SQUIRE PATTON BOGGS

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

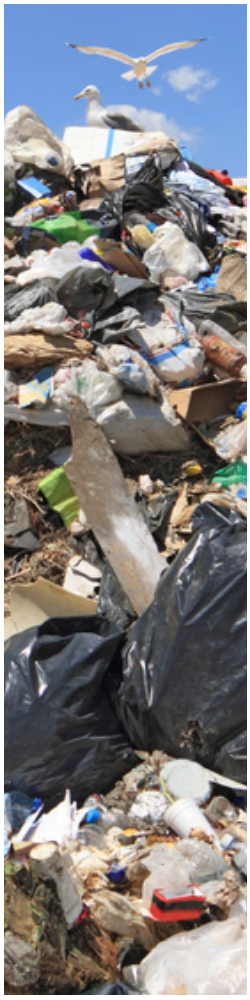
November 2018

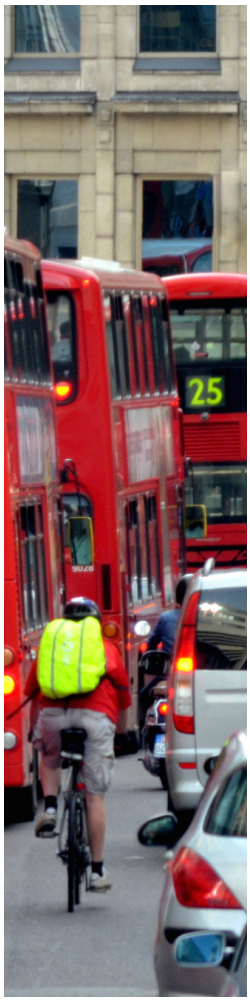
Sentencing Guidelines on Manslaughter in force from 1 November 2018. The Institute of Occupational Safety and Health (IOSH) has responded to the guidelines by calling for penalties that "reflect the gravity" of offences and more use of measures such as director disqualification and retraining. As we reported in our August edition of frESH Law Horizons, when sentencing for corporate manslaughter, the separate guideline for corporate manslaughter will still be referred to by courts, but the new guideline may still be relevant in the event of breaches of regulatory laws, such as those governing safety, for example, where directors are charged with gross negligence manslaughter, for work-related deaths. The offence range under the guideline for gross negligence manslaughter is between one month and 18 years' imprisonment (with a maximum sentence of life imprisonment).

Director sentenced to eight months' imprisonment and company fined £700,000 for breach of Health and Safety at Work Act 1974. A Health and Safety Executive (HSE) press release includes a statement from a HSE Inspector that the incident was "completely avoidable and it is inconceivable that [the company] continued to operate the same dangerous machine in the way it did for as long as five years after this incident". This case is a reminder 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. Indeed, another director was fined this month, following the collapse of a building during roofing work, according to a separate HSE report.

Home Office publishes 2018 UK Annual Report on Modern Slavery. The report includes an assessment of modern slavery in the UK and a summary of the UK's existing and future response to modern slavery. The report comments that the government recognises that more action is required and the Home Office will write directly to the chief executives of companies in scope, with very clear instructions to support effective reporting (the legislation requires that businesses with a turnover of more than £36 million must publish annual transparency statements setting out what they are doing to stop modern slavery and forced labour practices occurring in their business and supply chains). According to the report, it is estimated that 60% of companies in scope have published a statement, some of which are of poor quality or fail to meet the basic legal requirements.

National Economic Crime Centre (NECC) launched. The multi-agency NECC is a division of the National Crime Agency and is part of the government's strategy to tackle serious and organised crime. The government says the NECC will "bring the full force of government, law enforcement, civil society, regulators and the private sector – particularly the technology and financial sectors – to those engaged in this criminal activity."





HSE releases Great Britain's annual injury and ill health statistics, which show number of prosecutions resulting in conviction has fallen, but fines have increased. The summary on the HSE website includes confirmation that in 2017/18, 493 cases were prosecuted and resulted in a conviction, with fines from convictions totalling £72.6 million. This compares to 554 cases prosecuted/resulting in a conviction in 2016/17, with fines totalling £69.9 million, according to last year's statistics.

Reminder of protection for whistleblowers. In *Timis and another v Osipov* [2018] EWCA Civ 2321, the Court of Appeal upheld a decision that two non-executive directors were liable for their part in dismissing a whistleblower. As mentioned in the judgment, the relevant legislation (the Employment Rights Act 1996) includes acts done to promote health and safety. Subject to any successful appeal, the case clarifies that, in addition to the employer, individuals may be personally liable for their actions towards whistleblowers.

Waste management company fined £650,000 by Crown Court for breach of the Provision and Use of Work Equipment Regulations 1998 and Management of Health and Safety at Work Regulations 1999. A HSE press release indicates that the company had failed to identify, via a suitable and sufficient risk assessment, the risks associated with the cleaning and clearing of blockages of machinery; and the HSE's investigation found the company had failed to put in place safe systems of work and adequate guarding measures.

The revised Code for Crown Prosecutors came into force on 26 October 2018. The Code for Crown Prosecutors sets out general principles for the Crown Prosecution Service to apply when deciding whether or not to charge. The revised code includes changes requiring prosecutors to consider whether there is any material held by the police, or other material that may be available that could affect the decision to charge; and a requirement for prosecutors to take into account the degree to which a suspect benefitted financially from an alleged offence, although these changes will only be relevant to the extent that prosecutors ensure that disclosure is conducted fully and acted on appropriately, with the sanctions for failure to do this being limited. It should be noted that this code does not apply to prosecutions undertaken by other bodies, such as the HSE, albeit such bodies should have and follow their own enforcement policies, in accordance with the Regulators Code 2014.

Council fined £300,000 following death of 15-year-old pupil involved in collision with school minibus. The HSE took enforcement action against Bridgend County Borough Council following the death of one pupil and injury to another. Following its investigation into the death of 15-year-old Ashley Talbot, the HSE has urged schools to review traffic arrangements within their grounds, and where possible design layouts so pupils are separated from moving traffic.

Law Commission publishes Sentencing Code. The report indicates that the Law Commission's draft bill contains the law of sentencing procedure in a "simple, coherent and accessible form". The Law Commission argues that the code will reduce the risk of error, and reduce the time taken for sentencing and subsequent appeals, with an estimated saving of £256.05 million over 10 years. However, it may be some time before the code is debated, given the current constraints on Parliamentary time.

Privacy and Electronic Communications (Amendment) Regulations 2018 will introduce power to fine company officers up to £500,000 for breach of the rules on using automated calling systems and on unsolicited direct marketing. The Information Commissioner's Office already had the ability to fine companies, but this amendment will extend powers and allow personal director liability. The Regulations will come into force on 17 December 2018.

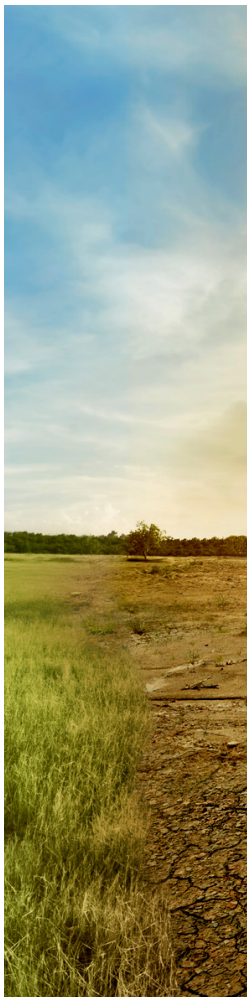
Fines and costs of £43,000 for food hygiene offences. Trade press reports indicate that a meat cutting plant was found guilty of four offences. The Food Standards Agency has said that the substantial fine "sends a strong message" and that it will "prosecute those businesses that fail to uphold acceptable standards of food hygiene".

The government's Autumn Budget 2018 was light on environmental and climate change content, but two developments of particular note were:

- A carbon tax, of £16 per annum per tonne CO2 emitted, to apply in the event of a no-deal Brexit to those UK organisations currently covered by the EU Emissions Trading Scheme
- A new tax on single use plastics (both produced in UK and imported) with less than 30% recycled content, from April 2022
- A £10 million fund for clearing up abandoned waste sites

Waste and Resources Action Programme (WRAP) published the UK Plastics Pact Roadmap to 2025. Following the signing by 42 UK businesses in April 2018 (who together account for 80% of the plastic packaging on products sold in UK supermarkets) of the UK Plastics Pact, WRAP has now set out actions and deadlines that will be needed if the signatories are to meet the targets set out in the Pact, which include 30% recycled content across all plastic packaging by 2025. There seems to be a clear connection with the new plastics tax that was announced in the budget.

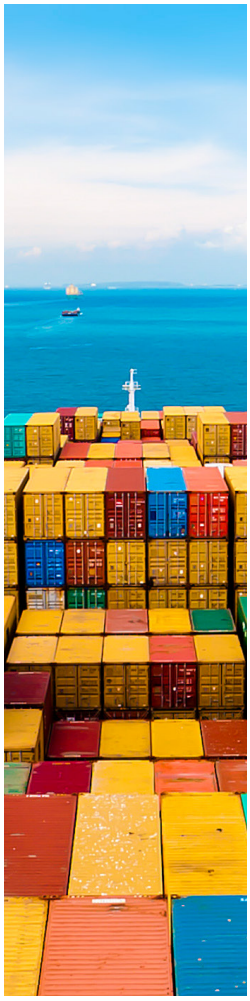
The European Union committed €300 million in 23 new commitments for better governance of oceans. The commitments were made at the 5th edition of Our Ocean conference, in Bali, Indonesia and include projects to tackle plastic pollution, make the so-called "blue economy" more sustainable and improve research and marine surveillance.



The House of Lords European Union Committee has published its report on Brexit: chemical regulation, which expresses concern about lack of progress with the government's preparations and that in some respects the government appears to lack a credible plan of action. The report includes evidence provided to the Committee by Squire Patton Boggs. Separately, Lord Teverson, head of the EU Energy and Environment Sub-Committee wrote to Michael Gove expressing concerns about **Department for Environment, Food and Rural Affairs' (DEFRA's)** preparedness for Brexit in a number of policy areas including waste shipments and chemical data ownership.

First-tier Tribunal ruled on "manifestly unreasonable" Environmental Information Regulations request. In *Scott v Information Commissioner & Kirby Muxloe Parish Council*, the appellant had requested from the council copies of surveyors' reports relating to the lease of a recreation ground. This was rejected, and that decision was upheld by the Information Commissioner. The backdrop was a huge amount of requests from three residents, that the council felt were working together to disrupt the council, and that the appellant was acting with or on behalf of those individuals. Even if his specific current request was not particularly burdensome, the overall effect was "manifestly unreasonable", and the court agreed. This is an illustration of when the bigger picture can outweigh the apparent simplicity of an Environmental Information Regulations request, and shows that this will be taken into account.

DEFRA and Environment Agency published Waste Electrical and Electronic Equipment Regulations guidance ahead of the move to open scope in 2019, where all electrical and electronic products will be covered unless specifically exempt. It outlines what products are in scope and the reporting requirements.



DEFRA consulted on proposed amendments to the Restriction of the use of Certain Hazardous Substances in Electrical and Electronic Equipment Regulations 2012, in order to transpose the RoHS 2 Directive into UK law (with the intention that these come into force before Brexit), and move to "open scope". The consultation also proposes correcting some unintended consequences of widening the definition of electrical and electronic equipment, such as stopping the restriction on the resale and repair of old equipment. The consultation is open until 4 December 2018.

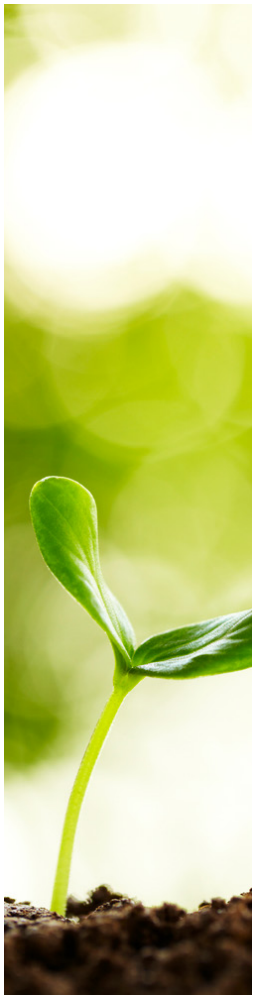
Maritime and Coastguard Agency responded to consultation on updating Merchant Shipping (Prevention of Oil Pollution) Regulations 1996. The consultation related to updating the UK's transposition of Annex 1 to the International Convention for the Prevention of Pollution from Ships 1973 to reflect recent amendments, includes construction and operational standards for preventing oil pollution from ships. The report confirms that the proposals will be implemented and new regulations will be brought into force in early 2019.

The Environment Agency is setting up an "intelligence sharing concordat" with the waste industry to address problems of illegal waste carriers, according to the recently published Serious and Organised Waste Crime Strategy. This highlights the waste sector as one where private and public sector resources are integrating to combat organised crime. However, an independent review into serious and organised crime in the waste sector was published shortly after, and this identifies various shortfalls in the way the various agencies collaborate, and in the Environment Agency's ability to address issues. Its recommendations include the establishment of a Joint Unit for Waste Crime and the strengthening of Environment Agency powers.

Government responded to Environmental Audit Committee (EAC) report "Greening Finance: embedding sustainability in financial decision making". The government has rejected the idea of mandatory climate risk reporting for all large organisations, but does confirm its intention to require pension scheme trustees to consider environmental risks as part of their fiduciary duties. It also declined to order the Financial Conduct Authority, Financial Reporting Council and The Pensions Regulator to produce climate change adaptation reports, but this will continue on a voluntary basis. This is the latest development in a substantial number of initiatives this year focusing on climate and environmental reporting in the financial services and pensions sector, including an influential US$2 trillion group of investors who have written to 55 large European companies challenging them on their approach to climate lobbying and asking them to align with the objectives of the Paris Agreement.

Government responded to EAC report on its 25-year plan. The EAC had called for a number of specific commitments and the government declined to do so in all cases, referring instead back to previous policy announcements. The EAC has criticised the government's response as woolly and that the lack of firm commitments on the future governance of the environment after Brexit is of great concern.

Committee on Climate Change issues called for evidence on transition to a net zero carbon economy in connection with the advice that the government has asked it to provide early next year on when and how the UK should aim to reach net zero emissions of carbon dioxide, and how this will contribute to the UK's emissions reduction obligations under the Paris Agreement. The Committee's advice will be influential in the government's future climate policy.



Dyson succeeded in energy labelling case after applying for annulment of an EU Delegated Regulation regarding energy labelling of vacuum cleaners. Dyson asserted that whilst it sought to give users information to enable them to make more energy efficient choices, the process was fatally flawed because the information was based on tests of empty vacuum cleaners before the bag filled and gradually reduced suction (although Dyson's selling point was that its vacuums did not suffer from this). He therefore claimed that the regime was discriminatory and the General Court agreed with him. It will be interesting to see whether the apparent common sense and science-based approach of the court will be carried into other environmental product regimes.

Judicial review of an environmental permit dismissed despite an error of fact by operator. The High Court dismissed the application, by a non-governmental organisations, to quash an Environment Agency decision to grant an environmental permit to Covanta, for an energy from waste facility. The Environment Agency conceded that there was an error in the application but said it had not relied upon the information.

Pipeline company pays £150,000 enforcement undertaking for a major pollution incident where 140,000 litres of Kerosene entered a Welsh stream in October 2016. The leak was traced to a fractured pipeline that transports oil from Pembroke refinery to Manchester and Nottingham. The donation was made to Afonydd Cymru, a river environment charity. The company also carried out a full clean-up after the incident and put in place a significant ground water environmental monitoring programme. This is one of the largest undertakings accepted by Natural Resources Wales to date.

The Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018 were published requiring additional reporting on emissions, energy consumption and energy efficiency actions by quoted companies, large unquoted companies and large LLPs. These were published in draft in July and come into force on 1 April 2019. They will apply to financial years beginning on or after 1 April 2019, so if you are affected then you need to prepare to report on these additional aspects from that point.

The Environment Agency issued guidance to participants on the closure of the Carbon Reduction Committee (CRC) Energy Efficiency Scheme explaining the remaining steps that participants must take to comply with it, namely collecting data and submitting an annual report 2018/19 by 31 July 2019, purchasing allowances for 2018/19 emissions and surrendering them by 31 October 2019, updating details on the CRC registry until 31 March 2022 and maintaining an evidence pack until 31 March 2025.

Restrictions added to REACH Regulation affecting clothes or related accessories, textiles and footwear. Regulation (EU) 2018/1513 amends Annex XVII of REACH to add a list of 33 substances classified as carcinogenic, mutagenic or toxic for reproduction and provides that they may not be used in these applications from 1 November 2020. The list includes cadmium, chromium, arsenic, lead and their compounds, benzo[a]pyrene and several phthalates.

EU Council adopts and updates negotiating mandate on single-use plastics (SUP). COREPER 1, the body composed of ambassadors of the EU member states, adopted the council's negotiation position for a SUP Directive on 31 October. It was leaked. The council's position includes ambitious extended producer responsibility (EPR) schemes including clean-up costs and the costs of awareness raising measures, and extending EPR to new products, including wet wipes and balloons. Further changes were made to the mandate, following proposals of the Austrian Council Presidency, which have also been leaked. The proposed changes include bans of both EPS food and beverage containers. Council and EP are expected to continue negotiating the final text of the SUP Directive at least until the end of the year.

European Commission (EC) publishes preliminary assessment of pledges towards Plastics Strategy. In a press release, the EC presented a "cautiously positive preliminary" assessment of the pledges it has received after calling on industry and other plastic users to commit to the uptake of 10 million tonnes of recycled plastic by 2025. The EC has received more than 60 pledges and wants to increase demand for recycled plastic "in cooperation with stakeholders". It will now analyse the pledges in more detail and publish the final results in the first quarter of 2019. It remains to be seen whether the EC will propose setting mandatory recycled content requirements.

EC to start evaluation of Industrial Emissions Directive 2010/75 (IED). The EC published a roadmap on the evaluation of the IED. Following the criteria set out in the EC's Better Regulation Agenda, the so-called fitness check will evaluate whether the IED functions well and has met its intended objectives. In particular, the evaluation will look at the relevance, coherence, effectiveness, efficiency and EU added value of the IED. Stakeholders can submit comments on the roadmap until 4 December 2018. The EC is expected to launch a 12-week public consultation in late 2019 and finalise the evaluation by early 2020.

EU Council and EP reach compromise on fertilisers. The EP announced that the EU co-legislators have agreed on the text of a new regulation on fertilisers (amending Regulations 1069/2009 and 1107/2009). Amongst other things, it would introduce a limit for cadmium in "CE marked" phosphate fertilisers three years after entry into force. There is also a seven-year review period to assess feasibility for further reductions, and a voluntary "low cadmium" label for qualifying products. Once the provisional agreement is confirmed, the draft regulation will be put to a vote by the full EP and formally adopted by the EU Council.

Co-legislators prepare their negotiations of the recast of the Persistent Organic Pollutants (POP) Regulation 850/2004. Attachés of the EU member states have continued internal negotiations, but reportedly, there was no new proposal on what limit to allow for toxic flame retardant decaBDE in recycled materials. The Austrian Council Presidency is working on a compromise solution. The issue is controversial, with the EC's original proposal banning the substance except for unintentional traces at concentrations of no more than 10 parts per million. Recyclers complained that concentration could end the recycling of cars and electronics. The file will be discussed next in COREPER, i.e. at ambassador level. The EP adopted its negotiating position on the file, which called for allowing 500 parts per million for the cumulative sum of all PBDEs (a whole category of flame retardants that includes decaBDE). Council and EP are expected to enter into negotiations after the member states have agreed on their position.

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