SQUIRE PATTON BOGGS

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

February 2018

Government launches new Office for Product Safety and Standards. The new office will further enhance the UK's world-leading product safety system and give consumers the highest ever levels of protection. The role of the office, which will have a £12 million a year budget, will be to identify consumer risks and manage responses to large-scale product recalls and repairs. See government announcement.

An ejector seat maker has admitted breaching health and safety laws over the death of a Red Arrows pilot. Statutory director of Martin-Baker Aircraft Ltd pleaded guilty on behalf of the company at Lincoln Crown Court on 21 January 2018 to a breach of Section 3(1) of the Health and Safety at Work Act 1974 in connection with the 35-year-old's death.

The Office of the Public Guardian (OPG) has updated its legal guidance for professional deputies and lawyers on the rules about giving gifts. OPG's gifting practice note explains the legal framework around giving gifts and has been updated to reflect recent judgments by the Court of Protection. It also explains the approach OPG takes if deputies or lawyers go beyond their authority to give gifts on behalf of the person they act for.

Trade press reports suggest that the Food Standards Agency and Food Standards Scotland are to review meat cutting plants and cold stores, following two incidents of "serious non-compliance". Cutting plants are subject to inspections by the FSA, FSS or local authorities and are subject to the provisions of the EU Hygiene Regulations ((EC) 852/2004 and (EC) 853/2004)**. Further press reports suggest that trade customers have disposed of a significant quantity of products, after an alternative supplier conducted a voluntary recall over labelling concerns.** There has been a focus on the corporate customers of these businesses, as well as the businesses themselves, highlighting the potential importance to brand reputation of supply chain provenance and due diligence. One of the meat suppliers involved has now gone into administration. Supply chain mapping to ensure that you have more than one alternative source of supply can be an invaluable safeguard when a key supplier or suppliers, or key products, are under scrutiny.

Liverpool & Knowsley Magistrates Court imposed a £40,000 fine on a retailer after mouse droppings were found near baby food. There has been local press coverage of the penalty after the company reportedly admitted two breaches of food safety regulations. Food safety and hygiene offences are now covered under the Sentencing Guidelines 2016 (which also apply to health and safety offences) so turnover, risk and culpability will have been taken into consideration by the court. It is now two years since the guidelines came into effect.

Tata Steel fined £1.4 million for breach of Health and Safety at Work, etc. Act 1974 following death of employee crushed by an overhead crane. The Health and Safety Executive issued a press release, which indicates that their investigation found Tata Steel had failed to enforce its own safety procedures and put in place essential control measures, which would have prevented the overhead crane that killed the employee from even being in operation. In addition to the fine, Tata Steel was ordered to pay costs of £140,000.

The HSE is inviting tenders for the provision of a survey to support evaluation of HSE's Health and Work programme, by accessing nationally representative samples of employers and employees. This is potentially of interest for those in business with responsibilities for health and safety because the tender request identifies that **the HSE's internal analysis and external consultation exercise has resulted in three priority strands for interventions on health: occupational lung disease; musculoskeletal disorders; and work-related stress** (see further the HSE's Health and Work Strategy). It is, therefore, clear that these will be focus areas for the HSE over coming months and years, and businesses would be well-advised to ensure such risks to health are suitably **and sufficiently assessed and provided for in health and safety management plans.**

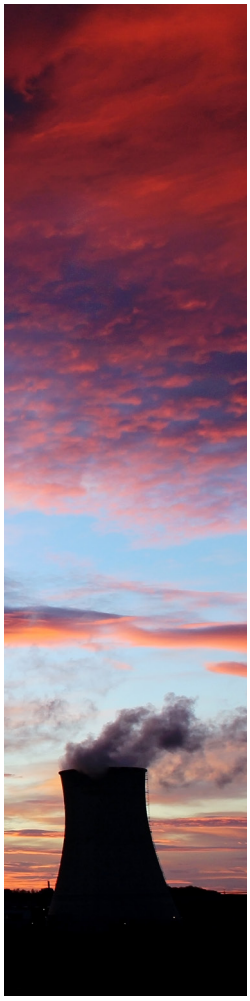
Combined fine of £800,000 for two companies following fatal incident on construction site in 2013. The HSE press release indicates that the construction company had not made provision to maintain the separation of vehicles and pedestrians and the sub-contractor had failed to provide a banksman or have employees trained as banksmen. They also found that the vehicle was not fit to be used on site. The significant fines and costs orders (cost orders were in the sum of £101,000 and £17,000 respectively) underline the importance of principal contractors and sub-contractors implementing safe systems of work and ensuring appropriate training and compliance with health and safety documentation.

ISO 45001 nears publication. The proposed international standard for occupational health and safety (OHS) management, ISO 45001, is due to be published in March 2018. The new voluntary standard will replace BS OHSAS 18001 (on health and safety management systems). There will be a three-year transitional period for migration. As a voluntary standard, ISO 45001, will provide a means of meeting regulatory requirements, but obtaining the standard is not a legal requirement. The HSE does, of course, also issue guidance on health and safety management, hsg65.

The Interim Report of the Independent Review of Building Regulations and Fire Safety has been published and the current regulatory system for ensuring fire safety in high-rise and complex buildings has been criticised as "unfit for purpose" by Dame Judith Hackett, who is leading the review. The report notes that the second phase will consider numerous matters, including regulation and guidance (which it notes should be simplified and unambiguous), roles and responsibilities for ensuring buildings are fit for purpose, competence levels, compliance and enforcement, quality assurance and products (which must be properly tested and certified). Organisations involved in the design, construction and/or fitting out of such buildings will be keen to understand detailed proposals for change. High-rise and complex buildings are, of course, not limited only to residential developments, but may also be used for offices, hotels and mixed-use developments.

A former night worker took his own life after moving to an early shift left him with "terrible" insomnia, according to local press reports. We have previously authored a blog on the duties of UK employers in the age of rising suicides. Employers should review whether their policies support their employees who are going through mental difficulties and monitor the well-being of remote and vulnerable workers.

The Environment Agency (EA) has updated a number of its regulatory position statements (RPS). These cover particular activities which strictly would require an environmental permit, but in respect of which the EA has decided there is a very low environment risk. If the parameters of the relevant RPS are followed, then no regulatory action would be taken for failure to have an environmental permit for the relevant activity. These cover various activities relating to storage, use and treatment of certain wastes, and some water discharges. They are often overlooked but are worth bearing in mind when assessing if a permit or exemption is required for an activity, because they can offer some certainty and a low regulatory burden.



In the recent case of *King and others v Environment Agency*, two farmers unsuccessfully argued that the EA has breached their human rights by allowing their land to flood. The High Court rejected their assertion that the EA had: (i) interfered with their land and property in breach of Article 1 of the first Protocol to the European Convention on Human Rights (ECHR) by adopting a policy treating their farm land as a flood plain, in order to increase flood protection for Gloucester; or (ii) discriminated against them (in breach of under Article 14 of the ECHR which prohibits discrimination) by paying compensation to landowners in other parts of the country who were in a similar position. In recent years, we have seen a number of attempts to use human rights provisions in relation to environmental cases, but with limited success.

Waste Enforcement (England and Wales) Regulations 2018. Draft Regulations were laid before Parliament on 25 January 2018 and include enhanced powers to tackle illegal activity at waste sites. The proposed change will give waste regulation authorities and waste collection authorities in England and Wales the power, by notice, to require waste from a site to be removed where it has been unlawfully kept or disposed of, including waste that was initially lawfully deposited. In addition, regulators will be able to issue a restriction notice prohibiting access and the importation of waste to premises for up to 72 hours; and courts will be able to issue a restriction order prohibiting access and the importation of waste for up to six months. This should be particularly noted by anyone who owns or occupies land on which waste has previously been deposited, for example, a landlord of a waste site which a tenant vacates.

HM Revenue & Customs issued a short consultation on legislation to give effect to its previously announced intention to extend landfill tax to cover material disposed of at illegal waste sites. This means that as well as criminal fines, and potentially proceeds of crime confiscation orders, waste offenders are going to have to retrospectively pay landfill tax on waste that has been disposed of illegally. The provisions will come into effect on 1 April 2018.

The government has reportedly refused to grant a consent to a company for hydraulic fracturing operations until it brings its company accounts up to date at Companies House. This acts as a reminder that companies need to pay attention to all their regulatory requirements when making permit and consent applications, not just those directly relating to the application being made.

Waste duty of care prosecutions are not particularly common, with attention more often being focussed on illegal waste site operators, but a recent case has highlighted the importance of fulfilling your duty of care in respect of waste that you produce, and the possible consequences of not doing so. A car breaking operator failed to produce waste transfer notes for the transfer of waste to and from his site, even after a warning letter and a fixed penalty notice being issued to him. He was fined £2,000, and ordered to pay £1,782.68 in costs and a £170 victim surcharge.

The European Chemicals Agency (ECHA) has published its substitution strategy regarding ensuring that restricted chemicals are not simply swapped for ones that are also likely to be restricted in the future, which would hinder circular economy efforts. For example, some substitutions for bisphenol A are now known to have more powerful endocrine disruptive effects than the original substance. ECHA highlights, in particular, that supply chain collaboration will be a "critical prerequisite for advancing the development and adoption of safer alternatives" and is working with regulators, industry associations and other stakeholders to organise workshops on substitution challenges. Companies involved in supply chains including substances that are subject to, or are candidates for, authorisation should be aware of this strategy and the need for enhanced supply-chain collaboration.

ECHA has recommended a further seven substances of very high concern (SVHCs) be added to the REACH authorisation list, including several substances which are not currently used in the EU but could potentially replace other substances recommended for or already on the authorisation list, and also have significant impacts themselves (in line with the new substitution strategy). Two of the substances are toxic for reproduction and the rest have persistent, bioaccumulative and toxic (PBT) and/or very persistent and very bioaccumulative (vPvB) properties.

ECHA has updated its web-pages on Brexit, with a new set of Q&As on the UK's withdrawal from the EU, featuring questions and responses on the Biocidal Products Regulation, CLP Regulation, PIC Regulation as well as REACH. The responses are high-level and brief but offer the ECHA/EU position on many chemical regulatory questions. These Q&A do not take into account any transitional or other agreement that may be reached between the UK and EU. They offer a stark view of what will happen in a "no deal" scenario, and are worth reading if you are affected by any of these regimes.

From 1 April 2018, it will be an offence for landlords to grant a new tenancy or renew an existing tenancy of a private rented property unless it has an energy performance certificate (EPC) rating of at least "E". Following the Clean Growth Strategy in October 2017, BEIS is currently consulting on amending the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (SI 2015/962) (usually referred to as the MEES (Minimum Energy Efficiency Standards) Regulations) to remove the "no cost to the landlord" principle for domestic properties to (where funding is not available to cover the costs of improvements). It will be replaced with a capped landlord financial contribution, because of the lack of Green Deal finance which was expected to have been widely available when MEES was issued in 2015. Meanwhile Arbnco (a firm providing energy efficiency software) has analysed 3,620 buildings currently registered on its EPC platform and estimates that around 20% of commercial properties, worth around £130.7 billion, are likely to currently be below the required E rating. If you are a landlord of private or commercial property, then you need to be aware of, and may need to act on, MEES.

The European Commission has published a number of notices to stakeholders setting out the consequences of Brexit under different EU legislative regimes, essentially confirming that the UK will be treated as a "third country" under this legislation after Brexit (i.e. as if it were any other non-EU country). Notices issued so far include ones relating to economic operators who place non-food and non-agricultural products on the EU market; waste law; food law; and use of the EU Ecolabel. As with the ECHA Q&A pages referenced above, these notices are stark statements of the consequences of a "no deal" exit from the EU.

The UK Environmental Association (UKELA) has issued two new reports about Brexit and environmental law. "Brexit and Environmental Law - The UK and European Cooperation Bodies" considers key questions about the UK's continued participation in bodies such as ECHA and the European Environment Agency) and the implications of non-participation, while "Brexit and Environmental Law - Environmental Standard Setting after Brexit" considers environmental law challenges in three different types of Brexit scenario. These reports are very informative if you are responsible for considering impacts of Brexit on environmental and chemical regulatory laws that affect your business.

Another recently issued paper on environmental law and Brexit is "Brexit, Brexatom, the Environment and Future International Relations", written by leading environmental barrister Stephen Tromans QC. This emphasises that it would be naive to suggest that the UK will abandon the existing body of EU environmental law, but that there will be some serious and complex issues to be resolved because much of the law is predicated upon the involvement of EU institutions, and it highlights particular difficulties relating to REACH.

The EU Commission has issued a public consultation on the evaluation of the Waste Shipment Regulation (open until 27 April 2018). This evaluation exercise is the first step in a "better regulation" review of the Waste Shipment Regulation, and is seeking submissions on good and bad practices in relation to the implementation of the Waste Shipment Regulation to help assess whether it has achieved its objectives. If you are involved in the import or export of waste then this consultation may be of interest to you.

The Fluorinated Greenhouse Gases (Amendment) Regulations 2018 come into force in February 2018 and introduce, from April 2018, the availability of civil penalties to largely replace the criminal sanctions that currently apply under these regulations.

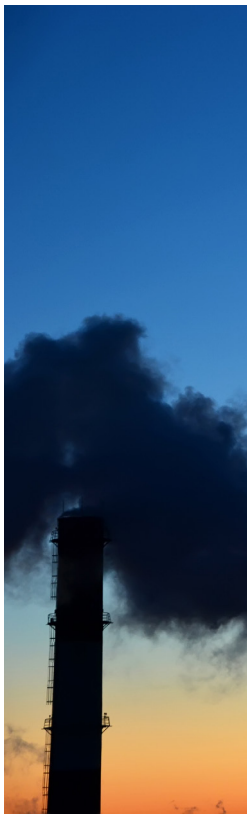
The Environmental Permitting (England and Wales) (Amendment) Regulations 2018 came into force on 30 January 2018, implementing the Medium Combustion Plants Directive 2015 (for combustion plants with a rated thermal input equal to or greater than 1 MW and less than 50 MW) and establishing new NOx emission limits for generators or groups of generators (between 1 MW and 50 MW). They are accompanied by an explanatory memorandum, but there is still no official guidance, as we mentioned last month (other than a Q&A document provided to stakeholders). This new legislation will impact UK facilities with combustion plants or generators of the sizes noted above.

The European Commission has issued a public consultation on amending the scope of the EU Timber Regulation (EUTR). EUTR requires those who import certain timber-based products into the EU to take steps to ensure that the timber has not been illegally harvested. The consultation notes that many "stakeholders do not consider the current EUTR product scope is optimal and feel it should include more timber products, such as printed paper. However, others consider that the product coverage should not be expanded before the EUTR is fully implemented and effectively applied." Three policy options are being considered, namely: no changes, include one or more additional categories of products, or include all products that contain timber (with a list of exemptions if appropriate). The consultation runs until 24 April 2018 and anyone who imports products containing wood into the EU should be aware of the current and prospective scope of the EUTR.

The government has launched a consultation seeking views on how it can manage the third round of climate change adaptation reporting and which organisations will be asked to participate. The Climate Change Act 2008 (CCA 2008) provides for infrastructure operators and public bodies to report on how they are addressing current and future climate effects to their organisations. Under CCA 2008, the government is required to set out and consult on its strategy for climate change adaptation reporting and this strategy has to be laid in parliament. The consultation will close on 26 March 2018 and will be of particular interest to infrastructure operators and public bodies.

The Environment Agency's revived "definition of waste panel" is expected to open in April and it is anticipated that there will be an initial administration fee of £750 to access the service. The panel will then estimate how much work will be needed to provide an opinion and invoice (in advance) for that time-cost as well. This was reported by **ENDS** following a meeting between the Environmental Services Association and the Environment Agency on 13 February.

Severn Trent, the water utility company, has prosecuted Arrow Environmental Services, a specialist waste disposal company, for illegal discharges into its sewers. Arrow was fined £43,750 and ordered to pay £80,000 in legal costs, and this is the third in a string of similar prosecutions, all resulting in much higher fines than we have previously seen for this sort of case. Whilst the Environmental Sentencing Guideline does not strictly apply to these particular offences, it is notable that we are also seeing fines increasing for these offences in line with those covered by the guideline.



Judgment has recently been issued in the case of *Adam Smith and Eleanor Smith v Rosemary Line*, reported in *local press* and *The Times*, following a trial at Truro County Court in October 2017. The court held that Line was liable in common law nuisance for a 10% diminution in the value of the Smiths' house for allowing Japanese knotweed to spread from her land into their adjoining property. This follows the 2017 case of *Williams v Network Rail Infrastructure Ltd*, where Cardiff County Court found that knotweed could be an actionable nuisance, even before it caused physical damage to neighbouring land, because of its effect on the amenity value of the land, and that this also caused a diminution in its value (which Network Rail is appealing).

While the final versions of the Circular Economy compromise legislative texts negotiated two months ago have still not been published, the Deputy Permanent Representatives of the Member States within the EU Council (COREPER I) endorsed them on 23 February. They will now to progress through the European Parliament to be finally adopted by the Member Sates ministers in the Environment Council without further debate, on 10 April or, more likely, on 25 June. In the meantime, Greenpeace has reported that the UK has opposed the proposed 65% EU recycling target for all municipal waste by 2035 during the Council meetings, whilst having pledged to develop "ambitious" recycling goals inthe 25-year environment plan issued last month. A spokesman for Defra is said: "The government will make a decision on its vote following close scrutiny of the proposals, which are still provisional." The UK government argues that recycling targets must be achievable and reflect the environmental impact of different materials. Environment Minister Thérèse Coffey had said in October 2017 that binding recycling targets based on weight alone could lead to "perverse outcomes", with, for example, heavy garden waste prioritised over plastic. Since the UK is set to leave the EU in March 2019, and it is not yet clear whether it will have to implement the new EU waste legislative package. However, the legislation will require only a qualified majority vote in the EU Council to be passed, which could be achieved without the UK supporting the measure.

The Court of Appeal has handed down its judgment in *Okpabi and others v. Royal Dutch Shell Plc* and another. This is the latest in a line of cases being lodged in the UK courts against UK-domiciled parent companies, but relating to liability for environmental damage overseas. The court held that the English courts did not have jurisdiction over these claims, which relate to alleged pollution in Nigeria, as no duty of care had been established. It is understood the case will be appealed to the Supreme Court. This contrasts with the findings of the same court in late 2017 in *Lungowe & Others v Vedanta Resources Plc & Others*, where jurisdiction was accepted for claims relating to discharges from a copper mine in Zambia. There is a further similar case which will be heard by the Court of Appeal shortly, so this is very much a developing body of case-law. It will be of particular interest to companies headquartered in England but carrying out operations through subsidiary companies overseas.

Defra's air quality plan has been successfully challenged in court by ClientEarth for the third time. The High Court ruled on 21 February that the government's clean air plan issued in July 2017 (followed earlier legal challenges over previous versions of the plan) still did not meet the relevant requirements. Defra has been ordered to produce a further plan by 5 October 2018. ClientEarth was also granted the continuing right to judicially review the government (without applying for permission each time which would ordinarily be required), if there is evidence that the government is falling short in its compliance with the terms of the order of the Court.

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