

## frESH Law Horizons

February 2020

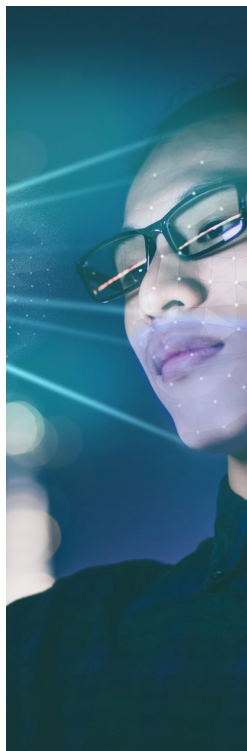


**Defence of legal professional privilege by the Court of Appeal.** In [Sports Direct International plc v Financial Reporting Council \[2020\] EWCA Civ 177](#), the Court of Appeal held that Sports Direct was not required to disclose privileged documents to the regulators (the Financial Reporting Council (FRC)) that were investigating Sports Direct's auditors. The court said it was required to look at the wording of the relevant statute to determine if Parliament intended to override legal professional privilege (in this case, the relevant regulations did not imply this intention). However, the case involved numerous emails, with attachments. The court also said that some of the attachments to the emails were pre-existing documents, which, by themselves, would not be protected by legal professional privilege. This further defence of privilege will be welcomed. It follows a decision almost 18 months ago restoring the previously understood position for reliance on litigation privilege (see our earlier [article](#)), relating to the ability of a business to rely on "legal privilege" to avoid disclosure of documents created during investigations, to third parties in subsequent civil or criminal proceedings, for example, the investigation report and notes of interviews with staff (which have the potential to self-incriminate, in particular because the investigation report will usually pinpoint failings with management systems that can amount to breaches of legislation). For litigation privilege, in particular, the instruction of a lawyer at an early stage is an indicator of the rationale that a prosecution is a real likelihood. Setting up an accident investigation protocol, which involves early dialogue with a lawyer, may help businesses to decide whether exerting legal professional privilege over the internal investigation report would be an appropriate safeguard, in the particular circumstances of the case.

**Health & Safety Executive (HSE) inspections are planned for the control of welding fumes.** The HSE has issued a [press release](#) reminding employers to protect workers' health and control exposure to welding fumes. The inspections follow a safety alert that was issued in February 2019, after new evidence showed exposure to mild steel welding fumes can cause cancer and HSE updated guidance to reflect this.

**Food Standards Agency (FSA) sets a deadline for cannabidiol (CBD) products.** CBD is derived from cannabis, but it does not have a psychoactive effect and, in its pure form, would not be classified as a controlled drug. There have been numerous CBD supplement products on the global market for several months. A number of producers have now also started to incorporate CBD as an ingredient in other food and drink products. In 2019, the FSA announced that it accepted the EU clarification that CBD extracts are considered novel foods. It has now [announced](#) a deadline of 31 March 2021, after which, only food products that have submitted a valid novel food application will be allowed to remain on the market. It should also be noted that, regardless of the position in relation to whether a novel food application has been submitted, if there is a trace of a controlled cannabinoid, such as tetrahydrocannabinol (THC), the product would be unlawful as a controlled drug. There are also no approved health or nutrition claims for CBD and, therefore, such claims cannot lawfully be made in relation to CBD food and drink products, or supplements.

**Fine for exposing a worker to the risk of occupational asthma.** A car company was investigated by the HSE in connection with the risks to a bodywork sprayer. The [HSE press release](#) on the prosecution and fine (of £120,000) confirms that the company pleaded guilty to breaching the Control of Substances Hazardous to Health Regulations 2002 (COSHH). The HSE's website includes a [list of substances](#) that can cause occupational asthma. The case underlines that the HSE will investigate and take action over longer-term risks to health, as well as safety breaches. This is also demonstrated by another fine [reported](#) this month, for an engineering company's failure to control the risk of its employees developing dermatitis, following exposure to metalworking fluid.



**Decision on an application for costs in private prosecution.** In [Fuseon Ltd v Senior Courts Costs Office \[2019\] EWHC 126 \(Admin\) \(28 January 2020\)](#), the court said that it was wrong to automatically disallow costs on the basis that they were at London rates, as opposed to local rates, and that it should not have rejected evidence that there were not enough local firms carrying out private prosecutions. The court said that the question was whether the overall claim for costs was reasonable, bearing in mind the inability of the company to instruct a local firm that was able to act. In this case, a company had elected to privately prosecute a director who had defrauded it. There is a right to bring private prosecutions for most offences within the Prosecution of Offences Act 1985. A private prosecution is a prosecution started by a private individual or entity (such as a company) that is not acting on behalf of the police or other typical prosecuting authority. Private prosecutions have grown in popularity recently, where a private party has been a victim of an offence. There are some advantages to a private prosecution, including more control over the investigation and prosecution, and the possibility of applying for costs to be reimbursed in the event of conviction. A [voluntary "code"](#) on private prosecutors was published last summer.

**FSA consultations on country of origin or place of provenance for primary ingredients (Wales and Northern Ireland).** The consultations closed on 19 and 23 February, and provides for the enforcement of EU rules requiring the country of origin or place of provenance of a primary ingredient to be indicated where it is not the same as the origin of the food as a whole (for prepacked foods). There is [guidance](#) available from Food Drink Europe on these requirements.

**Driver and Vehicle Standards Agency (DVSA) investigation leads to £500,000 in fines and costs for the forgery of lorry maintenance records.** [Local press reports](#) confirm that the firm, based in Pembrokeshire, was sentenced by Swansea Crown Court. It had pleaded guilty to 19 offences of forgery and counterfeiting maintenance records from October to December 2017 at an earlier hearing. An administrative assistant at the company was also given a nine-month prison sentence, suspended for two years, and has been ordered to pay £1,500 costs after pleading guilty to forging maintenance records. The DVSA supports the Traffic Commissioners to license and monitor companies that operate lorries, buses and coaches. The conviction may lead to action being taken against the operator licence, as such a conviction will be relevant to the good repute of the licence holder and there is a duty on holders of goods vehicle operator licences to notify relevant convictions within 28 days.

**Proposed new law on automatic facial recognition technology.** A [private member's bill](#) has been introduced to Parliament, which, if enacted, would prohibit the use of automated facial recognition technology in public places. If implemented, it would prevent use in music and sporting venues, being venues to which the public (or a section of the public) can access on payment. Even in the absence of such legislation, any operators looking to introduce such technology would, of course, need to be mindful of general restrictions relating to privacy and data protection, as well as codes of practice on surveillance cameras and CCTV.

**Court imposes a sentence of five years' imprisonment for an offence under the Fraud Act 2006.** The Crown Court, in *R v McLarry*, sentenced the former head of a charity who was found guilty of fraud by abuse of possession, contrary to the Fraud Act. The case serves as a reminder of the significant custodial sentences that can be imposed for financial crimes.





The revised [Environment Bill](#) was laid before Parliament on 30 January. There are eight parts to it, covering environmental guidance; environmental governance in Northern Ireland; waste and resource efficiency; air quality and environmental recall; water; nature and biodiversity; conservation covenants; and miscellaneous and general provisions. The main changes compared to the previous version (before the general election) are a ban on exporting plastic waste from the UK to non-OECD countries and a commitment to review major developments in international environmental law every two years, to consider whether to incorporate them into UK environmental law. We expect the bill to gain Royal Assent later this year. The legislation needs to be in place as soon as possible in order to establish and fund the new Office for Environmental Protection.

This month, there have been **numerous developments in relation to climate change**, including:

- **The Green Alliance launched a [net zero tracker](#) of UK carbon emission policies** to measure how the UK is progressing towards the net zero carbon by 2050 target. It claims there is a gap of 313 MtCO<sub>2</sub>e to meet the net zero target.
- **On 4 February 2020, the UK government officially launched [COP26](#)** – the 26th session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, which will be held in Glasgow in November 2020. At the time of the launch, the previous president of the COP had been removed and the new one had not yet been confirmed, but Alok Sharma was subsequently appointed as business secretary, and COP26 president.
- Also at the COP26 launch, the Prime Minister announced a “**Year of Climate Action**” in the UK in 2020, and that the **UK will end the sale of new petrol and diesel vehicles by 2035** (against the previous target of 2040), subject to consultation. The [consultation](#) was published on 20 February and is open until 29 May 2020.
- **The [Court of Appeal has held that the plans for the Heathrow Airport expansion are unlawful](#)** because the airport did not take account of climate change targets and obligations. The airport has said it will appeal to the Supreme Court.
- **A [planning application to expand Bristol Airport was refused](#)** by North Somerset Council’s planning committee on the grounds of noise and climate impacts, against the advice of planning officers.
- **[Barratt Developments announced plans to cut its direct carbon emissions](#)** by 29% by 2025 and indirect carbon emissions by 11% by 2030, by reducing its diesel use, trialling new technology such as solar-assisted generators, and building more energy-efficient homes. It said it aims to be the UK’s most sustainable house builder.
- **The [Carbon Accounting \(Provision for 2018\) Regulations 2020](#)** were made on 4 February 2020 and come into force on 28 February 2020. They update the UK carbon accounting system used to monitor compliance with the first year of the third carbon budget under the Climate Change Act 2008 (CCA 2008). They only cover the first year of the budget because the UK’s post-Brexit carbon pricing policy is still being developed and could impact the remaining years.
- **Ofgem published its [Decarbonisation Action Plan](#)** setting out actions for the next 18 months to help the UK to decarbonise its energy sector, recognising the need for a huge increase in renewable and low-carbon electricity.
- **ClientEarth launched [a judicial review](#) against the UK government’s decision to approve a gas turbine development.** The Planning Inspectorate had recommended that the application be rejected on climate grounds, but the application was called-in and approved by the Secretary of State. ClientEarth asserts that this decision undermines the UK’s path to reducing carbon emissions and building a more sustainable energy sector.
- **Members of the UK Sustainable Aviation coalition pledged to achieve net zero carbon emissions by 2050.** They published a [Decarbonisation Roadmap](#) explaining how they will meet this target, including new aircraft and engine technology, sustainable aviation fuels and offsetting.
- **A campaign group has been [granted permission to judicially review](#) the planning approval for a new deep coal mine in Cumbria, on climate grounds.** The claimants assert that the council failed to consider the greenhouse gas emissions associated with the mining operations and the government’s net zero target.
- Our energy team has published a briefing called [Towards Net Zero by 2050: A Challenging But Necessary Goal](#).



It has also been a busy month for developments on **environmental reporting and sustainable investment and finance**, including:

- **The European Commission [consulted](#) on updates to the non-financial reporting directive.** The consultation is an early stage request for comments and feedback on how to address issues regarding inadequate publicly available information about how non-financial issues impact companies, and how companies impact society and the environment, and the unnecessary and avoidable costs incurred by companies that have to make reports. The European Commission's aim is to ensure that investors have access to adequate non-financial company information; that sufficient information is available to hold companies accountable for their social and environmental impacts; and to reduce unnecessary costs for companies. This initial consultation closed on 27 February, but a more specific one has just opened.
- On 20 February, **the European Commission published a [consultation on possible options for revisions to the non-financial reporting directive](#).** The consultation requests responses on a wide range of issues, including the quality and scope of non-financial information that is reported, standards, types of companies affected, and the administrative and cost burden on the reporting requirements. The consultation is open until 14 May 2020.
- **The FRC will review company and auditor responses to climate change.** The FRC is going to review how far companies and their auditors are responding to the impact of climate change on their businesses. It will do this by reviewing samples of company reports and accounts, as well as audits, and evaluating the quality of disclosures under the new UK Corporate Governance Code, among other things. The FRC will also consider how investors are addressing climate risk when it monitors the reports issued under the new Stewardship Code, which will start in 2021.
- **The European Securities and Markets Authority (ESMA) has published its [strategy on sustainable finance](#),** setting out ESMA's strategy for taking account of sustainable business models and integrating environmental, social and governance (ESG) factors across its four areas of work (the single rulebook, supervisory convergence, direct supervision and risk assessment).

**Clean air** has also been a hot topic this month, including:

- **The government has updated its policy paper [Air quality: clean air zone framework for England](#),** which sets out the principles that local authorities should follow when setting up Clean Air Zones in England, to update the Annex on Clean Air Zone minimum classes and standards.
- **Defra published its [consultation response](#) on proposals for cleaner domestic burning of solid fuels and wood in England,** confirming that it will ban pre-packaged "house coal" from February 2021 (with a year to use existing stocks, and with loose coal from merchants to follow in 2023), and will require wood for domestic use to meet maximum moisture content standards from the same date. Manufactured fuels will also have to meet sulphur content and smoke emission standards from February 2021.
- **The British Heart Foundation (BHF) has called on the government to go [further and faster on air pollution](#) following the publication of its [report on clean air](#).** New BHF analysis in the report shows around 15 million people in the UK live in areas where average levels of fine particulate matter (PM2.5) exceed guidelines set out by the World Health Organization (WHO).
- **The Birmingham Clean Air Zone has been [postponed again](#)** due to further delays in the availability of the government's number plate recognition software. It was due to start on 1 July 2020 (having already been deferred by six months from the original start date of 1 January 2020). It is thought that the scheme will still go live "in the Summer," but no firm date has been published.
- **A substantial [drop in air pollution breaches](#) in London has been attributed to clean air measures** (such as the electric vehicles and the ultra-low emission zone). The figures reveal that during 2016, London's air exceeded the hourly legal limit for nitrogen dioxide for over 4,000 hours, but in 2019, this fell to just over 100 hours – a reduction of 97%. Between 2004 and 2017, London breached the permitted number of exceedances for nitrogen dioxide within the first week of the year, but in 2019, only one site breached, and it did not occur until July.







**Heathrow Airport and E.ON UK plc are public authorities for purposes of access to environmental information.** In separate decisions, the Information Commissioner held that [E.ON](#) and [Heathrow Airport](#) met the criteria for being public authorities and, therefore, were required to comply with requests for information under the Environmental Information Regulations 2004. This follows previous case law considering the status of privatised water companies under the same regulations.

**A British Institute of International & Comparative Law study, “[A UK Failure to Prevent Mechanism for Corporate Human Rights Harms](#)”,** has found that many UK companies would support tougher human rights and environmental legislation, similar to the “failure to prevent bribery” provisions in the Bribery Act 2010.

**Both the EU and the UK have issued mandates for the negotiation of the EU/UK future relationship**, including information on the approach to be taken for environmental and climate change matters. The [EU mandate](#) is that the UK and the EU should agree not to lower the level of environmental and climate protection below the position at the end of the transition period, and that the UK should continue to use EU standards as a reference point. It specifically refers to consideration of linking greenhouse gas emissions trading systems. In contrast, the [UK mandate](#) has regulatory autonomy as its main objective, but it does refer to reciprocal commitments not to weaken or reduce the level of protection provided by environmental laws, and to co-operate and share data on chemical regulation. Negotiations are due to start in the first week of March.

**A European Commission [report](#) on the implementation of the end-of-life vehicles (ELV) directive** states that the implementation of the directive has been satisfactory and the majority of member states have met the targets under it (85% reuse and recycling by an average weight per vehicle and year) and the use of banned heavy metals in components has drastically reduced since 2003. Challenges remain regarding illegal operators, which leads to a loss of resources from the recycling system, but also potential environmental and health impacts. The European Commission is currently evaluating the ELV directive and is looking at issues such as resources being lost from the system, and the challenges of new developments in the sector, like electric and hybrid vehicles.

**The Environment Agency (EA) published [information](#) on 10 priority catchment areas for water abstraction reform**, as part of its reform of the water abstraction regime. The idea of the catchment-based approach in priority areas is that more innovative solutions can be developed to improve access to water and ensure sustainable abstraction. The priority catchments are areas where there are concerns about demand or impacts, or where there is the potential for water to be shared. Updated abstraction licensing strategies for the priority catchments will follow gradually between now and the end of 2027.

**[Advocate General opinion](#) in a European Court of Justice (ECJ) waste case indicates the permissible level of impurities in paper waste for classification as “green list” waste.**

A German company, Interseroh Dienstleistungen, which ships wastepaper for recycling to the Netherlands, is arguing that paper with up to 10% impurities can still be classed as low-risk green list waste under the waste shipments regulation. The German regulator disagrees, and questions on interpretation have been referred to the ECJ. Ahead of the court’s judgment, the Advocate General’s opinion has been issued, indicating that the use of a general figure such as 10% cannot be assumed to be insignificant as regards impact on recyclability, and that scientific evidence would be required to show that there would be no impact up to this impurity level. Concluding, she said the waste in question should be subject to the procedure of prior notification and consent, and not green list controls. It remains to be seen if the court will follow this position, which could impact others shipping wastepaper under the green list procedure.

**EA consults on [appropriate measures for permitted facilities that take chemical waste](#).**

There is existing guidance in [technical guidance note EPR 5.06: recovery and disposal of hazardous and non-hazardous waste](#), and this consultation is about new guidance to replace this with a view to improving the design and operation of chemical waste facilities and ensuring more consistency in the application of measures.



#### **92% of REACH non-compliant chemicals in consumer products come from outside**

**the EU**, the European Chemical Industry Council (Cefic) [announced](#), based on the latest data from the EU's Rapid Alert System for dangerous non-food products (RAPEX). Through RAPEX, EU member state authorities and the Commission exchange information on non-food products posing a risk to the health and safety of consumers. Cefic points out that the number of non-compliant cases in 2019 (1,468) increased by 24% compared to 2018, in particular for restricted phthalates, notably found in toys. The overwhelming share of non-compliant chemicals that come from outside the EU/EEA confirms an urgent need for EU member states to step up the enforcement of REACH in imported goods. This conclusion would be in line with the second [REACH Review](#) of 2018, where the Commission identified the need for stronger enforcement of EU chemical legislation, especially regarding imports.

**European Parliament objects to lead in polyvinyl chloride (PVC).** The plenary of the European Parliament [decided](#) to object to the European Commission's proposal to restrict lead in PVC. While restricting the concentration of lead to 0.1% w/w of PVC, the proposal allowed for higher thresholds in recycled PVC (2% in rigid and 1% in flexible/soft). The European Parliament found that "lead is a toxic substance that can seriously affect health [...] even in low doses", and that the levels proposed by the European Commission would not be safe, on top of the fact that alternatives would be available. With its objection, the European Parliament followed the opinion of its Environment Committee (ENVI) (please see [frESH Law Horizons](#), January 2020). The European Parliament's [objection](#) in principle blocks the European Commission from adopting its proposal. However, the European Commission may still choose to amend it, or to submit a new proposal.

**Titanium dioxide (TiO<sub>2</sub>) is classified as a suspected carcinogenic.** With [Delegated Regulation 2020/217](#) (amending Regulation 1272/2008 on classification, labelling and packaging of substances and mixtures [CLP]), the European Commission classified TiO<sub>2</sub> as a category 2 suspected carcinogen by inhalation with effect from 9 September 2021. As a result, warnings and labelling requirements will apply to mixtures in powder form containing 1% or more of TiO<sub>2</sub>, which is in the form of, or incorporated in, particles with an aerodynamic diameter of  $\leq 10$   $\mu$ m. TiO<sub>2</sub> is used in a wide variety of products, including paints and coatings, pharmaceuticals and textiles. The European Commission's amendment to the CLP Regulation comes after the European Chemicals Agency's (ECHA's) Risk Assessment Committee (RAC) proposed to classify TiO<sub>2</sub> as a suspected carcinogen in 2017 (please see [frESH Law Horizons](#), September 2019).

**Companies can start testing ECHA's "waste database".** ECHA [launched](#) a prototype version of its database on substances of concern in products (SCIP). Companies may test and get familiar with the database, and help ECHA prepare for the launch of the final version later in 2020. All submitted test data will be deleted before the launch of the final SCIP database. From 5 January 2021, companies that place on the market products containing substances of very high concern (SVHC) in a concentration above 0.1% w/w have to submit information on the safe use of those substances through the SCIP database. In accordance with the revised Waste Framework Directive, ECHA is responsible for setting up and maintaining the database (please see [frESH Law Horizons](#), September 2019).

**Food-contact materials (FCMs) evaluation report may be delayed.** At the [third conference](#) on food contact regulations, European Commission officials indicated that the report evaluating the EU FCM regulatory framework might be delayed by nearly two years. EU legislation on FCMs has been in place since 1976 and has never been evaluated since then. Currently, EU [Regulation 1935/2004](#) provides a harmonised legal framework for FCMs at the EU level. Following pressure from various stakeholders and the publication of a detailed report by the European Commission's Joint Research Centre (JRC), the European Commission launched the evaluation of EU FCM laws in November 2017. The evaluation aims to assess to what extent the current EU legislative framework for FCMs is fit for purpose. One of the issues discussed at the event was the lack of regulation of harmful chemicals in FCMs, including SVHC.



**European Commission outlines 2020 plans regarding endocrine disruptors.** [According to a letter](#) to the EDC Free Europe Coalition of NGOs, the results of the evaluation of EU rules on endocrine disruptors will be published in the first half of 2020. The European Commission will publish a [draft Delegated Act amending the data requirements for active substances and biocidal products](#) in early 2020 for feedback. It will also prepare an amendment of the registration requirements in REACH, to make sure that companies placing chemicals on the EU market provide authorities with data regarding their substances' endocrine disrupting properties. Work on that update to the REACH annexes started in the summer of 2019, according to a European Commission [note](#) to the Competent Authorities for REACH and CLP (CARACAL).

**European Food Safety Authority (EFSA) opens consultation on perfluoroalkyl substances (PFAS) in food.** Until 20 April, interested parties are [invited](#) to comment on the [draft scientific opinion](#) (with detailed [Annex](#)) of EFSA's Panel on Contaminants in the Food Chain (CONTAM) on the risks to human health related to the presence of PFAS in food. In its opinion, EFSA assesses the risks linked to human dietary exposure to four main PFAS substances that accumulate in the body. After estimating a "tolerable weekly intake" (TWI) of 8 ng/kg bw of PFAS per week, EFSA concludes that "parts of the European population exceed this TWI, which is of concern". Fish, fruit and eggs are the foods that contribute most to human exposure to PFAS. The European Commission asked EFSA to reassess the risks based on new available scientific data. As part of the consultation process, EFSA will organise a [technical meeting](#) on 12 March in Brussels.

**European Commission 2020 Work Programme explains the "One-in, One-out" approach.** In the newly adopted [work programme for 2020](#), which will guide its policymaking for its first year in office, the European Commission shed light on the "One-in, One-out" approach. Newly introduced administrative burdens would be offset by relieving people and businesses – notably SMEs – of equivalent administrative costs at the EU level in the same policy area. This approach would not lower social and ecological standards, nor be applied in a purely mechanical way. While aiming to reduce unnecessary legislative burden, the European Commission will design EU legislation "from a user-perspective" and "consistently apply the digital-by-default principle". The work programme, published on 29 January 2020, lists the European Commission's initiatives for the year 2020 (please see our [client alert](#)).

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