

## frESH Law Horizons

January 2020



**A consultation was launched on amended FSA technical guidance for allergen labelling for foods prepacked for direct sale.** The [consultation](#) is seeking views on amendments to current guidance, mainly introduced in connection with the legislation published in September 2019, requiring labels for “prepacked for direct sale” foods to comply with the requirements for lists of ingredients for prepacked products i.e. with any of the 14 specified allergens highlighted in an ingredient list in a different typeset, with the specified allergen appearing after the derivative (for example, cheese (milk)). The legal name of the product will also be required on the label. The consultation closes on 6 March 2020. Please see our [article](#) on this consultation for further detail and the background to these changes.

**TV cameras are set to broadcast sentencing remarks from the Crown Court.** The Ministry of Justice and HM Courts and Tribunal Service has [announced](#) legislation to introduce the change. It may be a concern that any partial broadcast of remarks might not properly reflect relevant facts, although it is worth noting that the full sentencing remarks of any case broadcast will be hosted on a website to which the public has access.

**The Court of Appeal confirms that the “Slip Rule” can be used where sentencing guidelines are misapplied.** The “slip rule” is the power to correct a sentence within 56 days. In *R v George [2019] EWCA Crim 2177 (3 December 2019)*, the Court was asked to consider circumstances where a trial judge had reconsidered a sentence he imposed overnight and decided that his acceptance of Counsel’s arguments on how aggravating and mitigating factors should be taken into account was wrong in terms of the applicable sentencing guideline. The case related to a burglary offence, but will be of relevance to other regulatory offences, including regulatory offences such as those under health and safety or food safety laws, where a sentencing guideline applies. The Court of Appeal said in deciding whether to correct a previous error, the judge should apply a flexible test balancing the public with the private interest; and that the slip rule could be applied where there was a misapplication of the relevant guideline, as well as a legal error such as a misapplication of the statute.

**Asbestos fines: Owner and construction company fined for failure to remove asbestos; and college fined for failure to carry out an asbestos survey.** The Health and Safety Executive (HSE) has [reported](#) on the first conviction, related to the refurbishment of a former hotel. Although the fines in the case were not excessive, it demonstrates that both parties had responsibilities in relation to asbestos containing materials found on-site during the refurbishment of a previous hotel. It also demonstrates that the HSE does carry out proactive inspections in relation to such projects. The fine imposed on the college, also [reported](#) online, resulted largely from a failure to carry out an asbestos survey. The HSE issues guidance in relation to [asbestos health and safety](#).

**A building safety regulator is to be established as part of the HSE.** The government [announcement](#) indicates that the regulator will give oversight over the design, construction and occupation of high-risk buildings. It is not clear whether there will be separate powers of enforcement for the regulator.



**A successful appeal was made against landfill tax on “fluff”.** The Upper Tribunal Tax and Chancery Chamber [allowed a joint appeal](#) brought by Biffa, Veolia and Devon Waste Management Limited about the landfill tax status of “fluff” (the industry term for selected black bag waste that is used to provide buffer layers in landfill cells, which help contain the waste, and prevent leachate and landfill gas leakage. The operators claimed that the fluff should not be subject to landfill tax because it was performing a technical function in the landfill. One major previous sticking point had been that the material is waste when the operators first take custody of it. However, the court confirmed that material is not disposed of by the operator as waste just because it had previously been discarded as waste by someone else. The key thing is the intention of the operator. This ruling could have implications for historical landfill tax claims, but the regime changed in April 2018 and so it is not relevant to more recent claims.

**The Environment Agency’s (EA) [packaging producer responsibility monitoring plan](#) 2020** indicates a substantial reduction in inspections for sites issuing packaging waste recovery notes (PRNs) in 2020, within minimum inspection targets falling from 160 to 110. Most other inspection targets remain unchanged.

**Defra amends [Medium Combustion Plant \(MCP\) Guidance](#) to clarify “existing plants”.** Existing plants benefit from transitional exemptions under the MCP regime, and under the previous guidance, an existing MCP was to be treated as a new one if it was “altered and repaired” in a way that affects the emission limit value (ELV), for example changing fuel type. This presented a rather strange incentive not to lower the ELV of an older MCP, because it would transition into the regime sooner. The guidance now states that this rule applies when the ELV changes for the worse.

**EA published the [latest civil sanctions](#) accepted in respect of environmental breaches.** The list covers May to November 2019 and includes sanctions for packaging waste breaches, as well as permitting and water pollution breaches. Several utility companies had substantial enforcement undertakings (EU) accepted, the largest being for £264,000. Tarmac Aggregates also has an EU of £200,000 accepted for permitting breaches.

**EA publishes [offence response options](#) for every offence it regulates.** There are separate guidance documents for each subject area as follows: chemical sector offences; climate change offences; Control of Major Accident Hazards (COMAH) offences; environmental damage offences; Environmental Permitting (England and Wales) Regulations 2016 (*SI 2016/1154*) offences; extant water quality provisions offences; fisheries offences; flood risk management offences; land quality offences; navigation offences; obstruction offences; reservoir offences; waste offences and water resources offences. The documents set out the difference sanctions, criminal and civil, which are available to the EA for each offence. No guidance is provided on when the different options are chosen, but further guidance on that is already contained in the [Enforcement and Sanctions Policy](#).

**Brothers receive [jail sentences](#) for waste electronic and electrical equipment (WEEE) fraud.** The brothers received custodial sentences for their involvement in a £1.48 million WEEE fraud whereby their company received substantial payments from a WEEE compliance scheme for recycling evidence that they had falsified. This is further evidence of the EA cracking down on large-scale waste crime.

**[Circulytics™](#) is a new tool for measuring circularity which was launched by the Ellen McArthur Foundation.** Circulytics is intended to support a company’s transition towards the circular economy, regardless of industry, complexity, and size. It reveals the extent to which a company has achieved circularity across its entire operations.

**The government confirms further details of the new Office for Environmental Protection (OEP).** In a [debate in the House of Lords](#) on 20 January 2020, Lord Gardiner of Kimble, the Parliamentary Under-Secretary of State for Environment, Food and Rural Affairs, confirmed that the OEP (a new post-Brexit environmental watchdog to take over the oversight previously done by EU institutions) would be fully operational from 1 January 2021 (i.e. at the end of the Brexit implementation period). He also confirmed that it would be independent, will have scrutiny of all public authorities acting on environmental matters, and will develop a strong working relationship with the Committee on Climate Change, formalised through a memorandum of understanding.



**The government announces a new [Waste Crime Task Force](#).** The task force is “dedicated to tackling serious and organised waste crime, such as dumping hazardous materials on private land and falsely labelling waste so it can be exported abroad to unsuspecting countries.” The Joint Unit for Waste Crime (JUWC) will bring together law enforcement agencies, environmental regulators, HMRC and the National Crime Agency. To tackle the growing trend in criminal waste networks, JUWC will conduct site inspections, make arrests and prosecutions and, upon conviction, push for heavy fines and custodial sentences.

**A company was fined [£200,000](#) over a major fire at its waste facility.** R Plevin & Sons Ltd had a fire in April 2014 at its waste wood shredding site in Barnsley, which led to river pollution and temporarily closed a sewage works. Following this fire, the EA was concerned about compliance with permit conditions (particularly restrictions on maximum size for wood stockpiles and fire response plans), and required changes to be implemented. However a more serious fire followed in June 2014, which lasted 13 days, caused by self-combustion of wood stockpiles. The firewater first drained into two lagoons managed by Plevin, but two months later contaminated firewater leaked into a watercourse and nearby residential gardens, and again the sewage treatment plant was put out of action. Counsel defending the company highlighted severe delays in the EA bringing this prosecution. The company pleaded guilty to breaching its permit conditions. In sentencing, the judge said that self-combustion risks in waste wood piles were well understood and that the company deliberately failed to take action to avoid it. Under the Environmental Sentencing Guideline, an offence classified as deliberate (rather than reckless, negligent or low culpability) gives rise to a higher starting point for the fine.

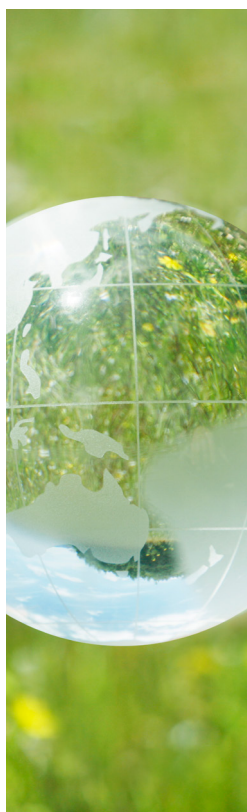
**The government publishes a [House of Commons Library Briefing Paper on plastic waste in the UK](#).** The report includes statistics on plastic waste and information on government plans and ambitions to reduce avoidable plastic waste and examples of voluntary initiatives from the plastics industry, environmental groups and retailers. It highlights in particular that local authorities are struggling to find alternative destinations for waste, following various countered like China and Malaysia closing their doors to waste exports, and this has increased their recycling costs substantially, and has led to higher levels of waste being incinerated.

**Environmental developments to expect in the UK in 2020.** Climate change is likely to be the major focus, both in terms of policy development, corporate (ESG) responsibility, and potentially also a rise in climate related litigation. We may see the revival of a government department similar to the old Department for Energy and Climate Change (DECC). The carbon neutral 2050 target was also recently affirmed in the Queen’s Speech opening the new parliament. Air quality will also be a big issue, and we are expecting new air quality targets in the Environment Bill, in particular relating to fine particulate matter (PM2.5). On the subject of the Environment Bill, the Queen’s Speech on 19 December 2019 set out details of the Environment Bill, which includes many of the measures from the previous Bill. These include enshrining environmental principles in law; establishing the OEP; implementing enhanced producer responsibility obligations, a deposit return scheme for drinks bottles, and a more streamlined household recycling system; and requiring biodiversity net gain from developers. One new measure announced that was not in the previous Bill, is a proposed ban on the export of plastic waste to non-OECD countries. The Chancellor has also claimed that the government’s first budget in March will “prioritise the environment”, so we are anticipating environmental measures like the plastic packaging tax to be confirmed.

**Turning up the heat – the government consultation puts UK landlords back in the frying pan.** Are you a UK landlord of a multi-let property and/or are you already obliged to provide information about any district or communal heating network? If so, the government’s current consultation on amendments to the Heat Network (Metering and Billing) Regulations is a must-read for you. [Download our briefing for the full picture.](#)

**[Conference of the Parties 25 – keeping up with Paris Agreement obligations](#)** is a briefing note by Anita Lloyd, originally published on LexisLibrary and LexisPSL, which provides an overview of the key issues raised in the Conference of the Parties 25 (COP25) regarding meeting the targets in the Paris Agreement. Lloyd discusses where COP25 fell short of expectation, and its strengths, and looks forward to what to expect from COP26, the last COP before the Paris Agreement is due to come into effect.





**The European Commission publishes its [roadmap on a new climate law](#).** This roadmap enshrines the European Green Deal's net zero carbon by 2050 pledge into law. It is intended to ensure that all EU policies contribute to the carbon target and that all sectors play their part. The new law will set milestone targets and confirms that the Commission will present a plan by summer 2020 to increase the 2030 target to at least 50%, and towards 55%. The roadmap is open for comments and feedback until 6 February 2020.

**The EU technical expert group on sustainable finance (TEG) published a "[handbook on climate benchmarks and benchmarks' ESG disclosures](#)".** This follows the TEG's [final report](#) on climate benchmarks and environmental, social and governance (ESG) disclosures late last year (as reported in [frESH Law Horizons October 2019](#)). The handbook is a response to frequently asked questions that the TEG have encountered when presenting their benchmarks.

**Landmark [Dutch legal ruling on climate change](#).** The Dutch Supreme Court has held in the case of *The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation* that the Netherlands government is contravening the European Convention on Human Rights (ECHR) by not having a more ambitious greenhouse gas (GHG) reduction target for the end of 2020. It further held that the government should reduce GHG emissions by at least 25% (against 1990 levels) by the end of 2020, and should consider the latest climate science when drawing up policies to achieve that target. 886 citizens had brought the climate case, asking the courts to order the Dutch government to reduce the emission of greenhouse gases by 40% by 2020, or at least 25%, compared to 1990 levels. The Dutch government is expected to respond to the decision shortly. In January, German citizens [filed a similar case](#) against what they argue is an insufficient Climate Protection Law and other measures with the German Federal Constitutional Court. Their case, which the NGOs Greenpeace and Germanwatch support, is based on the German Constitution, "having regard to Articles 2 and 8 of the ECHR".

**The European Parliament welcomes the European Green Deal but demands higher ambition.** The European Parliament (EP) adopted [its position](#) on the European Green Deal communication, which the European Commission adopted in December 2019 (please see [our client alert](#)). The European Parliament expressed its general support for the propositions in the European Green Deal. However, it called for increasing the GHG emissions reduction target for 2030 to 55%, instead of "at least 50%" and towards 55% "in a responsible way," as the Commission has proposed. The EP emphasised the need to set "legally binding domestic and economy-wide" reduction targets for 2050 and add intermediate targets for 2030 and 2040. The transition should, however, be "just and fair" and take account of disadvantaged European regions. It also highlighted the need for a "rapid phase-out of direct and indirect fossil fuel subsidies by 2020" and an ambitious Circular Economy Action Plan that should focus, in particular, on waste prevention.

**The European Commission publishes a roadmap for a New Circular Economy Action Plan.** The [document](#) lays out the intentions of the Commission for its upcoming New Circular Economy Action Plan (CEAP 2.0). It will follow the 2015 CEAP and contribute to speeding up the transition towards a circular economy through a number of targeted initiatives. The Commission intends to put forward a "sustainable products policy," with a focus on reuse and repair of complex products. It will propose actions on "high-impact sectors," e.g. electronic and electric equipment, textiles, construction, as well as regarding certain plastic products, in particular microplastics and bio-based and biodegradable plastics. Further targeted action will focus on the safety, competitiveness and reliability of secondary raw materials. Commission officials have indicated that the action plan would build on the 2019 [Implementation Report](#) of the 2015 Circular Economy Action Plan and the [Staff Working Document on Sustainable Products in a Circular Economy](#). The Commission is expected to adopt the CEAP 2.0 as a communication on 3 March.



**The European Chemicals Agency (ECHA) to prepare a list of chemicals safe for use in contact with drinking water.** In December, the EU [co-legislators agreed upon the revision of the Drinking Water Directive](#). The formal adoption by the European Parliament and the Council is currently pending. ECHA [announced](#) it will start work on its new task under the Directive to create a “positive” list of around 1,500 substances that can be safely used in materials that come into contact with drinking water. It will collaborate with the European Food Safety Authority (EFSA). The Commission is scheduled to adopt this list by 2024 and review each substance within 15 years of its publication. The use of each substance will be authorised for limited time, pending the review by ECHA. Companies will have to submit an application to ECHA if they wish to keep their substances on the list or add new ones. ECHA will prioritise substances for review based on 1) hazardous properties, and 2) the quality and timeliness of the related risk assessment. Member states shall also submit dossiers to update the list. ECHA will assess applications and dossiers and its Committee for Risk Assessment (RAC) will form its opinion for further decision making by the Commission. The new task for ECHA follows a trend to give the Agency additional responsibilities for substances in, e.g. waste (please see [frESH Law Horizons September 2019](#)).

**ECHA adds [four new substances](#) to the REACH candidate list.** Three new substances were added due to their toxicity to reproduction, including diisohexyl phthalate and two substances used in polymer production. Perfluorobutane sulfonic acid (PFBS) and its salts were added due to probable serious effects to human health and the environment to an equivalent level of concern to carcinogenic, mutagenic and reprotoxic (CMR), persistent, bioaccumulative and toxic (PBT) and very persistent and very bioaccumulative (vPvB) substances. Inclusion in the candidate list entails legal obligations for the industry, e.g. communication obligations towards consumers. Furthermore, the substances of very high concern (SVHCs) are included in the candidate list “for eventual inclusion” in the authorisation list. After inclusion in that list, companies need authorisation for using the substances. Coincidentally, the NGO ChemSec [announced](#) an update to its non-binding [Substitute It Now \(SIN\) List](#). The SIN list currently includes 991 chemicals, while the official REACH candidate list includes 205.

**ECHA exposes breaches of classification and labelling rules for hazardous chemicals.** ECHA's sixth EU-wide Enforcement Forum project (REF-6) [found](#) that 44% of products containing mixtures of hazardous chemicals do not comply with classification and/or labelling rules under the REACH, CLP and PIC Regulations, underlining “a substantial non-compliance rate”. The project looked at the industry’s classification and labelling for 3,391 mixtures in all 28 EU member states. 17% of mixtures were found to be incorrectly classified and 33% of companies’ safety data sheets (SDS) contained issues. Furthermore, 45% of the inspected companies had at least one case of non-compliance, with one in ten of the most hazardous substances not fulfilling EU classification and labelling requirements. REF-projects are generally carried out by inspectors at national level and reported back to ECHA, which produces a report with conclusions. The current report concludes that companies should put more effort into defining the right hazard classification of their mixtures and improve their SDS. The Forum may repeat the project in a few years to monitor companies’ compliance with the REACH and CLP regulations and their enforcement by member state competent authorities.

**ECHA launches an EU Chemicals Legislation Finder.** From March, companies will be able to access legislative information regarding the substances they manufacture, use, distribute or sell via EUCLEF, [the ECHA announced](#). This platform will give them access to legal information, including the scope of the legislation, exemptions and substance lists, on their substance in areas such as pesticides, waste and food contact materials. At first, it will cover 35 pieces of legislation. For EU and national authorities, EUCLEF will also contribute to identifying substances for which there may be regulatory overlaps or gaps. Over the next few years, ECHA will further develop the service. Notably, it could incorporate information on national occupational exposure limits and emission limit values from individual member states.



**The European Parliament Committee (ENVI) resolves to object to the Commission's proposed restriction on lead in polyvinyl chloride (PVC).** According to ENVI, the proposal allows for higher concentrations of lead in recycled PVC, which are not safe for human health and are in contradiction with the REACH Regulation. ENVI reasoned that "recycling should not justify the perpetuation of the use of hazardous legacy substances." Lead in PVC was phased-out in the EU following a 2015 industry voluntary commitment. However, in order to prevent lead emissions from all EU and imported PVC products, the Commission has proposed a maximum concentration limit of lead of 0.1 % w/w of PVC, but allowing some derogations for recovered PVC. ENVI's draft motion will be put to a vote in February. If the Parliament objects before 27 February, the Commission may, in principle, not adopt the proposed restriction. However, it would not hinder the Commission from amending the draft restriction or submitting a new one.

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