

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

January 2018



The *Safety & Health Practitioner* (SHP) published a [summary](#) of the top Occupational Health and Safety prosecutions last year. This summary is a useful reminder of some key cases and fines imposed.

The government has published its [UK Anti-Corruption Strategy 2017-22](#), which provides a framework to guide government action to tackle corruption, which includes bribery and corruption, money laundering, law enforcement and guidance for both the public and private sectors, as well as overseas. Potential reforms identified include adding the Serious Fraud Office to the list of organisations that the Director General of the National Crime Agency can directly task to investigate cases of economic crimes; considering findings of calls for evidence that propose extending corporate criminal liability beyond bribery and tax evasion to wider economic crimes; further reforms to the money laundering regime; and the creation of a public register of foreign owners of property in the UK.

In November 2017, the Organisation for Economic Co-Operation and Development published [Anti-Bribery Convention enforcement data for 2016](#). According to the report, there were more than 500 ongoing investigations into foreign bribery in 2016 and at least 125 of the sanctioned individuals were sentenced to prison for foreign bribery. In addition, at least 144 criminal proceedings are ongoing in 12 member states of the Working Group on Bribery.

The Health and Safety Executive (HSE) has [announced](#) it is beginning a programme of unannounced inspections to review health and safety standards in food manufacturing businesses across the UK from 2 January 2018. This is likely to affect manufacturers of biscuits, cakes, pastries and other flour-containing products, in particular.

**Insufficient evidence for gross corporate manslaughter prosecution has been found.** It has been [reported](#) that the Crown Prosecution Service (CPS) found insufficient evidence to support corporate manslaughter charges following the deaths of two men in a steelworks explosion.

The Local Government Association (LGA) has published a [guide for councils on their role on the prevention of modern slavery](#). The [Guidance](#) notes that partnership work between councils and those engaged in detecting and addressing modern slavery, such as the Gangmasters and Labour Abuse Authority, police and crime commissioners, safeguarding boards and fire and rescue services, is critical for councils seeking to develop a coherent strategy. This follows on from the CPS [response](#) to the Modern Slavery Act 2015, which was published in December.

**A fine of £100,000 has been issued for a pest control company and director for unsafe storage of biocidal products and phostoxin.** The HSE [reported](#) that Rodent Service (East Anglia) Limited pleaded guilty to breaching sections 2(1) and 3(1) of the Health and Safety at Work etc. Act 1974, and a director pleaded guilty to an offence of neglect – he was sentenced to six months in prison (suspended for 12 months).

**A recycling company and director were fined £130,000 and £30,000 for repeat waste offences (failure to comply with environmental permit condition and enforcement notice).** [Reports](#) indicate they had previously been prosecuted for failing to store refuse-derived fuel (RDF) properly. This is another example of increasing fines for environmental offences.





**Convenience retailer and construction company fined.** It was found that it was reasonably practicable to close the store during the period of works, as two members of the public injured themselves whilst accessing the store during construction of a ramp. The HSE [reported](#) that the retailer (McColls) was fined £600,000 and the construction company, £40,000. This is a useful reminder of the need to balance health and safety risks with business continuity.

**A Birmingham restaurant was fined £50,000 following a conviction for failing to comply with a food hygiene improvement notice** The press has [reported](#) that concerns raised by Birmingham City Council included serving food on unhygienic wooden boards, which were still in use two months later.

**HSE [reports](#) a significant fine (£1.8 million) for a road building sub-contractor following a road accident.** 8 million) for a road building sub-contractor following a road accident. This followed a guilty plea for breach of section 3(1) of the Health and Safety at Work, etc., Act 1974 at Ipswich Magistrates' Court. This is another large health and safety fine, following the introduction of the Sentencing Guidelines.

The Home Affairs Select Committee has [responded to](#) the Sentencing Council manslaughter consultation ([published](#) in July and closed in October 2017). Its conclusions in relation to gross negligence manslaughter includes concern about the impact of potentially higher sentences for gross negligence manslaughter on prison populations; risk that high-culpability factors proposed will lead to inappropriately long sentences, especially in relation to clinical decisions taken by medical practitioners; and that it would be inappropriate to include "blame wrongly placed on others" as an aggravating factor, without further explanation, to avoid penalising offenders who have sought to defend themselves at trial by reasonably highlighting the role played by others. However, the Sentencing Council is, of course, independent of government and is, therefore, not obliged to take these recommendations into account.

**Successful appeal against fine for a health and safety conviction on the grounds of misapplication of Sentencing Guidelines** (*Whirlpool UK Appliances Ltd v R (Upon the prosecution of Her Majesty's Inspectors of Health and Safety)* [2017] EWCA Crim 2186). The appellant submitted to the Court of Appeal that a judge erred in application of the Sentencing Guidelines, with the result that the sentence imposed was manifestly excessive. Three particular issues were considered: the impact of a death on the approach to the ranges; how to identify and treat a "very large organisation"; and the impact of relatively poor profitability in the context of an organisation with a substantial turnover. The two main criticisms of the judge's approach were (i) the starting point (£1.2 million) was too high by comparison with the starting points and category ranges for large organisations, and (ii) the failure to examine the financial circumstances of the company, which required the court to consider whether the proposed fine based upon turnover was proportionate to the overall means of the offender. The court found that the circumstances of the case were quite unusual because they resulted from an offence of low culpability and low likelihood of harm (although, the fact of death justified a move to the top of the next category range). With levels of fine increasing, it is useful to note how appeals against excessive fines are being determined.

**Revised fixed penalties for environmental offences to come into force April 2018.** The [Environmental Offences \(Fixed Penalties\) \(England\) Regulations 2017](#) mainly come into force on 1 April 2018 and will increase fixed penalty ranges and minimums for certain environmental offences in England, including in relation to: transport of waste and waste duty of care and littering.

**The Select Committee heard evidence on the likely gap in provisions to monitor and control food safety after Brexit.** The policy and scientific development director at the Institute of Food Science and Technology told the [Science and Technology Select Committee](#) that the UK's Food Standards Agency does not currently meet the standards of the European Food Safety Agency. As with a number of other regulations that include an EU-wide regulator, there are many open issues about the capacity of UK bodies to take over those functions after Brexit.





**Health & Safety Bulletin report on a corporate manslaughter case dealing with fines for micro companies.** The article considers why liquidation cannot avert a significant fine for a micro company that cut corners at the expense of safety.

**EU representatives reached a provisional agreement on the [Circular Economy Package](#)** in the early morning of 18 December after 18 hours of talks, in the sixth round of negotiations. The hard-fought compromise comes after lengthy negotiations with the European Parliament since May 2017. It is a key achievement of the outgoing Estonian Council presidency. When adopted, it will amend the waste framework directive; packaging and packaging waste directive; landfill directive; and directives on electrical and electronic waste, end-of-life vehicles; and batteries. Key elements of the agreed text include:

- Clearer definitions of key waste concepts
- New binding targets at the EU level for waste reduction
- Stricter methods and rules to calculate the progress made toward those targets
- Stricter requirements for the separate collection of waste, reinforced implementation of the waste hierarchy through economic instruments and additional measures for member states to prevent waste generation
- Minimum requirements for extended producer responsibility schemes; product manufacturers will be required to pay a financial contribution calculated on the basis of the waste treatment costs

The proposal needs to be formally approved, and will then be then submitted to the European Parliament and European Council for final adoption. The evolution of this far-reaching policy package will be of particular interest to manufacturers and those in the producer responsibility and waste sectors.

**After some delay, the EU Commission has now adopted a [Plastics Strategy](#).** This sets out plans to increase the recyclability of packaging and calls for increased recycling facilities and a standardised system for waste collection and sorting. The proposals are more far-reaching than those set out in the UK government's 25-year plan. One key aspect of the strategy is for all plastic packaging on the EU market to be made recyclable by 2030, compared with the UK strategy of eliminating plastic waste in the UK by 2042. This strategy document was originally expected to be accompanied by legislative proposals, but instead has been issued as a Communication only, with high-level goals and objectives.

**EU Emissions Trading Scheme (ETS) Brexit safeguard measures have been approved.**

The European Commission had proposed a [draft regulation](#) amending the ETS Registry Regulation (389/2013) to prevent operators in the ETS from using allowances that are issued from 1 January 2018 onward by the UK, and that UK operators would no longer have to surrender when EU law no longer applies to them. Member state representatives approved the proposal on 30 November 2017 and it has now been submitted to the European Parliament and European Council for a three-month scrutiny period. If neither institution raises a formal objection, the European Commission will adopt the measure. Also, on 5 December 2017, the UK government adopted a statutory instrument that brings forward the ETS compliance deadline for 2018 emissions of UK operators to 15 March 2019. These changes are essential so Brexit does not cause problems in the EU ETS market.

**The Chinese import ban on recyclates**, which came into effect on 1 January 2018, is expected to have a major impact on the UK waste sector and how it deals with the millions of tonnes of plastic and paper waste that had previously been exported to China for recycling. This has been [debated in the House of Lords](#), and is the subject of a new [Environmental Audit Committee inquiry](#). Members of the House of Lords expressed concern on how the UK waste sector will be able to adjust and pressed DEFRA to respond to the EU Circular Economy Package.



**The UK government has published its long-awaited [25 year environment plan](#)** covering the six main themes of land management, recovering nature, connecting people to the environment, resource efficiency, reduction of pollution and waste oceans, and the global environment. The most talked-about aspect so far is the goal to eradicate “avoidable” plastic waste by 2042. Other key points are:

- A consultation early this year on the independent body to champion and uphold environmental standards after Brexit
- A new overarching strategy on safe use and management of chemicals, which will set the framework for chemical regulation post-Brexit, as well as a new waste resources strategy promised later in 2018
- Proposals to embed a “net environmental gain” principle
- A move to paying farmers “public money for public goods”
- Review of national parks and areas of outstanding natural beauty
- Creation of a Green Business Council
- A clean air pledge to halve the effects of air pollution on health by 2030
- A new, more coordinated strategy for nature
- Maintaining neonicotinoid restrictions post-Brexit

**The UK government has recently published draft [regulations](#)** amending the Environmental Permitting Regulations **to implement the Medium Combustion Plants Directive** (for combustion plants with a rated thermal input equal to or greater than 1 MW and less than 50 MW) **and establishing new NOx emission limits for generators** or groups of generators (between 1 MW and 50 MW). The Department for Environment, Food & Rural Affairs has promised that guidance will be issued shortly, but in the meantime, a Q&A document has been provided to stakeholders and can be accessed through the Institute of Air Quality Management’s [website](#). This new legislation will impact UK facilities with combustion plants or generators of the sizes noted above.

**The European Chemicals Agency (ECHA) has [announced](#) seven further chemicals as substances of very high concern (SVHC) and an update to the entry for Bisphenol-A.** This is the list of substances that are considered for authorisation under REACH. Polycyclic aromatic hydrocarbons chrysene and benz[a]anthracene have been declared SVHCs for being carcinogenic and persistent, bioaccumulative and toxic. Three cadmium compounds were included for being carcinogenic, mutagenic and causing damage to the kidneys and bone after prolonged exposure. Flame retardant [Dechlorane Plus](#) has been declared an SVHC for being very persistent and very bioaccumulative. Finally, “reaction products of 1,3,4-thiadiazolidine-2,5-dithione, formaldehyde and 4-heptylphenol, branched and linear (RP-HP) [with  $\geq 0.1\%$  w/w 4-heptylphenol, branched and linear]” was added for containing another SVHC with endocrine disrupting properties. Bisphenol-A, already a SVHC for of being [toxic to reproduction](#), has now also been classed as an endocrine disruptor. Any companies manufacturing or using these chemicals, including in products (articles) should be aware of the potential for them to be phased-out in the future, and look for substitutions where possible.

**The Court of Appeal has [dismissed](#) anti-fracking campaigners’ claim** that the government’s decision to allow **fracking at the Cuadrilla Preston New Road site** was unlawful. On the same day, Cuadrilla [announced](#) that it had found a “very sizeable quantity” of natural gas in Lancashire’s Bowland shale.

On 9 January 2018, **INEOS Shale [launched](#) a judicial review against the Scottish government’s “[effective ban](#)” on fracking**, which it believes was a “misuse of ministerial power” and has “serious concerns” about its legitimacy.



**The Environment Agency (EA) has [consulted](#) on a revised Enforcement and Sanctions policy.**

Amongst other things, the EA proposes combining and shortening its two current enforcement and sanctions policy documents into a single revised policy. It also reveals that a [natural capital](#) natural capital calculator has been developed by the EA to improve enforcement undertakings from water pollution incidents. Once adopted, this policy will inform the EA's approach to enforcement for new incidents.

The **ban on the manufacture of products containing microbeads** came into force in England on 9 January 2018, with the ban on sale to apply from 30 June. [Wales issued a consultation](#) on the detail of its ban in October, to take effect from 30 June and Scotland's equivalent ban will apply from 9 July 2018. The EU has recently asked [ECHA to consider restrictions](#) on microplastics, as well as oxo-plastics (which are designed to degrade into particles and have uses as agricultural films, rubbish bags and food packaging). Companies at all stages of the supply chain of products containing microbeads are likely to be affected by these bans and proposals.

**The "latte levy".** The House of Commons' Environmental Audit Committee has called for a 25p recycling levy to be added to every disposable cup sold in coffee shops in the UK in an effort to achieve 100% recycling of coffee cups by 2023. This is the main recommendation of its report [Disposable packaging: coffee cups](#), published on 5 January.

**The UK government's [Water Abstraction Plan 2017](#) has been published.** Key aspects that will affect existing water abstractors are plans to:

- Regulate all significant abstractions that have been exempt historically (approximately 5,000) to make sure they also play a part in protecting the water environment
- Review more than half of time limited licences by 2021 (2,300 in total), adjusting them as necessary to make sure they do not allow environmental damage now or in the future
- Adjust all permanent licences shown to be seriously damaging; this includes completing the Restoring Sustainable Abstraction programme, a list of 150 potentially damaging licences, by March 2020

Any companies that currently use abstracted water should check whether their licences are among those to be reviewed.

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