

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

July 2018



Government [White Paper](#) on future of EU/ UK Relationship post-Brexit proposing Facilitated Customs Arrangement includes Reminder of Importance of Discussions on Common Rules on Safety and Security. Such an arrangement would involve the UK applying the EU's tariffs and trade policy for goods destined for the EU and applying its own tariffs and trade policy for goods remaining in the UK. The government White Paper suggests that the arrangement will need to preserve the integrity of the EU customs union (to ensure that goods cannot enter the EU without application of the correct tariff and trade policy) and identifies various issues for discussion with the EU, including the UK's adoption of common rules within the EU related to safety and security and ensuring the application and interpretation of those rules are consistent. There is a welcome acknowledgement of the importance of frictionless trade in food and drink.

The government has also committed in the White Paper to maintaining high environment standards and not regress from EU standards. It proposes a common rulebook on standards for goods, which will include a number of environmental standards, but there is no proposal for full alignment of the wider body of environmental law. The paper also proposes that the UK participates in a number of EU agencies, including the European Chemicals Agency, and associated regimes such as REACH, thereby avoiding duplication of approval mechanisms.

Spot checks by Environment Agency to detect waste crime. The government has [reported](#) a multi-agency initiative with the Met Police and Drivers and Vehicles Standards Agency (DVSA) around London City Airport to help identify waste offences and non-compliance. The report includes a reminder from a senior environmental crime officer that "if you use illegal waste carriers to take your rubbish you risk being fined up to £5,000."

Recent sentences for company directors are a reminder to all of potential officer liability for regulatory offences News [reports](#) last month detailed a sentence of 10 years imprisonment for a factory owner convicted of gross negligence manslaughter. The sentence was imposed following a fire at a factory that led to the deaths of two men. This month, a director was jailed for eight months after pleading guilty to a health and safety breach that resulted in the death of two brothers ([Health and Safety Executive \(HSE\) press release](#)); and a court has fined three directors of a now-liquidated waste company for asbestos failures, also with an order that the directors re-pay costs of £200,000 (also [reported](#) by the HSE). These cases demonstrate that breaches of health and safety law can lead to a significant custodial sentence for a senior manager or director, as well as a financial penalty for the director and/ or the corporate entity. Although the conviction in one of these cases was for gross negligence manslaughter, it is worth remembering that the [Sentencing Guidelines](#) for Health and Safety and Corporate Manslaughter offences require the court to consider culpability and harm when sentencing individuals. Where there is very high culpability (where the offender intentionally breached, or flagrantly disregarded, the law) and harm category 1 (a high likelihood of death, physical or mental impairment resulting in lifelong dependency on third party care, or significantly reduced life expectancy) the starting point is 18 months' custody. Relevant recent convictions, in particular, are likely to result in a substantial upward adjustment.



Utilities company fined £466,000 by Crown Court for dangerous gas installations. A [HSE Press Release](#) confirms that Dimension Data Advanced Infrastructure Limited pleaded guilty to breach of Section 3 of the Health & Safety at Work Act 1974. At the time the work was carried out, neither the company nor any of its employees were registered on the gas safe register. Multiple gas leaks were found across a new student village. The HSE provides information on the regulation of health and safety for the onshore natural gas industry on its [website](#).

Listeria risk in frozen vegetables prompts recall from supermarkets. [Press reports](#) this month have provided the full list of products recalled, which have been supplied by a UK-based manufacturer to numerous retailers. The Food Standards Agency (FSA) has advised consumers not to eat affected products and to return them to the store for a full refund. The alert on the [FSA website](#) notes that this is a voluntary recall undertaken as a precautionary step. The notification has been published on the Rapid Alert System for Food and Feed (RASFF) and indicates that the notification was as a result of the company's own checks; and the product has been distributed to other member countries. If you distribute foods or other products outside of the UK, it is worth ensuring that any recall protocols and procedures you have in place cover your global supplies properly, as potential issues will likely be notified rapidly in other countries (via RASFF for the EU and INFOSAN more widely and equivalent information networks for non-food products).

Textile company fined £600,000 after worker crushed attempting to free a stuck package from a packaging machine. Local press [coverage](#) of the penalty reports that the HSE found the company had failed to take measures to prevent access to the danger zone between moving conveyors; and that no safe system of work had been provided for the removal of trapped packages from the machine. Another substantial fine reflecting the upward trend of penalties for health and safety breaches and a reminder of safeguards that many industrial manufacturers should be taking to prevent such injuries.

Consultation on Amendments to Food Law Code of Practice (England). The FSA is [inviting views](#) by 27 September 2018. The proposed changes are intended to enable the new digital approach to the process of registration for new business; enable the targeting of resources through amendments to the Food Establishment Intervention Rating Scheme; and recognise national inspection strategies. To target resources, proposals include changes to the Food Hygiene Risk Assessment process. A business that meets specified criteria will be suitable for a reduction to its collective total risk assessment score to recognise sustained compliance. It is also proposed that the current additional score for food businesses producing/serving food for more than 20 vulnerable persons (for example, children, the elderly and/or immune-compromised) will be directly linked to the assessment of confidence in management. The online registration service will represent a significant shift from the current system of registration with the local authority, which will result in a national "database" of food business establishments. In the consultation, the FSA notes that relevant information from the online registration service about the food business operator and their activities will be made available to local authorities and the FSA.

Timber yard fined £730,000 after two workers seriously injured when struck by vehicle. According to trade press [reports](#), the HSE investigation found the company did not have effective precautions in place for vehicles and pedestrians to move around safely. The case is another example of significant fines being imposed by the courts for health and safety offences.

[Automated and Electric Vehicles Act 2018](#) makes provisions in relation to transport technology. In addition to provisions relating to the installation of charging points, the act also provides for the liability of insurers where an accident is caused by an automated vehicle. The act makes clear that regulations may impose requirements on large fuel retailers and/or service area operators in connection with the provision of charging/refuelling points. The act is not yet in force, the date of commencement will be specified by the Secretary of State.



Fine for hover board company after Trading Standards found it failed to test the motorised scooters. [Local press](#) has reported on the Manchester Crown Court fine of £27,000 for breach of two safety regulation offences, with an order for costs taking the total penalty up to almost £50,000. The products had not gone on sale: Trading Standards issued a withdrawal notice for 1,015 of the hover boards and a further import of 1,364 boards was prevented after tests carried out for the council showed that the battery did not have a charging cut-off, leaving it prone to becoming unstable and overheating. The importer of a product into the EU is defined as the “producer”, for the purposes of the General Product Safety Regulations 2005, if the manufacturer is not established in an EU member state. It is a requirement of the regulations that producers cannot place/supply, or offer/agree to supply/place a product on the market, unless it is a safe product, and a failure to comply with this requirement is an offence. Furthermore, an enforcement authority has power to serve a withdrawal notice if it has reasonable grounds for believing that a product is a dangerous product, which it appears was the action taken in this case. A government-backed Code of Practice for Product Safety Recall was recently published in the UK. We have published a summary of the key requirements recently on our [website](#).

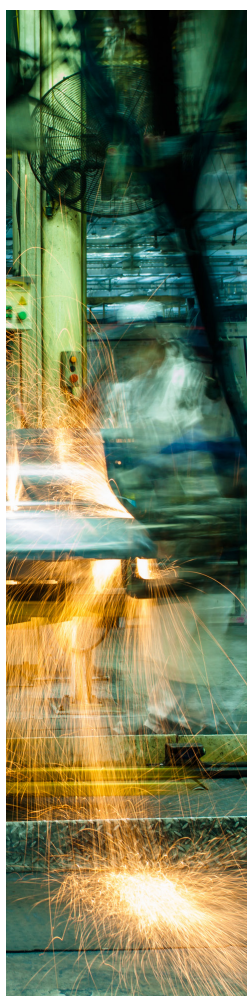
Haulage permits and trailer registration bill receives royal assent in preparation for Brexit. The [Act](#) will help UK hauliers to continue to operate internationally after Brexit, by providing the Secretary of State with powers to introduce administrative systems for haulage permits, and a trailer registration scheme. Previous trade press [reports](#) explained the some European countries have agreements with third (non-EU) countries which require a permit as a condition for hauliers to operate across borders. In addition, under the Vienna Convention on Road Traffic, access to foreign roads is only guaranteed for registered motor vehicles and trailers. Mandatory registration will apply primarily to commercial trailers travelling internationally. The Act will come fully into force when appointed by the Secretary of State.

Welsh dairy company fined £200,000 by Magistrates Court following conviction for health and safety breach. A worker was seriously injured after he was covered in hot caustic and steam after a failure to ensure safe isolation of plant and pipework (according to the [HSE Report](#)).

Coroner finds car maker’s delay in recalling UK cars with an electrical fault contributed to a driver’s death. [Press reports](#) indicate the company knew about electrical faults for five years before the fatal incident and had issued repair kits to dealerships to fix it. However, because the UK DVSA did not consider that the fault could lead to “total electrical failure” it did not prioritise it as a major concern. Nevertheless, the coroner reportedly accepted that the DVSA were not made aware of 19 cases of electrical failure in this model between 2011 and 2014. An inquest is a public court hearing held by the coroner in order to establish who died and how, when and where the death occurred. It is separate to any regulatory proceedings which may be commenced for any alleged breach of product safety laws and to any potential civil proceedings for compensatory damages.

The Committee on Climate Change published its [10th annual progress report](#) to Parliament. The key finding is that the UK is likely to miss its carbon targets in its fourth and fifth carbon budgets. The previous savings have been largely due to decarbonisation of the power sector and there are harder challenges to decarbonise the built environment, transport and agriculture.

The Environment Agency has accepted almost £940,000 in [enforcement undertakings](#) between February and May 2018 for a range of environmental offences.





The Court of Appeal ruled on the meaning of the term “recovery”, in [*Neal Soil Suppliers Limited & Others v Natural Resources Wales Ltd*](#). The appellant held an environmental permit for recovering waste soils and aggregates, including storage of waste soil on the site for up to three years “prior to recovery”. The argument centred around when recovery started, with the appellant arguing that once any recovery operation had begun then the material was no longer being stored “prior to recovery”, and Natural Resources Wales (NRW) arguing that “prior to recovery” meant the whole period prior to the achievement of the end result once the material has been recovered. The Court of Appeal stated that “recovery” in the Waste Framework Directive does not reference the end result and on that basis NRW conceded that it could not establish (for the purposes of prosecution), that the waste in question had been stored for a period in excess of three years prior to recovery.

The Environment Agency published a [consultation](#) on proposed amendments to standard rule environmental permits for water discharges, materials recovery and recycling, waste electrical and electronic equipment, storage of electrical insulating oils, onshore oil and gas exploration and mining and clarification on distances from springs, wells or boreholes. The consultation closes on 20 September 2018.

The Court of Appeal dismissed Network Rail’s appeal in [Network Rail Infrastructure Ltd v Williams and another](#) and decided that whilst reduction in value of the land due to the presence of Japanese knotweed was not an actionable nuisance, the actual presence of Japanese knotweed roots on land is an actionable nuisance, so Network Rail had caused an actionable nuisance by failing to take reasonable steps to prevent Japanese knotweed from blighting properties next to its railway embankment.

Defra and the Welsh Government published a [government response](#) to the consultation on enforcing the EU Invasive Alien Species Regulation 2014. The government will introduce civil penalties for less serious non-compliance, consider developing new criminal offences and re-consider the level of penalties.

The government has published its [Road to Zero Strategy](#), setting out measures to reduce emissions from road transport, including a target for at least 50% of new car to be ultra-low emission by 2030, and a requirement for new homes to have car-charging points.

The [Offshore Environmental Civil Sanctions Regulations 2018](#) introduce powers and civil sanctions to be used in breaches of some environmental regulations relating to offshore oil and gas operations. These powers will be exercised by the Offshore Petroleum Regulator for Environment and Decommissioning, which regulates offshore oil and gas operators. The powers come into force on 1 October 2018 and will be available for offences committed after 1 November 2018.

A company was [fined £50,000 and ordered to pay Environment Agency costs of £50,000](#) for illegally disposing of waste and damaging protected species. Waste brick, stone, soil and concrete was deposited on a farm that was a habitat for great-crested newts, a European protected species. As well as being unlawful waste deposits, the activity resulted in disturbance to the newt population including injuries and deaths.

Thailand has issued a [ban on plastic and electronic waste imports](#), following in the footsteps of the recent Chinese bans, to avoid diversion to Thailand of waste that would previously have gone to China. The bans are temporary, but permanent measures are in the pipeline. There are also calls for the international prohibition on certain types of waste to less developed countries, under the Basel Convention, to be extended to cover all exports of electrical waste and end of life ships.





The UK government has published its response to the [Streamlined Energy and Carbon Reporting Consultation](#)

regarding a new energy and carbon reporting framework from April 2019. The response confirms that all UK quoted companies, other large UK companies and large LLPs (who have at least 250 employees, or annual turnover greater than £36 million and annual balance greater than £18 million) will be required to include in their annual reports details of global energy use and global scope 1 and 2 carbon emissions together with an intensity metric. Scope 3 reporting will remain voluntary. There will be an exemption for very low energy users (less than 40,000 kWh per year) and an exemption from disclosure where directors consider it would be seriously prejudicial to the interests of the company.

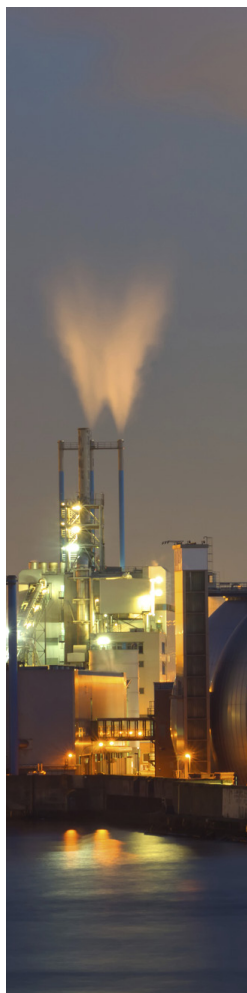
UK begins to issue draft Brexit-related secondary environmental legislation, dealing with changes that will be needed to existing UK Regulations that are based on EU Directives, as well as those which will transpose EU regulations into UK law with necessary adjustments. Examples of statutory instruments issued so far include one to [transpose the EU Timber Regulation into UK law](#). Companies are advised to monitor the issue and progression of the new regulations so far as they relate to the legislation applicable to their own businesses, so that they can check what changes are proposed and whether there are any implications for their businesses.

UK government publishes updated plan to tackle climate change. The government has updated the [National Adaptation Programme \(NAP\)](#) and remains committed to tackling the effects of a changing climate on the UK.

Order made to terminate the CRC Energy Efficiency Scheme. The [CRC Energy Efficiency Scheme \(Revocation and Savings\) Order 2018](#) has now been made and comes into force on 1 October 2018. The government had announced in March 2016 that the scheme would close after the 2018/19 compliance year but had not until now actually issued the necessary legislation to give effect to that announcement. This clarifies for affected companies that they will not have to take any steps relating to future phases of CRC, although it should be noted that some obligations on participants continue for several years after the CRC closes, primarily record retention.

UN body recommends three chemicals for export/import regulation. The Chemical Review Committee of the Rotterdam Convention on the Prior Informed Consent (PIC) Procedure for Certain Hazardous Chemicals and Pesticides in International Trade [recommends](#) including Acetochlor, Phorate and Hexabromocyclododecane in Annex III to the Convention. The 9th Conference of the Parties in 2019 is scheduled to consider their inclusion. The PIC procedure is a mechanism requiring formally obtaining and applying the decisions of importing parties as to whether they wish to receive future shipments of chemicals listed in Annex III. EU Regulation 649/2012 concerning the export and import of hazardous chemicals implements the Convention in the EU.

EU REACH Committee discusses long-delayed DEHP authorisations. EU member state representatives held [preliminary discussions](#) on draft implementing decisions granting partial authorisations for specific uses of bis(2-ethylhexyl) phthalate (DEHP) under REACH. The vote in the committee, which would pave the way for the European Commission to adopt the decisions, is expected to take place after the summer. The next meetings of the committee are planned for 27-28 September, 23-24 October and 4-5 December. Polish Grupa Azoty and Czech DEZA applied for the authorisations back in August 2013 and preliminary opinions were adopted in [October 2014](#) and [January 2015](#), respectively.





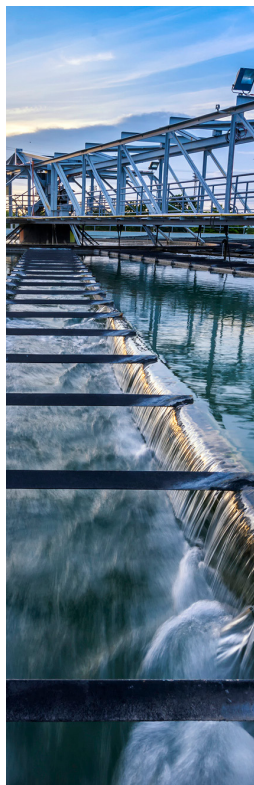
European Commission publishes roadmap for endocrine disruptors. The initiative will lead to a Commission Communication setting out the comprehensive framework of EU policies on endocrine disrupting chemicals (EDCs) and any further measures that need to be taken. 44 organisations have provided feedback on the Roadmap, with comments ranging from the Commission's plan lacking the necessary ambition, to others that advocate a five-year period to evaluate the impacts current regulations before introducing new ones (Cefic). Meanwhile, Member State representatives in the Commission Standing Committee on Plants, Animals, Food and Feed (**SCoPAFF**) have not been able to agree whether [derogations from being considered an EDC in pesticides](#) should be based on a hazard-based or risk-based approach, as almost none of them had a position, according to reports. Pesticides and biocides containing endocrine disruptors are banned under Regulation 1107/2009 and Regulation 528/2012, and setting the criteria for identifying EDCs under these Regulations has been controversial. The European Chemical Agency (ECHA) and the European Food Safety Authority (EFSA) have recently adopted [guidance for the identification of endocrine disruptors](#) in this context.

ECHA publishes note on substance identification and the potential scope of a REACH restriction of intentional uses of microplastics. ECHA notes that polymers are an appropriate starting point for substance identification for this restriction. However, polymers that occur in nature can, by default, be considered to be inherently (bio)degradable and should not be considered as microplastics. ECHA confirms that the identification of microplastics is distinct from the scope of a potential restriction (i.e. not every plastic that is at some stage microplastic will be regulated). Uses of microplastics that do not result in their release to the environment at any stage of their life-cycle are unlikely to contribute to the concern. Microplastics that are [completely consumed](#) during their use can also be considered as not contributing to the concern. ECHA has been tasked by the European Commission to assess and prepare a REACH restriction by January 2019. Industry stakeholders have questioned whether the scope of a restriction will encompass polymers as substances under REACH or actually microplastic articles as such.

Recycling industry and NGOs demand obligation to use recycled plastic. "A minimum recycled content [in packaging and other plastic products] of just 30% by 2025 would considerably boost the markets for recycled plastics within Europe", according to the [Call for Action](#) by more than 30 organisations. Among the signatories are public sector waste management association Municipal Waste Europe (MWE), the private waste management association FEAD, Plastics Recyclers Europe, individual companies such as German Remondis, and NGOs such as the European Environmental Bureau. MWE has [recently called for a 50% recycled](#) content requirement by 2025, rising to 75% ten years later. The concept of minimum recycled content requirements for plastic has gained some traction in the European Parliament. Its Environment Committee has called upon the European Commission "to consider" such laws in a recently adopted [report on the EU Plastics Strategy](#). Its draft report (not publically available yet) on the [legislative proposal on single-use plastic](#), demands 25% recycled content in plastic bottles by 2025. The European Commission recently [extended the deadline for voluntary pledges](#) by stakeholders to increase the uptake of recycled plastics by 10 million tonnes, until 2025 to 30 September. It wants to consider further regulatory steps after assessing the outcome of this exercise.

European Commission launches public consultation on the evaluation of Urban Waste Water Treatment Directive 91/271. In the context of an evaluation and fitness check of the Directive, it will run until 19 October. Its aim is to find out how the directive has affected urban wastewater collection and treatment and thereby improved the state of the EU's water bodies and the environment in general.

European Commission publishes roadmap on the evaluation of Toy Safety Directive 2009/48. [Feedback on the roadmap](#) can be submitted until 8 August. As part of the evaluation conducted to assess the performance of the directive, the European Commission will launch a 12-week public consultation in October 2018 and a targeted consultation with selected economic operators to collect data on costs and benefits. The European Commission expects to complete the evaluation in Q2 2019. The Toy Safety Directive aims to protect the health and safety of children while guaranteeing the functioning of the internal market. It has applied since July 2011, with its chemical provisions applying from July 2013.



European Commission consults on long-term greenhouse gases (GHG) reduction strategy.

With the strategy, the European Commission intends to enable the EU to fulfil its climate change obligations under the UNFCCC Paris Agreement, with its target of keeping the rise in global temperature below two degrees Celsius, and aiming for 1.5 degrees. It will set out pathways with various options for decarbonisation, and their implications, with regards to technology choices, and their socioeconomic factors, in order to achieve net zero GHG emissions by 2050 and milestones for meeting that objective. The European Commission notes that the EU is on track to achieve its [2020 targets](#) and is currently putting in place its energy and climate framework for 2030, to reduce GHG emissions by at least 40% in 2030 and achieve a high level of ambition in energy efficiency and renewable energy. That framework is a starting point of the long-term strategy. The [consultation](#) closes on 9 October. It consists of a questionnaire inviting comments on the technological and socio-economic pathways that should be explored and relevant factual information, including drivers, opportunities and challenges. The European Commission has also published a [Roadmap](#) for this initiative, which is open for feedback until 10 August. The European Commission aims to put forward its strategy proposal ahead of the next UN climate conference (COP24) taking place in Katowice, Poland, in December.

Brexit: will there be a potential supply chain disruption for the chemicals sector? Following an appearance at the House of Lords EU and Environment Sub-Committee to give evidence about the [Future of REACH regulations post Brexit](#), Anita Lloyd was asked to author a guest blog for The UK in a Changing Europe about the potential effects of Brexit on chemical regulation. The blog can be accessed [here](#) and discusses the complexities surrounding the EU REACH Regulation and the legal challenges posed by Brexit, particularly in a no-deal scenario. Due to the way that REACH works on a whole supply-chain basis, when the UK leaves the EU, there could be significant disruption to cross-border supply chains and the many billions of pounds' worth of trade in chemicals, unless measures can be agreed with the EU.

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