Forward thinking.
Linklaters

The year in review – Developments in sustainability law and policy

UK

Transparency

The Accounting Directive (Directive 2013/34/EU) and recent amendments to the Transparency Directive (Directive 2004/109/EC as amended by 2013/50/EU) provide for a new reporting regime applicable to large extractive companies of all sizes registered in EU Member States and to extractive companies listed on EU regulated exchanges. The regime will require the annual disclosure of payments of £84,800 (€100,000) or more, in money or in kind, by those companies to all levels of government (including state-owned enterprises) across the world on a 'by country', 'by project' and 'by payment type' basis where the payment relates to extractive activities. In the UK, the penalty regime will include criminal offences punishable by unlimited fines or possible jail terms. Following the publication of the Disclosure and Transparency Rules (Reports on Payments to Governments) Instrument 2014 and the Report on Payments to Governments Regulations 2014, the UK will require reports to be completed for financial years beginning on or after 1 January 2015 (one year earlier than that required by the directive).

Modern Slavery Bill

The Modern Slavery Bill 2014-15 was introduced in June 2014 and aims to consolidate and simplify existing modern slavery offences into one piece of legislation. The bill focuses on slavery, servitude and forced or compulsory labour and human trafficking and, once passed, will facilitate the imposition of harsher penalties for offenders. The current drafting contains proposals for corporate reporting on supply chain due diligence for companies with turnover above a threshold amount.

More stringent sentences for environment, health and safety offences

In England and Wales, the Sentencing Council guidelines on environmental offences came into force on 1 July 2014. These guidelines introduced starting points and ranges that could result in much higher corporate fines than those imposed historically in relation to a variety of environmental offences. Similar changes have been proposed for health and safety offences and are subject to public consultation. Two environmental cases heard by the Court of Appeal earlier in 2014 established in any event that the structure, turnover and profitability of a company should be taken into account in determining the level of fine to be levied against it[1].

In December 2014, a commercial director of a company was convicted of gross negligence manslaughter and (alongside an independent health and safety consultant) was sentenced to prison[2] following a fatal incident involving the death of an employee working in an unsupported excavation trench on a building site in 2010.

The law on nuisance

In the case of *Coventry v Lawrence* [2014] UKSC 13, the UK Supreme Court reviewed the law on nuisance. The court held that (i) the right to commit a nuisance by noise *can* be acquired by prescription, (ii) where a claimant uses his or her property for essentially the same purpose as his predecessors pre-nuisance, the defendant cannot rely on the defence that the claimant 'came to the nuisance', (iii) in assessing the character of the locality, the court should start from the proposition that the defendant's activities will be taken into account (except where such activities constitute a nuisance) and (iv) the terms of an associated planning permission will only be relevant where the permission expressly authorises the activity in such a way as to cause a nuisance.

Disapplication of trespass for shale projects

On 14 October 2014, the UK Government added draft provisions into the Infrastructure Bill 2014-15 which will dis-apply the law of trespass to land deeper than 300 metres below the surface where a company has obtained a right of access for the extraction of gas (including shale gas), oil or geothermal energy and is in compliance with any conditions attached to that right[3]. This proposal is intended to remove one of the barriers to the development of onshore shale gas projects.

[1] R. v Sellafield Ltd, R. v Network Rail Infrastructure Ltd, Court of Appeal (Criminal Division), 17 January 2014.

[2] The Commercial Director was sentenced to three years in prison and the independent health and safety consultant to nine months in prison.

[3] The relevant provisions extend to England and Wales and Scotland.

Offshore developments

DECC launched a consultation in September on the implementation of Directive 2013/30/EU on the safety of offshore oil and gas operations (the 'Offshore Safety Directive'). The directive aims to improve safety standards at European oil and gas platforms and to reduce the occurrence of (and improve responses to) major accidents relating to offshore oil and gas operations. A second consultation[4] published by both DEFRA and DECC considered the application of article 38 of the Offshore Safety Directive which extends the Environmental Liability Directive (2004/35/EC) to the marine waters of Member States.

From the carbon to the climate economy

At the COP20 meeting in Lima in December 2014, the energy secretary Ed Davey called for tougher rules to be applied to companies holding fossil fuel assets that could become 'stranded' i.e. lower in value as a result of global efforts to address climate change. It is an issue which is reported to be under consideration also by the Bank of England and by the Environmental Audit Committee.

Energy Savings Opportunity Scheme ('ESOS')

This scheme came into force on 17 July 2014 as part of the implementation of the Energy Efficiency Directive (2012/27/EU[5]) and requires larger companies and non-public sector organisations in the UK to perform energy saving assessments and calculate their total energy consumption so as to identify where energy savings can be made by the end of 2015. Qualifying organisations must carry out their ESOS assessment and notify the Environment Agency by 5 December 2015.

EU

Reporting on CSR issues

On 15 November 2014, the newly adopted Non-financial Reporting Directive (2014/95/EU) was published in the Official Journal. The directive came into force on 5 December and requires large companies which are public interest entities with an average of more than 500 employees during the financial year and with either:

> a balance sheet total of more than €20m, or

> a net turnover of more than €40m,

to include a non-financial statement in their annual report from 2017 containing information relating to environmental, social and employee matters, respect for human rights (including with regard to supply chains), anti-corruption and bribery matters.

Self-certification for conflict minerals

In March 2014, the European Commission proposed a draft regulation setting up a system for supply chain due diligence self-certification for companies that import tin, tantalum and tungsten, their ores and gold into the EU from conflict-affected and high risk areas. Self-certification requires EU importers of these metals and their ores to exercise 'due diligence' – i.e. to avoid causing harm on the ground – by monitoring and administering their purchases and sales in line with the five steps of the Organisation for Economic Cooperation and Development Due Diligence Guidance for Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

Climate change

Market stability reserve

In January 2014, the European Commission published a draft decision introducing a market stability reserve ('MSR') into the EU Emissions Trading Scheme from the start of Phase IV in 2021. This is designed to tackle the surplus of 2 billion EU allowances which has reduced the price of EUAs to very low amounts and has neutralised the efficacy of the scheme. During a debate of the EU parliamentary committee for Environment, Public Health and Food Safety held on 3 December 2014, most members advocated for the introduction of the reserve by 2017 rather than 2021. The Commission has stated that it will propose legislation shortly after MSR is adopted. Both the European Parliament and the EU Council must agree a common text before the proposal can become binding.

2030 Climate and Energy Package

In October 2014, the European Council endorsed a binding EU target of an at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990 levels for submission as the EU's contribution to the global climate agreement to be concluded in Paris in 2015.

And elsewhere…

Germany – CO2 emission reduction plan

On 3 December 2014, the German Government published a programme to reduce national carbon dioxide emissions by the year 2020[6]. Due to concerns that Germany is not going to achieve a 40% reduction of emissions against 1990 levels, the programme envisages a €40bn boost in private and public investment by 2018 to increase the market share of renewable energy and subsidise measures improving the energy efficiency of buildings, electric transport infrastructure and CO2 efficiency of agriculture.

The red dragon turns green

On 1 January 2015, the long debated amendments to the PRC's Environmental Protection Law that were passed in April 2014 came into effect. These provide the government with greater enforcement powers including the ability to impose more severe sanctions on polluters. For the first time in the PRC, public interest litigation is envisaged, exposing polluters to greater scrutiny and supervision from the public than ever before. A link to our client briefing is here.

[4] Both consultations closed on 21 September and UK government is analysing the responses.

[5] The directive aims to reduce energy consumption in the EU by 20% by the year 2020.

[6] *Aktionsprogramm Klimaschutz* 2020.

Key contacts

Vanessa Havard-Williams
Partner, London
Tel: +44 20 7456 4280
vanessa.havard-williams@linklaters.com

Chris Staples
Partner, London
Tel: +44 20 7456 4876
chris.staples@linklaters.com

Ruth Knox
Associate, London
Tel: +44 20 7456 4413
ruth.knox@linklaters.com

linklaters.com

FT INNOVATIVE LAWYERS 2014 AWARD WINNER

GC3943A_F/01.15