

frESH Law Horizons

July 2019



Fine of £1 million for a rail company after the death of a passenger on the Gatwick Express.

The [press release](#) from the Office of Rail and Road (ORR) reports on the fine imposed by Southwark Crown Court for breach of an offence under the Health & Safety at Work etc. Act 1974. Its investigation showed that there had been a similar incident in 2002, which resulted in enforcement action against the train operator in that case, and that the risks should have been identified by a suitable risk assessment.

Government response [to the final report of the Modern Slavery Act review](#) is published.

The Home Office has accepted most of the recommendations and the government will launch a central registry for modern slavery statements and is investing in a Policy and Evidence Centre for Modern Slavery and Human Rights. Companies will not be able to state they have taken no steps to address modern slavery in their supply chains (which the legislation currently permits), and the six areas of reporting currently recommended in guidance will be made mandatory. In addition, the government will bring forward proposals for an enforcement body to enforce sanctions against non-compliant companies. In our [March](#) edition of frESH Law Horizons, we reported that the government was conducting an audit of compliance with the relevant provisions of the Modern Slavery regime, in particular whether statements meet minimum legal requirements, and whether they meet key standards in the Home Office Statutory Guidance on transparency in supply chains. Non-compliant organisations may be named. It seems that, in the future, the act will bear more teeth. Therefore, businesses may wish to review their compliance with the current guidance, as well as the legislation.

Health board and maintenance company is fined after the fall of a window cleaner.

The Health and Safety Executive (HSE) has [reported](#) on the £400,000 fine for the NHS Trust and a six-month suspended sentence for the director of the maintenance firm. The prosecution is a reminder of the requirement for organisations to check the competency of their contractors and ensure a suitable risk assessment/safe system of work is in place, particularly for contracts that involve work at height, where the risk of death means that the “harm” category under the [sentencing guidelines](#) will be “Level A”.

HSE releases [annual workplace fatality figures](#).

We have published an [article](#) with more details. The recent increases in fines for health and safety offences seem to be having little impact on the number of workplace fatalities, which have remained relatively constant (and comparatively low) over recent years.





Amendments to UK regulations for enforcement on “smart tachographs”. The Department of Transport has proposed amendments to the Transport Act 1968 in the [Passenger and Goods Vehicles \(Tachographs\) \(Amendment etc.\) Regulations 2019](#). The amendments are to allow effective enforcement if requirements in relation to smart tachographs are breached. All new trucks are now required to be fitted with smart tachographs, which introduce a Global Positioning System (GPS) for positioning and tracking a vehicle, the ability to link the units to vehicle telematics systems and the ability for remote enforcement. For remote enforcement, vehicles can be fitted with a Remote Early Detection Communication Reader, which will be able to read data remotely from a passing digital tachograph, without a vehicle stop, for some offences, although the data received cannot lead to automatic penalties or fines (and, in practice, is likely to lead to a vehicle stop if issues are detected, with a full examination of the tachograph and drivers’ card). There is currently no requirement to fit smart tachographs to older vehicles. Such vehicles may, of course, still be subject to roadside inspections, including in relation to tachograph date. When the new regulation comes into effect for vehicles registered after 15 June 2019, there will be no immediate requirement for the equipment to be retrofitted to older trucks, buses and coaches.

Work at height fine of £500,000 following a fall from a viaduct. Another significant fine has been imposed for failures in relation to work at height. This case also involved the ORR, which has reported on the case, heard at Westminster Magistrates’ Court.

Court of Appeal confirms a plea discount of 25% for a guilty plea on first appearance at Crown Court. In *R v Ball* [2019] EWCA Crim 1260, the court stated that provided the indication of plea was clear and unequivocal, the sentencing judge should afford the defendant this discount (in this case, the Crown Court gave a 20% discount, which is not in accordance with the sentencing guideline). The Sentencing Council published the [definitive guideline on the reduction in sentence for a guilty plea](#) on 1 June 2017. The applicable discount for a guilty plea at the first stage of proceedings (in the magistrates’ court) is one-third. However, whether a guilty plea is appropriate should always be considered by the defendant in relation to any regulatory prosecution, after a careful analysis of whether the facts of the offence are made out and whether a defence, such as due diligence, would be available.

Court of Appeal decision on sentencing remarks. In *R v Chin-Charles* (3 July 2019), the court issued a reminder that, in relation to sentencing, its task is to determine whether the sentence was wrong in principle or manifestly excessive. It does not have an administrative function, and, where a guideline applies, the court hearing the case should announce findings of fact without supporting narrative. Appeals in relation to sentencing in environment, health and safety, and food safety offences are, in our experience, more common over recent years, since the relevant sentencing guidelines were introduced, and fine levels have increased significantly. Persuading a court that an offence was categorised in the wrong bracket can, effectively, halve the fine. The increasing length and complexity of sentencing remarks, with extensive citations of authority, detailed discussions of relevant guidelines and recitation of the arguments, are almost certainly a by-product of that.

Code for private prosecutors is published. In our [January edition](#) of frESH Law Horizons, we reported on the consultation launched by the Private Prosecutors’ Association (PPA). The [code](#) is voluntary and is by way of guidance. It covers various matters relating to investigation, disclosure, charging and proceedings, as well as abuse of process, trial, sentencing and costs. Private prosecutions can be used by businesses, as well as individuals, who have been the victims of alleged criminal acts committed against them and may be considered where enforcement agencies have not investigated/prosecuted. There are examples of private prosecutions being used for breach of environmental legislation, in particular where noise or other nuisance has been caused to victims.



Environment Agency (EA) is to use drones to tackle illegal water abstraction. The EA has announced that due to the heatwave in 2018 and subsequent mild winter, rainfall levels have not been as high as would ordinarily be expected and there is increased pressure on the water environment. Water abstraction is regulated through licences; however, there is always the risk that licence holders will breach their conditions in order to protect their own cause, notably irrigation of crops. Therefore, the EA has [engaged with a drone operator](#) to monitor water areas from above and carry out enforcement efforts where necessary. In our [April edition of FrESH Law Horizons](#), we reported that drones are now used by some local authorities for surveillance as well. Government [guidance](#) is available on using directed surveillance.

Sentencing Council publishes [new general guidelines and expanded explanations](#). These update and replace the 2004 Seriousness Guideline. Set to come into force on 1 October 2019, the new guidelines are paperless and intend to provide a clear structure when sentencing offences that do not yet have specific guidelines, but also aim to leave wide discretion to judges and magistrates (with reference to all relevant factors of the case) in arriving at a final sentence. There are also expanded explanations that are supplemental to the new general guidelines, which are to ensure a consistent approach when applying the guidelines. It is not thought, though, that the new general guidelines will have a notable impact on business crime cases where the majority of offences are covered by specific guidelines themselves, such as health and safety, and food offences.

Department for Environment, Food & Rural Affairs (Defra) has published [guidance](#) for local authorities on climate change resilience and “revolutionising” the management of climate change risk. The guidance outlines a range of adaptation measures that can be implemented by local authorities into their corporate plans, policies and performance monitoring systems. Given that many local authorities have declared climate emergencies in recent months, this guidance should assist local authorities to take account of climate change issues in all of their decision-making.

The International Standards Agency (ISO) has [published](#) the first international standard for climate change adaptation. [ISO 14090](#) (Adaptation to climate change – Principles, requirements and guidelines) aims to help organisations assess climate change impacts and put plans in place for effective adaptation. It helps them identify and manage risks, as well as seize any opportunities that climate change may bring.

The Environmental Audit Committee (EAC) has launched an [inquiry on electronic waste and the circular economy](#). The huge growth in the use of electronic devices has led to a rapid increase in electronic waste. The overview of the inquiry notes that, globally, 44.7 million tonnes of e-waste were produced in 2017, 90% of which was sent to landfill, incinerated, illegally traded or treated in a sub-standard way. The inquiry will focus on two key areas: how to implement a circular economy for electronics, and the state of the UK electronic waste sector, including waste exports and the functioning of the WEEE system. The deadline for written submissions is 5 August.

The Treasury has published its [Green Finance Strategy](#). This describes how the UK intends to lead on green finance and ensure the financial system can respond to climate change. The part that has attracted the most attention is the announcement that listed companies and large asset owners will be expected to report on climate change risks by 2022 (using the Task Force on Climate-related Financial Disclosures ([TCFD](#)) requirements). This will be a significant new requirement for many large organisations.





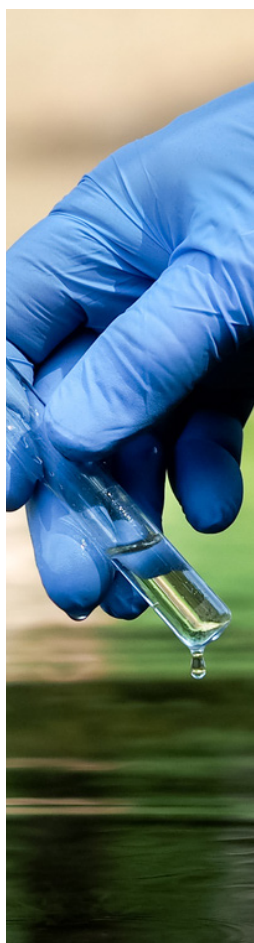
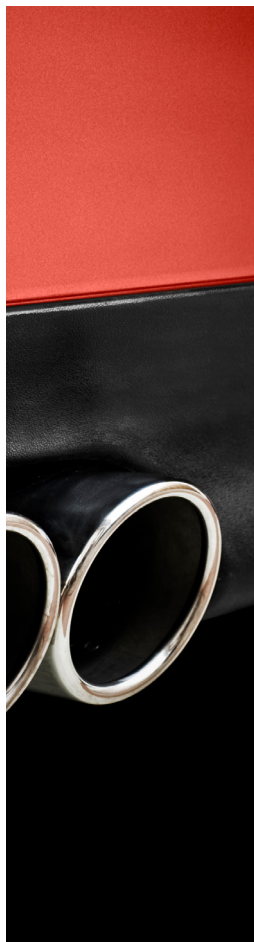
Severn Trent has fined a company for illegal hydrant use and wasting water. In the first prosecution of this kind for Severn Trent, Birmingham Drain Services Ltd was ordered to pay just under £10,000, consisting of a £6,300 fine, £3,465.90 costs and a £170 victim surcharge for three offences of illegal hydrant use and wasting water across Warwickshire last year. Severn Trent's spokesman said: "This company acted recklessly, and could have caused real problems when accessing our network when they shouldn't have. Not only could they have caused our customers water to be off or murky, but they could have easily caused issues for the fire service in the event of an emergency."

The European Court of Justice (ECJ) has ruled on the definition of waste electronic equipment. In the [Tronex BV](#) case, the European court had to decide whether containers of used electric products shipped to Africa as products, rather than as waste, should have been classed as waste and, therefore, subject to the rules on transfrontier shipment of waste. The court ruled that defective products would be waste unless the holder can "demonstrate not only that they can be reused, but that their reuse is certain", which would require them to have all been inspected/tested before being shipped. The way the shipment was packed was also relevant – some products were boxed, but others were loose. The court's view was that failing to protect items properly in transit leads to the presumption that they have been discarded and are, therefore, waste. Conversely, the court also clarified that items considered redundant but not defective, and still in their original unopened packaging, should not be regarded as waste. This is some helpful clarification in what is a very grey area of law.



New EU requirements to notify hazardous mixtures are likely to be postponed by a year. Annex VIII of the CLP Regulation was to phase in new requirements from 1 January 2020, but this now looks set to be postponed to January 2021. The latest committee meeting discussed a [draft delegated act](#), which will then be subject to public consultation and is expected to be adopted by the end of September. The EU chemical industries association, Cefic, welcomed the postponement and noted that it is necessary to resolve a number of workability issues.

The Committee on Climate Change (CCC) released its 2019 Progress Report to Parliament. It finds that UK action to curb greenhouse gas emissions is lagging behind what is needed to meet legally binding emissions targets, and notes that since June 2018, government has delivered only one of 25 critical policies needed to get emissions reductions back on track. At the launch meeting, the Chair of the CCC, Lord Deben, likened the government to "Dad's Army" in its approach to climate change management. The recommendations include that net-zero policy is embedded across all levels and departments of government, and that policies to reduce UK emissions to net zero are business-friendly. The report says that there is an urgent need for "a mechanism to incentivise widespread uptake of near-zero emissions technologies in industry, including the use of hydrogen, electrification, CCS and BECCS, as well as support for energy and resource efficiency. The design of this mechanism must ensure it does not drive industry overseas, which would not help to reduce global emissions, and be damaging to the UK economy."



New directive on the promotion of clean and energy-efficient road transport vehicles is published.

[Directive \(EU\) 2019/1161](#) amends Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles, as part of the EU's Clean Mobility Package that aims to accelerate the transition towards low and zero emission vehicles. The new directive seeks to cut vehicle emissions by at least 40% below 1990 levels by 2030, and sets targets for public authorities to source a percentage of either low emission or zero emission vehicles in their own public procurement by 2030. Member states must implement this directive by 2 August 2021, so the UK will not be bound to introduce these measures post-Brexit. The UK's own policy on zero emission vehicles, the [Road to Zero](#) strategy, with its ambition for all new cars and vans to be effectively zero emission by 2040, was bolstered by a number of consultations on policies designed to help achieve this target, as well as meet the target of net-zero greenhouse gas emissions by 2050. This includes a proposal for all new homes to be fitted with an electric car charging point. Meanwhile, the Department for Transport issued a [call for evidence](#), open until 26 September 2019, on options to improve consumer understanding of greenhouse gas emissions from their journeys, the role of carbon offsetting, and whether travel providers should be required to offer voluntary carbon offsets.

Defra has issued [guidance](#) on environmental permits for medium combustion plants and specified generators.

This guidance covers when you need an environmental permit for air emissions from a medium combustion plant (combustion plants with a capacity between one and 50 MWth) or a specified generator, complying with permit conditions on air quality, application forms and fees.

Thames Water has been [fined £700,000](#) for pollution offences. The offences arose from failures in 2014 at a sewage treatment works that caused a significant fish kill and threatened another utility's drinking water supplies. The EA stated that the pollution "could and should have been avoided had the many warnings and alerts leading up to the incident been acknowledged and dealt with properly". Thames Water pleaded guilty to two breaches of regulation 38(2) of the Environmental Permitting (England & Wales) Regulations 2010 and was sentenced to a fine of £607,000 and required to pay costs of £100,000.

There have been a number of developments in cases on parent company responsibility for overseas incidents.

The Court of Appeal in [AAA and others v Unilever PLC and Unilever Tea Kenya Limited](#) ruled that Unilever's Kenyan subsidiary should not face claims in England and Wales regarding injuries suffered by visitors to its Kenyan tea plantation. The claim that England and Wales was the correct forum was based on an "anchor" claim of parent company liability against Unilever PLC, but the court held that no duty of care could be shown between the PLC and the claimants. The claimants sought permission to appeal to the Supreme Court, but that was rejected by the Supreme Court, relying on its recent decision in [Lungowe v Vedanta](#) (in which it concluded that this case could be heard in the UK courts) and the "formidable obstacles" presented by the conclusions of the lower courts. In a connected development, permission to appeal to the Supreme Court has been granted in [Okpabi and others v Royal Dutch Shell Plc](#). In the *Okpabi* case, the Court of Appeal held that the English courts do not have jurisdiction over claims from two communities in the Niger Delta regarding oil pollution from pipelines. This line of cases continues, and it will be interesting to see how the decision in *Vedanta* is applied again in the *Okpabi* appeal.

Defra has [issued](#) policy updates and consultation responses relating to the Environment (Principles and Governance) Bill.

The bill is likely to be introduced in October. In a recent speech, the environment secretary pledged that the bill would contain the "most complete set of environmental targets set by any government". He also signalled that, contrary to earlier indications, the new Office for Environmental Protection will have a mandate on climate change matters, and have stronger enforcement powers than previously proposed. In tandem with these announcements, the government issued responses to a number of environmental consultations, whose outcomes will be reflected in the bill. These included the recent consultations on [extended packaging producer responsibility](#), [consistency in recycling collections in England](#), [a proposed deposit return scheme for drinks containers](#) and [a new plastics tax](#).



Defra has launched a [consultation on invasive non-native species \(INNS\)](#). The consultation proposes management measures for 14 INNS, which are widespread in England and Wales, and regulated under the EU Invasive Alien Species Regulation 2014. The consultation covers the following plants and animals: Nuttall's waterweed, Chilean rhubarb, giant hogweed, floating pennywort, Himalayan balsam, curly waterweed, American skunk cabbage and parrot's feather, Egyptian goose, Chinese mitten crab, muntjac deer, signal crayfish, grey squirrel and slider terrapins.

Following the EAC inquiry into [toxic chemicals in everyday life](#), the Department for Business, Energy & Industrial Strategy (BEIS) has announced that it will not proceed with revising the testing requirements in the [Furniture and Furnishing \(Fire\) \(Safety\) Regulations 1988](#), as proposed in its 2016 consultation. It has finally issued a [response to the consultation](#) and stated in a [letter](#) to the EAC that: "Instead, we intend to introduce a new approach to the legislation which will have a set of essential safety requirements, rather than a prescriptive testing regime, at its core. This is consistent with the approach for other consumer products. The legislation will be supported by British Standards to be developed by the British Standards Institution in partnership with a wide range of stakeholders, including industry, fire safety experts and consumer representatives." The new regime will apparently "focus on safety outcomes", such as the risk of ignition and fire spread, and further details will be issued for consultation in the future.

The EA has published details of the latest [civil penalties](#) it has imposed under climate change legislation. Twenty-five civil penalties, amounting to almost £147,000, have been issued in relation to non-compliance with the Energy Savings Opportunity Scheme (six) EU Emissions Trading Scheme (10 aviation and three for installations) and CRC Energy Efficiency Scheme (six). The largest single penalty, of almost £35,000, was for Sixt, a car rental company, for failing to surrender sufficient EUETS allowances for its private jet. Under CRC, the penalties totalled just over £20,000, with five of them being for failure to surrender sufficient allowances, and one for failure to submit an annual report for 2018/19. Under ESOS, the penalties included payments of £13,500 and £6,820 for two jewellery sector companies.

Council working on conclusions on circular economy. Following the informal meeting of environment ministers, the Finnish Council Presidency reportedly "would like to adopt [...] conclusions on the circular economy" during the Environment Council on 4 October and make sure "the circular economy is strong in the Commission's working programme." Two [preparatory documents](#) make the well-known connection between climate change mitigation and the circular economy: "Switching to the circular use of materials ... could be central to cutting global greenhouse gas emissions. [In] the EU alone [this] could cut industrial emissions by more than half by 2050. According to the [Commission's 2018] strategy [["A Clean Planet for all"](#)], new materials will play an important role as well, whether rediscovering traditional uses such as wood in construction, or new composites replacing plastics or energy-intensive materials." The documents also discuss economic instruments for the circular economy: internalising externalities of carbon and other emissions by pricing mechanisms and fiscal reform, i.e. taxation, in addition to extended producer responsibility.





New President of the European Commission has a green deal and the circular economy high on her agenda.

The new Commission President Ursula von der Leyen published "[Political guidelines for the next Commission \(2019-2024\) – A Union that strives for more: My agenda for Europe](#)" on the day of her confirmation by the European Parliament (EP). The high-level document includes the commitment to "A European Green Deal" as first of six "headline ambitions". It focuses on "Europe [striving] for more by being the first climate-neutral continent". Europe also "needs to move towards a zero-pollution ambition". To that end, von der Leyen "will put forward a cross-cutting strategy to protect citizens' health from environmental degradation and pollution, addressing air and water quality, hazardous chemicals, industrial emissions, pesticides and endocrine disrupters". Also, she commits to "propose a New Circular Economy Action Plan focusing on sustainable resource use, especially in resource-intensive and high-impact sectors such as textiles and construction". She wants "Europe to lead on the issue of single-use plastics. [...] We need to get serious about how we turn the tide. [...] I want to open a new front in our fight against plastic waste by tackling micro-plastics."

European Commission [decides to register](#) European Citizens' Initiative (ECI) against plastic.

The ECI "Let's put an end to the era of plastic in Europe" calls on the commission to revise the Single-use Plastics Directive with the aim of banning all plastic packaging and bottles by 2027. If the ECI receives the support of at least 1 million citizens from at least seven member states within 12 months, the commission must meet with its representatives and set out in a reasoned communication its legal and political conclusions on the ECI and the action it intends to take, if any, within three months. Under these conditions, the organisers of the ECI must also be given the opportunity to present it at a public hearing at the EP.

US lawmakers to propose plastics bill. Two US Democratic members of Congress (from both chambers) released an [outline federal legislation proposal "to tackle plastic waste pollution crisis"](#). It seems to follow the concept of the EU Single-use Plastics Directive and some elements from the EU Plastics Strategy, including extended producer responsibility for litter clean up, setting "requirements toward plastic bottles, packaging and other certain products to be made out of 100% recyclable materials and be made from a significant percentage post-consumer recycled product". It also includes bans of cups and lids, cutlery, plates, straws and drink stirrers, as well as "Styrofoam"/"expanded polystyrene in food-ware, disposable coolers and shipping packaging".

European Commission is to study the integration of REACH and customs procedures. The European Commission will tender a study to support the integration of REACH provisions into customs legislation/procedures and assess their feasibility, the commission said in a document circulated at a REACH and CLP competent authorities meeting and [published by Chemical Watch](#). The study also intends to clarify the role of customs and REACH enforcement authorities to strengthen the enforcement of REACH. It follows the commission's REACH review and council conclusions [Towards a Sustainable Chemicals Policy Strategy of the Union](#) (see our [June 2019 edition](#) of frESH Law Horizons). The commission is expected to publish the tender in the autumn, and work on the study is to begin in the first quarter of 2020 and run for 16 months.

European Chemicals Agency (ECHA) publishes Q&As on microplastics restriction. The ECHA [published](#) updated Q&As on the proposed REACH restriction of intentional uses of microplastics. ECHA's Committee for Risk Assessment (RAC) is scheduled to discuss its second draft opinion on the restriction proposal during its meeting on 9-20 September. Stakeholders have until 20 September to submit comments. ECHA committee opinions are expected to be finalised towards April 2020. If a restriction is the outcome, this would be expected towards the end of 2020.



ECHA starts work on persistent organic pollutants (POPs) under a new regulation. Upon entry into force of the [new POPs Regulation 2019/1021](#), ECHA [announced](#) that it would start working on its tasks to identify and regulate POPs. This includes compiling and publishing information from the member states on uses, volumes, releases, monitoring data, stockpiles and waste related to POPs, as well as supporting the commission regarding future activities, promoting the exchange of information between various EU actors and third countries, and helping the commission's work in the Stockholm Convention's POPs Review Committee. In 2020, ECHA will integrate data on POPs to its chemicals database.

EU court confirms ECHA's classification of bisphenol A (BPA) as a substance of very high concern (SVHC). On the application of industry association PlasticsEurope, the General Court ruled that the ECHA was correct to identify BPA as an SVHC, based on its reproductive toxicity (case [T-185/17](#)). [ECHA added BPA to the REACH candidate list in January 2017](#). PlasticsEurope argued that because BPA is an intermediate, it is exempt from authorisation under REACH, and so the SVHC listing is "disproportionate". The court dismissed the PlasticsEurope action for annulment entirely. It confirmed that ECHA may include a substance in the candidate list even if it has intermediate uses. PlasticsEurope [reportedly](#) said in reaction to the ruling that it is "assessing options" but "already note that the court's conclusion is in clear contradiction to the express provisions of the REACH Regulation". PlasticsEurope considers that the court misinterpreted the "concept" of intermediates and that "the REACH regulation exempts intermediates from the entire authorisation title of REACH, including their inclusion on the candidate list".

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