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£4.4 million fine for civil engineering firm over M6 motorway works. Between March 2018 and January 2019, workers struck overhead powerlines twice, causing a cable to be brought down and hit a lorry and another to land on the motorway. According to the Health and Safety Executive (HSE), after one of the incidents, the workers failed to immediately inform the electricity network provider, which led to the cable being re-energised several times while lying on the motorway with vehicles passing by. The HSE found that there had been inadequate planning of the work, which led to the use of an unsuitable vehicle, a lack of a task-specific risk assessment, and workers being unaware of the hazard of overhead cables. The firm pleaded guilty to breaching Sections 2(1) and 3(1) of the Health and Safety at Work etc. Act 1974 and Regulation 13(1) of the Construction (Design and Management) Regulations 2015 and was [fined £4.4 million](#). The case demonstrates the importance of task-specific risk assessments and their value in identifying hazards and appropriate control measures in relation to those risks. Reliance on more generic risk assessments can, and will, be criticised by the regulator if there is another serious safety incident and the associated hazards were not identified or controlled.

Criminal Courts may suspend sentences due to delays caused by COVID-19. In *R v Asif [2022] EWCA Crim 1372* (judgement not available online outside subscription sources), the Court of Appeal determined that, although delays between the arrest and sentencing of a criminal defendant was not a factor set out in the definitive [Guideline on the Imposition of Community and Custodial Sentences](#), delays “may be relevant to the issue of suspension” (although not relevant in this case). This may be applicable to breaches of regulatory laws that carry the possibility of individual liability for directors, senior managers and alike where an offence is committed with their consent or connivance or that is attributable to their neglect.

Consultation opens on extending investigatory powers under the Proceeds of Crime Act 2002 (POCA) to more public bodies. [The Government consultation](#) opened on 7 December 2022 and proposes that powers granted to certain bodies to recover the proceeds of crime under [POCA](#) should be extended to the Environment Agency (EA), the Food Standards Agency, the Security Industry Authority, the Public Sector Fraud Authority and the Department for Work and Pensions. Proceeds of crime are defined as any money or assets gained via criminal activity, which might include breaches of regulatory requirements by corporate bodies such as companies. POCA allows for the recovery and confiscation of “proceeds” from such breaches (there have been cases where planning authorities have sought confiscation orders against those who have committed planning offences). The consultation closes on 1 March 2023.

Work-related ill-health and injury statistics 2022 published by the HSE. [The statistics](#) show that stress, depression, and anxiety made up 51% of all work-related illnesses in Great Britain, with a total of 1.8 million workers suffering from them. Musculoskeletal disorders also made up 27% of both new and long-standing cases. The HSE commented in its [press release](#) that it has been warning of the “growing crisis in stress and poor mental health related to work.” The statistics also show that there were 123 deaths from work-related accidents in 2021 and 2022, which compares favourably with other European countries, and 565,000 workers sustained a non-fatal injury. The annual cost of work-related injuries and new cases of ill health in the 2019–2020 period (excluding long latency illnesses such as cancer) was £18.8 billion.

Food company fined £858,000 after an employee loses an arm. In September 2021, an employee of a baking company had to have his arm [surgically removed](#) after being pulled into an industrial food mixer. The company was fined £858,000 and ordered to pay £8,000 costs after pleading guilty to breaches of [Regulation 11\(1\)\(b\) of the Provision and Use of Work Equipment Regulations 1998](#). The HSE found the company’s control measures were inadequate to prevent contact with the moving parts of the machine. Factors that contributed to these findings were that the guard on the mixer was often not replaced after cleaning and the interlocking system was defeated, which allowed the mixer to operate without the front guard in position. There is specific [HSE guidance](#) on working with bakery products. This is another example of significant fines for health and safety breaches, and a reminder that guarding on machines (or lack of it) is a common feature in such cases.



Newcastle city council fined £280,000 following the death of a six-year-old girl. A six-year-old girl was killed by a falling tree at Gosforth Park First School (a council-controlled school) which led to Newcastle city council being [fined £280,000](#) and ordered to pay costs of £8,020. Other children also were hit, but only sustained superficial injuries. The HSE found the tree to be in a decayed and poor condition. The council pleaded guilty to breaching [s. 3\(1\) of the Health and Safety at Work etc. Act 1974](#). Section 3(1) requires employers to protect people not in their employment from being exposed to risks to their health or safety and, in this case, that included the pupils attending the school, but in a business context, it could include visitors to a company site.

UKCA marking transitional deadlines extended. The [Product Safety and Metrology \(Amendment and Transitional Provisions\) Regulations 2022](#) came into force on 31st December 2022. They provide additional time to transition to the post-Brexit UK conformity assessment marking (UKCA) regime requirements. The regulations extend (for an additional two years, until 31 December 2024) transitional provisions allowing continued recognition of EU CE marking in Great Britain and extends associated transitional provisions regarding labelling with respect to the UKCA marking, importer information and responsible person's information (some aspects, until 31 December 2027). Associated guidance has been updated for a number of product types, which provides full details of the extensions for those products, including [toys](#), [simple pressure vessels](#), [recreational crafts](#), [radios](#), [pyrotechnics](#), [pressure equipment](#), [personal protective equipment](#), [cosmetic products](#), [electrical equipment](#), [gas appliances](#), [lifts](#) and [packaged goods](#).

Recovery of trial expenses must be directly referable to the proceedings. In certain circumstances, a defendant in a health and safety or other regulatory prosecution can ask the court to make an order for recovery of expenses incurred during a trial if the trial does not proceed or if there is a successful appeal under [s. 16\(6\) of the Prosecution of Offences Act 1985](#). However, in [R v Whiteley \[2022\] EWCA Crim 721](#), it has been decided that certain expenses may not be recoverable. The expenses that could not be recovered in the case included those for car hire, flights to visit family, rental accommodations and a laptop. Section 16(6) provides for the recovery of "such amount as the court considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings". The Court of Appeal held that the phrase "in the proceedings" meant that the only expenses that could be recovered are those directly referable to the proceedings, and that expenses that would not have arisen, had criminal proceedings not started in the first place, were not recoverable under the statutory scheme.

High Court orders that prosecutor's costs are to be paid by unsuccessful appellants. Perhaps a warning for those considering appeal of a conviction for health and safety or other regulatory offence, the court in [Hargreaves v Powys CC \[2023\] EWHC 13 \(Admin\)](#) ordered an unsuccessful appellant to pay the prosecutor's costs, even though there was no express provision in the Prosecution of Offenders Act 1985 for an accused to pay a prosecutor's costs in the Divisional Court. Hargreaves had been prosecuted by the Powys county council and the High Court was asked to determine whether it could order the appellant to pay the council's costs in circumstances where Hargreaves had appealed the decision of the magistrates' court to imprison Hargreaves for failure to meet a confiscation order. That appeal was dismissed. The appellant was ordered to pay the local authority's costs for their appeal under [s. 28A\(3\) of the Senior Courts Act 1981](#) and the Court held that this section could be exercised, where appropriate, if there was no equivalent provision in the Prosecution of Offenders Act 1985.

Insurance exclusion for "pollution and contamination" considered by Court of Appeal. In the recent case of [Brian Leighton \(Garages\) Ltd v Allianz Insurance plc](#), the Court of Appeal was asked to interpret an insurance policy exclusion which covered "damage caused by pollution or contamination". A fuel pipe at a petrol station had been pierced by a sharp object, leading to a fuel leak that contaminated an area of the property, resulting in an evacuation. It was agreed by the parties that the proximate cause of the damage was the sharp object piercing the pipe, but the issue in the case was whether the wording of the exclusion only applied to matters where pollution and contamination were the proximate cause of the damage or whether it also excluded damage that caused pollution and contamination (as was the case here). The Court decided that the exclusion only applied where pollution or contamination was a proximate cause of damage and, therefore, it did not apply in this case. One determining factor was that other wording in the policy did refer to loss or damage "directly or indirectly caused by pollution or contamination". This case is potentially important because it may mean that pollution/contamination exclusions may not be as broad as insurers had intended or insureds had anticipated, but it may also lead insurers to revisit policy wording to broaden the effect of such exclusions.



The government announces that fines for water companies will be used for environmental improvements. The [press release](#) by the Department for Environment, Food & Rural Affairs (DEFRA) states that money from fines against water companies for pollution incidents will be reinvested into schemes that benefit the environment, rather than going to the treasury. The announcement came just two weeks after the Environment Agency (EA) and Water Services Regulation Authority (Ofwat) announced two separate major investigations into potential noncompliance with permit conditions by water and sewerage companies at wastewater treatment works (We reported on this in [November's edition](#)). Reducing water pollution has become a priority in UK environmental policy, and there has been a series of high-profile convictions of water and sewerage companies in recent years, which the EA reports has secured fines of over £141 million. The Environment Secretary also recently proposed to increase civil penalties for water companies 1,000-fold to a maximum of £250 million (We reported on this in [October's edition](#) and in a recent [FrESH blog post](#)).

Competition and Markets Authority (CMA) to crack down on greenwashing in fast-moving goods sector (FMCG). The CMA [announced](#) plans on 26 January 2023 to examine the accuracy of green claims made in the FMCG sector. This investigation will concern the types of essential items that people use on a daily basis and buy frequently, such as food and drink, cleaning products, toiletries and personal care items. The CMA says it will analyse environmental claims made both online and in stores, targeting "vague and broad eco-statements for example packaging or marketing a product as 'sustainable' or 'better for the environment' with no evidence." This is a significant next step in the regulator addressing greenwashing claims in consumer goods. In response to a rise in claims about the environmental credentials of products and services, CMA published its [Green Claims Code](#) in September 2021. In January 2022, the CMA announced that the fashion industry would be one of the first investigated. The wide scope of this investigation into the FMCG sector will be of interest to a broad range of product brand owners. More information on the investigation of FMCG can be found on the CMA's page [here](#).

New HSE consultation on revisions to the Great Britain Biocidal Products Regulation. Biocidal products are products that control harmful organisms and include insecticides, rodenticides, wood preservatives, anti-fouling coatings on ships, disinfectants and hand sanitisers. They are essential to society to protect human health and infrastructure, but can also present risks to human and animal health and the environment. The HSE has launched a [consultation](#) on proposed revisions to Annexes II and III of the GB Biocidal Products Regulation (GB BPR) (Regulation EU No 528/2012), the regulation surrounding the supply and use of biocidal products. The proposed changes include more emphasis on in vitro studies rather than *in vivo* studies, making new tests for endocrine disruptors part of the legal data requirements and changing requirements in relation to reproductive toxicity and generational studies. The HSE says these proposals would lead to a reduction in animal testing, alignment with current guidance and validated tests of the Organisation for Economic Co-operation and Development (OECD). The consultation will close on 14 March 2023.

DEFRA publishes government response to consultation on proposed ban for single-use plastics. The government has published a response to its consultation "[Single-use plastic: banning the supply of commonly littered single-use plastic items](#)" (and accompanying [press release](#)). Over 53,329 responses were submitted to the consultation, which ran from November 2021 to February 2022. Responses from members of the public and nongovernmental organisations demonstrated overwhelming support for the proposals, with 95% in favour of all the proposed bans. Responses from businesses were more varied, with approximately 20% opposing all bans on single-use plastic, while others supported a ban in principle, but highlighted further issues for consideration. Legislation will be introduced to ban the supply of the following single-use plastics in England from October 2023: plates, trays, bowls, cutlery, balloon sticks expanded and extruded polystyrene food and drinks containers (including cups). A [draft statutory instrument](#) has also been shared. The government has also [updated the response to its call for evidence on other sources of plastic pollution](#).



DEFRA and devolved administrations publish response to deposit return scheme (DRS) consultation for England, Wales and Northern Ireland. On 20 January 2023, the highly anticipated [response to the DRS consultation for England, Wales and Northern Ireland](#) was published. The document sets out the materials in scope and the various actors who will have obligations under the proposed schemes. DRS will capture PET plastic bottles and steel and aluminium cans in England and Northern Ireland, with the addition in Wales of glass bottles. The size of containers ranges from 50 millilitres to three litres. Obligated parties under the proposed schemes are “producers” (brand owners or importers into the UK) and “retailers” who will be required to add the deposit charge on sale and operate return points (unless exempt). There are similar obligated parties under the Scottish DRS, which is at a more progressed stage with legislation already in force and will commence in August 2023. However, there have been significant concerns over the rollout. Scotland’s Court of Session will hold a substantive hearing on the Scottish DRS after a judicial review case was [allowed](#) to proceed. Small retailers, who challenge the legality of the retailer handling fees, are concerned they will be disproportionately affected by the Scottish DRS. Retailers are now able to apply to Zero Waste Scotland for an exemption from the obligation to operate a return point on the basis of either proximity to an alternative return point or environmental health concerns about having to operate a return point themselves. Owners of large spaces, such as transport hubs, are able to apply to be a voluntary return point on behalf of other named retailers. Another concern with DRS rollouts in the UK is that there is very little guidance on how the DRSs for each nation will interact with one another.

Court of Appeal dismisses Friends of the Earth’s application for judicial review for export finance decision. The Court of Appeal has handed down a [judgment](#) dismissing Friends of the Earth’s appeal in a judicial review claim. The environmental charity had challenged the government’s decision to provide export finance in support for a liquefied natural gas project in Mozambique. The project involved the development of offshore deep water gas production facilities connected to an onshore liquefaction facility operated by Total E&P Mozambique Area 1 Limitada and financed by Moz LNG1 Financing Company Limited. Friends of the Earth’s [position](#) was that financing for the Mozambique LNG project was permitted after it was incorrectly judged to be compatible with the Paris Agreement. The two High Court judges were split on the issue of whether the UK government had acted unlawfully in approving the investment, and the case was disallowed, but Friends of the Earth was granted the right to appeal. Although the Court of Appeal ultimately dismissed the application, this is indicative of a larger trend in resorting to litigation in climate change matters (in particular, using the judicial review route).

Net Zero Review highlights “historic opportunities” and economic benefits of green growth. The former Energy Minister Chris Skidmore had published his [Net Zero Review report](#) (also called the “Mission Zero” report), outlining the opportunities offered by net zero. It was commissioned by Liz Truss’s government last year and is based on 1,800 responses from businesses and climate experts. The document outlines 129 recommendations that certain NGOs have [encouraged](#) government to act on. The government’s [press release](#) singles out five recommendations of the Net Zero Review. These include backing business through incentives for investment in decarbonisation, reforming the planning system to put net zero at its heart on national and local levels, and a proposal to develop a cross-sectoral infrastructure strategy by 2025 to support the building and adaptation for new green energy sources such as hydrogen to support the green economy. The Mission Zero report has generally been well received and praised and is a rebuttal to claims that climate policies are harmful to the economy. The London School of Economics published a response to the report, which can be viewed [here](#), and there is further commentary by [Squire Patton Boggs](#).

International Biodiversity COP15 meeting concludes. COP15 is an international biodiversity conference held under the United Nations Convention on Biological Diversity (CBD). COP15 ran from 7 to 19 December 2022 in Canada. One key outcome was the adoption of the Kunming-Montreal Global Biodiversity Framework. This set out global goals to address ongoing biodiversity loss. This [House of Lords briefing](#) is a good summary of the conference outcomes.



Sustainable drainage systems (SUDS) to become mandatory for new developments in England. On 10 January 2023, DEFRA announced plans in a [policy paper](#) to make SUDS mandatory for new developments in England. SUDS help alleviate the pressure on traditional drainage and sewerage systems. New developments, which can cover surfaces that would otherwise help deal with heavy rainfall, can inadvertently add to the risk of surface and sewer floods. SUDS collect surface water runoff and release it slowly, as opposed to it being discharged straight into the public sewer, which reduces the impact of flooding and contamination. Regulations for the creation of SUDS at new developments are expected in 2024. The government's [press release](#) accompanying the SUDS policy paper announced that a public consultation later in 2023 will take place to collect stakeholder opinions on the impact assessment, national standards and statutory instruments. This will certainly be of interest of developers, and we will continue to report on this issue and any consultation document.

Environment Act 2021: Government publishes new long-term environmental targets. In December 2022 and, after some delay, attributed to high levels of engagement, the government's [response to its consultation](#) on long-term targets under the Environment Act 2021 was published and a [written statement](#) made in the House of Lords. The targets span various areas, such as biodiversity on land and at sea, targets for resource efficiency and waste, for water quality and availability and air quality. Many respondents to the consultation called for the government to show greater ambition than the proposals set out in the consultation document. This was the case, for example, for the Population Exposure Reduction target for reduction in PM2.5 population exposure of 35% compared to 2018, to be achieved by 2040). In response to the consultation response, the Office for Environmental Protection [stated](#) it would publish a report on the government's progress on the environment. In the meantime, some environmental groups are [concerned](#) by the targets the government is proposing to take forward, which they consider to counter public opinion notably on river pollution and wildlife recovery. The targets that government is taking forward from the consultation will be set out in draft statutory instruments and will go before Parliament for approval.

EU

The long awaited proposal for Packaging and Packaging Waste Regulation (PPWR) was finally tabled by the EU Commission on 30 November 2022. This will replace the existing directive with a new regulation, directly applicable in all of the EU member states. The PPWR will introduce an array of new rules with regard to packaging recyclability, reusability, uptake of recycled content and size. The proposals are explained in [our separate briefing note](#). Any comments on the proposal can be submitted to the EU Commission until 29 March through a [dedicated website](#). Apart from being open to the public feedback, the initiative is now undergoing scrutiny of co-legislators: the European Parliament and the Council. Legislative works on the proposal are expected to last until May 2024.

Consultations issued on first products to be covered by the proposed Ecodesign for Sustainable Products Regulation ('ESPR'). ESPR was tabled in March 2022, with the objective of reducing the environmental impacts of products across their life cycles. The ESPR builds on the [Ecodesign Directive](#), but with the intention of regulating a broader range of physical products. Even though the ESPR is still a proposal, public consultations on the [first list of new group of products to be covered by ecodesign requirements](#) were opened by the EU Commission on 29 January and will last until 25 April. The proposed list identifies end-use products (textiles and footwear, furniture, ceramic products, tyres, detergents, bed mattresses, lubricants, paints and varnishes, cosmetic products, toys, fishing nets and gears, and absorbent hygiene products) and intermediary products (iron and steel, non-ferrous metals, aluminium, chemicals, plastic and polymers, paper, pulp paper and boards and glass). Following this first online consultation, the Commission will run targeted consultation exercises, tentatively planned for second quarter of 2023.



Proposed new waste shipment regulation progresses. The European Parliament (EP) has [adopted its negotiating position](#) on the proposed new regulation on cross-border waste shipments. The proposal would include tighter controls, including export bans for wastes destined for disposal within the EU and EU exports of hazardous waste to non-OECD countries. Exports of nonhazardous waste to non-OECD countries would also need the consent of those countries and evidence that the waste can be treated sustainably. The EP also wants to ban the export of plastic waste to non-OECD countries and to phase out its export to OECD countries.

The European Chemicals Agency (ECHA) adds nine chemicals to the candidate list of substances on very high concern. The nine substances are all listed due to their hazardous properties. Examples of their uses are flame retardants, paints and coatings, inks and toners, coating products, plasticisers and the manufacture of pulp and paper. The substances are listed [here](#), and include melamine and PFHpA and its salts, isobutylparaben and TBPH. By being placed on this list, these substances will be reviewed for the purposes of future authorisation and/or restriction, so businesses that use these substances will need to plan for this.

Denmark, Germany, the Netherlands, Norway and Sweden have submitted their PFAS restriction proposal. Their intention to propose a wide ranging REACH restriction for per- and polyfluoroalkyl substances (PFASs) has been public for some time, but the formal proposal has now been submitted to ECHA, according to its recent [press release](#).

ECHA will publish the detailed proposal on 7 February 2023, and the national authorities will host a hybrid media event in Brussels. Given the breadth and complexity of the proposal, ECHA estimates that the risk assessment committees will need longer than usual to finalise their opinions. We will report on this further next month.

Progress made on sustainability reporting and due diligence proposals. In a raft of developments in December:

The corporate sustainability reporting directive was finalised and [published](#), extending the information that companies will need to report and the categories of companies who are required to report.

- A provisional political agreement was reached on the [proposed regulation](#) on certain commodities and products associated with deforestation and forest degradation. This will make it obligatory for companies to verify and issue a due diligence statement that goods placed on the EU market have not led to deforestation and forest degradation. Products originally covered were cattle, cocoa, coffee, palm-oil, soya and wood and products containing/derived from these (such as leather, chocolate and furniture), but the EP has successfully added rubber, charcoal, printed paper products and a number of palm oil derivatives to the list.
- The Council [adopted its negotiating position](#) ("general approach") on the corporate sustainability due diligence directive. This directive will require very large companies (EU, but also non-EU if they have substantial EU operations) to assess actual and potential adverse impacts on human rights and the environment of their own operations, those of their subsidiaries and those of their supply chains. It also requires companies to adopt a plan ensuring their business model and strategy are compatible with the Paris Agreement.

New hazard classes under CLP Regulation. On 19 December 2022, the European Commission adopted its [Delegated Act introducing new hazard classes and their criteria](#) to the [CLP Regulation](#). The new hazard classes will include endocrine disruptors; persistent, bioaccumulative and toxic (PBT) and very persistent, very bioaccumulative (vPvB) substances and mixtures, persistent, mobile and toxic (PMT) and very persistent, very mobile (vPvM) substances or mixtures. In principle, chemical suppliers will have to reclassify and comply with the new labelling requirement with regard to their substances within 24 months and mixtures within 36 months after the entry into force of the delegated act. The proposal is now being discussed in the Council of the European Union and the European Parliament. The two institutions are given 2 months "scrutiny period" (extendable by two more months), during which they can raise an objection to adoption of the delegated act.



Revision of CLP Regulation. On 19 December 2022, the European Commission published its [proposal for revision of the CLP Regulation](#). The initiative is aiming at ensuring that the rules on chemical hazard classification and communication are applied to online sales and imported articles, improving of hazard communication by making labels more accessible and understandable, and ensuring that all hazardous chemicals are classified adequately and uniformly throughout the EU. After adoption by the European Commission, the European Parliament and the Council of the European Union started legislative work on the initiative. In the upcoming months, the co-legislators will be working to deliver their positions and will then proceed to informal negotiations to reach common agreement. The proposal is also open for public feedback until 23 March 2023.

Contacts



Rob Elvin

Partner, Manchester
T +44 161 830 5257
E rob.elvin@squirepb.com



Nicola A. Smith

Partner, Birmingham
T +44 121 222 3230
E nicola.smith@squirepb.com



David Gordon

Partner, Birmingham
T +44 121 222 3204
E dave.gordon@squirepb.com



Anita Lloyd

Director, Birmingham
T +44 121 222 3504
E anita.lloyd@squirepb.com



Nina Kusnierkiewicz

Associate, Brussels
T +32 2 627 1102
E nina.kusnierkiewicz@squirepb.com



Gary Lewis

Director, Manchester
T +44 161 830 5373
E gary.lewis@squirepb.com

