

frESH Law Horizons

October 2019



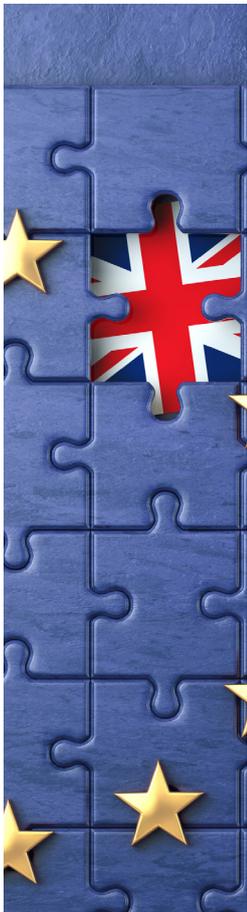
A ferry operator is fined after a vehicle reversing out of a vessel struck a worker. Press reports indicate that the court fined the operator £400,000, after the Health and Safety Executive (HSE) found that there was no consideration of physical segregation of pedestrians and moving vehicles when vessels were unloaded. The HSE website includes [guidance](#) on separating vehicles, which underlines the need for separate pedestrian routes whenever possible.

The 2019 UK Modern Slavery Report is published. The [report](#) comments on the recent review and the government's response, which we have covered in previous editions of *frESH Law Horizons*. The report also includes a section dedicated to the UK's future response, which notes that the government will develop a central reporting service for statements published under the act, as well as publish its own Modern Slavery Statement in 2019. It notes that the central reporting service for annual transparency in supply chain statements will have the purpose of holding businesses to account, as well as tackling the risks of slavery in public procurement.

The Court of Appeal decides that the resources of a parent company should not be taken into account for sentencing unless there are special factors (*R v BUPA Care Homes (BNH) Limited [2019] EWCA Crim 1961*). The sentencing judge in the Crown Court uplifted the fine to £4.5 million based on the turnover of the parent company (reduced to £3 million for an early guilty plea) when applying step three of the sentencing guidelines for health and safety offences, corporate manslaughter, and food, safety and hygiene offences. The Court of Appeal held that the judge should not have done so and reduced the fine to £1.15 million. The judgment does not give a clear indication of factors that would lead the parent company's resources to be relevant.

The Office for Product Safety and Standards (OPSS) publishes the [National Market Surveillance Programme](#) and a [Delivery Report](#). The programme reports on the annual national market surveillance programme for consumer product safety in the UK. It also sets out how the government will enforce legislation on product safety, and the responsibilities and approach of various agencies, such as the Maritime and Coastguard Agency (MCA), the Medicines and Healthcare Products Regulatory Agency (MHRA) and the Vehicle Certification Agency (VCA), among others. It notes that in the event of non-compliance, OPSS is committed to acting in a manner proportionate to the nature, seriousness and circumstances of the offence. The Delivery Report sets out how OPSS is working to protect consumers, but the foreword from Kelly Tolhurst notes that as we leave the EU, effective product regulation will underpin opportunities for global trade in consumer goods.

Fine of £1.8 million after a steel works explosion. The [HSE press release](#) reports on the fine for breach of Regulation 3 of the Management of Health and Safety at Work Regulations 1999. The explosion killed two workers and the investigation found that the company failed to assess the risks of the maintenance work and identify suitable control measures to prevent an explosion.



Preparing for Brexit: product safety, CE marking/UKCA mark and producer name and address.

EU product safety and compliance requirements will carry over into UK law immediately on the UK's exit from the EU. For products sold in the UK that require a mark, a replacement UK conformity assessment (UKCA) mark will be introduced to indicate that the product has been assessed for conformity to UK standards (which, in the short term at least, will align with EU standards). Where a CE-marked product is sold elsewhere in the EU and relevant EEA countries, if it is currently assessed and certified by a UK-notified body (and is required to be assessed by a notified body), it will need to be reassessed and remarked by an EU-recognised conformity assessment body (unless files have already been transferred to an EU-recognised body). Government guidance is available covering conformity assessment marking, for manufacturers looking to place [goods on the EU market](#) and for placing [goods on the UK market](#). OPSS has also published [guidance on product safety in the event of "no deal"](#). Producers should note that the name and address required to be provided under the general product safety regime may need to change – if a UK product is being exported to the EU, for example, it is the name and address of the EU importer that will be required.

Preparing for Brexit: food and drink labelling.

Food and drink producers will need to ensure that the name and address of the food business operator on labels of products exported to the EU is an operator in the EU. Likewise, those who import into the UK market for sale in the UK will need to ensure that the address of the UK importer appears on the label. Other changes that may be required include country of origin labelling, health and identification marks (for products of animal origin), use of the EU organic logo, use of the EU emblem and protected geographical indications. Government [guidance](#) summarises the relevant changes. The date when the Brexit changes will take effect will depend on whether the UK leaves with a deal, or not. If there is a deal, there will be a transition period, during which operators will have the opportunity to make the required changes, but if not, changes will likely be required immediately on exit (although, in practice, the UK has indicated that it would take a practical approach to enforcement and effectively allow a "grace period" for changes).

The government has published a [No-deal Readiness Report](#). The report includes sections on environmental and product regulation. The report does not contain new policies but draws together the information from numerous technical notices into a more streamlined format. It also includes some useful summary tables.

The government publishes the full [Environment Bill](#), setting out how it will regulate environmental matters over the coming years, including post-Brexit governance. The first part of the bill, focusing on environmental principles, governance and the establishment of the Office for Environmental Protection (OEP), was published last year, but the remaining sections have now been revealed in the new version of the [bill](#). In addition to adding more flesh to the bones of the parts that had already been published (such as confirming that the OEP will have oversight on climate change, as well as environmental targets), the new parts of the bill cover waste and resource efficiency, air quality and environmental recall, water, nature and biodiversity, and conservation covenants. This bill, assuming it progresses, will have effects on all businesses operating in the UK.

New Environment Agency (EA) guidance confirms the need for a climate change risk assessment with permit applications. All permit applications for a new bespoke waste and installation environmental permit must now include a [climate change risk assessment](#), if they are expected to operate for more than five years. When completing the application form, the applicant will need to calculate its climate change risk screening score – if the score is five or more, a climate change risk assessment must be submitted with the application form. Where the score is less than five, the assessment does not need to be submitted, but still needs to be completed and kept as part of the environmental management system. Anyone planning to submit a permit application for a waste or industrial installation should be aware of this new requirement.





A man has [pleaded guilty to assaulting two EA officers](#). The officers were attending his business premises in Yorkshire. The EA officers were attending to check that waste, which had been delivered in breach of environmental permit conditions, had been removed, and the defendant verbally threatened and physically assaulted them. The man was ordered to undertake a 21-day “thinking skills and rehabilitation programme”, and to undertake 80 hours’ unpaid work. He was also required to pay a victim surcharge of £85, costs of £85 and £50 compensation to both victims. Numerous assaults are reported against EA officers, but few have been prosecuted to date. An EA spokesman said, “Our officers do endure abuse and threats of violence in carrying out important work to protect people and the environment. The sentence handed out shows that the courts will not allow assault of public servants to go unpunished. It sends out a strong message to others that would obstruct our officers from performing their duties.”

A former waste electrical and electronic equipment (WEEE) compliance scheme and its [director](#) are fined for failing to comply with their legal obligations. Northern Compliance Ltd and its director pleaded guilty of failures to finance the cost of WEEE collection, treatment, recovery or disposal of household WEEE items, as per their obligations in 2017. They were ordered to pay a combined amount of £54,365 in fines and compensation. The EA said that the director had flagrantly disregarded the law, and his arguments stating he was not to blame amounted to “smoke and mirrors”, and “hopefully this will make other companies in a similar position of responsibility think twice about breaking the law and pay their compliance fees.”

The EA [wrote to WEEE collectors and processors](#) confirming that WEEE plastics must be hazardous waste unless the composition is known. Recent industry analysis found flame retardant chemicals (which are persistent organic pollutants [POPs]) in more than 2,000 items of WEEE plastics. The recast of the EU POPs directive sets maximum concentration levels for POPs in waste materials at levels below those that would have commonly been found in products in the past, with anything above the maximum concentration being considered hazardous waste. The EA’s guidance is that unless the operator knows that what they are collecting or treating is below the POPs thresholds, they must assume the items are hazardous. The EA also states that small WEEE and displays that have become waste can no longer be reused, whether in the UK or abroad, unless the plastic contained in them is known to be below the POPs thresholds. Any hazardous POPs plastic must be destroyed by high temperature incineration. This is relevant to any operator that collects WEEE, manages a site that receives WEEE, disposes, treats or recycles WEEE, or puts WEEE back into reuse.

The Department for Environment, Food and Rural Affairs (Defra) is [seeking views](#) on a WEEE compliance fee for the 2019 compliance year. The WEEE regime requires obligated producers to finance the cost of collection, treatment, recovery and recycling of WEEE, and establishes a system of annual collection targets that are imposed on producer compliance schemes (PCSs). The secretary of state has powers to approve a compliance fee methodology as an alternative form of compliance, payable by PCSs that fail to achieve their collection target. This was made available in 2018, in the face of a shortfall of available recycling evidence, and the position is likely to continue this year. As with last year, two different proposals are being consulted on, and comments are invited on whether the secretary of state should set a compliance fee for 2019 and, if so, the extent to which each of the proposals meet the published evaluation criteria. The consultation closes on 11 November 2019.

Do you have a septic tank that discharges to surface water, rather than to ground? This type of septic tank needs to be upgraded to a package sewage treatment plant to continue to be eligible for an environmental permitting exemption. The EA has issued [general binding rules](#) for all types of small sewage discharges, and [more details](#) on the requirements for discharges to surface water are available. The guidance has just been updated to remove specific references to making this change by 1 January 2020 and instead now says that if you have not yet upgraded, you need to do it as soon as possible and have plans in place to carry out this work within a reasonable timescale, typically 12 months.



The EA is [consulting](#) on new standard rules permits replacing some waste exemptions and changes to other exemptions. Following the EA's waste crime consultation in 2018, one measure identified was reform to the waste exemptions regime. The EA is, therefore, proposing to withdraw three exemptions and replace them with standard rules permits. These are T8 (mechanically treating end-of-life [ELV] tyres), T9 (recovering scrap metal) and U16 (using depolluted ELV vehicles for parts). A further raft of exemptions will be amended to narrow their scope. These are U1 (use of waste in construction), T4 (preparatory treatments), T6 (treating waste wood and waste plant matter), T12 (manually treating waste), D7 (burning waste in the open), S1 (storage in secure containers) and S2 (storage in a secure place). Further, more general restrictions are also proposed regarding the number of exemptions per site, as well as regarding exemptions at already permitted sites. The overall effect is that more activities will need to be regulated by environmental permits. The consultation closes on 24 December 2019, and the new rules are likely to come into effect in March 2020. If you hold any waste exemptions, you should review whether you may need to obtain a permit in future and consider the conditions that you will need to meet.

The EA publishes its annual report on regulation, [Regulating for People, Environment and Growth](#). The report provides statistics, trends and messages on the environmental performance of the businesses regulated by the EA. It highlights that the greatest threat now is the climate emergency, and the EA is working hard with those it regulates to tackle this. It also considers regulation to be one of the key tools to help tackle the climate crisis. Areas of regulation highlighted as needing work are serious pollution incidents, water quality and waste crime.

The latest data on clean air indicates that 83% of reporting zones still have illegal levels of air pollution. Analysis of data recently issued by the UK government, undertaken by [ClientEarth](#), shows that very limited progress has been made in meeting the targets that have been applicable since 2010. The zones that most exceed the targets are Greater London, South Wales, West Midlands and Glasgow. ClientEarth said that, "Almost 10 years after legal limits should have been met, it is astounding that only seven out of 43 zones have legal levels of air pollution."

The government has responded to the Climate Change Committee's 2019 Progress Report. In its response, "[Leading on Clean Growth The Government Response to the Committee on Climate Change's 2019 Progress Report to Parliament – Reducing UK emissions](#)", in addition to confirming measures previously announced, such as delivery of the commitment to net zero by 2050, the government confirms it will shortly publish the evaluation and post-implementation review of the Energy Savings Opportunity Scheme, followed by a consultation early in 2020 on strengthening future phases of the scheme. It will also publish the results of the evaluation of the Climate Change Agreements in early 2020, to inform the design of "any successor scheme" for 2023. The report also covers a range of funding initiatives for low-carbon technologies, carbon capture, and storage and fuel switching. Shortly after the response was published, the prime minister [announced](#) that he will chair a new Cabinet Committee on Climate Change, to bring together ministers responsible for domestic and international climate change policy and provide a forum to hold departments to account for their actions to combat climate change.





The Department for Business, Energy and Industrial Strategy (BEIS) is [consulting on increasing the minimum energy efficiency standard for non-domestic private rented properties \(NDPRP\) by 2030](#).

The consultation seeks views on two alternative targets. The government's preference is that all NDPRP should achieve a minimum Energy Performance Certificate (EPC) rating of B by 1 April 2030, if cost effective. The alternative target is a minimum EPC rating of C. The current minimum rating is E. The test for whether an improvement is cost effective would still refer to the seven-year payback test that is set out in the current legislation. These proposals are part of the government's work towards net zero emissions by 2050 and at least 20% reduction in business energy use by 2030. The consultation applies to England and Wales, and is open until 7 January 2020. Owners/landlords of NDPRP should pay close attention to these proposals and assess their portfolios for properties that would not meet these requirements, which are substantially more stringent than current minimum standards.

A developer and a contractor have been [fined](#) for breaching tree preservation regulations.

Housing developer Fiorenzo Sauro, a director of Enzo Homes, and tree contractor Arwyn Morgan have been fined £420,000 by Swansea magistrates. The trees in question included the felling of a rare protected Giant Redwood and a collection of other trees at the site in Penllergaer, the site of the former Swansea Council offices.

The Financial Conduct Authority (FCA) has published a [feedback statement on climate change and green finance](#).

The statement contains a summary of responses to FCA's December 2018 discussion paper on climate change and green finance (DP18/8), and provides a detailed explanation of FCA's priorities that will form the basis for its future work on climate change and green finance. Key areas for action include issuers' climate change disclosures and firms' integration of climate change risk.

The Financial Reporting Council (FRC) has issued the [UK Stewardship Code 2020](#).

This is an update to the 2012 version of the code, and will take effect from 1 January 2020. The code has a strong focus on achieving sustainable benefits for the economy, the environment and society through stewardship of investment. There are new expectations about how investment and stewardship is integrated, including environmental, social and governance (ESG) issues. The code consists of 12 principles for asset managers and asset owners, and six principles for service providers. Organisations wanting to become signatories to the code must produce an annual Stewardship Report, explaining how they have applied the code in the previous 12 months.

The EU Commission has [adopted 10 ecodesign implementing regulations](#).

These cover commonly purchased electrical appliances, such as fridges, washing machines and display screens (including televisions). Eight of these appliances were covered by existing ecodesign requirements (welding equipment and fridge vending machines are new), but the new measures strengthen spare part availability as part of the Circular Economy Package's aims to improve product repairability. Other new ecodesign measures have been introduced, including a ban on halogenated flame retardants in display screens and reduced water use for washing appliances. Most of the measures come into effect in March 2021.



The EU Technical Expert Group on Sustainable Finance (TEG) has issued its [final report on climate benchmarks and ESG disclosures](#). A [summary](#) report has also been published. Following its interim report in July, TEG's final report recommends that in order to help investors wishing to adopt climate-conscious investment strategies, there should be minimum technical requirements for EU climate benchmark methodologies (namely, a climate-transition benchmark and a benchmark for a portfolio being in line with the 1.5°C goal). The proposals also aim to address the risks of "greenwashing" by using unclear environmental claims. In addition, TEG recommends ESG disclosure requirements for benchmark administrators that should improve the transparency and comparability of information. This report will feed into delegated legislation to be produced by the commission under the proposed Low Carbon Benchmarks Regulation. The regulation is expected to be published before the end of 2019, and the delegated acts should be adopted in the middle of 2020.

The European Chemicals Agency (ECHA) [recommends a general ban of Bisphenol A \(BPA\), Dechlorane Plus and 16 other substances](#), by their inclusion in Annex XIV, the so-called Authorisation List of the REACH Regulation 1907/2006. That would mean they could not be placed or used on the European market, unless individual companies successfully apply for the authorisation for specific uses. Following the ECHA recommendation, the European Commission will decide on whether to add these substances to the authorisation list by adopting implementing regulations.

The [European Commission sets an end-year deadline for REACH phase-in substances](#). The commission has published an [implementing regulation](#) setting a new deadline of 31 December for "phase-in substances". After that date, some conditions will no longer apply. Companies will need to calculate their manufactured or imported volume per calendar year for each of their substances and conduct data-sharing negotiations if they plan to register a substance. Certain phase-in substances will continue to benefit from less stringent information requirements after 31 December if they are registered at the lowest tonnage band and if they do not meet the criteria listed in Annex III to REACH. Phase-in substances are substances that were already on the internal market when REACH entered into force in 2007. Article 23 of REACH established a transitional regime for phase-in substances, including different transitional deadlines for their registration, which officially ended on 31 May 2018.

[French authority concludes Bisphenol B \(BPB\) is an endocrine disruptor](#). The French Agency for Food, Environmental and Occupational Health Safety (ANSES) has published a systematic [review](#) of BPB's adverse effects and endocrine activity in the *Environmental Health Perspectives Journal*. Despite the limited data available, ANSES indicated that BPB meets the World Health Organisation's definition of an endocrine disrupting chemical and should be regulated in the same way as Bisphenol A (BPA). BPB is a bisphenol chemical compound closely related to BPA and is often used as an alternative to BPA. ANSES has notified ECHA of its intention to propose to include it as a substance of very high concern in the REACH Candidate List. The proposal is expected in August 2020.

The European Commission acknowledges challenges with the Aarhus Convention. The European Commission released a [report](#) (SWD (2019) 378) revealing the difficulties of implementing the international Aarhus Convention on access to environmental justice in the EU. It shows that environmental NGOs and individuals face significant hurdles in using national courts to object to EU laws, and that they cannot obtain administrative review of acts of general application. In 2017, the international Aarhus Convention Compliance Committee [found](#) that the EU was not providing citizens with enough possibilities to legally challenge decisions, acts and omissions by EU institutions violating environmental law. As a result, the council tasked the commission with evaluating the EU's compliance with the Aarhus Convention and coming up with recommendations. The commission was to consider taking non-legislative actions, including awareness raising measures, or propose to reform the EU Aarhus Regulation 1367/2006, which environmental groups have urged. The commission has yet to express a clear recommendation regarding these options.





The EU POPs implementation plan is open to comments. The commission launched a public consultation on the review of the EU's [Implementation Plan for Persistent Organic Pollutants](#). POPs are chemical substances that persist in the environment, bioaccumulate through the food chain and pose significant risks to human health and the environment. At the international level, [the Protocol to the regional UNECE Convention on Long-Range Transboundary Air Pollution \(CLRTAP\) on POPs](#) and the [Stockholm Convention on POPs](#) establish rules to reduce and eliminate the use of those substances. In particular, state parties are required to develop a plan for the implementation of their obligations under the convention. This international regime was implemented in EU law through [Regulation 850/2004](#) and a first Union Plan was developed in 2007. The current public consultation aims to capture the changes included with the recast of the POPs regulation, but also the additional developments at the international level, into a third EU implementation plan. It is [open](#) until 11 November 2019.

The European Commission consults on environmental crimes. The [public consultation](#), which will run until 2 January 2020, is part of a general evaluation of the implementation of Directive 2008/99 on the protection of the environment through criminal law, which the commission launched in March 2019. The directive criminalises violations of various EU environmental laws, including illegal waste trade, producing and handling hazardous materials, water pollution and wildlife trafficking. The review aims to assess whether the EU rules on environmental crime are relevant, effective, efficient and in line with other EU legislation, in particular in the areas of waste and wildlife crime. In 2018, the commission published an [action plan](#) to improve environmental compliance and governance, including in the area of combating environmental crime. The UN [considers](#) environmental crime the fourth-largest criminal activity after drug smuggling, counterfeiting and human trafficking.

The EU court rules on access to REACH joint submission. In two judgments (cases [T-805/17](#) and [T-806/17](#)), the General Court ruled that ECHA does not exceed its powers when providing a registrant, who seeks a complete opt-out from the costs of a joint submission, with a security token granting them individual access to the submission. In the cases at stake, the lead registrants (BASF and REACH & Colours Kft.) refused to give a third company (SSS) access to the joint submission for disodium, after SSS asked to submit an individual registration without contributing to the common costs ("opt-out"). Pursuant to Article 11(3) of REACH, a registrant may choose to submit information separately and opt out from a joint submission under certain conditions. According to the court, the negotiations between the companies had reached an impasse, which justified that ECHA granted SSS access to the joint submission. Furthermore, the court held that REACH "allows neither ECHA to refuse a registration on grounds other than the incompleteness of the registration dossier [...], nor the lead registrant to object to a request for access to the joint submission made by a registrant seeking a complete opt-out or to challenge the compliance of the information provided by that registrant in support of its request." In a case ([A-011-2017](#)) similar to the court cases, ECHA's Board of Appeal reached the same conclusion in 2018. ECHA amended its procedure accordingly to automatically issue a security token to any registrant who seeks a complete opt-out. As a result, such registrants will be exempted from demonstrating that they have done everything to reach an agreement with the lead registrant.

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