

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

October 2018



The Health and Safety Executive (HSE) announced it is targeting construction firms across Great Britain on health standards. The HSE has issued a press release explaining that this will be the first time it has targeted the industry with a specific focus on respiratory risks and occupational lung disease, looking at the measures businesses have in place to protect their workers' lungs from the likes of asbestos, silica and wood dust. It also notes that, while the primary focus will be on health, if a HSE inspector sees any other issues of concern during the upcoming programme of inspections, they will take the necessary enforcement action. Therefore if, for example, an inspector spots safety issues in relation to work at height while reviewing measures in relation to asbestos, they will still take action in relation to the work at height breaches. The focus on health standards for the industry appears to be in line with the HSE's [health priority plan for dealing with occupational lung disease](#), one of three [health priority plans](#) (the others being musculoskeletal disorders and work-related stress).

An Environment Agency (EA) investigation into operation without a permit led to suspended prison sentences and an order to re-pay £250,000 under the Proceeds of Crime Act 2002 (POCA). The EA has [reported](#) on the outcome of its financial investigation, which followed on from an earlier trial into the defendants' failure to comply with an enforcement notice served by the EA in February 2012. The case demonstrates how POCA can be used by enforcement agencies as a tool for dealing with "corporate" offences and the significant penalties that can be imposed in such cases. We have previously published an [article](#) on a similar case, commenting on situations where officers may look to "pierce the corporate veil" for breaches of environmental permits, on our [frESH law blog](#).

The European Parliament (EP) has published a resolution on distributed ledger technology and blockchain. The [resolution](#) considers potential uses of the technology in a number of sectors, including its significance in relation to supply chains, in particular where it can facilitate the forwarding and monitoring of origin of goods and their ingredients or components, improving transparency, visibility and compliance checking, thus "reducing the risk of illegal goods entering the supply chain and ensuring consumer protection", noting that the technology can be used as a tool to improve the efficiency of customs officers for counterfeit checking and also noting the potential use of such technology for smart contracts. The resolution calls on the European Commission (EC) to assess and develop a European legal framework to solve any jurisdictional problems that may arise in the event of fraudulent or criminal cases of distributed ledger technology exchange; to raise awareness of the technology; and to address the problem of the digital gap between member states.

The Serious Fraud Office will not appeal the decision in a recent legal privilege case. We reported on the decision of the Court of Appeal in *Serious Fraud Office (SFO) v. Eurasian Natural Resources Corp Ltd (ENRC)* in our [September edition](#) of frESH Law Horizons. This month, [reports](#) indicate that there will be no appeal against this decision.



A review of meat processing identifies improvements. The Food Standards Agency (FSA) has [reported](#) on the draft review and there are several recommendations. These include a recommendation to make the most of all sources of food business information, including information from third-party assurance schemes, such as BRC, or assured food standards (which could have a fundamental change on the approach to such voluntary schemes) and local authority information (the exchange of information between authorities is not currently common practice). It also includes recommendations in relation to official controls, such as modernising systems used, coherent and consistent delivery; and the provision of comprehensive guidance. The [full final report](#) is available online.

The judicial review of a police failure to prosecute a local authority fails (*R (on the Application of Wyatt) v. Thames Valley Police*). The claimants sought to challenge, by way of judicial review, a police decision to close an investigation into allegations that a local authority was guilty of numerous offences, which followed on from enforcement action taken by the local authority against the claimants in relation to unlawful depositing of waste on a golf course. As with every case, it is on its own facts. However, it is interesting to note that the court considered various matters in refusing the application for judicial review, including the important public interest in a proper and diligent investigation by the police (in this case, the investigation was seen to be impartial); independence of investigation in accordance with the College of Policing's Code of Ethics (the court noted that the mere fact of previous failings could not doom a later investigation from the start, although it might mean that the investigation should be more extensive than might otherwise have been the case); adequacy of reasons (in the context of the Criminal Procedure and Investigations Act 1996); and misdirection at law (in this case, the report had inaccurately stated that copyright matters could only be dealt with in the civil jurisdiction; however, the court held that a misdirection on one aspect of the law could not, in of itself, mean that there was not a proper and diligent investigation). Although the case report indicates that there were some errors in the police investigation, it is clear that the judge had regard to the police report as a whole and did not consider that the decision (not to prosecute) was flawed such as to justify the quashing of that decision. The judge also took account of the requirement on the court to refuse to grant relief on an application for judicial review if it appears to the court that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

The draft Consumer Protection (Enforcement) (Amendment etc.) (EU Exit) Regulations 2018 have been published. The Department for Business Energy and Industrial Strategy (BEIS) has published the draft [regulations](#), together with an [Explanatory Memorandum](#). The draft regulations revoke certain UK legislation providing for cooperation between national authorities of EU member states and amend related enforcement and investigatory powers for consumer protection laws following Brexit. The Explanatory Memorandum indicates that guidance will be published in due course.

Landfilling in England appears to be rising. The amount of waste sent to landfill has increased for the fourth year running, according to [data published by the EA](#). However, it is coupled with a reduction in landfill capacity. This is not the government's intended direction of travel for waste management, and it will be interesting to see if there is any regulatory or policy reaction to this data. The EA has claimed that the increases are due to economic recovery. However, a number of commentators in the waste industry have questioned the figures, which are at odds with the HM Revenue & Customs (HMRC) landfill tax revenue figures. HMRC statistics show landfill tax revenue falling by 4.1% between 2016/17 and 2017/18. This inconsistency could be a sign that landfill tax is being underpaid, or that site returns are overstating landfill tonnages.



Environment Secretary Michael Gove, speaking at a WWF event, gave his views on the upcoming Environment Bill. He said it will include legally binding targets and be capable of adapting to technological progress and future innovation. He reiterated that the government would not seek post-Brexit deals that undermine standards and that leaving the EU would give the UK a chance to “do things differently”, allowing the UK to become a world leader on sustainability.

The EA has joined forces with eBay to [stop illegal vehicle breakers](#) and make sure that eBay sellers understand that an environmental permit is needed to break vehicles. The EA is also directly contacting eBay traders that do not display their environmental credentials, providing guidance and warning them about undertaking non-permitted breaking activities. This is an interesting example of collaboration between online marketplaces and regulators to address “free riding”.

In a recent [announcement](#), the EA committed to tackling modern slavery in the waste sector. Evidence from charity Hope for Justice suggests that two-thirds of modern slavery victims are reported to have worked within the waste industry. The EA is training its officers to spot signs of exploitation during site inspections.

The UK has joined the [Carbon Neutrality Coalition](#), a group of countries committing to reach net zero greenhouse gas emissions by 2050. Prime Minister Theresa May announced the decision in New York at the UN General Assembly. The Prime Minister also announced £160 million in funding from the UK to help other nations transition to cleaner energy systems and to adapt to the impacts of climate change. The Climate Change Act 2008 already requires the UK to reduce its greenhouse gas emissions below 1990 levels by 80% by 2050 and has ratified the UNFCCC Paris Agreement, committing to ensuring that global temperature increases above pre-industrial levels remain below 2 C and to make efforts to get to 1.5 C.

Shortly after this announcement, the Intergovernmental Panel on Climate Change (IPCC) published its latest [report](#) on climate change. Its stark warning is there may only be a 12-year window of opportunity to limit world temperature increases to below 1.5 C above pre-industrial levels, and to avoid the worst climate change impacts.

Subsequently, the UK’s Committee on Climate Change published a [letter](#) to the government recommending improvements to the Road to Zero strategy about low carbon transport. In addition, the government has written a [letter](#) to the committee requesting advice on the appropriateness of the UK’s long-term greenhouse gas reduction targets.

A fruit and vegetable wholesale business has been ordered to pay [£22,200 in fines, costs and compensation](#) for breaching a nuisance abatement notice over fumes from its biomass boiler. The council apparently received allegations of smoke and odours coming from the biomass boiler in December 2017. Following an investigation, the council served an abatement notice prohibiting “further nuisance”. However, the complaints continued and the council concluded that the notice had been ignored.





Four company officers have been [fined more than £66,000](#), plus more than £14,000 in costs, for the illegal use of waste for construction at a golf course. Two golf course managers were paid by two hauliers to deposit waste soil to create bunds around their driving range, build a zorbing ramp and raise another area of ground. In each case, this was outside the terms of three U1 exemptions that had been registered with the EA. Further, only one of these exemptions should be registered on a site in a three-year period. More than 2,000 lorry loads of waste soil had been deposited between 2012 and 2015, which would be in the region of 42,000 tonnes, significantly exceeding the 1,000 tonne limit of a U1 exemption. The court accepted that the golf course operators had limited knowledge of the waste industry, but the hauliers both had a long history in the business and should have known better than to deposit large volumes of waste on the site.

[Illegal storage and spreading of vegetable waste led to pollution.](#) A company stored too much highly polluting waste in a lagoon and spread too much organic waste onto land controlled by an individual, leading to run off and pollution. Both the company and the individual were fined, in the latter's case for knowingly permitting the illegal waste operation. This is another example of the courts' increasing willingness to look beyond the main "polluter" to others who have been complicit in the illegal activities.

A number of high-profile organisations, including eBay, Gumtree and Forever 21, have been [fined for failing to comply with the Energy Savings Opportunity Scheme \(ESOS\)](#). The scheme required companies to carry out energy audits during 2015. In the latest published data from the EA, 15 businesses have incurred civil penalties of almost £160,000.

The [Bank of England](#) has investigated the impact of climate change on the UK banking sector. 90% of the UK banking sector was surveyed and two main categories of risk factors were identified: physical risks from climate and weather-related events, and transition risks arising out of the move to a low-carbon economy. The report found that 30% of banks are being "responsible", 60% are being "responsive" and only 10% are being "strategic". The Bank of England considers that financial risks from climate change are sufficiently material to be considered at board level and so has subsequently issued a [consultation](#) on supervisory expectations, focusing on governance, strategy and risk management. This includes a [requirement to identify a senior executive to take charge of managing climate-change risks and report on that to the board](#).

The Financial Conduct Authority (FCA) has issued a discussion paper called [Climate Change and Green Finance](#). The paper proposes changes to the regulation of the disclosure of climate change risks by listed issuers. The FCA notes a number of relevant industry initiatives and considers whether greater consistency would be achieved by requiring issuers to state whether or not they have followed the Task Force on Climate-related Financial Disclosures recommendations in preparing their disclosures. If not, issuers could be required to explain why not. Responses to the discussion are requested by 31 January 2019.

[The High Court has ordered a full hearing](#), in March 2019, of the [judicial review](#) by Plan B and Friends of the Earth, against the UK government's plan for a third runway at Heathrow Airport. The claimants argue that the proposal is inconsistent with and has failed to take account of the UK government's greenhouse gas reduction commitments under the UNFCCC Paris Agreement and the UK Climate Change Act. The claimants will also seek to quash the Airport National Policy Statement, which contains the policy framework for the third runway at Heathrow Airport.



The government has issued further Brexit “no-deal” notices. These relate to [waste shipments](#); [meeting climate change requirements](#); [chemical classification labelling and packaging](#); and [export and import of hazardous chemicals](#). One notable point on climate change is the proposal that HM Treasury will establish its own carbon tax to replace the European Union Emissions Trading System (EU ETS) if the UK leaves the EU in a no-deal situation.

Waste company Biffa Waste Services has been [charged](#) with the illegal export of household waste to China. The EA alleges that Biffa tried to ship seven containers in breach of waste shipments legislation because officers found household waste in them when the documents described the material as waste paper. Biffa is charged with two counts of breaching regulation 23 of the Transfrontier Shipment of Waste Regulations 2007, which makes it an offence to export mixed household waste to China. The case began on October 15 and is expected to run into November.

The recent case of *Watkins v. Aged Merchant Seamen’s Homes & Anor* considered what interest in land was required for an action in statutory nuisance to be brought. Case law on private nuisance has established that the claimant needs a property interest in the affected land. However, this case has looked at who can be a “person aggrieved” (and therefore able to lodge a statutory nuisance claim). The High Court held that if someone is in actual occupation, even if that occupation is not lawful, then they may be able to bring a statutory nuisance claim. This case could have implications for the ability of protectors illegally occupying land near the project they are objecting to, to bring a statutory nuisance claim.

Two major UK trade bodies warn that a no-deal Brexit would create major disruption for the energy and chemical sectors. [Eurelectric](#) and the [Chemical Industries Association](#) (in conjunction with the EU chemical sector association CEFIC) have issued open letters to the EU heads of state calling for a mutually beneficial deal to be reached.

Almost a third of high volume chemicals in Europe are being used in breach of REACH. This is according to a new [report](#) by the German Federal Institute for Risk Assessment (BfR) and German Environment Agency (UBA). Only 31% of registration dossiers for chemicals over 1,000 tonnes per year were found by the BfA to be fully compliant, and 32% were non-compliant. This German review is the first REACH legal compliance review for some years, and the European Chemicals Agency (ECHA) has welcomed the results and agrees with its assessment. It will be interesting to see if enforcement proceedings, in Germany or elsewhere, flow from it.

[The European Court ruled](#) that the UK has failed to protect harbour porpoises by not designating sufficient sites for their protection. The court held that the UK government had breached its obligations under article 4 (1) of the EU Habitats Directive to designate a suitable habitat for certain vulnerable species, including the porpoise. The court also found a further breach of law in failing to designate special areas of conservation (SACs) for the species. The EC will now ask the UK government what steps it will put in place to comply.



The government has issued a [consultation](#), as promised earlier in the year, on phasing out plastic straws, stirrers and cotton buds. The consultation proposes a ban from October 2019, with limited exemptions, and is open for responses until 3 December 2018.

The EP has adopted a negotiating position on SUP. The environment committee (ENVI) of the EP adopted its [report](#) on the legislative proposal on SUP, as amended, with [51 votes to 10, three abstentions](#). With the exception of extended producer responsibility (EPR), a broad coalition of all political groups supported almost all of the 14 compromise amendments that they had negotiated among themselves. The EP plenary adopted the report as its negotiating position with the council as EU co-legislator. The final text of the directive will be the outcome of these negotiations (so-called trilogues).

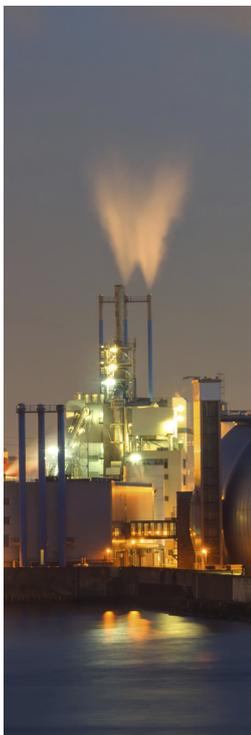
The Environment Council has confirmed plans to accelerate the legislative process for SUP. The [Council of EU environment ministers on 7 October](#) confirmed the intent to accelerate the preparation of the council's negotiating position. 20 member states commented briefly on the file; some large member states, such as Germany and Poland, did not. The UK representative highlighted the importance of behavioural change, but also warned of the potential unintended consequences of restrictions of SUP products, in particular for disabled people. Member states expressed doubts about the acceleration, most explicitly the Netherlands, saying that clarity should not be sacrificed for speed.

The European Ombudsman has started an investigation into the EC's preparation of the SUP proposal. The [Ombudsman registered a complaint](#) lodged by convenience food packaging association Pack2Go. According to [media comments that Pack2Go made in August](#), its complaint is based on:

- A conflict of interest, as the EC appointed UK consultancy Eunomia to prepare and support the development of the Plastics Strategy after Eunomia had campaigned, in its own right, for a range of restrictive measures against SUP. The EC also paid the consultancy, via NGO Seas at Risk, to research and prepare an [advocacy report on SUP and the marine environment](#), published in autumn 2017.
- The fact that the EC had not complied with its own rules on better regulation by rushing through a partial and inadequate impact assessment (IA).
- The assessment of employment effects would be "anecdotal and often based on conjecture with little or no clear factual evidence".

If the complaint is successful, the Ombudsman will issue findings and recommendations to the EC, which has three months to comment. The Ombudsman will then issue a report to the EP and the EC. The EC normally implements Ombudsman recommendations, but he has no power to suspend the legislative progress, so this development is unlikely stop the EP and council entering into trilogues as soon as both have adopted their negotiating positions.

The European Court of Auditors (ECA) has criticised the EC proposal on an EU "plastic tax". In a non-binding [opinion](#), the ECA stated, with regard to the proposed resource levy on member states based on non-recycled plastic packaging, that the EC should carefully consider how the amounts collected may decrease due to changes in the behaviour of households and economic operators.



The EP committee has adopted a report on the recast of the Persistent Organic Pollutants (POP) Regulation 850/2004. ENVI adopted its [report](#) as [amended](#), with 52 in favour and three against (the final version is not yet available). However, contrary to original plans, the EP has not yet adopted this report as its negotiating position – this is now expected during the next plenary session on 12-15 November. Changes to the EC proposal, which ENVI's report demands, include that manufacturers would need to demonstrate no technically feasible alternatives to the use of a substance listed in Parts A of Annex I and II. As with the SUP proposal, only once the EP and the council have each finalised their positions on the proposal, trilogue negotiations between them can begin to conclude the legislative process.

REACH: The EC studies “polymers of concern” (PoCs). REACH does not currently require registration or evaluation of polymers, but REACH requires the EC to review the hazards that PoCs pose to human health or the environment and the need for their registration and evaluation. The EC [tendered](#) a consultancy/study contract in May. It specifically calls for the development of scientific criteria, which would be physical-chemical, structural or toxicological properties. It appears that the EC has chosen [Wood McKenzie](#). The current focus seems to be reactive polymers, not widely used common plastics such as Polyethylene and Polypropylene.

REACH: The ECHA has proposed 96 substances for evaluation by member states in 2019-2021. According to the [draft Community Rolling Action Plan \(CoRAP\)](#), 28 substances would be evaluated in 2019, 43 in 2020 and 25 in 2021. ECHA prepared the draft, together with the member states, taking into account risk-based criteria for selecting the substances. ECHA's Member State Committee (MSC) will prepare an opinion on the draft plan in February 2019. Based on this, ECHA will adopt the update in March 2019. From the date of publication onwards, the member states have one year to prepare a draft decision requesting further information from the respective registrants to clarify potential concerns identified during evaluation. [ECHA advised](#) registrants of a listed substance to start coordinating their actions and contact the evaluating member state authority. Downstream users of a listed substance should also review the information they have available and share it with the registrants.

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