

## Ten things you should know about environmental enforcement and sanctions



### Dispatches from the UCL/UKELA conference on 'The New System of Environmental Enforcement and Sanctions: from Principle into Practice', 8 November

Rosie Oliver, UKELA working party support officer

1. A tariff-based approach to sentencing environmental crime is on the cards. Michelle Crotty, Chief Executive of the Sentencing Council, explained that in Spring 2013 the Council will consult on sentencing guidelines for waste and environmental permitting offences that will include detailed tables with starting point figures for fines, depending on culpability, harm and business turnover. The Council intends the new approach both to promote consistency and increase fines across the board, which it regards as generally too low.
2. Future orders making civil sanctions available to deal with offences that are not yet covered will restrict the use of fixed and variable monetary penalties and restoration notices to businesses with more than 250 employees. This surprise announcement by Department of Business Innovation and Skills Minister Michael Fallon was issued on 8 November, the day of the conference. Cabinet Office Minister Oliver Letwin's keynote address explained the background: essentially a fear that regulators might otherwise unfairly target sanctions on 'the small guys' who cannot call on an 'army of lawyers' to challenge them in the environmental tribunal. He saw this as a problem particular to civil sanctions because, unlike criminal fines that are imposed by the courts, regulators can issue sanctions directly on businesses.

Somewhat regrettably, Letwin's brief 30 minute appearance at the conference meant he did not hear the preceding speech by Judge Nick Warren, President of the General Regulatory Chamber: a comforting vision of the tribunal as a non-intimidating, user-friendly place where individuals are enabled to represent themselves, without fear of costs orders. Nor was the Minister around to hear the exasperated bafflement that followed his address. Floor and panel members commented that limiting monetary penalties and restoration notices to businesses with over 250 employees would massively restrict their use, nudging regulators back towards prosecutions. Representatives from various environmental regulators present palpably bristled when Letwin insinuated they had a tendency to be overzealous.

3. Defra still intends to introduce civil sanctions for Environmental Permitting Regulation offences, but has held this up pending the Home Affairs Committee Review of Civil Sanctions. This was confirmed by Defra official Steven Gleave in a comment from the floor. Although this seems like a significant extension in scope of civil sanctions, the move will be subject to the new policy in the Ministerial statement (point 2 above). In other words, fixed and variable monetary penalties and restoration notices would not be available to deal with environmental permitting offences committed by businesses with up to 250 employees.
4. So far, the vast majority of the Environment Agency's civil sanctioning activity has been dealing with offers of enforcement undertakings for packaging waste offences. Dan Wiley, Environment Agency Legal Adviser, reported that in the eighteen months since their introduction in January 2011 the Agency received 109 valid enforcement undertakings of which 99 were for packaging waste offences. 59 were formally accepted and 36 were fulfilled and subject to completion certificates.

5. Packaging waste enforcement undertakings have generated donations to environmental charities totalling hundreds of thousands of pounds. We were not shown precise figures at the conference but details of enforcement undertakings are available on the Agency's website. Dan Wiley explained that enforcement undertakings in these cases are unusual ('almost a freak feature' of the regime) in that there is no identifiable environmental harm that businesses can pledge action to deal with: hence there is 'nothing else to do' apart from make donations. Comments from the floor indicated concerns about a lack of transparency in the process for agreeing undertakings and deciding which charities would benefit.
6. Packaging waste enforcement undertaking donations are calculated according to consistency guidelines. The sums represent the costs avoided by failing to comply with the Packaging Regulations (primarily the cost of the packaging recovery notes due during the period of non-compliance) plus 10% if the business pro-actively self-reported the breach, or 30% if the Environment Agency made the first approach. The lower 10% figure is intended to give non-compliant businesses an incentive to self-report. Andrew Bryce, Solicitor, pointed out limitations to the incentive effect: some businesses may prefer not to come forward for fear of self-incrimination, and instead take the risk of a prosecution. In some cases, the extra legal costs associated with a prosecution might be less than the extra 10% they would have to pay under an undertaking. Guidance on self-incrimination would be helpful.
7. Apart from four fixed monetary penalties issued for water abstraction reporting offences under the Water Resources Act 1991, the Environment Agency has not issued any other civil sanctions. Dan Wiley and Anne Brosnan of the Environment Agency suggested that this was because we are still only in 'the foothills' of the new regime. As it beds down and sanctions become available for more offences (in particular environmental permitting offences) we can expect more civil sanctions to be issued. This suggestion was tempered by the Ministerial announcement later in the day limiting the sanctions that would be made available to deal with offending by businesses with less than 250 employees. Further, Andrew Bryce suggested that in the case of variable monetary penalties, the high degree of regulatory effort required meant regulators would be reluctant to impose them, preferring to prosecute instead.
8. The Scottish Government is planning to introduce 'variable penalties and enforceable undertaking', a similar scheme of sanctions to those under the Regulatory Enforcement and Sanctions Act. Bridget Marshall, Head of Legal at the Scottish Environmental Protection Agency (SEPA), explained that the powers would be part of a new integrated framework of environmental regulation, with a new outcome-focused approach to enforcement by SEPA. A consultation earlier this year proposed that variable monetary penalties should be capped at £40,000, signalling their use for less significant cases than those that would be prosecuted. The proposal that there should be a right of appeal to the Minister was generally considered by consultees to fall short of requirements under Article 6 of the European Convention of Human Rights (right to a fair hearing).
9. Legal aid might need to be made available for civil sanctions appeals to the environmental tribunal, if civil sanctions were deemed to be criminal in nature. James Maurici of Landmark Chambers went through some of the lead cases on whether civil sanctions are criminal for the purposes of Article 6 of the European Convention of Human Rights. The case law is inconclusive, but it is possible that variable monetary penalties in particular might be criminal, in which case the protections under Article 6(3) would apply.
10. For some offences, the availability of civil sanctions might fall foul of the Environmental Crime Directive 2008/99EC. Claire Dupont and Josephine Armstrong of Milieu Ltd Law & Policy Consulting reported that they are reviewing UK legislation for conformity with the Directive. They had not yet reached a view on whether the legislation complies. Ludwig Kramer, Visiting Professor, UCL Law Faculty, rejected the suggestion that it would be enough to have criminal sanctions 'available' for relevant crimes, alongside civil sanctions. However, he also commented that he could not see the Commission taking a case against a member state on the basis that its sanctions are not effective, dissuasive or proportionate.