SQUIRE PATTON BOGGS

frESH Law Horizons

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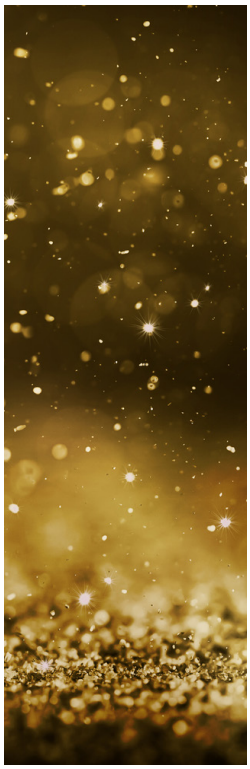
A food grain storage company pleaded guilty to breaching section 2(1) of the Health and Safety at Work Act 1974 and received a fine of £180,000, plus costs of £20,000, following the death of a worker who was struck by a lorry onsite. The Health and Safety Executive (HSE) investigation found that the company had failed to ensure that pedestrians and vehicles were able to move safely around the worksite and that it did not have measures in place to prevent employees walking into areas where large vehicles may be moving.

The construction industry has announced plans to develop a mandatory licensing scheme for all UK construction companies that will be driven by a newly formed Construction Licensing Task Force. The plans are to tackle issues identified by homeowners and construction firms through extensive research, such as the rise of rogue building companies, and the task force will be chaired by Liz Peace CBE, the former CEO of British Property Federation, with key organisations, such as the Federation of Master Builders and Royal Institution of Chartered Surveyors, sitting on it.

The government has begun a consultation into reforms of the building safety regime suggested by the Hackitt Review of Building Regulation and Fire Safety. The consultation proposes a new regime that applies to multi-occupied residential buildings of 18 metres or above in height with various responsibilities and information requirements, and also suggests bringing into force section 38 of the Building Act 1984 to allow individuals to claim damages where they suffer harm where a building fails to meet regulatory standards.



In the coming weeks, **HSE inspectors will visit businesses in industries where occupational lung diseases are most common** (such as food production and woodworking) to conduct inspections into dust control and the adequacy of protective measures. Inspectors will look for an awareness by employers and workers of the risks associated with exposure to substances commonly contained within dust and whether the necessary controls to protect workers have been put in place.

The Home Office has sought feedback by employers and businesses on the Regulatory Reform (Fire Safety) Order 2005 and their views on fire safety in workplaces in England, following the publication of the Hackitt Review in response to the Grenfell Tower fire in June 2017. This call for evidence complements the government's current consultation, which outlines the proposed legislative reform to the building safety regulatory system.

The independent review of the Modern Slavery Act 2015 has published its final cumulative report, which contains key suggestions and commentary on the adequacy of various provisions, such as a potential weakness in the current law on prostitution in the fight against traffickers involved in sexual exploitation. It also suggests that there should be a central government-run repository for modern slavery statements and that a failure to act or make a statement where slavery is discovered within an organisation's supply chain should become a culpable offence.

The Magistrates Association has published its response to the Sentencing Council's consultation on its proposals to embed additional information into offence-specific sentencing guidelines, supporting all of the proposals made by the Sentencing Council. The Sentencing Council's consultation closed in September 2018, and the response welcomes the inclusion of additional information relating to fines, community orders and custodial sentences, but does not actually believe there will be a major impact on sentencing as a whole.

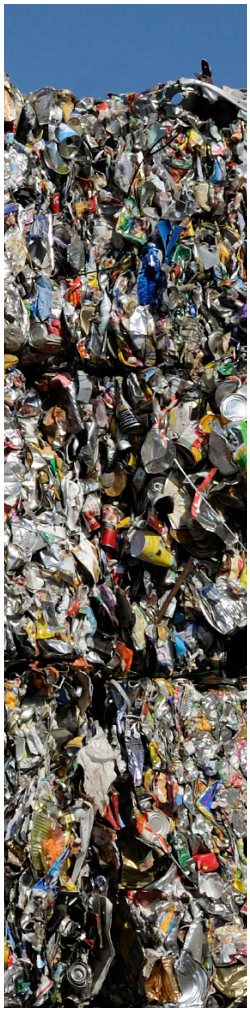
The National Audit Office published its report on ensuring food safety and standards on 12 June. It reports that the food regulation system is complex, has come under increasing financial pressure and has elements that are outdated. The Food Standards Agency (FSA) has responded to the report, welcoming it and noting recommendations in relation to establishing the role of sampling, addressing gaps in outcome-based measures and targets, pressing ahead with mandatory display of food hygiene ratings in England and addressing gaps in enforcement powers available to the Food Crime Unit. For food businesses, the report and the response from the FSA are further signs that the regulatory regime in the UK will likely change over the coming months and years, although the speed of change may depend on how Brexit evolves.

The UK government has confirmed a ban on plastic straws, stirrers and cotton buds in England, coming into force in April 2020. The government's response to the consultation indicated that more than 80% of respondents supported the ban on straws, 90% for drinks stirrers, and 89% for cotton buds. The ban will include exemptions to ensure that those with medical needs or a disability are able to continue to access plastic straws. In England, it is estimated that annually we use 4.7 billion plastic straws, 316 million plastic stirrers and 1.8 billion plastic-stemmed cotton buds. An estimated 10% of cotton buds are flushed down toilets and can end up in waterways and oceans.

The European Chemicals Agency (ECHA) has announced it will start to evaluate 20% of REACH registration dossiers in each tonnage band to improve the compliance of REACH registrations. This means that approximately 30% of all registered chemicals will be checked. This is an increase from the current minimum level of 5%, and a new regulation from the Commission will be required to change the target. ECHA's aim is to screen all registration dossiers that were submitted by the 2018 deadline: by 2023 for substances in the over 100 tonnes per year band and by 2027 for substances in the 1 to 100 tonnes band. For high tonnage substances, ECHA will conclude by the end of 2020 whether they are a priority for risk management, for data generation or currently of low priority for further action. These new targets are part of a wider joint action plan by ECHA and the European Commission, being finalised this month, to address the lack of compliance in registration dossiers and encourage industry to improve their safety data on chemicals.

ECHA has also confirmed plans to change the authorisation process for using substances of very high concern, so that companies will have to provide details of any existing alternatives, and explain why they are not feasible in their specific case. It is also going to revise how its risk assessment and socio-economic committees provide opinions on chemical authorisation applications and further standardise the opinion texts themselves.

Meanwhile, **a German campaign group has published details of a number of non-compliant REACH dossiers** that had been identified in a German government investigation in 2014. The dossiers highlighted reference 654 EU companies, of which 80 are from the UK. It states that only 31% of registration dossiers were found to be fully compliant. The European chemicals industry trade body Cefic said this report was "not helpful at all", since the issues are not new and are already being addressed by chemicals companies. Cefic has also published a REACH dossier improvement action plan.



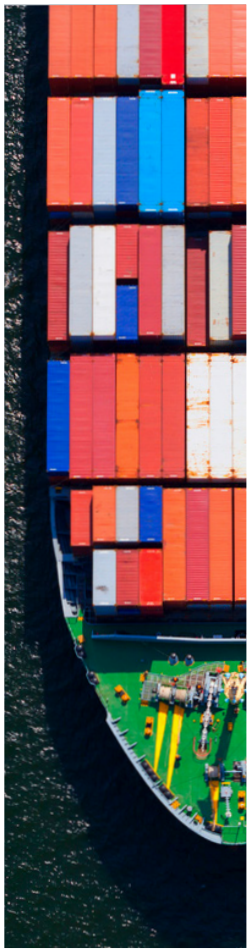
Defra has issued a further draft amendment to its REACH Brexit legislation, the draft REACH etc. (Amendment etc.) (EU Exit) (No.3) Regulations 2019. This has been nicknamed the "Rolls Royce" amendment because it addresses an issue raised by a number of engineering companies, of which this was the most high profile, regarding pending REACH authorisation applications not being recognised post-Brexit. Under the draft amendment, where the latest application date is between 29 March 2017 and exit day, there are now transitional provisions to extend the latest application date and sunset date to 18 months after exit day, subject to certain conditions being met. A total of 16 substances fit into this category, with last application dates up to 4 July 2019. Where the latest application date is within 18 months of exit day, it is extended to 18 months after exit day. The amendment also makes further amendments to reflect the later proposed exit date, and updates to the REACH Regulation, including chromate authorisations that the court rules were unlawful earlier this year.

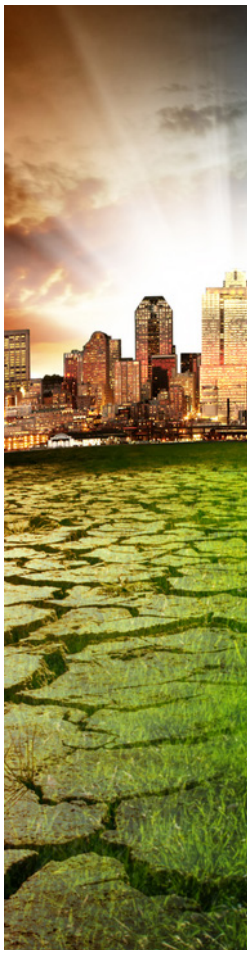
Defra was threatened with legal challenge by campaign group CHEM Trust over gaps in Brexit legislation that omitted key sections of the EU legislation banning products with endocrine-disrupting properties from approval as pesticides. Defra responded by explaining that this was a drafting error, and it has issued the Pesticides (Amendment) (EU Exit) Regulations 2019 correcting it.

ClientEarth has warned of further legal action regarding air quality, having repeatedly challenged the government's clean air plans in court over recent years. This time, its target is Highways England (HE), which has responsibility for 3,000km of motorway and 4,100km of major A-roads in England. Recent statistics show that more than a third have illegal levels of nitrogen dioxide – sometimes as high as 1.5 times the limit. HE has been allocated £100 million to address air quality hotspots on these roads, and ClientEarth alleges that HE has spent only a fraction of this to date, thought to be about £7.7 million. The government has previously directed many local councils all around the country to produce plans to achieve applicable quality standards in the shortest time possible, but those plans do not include these major roads because they are the responsibility of HE rather than the councils. Therefore, ClientEarth has asked the government to direct HE to produce a similar plan for these major roads. HE responded that it was aware of the letter from ClientEarth and that it "remain[s] committed to investing the £75m air quality fund through to the end of March 2020, as set out in the Government's Road Investment Strategy".

Two very recent cases about the waste duty of care highlight how diligent companies need to be about the companies or individuals to whom they pass their waste. Two waste companies in Essex incurred fines and costs of more than £45,000 after their contractor fly-tipped waste that they had consigned to him. They had no formal contract or waste transfer notes, and they had not carried out the due diligence checks required to satisfy the duty of care. In the next case, the company producing the waste (Biowood Recycling) had taken several steps to try to comply with its duty of care, but had failed to check that an exemption held by the waste operator was sufficient for the amount of wood that it was sending to the site (the exemption allowed it to store 500 tonnes of waste wood per week, but the Environment Agency (EA) said that around 1,000 tonnes were taken there every week for five weeks). Biowood pleaded guilty. It was fined £12,690 and ordered to pay £314,426 compensation to the landowner who paid to clear the waste. The two rogue operators of the site received prison sentences (one suspended), although one was jailed in his absence as a warrant was issued for his arrest. These cases reinforce the need for waste producers to check their waste service providers' credentials in detail, and to keep detailed records.

A climate group litigation fails in EU General Court. In *Carvalho v European Parliament (T-330/18)*, a group of litigants from eight countries claimed the EU's 2030 40% greenhouse gas (GHG) reduction target breached their human rights to life, health, occupation and property, and was inconsistent with other (higher) laws. They claimed that it should be increased to between 50% and 60%. The General Court concluded that the applicants did not have any legal standing to bring the case under the EU Treaty and dismissed the claim. This is one of the first attempts at group climate change litigation in the EU, as claimants begin to try to find new ways to bring cases to the courts. Despite its failure, it could still encourage others to try other ways to bring such claims.





Waste company Biffa has been convicted of breaching the EU transfrontier shipment of waste regulation by illegally exporting approximately 175 tonnes of household waste to China in 2015, described as waste paper, but containing contaminants such as nappies, bags of excrement, clothing, textiles, electrical items and hot water bottles. Sentencing was postposed (although a proceeds of settlement of almost £10,000 was agreed) because the EA announced that it is pursuing another prosecution against Biffa under the same legislation, regarding shipments of waste to India and Indonesia in 2018. Biffa has criticised the EA for lack of guidance and standards, accused it of being "in breach of its responsibilities to the market", and is believed to be considering an appeal.

The UK has committed to a net zero carbon target by 2050 following the recent Committee on Climate Change (CCC) report. It was announced by Theresa May on 12 June and an amendment to the Climate Change Act 2008 passed through Parliament on 26 June. In doing this, the UK is the first major economy to agree a legal target to reach net zero GHG emissions. The Climate Change Act 2008 (2050 Target Amendment) Order 2019 simply amends the target in the Climate Change Act 2008 from 80% to 100%. This act requires the government to set legally binding "carbon budgets" to act as stepping-stones towards the 2050 target. Once the budgets are set, the government is obliged to prepare policies to ensure the budget is met. Currently, carbon budgets have been set running up to 2032, but there will need to be material adjustment going forward, and the CCC will provide advice to the government next year on meeting net zero for the next phase of budgets to take us to 2037. This is a very important development in the move towards UK decarbonisation and net zero emissions. Of course, the real challenge is implementing and achieving this target. It will have to be supported by strong policies from all areas of government, and significant responses and behaviour changes across the public sector, business and from individuals.

The European Commission has published guidelines on climate-related reporting as a supplement to its existing guidelines on non-financial reporting. They are intended for use by companies that fall under the scope of the Non-Financial Reporting Directive (NFRD) (large listed companies, banks, insurance companies and other public interest companies, with more than 500 employees). However, they may also be helpful for any companies that are voluntarily disclosing climate-related information. The guidelines propose a number of climate-related disclosures for each of the five reporting areas in the NFRD (business model; policies and due diligence processes; outcomes; principal risks and their management; and key performance indicators).

The Treasury Committee has launched an inquiry into decarbonisation of the UK economy and green finance. The inquiry will cover:

- The economic opportunity that decarbonisation presents for the UK, and the potential of the green finance sector
- HMT's strategy in facilitating clean growth and its response to the CCC's net zero recommendations
- The role of the Spending Review in facilitating net zero
- The role that financial services firms are currently playing in financing the transition
- The "green" financial product landscape and their associated regulatory environment

For each point, the Treasury has set out a number of key questions and invites submissions from interested parties. The deadline for written submissions is 26 July 2019.

The government has awarded nine companies a total of £26 million for carbon capture, utilisation and storage (CCUS) projects, including a facility to capture and use 40,000 tonnes of carbon dioxide (CO2) a year, which will be the largest to date in the UK (removing 100 times more CO2 from the atmosphere than the current largest CCUS facility). The government states that these projects are an essential part of the UK reaching its goal of cutting carbon emissions to net zero by 2050.

A council is being challenged in court over a planned incinerator. Community group Community R4C (CR4C) has brought the legal challenge on various grounds, including that the proposed incinerator will not sort recyclable materials from non-recyclable, resulting in the burning of recyclable material "which could otherwise have been recycled or composted", contrary to the government's resources and waste strategy and the EU legal requirements on local councils to maximise recycling. CR4C also claims that the pricing structure will discourage recycling because incineration is cheaper. National incineration rates are rising, but recycling rates are flat, and Theresa May has previously warned of the risk of taxes on incineration if necessary to boost recycling rates. This case is still at an early stage, but it will be interesting to see if any of these arguments are successful, because they could have significant implications for other incineration projects.

Waste incineration "best available techniques" (BAT) conclusions have been approved by the Industrial Emissions Directive's Article 75 Committee. The final form has not yet been published, but this is expected shortly and will be published in the Official Journal (OJ), as well as on the European IPPC Bureau's website. Once published, there will be a four-year period for the implementation of the new BAT conclusions in affected waste incineration installations.

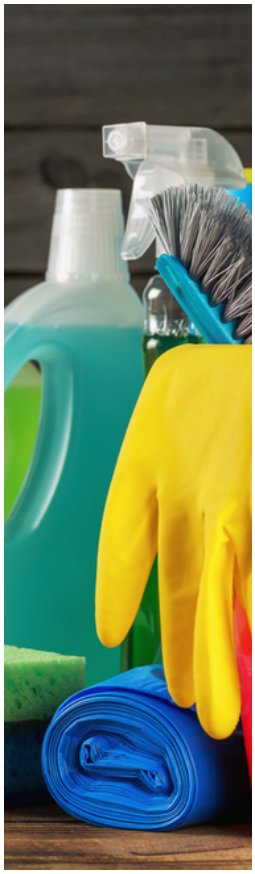
The EA has published the latest civil sanctions data, with £3.7 million of civil penalties being paid to charitable organisations under enforcement undertakings. The vast majority of this figure was made up of donations by water undertakers regarding water pollution breaches, but there are some other sizeable penalties for food supplier Fuerst Day Lawson for water pollution, and for LEC (L'Pool) Ltd for packaging waste regulation non-compliance.

The EU has published the Single-use Plastics (SUP) Directive. The SUP Directive was published in the OJ on 12 June. It will enter into force on 2 July, and the general transposition deadline is 3 July 2021. The time limit for a direct legal action (for annulment) against the directive expires in mid-September and some stakeholders have discussed a legal action against the directive, e.g. the UK-based Oxo-biodegradable Plastic Association (OPA). For its Plastics Strategy including the proposal for the SUP Directive as a "comprehensive strategy for reducing plastics pollution", as well as for the awareness-raising campaign about SUP, the EU Ombudsman bestowed the 2019 Award for Good Administration to the competent teams within the European Commission. Conversely, industry representatives have criticised the SUP Directive as rushed, lacking quality and disproportionate. For example, EUROCHAMBRES, the association of European chambers of commerce and industry representing more than 20 million enterprises, 98% of which are SMEs, published a short review of "The Good, the Bad and the Ugly of the 2014-19 EU Term" in April. It lists the SUP Directive as "bad", opining that "it is questionable whether this legislation will deliver on its intentions or merely constrain the competitiveness of the European plastics sector."

EU member states have set strategic priorities for the next legislative term of the EU. The European Council, on 20-21 June, agreed on a high-level strategy document in its conclusions. Continuing a trend in EU policy to link climate change and the circular economy, it reads under the third priority, "Building a climate-neutral, green, fair and social Europe": "Europe needs inclusiveness and sustainability, embracing the changes brought about by the green transition, technological evolution and globalisation while making sure no-one is left behind. As the effects of climate change become more visible and pervasive, we urgently need to step up our action to manage this existential threat. The EU can and must lead the way, by engaging in an in-depth transformation of its own economy and society to achieve climate neutrality. This will have to be conducted in a way that takes account of national circumstances and is socially just." The European Council failed to agree on a climate strategy for 2050, as Poland, the Czech Republic, Hungary and Estonia blocked the inclusion of a specific date, despite the efforts of France and Germany to convince them. This means that the EU will go to a crucial UN summit in September, as well as next week's G20, without a clear timeline. A footnote in the conclusions expresses the position of the majority of member states: "For a large majority of Member States, climate neutrality must be achieved by 2050."

Environment ministers adopt conclusions "Towards a Sustainable Chemicals Policy Strategy of the Union". The council calls on the European Commission to develop a sustainable chemicals policy that covers REACH, endocrine disruptors (EDCs) and nanomaterials. It urges the European Commission to provide an action plan "without undue delay" on how to minimise exposure to endocrine disruptors and to stimulate substitution to safer chemicals, "as far as technically and practically possible", and calls for a hazard-based "horizontal approach" across different pieces of legislation to identify and manage risks of EDCs. It also urges the European Commission to develop, without further delay, a union strategy for a non-toxic environment (NTE) in close collaboration with the member states and the union institutions.

The European Commission has opened a public consultation on its roadmap for the fitness check on EDCs. In the roadmap, the European Commission states that "the EU is today recognised as one of the global leaders in dealing with [EDCs]." A variety of EU legal measures addressing EDCs collectively aim to ensure a high level of protection of human health and the environment, while ensuring the smooth functioning of the internal market. However, because these measures "have been developed at different points in time and have, in certain cases, different specific objectives," currently there exist "different approaches for managing endocrine disruptors, depending on the sector being regulated". Consequently, "questions are regularly raised by stakeholders on the overall coherence of the EU legal framework." The fitness check will pay "particular attention to legislation that does not contain specific provisions for endocrine disruptors, such as the legislation on toys, cosmetics and food contact materials". A public consultation and "the first meeting of the Annual Forum on endocrine disruptors" will take place in the last quarter of 2019. The current consultation on the roadmap will be open until 10 July.



ECHA enforcement forum: national inspectors are to look into classification of mixtures. ECHA announced a pilot project to review the classification of chemical mixtures pursuant to the Classification, Labelling and Packaging (CLP) Regulation. It will focus on detergents and cleaning products and work with stakeholders to identify how safety data sheets can be improved. The forum is preparing "a compilation of [enforcement] measures available to inspectors in their Member States" that "could be used … to address non-compliance with dossier evaluation and to explore if ECHA could further support enforcement authorities in taking action when there is misuse of the evaluation process."

The European Food Safety Authority (EFSA) has published its guidance on the use of the Threshold of Toxicological Concern (TTC) approach in food safety assessment. In the document, EFSA's Scientific Committee confirms that the TTC is a pragmatic screening and prioritisation tool for use in food safety assessment and provides step-by-step instructions for use of the TTC approach. EFSA also published a summary of the outcome of the public consultation held at the end of 2018 on the draft guidance. It shows several calls for changes relating to endocrine-disrupting chemicals. However, the final version of the guidance document does not include such changes.

The first refusal of a REACH authorisation has been published. A summary of the first-ever decision to refuse a REACH authorisation was published in the OJ. The Commission decided to reject an application by Hapoc, a German surface treatment company, for an authorised use of sodium dichromate substance in a molten bath form for the treatment of certain micro-surgery medical instruments, because it did not conform with the requirements to include the necessary information specified by REACH. The Commission's REACH Committee agreed to the rejection following the opinions of ECHA's Committees for Risk Assessment and Socio-economic Analysis.

ClientEarth has appealed an EU court ruling on DEHP. The ruling (in case T-108/17) effectively confirmed the Commission's decision to grant an authorisation to plastic recyclers to use DEHP in recycled PVC and denied that the non-profit organisation has standing to challenge the authorisation decision itself. ClientEarth said that the judgment undermines the EU's chemicals regulation REACH and its objective to protect people and the environment from dangerous chemicals. REACH would be meant to "put the responsibility on industry to generate and provide the necessary information regarding the risk of using their products". The European Court of Justice registered the appeal as case C-458/19 P.

We hosted our annual ESH conference in our London office on 5 June 2019, where we welcomed external speakers from a range of sectors, including:

- Michael Jackson, Food Standards Agency, speaking about modernising regulation of the food industry
- Louise Wad, Siemens Mobility, speaking about returning to continual improvement following a serious incident in the workplace
- Polly Cook, Leeds City Council, speaking about Leeds City Council's Air Quality Plan
- Delphine Bard, Health and Safety Laboratory, speaking about safe work with manufactured nanomaterials
- Duncan Spencer, EDIA Limited, speaking about the way environmental insurance responds to regulatory, policy or practice changes

Lawyers Matthew Kirk, Gary Lewis and Rob Elvin also hosted sessions on key topics in environment, health and safety law.

If you would like to be notified about our upcoming conferences and seminars, please contact Nicola Smith.

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