

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

December 2018



Plastic manufacturing company fined almost £300,000 after employee killed. The Health and Safety Executive (HSE) has [reported](#) on the fine, imposed by Leicester Magistrates' Court, which heard how a 52-year-old employee died after a metal retaining end cap and plastic rod were forcibly ejected from a casting machine at an estimated 81 mph. The HSE inspector in the case reminded those in control of work equipment of the responsibility to undertake a suitably robust assessment in order to ensure that all foreseeable hazards have been identified.

Press reports warn Christmas shoppers of potential safety issues with counterfeit goods. The [coverage](#) notes particular concerns with online platforms. The Office for Product Safety and Standards (OPSS) has also launched a [guide](#) for consumers on "shopping safety for children at Christmas". OPSS was created in January 2018 to enhance protections for consumers and the environment and drive increased productivity, growth and business confidence. It has been relatively active since its creation, and businesses may want to track its publications to identify potential areas of concern and focus (we issued a "[need to know](#)" guide on the first government-backed Code of Practice for product safety recalls, PAS7100, earlier this year).

Three companies fined total of over £1.4 million after security guard killed. Associated British Ports, DFDS Seaways PLC and ICTS (UK) Ltd were all fined after a security guard employed at a container terminal at Immingham Docks was fatally injured when he was struck by an articulated vehicle. The HSE [press release](#) notes the HSE inspector's view that there was inadequate communication among the parties and that a properly implemented transport risk assessment "should have identified sufficient measures to separate people and vehicles, and provide safe facilities." This is an interesting case, as it demonstrates how more than one party operating on a site can each be held liable under health and safety law for a single incident.

Draft Brexit Regulations published for various areas of regulatory compliance. The regulations are each made under the European Union (Withdrawal) Act 2018 (EUWA), which enables a minister to make regulations to deal with deficiencies in retained EU law arising from withdrawal and are due to come into force on "exit day". Draft regulations include those relating to [health and safety](#), [environmental permitting](#), [air quality](#), [official controls \(animals, feed and food\)](#), [consumer protection](#), [genetically modified organisms \(GMOs\)](#), [CRC energy efficiency scheme](#), [persistent organic pollutants](#) and the [energy savings opportunity scheme](#).





Bus company fined £2.3 million for health and safety breach at Birmingham Crown Court.

A [press release](#) from the Crown Prosecution Service reports that the bus company was found to have dealt inadequately with numerous complaints about the driver's driving and ignored warnings to ensure he reduced his hours of work due to the effect of fatigue on his standard of driving (but despite these complaints, the driver had worked in excess of 60 hours per week in the three weeks prior to the crash). This fine was imposed despite the company pleading guilty and is a clear reminder of the significant fines that may be imposed by courts when following sentencing guidelines.

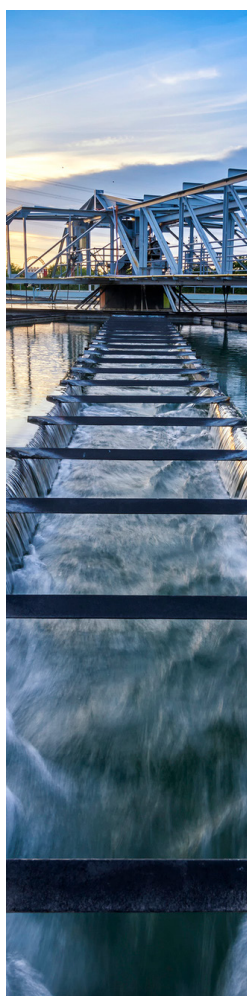
First Deferred Prosecution Agreement (DPA) now concluded. The Serious Fraud Office (SFO) [announced](#) at the end of November that Standard Bank PLC had fully complied with all terms during the three-year period of operation and the DPA was concluded. DPAs are a discretionary tool introduced by the Crime and Courts Act 2013, which came into effect in 2014, and are available to the SFO and CPS. The CPS operates a [Code of Practice](#) relating to DPAs, which notes that in order to enter into a DPA, the prosecutor must apply a two-stage test, dealing with both the evidence and the public interest. The existence or otherwise of a proactive corporate compliance programme is one of the factors taken into account. The fact that the first DPA has concluded successfully may mean that such agreements are now more likely to be considered as an alternative to prosecution of corporate offenders.

A landowner who allowed an illegal waste wood "recycling" business in the Devon countryside has been fined £12,850, plus costs and compensation. Despite the intention to recycle the wood, material arrived, but none ever left, resulting in a huge stockpile of waste wood, much of which was later destroyed in a massive fire. This is the second recent example of a landlord being held liable for "knowingly permitting" illegal waste accumulations by his tenants.

Water utility Wessex water paid a record [Enforcement Undertaking](#) for a water pollution offence. The firm gave a donation of £975,000 to a number of local charities, and paid Environment Agency (EA) costs. Other large EUs (each in excess of £100,000) have recently been agreed with Northumbrian Water, United Utilities and Carlsberg. These latest statistics released by the EA show this mechanism being increasingly used for permitting breaches. Notably, only one EU for packaging waste offences appears in the latest round of data issues by the EA, which is an unusually low level of activity in this area of enforcement, and has been questioned by a number of commentators in the packaging industry.

Defra has [responded](#) to its consultation on "Proposals to tackle crime and poor performance in the waste sector and introduce a new fixed penalty for the waste duty of care". In the response, Defra has said, amongst other things, that it will strengthen the EA's powers for assessing operator competence, introduce fixed penalty notices for householders who breach their duty of care and will consult on changes to the waste exemption regime to prevent it being used to hide waste crime. Legislation to give effect to the first two items has already been issued (The Environmental Protection (Miscellaneous Amendments) (England and Wales) Regulations 2018) and comes into force on 7 January and 7 April 2019.

The Met Office has published [The UK Climate Change Projections 2018 \(UKCP18\)](#) updating the previous one from 2009. The Met Office says that UKCP18 sets out "the most comprehensive and detailed picture of the UK's temperature, rainfall and sea level rise over the next century" and that "urgent international action is needed" to address the problem. In a connected statement, EA has confirmed that it is working on the basis of a four-degree temperature rise when planning flood defences.





Environment Minister Michael Gove has [confirmed](#) that the Environment Bill will not be laid until after Brexit. This bill is required under the terms of the EU (Withdrawal) Act 2018, and will now be divided into two parts. Whilst the first part, on environmental principles and governance, will be published before 26 December as required by the act, the remaining part will not be published until January, and the bill will not be laid before Parliament until after 29 March 2019.

Friends of the Earth seeks judicial review of EA wastewater treatment permitting decision.

Friends of the Earth sought permission to challenge Cuadrilla's permit, arguing that the EA had not met its "legal duty to promote the best available techniques for reducing the environmental impact of fracking" in relation to the treatment of flowback fluid. A judgment (i.e. whether to grant permission for the JR) is expected before Christmas. Meanwhile, a [statement](#) issued by one of Cuadrilla's main investors has indicated that the company "will engage with the regulators and the industry to clearly demonstrate that a more appropriate upper limit on seismic monitoring should be set to enable optimal testing without compromising on world class environmental and safety measures".

The Environment Agency has developed a strategy to [investigate soil and water contamination](#) arising from the Grenfell fire. It will investigate impacts on the environment of hazardous substances present in the tower or produced by the fire itself. Meanwhile, Public Health England has published a [data update](#) on air monitoring in the aftermath of the fire.

The Environment Agency has opened a [consultation](#) on amending its charging scheme in relation to closed landfills and radioactive substances under the Environmental Permitting Regulations, the Environmental Protection (Disposal of Polychlorinated Biphenyls and other Dangerous Substances) (England and Wales) Regulations 2000, abstraction in the Dee and Wye catchments, the EU emissions trading system and WEEE compliance. Notably, the EA has not pursued previous plans to allow operators of closed landfills to self-assess their impacts on the environment. The new scheme is due to take effect in April 2019.

The Department for Business, Energy & Industrial Strategy (BEIS) is inviting comments on draft guidance for [Streamlined Energy and Carbon Reporting \(SECR\)](#). The Companies (Directors' Report) and Limited Liability Partnerships (Energy and Carbon Report) Regulations 2018 introduce new requirements for large, unquoted companies and limited liability partnerships, and the guidance includes a draft template for reporting. Comments are invited by 14 January 2019.

ECHA's Committee for Risk Assessment (RAC) concludes on 19 [opinions](#) on harmonised classification and labelling. The Committee for Socio-Economic Analysis adopted its final opinion, supporting the proposal to restrict the manufacturing, use, placing on the market and import of C9-C14 perfluorinated carboxylic acids (PFCAs), their salts and precursors.

The Health and Safety Executive has issued revised and extended [guidance](#) on how businesses producing, importing or using chemicals should respond to no-deal Brexit. HSE confirms it would take over the role of ECHA, and the EU chemicals regime would effectively be replicated in the UK.

A company has been fined [£18,000 under anti-social behaviour legislation](#) for failing to deal with Japanese knotweed. This is thought to be the first time that powers introduced in 2014 have been used since new powers were introduced under the Anti-Social Behaviour, Crime and Policing Act 2014. The company had ignored a "community protection notice", ordering it to get rid of the knotweed at a house it owned, and then the Council prosecuted. The court order also includes a requirement to hire a specialist company to implement a treatment plan.



The Oil and Gas Authority (OGA) has awarded its first [carbon dioxide appraisal and storage licence](#). Pale Blue Dot Energy (Acorn) Ltd will develop a carbon capture and storage project on the east coast of Scotland, re-using existing infrastructure where possible. The licence is for four years and allows the project to undertake the characterisation work necessary to obtain a permit to permanently store CO2 at this offshore site.

The European Commission adopted a [draft Regulation](#) amending several Annexes of the EU REACH Regulation to clarify how it applies to nanomaterials. REACH already applies to nanomaterials but did not previously have any specific provisions and there has been some confusion over registration requirements. The amendments come into effect from 1 January 2020 and introduce new definitions and clarity about how to provide information about nanomaterials' characteristics.

We have recently published an article on the [frESH Blog](#) on “The Significance in UK Nuisance Law of the Introduction of the ‘Agents of Change’ Principle” – a principle which makes those who change the nature of a neighbourhood responsible for the effects of those changes (e.g. new residential accommodation in a mainly industrial area).

EU co-legislators progress in negotiations of the recast of the Persistent Organic Pollutants (POP) Regulation 850/2004. We understand that an updated [mandate](#) has been approved for the legislative negotiations with the European Parliament (EP). The proposal, dated 14 December, has been [leaked](#). According to an earlier [leaked](#) Council document, the Council Presidency reported to the other Member States that the discussions at the first trilogue showed the EP would not be able to accept Council's text on the procedure regarding the amendments of the Annexes. The choice of procedure has implications for the influence the EP can exert. Therefore, the Presidency proposed that all amendments to Annexes I, II and III (adding new substances to Annexes I, II and III, establishing specific exemptions in Annexes I and II, permitting the manufacture and use of a substance listed in Part A to Annex I or Part A to Annex II as a closed-system site, limited intermediate, and moving substances from part B to Part A in Annex III) will be done by delegated acts. The ordinary legislative procedure will be used to add any new substances in Annexes IV and V, while the concentration limits originally set out in Annexes IV and V will be established by an implementing act. Annexes I to III list the chemicals subject to bans, partial restrictions and release reduction provisions; Annexes IV and V contain the substances subject to specific waste management rules. Resulting from technical negotiations, the Presidency proposed to add one additional paragraph 4b to the entry of decaBDE to allow a specific exemption in Annex I for aircrafts, motor vehicles and electronic equipment also for imports. Reportedly, Council officials expressed confidence that the compromises included in the mandate will be enough to conclude the trilogues during the next round on 18 December. An EP official was more cautious.

European Commission receives comments on roadmap on the evaluation of Industrial Emissions Directive 2010/75 (IED). The European Commission (EC) has [published](#) the 36 comments it received during the comment period, most of them from business associations. Many considered that the EC's decision to launch the fitness check at this stage contradicts the conclusions its Implementation Report published in December 2017, which pointed out that more time is needed in order to assess the implementation of the Directive. The European Environmental Bureau (EEB), the only environmental NGO that commented, [submitted](#) an extensive list of IED provisions and implementation practices that would “undermine the policy objectives and effectiveness” of the Directive, concluding that the law should take the form of a directly applicable regulation. The EC is expected to launch a 12-week public consultation in late 2019 and finalise the evaluation by early 2020.



Council discusses REACH Regulation 1907/2016 in terms of competitiveness. The Competitiveness Council has discussed the EC's [Communication](#) on the Implementation of REACH. It adopted [conclusions](#) on reacting to the EC's communication on "A future EU Industrial Policy Strategy" and calling "for a comprehensive and long-term industrial policy strategy for the EU, including an action plan, as part of the Commission's annual and multiannual priorities, to be in place at the latest by the beginning of the next EU institutional cycle". [In this context](#), the Council "took note" of information from the Austrian Council Presidency on the need to review aspects of the REACH Regulation that weigh heavily on the competitiveness of EU small- and medium-sized enterprises (SMEs).

ECHA enforcement project calls for improved safety information to protect workers from chemical hazards. In a new EU-wide enforcement project (REF-5), the European Chemicals Agency's Forum for Exchange of Information on Enforcement (Forum) [found](#) that "while companies have systems in place to communicate safe use information down the supply chain, the quality of this information needs to improve significantly". 898 inspections across the EEA of how companies share safety information about hazardous chemicals with their customers found that nearly one in five companies did not meet at least one of the requirements.

EP pesticide committee calls for glyphosate to be re-evaluated. After nearly a year of activity, members of the so-called PEST committee [adopted](#) a report on how to reform the EU's authorisation procedure for pesticides. It calls for more transparency. The committee reportedly also narrowly passed [an amendment](#) that calls on the EC's [Scientific Advice Mechanism](#) (SAM) "to initiate a systematic review of all available studies concerning the carcinogenicity of glyphosate and glyphosate-based formulations to assess whether it would be justified to review the approval of glyphosate according to Article 21 of [...] Regulation [1107/2009]." Last year, EU Member States voted in favour of extending the approval of glyphosate for another five years. The vote to re-approve the weedkiller triggered an immediate backlash in Paris, Berlin and Rome, all of which have since decided to phase-out its use at the national level. The EP Plenary will vote on the report in January 2019 as a non-binding resolution.

EU General Court finds no requirement to disclose glyphosate test information. On referral back from the Court of Justice (ECJ), the General Court upheld the EC's decision to refuse access to a commercially sensitive report on glyphosate (Stichting Greenpeace Nederland and PAN Europe v Commission ([T-545/11](#) RENV). Environmental NGOs had requested access under Aarhus Regulation 1367/2006 and Access to Documents Regulation 1049/2001. It did not deem the information to be "relating to emissions into the environment" under Article 6(1) of the Aarhus Regulation. Such environmental information must be disclosed even where there is a risk of undermining commercial confidentiality. The case related to EU authorisation of glyphosate in plant protection products. The court found that it is only at the stage of the national authorisation process that the exact composition and emissions into the environment are assessed. Therefore, the information in the document did not relate to foreseeable emissions.

EC [launches](#) a public consultation on the "EU Product Policy Framework contributing to the Circular Economy". It will be open until 24 January 2019. The initiative examines options and actions for a more coherent policy framework of the different strands of work of EU product policy in their contribution to the circular economy. Notably, the survey does not specifically address two sectors that Eunomia, the consultancy chosen by the EC to conduct a preparatory study, recently covered in targeted preparatory workshops: construction and automotive. The EC had [originally](#) foreseen to issue a Communication, but according to its [website](#), it now intends to draft an EC staff working document (SWD), a policy document that is not addressed to the other EU institutions, in Q1 2019.





EC launches “Circular Plastics Alliance” to foster the market of recycled plastics. As part of its efforts to transition the EU towards a [circular economy](#), the Circular Plastics Alliance will aim to improve the economics and quality of plastics recycling. It will consist of key industry stakeholders covering the full plastics value chain. It will in particular encourage cooperation and dialogue between market operators, both on the supply and the demand side. The EC had identified lacking demand as the main obstacle to a well-functioning EU market of recycled plastics (please see [frESH Law Horizons November 2018](#)). To this end, the Circular Plastics Alliance will foster short-term, voluntary and coordinated actions and investments, report on obstacles, which may hamper stakeholders’ efforts to deliver on their [pledges](#) to collectively reach the goal of at least 10 million tons of recycled plastics in new products on the EU market, which the EC set for 2025 in its [European Strategy for Plastics](#), and monitor the progress made.

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