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# frESH Law Horizons

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## UK

### **[Additional Building Safety Act guidance – Criteria for being a higher-risk building during the occupation phase of the new higher-risk regime.](#)**

On 21 June, the Department for Levelling Up, Housing and Communities published guidance on the legal criteria for determining whether a building is considered a higher-risk building under the Building Safety Act 2022 and the Higher-Risk Buildings (Descriptions and Supplementary Provisions) Regulations 2023. It relates to the definition of higher-risk buildings during the occupation phase of the higher-risk regime only.

**[Protect duty – Draft standard terrorism evaluation and guidance.](#)** Following the publication of the [Terrorism \(Protection of Premises\) Draft Bill](#) in May, the Home Office has now published a [draft standard terrorism evaluation template](#) and [associated guidance](#) to help persons responsible for relevant premises to understand the intended format and content in support of the bill scrutiny process. It explains how to evaluate the threat in the context of your premises, who may need information or training and how to deliver this, and who should do what in an attack.

**[Firm fined £50,000 following outbreak of legionnaires' disease.](#)** A plastics manufacturing company was [investigated by the Health and Safety Executive \(HSE\) and fined £50,000](#) after members of the public became infected with legionnaires' disease. The HSE found that the water-cooling towers at the company were in an extremely poor condition, which allowed legionella bacteria to grow in the water-cooling towers and pipes, exposing employees and members of the public to risks of significant ill health. The company pleaded guilty to breaching Section 2(1) and 3(1) of the Health and Safety at Work Act 1974. Exposure to legionella can cause death or serious illness where water-cooling systems are not managed effectively, and the HSE emphasised the importance of proactive management of the risk from legionella bacteria to be taken seriously.

**[Company fined £200,000 as worker crushed by 700kg crate.](#)** A glass distribution and installation company was [fined £200,000](#) due to an employee sustaining serious injuries after being crushed by a crate. The HSE investigation found the firm's system of work used to move crates in the warehouse was hazardous, as, when a crate was balanced on the skates, it became unstable, increasing the risk of the load tipping. In addition to an inadequate work system to move the crates, the company also had no suitable risk assessment despite a previous similar incident. This led to the company pleading guilty to breaching Section 2 (1) of the Health and Safety at Work etc. Act 1974. The HSE concluded that if the warehouse had been less congested, a more suitable method of moving the crates could have been used, such as a proprietary pallet handling truck.

**[HSE guidance on working in hot weather.](#)** The HSE has issued [guidance](#) for employers regarding working in hot weather and has suggested measures to help employees adapt to the UK's changing climate, such as placing workstations away from direct sunlight and heat sources, for example. This was provided in response to the UK Health Security Agency and the Met Office issuing a yellow heat-health alert earlier in June, and HSE is seeking to prompt employers to take action to protect those working both inside and outside in extreme heat. Although there is no legal maximum temperature for workplaces, the HSE encourages employers to assess and manage the risks to the health and safety of their workers.





**The UK Food Standards Agency (FSA) expected to update “may contain” labelling guidance – “May contain nuts” is to be clearer.** To assist operators with ensuring precautionary allergen labelling (PAL) is used appropriately, sector guidance is available; and, in addition, the UK’s FSA has issued allergen labelling technical guidance. In March, the FSA opened a [consultation](#) on updating this guidance. Following the consultation closing in late May, we expect publication of the updated guidance later this summer. The consultation invited feedback on two main changes: (i) standards for applying PAL; and (ii) best practice guidance that “No Gluten Containing Ingredients” (NGCI) statements should not be used – both in terms of their scope and impact. The proposed standards for applying PAL include requirements for PAL statements only to be used following a thorough risk assessment; and for PAL statements to specify which of the 14 regulated allergens they refer to. The particular example provided relates to the commonly used statement “May contain nuts”. Peanuts and tree nuts are separate allergens in the list of 14 regulated allergens and some consumers may be allergic to one but not the other, so if the technical guidance is updated in this respect and operators follow the updated guidance, they would instead use PAL stating that the product “May contain peanuts and tree nuts” rather than the more generic statement. The proposed updates will also include a requirement that PAL should not be used in conjunction with a free-from statement for the same allergen. For example, “May contain milk” should not be used in combination with “Dairy free”.

**The legal implications of food safety culture – Presentation at the Food and Drink Federation’s (FDF) Food Safety Networking event.** We were pleased to sponsor the FDF’s recent [Food Safety Networking](#) event, and present on the legal implications of food safety culture. We discussed that, in the UK, despite the requirement for “food safety culture” not being embedded in legislation, there are legal implications, including in relation to the risk of non-compliance with legal requirements (more likely where the symptoms of a poor food safety culture mean routine procedural violations of food safety management systems and management placing production or cost above safety); the implications of that on the safety of food produced, and associated offences; the potential impact on risk-based inspections, especially in light of the proposed new food hygiene delivery model (as summarised above); the availability of a due diligence defence; the likely impact on the “public interest” test in enforcement decision-making; the potential for director liability; and relevance for sentencing guidelines (including in relation to culpability assessments and mitigating and aggravating factors). Also speaking at the event were Robin May, chief scientist for the FSA; Bertrand Emond, culture excellence lead for Campden BRI; and Zoë Shaw-Mason, group quality manager from Hilton Foods. The event was chaired by Kate Halliwell, chief scientific officer for FDF; and introduced by Alex Turtle, head of regulatory affairs at FDF.

**Restaurant ordered to close for food hygiene failings.** Local press have [reported](#) on a restaurant in Chelmsford being ordered to close by the magistrates’ court following a council investigation. This is a reminder of the potential implications of failures to comply with hygiene requirements and, in particular, the consequences of ignoring a hygiene improvement notice, an enforcement mechanism available to competent authorities, to order action be taken with a specific period. Non-compliance with such a notice is an offence. In addition to the issue of a prohibition notice (requiring closure) the business order was fined and ordered to pay the costs of the prosecution.



**Retained EU Law Bill finalised without any environmental non-regression clause.** While the Bill as a whole has been significantly watered down from the original proposed approach of revoking all EU derived law that was not specifically saved, the House of Lords had continued to seek amendments to ensure that there would be no lowering of environmental standards. The government consistently refused to accept any such provisions, despite multiple attempts made by the Lords, and various forms of wording proposed. The bill is now in its final “rubber stamping” stages and [received royal assent](#) on 29 June. In its final form, there is no sunset date for EU laws generally, but rather an exhaustive list of around 600 specific (largely redundant) laws that will be revoked at the end of 2023 if not expressly saved. However, we can still expect a rolling review of EU-derived laws to continue in the various government departments, and other EU-derived laws to be revoked on a more targeted basis, using other powers introduced by the bill.

**UK registration, evaluation, authorisation and restriction of chemicals (UK REACH) update – Rolling Action Plan, tattoo inks and extension to transitional registration deadlines.** June began with the publication of the [HSE’s Rolling Action Plan 2023-2025](#) (RAP) for the evaluation of certain substances under the UK REACH regime. The RAP confirmed that, in 2024-25, the HSE will focus on poly- and perfluoroalkyl substances (PFAS) and consider recommendations from broader scoping activities, regulatory management options analyses (RMOAs) and the Environment Agency’s (EA) updated report on flame retardants (when published). Also this month, the HSE made its [first recommendation](#) for a substance restriction as regulator under UK REACH, in an opinion concerning hazardous substances in ink used for tattooing and permanent makeup (PMU) in Great Britain. Finally, a new statutory instrument (SI) was made to give businesses an additional three years to submit technical information on the hazards and risks of their substances to the HSE. The [REACH \(Amendment\) Regulations 2023](#), which will come into force on 19 July 2023, also extend the timelines for the HSE to complete compliance checks to ensure that the information submitted by industry is of sufficient quality. This is the first instance of UK REACH being amended by the powers granted in Schedule 21 of the Environment Act 2021 (see [explanatory memorandum](#) published alongside the SI). The UK government is in the process of developing an alternative transitional registration model. In the run up to passing the SI, there was a wider [discussion in the House of Lords](#) of the challenges facing the chemicals industry.

**Further disruption to the planned Scottish deposit return scheme, and announcements about the Welsh scheme.** Following months of turmoil and uncertainty around the rollout of the Scottish Deposit Return Scheme (DRS), the scheme administrator was [placed into administration](#) on 20 June 2023. Circularity Scotland Ltd was set up as a not-for-profit to operate the DRS and provide information to stakeholders in the run-up to the scheme beginning. However, following the Scottish government’s announcement that the Scottish DRS would be delayed until October 2025 at the earliest, major producer funders [withdrew their support](#). Alternative funding negotiations were unsuccessful, resulting in the appointment of insolvency practitioners. In a recent [policy statement](#), the Westminster government blocked aspects of the Scottish DRS under the Internal Market Act, which was introduced to regulate the internal market of the UK nations following Brexit. The UK government confirmed that the Scottish DRS could progress but without including glass. This is consistent with current plans for the DRS for England. The decision to grant only a temporary exclusion and to not allow glass in the Scottish DRS’ ambit has been heavily criticised by commentators on constitutional and environmental policy grounds. Meanwhile, the Welsh Government has [restated](#) its commitment to including glass in its own national DRS, despite Westminster’s stance. However, there have been [recent calls](#) from retailers in the drinks industry for the Welsh scheme to align with the rest of the UK, who are concerned about Wales being the only outlier, which could create confusion and lead to higher industry emissions.





**Company fined half a million pounds for fertiliser leak.** OMEX Agriculture Ltd has pleaded guilty in an EA prosecution and been [ordered](#) to pay £510,190. This followed failure of an overground pipe caused a leak of liquid fertiliser into the river Witham, resulting in 135,000 fish dying. The incident was classed as a Category 1, the EA's most severe rating to grade pollution events. The pollution destroyed all invertebrates in the river's tributaries for more than 23km downstream of the site, and the court heard how it could take several years for the fisheries to recover. The company is a manufacturer of de-icer products and liquid chemical fertiliser used in the agricultural industry. An independent investigation uncovered that the company had no routine maintenance of electrical systems and that faulty pipework had separated at the leaking elbow joint. The review found that, had the pipe been checked two decades ago when initially installed, it would have been identified as faulty. However, overground pipework was only checked visually and there were no records of those checks. The judge commented that the incident "was avoidable had proper checks been made", that "checks were not clear or well documented" and that the incident was foreseeable. The case serves as a reminder to carry out routine checks of equipment and, crucially, to ensure these are well documented.

**Greenwashing UK update – Advertising Standards Agency (ASA) publishes guidance on environmental claims and social responsibility.**

The ASA's Committee of Advertising Practice and Broadcast Committee of Advertising Practice have released [updated guidance](#) on misleading environmental and social responsibility claims in advertising. In an accompanying [press release](#), the ASA said that the new Section 3.1, titled "Claims about initiatives designed to reduce environmental impact", draws on the principles established by recent ASA rulings and the principles from the Competition and Markets Authority's [Making environmental claims on goods and services](#) guidance, to which marketers should have regard when making claims about initiatives designed to reduce environmental impact. New points to note are that absolute environmental claims require a high level of substantiation. Next, if an advert focuses on a net zero initiative, context should be given about how it fits into the business' wider net zero plan. Finally, there is specific guidance for water companies, noting that the ASA is likely to take account of the EA's environmental performance assessment when assessing whether positive claims that omit any reference to low ratings are likely to mislead. This updated guidance follows the publication of two recent ASA cases concerning water companies, where the regulator reached different conclusions. In both the [Anlian Water](#) and [Severn Trent](#) cases, it was alleged that significant information had been omitted from the advert about the companies' history of releasing sewage into the environment. Assessing the first advert, the ASA considered that the overall impression made by voiceover and visuals was that the company made and intended to make a positive overall environmental contribution. While the regulator accepted that the company carried out a number of activities that could have a positive impact on the environment, the advert was deemed misleading for omitting material information about the company's activities that did cause harm to the environment (and therefore contradicted the overall impression of the advert). Conversely, in the second decision, the ASA noted the company's good recent overall environmental performance, and considered this did not contradict the overall impression created by the advert. In this case, the ASA did not consider that that the company's history of releasing sewage into the environment was material information that was needed to prevent viewers from being misled. These cases show that the ASA will take each complaint on a case-by-case basis, and similar factual backgrounds are not a guarantee of the same decision being reached.





**Climate Change Committee (CCC) delivers its latest progress report to UK Parliament.** The CCC's latest report states that policy development continues to be too slow, and its assessment of the Carbon Budget Delivery Plan (CBDP) prompted by last year's High Court judgement has raised new concerns. CCC's confidence in the UK meeting its medium-term targets has decreased in the past year, and while it welcomes the increased transparency embodied in the CBDP, CCC feels that a key opportunity to raise the overall pace of delivery has been missed. CCC's key messages include that there is a lack of urgency, that immediate actions are required in a range of areas, and that expansion of fossil fuel production is not in line with net zero.

**Single-use plastic (SUP) bans in England and Wales.** The Welsh ban on various SUP products (expanded polystyrene (EPS)/extruded polystyrene (XPS)) cups, takeaway containers and lids, cutlery, drink-stirrers, straws, plates, balloon sticks, carrier bags, cotton buds and oxo-degradable plastics) became law on 7 June 2023 in the [Environmental Protection \(Single-use Plastic Products\) \(Wales\) Act 2023](#). The majority of the Act will come into force on dates yet to be determined, but will make it an offence to supply or offer (including free of charge), certain commonly littered and unnecessary disposable SUP products to a consumer in Wales. In England, the legislation remains in draft ([Draft Environmental Protection \(Plastic Plates etc. and Polystyrene Containers etc.\) \(England\) Regulations 2023](#)), covering SUP plates, bowls, trays, cutlery and balloon sticks, and EPS/XPS food and drink containers, and has this month been going through the Secondary Legislation Scrutiny Committee, and we expect a [legislative scrutiny debate to be held on 4 July](#).

**Energy Savings Opportunity Scheme (ESOS) Phase 3 compliance deadline extended by six months.** In the EA's June ESOS newsletter, sent to ESOS participants, the EA announced that the ESOS compliance deadline has just been extended to 5 June 2024. The EA explains that the government still intends to make some changes to Phase 3 requirements, as announced in its [July 2022 response](#) to the ESOS consultation. However, these changes have not yet been put into law, and the IT system for submitting notifications is still under development, and stakeholders had expressed concerns about the timing. The extension is intended to ensure there is reasonable time for participants to meet the new requirements and for assessors to carry out assessments. The qualification date is not changing, and remains as 31 December 2022. The [Telegraph](#) has also reported rumours of a deadline extension for the packaging extended producer responsibility regime, but no government announcements have been made yet.

**Global plastic treaty moves forward.** [First steps have been agreed](#) on a plastics treaty at talks in Paris. Delegates from 180 nations agreed a pathway towards a binding global agreement on tackling plastic pollution. The meeting was also attended by multiple stakeholders. Following an historic UN resolution in early 2022 to develop an international legally binding treaty on plastic pollution with a target date of end of 2024 for completion of negotiations, this was the second of five planned meetings to establish and agree the wording of the new treaty. The agreements included that the first draft of the treaty text will be developed by November this year, when the next round of negotiations are due to take place in Kenya. Further meetings are planned for April 2024 (Canada) and October/November 2024 (Republic of Korea), towards the goal of a final global and legally binding plastics treaty by the end of 2024.



## EU

**Greenwashing EU Update – KLM action in Dutch courts, and calls to EU Commission to investigate European airlines for misleading climate-related claims.** A case is being brought by Dutch climate NGOs (supported by ClientEarth) in the Dutch courts against KLM’s “Fly responsibly” advertising campaign. The District Court of Amsterdam has now granted [permission for the case to proceed](#) (following an admissibility hearing). The claim alleges breach of consumer law standards by creating a false impression that KLM’s flights do not contribute to the climate emergency. It is believed to be the first case of its kind to challenge airline industry environmental claims, and the first use of a recent Dutch class action law by an NGO in relation to a greenwashing claim. KLM has dropped the advertising campaign, but the case will still proceed. Separately, the European Consumer Organisation (BEUC) has [filed a complaint](#) to the European Commission and network of consumer protection authorities about misleading climate-related claims by a group of airlines, alleging that the claims breach EU rules on unfair commercial practices. BEUC call for the entire aviation sector to stop making claims that “give the impression that flying is sustainable”. Examples of misleading practices that BEUC cites in its complaint are claims that paying extra credits can “offset”, “neutralise” or “compensate” the CO2 emissions of a flight, charging consumers more to contribute to the development of sustainable aviation fuels, and claims implying that air travel can be sustainable, responsible or green. The BEUC is also asking authorities to request that airlines reimburse consumers where they were proposed extra fees for greener fares. In addition to coordinated enforcement action, the BEUC has made policy recommendations to tackle misleading green claims (including a specific ban of carbon neutral claims, and for the EU Commission to define high-integrity offsets with robust quality criteria) and on sustainable mobility (i.e. alternatives to plane trips for certain journeys and correct price signals).

**Deforestation Regulation enters into force.** The new EU [Deforestation-Free Regulation](#), came into force on 29 June 2023. It is intended to ensure that certain products that European consumers buy and consume do not contribute to deforestation and forest degradation. The trade press has [reported](#) on the likely impact on costs and administrative burdens on food and drink companies. The new legislation will require supply-chain due diligence linked to the production of palm oil, cattle, soy, coffee, cocoa, timber, and rubber and certain derivatives, such as leather, chocolate and paper, which are defined by reference to specific commodity codes in the regulation. It will involve a benchmarking system, which assigns a level of deforestation risk (low, medium or high) based on the location of production. This risk level determines the level of due diligence required (which can include use of satellite images, supplier visits and digital tracing) and also determines the frequency of required spot checks on suppliers. Until a due diligence report is filed, relevant products will not be able to be placed on the EU market. As well as obligations on “operators” for these products, “traders” who sell on relevant products will also have obligations to keep a record of their suppliers for at least five years, even if they are SME’s, although the obligations for larger traders will be broader and will also include obligations for submitting due diligence statements and liability for compliance.





**New EU General Product Safety Regulation (EU GPSR).** The new EU GPSR entered into force on 12 June 2023. The new EU GPSR will replace the provisions of the General Product Safety Directive 2001/95/ EC, which is the EU legislation that the UK's legislation is based upon. It will apply in the EU from 14 December 2024. As with the GPSD, the new GPSR will apply to products that are not already subject to product-specific regulations. It expands the current regime to cover new technologies and online marketplaces (like Amazon and eBay), with specific product safety obligations for both economic operators and providers of online marketplaces; accident reporting to authorities through the Product Safety Gateway portal (as opposed to the current obligation to notify a risk, but not each individual incident); and specific rules on how to handle product safety recalls, including a mandatory recall notice template, and right to remedy for consumers. As a regulation, the new EU GPSR will apply directly in all EU member states, but it will not apply in the UK because it is being implemented post-Brexit. This will mean that handling a cross-border notification and recall is likely to become even more complex, as the requirements in the EU will likely differ further from those in the UK, at least unless and until the UK regulations are amended to realign the regimes (which is perhaps unlikely, at least in the short term).

**European Commission is consulting on its evaluation of the Waste Electrical and Electronic Equipment (WEEE) Directive.** This follows a call for evidence in October 2022. The evaluation process aims to assess the performance of the directive against its objectives and expectations, and how consistent the directive is with the EU's wider policy objectives, including the European Green Deal and the Circular Economy Action Plan. The consultation seeks feedback on multiple aspects of the regime, including whether the objectives and scope of the Directive are still applicable and sufficient, collection targets, and extended producer responsibility (particularly for online selling). The consultation lasts until 22 September 2023.

**European Parliament adopted a new regulation on batteries and waste batteries.** The new regulation will repeal Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators, and amend the EU Market Surveillance Regulation (2019/1020). Unlike the previous batteries regime, this will now be a directly applicable EU regulation, rather than having to be transposed into member state national law. Key features of the new regulation include a compulsory carbon footprint declaration and label for electric vehicle (EV) and scooter/bike batteries, and rechargeable industrial batteries with a capacity above 2KWh; a due diligence policy for all economic operators, except for small and medium-sized enterprises (SMEs), stricter waste collection targets and minimum levels of recovery of certain materials from waste batteries. The Council is expected to formally adopt the regulation at one of its next meetings, after which it will be published in the Official Journal of the EU and enter into force shortly after.

**Draft Regulation on European Sustainability Reporting Standards (ESRS).** On 9 June, the European Commission [published the draft delegated regulation](#) introducing the initial set of ESRS for the Corporate Sustainability Reporting Directive (CSRD). Specifically, the ESRS define the sustainability information that companies must report. The draft delegated regulation is accompanied by two annexes; Annex I is the complete first set of ESRS and provides comprehensive guidelines for reporting on sustainability aspects, ensuring that companies address environmental, social, and governance (ESG) considerations in their reporting obligations, and Annex II contains a list of acronyms and a glossary to be used when conducting sustainability reporting in accordance with the ESRS. The Commission launched a short [public consultation](#) on the ESRS, lasting until 7 July 2023. It aims to adopt the delegated regulation by July 2023, and have the final delegated regulation in place in autumn 2023. Although this delegated regulation is currently subject to public consultation and has not yet entered into force, it can be assumed that the final version of the standards will not deviate significantly from this version.





**EU Commission proposed a new regulation to regulate ESG rating providers that operate in the EU.** This seeks to address a lack of transparency and consistency in the ESG rating market, which is expected to grow substantially in the coming years. The inefficiencies include a lack of transparency regarding the characteristics of ESG ratings, their methodologies, data sources and how ESG rating providers operate more generally. Currently, the Commission thinks that ESG ratings do not sufficiently enable users, investors and rated entities to take informed decisions, and wants companies to obtain better clarity on the way they are rated. Under these proposals, all ESG rating providers will, in future, need an authorisation from the European Securities and Markets Authority (ESMA). The proposal will, however, not harmonise the methodologies used for the creation of ESG ratings, in order to ensure a variety of approaches and choices in the ESG ratings market.

**Other recent updates/insights published by our team:**

**[Corporate Sustainability Due Diligence Directive \(CSDDD\) Update](#)**

**[Plastic Packaging Tax: Proposed Updates to Recycled Content Definition to Facilitate Chemical Recycling](#)**

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