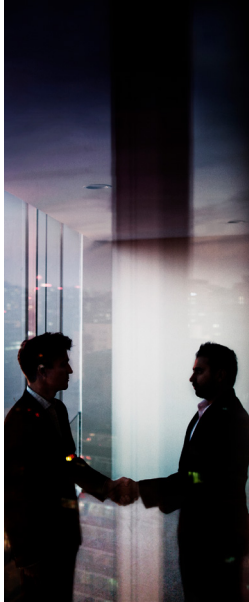


frESH Law Horizons

December 2019



Crown Court fine of £15 million and order to pay £1.4 million costs for conspiracy to corrupt.

At the end of last month (just missing our November edition!) Alstom Network UK Limited was sentenced, following an investigation by the Serious Fraud Office (SFO) into its contract to supply trams in Tunisia. The case followed a number of others, including in relation to other Alstom companies and individuals, under similar charges. Investigations had first commenced 10 years' ago in 2009. The sentence demonstrates the significant penalties that courts will impose for bribery and corruption offences.

Office for Product Safety and Security (OPSS) investigation leads to washing machine recall.

The recall and replacement will affect around half a million machines. The government [announcement](#) confirms that the recall will be carried out by the brand owner. The advice indicates that there is a risk that the door locks of affected machines could catch fire due to overheating during the washing process. The General Product Safety Regulations 2005 require that producers must only place safe products on the market and includes powers for enforcement authorities to require a recall, if they have reasonable grounds to believe that it is a dangerous product, although it is not clear in this case whether the recall was mandated by OPSS. The latest recall follows an [announcement](#) of a recall earlier in the year in relation to tumble dryers. Producers of consumer products should ensure they are familiar with legal obligations for notification, withdrawal, and recall laws and plan for a recall before any issue is identified by developing and regularly reviewing thorough recall policies and protocols and insurance coverage. We have previously [reported](#) on the OPSS Consumer Product Recall Code of Practice, summarising what is required for a product safety incident plan.

Bioservices company fined for high hazard biological agent release. The Health and Safety Executive (HSE) has [reported](#) on the sentence imposed by Chelmsford Magistrates' Court, for possession by the defendant of a high hazard biological agent (avian influenza and West Nile virus) without the required licence under the Specified Animal Pathogens Order (SAPO) 2008. The fine ordered was £40,000, but the court ruled that costs of £80,000 were also payable by the defendant. The HSE is the licensing authority for the SAPO regime and undertakes inspections, investigations and enforcement.

The Royal Bournemouth Hospital Trust was fined £45,000 for giving the wrong drug dose to a cancer patient. The prosecution followed an investigation by the Medicines & Healthcare products Regulatory Agency (MHRA). The Trust pleaded guilty to supplying a medicinal product that was not of the nature or quality demanded, which is a breach of the Medicines Act 1968. The Crown Prosecution Service (CPS) [case report](#) confirms that the case was built around the investigation carried out by the MHRA, who had identified that staff working in the unit were beyond capacity. The CPS Specialist Fraud Division prosecutes cases investigated by the MHRA.



Local Authority Fines – £1.4 million for breach of health and safety laws and £500,000 for care provider breaches. December has seen some sizeable fines imposed on local authorities. Derbyshire County Council was fined £500,000 for Breach of Health and Social Care Regulations – the case has been [reported](#) by *Local Government Lawyer* as the first prosecution by the Care Quality Commission (CQC) against a local authority. The council had pleaded guilty to offences under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2015. The CQC commented that the council had failed to adequately assess and reduce the risk of a resident falling. It also remarked that the CQC would take action to hold care providers accountable and ensure that others can receive safe care, where they find that they have put people using their services at serious risk of harm.

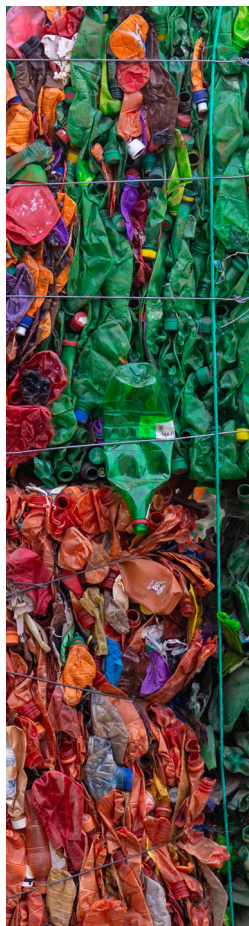
In a separate case, the HSE prosecuted Hampshire County Council after a bollard on a pedestrianised street fell when a young girl climbed on it, leading to life-changing injuries. The HSE [press release](#) reports that the council was found guilty of breaching requirements to ensure persons other than themselves and their employees are not exposed to risks to health and safety. Speaking after the case, an HSE inspector remarked that councils have a duty to adequately assess and control risks to members of the public from street furniture. The costs payable in the case were also significant, amounting to more than £130,000.

Owner of a coach company sentenced after an employee suffered a fatal injury for Employee.

The sentence of six months imprisonment (suspended) was imposed by Crewe Magistrates' Court. [Local press](#) coverage includes details of the circumstances of the incident. The owner pleaded guilty to breaching section 2(1) of the Health and Safety at Work Act 1974. The case is a reminder that health and safety breaches can result in sentences against individuals. The HSE has guidance available on its website in relation to [working under vehicles](#) and in relation to the [repair of buses](#) fitted with air suspension.

A report claims that the UK remains a storehouse of asbestos. A new report by *ResPublica* says that there are six million tonnes of asbestos in the UK, most in over 1.5 million public buildings, including our hospitals and schools, such that many people are still exposed to the potential dangers of asbestos on a daily basis. Asbestos continues to be the UK's number one occupational killer, causing more than 5,500 deaths in 2018. The report summarises the discussion around current asbestos legislation and regulation and aims to highlight the dangerous unknowns in current research, policy and practice. *ResPublica's* goal is to inform the objectives of a national campaign to reorder the Health and Safety Executive's (HSE's) parameters for the management of asbestos *in situ*.

Cabinet Office ordered to disclose information on the state of the UK shale industry to Greenpeace. The First-tier Tribunal determined the [appeal](#) regarding a decision notice from the Information Commissioner (IC) requiring the Cabinet Office (CO) to disclose part of a government report on the state of the UK shale industry to Greenpeace, under the Environmental Information Regulations 2004 (EIR). The IC had decided that the EIR exception for internal communications applied to the report and the public interest favoured withholding the body of the report, but not the background and executive summary (although parts of the summary were also covered by the commercial confidentiality exception and the public interest also favoured withholding them). On appeal, the Tribunal found that the internal communications exception did not apply because the Environment Agency was not a government department. It also reconsidered the public interest factors relating to the commercial confidentiality exception and another one raised by the CO in the appeal, and concluded that this favoured disclosure. This is a good example of where exceptions under the EIR are engaged but then overruled on the public interest test.



UK to take back 42 containers of plastic waste that was illegally shipped to Malaysia. More than 300 containers of plastic waste are apparently being held at Penang after arriving without the right permits, with several countries having agreed to take back 200, including 42 for the UK. The British High Commission in Malaysia has said that the UK and Malaysian authorities and shipping agents are currently working together in the repatriation process, "the repatriation of these 42 containers reflects our commitment to fighting the illegal plastic waste trade", said a spokesperson.

European Parliament declares a climate emergency. The declaration was made ahead of the UN COP25 climate talks in Madrid. The chair of the Committee on the Environment, Public Health and Food Safety said, "The European Parliament has just adopted an ambitious position in view of the upcoming COP 25 in Madrid. Given the climate and environmental emergency, it is essential to reduce our greenhouse gas emissions by 55% in 2030. It also sends a clear and timely message to the Commission a few weeks before the publication of the communication on the Green Deal".

COP 25 climate talks conclude with many goals not achieved. The main aim was to agree further steps to enable the Paris Agreement to become fully operational. However, the final outcome, a text called [Chile Madrid Time for Action](#) did not go as far as many had hoped. The compromise agreement stresses the urgent need to deliver deeper cuts in greenhouse gas emissions and restrict global warming to 1.5°C, but it does not go as far as agreeing on rules for global carbon markets (Article 6 of the Paris Agreement), or funding mechanisms for developing countries most affected by climate change. UN Secretary-General António Guterres said he was "disappointed with the results of #COP25", and this "lost an important opportunity to show increased ambition on mitigation, adaptation and finance to tackle the climate crisis". The issues that were not agreed in Madrid will roll forward to COP 26 in Glasgow next year.

Court dismisses a claim for the return of free EU Emissions Trading System (EU ETS) allowances due to Brexit delay. The First-tier Tribunal (General Regulatory Chamber) (FTT) [dismissed an appeal](#) by a joint venture oil and gas company, an EU ETS operator, against a recovery notice requiring the surrender of allowances (worth about €4 million in total, of which €2 million was for 2018 allowances). The company had not been given its usual free allocation of allowances by the Commission in 2018 due to a decision to suspend such allocations to UK companies as a result of Brexit. However, the UK was still in the EU when the date for surrender of EU ETS allowances equivalent to emissions came around in March 2019. The company claimed that those 2018 free allowances should be "netted off" the government's claim for surrender of allowances. Although the court sympathised with the predicament, it concluded that the legislative framework of EU ETS gave no discretion to do this, so the company will have to buy allowances to comply with the recovery notice. This is very tangible evidence of one impact of Brexit, and in particular the uncertainty and previous delays, on UK businesses.

Government nearly doubles the potential civil penalties under EU ETS for 2020. The government has [fixed the carbon price](#) to be used for calculating penalties under the regime at £21.93 a tonne for 2020 (it was £12.61 in 2019). The formula for calculating the penalty for carrying out a regulated activity without a permit uses an estimated amount of the costs avoided, plus a multiple of the estimated amount of reportable emissions multiplied by the carbon price. This means that operators who fail to comply with their obligations under the EU ETS regime will face much higher penalties for doing so from 2020.

The Committee on Climate Change (CCC) launches call for evidence on the sixth climate budget. The Climate Change Act 2008 requires the CCC to provide advice to the government on each carbon budget towards the long-term net zero 2050 target, and the CCC's advice on the sixth carbon budget needs to be provided in 2020. The CCC has, therefore, issued a call for evidence to be submitted by 5 February 2020 on five key topics: climate science and international circumstances; the path to the 2050 target; delivering carbon budgets; Wales, Scotland and Northern Ireland; and emission reductions in specific sectors of the UK economy. This is all in the context of the relatively recent net zero target, and the CCC's report that current plans and policies are insufficient to meet the current carbon budgets (which were based on an 80% rather than 100% reductions target). It is, therefore, clear that some significant changes will be needed to align with the net zero by 2020 target.



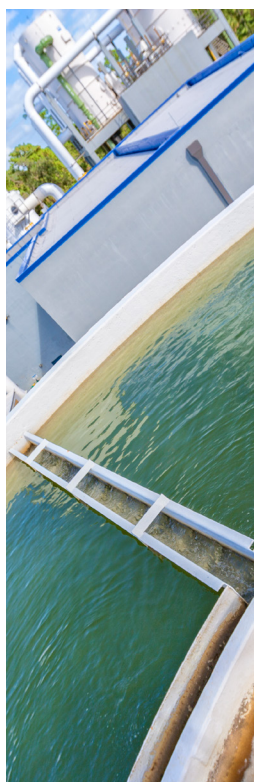
Inquest into death linked to air pollution will consider human rights breaches. In May 2019, a new inquest was ordered into the death of Ella Kissi-Debrah, a nine-year-old girl who suffered from asthma. There was a pre-inquest hearing on 17 December, and the assistant coroner gave his view that there had been an “arguable breach” of Article 2 of the Human Rights Act, which imposes a duty on the state to protect the life of its citizens. This is in addition to the anticipation that the outcome from this inquest may be the first example of air pollution being attributed as a cause of death. A further pre-inquest hearing will be held in April, and potentially another in September, and the two-week inquest is expected to take place in October or November 2020.

Nigerian pollution judgement against Shell not enforceable in UK. The High Court held in [Agbara and others v Shell Petroleum Development Co of Nigeria Ltd and others](#) that it was not just and convenient for a Nigerian judgment for oil pollution damages against Shell to be enforced in the UK. This was because Shell had been prevented from defending the claim in Nigeria (a breach of natural justice), and such a breach would ordinarily lead to the conclusion that it was not “just and convenient” for the judgment to be registered in the English courts. The court also held that Shell’s failure to exhaust all domestic remedies in Nigeria did not affect that conclusion. It also commented that the fact an appeal was pending in Nigeria was not an additional ground to set aside the registration of the judgment, since an appeal could not be said to be pending where permission to appeal out of time was required. The judgment registered also seemed to have material calculation errors and a punitive general damages element, both of which would have caused issues had the decision on the other aspects been different. This is the latest in a developing line of cases (although from a different angle) which are seeking to make UK parent companies responsible for pollution incidents connected to overseas operations.

European Commission adopts European Green Deal. The European Green Deal [Communication](#) and its [annex](#) set out an indicative timeline for about 50 legislative, preparatory and non-legislative actions. One main goal of the new Commission will be to set the EU on the path to climate-neutrality by 2050 by involving all sectors, in particular transport, agriculture, construction, chemicals and energy. Notably, the Commission will increase the EU’s emission reduction target for 2030 to at least 50% and will also enshrine the 2050 net zero goal in law by March 2020. The Commission also plans to revise its climate legislation and promote “clean, affordable and secure energy”, as well as “smart” mobility. The European Green Deal includes the adoption of an industrial strategy and a new Circular Economy Action Plan, focusing on resource-intensive sectors. In this context, the Commission will follow-up on the [European Plastics Strategy](#) and address unintentional releases of plastics into the environment, and produce a chemicals strategy for sustainability by the summer of 2020 and take action on specific chemicals, e.g. endocrine disruptors and very persistent substances. The European Parliament and the Council are expected to formally respond to the communication. **More information on the European Green Deal can be found in our client alert.**

EU publishes Disclosure Regulation and Low Carbon Benchmarks Regulation. The Disclosure Regulation enters into force on 29 December 2019 and prescribes harmonised rules for financial market participants and financial advisers on transparency about the integration of sustainability risks and the consideration of adverse sustainability impacts in their processes, and about the provision of sustainability-related information on financial products (the requirements phase in over a two-year period). The Low Carbon Benchmarks Regulation enters into force on 10 December and provides a framework for minimum requirements for EU climate transition benchmarks and Paris Agreement-aligned benchmarks, to ensure that these benchmarks do not adversely impact other environmental, social and governance (ESG) objectives.





Amendments to chemical language labelling requirements apply from 1 December. EU

Regulations 2018/669 and 2018/1480 changed the lists of chemicals in each language version of the EU Classification, Labelling and Packaging Regulation so that all the chemical names are in the same language as the main text. Labels of a substance or mixture must now use the relevant translated name of the chemical substance applicable in the official language of the member state where it is placed on the market. By now, suppliers should have adapted their labelling and packaging of substances and mixtures and sold off existing stocks.

New environmental standards for EU industrial installations have been issued. BAT conclusion documents set out the best available techniques for different types of Industrial Emissions Directive installations, and once finalised, the standards need to be applied to all new installations, as well as to existing ones four years later. The [final waste incineration BAT conclusion](#) document was published on 3 December, and the [first draft of the new BAT conclusions on common waste gas management and treatment systems in the chemical sector](#) has been issued for stakeholder comment.

A new report from the European Environmental Bureau on access to environmental

information examines the current state of play in the EU, with a special focus on current access to information at member state level. The report also gives policy recommendations and gives examples on how civil society and the public can exercise their right to information for a strengthened democracy. Belgium, Germany, the Netherlands, Poland, Spain and the UK were criticised for not having a single national website for IED permit information, making it more difficult to obtain information about IED permits.

European Commission concludes a fitness check of Ambient Air Quality Directives.

The review concludes that EU air quality legislation has made member states set up high-quality systems to collect and share air quality data, but has been less effective at actually cutting air pollution. Despite failures by many member states to meet legally binding air pollution limits (the UK and 13 other member states are subject to infraction proceedings for breaching nitrogen dioxide limits), the Commission concluded that the legislation has been broadly fit for purpose in that it has “contributed to a downward trend in air pollution and reduced the number and magnitude of exceedances”. However, the review notes that there are still widespread and persistent exceedances in relation to particulate matter, nitrogen dioxide, ozone and benzo(a)pyrene, and that standards need to be updated in line with scientific developments, particularly for fine particulate matter (PM2.5).

European Commission finds EU water laws are “fit for purpose”. The Commission [announced](#) that the Water Framework Directive, its associated Directives, and the Floods Directive are generally “fit for purpose, with some room for enhanced effectiveness”. Overall, the fitness check found that the protection of water bodies and flood risk management have improved, and the legislation is flexible enough to accommodate various challenges, e.g. climate change. However, implementation issues have arisen due to “insufficient funding, slow implementation and insufficient integration of environmental objectives in sectoral policies”. It identified chemicals as a key area for improvement. Environmental organisations [reportedly greeted with “relief”](#) the results of the fitness check, as they feared a postponement of the 2027 implementation deadline by which member states have to ensure their waters meet the “good status” standard. Commissioner for the Environment Virginijus Sinkevicius commented, “We now need to accelerate the implementation of what we have agreed. The momentum of the European Green Deal will allow us to make such a leap forward.”



European Commission consults stakeholders on the fitness check of endocrine disruptor legislation.

Until 9 March 2020, interested parties can [comment](#) on the review of EU laws addressing the risks from exposure to endocrine disruptors. The results of the consultation will help the Commission determine whether legislative changes are required to minimise the risks of endocrine disruptors. A specific focus of the consultation is on the effectiveness of the EU legislation in protecting vulnerable parts of the population that are sensitive to endocrine disruptors (e.g. fetuses, adolescents). In its communication "[Towards a comprehensive EU framework on endocrine disruptors](#)", the Commission had announced plans for this fitness check in November 2018. The Commission is expected to publish a staff-working document summarising the results of the fitness check in the second quarter of 2020.

European Chemicals Agency (ECHA) maps more than 21,000 REACH registered substances in its "chemical universe".

ECHA's [list](#) of substances registered under the REACH Regulation, also called the chemical universe, shows there are still thousands of substances for which possible actions have not yet been determined. ECHA divided the substances into five pools, which might evolve over time if deemed necessary: 1) regulatory risk management ongoing; 2) regulatory risk management under consideration; 3) data generation; 4) currently no further actions proposed; and 5) substances registered under REACH but not yet assigned to any pool. This is not supposed to indicate whether the use of a substance is safe or not, but is intended to help member states and EU authorities focus their actions on substances of (potential) concern. At the same time, it provides further transparency on the authorities' work and progress regarding the regulation of chemicals.



Europe's state of the environment 2020 report issued by the European Environment Agency (EEA).

The report concludes that Europe will not achieve its 2030 goals without urgent action during the next 10 years to address the alarming rate of biodiversity loss, increasing impacts of climate change and the overconsumption of natural resources. The report says, however, there is reason for hope, amid increased public awareness of the need to shift to a sustainable future, technological innovations, growing community initiatives and stepped up EU action like the European Green Deal. The report includes a chapter (n°10) on chemical pollution, where the EEA examines the trends and possible scenarios regarding the use of, exposure to, and management of chemicals in Europe.

EEA warns against the emerging risks of PFAS in Europe in a [briefing note](#) summarising the "known and potential" health and environmental effects of per- and polyfluorinated alkyl substances (PFAS). This group of substances comprises more than 4,700 of widely used chemicals that accumulate over time in humans and in the environment. The EEA reports that PFAS were detected in high concentration levels in the environment across Europe and contaminated drinking water supplies in several EU countries. PFAS were also found in human blood. The EEA observed that "though the levels for the most prevalent, studied and regulated PFAS, PFOA and PFOS are decreasing, levels of more 'novel' PFAS are increasing". Due to the large number of PFAS, the EEA opines that substance-by-substance risk assessments and management approaches are inappropriate. Rather, it advocates "precautionary risk management actions" and the use of chemicals that are "safe-and-circular-by-design".



PlasticsEurope appeals BPA judgement. The trade body representing the European plastics industry [appealed](#) the ruling of the EU General Court (in [case T-636/17](#)), upholding ECHA's decision to list bisphenol A (BPA) as a substance of very high concern (SVHC) for endocrine disrupting with an impact on human health (see *frESH Law Horizons September 2019*). PlasticsEurope argues that the judgement sets precedents that will "severely affect the plastics industry" and bring "continuous legal uncertainty" where "substances risk being subject to the authorisation process without a solid scientific basis". In particular, the association rejects the Court's interpretation of what REACH requires in order to conclude a substance is an SVHC and contends that ECHA did not properly consider the conclusions of the European Food Safety Authority. In the meantime, ECHA has opined that BPA should be put on the REACH authorisation list (see *frESH Law Horizons October 2019*), which would have the effect of a general ban.

European Commission calls for input to update its Blue Guide on product legislation. Until 15 January 2020, interested parties may send their suggestions on issues that should be included in an [update](#) of the Blue Guide. The revision aims, in particular, to reflect new EU legislation, including rules on market surveillance (Regulation 2019/1020), international developments, as well as EU current priorities, e.g. digitalisation and the circular economy. The [Blue Guide](#) is a guidance document that provides information to the member states and others on "industrial products or products whether for use by consumers or professionals", in order to facilitate the free circulation of goods. It notably covers the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS), eco-design requirements for energy-related products and medical devices (amongst many other pieces of EU legislation). The latest update of the Blue Guide dates back to 2016.

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