

frESH Law Horizons: Key Developments in Environment, Safety and Health Law and Procedure

March 2019



Chemical manufacturing company fined £224,000 after worker exposure to chemicals. The Health and Safety Executive (HSE) [press release](#) indicates that the company failed to manage the risk of exposure to chemicals harmful to health and pleaded guilty to breaching the Health & Safety at Work etc. Act 1974.

Consultation on review of 2009 anti-bribery recommendation (ABR) to combat foreign bribery. The [consultation](#) from the Organisation for Economic Co-Operation and Development (OECD) seeks input on the effectiveness of the ABR. It also asks respondents to comment on whether there is a need to increase impact of the OECD anti-bribery monitoring work and, if so, how. The deadline for response is 30 April 2019.

Modern Slavery – Proposed audit of Statement Compliance, further interim reports on Modern Slavery Act 2015 and Guidance on annual statements. The government issued a [tender](#) in March for an organisation to support it with an audit of compliance with relevant provisions of the Modern Slavery regime, in particular whether statements meet minimum legal requirements; and whether they meet key standards in the Home Office Statutory Guidance, [Transparency in Supply Chains A Practical Guide](#). Earlier [reports](#) indicated that the Home Office intended to “name and shame” non-compliant organisations and the tender may indicate that they are looking to follow through with that in coming months. The [third](#) and [fourth](#) interim reports on the Modern Slavery Act 2015 have also been published this month, as well as [guidance](#) on publishing an annual modern slavery statement.



Food manufacturer fined more than £1.8 million for work at height failures. The HSE [report](#) includes a statement from a HSE inspector outlining a failure of the company to provide adequate controls against the risks arising from working at height, which caused serious injuries to two workers. Employers and those in control of any work at height activity are required under Work at Height Regulations to make sure work is properly planned, supervised and carried out by competent people. The HSE website includes various advice on work at height, including [Frequently Asked Questions](#) and a [Step-by-Step Guide](#).

Court of Appeal finds that judge was wrong to not give reasons for disregarding or disagreeing with expert evidence in sentencing for health and safety offence. In the case of [R v Squibb Group](#), the judge had assessed the likelihood of harm as “medium” under the Definitive Guideline for Health and Safety Offences, despite the fact that the court had been provided with a report from an independent expert, which estimated the risk to employees (which related to asbestos-related diseases) as extremely small. The appeal court stated that “the judge in this case did not give any reason for disregarding or disagreeing with the expert evidence of risk adduced by Squibb and, in our view, he was wrong to do so”. They concluded that they saw “no justification for assessing the likelihood of harm in this case as medium [and] the only reasonable conclusion on the available evidence was that the likelihood of harm arising from the offence was low”. The fine was reduced by the appeal court from £400,000 to £190,000. This case underlines the difference that classification under the “harm category” can make to the resulting fine and the importance of obtaining persuasive expert evidence, where appropriate.



HSE issue Safety Alert on Platform Lifts. The [alert](#) is aimed at platform lift maintenance companies and owners and operators of platform lifts and refers to a number of incidents and issues that the HSE is aware of. In particular, the HSE advises owners and operators of such lifts to review maintenance and inspection procedures and introduce tests into daily checks for lifts to ensure landing doors cannot be opened when the platform is not at the same level; and that the platform cannot travel without doors closed and locked.

Hoteliers fined for failing to assess presence of asbestos during refurbishment. A HSE [press release](#) indicates that an employee had raised early concerns about the potential presence of asbestos-containing materials, but although enquiries were made, there was no physical testing of the materials being disturbed for some time. Further work did not involve an adequate assessment of asbestos. The court imposed a fine of £80,000 and ordered payment of costs of almost £15,000. We reported in [last month's frESH Law Horizons](#) on a successful asbestos claim against a previous importer; and this case further underlines the importance of meeting minimum standards on asbestos, in particular when arranging for building work/refurbishment.

The Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (Amendment) Regulations 2019, transposing the 2017 RoHS Directive 2017 into UK law, were made on 4 March. They come into force on 12 June 2019 and are intended to address issues that have arisen from the transitional provisions for new categories of electrical and electronic equipment that were brought into the RoHS regime under the 2011 RoHS Directive

The Invasive Alien Species (Enforcement and Permitting) Order 2019 was made on 7 March. It comes into force on 1 October 2019 and sets out an enforcement regime of both civil and criminal sanctions relating to introducing invasive non-native species of plants and animals that are controlled by the EU Invasive Alien Species Regulation 2014. It applies to England, Wales and the offshore marine area (and to Scotland and Northern Ireland as regards import and export controls).

Defendant's equity in a property justifies substantial costs order. In [R v McIntosh](#), the Court of Appeal has upheld a costs order against a defendant convicted of environmental permitting breaches on the basis that the trial judge was entitled to take into account the value of property that he owned. The defendant argued that it was disproportionate because it would take him about six years to pay off via his weekly disposable income of around £220, but he also had equity of about £255,000 in a house, so he could remortgage that to pay the costs.

Court holds that Brexit is not an event that will frustrate European Medicines Agency's (EMA's) lease. In [Canary Wharf \(BP4\) T1 Ltd v European Medicines Agency](#), a case that has potential significance for force majeure type clauses in all manner of agreements, the High Court has held that Brexit would not frustrate EMA's lease by reason of supervening illegality. The court decided that whilst EMA would not have the same status in the UK once the EU pharma legislation ceased to apply, it would still have the capacity to deal with property. EMA's alternative argument of frustration of a common purpose also failed. It is not yet known if EMA is going to appeal.





Advocate General (AG) opinion given on ECJ case about waste electronic and electrical equipment. The European Court was asked questions about whether consumer returns of electrical appliances, some of which are no longer usable because defective, and residual stock are waste and can only be exported under trans-frontier shipment of waste rules (EU Regulation 1013/2006). The AG concludes that they must be regarded as waste if it has not been previously established that all the appliances are functional or not all the appliances are appropriately protected against damage during transportation. Appliances that have become redundant and which are in unopened original packaging, on the other hand, are not, in the absence of any further evidence, regarded as waste. This opinion is not binding but has been submitted to the court, which will consider it when making its judgment.

AG's opinion published in the case of *Craeynest and Others (including ClientEarth) v Brussels Hoofstedelijk Gewest and Others*. This case relates to the location of air quality monitoring points in the context of Brussels' air quality plan. The claimants sought review of the siting of the sampling points in terms of whether they were appropriate to ensure an adequate air quality plan, and questions were raised about how far the courts should be expected to scrutinise this level of detail in a policy. The AG's opinion indicates that national courts should examine whether the sampling points had been located in accordance with the Directive, and could go beyond considering manifest errors.

OECD Report says that waste electrical and electronic equipment (WEEE) free riders are avoiding "tens, if not hundreds, of millions of euros" in compliance costs. The report estimates that the sellers of up to 10% (920,000 tonnes) of electrical equipment purchased on digital marketplaces in Europe avoid contributing to schemes designed to pay for end of life and recycling costs. It identifies a lack of awareness amongst sellers, "even those with 'bricks and mortar facilities within the EU'", and that improvements can be made through codes of practice and linking producer responsibility and VAT registration. It is notable that in the UK government's current consultation of packaging waste producer responsibility reform, one suggestion is to extend the definition of "producer" to include online marketplaces, and if this is adopted, then it could be extended to other regimes like WEEE.

India has now banned imports of plastic waste, following in the footsteps of China, Vietnam, Malaysia and Thailand. In February, a group of cross-party MPs in the UK called for a complete ban on the export of the UK's plastic waste to developing countries, but the UK waste industry is currently struggling to find alternative markets for these waste streams.

The case of *Millmore and others v Environment Agency* considers what it means to obstruct the Environment Agency. A number of employees of water services company were prosecuted for obstructing an Environment Agency investigation, and they appealed those convictions. The acts in question were things like refusing to open gates, refusing to allow items to be removed, locking away documents and asking Environment Agency officers to leave the site. The court held that mere omissions (such as refusing to open a gate) can amount to obstruction and this does not require a positive. On the facts, three of the convictions were upheld and two were acquitted. This case gives some useful reminders of the level of co-operation that is required from regulators and when lack of co-operation can become obstruction.

European Commission communication on pharmaceuticals in the environment was published on 11 March, to meet its obligation under the Priority Substances Directive, for a strategic approach to pollution of water by pharmaceutical substances. The communication highlights that pharmaceuticals are released into the environment, mainly through human and animal excretions, and discarded product in sewers and aquaculture, and this can impact ecosystems and human health. Six areas of action are identified, including awareness raising, developing lower impact products and improving and expanding monitoring.



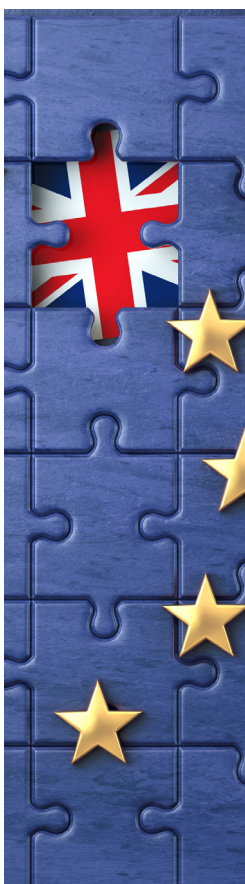
Environment Agency will issue [revised standard permit rules](#) shortly, following its [2018 consultation](#).

Affected holders of standard rules permits will have a three-month notification period before the changes apply. The permits in question mainly cover water discharges, materials recovery and recycling, WEEE, storage of electrical insulating oils, metal recovery, onshore oil and gas exploration and mining.

Severn Trent Water has been [fined £500,000](#) for polluting a site of special scientific interest (SSSI) with raw sewage.

A blocked sewer led to sewage spreading across 1.15 hectares of land and entering a ditch, enabling it to travel into a brook within the national park. The Environment Agency prosecuted for breach of waste and permitting legislation, but the case also involved Natural England, Birmingham City Council and Historic England. Natural England described it as one of the worst cases of damage to an SSSI, and was not satisfied with the speed of the clean-up work.

Michael Gove (Secretary of State for Environment, Food and Rural Affairs), **and Thérèse Coffey** (Parliamentary Under-Secretary of State for Environment, Food and Rural Affairs) **gave evidence to the [Environmental Audit Committee](#) on 20 March 2019 on key aspects of post-Brexit environmental governance.** Topics included the Office for Environmental Protection (OEP) – the UK’s post-Brexit watchdog – agreement/divergence with the devolved assemblies and “no-deal” planning. Gove indicated that he would like the OEP to be located in Aberdeen, if the devolved administrations agree to a UK-wide body. Current proposals are separated into the individual regions, and Westminster seems to be seeking to incentivise a more joined-up system. Gove has also announced that there will be an “interim secretariat” to provide an essential level of function and record breaches of environmental law by public bodies until the OEP is set up.



[Horizon Europe](#), the successor to the EU’s Horizon 2020 research and innovation programme, has been approved.

It has caused some controversy for including a requirement to assess policies and legislation against the “innovation principle” in addition to more established EU principles. Many environmental campaigners are against the innovation principle, as they consider it a threat to the application of the “precautionary principle”. A number of commentators and lobbyists on the new set of UK environmental principles in the Environment Bill have made a case for including the innovation principle, and its inclusion in this new EU policy potentially lends further support to those arguments.

European Chemicals Agency (ECHA) confirms it has extended the “Brexit window” for REACH registration transfers beyond 29 March,

in line with the newly extended Brexit dates of 12 April or 22 May 2019. ECHA reports that, since the beginning of 2019, UK-based companies have initiated the transfer of approximately 3,000 REACH registrations to EU 27 companies. Meanwhile in the UK, the [Statutory Instrument to copy REACH into UK law](#) and establish various transitional measures scraped through the House of Lords. The Lords approved the legislation by a narrow margin, strongly criticising it as “not fit for purpose”, but noting that the alternative of not approving it would be worse and leave a legislative vacuum. The UK government has also published [guidance](#) for how UK companies that manufacture or import chemicals can register for “UK REACH” using its new IT system.

The Environment Agency has extended the [list of convictions](#) to be declared on waste and installation permit applications.

It has made 20 additions to the list, including offences under the Modern Slavery Act 2015, the Corporate Manslaughter and Corporate Homicide Act 2007 and the Fraud Act 2006. Companies applying for permits should take note of this additional requirement.



European Parliament approves Directive on Single-use Plastics (SUP). As expected, the [European Parliament plenary approved](#) the outcome of the legislative negotiations. Rapporteur Frédérique Ries stressed its global dimension: “Europe now has a legislative model to defend and promote at international level, given the global nature of the issue of marine pollution involving plastics.” The European Commission [welcomed](#) the vote. The EU Council is expected to adopt the Directive in April.

ECHA opened the [first public consultation on the proposal for a restriction of intentional uses of microplastics](#). ECHA provided [guidance](#) on the consultation and requests supporting evidence to be provided to allow comments to be taken into account. The consultation makes specific information requests regarding: (1) (bio)degradable polymers; (2) synthetic turf (i.e. the granules produced from end-of-life tyres or other materials); (3) the proposed concentration limit of 0.01% weight by weight (w/w), in particular applications; (4) the proposed derogation primarily intended for medical devices and in vitro diagnostic medical devices; (5) other sectors or uses which may be affected by the proposed restriction or additional information to refine the assessment of sectors/uses already analysed; and (6) the 19 polymers found to be used in cosmetic products. The first deadline for comments is 20 May; the final deadline is 20 September.

European Parliament wants to limit EU regional funding of waste disposal. The plenary [voted](#) on the [report](#) of its competent committee on a [Commission proposal for a regulation on the European Regional Development Fund and on the Cohesion Fund](#), adopting its negotiating position. The Parliament wants to exclude financial support to waste incineration and other residual waste treatment facilities and limit funding for landfills, but with exemptions for Europe’s outermost regions (adopted text not yet publicly available). Legislative negotiations are expected to start after the Parliament elections in May. The EU Cohesion Fund is one of the financial tools to reduce regional disparities in income, wealth and opportunities, with the EU’s poorer regions receiving most of the support.

Basel Convention: Norwegian proposal on plastic waste shipments receives support. Japan will co-sponsor Norway’s [proposal to amend](#) the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal, to change several entries regarding plastic waste in the Annexes to the Convention. The changes would tighten the definition for non-hazardous plastic waste to only cover clean, sorted and easily recyclable waste, and would not include waste that is mixed with other types of plastics or waste, or is contaminated. Generally, plastic waste would require “special consideration”. The intention is to make it harder to export poor quality plastic recycle. A European Commission official has also indicated that the EU is likely to support the proposal, subject to some additional clarification. Amendments to both the Convention text and its Annexes are passed by consensus or, if this fails, with a three-fourths majority. Annex amendments do not have to be ratified, and become binding on all parties (unless they lodge objections) six months from the date they are passed. The proposal is tabled for the [14th Conference of the Parties to the Convention](#), which will take place from 29 April to 10 May.



European Parliament opposes pending DEHP authorisations. The Parliament adopted motions for a resolution to oppose the draft Commission implementing decisions granting an authorisation for certain uses of DEHP to Polish [Grupa Azoty](#) and Czech [Deza](#). The resolution argues that the Commission has exceeded its implementing powers and calls for the draft decisions to be withdrawn and replaced with rejections, to end the use of DEHP in all remaining applications. The European Parliament resolutions are not binding upon the Commission, which must only take account of the indication that it exceeded its implementing powers. However, the Commission does need the approval of the REACH Committee, which is composed of member state representatives, and has currently delayed the votes in that committee.

EU court annuls authorisation of lead chromates. The General Court ruled that a European Commission decision to authorise six uses of lead sulfochromate yellow and lead chromate molybdate sulfate red covering applications, including industrial coatings, plastics and road markings in the EU, was illegal (case [T 837/16](#)). The Commission may only grant an authorisation if there are no suitable alternatives, and the court found that the Commission had not sufficiently examined this. [Sweden](#) has been of the view that it is "obvious that there are alternatives [to the authorised uses] because lead chromates are almost completely phased out in the EU".

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