence manslaughter and breaches of the Health and Safety Act) have been committed and reports this month alleging at least two failed fire safety inspections, with a fire deficiency notice and an independent fire risk assessment identifying multiple failures. The Grenfell Inquiry is a public inquiry set up under the Inquiries Act 2005. As such, the chairman can compel any person to provide evidence to the inquiry panel in the form of a written statement and provide documents and other things in his custody/control relating to a matter in question. The scope of the inquiry is broad and many organisations have been asked to provide evidence, either by the police or the Inquiry, on a voluntary basis.

Definitive Guideline for Manslaughter Sentencing In Force From 1 November 2018. When sentencing for Corporate Manslaughter, the separate guideline for Corporate Manslaughter will still be referred to by courts. However, the new guideline for manslaughter may still be relevant in the event of breaches of regulatory laws, such as those governing safety, for example, where directors are charged with gross negligence manslaughter, for work-related deaths. The offence range under the guideline for gross negligence manslaughter is from one month to 18 years' imprisonment (with a maximum sentence of life imprisonment). The actual sentence will be assessed by the court on the basis of culpability and aggravating and mitigating factors, such as previous record and actions after the event. As reported in our January edition of frESH Law Horizons, the Home Affairs Select Committee had previously raised concerns on the draft guideline. The Sentencing Council has since amended the draft guideline, including in relation to aggravating and mitigating factors. In particular, it has changed the proposed aggravating factor for "blame wrongly placed on other(s)" to "investigation has been hindered and or other(s) have suffered as a result of being falsely blamed by the offender".

Property Management Company Fined for Failing to Undertake Asbestos Assessment. The company was sentenced after failing to carry out an asbestos survey before undertaking extensive refurbishment works and fined £15,000, according to the HSE press release. It is a requirement of the Control of Asbestos Regulations 2012 that employers must not undertake demolition, maintenance or other works which exposes, or is liable to expose, employees to asbestos, unless the employer has carried out a suitable and sufficient assessment as to the presence of asbestos, or (if there is any doubt) assumes that asbestos is present and observes the relevant provisions. The regulations are supported by an approved Code of Practice.

New Codes of Practice on Investigatory Powers In Force From 19 August 2018. The Investigatory Powers (Codes of Practice and Miscellaneous Amendments) Order 2018 brings into force three revised codes of practice issued under the Regulation of Investigatory Powers Act 2000 (RIPA). The codes of practice are to help public authorities assess if/how it is appropriate to use covert techniques and provide those authorities with guidance on the procedures that need to be followed in each case. The draft revised codes include Covert Surveillance and Property Interference; Covert Human Intelligence Sources; and Investigation of Protected Electronic Information. The Codes of Practice are admissible as evidence in criminal and civil proceedings in any court or tribunal considering any such proceedings. The Consultation Response summarises the changes to the Codes, which are largely to provide additional clarity and rectify previous errors. The HSE recognises, in its enforcement guide, that RIPA enables the HSE to obtain certain information from communications providers and that directed surveillance (regulated by RIPA), whilst not normally required for a HSE investigation, might be considered appropriate on occasions, for example, to observe a person's home to establish the identity of the landlord. Where the HSE (or another enforcement agency) fails to follow the proper procedures, this can result in any evidence obtained being excluded by the court, as well as referral of the matter to RIPA's regulatory bodies.

HSE Report on Workplace Fatal Injuries 2018 Released. The HSE released the report last month, which showed that the highest proportion of fatal accidents at work occurred in the construction sector, with falls from height being the main kind of fatal accidents for workers. The source of the HSE data is the RIDDOR reporting system. The HSE has a dedicated work at height website, with general and industry-specific guidance, including, for example, a guide on the safe use of ladders.

Health and Safety Charges for Deaths Caused by Explosion at Refinery. Trade press reports indicate that the Health and Safety Executive (HSE) have informed two companies that they will face charges. The Crown Prosecution Service had previously decided that there was insufficient evidence to proceed with corporate manslaughter charges. The Definitive Guideline on sentencing for corporate manslaughter also covers sentencing for offences under health and safety legislation. However, whereas the category range for corporate manslaughter charges is £180,000 to £20 million, the range for health and safety offences is from £50 to £10 million (still a significant top fine but substantially lower than that for corporate manslaughter). In addition, for health and safety offences, the court is required to consider culpability and harm in determining the offence category (whereas with corporate manslaughter, harm and culpability will by definition be very serious, therefore the assessment of seriousness will involve factors such as foreseeability, how far short of the appropriate standard the offender was, the number of deaths and how common the breach is).

Fake 5-star Food Hygiene Rating Results in 5-year Disqualification for Restaurant Director.

The press release from the Insolvency service reports confirms that the local Council's trading standards team took enforcement action and the company pleaded guilty to the charge that the company engaged in unfair commercial practices.

Court Considers Approach to Sentencing in Fire Safety Cases and Notes That the Guideline for Health and Safety Offences Could Provide a Useful Guidance When Determining the Seriousness of Offending. There are no applicable sentencing guidelines for breach of fire safety regulations. In *R v Mehmood Butt*, the court looked at earlier cases and considered that the structure of the guideline for health and safety offences could usefully be followed. The court noted that, in prosecutions for a breach of the Fire Safety Order, the harm risked would be categorised as level A in the guideline because of the risk of death or serious injury. The level of culpability would vary depending on the circumstances of the offending. The court also said that a breach of the Order alone would be a seriously aggravating factor. In that case, a fine of £150,000 after a guilty plea was considered to be appropriate for the owner of a hotel who was convicted of offences under the Regulatory Reform (Fire Safety) Order 2005 after failing, on several occasions, to rectify fire safety defects raised by local authority and fire inspection officers, and acting in breach of an enforcement notice.

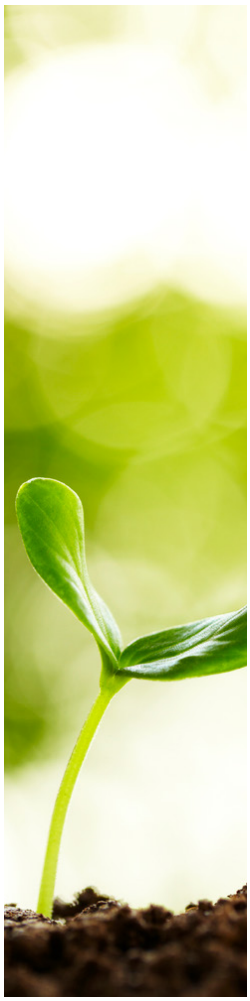
UK Government has Asked EU Retrospectively to Raise the National Emissions Limit for Nitrogen Oxides (NOx) under the EU National Emission Ceilings Directive (NECD)**.** The request is mentioned in the European Environment Agency's (EEA) latest annual report on NECD compliance.

A Textile Dyeing Firm has Been Ordered to Pay £59,259 After Operating an Illegal Textile Dye House In a Residential Area. Euro Dyers did not have a an Environmental Permit and officers witnessed dangerous conditions that could have affected local residents. Officers found flammable liquids stored on top of oxidising chemicals and chemicals stored with no containment to control leaks.

High Court Finds Seller's Environmental Consultant Owed No Duty of Care to Purchaser of Site. The judge dismissed a professional negligence claim by BDW, the buyer, against a consultant (Integral Technique) who produced a site investigation report for the seller. The buyer alleged that the consultant's report should have alerted it to the possible presence of asbestos throughout the site, and had been aware that the buyer would see the report. The consultant had apparently been willing to provide reliance on the report to the buyer (e.g. by an assignment or reliance letter), but no contractual link between them was actually put in place, so the buyer was relying on proving a duty of care and that it had been breached. The judge rejected the buyer's tort claim on the basis that there was no duty of care between them. This judgment is a good reminder that developers should not forget the legal steps that are necessary to obtain contractual reliance on consultant's reports prepared for other parties.

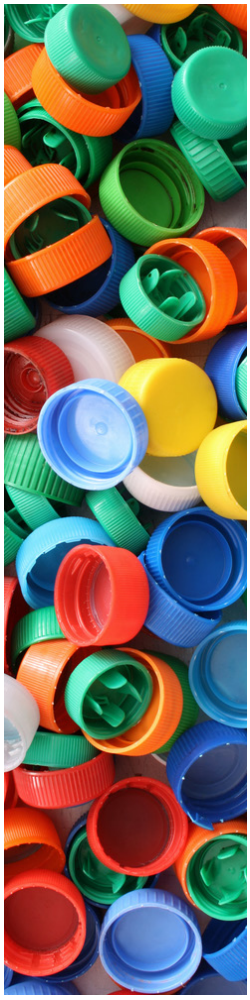
Permission for judicial Review Refused in Climate Action Case. In *Plan B Earth and Others v. Secretary of State for Business Energy and Industrial Strategy (BEIS) and the Committee on Climate Change*, permission was refused to judicially review the refusal by BEIS to revise the 2050 carbon target under the Climate Change Act 2008 following the conclusion of the Paris Agreement. Plan B claimed that the decision was unlawful because the current target does not commit the UK to making an equitable contribution to the global temperature goals in the Paris Agreement.

A Waste Industry Cross-sector Group Calls For Reform to the Carriers, Brokers and Dealers (CBD) Regulatory Regime Due to Its Contribution to Waste Crime. The group, which includes representatives from the Chartered Institute of Wastes Management and the Environmental Services Association, has issued a series of recommendations for the government to consider in its resources and waste strategy. The group says that operators should demonstrate competence, responsibility and transparency to enable proper regulation and the prevention of ongoing damage to communities and local environments caused by waste crime.



ECHA Has Begun to Publish More Details About Authorisations and the Companies That Hold Them. A new approach to publication was agreed by the ECHA secretariat following a request from activist lawyers ClientEarth. ECHA has now agreed to make more information public, including the quantity of the substance used and the number of staff potentially in contact with the substance, through a data register, which currently features six substances. This information could also be useful to other companies interested in authorization.

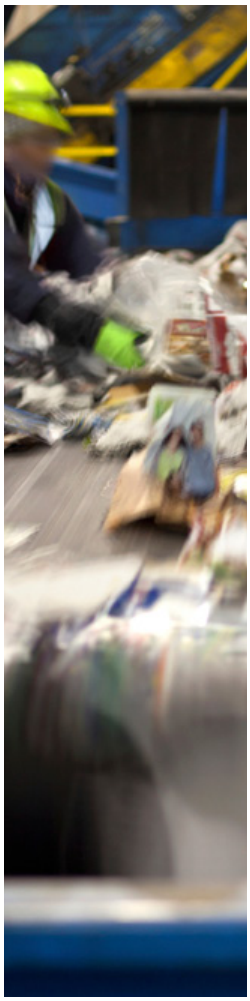
Water Companies Fined for Discharges of Untreated Sewage, Drinking Water and Leakage Issues. A government press release reports that Northumbrian Water was ordered to pay over £33,000 in fines and costs for three separate incidents. The sentencing judge indicated that, although the company's culpability was low, the additional offences meant the fine had to be increased. Thames Water was ordered to pay £120 million as compensation for poor management of leakages, and Southern Water was also fined £ £65,000, with costs of £44,620, for supplying water unfit for human consumption on the Isle of Wight in 2013.



BAT Conclusion Document for Waste Treatment Published on 17 August 2018 (European Commission Implementing Decision (EU) 2018/1147 of 10 August 2018 establishing best available techniques (BAT) conclusions for waste treatment). BAT conclusions are the reference documents for environmental permit conditions for industrial installations, including applicable emission limit values and must be reflected in permits issued after they are published. This will be relevant to anyone applying for or varying a permit including waste treatment processes.

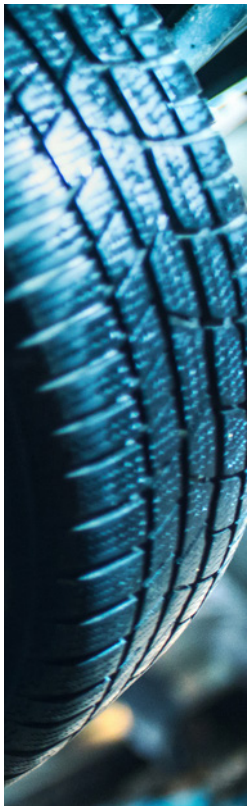
UK Treasury Receives Record-breaking Public Support for Reducing Single-Use Plastic and Boosting Recycling Through the Tax System. The recent call for evidence attracted an unprecedented 162,000 responses. Measures that received noteworthy public support include using the tax system to (1) encourage greater use of recycled plastic in manufacturing rather than virgin plastic; (2) discourage the use of difficult to recycle plastics, like carbon black plastic; (3) reduce demand for SUP like coffee-cups and takeaway boxes; and (4) encourage further recycling as opposed to incineration. Chancellor Philip Hammond is expected to include the measures in his autumn budget.

EU Advisory Body Publishes Draft Opinion on EU Legislative Proposal on Single-use Plastic. The draft opinion of the European Economic and Social Committee (EESC) supports the proposal as a "crucial element in the circular economy strategy" and "an important pilot project", but considers it could be even more ambitious. Comments include that the list of 10 target products should be expanded, and that there should be a "specific approach towards plastic products that will be processed into secondary raw materials. In particular, the plastic should not contain toxic chemical additives […] causing harm to people, businesses and the environment." The EESC provides non-binding opinions during the EU legislative procedure, and this opinion is likely to be formally adopted on 17 October.



Investigations Against Polish-British "Waste Mafia". Poland is to send 45 containers containing 1,000 tonnes of illegal waste back to the UK. The containers were marked as plastic and destined for Polish recycling facilities, but Poland found tins, detergent packaging, boxes and engine oil in them. Defra commented that illegal exports in breach of the EU Waste Shipments Regulation 1013/2006 could result in operators being forced to return waste at their own cost, while penalties include substantial fines and imprisonment. It confirmed that three companies were under criminal investigation for illegal waste shipments to Poland. Reacting to a report by UK newspaper *The Telegraph* in late July that British companies had become involved with the "waste mafia", which illegally burns or landfills material shipped as being recyclable, an spokesperson of the European Commission stated that it would monitor the situation, but emphasised that enforcement is the responsibility of the member states. Poland has reportedly become the sixth largest recipient of British waste in the world and the second largest inside the EU (just behind the Netherlands), accepting almost 12,000 tonnes of plastic, since China implemented waste import restrictions at the start of the year.

Malaysia and Vietnam Also Restrict Waste Imports. Malaysia announced that it had revoked plastics waste import licences from 114 factories, although it appears that production facilities with valid "approved permits" could continue to import plastic waste, and the factories which had had permits revoked should reapply within the next three months to obtain compliance letters, with new criteria to be observed. Malaysian plastic waste imports have soared since China announced waste import bans. Vietnam also announced that it would stop issuing new licenses for waste imports to first "clarify negative impacts of each type of waste and work out a short list of waste imports". These restrictions place further pressure on UK waste dealers and recycling facilities, needing to process waste plastics that would previously have been exported to these countries.



European Parliament (EP) Starts Work on Revision of Tyre Labelling Regulation 1222/2009. The European Parliament published a summary of the proposal, which includes mandates for the European Commission to develop a testing method to measure tyre abrasion and, after that, introduce labelling parameters or information requirements, in particular for mileage and abrasion. The leading industry committee (ITRE), has not yet determined/published a timeline for the conclusion of this work, but its progress will be of interest to anyone involved in tyre supply chains.

Industry Representatives Urged the EP to Adopt a "Sensible and Pragmatic Approach" to Updating the Persistent Organic Pollutants (POP) Regulation 850/2004 (which implements the Stockholm Convention in the EU) during a fact-finding visit by an MEP to two Manchester recycling facilities. Concern has been growing among plastics recyclers over a draft report from the European Parliament's Environment, Public Health and Food Safety Committee (ENVI), which proposes a concentration limit of 10ppm for the brominated flame retardant (BFR) decaBDE. In the latest ENVI amendments, the MEP has now proposed changing her own report, so as to refer instead to "concentrations of decaBDE at a level to be agreed under the Basel and Stockholm Conventions respectively". Limit values for both waste plastics and products made from recycled polymer under the UN Stockholm Convention on POPs are expected to be agreed during the next Conference of the Parties of the Stockholm and Basel Conventions in 2019.

Netherlands Proposes REACH Restriction for PAHs in Rubber Used In Artificial Sport Fields. The Dutch National Institute for Public Health and the Environment (RIVM), in cooperation with ECHA, prepared a proposal for a REACH restriction to address the risks from eight polycyclic aromatic hydrocarbons found in rubber granules and mulches used in synthetic turf pitches, or in loose forms at playgrounds and other sports facilities. ECHA has published a timeline for the proposed restriction. The carcinogenicity of PAHs has been a cause of concern in several countries after media reports suggested an increase in cancer cases among football players. ECHA had concluded in 2017 that there was, at most, a very low level of concern due to the PAHs present in recycled rubber infill. However, ECHA also gave a number of recommendations to be considered for the future – the first of which was to consider a restriction under REACH to ensure that granules for use as infill material are only supplied with very low concentrations of PAHs and of any other relevant hazardous substances. The progress of this proposal will be of interest for anyone involved in the supply chains for these materials.

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