

## **ENFORCEMENT UNDERTAKINGS AS AN ALTERNATIVE TO CRIMINAL PROSECUTION IN ENVIRONMENTAL CASES**

### **Introduction**

Cast your mind back to 2008 when the Regulatory Enforcement and Sanctions Act 2008 (the “RES Act”) made a range of civil sanctions available to regulators to use in cases of non-compliance with regulatory requirements. These include enforcement undertakings (“EUs”), which are voluntary offers made by offenders to restore and remediate any damage they have caused, in agreement with the regulator, without attracting a criminal record. EUs were first introduced by the Environment Agency (“EA”) in relation to certain offences and potential offences in relation to packaging.

### **What’s the change?**

The Environmental Permitting (England and Wales) Regulations 2010 (“Regulations”) came into force on 6th April.

The Regulations only apply to England and give the EA the power to accept enforcement undertakings (but not to use any other civil sanctions) from those who voluntarily offer them, for certain offences under the Environmental Permitting regime. A new Schedule 23A to the Regulations requires the Environment Agency to: publish guidance about its use of enforcement undertakings; revise it where appropriate; consult appropriate persons first; and have regard to the guidance in exercising its functions (paragraph 9).

EUs will be able to be accepted where there has been a failure to follow environmental permit conditions or failure to follow the requirements of a notice served by the EA for breach of an environmental permit in specified circumstances. However at present the EA has no policy of treating an accepted undertaking as a bar to it serving other kinds of (non RES Act) civil sanction. Business needs to know that acceptance of and compliance with the undertaking would be the end of the matter.

Where an enforcement undertaking is not complied with, the regulator will be able to prosecute for the original offence.

## **Comment**

EUs may appear costly but in the light of recent changes to magistrates' sentencing powers, which enable them to impose unlimited fines, they may be considered a sensible option.

EUs can also benefit the environment by focusing on putting things right rather than seeking to punish the offender. In practice it is the offender who sets out the terms of the undertaking and offers this to the EA for its acceptance.

In the meantime we recommend reviewing training and processes to ensure, if the worst ever happens and an incident occurs, the company can demonstrate that it was operating to the highest standards.

Guidance already exists on the use of enforcement undertakings in the Enforcement and Sanctions Guidance, and on the attachment to the form of undertaking. In the longer term this needs to be revised to provide clarification on the relationship between enforcement undertakings and other civil sanctions that can be issued to deal with environmental permitting offences such as enforcement notices, that are not creatures of the RES Act. The new Schedule 23A is silent on this issue.

This contrasts with the position for enforcement undertakings accepted as an alternative to one of the RES Act sanctions. In such cases, acceptance of an enforcement undertaking is a bar to the regulator serving a fixed monetary penalty, variable monetary penalty, compliance notice or restoration notice: see for example Schedule 4 to the Environmental Civil Sanctions (England) Order 2010. Schedule 23A is silent on this issue.

The introduction of enforcement undertakings for environmental offences may lead to a significant increase in their use. Revised guidance could usefully:

- clarify what counts as 'harm' and equivalent benefit in the fourth limb of what an enforcement undertaking can offer, namely 'where restoration of the harm arising from the offence is not possible, action that will secure equivalent benefit or improvement to the environment';
- address the practical aspects of assessing and quantifying harm so the enforcement undertakings can be properly scoped and valued; and

- indicate the level of harm for which an enforcement undertaking would be an acceptable alternative to, say, a prosecution; identify principles for determining where funds should go, in the case of undertakings under the fourth limb that involve making payments to ‘secure equivalent benefit or improvement to the environment’.

*This information is necessarily brief and is not intended to be an exhaustive statement of the law. It is essential that professional advice is sought before any decision is taken.*

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