



Largest ever enforcement undertaking accepted by the Environment Agency

In October 2015, the Environment Agency issued a press statement on an enforcement undertaking of almost £415,000, the largest enforcement undertaking accepted to date, from organic baby food company HiPP UK Ltd.

The EA found that HiPP had failed both to meet its requirements to register as a producer of packaging and to recover and recycle packaging waste between 2004 and 2011 under the Producer Responsibility (Packaging Waste) Regulations 2007.

As a result, HiPP offered a record enforcement undertaking of payments to three environmental charities (the Bumblebee Conservation Trust, the Woodland Trust and the Yorkshire Dales Millennium Trust) totalling £414,960, plus payment of the EA's costs.

What is an enforcement undertaking?

An enforcement undertaking is available to the EA as an alternative to prosecution when taking enforcement action. It is a legally-binding voluntary agreement proposed by a company (or an individual) when the EA has reasonable cause to suspect that an environmental offence has occurred. Enforcement undertakings for environmental offences were introduced under the Environmental Civil Sanctions Orders in 2010 and the majority have been accepted in relation to offences under the Packaging Regulations.

Why is HiPP UK Ltd's enforcement undertaking interesting?

The significant value of HiPP's enforcement undertaking reflects the notable increases in environmental fines seen over the last two years following the ground-breaking decision of the Court of Appeal in relation to fines against Sellafield and Network Rail in early 2014.

Also of interest in relation to this enforcement undertaking is the period of time that the offence relates to. Enforcement undertakings were only made available to the EA for environmental offences on 6 April 2010 in England and 15 July 2010 in Wales when the Environmental Civil Sanctions Orders for England and Wales became law. The EA therefore appears to have taken a decision that it will consider accepting enforcement undertakings in relation to on-going breaches even where the breach started before 2010.

The acceptance of the enforcement undertaking was in fact included on the statutory register some time ago. It is not clear why the EA waited to issue a press release.

Benefits of enforcement undertakings

Some of the benefits of securing an enforcement undertaking are that:

- the company will have a degree of control in making the offer (as compared to a criminal prosecution);
- the company will avoid the expense and negative press coverage associated with a criminal prosecution, although the EA does publish enforcement undertakings and maintain a register;
- the company will avoid any commercial implications arising from a criminal fine, for example, in relation to insurance premiums or procurement tendering; and
- the EA cannot impose any further civil or criminal sanctions (provided the company delivers upon its promises).

How can companies secure enforcement undertakings instead of prosecution?

Accepting an enforcement undertaking is always at the discretion of the EA and the stakes can be very high where the alternative is a criminal fine. The EA has produced guidance and standard forms to help formulate offers for enforcement undertakings. However, getting the terms of the offer and

overall negotiation strategy with the EA right first time is critical to maximising the chances of avoiding prosecution.

When offering an enforcement undertaking, the company or individual is required to focus upon accepting culpability, demonstrating restoration of harm and ensuring future compliance as well as making a suitable offer to pay an appropriate environmental charity.

If you would like any advice in relation to enforcement undertakings or prosecutions for environmental offences please contact Michael Barlow or Ella Curnow.

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