

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

May 2018



Annual Environmental, Safety and Health Conference to be held in London on 6 June 2018. The agenda, speaker profiles and free registration are available on our [website](#) – there is still time to register.

Manufacturer is fined £1.6 million following two (unconnected) offences within a year. The Health & Safety Executive (HSE) has [reported](#) that between October 2015 and June 2015, five people (including a local resident) suffered from legionnaire's disease caused by a failure to effectively manage water cooler systems in the factory. In addition, in October 2015, an employee was injured in an explosion (an investigation by the HSE found that adequate measures were not in place to protect against the risk of explosions). There had been previous explosions at the site. The significant fine imposed, despite the guilty plea of the defendant, is a stark reminder of rising penalties since the introduction of the Sentencing Guidelines.

Failure to brief workers on risk assessment led to a fall and a £900,000 fine. [Local](#) and [trade](#) press reported on the prosecution of BAM Nuttall after an industrial painter fell through the ceiling of a passenger waiting room at East Croydon railway station. This case is one of a number of recent HSE reports of prosecutions following falls from height (including this month the [report](#) of a scaffolding company fined after a worker fell through a fragile roof light). The HSE has an area on its [website](#) dedicated to work at height, including industry-specific guidance and "key messages". One of the key messages is to take precautions when working on or near fragile surfaces, which seems to have been the key factor in the scaffolding case.

European Commission issues a [proposal for a Directive](#) to protect EU whistleblowers.

The proposal would protect employees and others (including freelancers, consultants, suppliers and job applicants) and exempt them from liability for disclosure. It applies to reports of breaches of EU legislation in a wide range of areas, including product and transport safety, and consumer protection; environmental protection and nuclear safety; and food and feed safety, animal health and welfare, and public health. At this stage, this is a proposal only; the commission has invited feedback on the proposal via its [Have your say](#) website.

CCTV became mandatory in all abattoirs in England on 4 May 2018. All slaughterhouses will be required to comply in full by 5 November 2018. DEFRA has published [guidance](#) on compliance for operators. The [regulations](#) include a number of offences, such as failing to install and operate CCTV and failing to retain information and images, which can be committed by a corporate body, as well as an individual. Operators should, therefore, ensure measures are implemented as soon as possible and certainly by the deadline, to comply.

European Chemicals Agency (ECHA) [reports](#) internet chemical sales lack hazard warnings. ECHA found that 82% of inspected internet advertisements for hazardous chemicals were found to be non-compliant with the Classification, Labelling and Packaging (CLP) Regulation.



Construction company is fined £200,000 for a health and safety breach. The HSE has [reported](#) on the conviction and fine. Its investigation found that it was common practice, on this and other sites, for dumpers to access spoil heaps with no barriers to prevent over-running. To compound the situation, an excavator had removed some of this particular spoil heap, creating a sheer face.

Minimum unit price for alcohol of 50 pence came into force on 1 May 2018 in Scotland.

The Scottish government has provided [information for retailers](#), including details on how to calculate minimum prices. Minimum unit pricing will be enforced by Licensing Standards Officers (LSOs), who are employed by local councils. This will almost certainly reignite discussions around minimum pricing in Wales and England.

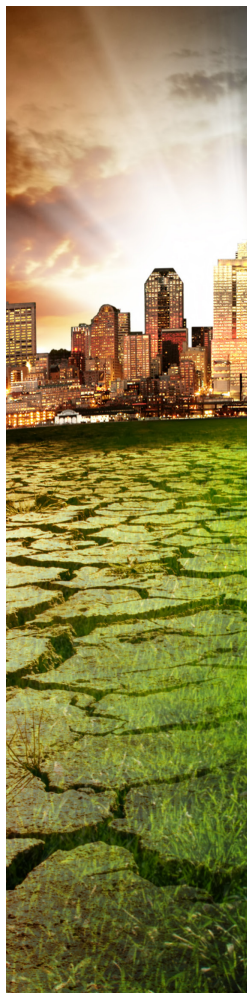
Justice Select Committee hear of incompatibility between Sentencing Council guideline on credit for guilty plea and duty of defence representatives to ensure that clients are fully advised on all evidence before a plea decision is arrived at. Practitioners were questioned on 1 May 2018 and details of the inquiry and evidence are available on Parliament's [website](#).

Pre-cast concrete firm is fined £660,000 after a worker is fatally injured. According to [trade press reports](#), the HSE investigation found that the company had not implemented procedures to ensure the machinery was isolated before starting maintenance work (there was a spare key that meant access to the machinery was possible without turning off and isolating the machine). The HSE found that there was insufficient supervision over the isolation of machines – procedures for safe maintenance work were not consistently understood or applied, there were deficiencies in instruction and training and it was common for people to access dangerous areas while machines were still running. The significant fine imposed in this case, following a guilty plea by the defendant, demonstrates the importance of ensuring that policies are implemented in practice.

European Consumer Organisation (BEUC) publishes a [checklist](#) for securing positive outcomes for consumers after the UK's exit from the EU, including regulatory cooperation. The report calls for EU and UK authorities to take specific steps to protect consumer rights after Brexit. The checklist stresses the importance of maintaining cooperation between regulators (including the need to continue and develop cooperation in the context of the rapid alert system RAPEX (non-food), the rapid alert system RASFF (food and feed), the Consumer Protection Co-operation (CPC) network and dialogues on issues such as antimicrobial resistance and sustainable consumption). However, it should be remembered that both RAPEX and RASFF already have non-EU members (including Iceland, Liechtenstein and Norway) and it is likely that the UK authorities will want to continue to be involved to maintain a high level of consumer protection.

Code of conduct for private prosecutions is to be published by the Private Prosecutor's Association (PPA). A private prosecution is a prosecution started by a private individual or entity who/which is not acting on behalf of the police or other prosecuting authority – a number of organisations regularly prosecute cases using these rights, such as animal welfare groups. *The Law Society Gazette* has [reported](#) that the announcement was at the launch of the PPA, alongside speculation that private prosecutions are likely to increase in future, as law enforcement agencies and the police continue to face budget restraints.

£30,000 donation to charity under an enforcement undertaking for breach of regulations that govern environmental permitting. The Environment Agency has [reported](#) on the undertaking following a pollution incident in November 2015 caused by the negligent storage of potatoes. The case demonstrates that enforcement undertakings may be used as an alternative to prosecution, particularly where (as in this case) the harm is localised, the substantive actions taken by the company/companies have taken substantive action to prevent further instances of pollution and where there is a good compliance record/lack of previous convictions. There is also a [report](#) this month of an undertaking by a company to pay £37,000 to charity for failing in its duty to recover and recycle packaging.



Property developer is [fined £20,000 for destroying a bat habitat](#). Bats are a European protected species and it is an offence to damage them or their habitats without a licence from Natural England. Knightspur Homes pleaded guilty to three counts of damaging or destroying bat habitats following an investigation by the Kent Police Rural Task Force in response to allegations that bat roosts and resting places were unlawfully lost in 2016 during demolition for a new housing development.

Landlord is found guilty of knowingly permitting a continuing “waste operation”. The recent case of [Stone v. Environment Agency](#) upheld a decision of the magistrates’ court that a landlord was guilty of knowingly permitting a continuing “waste operation” at premises that had been abandoned by its tenant, leaving waste mattresses on the site. A positive act was not required for the offence of “knowingly permitting”, and it was enough for the prosecution to show that the defendant knew about the waste operation and did nothing to prevent it. This case is important for all landlords to note in relation to potential liability for acts of their tenants.

House of Lords made significant [amendments](#) to the environmental aspects of the Withdrawal Bill. A series of amendments to the Withdrawal Bill directly relate to environmental protection standards after Brexit, including removal of the Henry VIII powers to amend EU environmental standards, requiring EU environmental principles to be enshrined in UK law through primary legislation, and allowing the UK to continue to participate in EU agencies after Brexit. A further amendment requires a clear legislative framework and timescale for the creation of a green “watchdog” within six months of the bill receiving Royal Assent. To be implemented, these amendments will have to be accepted when the bill is returned to the Commons; otherwise, it will be referred back to the Lords again in the process often referred to as “ping-pong”.

Court rules that landfill tax applies to the “fluff” used to make landfill cells. In [Devon Waste Management Ltd \(and others\) v. Revenue and Customs Commissioners](#), a number of waste companies appealed to the court against decisions that landfill tax should be charged on this fluff, but the appeals were dismissed on the basis that the deposits were made with the intention of discarding the material as waste by landfilling, so the tax was chargeable. Similarly, in [Biffa Waste Services Ltd v. Revenue and Customs Commissioners](#), the same principle was applied to “engineered into the void permanently” (EVP) material. If the landfill companies now have to pay landfill tax on these materials, it could lead to increased gate fees for users of landfill sites.

In a recent waste services and VAT case, the latest in a series of decisions in this case, the claimant, known as Max Recycle, a waste collection services company, complained that it faced unfair competition from local authorities that offered similar services but did not charge VAT. The court considered that the local authority was operating as a waste collection authority under the Environmental Protection Act 1990 (not on a commercial basis) so this was a “special legal regime” that entitled it not to charge VAT, even if the services were provided in a way that was indistinguishable from those provided by a commercial operator, although this was very much based on facts of the particular case, implying that waste collection activities of a local authority would not necessarily always receive this VAT treatment. This case may be of interest to anyone competing for business with services provided by local authorities.

Three former employees of a chemicals company have won a [landmark compensation case](#) after developing a sensitivity to platinum salts, which led to their dismissal on medical grounds, despite showing no symptoms. This case indicates that employees may be entitled to claim compensation if their employer’s negligence has caused a physiological change in the body, even if it is symptomless, and that change resulted in the loss of their job. The court held that the employer had failed to ensure its factories were properly cleaned and, as a result, its employees were exposed to platinum salts, which led them to develop “platinum salt sensitisation”. The Supreme Court’s decision overturns previous rulings made by the High Court and the Court of Appeal that the men could not claim compensation against their employer as the sensitivity had not developed into an allergic reaction and was, therefore, not “actionable”. This case will be of interest to any employers who use products that can lead to users developing sensitivities.





A new Shale Environmental Regulator will be established in England, together with a [range of new measures to streamline fracking applications](#). There will be a Shale Environmental Regulator and a new Planning Brokerage Service that will focus exclusively on the planning process and will have no role in the consideration or determination of planning applications. The government will launch a new £1.6 million shale support fund over the next two years to build capacity and capability in local authorities dealing with shale applications.

CRC participants have been reminded in a “community email” from the Environment Agency that the scheme has not yet formally closed and that the obligation to register for Phase 3 of the scheme by the end of January 2019 still stands. While the government has announced it will close the CRC scheme, the legislation has not yet been made. The Environment Agency is advising participants to determine whether they would qualify for Phase 3 but to delay their registration until closer to the January 2019 deadline. Current CRC participants should monitor whether the legislation is repealed.

[EU agrees a total ban on bee-harming pesticides](#). The EU will ban neonicotinoids, the world’s most widely used insecticides, within six months, to protect both wild and honeybees that are vital to crop pollination. The ban, approved by member states in late April, is expected to come into force by the end of 2018 and will mean they can only be used in closed greenhouses.

42 UK businesses have signed WRAP’s [UK Plastics Pact](#), committing to ambitious targets to reduce plastic packaging waste. Key targets are 100% of plastic packaging to be reusable, recyclable or compostable; 70% of plastic packaging to be effectively recycled or composted; and plastic packaging to contain an average of 30% recycled content. Signatories include supermarkets, major food and drink brands, manufacturers, retailers and plastic reproducers, together accounting for 80% of the plastic packaging on products sold in UK supermarkets. This pact is the first of a global network to be set up as part of the Ellen MacArthur Foundation’s New Plastics Economy initiative and the latest response to the growing consumer concern over plastic waste entering the environment. WRAP and others have also been discussing how [major changes to the packaging regulations](#) could help to reduce the environmental impact caused by the way we use and dispose of packaging, especially plastic packaging. A number of recommendations have been suggested, including better packaging design and making recycling easier. The EU Commission is planning to ban certain single-use plastics (SUP), according to a [leaked draft legislative proposal](#). The draft legislation would directly affect anyone who manufactures, imports, distributes or sells (including online and distance selling) SUP products (and fishing gear containing plastic) in the EU. This is just an early draft document, so it remains to be seen how it will progress through the legislative process.

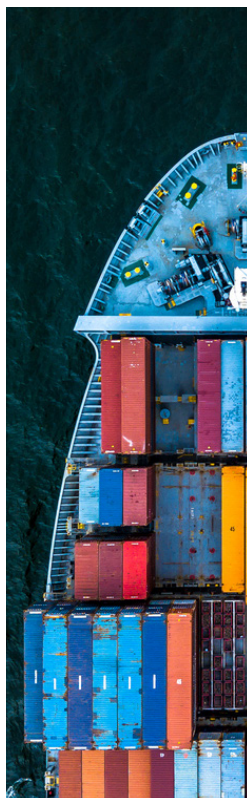
Environment Secretary Michael Gove MP gave [evidence](#) to the Environmental Audit Committee on the 25 Year Environment Plan and Brexit. Key points were a new Environment Act by 2020; that the UK could go beyond EU standards post-Brexit; the EU precautionary principle will remain; the waste and resources strategy has been delayed until late 2018; and it is intended that the new environmental oversight body will have enforcement powers but will have to be created by primary legislation, so this will take time.

Defra published a [consultation](#) on the new post-Brexit environmental body. The consultation was designed to hold the government to account on the environment, together with plans for a set of environmental principles to underpin environmental regulation and policy. Key aspects of the proposals are that a draft bill creating a new statutory policy statement on environmental principles and the new environmental body will be published in the autumn; it is clear that the new body will not be in place by Brexit, but it should be introduced by the end of 2020; the body’s enforcement powers will not (at least initially) extend to taking the government to court, but it will instead issue advisory notices; this body will only cover England, but the devolved administrations may adopt a similar approach or choose to be covered by it; and, finally, that the environmental principles may not be enshrined in primary legislation, but may only be policy statement. The Environmental Audit Committee has also launched [an inquiry](#) into the proposals for this new environmental watchdog and the environmental principles that it aims to conclude in time to report before the government’s consultation closes on 2 August 2018.



Major fund manager requires firms to meet climate change pledge. One of Europe's biggest investment managers, Legal and General Investment Management (LGIM), is preparing to name and shame companies that behave unsustainably, and to remove billions of pounds of investment in their shares. LGIM, which manages assets worth almost £1 trillion, has stepped up efforts to push the firms in which it invests to clean up their act with a "climate change pledge".

Legal controversies over discharges into the Manchester Ship Canal continue. In [*The Manchester Ship Canal Company Ltd. v. Vauxhall Motors Ltd.*](#), the Court of Appeal held that Vauxhall was entitled to relief from the forfeiture of its perpetual licence (granted in 1962) to make discharges of surface water and trade effluent into the canal from its factory, following its inadvertent failure to pay the annual licence fee of £50. The current value of the right was estimated at £300,000 to £440,000 per year, so this is an important victory for Vauxhall, but also a useful case for others who may have these types of very old rights/licences and inadvertently do something to jeopardise them.



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