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The International Comparative Legal Guide to:

Environment & Climate Change Law 2013

10th Edition

A practical cross-border insight into environment and climate change law

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Introduction

At the end of 2012 the Court of Justice of the European Union (CJEU) imposed a large fine on Ireland for failing to comply with its judgment three years earlier that Ireland was in breach of its obligations under EU waste legislation. The Court's powers to impose financial penalties on countries were introduced under Treaty amendments in 1993 to tackle the problem of an increasing number of Member States that appeared not to respect its judgments, and is unique in the international field. What is distinctive about the Irish case is that it largely concerned systemic weaknesses in a country's administrative structure for implementing and enforcing environmental law, and signals a more robust approach at European level to issues of implementation and enforcement.

European Union environmental legislation now represents a substantive body of law, but has largely tended to be rather cautious when it comes to enforcement and sanctions, leaving this to the discretion of Member States. The CJEU has often held that when it comes to implementing European Union law, Member States have an obligation to ensure that penalties are effective, proportionate and dissuasive. This mantra sometimes appears in some specific EU environmental laws, but as with the European Court, these rarely specify the type of penalties – criminal or administrative – that must be employed at national level. Even less is specified about the type and level of administrative structures needed at national level to ensure that laws are enforced. Political sensitivities over undue intrusion on national ways of doing things remains high. The European Commission has powers to bring infringement proceedings against Member States who fail to comply with obligations under European Union Law but, despite calls from the European Parliament to give the Commission greater powers of national inspection in the environmental field, Member States have long resisted giving it any such formal powers – a striking contrast to the position in Competition Law. The Commission is able to examine the text of national laws and policies for compliance, but when it comes to actual practice on the ground, it must largely rely upon information sent to it by non-governmental organisations and concerned citizens.

However, there are changes taking place. Following disputes about its legal basis under the Treaty, Directive 2008/99 on the protection of the environment through criminal law requires Member States to ensure that Member States created criminal offences for a whole range of environmental harmful activity where this was committed "intentionally or with at least serious negligence".

Directive 2003/87 introducing the greenhouse emissions trading scheme into the European Union has, perhaps because of its grounding in economic theory, gone the furthest of any European environmental legislation in specifying, in quantitative terms, penalties for the failure to surrender sufficient allowances at the end of each year. In addition to the requirement to make up the shortfall in allowances, a penalty must be imposed of 100 Euros for every ton of carbon dioxide emitted equivalent for which no allowances are provided. This formula can rapidly reach very high figures, and there is no discretion on Member States to reduce the penalty because of mitigating or other circumstances.

As for inspection and enforcement regimes in the environmental field, it is unlikely that in the foreseeable future the Commission will be given the power to carry out its own inspections or work alongside national enforcement bodies. However, recent EU environmental legislation is now beginning to refer to inspection as an explicit obligation on Member States. In the past, occasional directives have mentioned inspection – for instance, the 1975 Directive on the use of waste oils as fuels refers to the requirement that undertakings falling within the scope of the Directive are "inspected periodically by the Member States on competent authorities, particularly as regards their compliance with the conditions of their permits". In 2003 the European Court of Justice held, in a case concerning Portugal, that general legal provisions establishing the competence and powers of administrative authorities were not sufficient to reflect the precise inspection obligations in that Directive. Similarly, the 1975 Directive on Waste as amended in 1991 contains a duty on Member States to carry out "appropriate periodic inspections" of waste management sites.

The new Industrial Emissions Directive 2010/75 which will gradually replace the Directive on Integrated Pollution and Prevention Control, and apply to a large number of industrial installations, has taken the requirements of inspection and enforcement much further. Member States are required to set up a system of inspections and to ensure that all installations are covered by an environmental inspection plan. Routine inspections must be carried out with intervals based on risk assessment, while non-routine inspections are to be conducted in response to incidents of indigence's or complaints.

There are therefore strong signs that over the next decade more attention than ever will be paid at European level to the nature and effectiveness of national enforcement systems. There are already various European networks of bodies responsible for various aspects of enforcement which at least provide a forum for the exchange of information on best practice. The longest standing and most well-known is the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) set up in 1992, and largely focussed on industrial pollution control. In 2007, a parallel network of agencies involved in nature conservation, the European Network of Heads of Nature

Conservation Agencies (ENCA), was established. Three years earlier, the European Union Forum for Judges for the Environment was set up on the initiative of a number of national judges concerned with environmental law, with a core aim of promoting the enforcement of national, European and international environmental law by exchanging information on decisions and generally raising awareness amongst national judges. A more recent development has been the establishment of a European network of environmental prosecutors, an initiative promoted during the Belgian Presidency of the Council in 2010.

It is in this context that the Irish waste case is particularly significant. Many infringement proceedings brought by the European Commission against Member States are concerned with the formal state of the national law – either that the Member State has failed to notify any national implementing laws within the time scales specified in a Directive (normally two or three years), or that the laws that have been notified failed on examination to properly reflect the obligations contained in the Directive in question. However, the European Court has long held that even if the national law is formally in compliance with a Directive, the failure to apply it in practice is equally a failure by the Member State to comply with its obligations under European Union law. An inadequate environmental assessment procedure, for example, for an individual new power station can be the subject of infringement proceedings, and despite the evidential challenges, the Commission has been prepared to bring a large number of such cases.

In 2005 the Commission brought a case against Ireland concerning a number unlicensed waste disposal sites. It might have argued that each site itself represent a breach of EU law, but instead for the first time the Commission persuaded the Court of Justice that these were examples that were representative of a much larger systemic failure in the Irish system for waste management, and it was this fundamental failure to enforce the law that was the real breach. The Court agreed with the Commission and condemned Ireland.

The proceedings in the latest Irish case had their background in separate infringement proceedings taken by the Commission against Ireland on the grounds that Irish domestic legislation and inspection regimes concerning the disposal of waste waters through domestic septic tanks failed to reflect obligations under EU waste law. The European Court agreed with the Commission's analysis and ruled in 2009 that Ireland was in breach of its EU obligations. The Commission remained dissatisfied with the Irish Government's subsequent proposals to deal with the situation, and eventually brought proceedings claiming that Ireland had failed to comply with the 2009 judgment of the European Court and seeking financial penalties. In its judgment of 19 December 2012 (C-374/11), the Court agreed with the Commission that whatever the state of the new primary legislation passed in Ireland, regulations were still required for its effective implementation and no national inspection plan had yet been developed. Since Ireland has still not complied with its duties some 19 years after the original EU obligations under the waste legislation came into force, it was a particularly serious breach. The Court imposed a lump sum penalty payment of two million Euros, plus a daily penalty of 12,000 Euros for each day of delay in adopting the measures necessary to comply with the original judgment. The daily continuing fine is likely to concentrate the minds of civil servants and politicians, and other Member States will be watching with interest and concern. In a period of growing pressure for public sector cut-backs, governments will need to be especially wary of reducing the effectiveness of their environmental enforcement bodies.

New British Approach to Environmental Sanctions

Against a context of a far greater interest in enforcement systems, the experiments now taking place in England and Wales assume potentially greater significance. In most jurisdictions, whether based on common law or civil law systems, a mixture of criminal and administrative sanctions (such as the removal of a licence or the imposition of an administrative financial penalty) can be brought into play. However, they stem from different legal principles and are often in the hands of different public agencies, with little in the way of effective coordination. In England and Wales, a new approach to the design and implementation of regulatory sanctions has been proposed. It picks up on some of the best practice across the world, but combines them into an integrated approach involving a distinctive legal structure and set of underlying principles.

The process began with the so-called Hampton Review commissioned by the British Government in 2004. This independent review examined in broad terms the relationship of industry and regulators across a wide range of fields, from the environment to trading standards and workplace safety. It concluded that while there were examples of good practice, many regulators, especially at local level, had become over-dominated by a 'tick-box' mentality, forgetting the underlying purpose of regulation in preference to following process and meeting performance targets. Hampton called for more risk-based approach to enforcement, with regulators focusing their efforts on those most likely to breach their obligations. Hampton also recognised that the underlying system of sanctions was a key element to any new regulatory approach and called for a separate review devoted to the issue.

The present author was appointed by the Cabinet office to lead the Sanctions Review. Its final report *Regulatory Justice - Making Sanctions Effective* was published in 2006. As with Hampton, the Review examined an enormous range of regulators, some 61 different bodies at national level, as well as all local authorities. Despite the very different fields of regulation, some common pictures emerged. In almost every area, whether food standards, workplace safety, or environmental protection, there was usually a core of recidivist offenders, making money from conscious non-compliance and often having the know-how to work the legal system to their advantage. At the other end of the scale were legitimate companies genuinely trying to comply with regulatory requirements, but with occasional lapses – sometimes due to carelessness at the most, but also resulting from an unexpected cause such as a breakdown of equipment. However, not all of these instances could be treated as minor regulatory breaches that could be dealt with by a warning or the provision of advice – serious consequences such as significant local pollution might have resulted, or the breach might have posed a major risk, even if no actual damage occurred.

Integrating Criminal and Administrative Sanctions Over-reliance on the Criminal Law

In nearly every area of regulation, the core sanction in England and Wales has been a criminal offence, usually drafted in such a way that no intention needs to be proven, and allowing for companies to be found criminally liable where an employee actually committed the offence. The extensive use of these so-called 'strict liability' offences, first developed in the nineteenth century, is attractive to the regulator in that it is unnecessary to examine the inside decision-making procedures of a business. The potential harshness of the strict liability approach is tempered in practice by two core factors. First, regulators themselves (rather than the police or a

public prosecutor) in England and Wales have a discretion whether or not to commence a prosecution for any particular breach, and will normally focus prosecution on what they consider to be the more egregious offences. Regulators also have formal administrative responses other than a prosecution such as the variation, suspension or revocation of a licence where the regulatory system includes licencing powers, and the issuing of various sorts of enforcement notices giving a set time limit for a company to come back into compliance. However, such measures remain underpinned by the criminal law, since the failure to comply with such administrative requirements is a criminal offence. The second main protection against abuse lies in the sentencing discretion of the criminal courts. However, many of the regulators felt that when matters came to court, sentences were often not severe enough, and research has suggested that defence lawyers can all too easily manipulate courts by arguing that mere technical breaches were involved rather than genuinely criminal activity. Criminal judges for their part often felt they were unfamiliar in both the details of regulatory law and its underlying policy rationale. In effect, it was clear that in England and Wales the criminal law was being asked to do a great deal of work. By treating all types of breaches as criminal, there was a danger of the power and stigma of the criminal law being devalued, or, on the other hand, because a criminal prosecution is of necessity a laborious and time-consuming process, all breaches might not being effectively enforced – what is sometimes described as an enforcement deficit.

The Sanctions Review recommended the continued use of the criminal law, but proposed that a richer range of sanctions be made available. It seemed entirely inappropriate that a company who, through an oversight, failed to pay environmental licence fees, should be subject to a criminal prosecution, yet under the British system there was no other way than by a prosecution for the regulator to recover the savings made by that company. Proposals therefore included administrative financial penalties which avoided the use of the criminal courts and enforceable undertakings where a business offered its own sanctions to regulators which might include payments to charities and similar bodies to neutralise any profits made from non-compliance. These sanctions would be most appropriate for legitimate industry which had breached regulations through inadvertence or carelessness, and where a criminal sanction would be disproportionate, but a warning for an inadequate response.

Integrating Criminal and Administrative Systems

Concepts of administrative penalties are a familiar element of modern regulatory practice in many jurisdictions. Perhaps the core distinctive feature of the system being introduced in England and Wales is the way it aims to integrate the criminal and administrative systems both legally and administratively. Generally, in any legal system, the criminal law requires a far higher standard of proof (beyond all reasonable doubt) than that applied in administrative or civil law where the balance of probabilities test or something similar usually applies. The difference reflects the enormous potential severity of a criminal conviction, including the loss of individual liberty and reputation. However, little evidence was submitted to the Review by regulators suggesting that the enforcement problem with the criminal law was the evidential demand – rather the major challenges were length of time of proceedings, the inappropriateness of criminal law for certain cases, and the unpredictable nature of judicial sentencing. The legislation therefore provides that the offences remain as they are at present, and that if the regulator decides to impose an administrative penalty they must still be able to prove the offence to criminal standards if they are challenged on the point. The burden of proof rests on the regulator in any appeal. This means that investigation of potential offences will still be done to criminal standards with those under investigation receiving the protective requirements of criminal law, such as the right against self-incrimination. However, having decided that an offence has been committed and could be proven in a criminal court, the regulator then has the option of imposing an administrative sanction instead. The underlying purpose of the proposals is not to make it easier for regulators to impose sanctions, but to provide a system that provided for a more appropriate sanction response. Similarly, where the criminal offence provides an upper maximum fine, the equivalent administrative financial penalty should be similarly capped – the purpose of administrative penalties is not to avoid the limitations imposed by the criminal law. This process of integration is made all the more simple in England and Wales, where regulators such as the Environment Agency undertake their own criminal prosecutions. In other parts of the United Kingdom and in many other jurisdictions, a different branch of government deals with prosecutions, but in those cases, the regulator would make a recommendation as to their preferred choice, and the same principles would apply.

The Importance of Regulatory Governance

The underlying message of the Review was that regulators should have access to a greater range of sanctions, and that the choice of sanction should remain initially a matter of decision for a single regulatory body with responsibility for the relevant field of regulation. The choice of sanction is essentially a question of regulatory judgment. However, it is all too easy for institutions to find choices dictated by other factors that can eventually undermine confidence in the system and its underlying rationale – avoiding a system becoming corrupted in this way became one of the key challenges for the review. Revenue streams were an obvious example, and the legislation prohibits incomes from administrative penalties being paid directly to the regulator.

Transparency was also a key principle to lessen the likelihood of abuse by regulators. Some regulators already publish an enforcement policy, indicating in broad terms how they are likely to respond to different categories of regulatory breach. However, this was by no means universal, and the Review recommended that all regulators should be legally required to publish such enforcement policies. These policies would in future have to reflect the broader range of sanctions that would be available. Similarly, where a regulator was proposing the use of administrative financial sanctions, they would be obliged to publish policies as to how they calculate such penalties.

Published policies of this type can become useful enforcement tools in their own right in that they give clear signals to the regulated community of what is expected of them and what they can expect. For example, credit can be given in calculating a financial administrative penalty where a company in breach has voluntarily and quickly provided compensation to any victims. The Review recommended that regulators should be obliged to produce detailed annual reports of outputs – i.e. the numbers and types of enforcement action taken. Given the greater range of sanctions that a regulator could now impose, it is important to be able to analyse trends over time.

Experience to Date

The Government accepted all the recommendations of the Sanctions and Part 3 of the Regulatory Enforcement and Sanctions Act 2008 now contains the core framework provisions concerning administrative sanctions (termed 'Civil Sanctions' in the

legislation), including the availability of enforceable undertakings. The Review never envisaged that all regulators would be obliged to obtain the new powers, but that they would be acquired by subsequent Ministerial Order where a regulator and its sponsoring department felt the new powers would be of value.

There were over sixty national regulators within the scope of the Review, and progress on making Orders granting the new powers has been slower than expected – the extent of institutional conservatism and inertia should never been underestimated. It is in the environmental field that the main initiatives have been made with the Environment Ministry making Orders in 2010, giving new administrative sanction powers to the two main national regulators, the Environment Agency (pollution control) and Natural England (nature conservation) – in practice, many departments and regulators may now wait for the experience of the environmental regulators as first movers before seeking the powers themselves. A new environmental Tribunal has been established within the Tribunal system to hear appeals against the imposition of these administrative penalties.

The Orders do not yet cover all the offences covered handled by the environmental regulators, and as yet, no administrative penalty in the form of a financial penalty has been imposed. However, since January 2011, the Environment Agency has accepted a large number of enforceable undertakings, particularly in the field of Packaging Regulations, which implement the EU Directive on Packaging and Packaging Waste (94/62/EC, as amended). *In lieu* of an imposed penalty, companies may offer an undertaking that can include the payment of sums to third parties such as environmental charities, and such undertakers have to be on the public record. These are appropriate where the Agency judges the breach to have been due to an oversight or carelessness at the most. Deliberate non-compliance will still be subject to criminal prosecution. Between January 2011 and June 2012, over 100 undertakers have been offered, and around 60 formally accepted by the Agency. If all these undertakings offered are accepted, over one million Pounds will be donated to environmental charities, representing the financial gains made by the companies concerned, plus an uplift of around 30% because of a regulatory breach taking place.

The Future

It is still not possible to predict the full impact of revolution taking place in the design of regulatory sanctions in the United Kingdom. Many of the individual types of sanctions proposed in the Review are not unknown, and have been used in many other jurisdictions and even within the United Kingdom in areas such competition law. The system breaks new ground by framing the sanctions within a clear set of principles concerning their purpose and rationale, and integrated criminal and administrative responses in a legally coherent and systematic way. The new approach is based on a set of robust principles of regulatory governance, emphasising transparency and accountability.

There remain considerable challenges. The Sanctions Review and the Regulatory Enforcement and Sanctions Act took place under the previous Labour Government, and the new Coalition Government had concerns that in by-passing the ordinary courts, the system of financial administrative penalties could impose unfair pressure on companies, particularly small and medium size enterprises. The legislation provides for a full right of appeal to a specialised Tribunal, and although the Tribunal is intended to be user-friendly with low costs, the Government felt that many smaller companies would not have the resources or time to pursue appeals, and would feel bullied into paying penalties. In November 2012, the Government therefore announced a new policy that in the future, any Orders granting the power to impose administrative financial penalties would be confined to companies with more than 250,000 employees. Enforceable undertakers and other administrative penalties such as improvement notices would be available to any size of company. Time will tell whether smaller and medium sized companies will be relieved or deprived at being excluded from the full range of new sanctions. Despite these developments, the changes that are taking place should lead to a system where the criminal law is more focused on the truly criminal, and where sanctions better reflect the range of circumstances involved in the regulatory breaches taking place. Many jurisdictions across the world are likely to be looking to see how effective the new approach in Britain proves to be.

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Professor Macrory is a barrister and a member of Brick Court Chambers, London. He joined University College London in 1999, having previously held positions at Imperial College London and Oxford University, and is currently director of the UCL Centre for Law and the Environment and the UCL Carbon Capture Legal Programme. He was a member of the Royal Commission on Environmental Pollution between 1992 and 2003, and has been a Board Member of the Environment Agency. The founding editor in chief of the Journal of Environmental Law, Professor Macrory is currently legal correspondent to ENDS Report. He is a Patron of the UK Environmental Law Association, and has been President of the National Society for Clean Air, chairman of Merchant Ivory Film Productions, as well as chairman of the Steering Group of the European Environmental Advisory Councils. In 2005, Professor Macrory was appointed by the Cabinet Office to lead a review on regulatory sanctions applicable to business generally, and all the recommendations in the published report 'Regulatory Justice - Making Sanctions Effective' were accepted by Government. In 2000, he was awarded a CBE for services to the environment and law, and in March 2008 he was made honorary Queens Counsel. He is a Bencher of Gray's Inn.

UCL

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