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Enforcement undertakings for breaches of permit

THE IN-HOUSE LAWYER

Enforcement undertakings for breaches of permit

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NEW LEGISLATION CURRENTLY BEFORE Parliament promises greater choice for businesses who find themselves out of compliance with the environmental permitting regime. If passed, operators can be proactive in offering remedies – in the form of a civil sanction known as an enforcement undertaking – rather than waiting for the outcome of the Environment Agency's investigation. In-house lawyers should be alive to the opportunities these new powers present.

Enforcement undertakings are the most novel of a suite of civil sanctions introduced by the Regulatory Enforcement and Sanctions (RES) Act 2008 (see table on page 22). The civil sanctions enable regulators to plug the gap between criminal prosecutions and doing nothing (or very little, such as cautions or warning letters) – a gap that Professor Richard Macrory, the author of the report that led to the RES Act 2008, termed 'the compliance deficit'. However, despite the RES Act 2008 having cross-party support at the time, some in the coalition government formed in 2010 were concerned about increasing the powers of regulators without the safeguard of the courts, and the impact this might have on business. As a result, extending the powers into new areas – such as the environmental permitting regime, enforced by the Environment Agency (EA) – was put on hold.

However, what makes enforcement undertakings so novel is that they are not sanctions that can be imposed by the regulator on the business community. Rather, they are offered by businesses to the regulator, and are therefore of great benefit in providing choice to businesses that find themselves in breach of environmental law.

Following a targeted campaign led by the United Kingdom Environmental Lawyers Association (UKELA), in December last year DEFRA revealed plans to extend enforcement undertakings to the EA's environmental permitting regime for England, enabling the regulator to accept enforcement undertakings for breaches of the Environmental Permitting Regulations 2010. There are roughly 90,000 EA permits regulating a range of facilities from landfill sites, water treatment works, to chemical plants and so the new powers would have an implication for numerous businesses.

The draft regulations are currently before Parliament and, if passed, will come into force on 6 April 2015 and will only apply to England.

HOW ENFORCEMENT UNDERTAKINGS WORK

Enforcement undertakings are voluntary and can be offered at any time before the commencement of legal proceedings. It is entirely up to the business to decide whether they want to offer undertakings and what they will offer to undertake. The focus should be on restoration of harm and return to compliance.

Acceptance of an enforcement undertaking is at the discretion of the regulator. The regulator will stringently assess each offer based on a set of 'public interest factors' set out in guidance.

For the Environment Agency, the guidance provides that offers will only be accepted where they:

- make a positive commitment to stop the particular conduct or alleged breach and not recommence that conduct;
- set out how the person will address the conduct;
- set out how the person will prevent that conduct occurring again;
- set out how the person will rectify the consequences of the conduct, including interacting with any third party affected by the offence; and
- contain actions to (must include at least one):
  - secure that the offence does not continue or recur;
  - restore the position to what it would have been if the offence had not been committed;
  - benefit any person affected by the offence (including the payment of a sum of money); or
  - secure equivalent benefit or improvement to the environment,

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where restoration of the harm arising from the offence is not possible.

Once accepted, the regulator can no longer prosecute for the breach in question. However, subsequent failure to comply with the terms of an enforcement undertaking may result in a criminal prosecution. Appeals against the terms of a civil sanction (for example, a disagreement as to the terms of the undertaking) can be made to the General Regulatory Chamber (part of the tribunal system).

Enforcement undertakings will not replace criminal prosecutions, but supplement them, and criminal prosecutions will remain for more serious offending. In the Lord's debate in February this year, Dan Rogerson, the secretary of state for environment food and rural affairs, made clear that:

> '... the worst offenders will continue to be prosecuted. Enforcement undertakings will be most appropriate for normally compliant people and businesses, as long as they address the cause and effect of the offending.'

ENFORCEMENT UNDERTAKINGS TO DATE

The EA was the first regulator to gain the new powers under the RES Act 2008, but only for a limited range of offences (mainly for product

THE RES ACT 2008 CIVIL SANCTIONS

Civil sanction	Description
Fixed monetary penalties (FMPs)	FMPs are designed to provide an alternative to prosecution in relation to low-level, minor breaches, for example for failure to meet requirements to monitor or document activities. They are analogous to fixed penalties for road traffic offences.
Discretionary requirements	Discretionary requirements are designed for mid to high-level breaches and include the following measures: ■ **A compliance notice** Designed to target the breach and its causes. A written notice is issued by the regulator that requires a person to take specific steps to ensure that the offence does not continue or happen again. An example is a written notice to implement a system of maintenance for critical equipment. ■ **A restoration notice** Specifically aimed at situations where environmental damage has occurred, whether it is temporary or a sustained loss of environmental quality (for example, in air, water or soil quality). A written notice is issued by the regulator that requires a person to take steps to restore the position to what it would have been had no offence been committed. It will clearly identify the damage or losses, the actions required to restore the position and the period within which those actions should be taken. An example is a written notice to restock or reintroduce damaged species to an area. ■ **A variable monetary penalty** Designed for the most serious cases where the regulator decides that prosecution is not in the public interest. It aims to remove a financial benefit that may exist from a breach and to adequately deter future breaches. Penalties are capped at £250,000.
Stop notices	Stop notices are designed to prevent a business continuing an activity until it has taken steps to become compliant. They can only be served where the regulator reasonably believes that the activity is causing (or will cause) serious harm or presents (or will present) a significant risk of causing serious harm to human health or to the environment. Stop notices resemble injunctions. Stop notices can be served in combination with steps leading to a criminal prosecution.
Enforcement undertakings	The most novel and most commonly used civil sanction. Enforcement undertakings are a voluntary offer by a person to take steps to make amends for a breach and its effects, usually in the form of restoration activities or a payment to a local charity.

stewardship regimes such as the packaging waste regime). It was always the intention of the EA to extend the powers to the environmental permitting regime but, following the change in the political wind, environmental lawyers were left with a limited (and rather anomalous) list of offences for which civil sanctions were available. For example, it was not possible to use civil sanctions for pollution of an ordinary watercourse, but if the watercourse happened to fall within the remit of the Salmon and Freshwater Fisheries Act 1975 then civil sanctions became available (see case study below).

The EA first started civil sanctions in 2011, and the most popular sanction has been the enforcement undertaking. By 2012, the EA reported that over 100 enforcement undertakings had been accepted, and the figure today is likely to be much higher. In June 2014, it was reported that over £1m in charitable donations and restoration had been accrued due to enforcement undertakings. Some of the individual sums are sizeable: in 2014, cosmetics firm GR & MM Blackledge offered £191,107 and HIPP UK Ltd offered £414,000, both for non-compliance with the packaging waste regime.

THE NEW REGULATIONS

The new draft Environmental Permitting (England and Wales) (Amendment) (England) Regulations 2015 will enable the EA to accept enforcement undertakings from organisations that have committed the following offences:

- operating without an environmental permit – Regulation 38(1) of the Environmental Permitting (England and Wales) Regulations 2010;
- failure to comply with an environmental permit condition – Regulation 38(2);
- failure to provide information when requested – Regulation 38(4)(a);
- failure to comply with record-keeping requirements – Regulation 38(5)(a);
- offences by third parties – Regulation 38(6)

FOR BUSINESSES: SHALL I OFFER?

When a business finds itself in breach, it must make a decision – weighing up both legal and commercial considerations – as to whether to make an offer of undertakings. According to the EA guidance, the offer must be made before the EA commences legal proceedings (although see case study below for an exception to this rule).

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The pros

The advantage gained from making an offer is the prospect of avoiding potential criminal prosecution. Criminal prosecutions have numerous negative impacts: reputational damage, loss of management time, legal costs, uncertainty, loss of control, etc. For many business people not used to criminal processes, they are also an unpleasant and stressful experience. There are also commercial implications arising from a resultant criminal record, for example, in relation to insurance premiums or procurement tendering.

Enforcement undertakings give businesses a degree of control, which should not be underestimated. Criminal investigations and enforcement are reactive – the business must co-operate with the investigation and await its fate. In contrast, enforcement undertakings allow proactive negotiations and allow the matter to be brought to an end quickly and for an agreed financial sum.

Enforcement undertakings also provide those businesses which would voluntarily seek to remediate any environmental harm caused and make good the rapport with their local community a mechanism to do so with EA endorsement. It may also be a useful internal catalyst for the business to reassess its compliance management systems.

The environment benefits too: enforcement undertakings prioritise restoration of harm and renewed compliance rather than filling Treasury coffers with fines. It is one of the few legal mechanisms which allow the offending party to offer direct restitution to the local community which is most affected by the harm. Enforcement undertakings also steer the tone away from an adversarial mentality, and encourage better co-operation and honest dialogue between the EA and businesses. The use of undertakings will also allow the EA to devote their limited time and resources to going after the worst offenders.

The cons

The downside of enforcement undertakings for business is that the process requires the cards to be put on the table. For some, offers of compensation might be made

CASE STUDY

Burges Salmon acted on the first enforcement undertaking accepted for a water pollution event in Wales. At the point of instruction, the client had already received a Magistrates’ Court summons for an unauthorised discharge of cleaning products from an agricultural unit into a stream. The summons had been laid as a breach of the environmental permitting regime (for which enforcement undertakings were not permitted), but the stream also fell within the remit of the Salmon and Freshwater Fisheries Act 1975, opening up the opportunity to argue that enforcement undertakings were a route available to the EA. Burges Salmon appointed a hydrologist and aquatic ecologist to demonstrate there the harm was temporary and the stream had returned to back to its existing status, so no remediation was required. The client offered to take steps to prevent similar incidents in the future and offered £1,000 to a local wildlife charity. The EA in Wales agreed that this had the best outcome for the environment, accepted the enforcement undertaking and withdrew the summons.

‘Enforcement undertakings are one of the few legal mechanisms which allow the offending party to offer direct restitution to the local community which is most affected by the harm.’

when the EA have neither the means nor the evidence to prosecute. However, enforcement undertakings are voluntary and are designed for the majority of businesses who are genuinely keen to maintain good relations with the regulator and local community and who wish to make amends for non-compliance. Those with other intentions can ignore the new regime and wait to see whether the EA can build a case to prosecute, as has been the case for many years.

TOP TIPS

Early action is best...

Because any undertaking has to be offered prior to legal proceedings commencing, as soon as a regulatory breach has been identified, a business should start considering whether it will make an offer.

... but it’s never too late

While early action is recommended, and deferred action carries the risk of non-acceptance, the deadline for acceptance is still being tested. In one recent case, Burges Salmon’s environment team was able to persuade the EA in Wales (now Natural Resources Wales) to accept an enforcement undertaking even after a summons had been issued (see case study on page 23).

It’s a legally binding agreement

Enforcement undertakings are negotiated, and legally binding, with regulatory consequences for non-compliance. The EA will not accept an offer that is poorly directed and disproportionate to the harm caused. In their offers, businesses should make clear that they have identified the cause of the non-compliance and have taken action (or at least planned action) to address it. They should further show that they recognise the damage done and, if it is not possible to remediate, they should offer payments to a charity or organisation whose activities are closely related to the impact in question. As with any negotiation with legal consequences, in-house lawyers and their external advisors should support the business as necessary to ensure the most appropriate outcome for the business.

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