

SHE MATTERS

The Safety, Health and Environment newsletter from DLA Piper UK LLP

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SHE MATTERS



Teresa Hitchcock
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The Department of Environment Food and Rural Affairs has recently carried out a consultation on "Reforming Development Guidance: Plans for Future Content".

This is an outline of future content for the additional guidance, over and above the National Planning Policy Framework and associated Planning Practice Guidance, which is intended to be made available when existing guidance relating to planning and development is simplified. The new guidance will include specific text on plan making and planning decision taking, contaminated land, soils and minerals, environmental considerations and energy and renewables.

The consultation document does not provide the intended content of the guidance, but rather is intended to provide an opportunity for interested parties, and the public more generally, to identify any obvious gaps.

If the framework used for the purpose of the consultation were to be reflected in the actual provision of a navigable website to provide access to the detailed guidance, together with any necessary further explanation, this would seem in principle an admirable development. However, the Government has recently run into criticism for the way in which guidance and other information in matters relating to compliance have been moved onto a centralised Government website, or have simply disappeared.

This reflects our own negative experiences in attempting to access such material through the new site. The comprehensive and fairly easily navigable former Environment Agency website has been largely lost in favour of a short menu linking to fairly limited pages on the new Government website. The emphasis of the latter seems to be less on the provision of helpful information, and more on giving prominence to Ministerial Press Statements (i.e. to Government Propaganda).

For the time being, the HSE website appears to have avoided this fate. However, it is not clear whether this is simply a matter of a delay in the timetable, or whether the HSE site enjoys some special protection. This may be due to the fact that in this case the sponsoring department has little involvement in making policy in the area covered by the site, or perhaps it is because the sponsored Government agency is staffed by its own civil servants.

It is to be hoped that the adverse impacts on access to information through online electronic access, which are surely contrary to the policies underlying the Environmental Information Directive, can be reversed. This is because lack of access to relevant guidance is a recipe for arbitrary and capricious decision making.



FEE FOR INTERVENTION – IS IT SET TO STAY?

An independent review panel has reported on the first 18 months experience of the fee for intervention scheme, and made a number of recommendations. A key question is whether the review sees the scheme as a success.

INTRODUCTION

As many readers will be aware, the fee for intervention (“**FFI**”) scheme was introduced by the Health and Safety Executive (“**HSE**”) with effect from 1 October 2012. The operation of the FFI scheme essentially means that where a material breach of health and safety law has occurred, the HSE costs are recovered from the organisation in breach. A “material breach” occurs when, in the opinion of the HSE inspector, there is or has been a contravention of health and safety law which requires them to issue notice in writing of that opinion to the relevant duty holder. The “notice” referred to goes beyond the issuing of an improvement or prohibition notice, and includes the inspector writing to the business in question to identify the breaches. Where such a breach has been identified, the fee charged by HSE is based on the time spent by the inspector in identifying the material breach, investigating and taking enforcement action.

Concerns were raised prior to the introduction of FFI, and have continued to be raised, that it would change the relationship between HSE and duty holders, and would be used as a “cash cow” by HSE. Indeed, some commentators have referred to FFI as a fine.

TRIENNIAL REVIEW

The Triennial Review of the functions of HSE was carried out on behalf of the Department for Work and Pensions and was reported on in January 2014. That review identified FFI as one of the biggest issues raised by stakeholders, and made a number of recommendations about it. They included that the HSE’s review of FFI, which was already planned, should include (amongst other things) consideration of whether there had been any detrimental impacts on the behaviours of HSE inspectors, whether the threshold for FFI had been set at the right level, and if it had improved health and safety performance.



To this end, an independent FFI review panel was set up to consider such issues.

INDEPENDENT FFI REVIEW PANEL REPORT

The panel considered whether the policy objectives of FFI had been achieved, looked at the integrity of priorities and regulatory decision making, the financial impacts on businesses, independence of and trust in the FFI disputes process and any impacts on relationships. Its key conclusions were that:

- FFI has been effective in shifting the cost of health and safety regulation from the public purse to businesses which breach health and safety law. It goes on to note that the panel can see no viable alternative to the scheme given the current environment so far as public spending is concerned.
- FFI has not been popular with some inspectors and duty holders, but that it has been applied consistently and this has minimised detrimental effects.
- There has been a cost to pay in terms of the relationship between duty holders and inspectors. This was noted particularly in so far as whether businesses are motivated to seek advice from inspectors, and the advice which inspectors feel they can offer. The report does identify, however, that this “cost” has not been as high as predicted before the introduction of FFI.

- No compelling evidence was found that FFI was being used as a “cash cow” by HSE. The importance of HSE continuing to guard against this, or the perception of this, was stressed.
- There was no reason to conclude that the overall level of compliance with health and safety legislation had changed significantly as a result of FFI.
- The current threshold for FFI (that is the occurrence of a material breach) is appropriate and should not be changed (for example the service of a notice).

One issue on which the panel noted that it was difficult to draw conclusions based on evidence, is the level of independence and trust in the queries and disputes process. Reference is made to the low levels of appeals against FFI actions “*underlining that there is a low level of dissatisfaction amongst duty holders about the practice, as well as the principle, of the FFI scheme*”. The report subsequently notes that there is very little evidence that businesses do trust the independence and robustness of the queries and disputes process, and indeed that some comments from duty holders suggest the opposite! These two points seem to clash somewhat; whilst any lack of trust may have been tempered to an extent by the implementation of the Triennial Review recommendation that an independent person should sit on all disputes panels (implemented as from 1 April 2014), it is unlikely to remove it completely.

Overall then, it seems that FFI is here to stay for some time yet. As such, it is important that businesses carefully consider the implications of an FFI invoice, and take action and advice as appropriate. There is always a potential for change though, and HSE has committed to carrying out a post-implementation review of the scheme in 2015.

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HOW TO PROTECT BRAND REPUTATION AND SALES FROM THE RISKS ASSOCIATED WITH A PRODUCT RECALL

Teresa Hitchcock answers some questions commonly asked in this area:

Q I am in charge of risk management for a global organisation and have been asked to investigate product risk.

What suggestions can you offer on managing global supply and distribution?

A In the past decade or so, manufacturers in the developed world that would previously have created their entire product in their own country now outsource manufacture to other parts of the world. This has had significant economic advantages where the overseas partner has been able to create a high-quality product at lower cost. However, problems have also arisen. Developed countries have high safety standards to which not only manufacturers, but also the importers of goods manufactured abroad can be held. Heavy criminal or financial sanctions can be imposed if an unsafe product is placed on the market in an EU member state or another developed country in breach of product safety requirements. Market controls are being streamlined, as for example with the Product Safety and Market Surveillance package currently being further developed at EU level.

Regulatory authorities now have significantly increased powers to order product recall of goods. In one recent year product recalls involving consumer goods from China are thought to have increased by almost 20% over the course of a 12-month period. Nor is this

a “one-off” problem relating to a particular country. The global market is currently characterised by increasing diversity of overseas suppliers. Product recalls are not only costly and inconvenient but can cause major reputational, and hence also financial, damage for a brand. Moreover manufacturers are increasingly being encouraged to take on a more active role, as part of what is called product stewardship, to minimise the environmental effects of products overseas. Pressure for this is increasingly applied through public-sector and larger private-sector procurement contracts. Manufacturers and importers may need to take a similarly active role to ensure product safety, to avert more direct risks.

WHAT STEPS CAN BE TAKEN TO PROTECT THE BUSINESS?

Prevention is better than cure, and advance preparation can significantly mitigate the risks, either by preventing them materialising or by reducing their effect. For example if the company can quickly turn to alternative sources of supply for goods that present an issue, that will reduce the commercial and reputational damage.

Moreover, if the issue comes to the attention of the regulatory authorities, but it is evident that the company is well-prepared and has good systems, it is much less likely that the regulator will consider

prosecution. Conversely, evidence of a failing being systemic rather than an isolated incident, is likely to push the regulator in the opposite direction.

It is well worth while reviewing the company's systems and the risks they are designed to address, with a particular focus on the risks attaching to these products that are business-critical or are subject to a particular likelihood of regulatory intervention. One example arises from the public sensitivities attaching to products for children.

The team responsible for such a review should be multi-disciplinary, including production personnel, technical experts, marketing and design personnel, and even lawyers.

POINTS TO CONSIDER

The questions which need to be asked include:

- Is there an adequate system with appropriately trained staff?
- Does the system ensure that feedback will be acted on?
- Do the safety data represent the current state of knowledge and the legislation?

An assessment of the likelihood of compliance in the producer country need to be undertaken. Although the risks of long supply chains are increasingly balanced by new regulation in some producer countries (for example the Restriction of Hazardous Substance legislation in China) to meet market requirements, both of foreign customers and the increasingly affluent and demanding home consumers, that does not apply to all.

An important safeguard where products are supplied by others, is to carry out sample testing of those products.

It is sensible to review contractual obligations with suppliers and distributors. Apart from anything else these may draw the supplier's attention to the customer's requirements. Beyond this, however, how enforceable and effective are they? Do they impose specific requirements for compliance with legislation and standards? What are the requirements regarding quality control, notification of claims to draw attention to potential problems and record systems to ensure traceability (a particular requirement of the proposed new EU market surveillance regime)?

The business itself needs to have a document management system and a retention policy. (Retention for ten years is a proposed EU requirement). Records are



of key importance so that you do not merely comply, but are in a position to show you complied, and that if a safety issue were identified, it was considered and appropriate action taken. Good systems can rebut any claim that documents have been destroyed to conceal evidence.

To guard against the increasing risk of a compulsory product recall, and to provide for the many cases where it is in the best interests of the business to carry out a voluntary recall, a need will arise for recall and crisis arrangement plans.

These will need to include personnel, including key outsiders (for example insurers, lawyers and PR advisers) with their contact details, as well as actions.

It should not be forgotten that sensible risk management includes prioritisation, and preventative measures should be proportionate to the risks.

IMPROVEMENTS IN QUALITY

Some colleagues may be reluctant to take sensible measures (inevitably at a cost in time and money) to guard against risks that have so far not materialised. It should however be borne in mind that control measures to protect against risk are also likely to lead to improvements in product quality. Investment in these measures may also lead to considerable future benefits in brand reputation and sales.

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REVIEW OF THE PROPOSED CHANGES IN THE SENTENCING OF HEALTH AND SAFETY OFFENCES

Businesses should expect greater scrutiny and increasing fines for health and safety offences. New sentencing guidelines for environmental offences have been in the courts in England and Wales from the 1st of July 2014 and the Sentencing Council for England and Wales is currently considering a similar overarching review of the sentencing guidelines for health and safety offences.

For many years there has been dissatisfaction at the level of fines issued to organisations whose health and safety breaches have caused death. There is also currently no guidance in relation to food safety and hygiene offences. The Sentencing Council opened a consultation containing recommendations forming draft guidance for judges in England and Wales on 13 November 2014. The consultation covers health and safety offences, corporate manslaughter and food safety and hygiene. Such guidelines are being introduced due to a lack of comprehensive guidance for sentences in relation to these offences. While there is currently a guideline covering corporate manslaughter and fatal health and safety offences, there is no specific guidance on sentencing food safety offences or non-fatal health and safety offences. Furthermore, existing guidance only covers offences committed by organisations rather than individuals. The consultation marks the first time that guidelines will cover all the most commonly sentenced health and safety offences and food safety offences and will remain open until February of next year.

The Council is seeking views on its proposals through a consultation and is very interested in feedback from people working in industry, the criminal justice system or regulatory enforcement. In particular it is interested in feedback on the approach to sentencing, what factors should make these offences more serious or less serious, the principles of sentencing in this area and sentencing levels.

Changes to the law in relation to the sentencing of health and safety offences have been, in recent years, relatively unremarkable. The most significant change in health and safety sentencing came with the Health and Safety (Offences) Act 2008 whereby the penalties for contravening health and safety requirements increased. The maximum fine imposed in the Magistrates' courts for most health and safety offences was raised to £20,000 and imprisonment for up to two years was made an option for both the Magistrates' and Crown Courts for more mainstream offences under the Health and Safety at Work Act 1974 ("**HSWA 1974**"). This meant it became ever more important that employers understood the 'general duties' and the burden of proof under HSWA 1974 and although such provisions may not always have the ability to affect preventative behaviour prior to an accident, the potential for imprisonment must certainly now be a determining factor.

Other changes came as a result of the introduction of the new corporate manslaughter legislation. That prompted a review of sentencing by the Sentencing Council into fatal accidents. In 2007, the sentencing advisory panel issued a consultation paper and sentencing guidelines for convictions under the then new Corporate Manslaughter Act. A key proposal from this consultation was that fines for corporate manslaughter should be based on a percentage of the defendant company's turnover, a 5% turnover figure being the starting point fine.

If adopted, that could have led to multi-million pound penalties for larger organisations. For example in the Hatfield train disaster case, if the maximum 10% turnover figure had been applied, Network Rail and Balfour Beatty's fines would have risen to £600m and £200m respectively from the £3.5m and £7.5m fines which were in fact handed down. In October 2009 the prospect of turnover based fines receded when the former Sentencing Guidelines Council chose not to follow the panel's proposals as they saw these as having potentially unfair consequences and being difficult to apply. Instead they published guidelines of their own in February 2010. These stipulated that the courts should still look at turnover and profit to get a sense of the Company's resources and that fines should be punitive and big enough to have an effect, but as a general rule, should not be so large so as to put companies out of business or cause job losses.

Key points were:

- in respect of corporate manslaughter offences: *"the appropriate fine will seldom be less than £500,000 and may be measured in millions of pounds"*;
- with regards to Health and safety offences (involving death): *"the appropriate fine will seldom be less than £100,000 and may be measured in hundreds of thousands of pounds or more"*.

Percentage fines are certainly in use for the sentencing of other kinds of offences. Breaches of competition law carry fines based on a percentage of turnover, sending the message to the boardroom that compliance with competition law is key. It certainly seems to send the wrong message that the most serious of breaches of health and safety law receive a far lesser level of punishment than the decision to illegally fix prices when making a tender bid. Alternative suggestions base such fines on a level of profit as opposed to turnover. However it could be said that this is also fraught with difficulty. Such an approach might seem fairer, but the reality is that it could lead to companies that are making a loss avoiding the most serious of fines.

Indeed, it is the job of the sentencing council to strive for uniformity across the various criminal offences. Turnover based sentences were introduced recently with regards to environmental offences and there is a clear trend in this approach with much higher recommended fine levels for larger turnover organisations.

As for further considerations, at a meeting of the Sentencing Council in November 2013, the Council discussed two models of harm and culpability for health and safety offences. Health and safety offences are committed where the accused company cannot show that it was not reasonably practicable to avoid a risk of injury or lack of safety as opposed to corporate manslaughter which is committed where there is both a gross breach of duty of care and failings from senior management in the way that the business was run on the safety front. The failing, in health and safety offences will therefore be operational as opposed to systemic and instead of a gross breach of duty, may involve instances of minimal failures to reach the standard of reasonable practicability.

Currently, therefore when dealing with a health and safety offence causing death, the prosecutor need only prove that there has been a failure to ensure safety (which is often established by the very fact that the death has occurred). The burden then shifts to the defendant to establish that it was not reasonably practicable to do more than was done to comply with the relevant duty.

At the meeting in November 2013 the Sentencing Council therefore agreed that further work could be done to produce a model of harm distinguishing between offences that had caused actual harm and those that had caused a risk of harm. The Council agreed that they would invite experts to address the Council directly on the sentencing of such health and safety offences.

SO WHAT NEXT FOR THE SENTENCING OF HEALTH AND SAFETY OFFENCES?

Michael Caplan QC has said “We want to ensure that these crimes don’t pay”. The aim of the guidelines is therefore to ensure sentences passed down are proportionate to the seriousness of the offence while, as required by law, taking account of the financial circumstances of the offender. It is proposed that an offending organisation’s means will initially be based on its turnover as this is a clear indicator that can be easily assessed and is less susceptible to manipulation than other accounting methods. However, the guideline also requires that court to consider the organisation’s wider financial circumstances to ensure that fines can be properly and fairly assessed.

According to the guidelines, Large firms (with an annual turnover of more than £50m) could now face fines of up to £20m and up to £10m for fatal health and safety offences. Food safety and hygiene offences are addressed for the very first time and organisations could face fines of up to £3m for the most serious of offences. Individuals who commit health and safety offences face custodial sentences from the starting point of the range.

If, however, turnover based fines are to be put in place in relation to organisations who commit these types of offences, are we now heading into a dangerous territory where there is in fact no defined upper ceiling? The Guidelines state that when sentencing “very large” organisations-defined as those whose turnover “very greatly” exceeds the threshold for large organisations-it may be appropriate to move outside the range to achieve a proportionate sentence. If the Council’s aim is therefore to produce a scheme of starting points and ranges that will support those passing sentence, what will that mean for “very large” organisations if the bar has now been raised even higher for those that are defined as “large”?

Only time will tell what the final form sentencing guidelines in relation to health and safety offences will be. We will have to wait until next year following the conclusion of the consultation in February to find out. Although whether guidelines along these lines will actually change boardroom behaviour, particularly at the largest companies for whom turnover based fines may have the greatest impact, would then remain to be seen.

Whatever is recommended, the key message for senior management is nothing new. Companies need to be sending the right message from the top down, with senior personnel being trained on what the law expects in order that they themselves and their organisation can comply. We are, after all, concerned here with matters of life and death and getting the sentencing right for that must surely have to come out of one of the most measured and considered consultation processes of all.

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CHANGES TO FINES IN THE MAGISTRATES COURT AND THE IMPACT ON CORPORATE DEFENDANTS

INTRODUCTION

As a result of the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (the “Act”) there have been significant changes to the powers of the magistrates’ courts’ to impose fines on summary conviction as a result of the proposed removal of the current caps. The sections in question have not yet commenced, however when they are introduced the approach taken by Corporate Defendants to prosecutions in the magistrates’ courts will have to undergo a marked shift.

WHAT IS THE CURRENT LANDSCAPE?

The maximum fines currently available to magistrates depend on the seriousness of the offence committed. For most summary only offences maximum fines are set by reference to five statutory levels, £200, £500, £1,000, £2,500 and £5,000.

For triable either way offences magistrates may fine offenders a sum not exceeding a statutory amount, currently £5,000. There are some exceptional statutory maximum fines for offences suitable for being dealt with by magistrates, but where the financial gain realised by the offender is so large that the normal fine limits are inadequate. Such offences are largely environmental or health and safety offences committed by companies, with maximum fines for the organisations involved generally set by the relevant statute at £20,000 or £50,000.

WHAT IS THE FUTURE LANDSCAPE?

Under the Act the maximum fine of £5000 which is available to magistrates on summary conviction, as well as the fines of a larger amount for either way offences tried summarily, would be removed. There would essentially be unlimited fines available for these offences, however it will not have retrospective effect, and it will only apply to England and Wales.

In addition, although the Act does not set out any change to the maximum fines of £200, £500, £1,000, or £2,500, the Secretary of State, in line with its powers granted by the Act, has introduced a statutory instrument (the draft Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Amendment of Standard Scale of Fines for Summary Offences) Order 2014). This will amend s37(2) of the Criminal Justice Act 1982 to increase the maximum fines on levels 1 to 4 by 400% i.e. to £800, £2,000, £4,000, and £10,000 respectively.

A further statutory instrument has also been published in draft form which sets out how penalties that are expressed as proportions of amounts of £5,000 or more will be treated under the new regime.

IMPACT ON CORPORATE DEFENDANTS

These changes will apply to a very wide range of legislation, including commercial, company, financial services, health and safety, and environmental laws. In terms of the impact on Corporate Defendants, companies and their directors will ultimately have to pay

much more attention to regulatory offences in light of the possibility of a significantly increased fine. For example, companies being prosecuted for Health and Safety Offences can no longer rely on the maximum fine being limited to only £20,000 – this safety net has now been removed.

Of particular concern is the idea that organisations need to be fined significantly more than individuals in order to ensure that the fine they receive will be large enough to have an effect. This concept is clear from the Equality Impact Assessment associated with the Act which was published by the Ministry of Justice when it states that *“the current maximum of £5,000, or the exceptional maxima, curtail magistrates in the fines that they can impose, leading to the offender often not being fined an amount which represents a real punishment.”*

Furthermore, the Assessment concludes with *“the most significant differential impact of the new provisions is likely to be on organisations when compared with individual offenders. We consider that this can be justified as, in general, organisations are likely to have greater funds at their disposal.”* This perception that Corporate Defendants automatically have deeper pockets may prove to be a very costly problem for corporate bodies in the future and is an issue which those at the boardroom table need to be acutely aware of.

For example, in the March 2014 case of HSE v Maxibrite Ltd, the company, which is the UK’s leading independent solid fuel manufacture and which, in 2013, had a turnover of over £13,000,000, was fined £20,000 at the Pontypridd magistrates’ court. This was due to a breach of the Health and Safety at Work Act, and a single breach of the Management of Health and Safety at Work

Regulations further to two of its workers suffering burns, one seriously, when hot material from an industrial drier hit them as they tried to tackle a fire at a factory in South Wales. In future, a company with such deep pockets at these, is likely to receive a considerably higher fine in the magistrates’ court.

CONCLUSION

Once sections 85 – 88 of the Act come into force then Corporate Defendants will find themselves without the certainty of a maximum fine. The consequent risk that an extremely large fine may be imposed by the magistrates’ court will undoubtedly mean that businesses either decide to defend cases which would previously have been the subject of a guilty plea for commercial reasons, or for either way offences, opt for a Crown Court trial where conviction rates are generally lower. Either way, this new development is likely to have a long lasting impact on the balance sheets of Corporate Defendants.

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WILDLIFE LAW REVIEW

Wildlife protection and the sustainable management of natural heritage have increasingly become key policy aims for the Government. However, it is recognised by the Government that the legal framework for wildlife management is currently unnecessarily complicated, frequently contradictory and unduly prescriptive. The law therefore creates barriers to effective wildlife management, including the efficient implementation and enforcement of Government policy.

Therefore in March 2012, the Department for the Environment, Food and Rural Affairs (“**DEFRA**”) asked the Law Commission to review wildlife law in England and Wales as part of its 11th programme of law reform. This included a review of the law relating to conservation, control, protection and exploitation of wildlife in England and Wales.

The Law Commission consulted widely on provisional proposals contained in a consultation paper published in August 2012 and then in October 2013 published an Interim Statement. The Interim Statement sets out the Law Commission’s conclusions in advance of drafting the legislation. It does however make it clear that the process of developing draft legislation is likely to result in some substantial changes to the approach outlined in the Interim Statement.

BASIC APPROACH

The Law Commission recommends that there should be a single statute which covers the species-specific law on the conservation, protection and exploitation of wildlife.

This is because many of the problems with the current legal regime arise because the legal provisions are spread across various pieces of legislation, which can make it unnecessarily difficult to identify the exact legislative regime that applies to a particular species, or even to know where to find it.

The regime proposed by the Law Commission can be broken down as follows:

- regulatory structure and general provisions;
- prohibited activities;
- permitted activity;
- compliance and sanctions; and
- appeals and challenges.

The basic approach recommended by the Law Commission is the continued regulation of species on a species by species basis, such that the particular provisions relevant to species are determined by how it is listed in the legal regime. It is also proposed that there will be a general prohibition on certain activities regardless of the species affected or potentially affected. For example, the use of spring traps is prohibited (except in certain limited circumstances) irrespective of the species the user intends to trap. The Interim Statement also recommends a 5-yearly review of all species list in the legislation, as under the current Wildlife and Countryside Act 1981.

STATE OF MIND

The Habitats Directives and Wild Bird Directive specify that in order for certain proscribed acts to be criminal against species protected under those Directive (European Protected Species), they must be deliberate. The Wildlife and Countryside Act 1981, one of the most important legislative protections for wildlife in the UK, requires that such acts are carried out intentionally. Case law has interpreted deliberate acts more widely. In *Commission v Spain* a deliberate act was characterised as not only intentional killing or capture, but also instances where a person “at the very least, accepted the possibility of such capture and killing”. The Interim Statement therefore recommends the transposition of “deliberate”, as it is characterised in *Commission v Spain*, into the Wildlife and Countryside Act 1981. If implemented, this means there will be a lower threshold for the commission of an offence that requires intention.

Current offences protecting non-European Protected Species vary. Some offences require that the defendant act with intention, whereas with others intention or recklessness is sufficient. The Interim Statement indicates that this distinction would be retained in the proposed single statute.

COMPLIANCE AND SANCTIONS

The Law Commission has also recommended the following measures to improve compliance:

CRIMINAL LIABILITY OF EMPLOYER AND PRINCIPAL

The Law Commission recommend that it should be an offence for an employer or principal to knowingly permit an act to be done which, when done by the employee or agent, amounts to wildlife crime. For example, if a developer did not give an instruction, but knew that the action of the sub-contractor was going to destroy a structure that the developer knew contained bat roosts, and did nothing to prevent it, then they would be liable.

TRIAL AND SENTENCING OF WILDLIFE OFFENCES

In response to the consultation the majority of stakeholders thought that the current sanctions available in respect of wildlife crime are insufficient. The Law Commission has recommended that the penalties for wildlife crime be standardised, with most attracting the highest maxima on summary trial. There is a further recommendation that where appropriate, offences be either in the Magistrates’ Court, or in the Crown Court where more serious penalties would be available.

CIVIL SANCTIONS

The Interim Statement recommends introducing civil sanctions for wildlife offences, as with certain other environmental offences. This would allow regulators to issue fixed monetary penalties, discretionary requirements, stop notices and to accept enforcement undertakings as alternatives to criminal prosecutions.

INVASIVE NON-NATIVE SPECIES CONTROL

On 11 February, the Law Commission published its final report on the Control of Invasive Non-native Species. This element of the project was brought forward at the request of DEFRA and the Welsh Government to enable them to consider whether to introduce early legislation.

The final report concludes that invasive non-native species, such as Japanese Knotweed, pose a significant threat to both biodiversity and the economy, and that the existing law does not contain sufficient powers to control such species.

The proposals set out in the Law Commission report would allow the relevant body (which in England would be the Secretary of State, Natural England, the Environment Agency or the Forestry Commission) to enter into Species Control Agreements (“**SCA**”) allowing for invasive non-native species to be controlled or eradicated. The proposals also allow for the issue of Species Control Orders (“**SCO**”), where an authority has failed to reach an agreement with the owner or occupier of the land regarding the appropriate course of action or where such owner or occupier has failed to comply with the agreement. If the SCO was not complied with then the relevant body would be able to carry out the operations itself, or arrange for a third party to carry them out and recoup the costs of the works.

It is expected that the Law Commission proposals will make wildlife law less cumbersome and more accessible. However, if the proposals are enacted, compliance will become more onerous and there will be stricter sanctions in place. Whilst this will be welcome news for some, it is likely to place an additional burden on many businesses, particularly developers and those in the construction industry.

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CONSULTATION ON PERMITTING CHARGES



The Environment Agency has recently been consulting on revisions to its permit charging scheme for 2015/2016.

In general, it is envisaged simply to make a 2% increase in line with inflation to charges for installations, waste facilities, and non-nuclear radiation substances facilities.

However it is also proposed to make much more significant increases for sites with poor Operational Risk Appraisal (“**OPRA**”) scores for more than two years. For operators of sites compliance band D for more than two consecutive years, the proposed multiplier will be 200% (as against the current 125%) for those in Band E for more than two consecutive years the proposed multiplier will be 300% (as against the current 150%), and from those in Band F for more than two consecutive years 500% (as against the current 300%). These multipliers will continue to be applied until the site attains scores in Band A, B or C.

It is also proposed to scrap the current mid-year review of performance for Band F sites which currently allows the Agency a discretion to reduce the multiplier for the remainder of the year.

It is difficult to disagree in general with the proposition that those who perform poorly and who thus pose the greatest regulatory risk and take up more of regulators’ time and effort, should make a greater contribution towards meeting the costs of regulation than good performers.

However the Agency does appear occasionally make some questionable decisions in terms of OPRA scoring, and may also be under some pressure to maximise returns under the charging scheme in times of economic stringency.

For example, we know of one case where a company had accumulated significant amounts of hazardous materials on its site which required disposal off-site. This had come to the attention of the Agency, but it was accepted that in view of the difficulties, of finding appropriate disposal sites for all of the materials at once, a phased disposal plan should be implemented. This was put into effect. However, notwithstanding the implementation of the agreed plan, the Operator continued to be scored for subsequent years for the same breach.

The consequence for that operator has been severe, and threatens to be even more severe under the proposed changes to the Scheme.

While no doubt it can be argued that there is an ongoing theoretical risk of escape of contaminants especially of the continuing presence of the materials on the site, it is

evident from the fact that there was an agreed plan in place, that that risk was one which was acceptable to the Agency in the circumstances of the case.

Moreover, it is clear in this case that the continuing presence of the materials covered by the plan has not materially affected the Agency’s regulatory workload in respect of the site. Having regard to the purposes of the charging regime, there is thus little justification for penalising that particular operator in this way.

The consultation document also mentions in its “Forward Look” that the Agency is considering the introduction of some financial security mechanism to cover the costs of activity resulting from environmental incidents arising in respect of a range of regulated or unregulated sites.

Such mechanisms are familiar to landfill operators, who have for some time been required to provide financial security for the fulfilment of regulatory obligations in respect of their sites. Usually that has required a bond provided by a bank or insurance company, but under pressure from a number of organisations, and some discreet lobbying by this firm, the Agency has agreed that in some cases appropriate security can be provided at significantly financial cost to the operator, by a parent company bond, providing that the parent company is suitably diversified in terms of its activities assets and risks. That will obviously provide little comfort to smaller operators from whom there is no practical alternative to providing a bond from an external provider.

It is also not clear how security could reasonably be expected to be provided in respect of unregulated sites, unless it is proposed that the operators of regulated sites will in effect cross-subsidise the lack of security available to the Agency in respect of other sites.

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CLEARING THE AIR

THE EUROPEAN COURT'S LANDMARK AIR QUALITY JUDGMENT?

On 19 November, the European Court of Justice (“**CJEU**”) made a landmark decision on the interpretation of the Air Quality Directive (“**Directive**”).

The Air Quality Directive (2008/50/EC) came into force in 2008 and sets standards for ambient air quality with a view to reducing the risks of harmful pollution effects. It includes “limit values” which are obligatory targets for the maximum limits for certain air pollutants and “target values” which are non-obligatory limits on concentrations of pollutants.

The general requirement is for member states to identify zones and assess, monitor and manage the air quality in the each zone.

The CJEU’s preliminary ruling on the UK’s implementation of the Directive provides new guidance, both in relation to how the Directive is to be interpreted, and more importantly on the role of the UK courts in enforcing the environmental compliance of the government.

REACHING THE CJEU

Amongst other things, the Directive required Member States to reduce emissions of nitrogen dioxide by January 2010. To achieve this, the UK was split into 43 areas, each having an ‘air quality plan’ setting target levels of emissions to be reached. 40 of the 43 areas failed to achieve these target levels by January 2010 and in most cases the maximum extension of five years was

applied for. Extensions were not however requested by some of the worst polluting areas and instead they indicated that the target levels would be reached between 2015 and 2025.

In 2011, ClientEarth (a not-for-profit legal NGO) brought an action against the Department of Environment, Food and Rural Affairs (DEFRA) in the High Court contending that 17 areas would not meet their targets by 2015 and that where a target is not going to be met, the Member State should revise the ‘air quality plan’ to outline how they intend to reduce the levels of pollution in the shortest possible time. In order to remedy the situation, Client Earth asked for a mandatory order for DEFRA to revise existing ‘air quality plans’ to ensure targets were met. They also requested a declaration that DEFRA was in breach of the Directive.

The High Court made no such declaration and held that it was for the CJEU to hold the UK to be in breach of its obligations. It also refused to make a mandatory order holding that it did not have jurisdiction to do so. The Court of Appeal did not reverse the decision but gave leave to appeal to the Supreme Court who differed from the lower courts and granted a declaration that DEFRA was in breach of its obligations. In relation all other matters concerning the interpretation of the Directive, for example whether revisions should be made to existing ‘air quality plans’ where there was a breach, the Supreme Court referred the case to the CJEU for a preliminary ruling.

THE CJEU'S RULING

The CJEU considered the questions sent by the Supreme Court and ruled as follows:

If they wish to postpone the fulfilment of their obligations to postpone by five years, where targets are not going to be complied with, Member States are required to make an application for postponement and establish an air quality plan.

Where an application to postpone has not been made, a Member State cannot comply with its obligations by just revising its air quality plans.

In relation to what remedial action the domestic courts should take, the CJEU held that the courts should take “any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the directive”.

As such, in what was an unequivocal ruling, the CJEU ruled in favour of ClientEarth's position in every respect. This ruling provides a very clear interpretation of Member States' obligations to reduce nitrogen dioxide emissions under the Directive, and it appears that DEFRA will have to heavily revise its 'air quality plans' in order to meet its targets more quickly than previously intended. What is less obvious at this point, however, is the long term effects of this judgment.

AN EMPOWERED JUDICIARY, AN EMPOWERED PEOPLE?

Many commentators, for example ClientEarth lawyer Alan Andrews, believe that the CJEU's ruling “sets a ground breaking legal precedent in EU law and paves the way for a series of legal challenges”. The fact that ClientEarth (an NGO) successfully brought this case to a preliminary ruling from the CJEU does indeed represent a breakthrough in terms of the public's role in ensuring governmental compliance with environmental obligations. It also paves the way for the Supreme Court to hold the government to account for breaching environmental obligations in this way.

Whilst a “breakthrough”, caution should be given against jumping to conclusions too quickly about the lasting effects this ruling beyond this case. As with any ‘landmark’ legal judgement, the true test of its

effectiveness will be seen both in how the domestic court phrases its judgement, and then how that judgment is followed in the future. Whilst, given its support of ClientEarth's position in their referral, we do not expect the Supreme Court to go against the CJEU's position, it is expected that the court will be guarded in the way it phrases its judgement as this may well be important in terms of its lasting effect.

When the House of Lords sitting in its judicial capacity was recast as the Supreme Court, there was a lot of speculation over whether it would begin to take a more proactive role in holding the government to account. The CJEU seemed somewhat confused that the Supreme Court had referred the issue of remedies in their ruling as they felt that the position should have been clear from the EU framework legislation and previous CJEU jurisprudence. As such the decision to refer suggests a reluctance, or at least an uncertainty, by the judiciary in reviewing governmental compliance in this way. That being said, it will be interesting to see if this case does become a precedent for more proactive judicial reviewing of governmental bodies' environmental obligations in the future.

NEXT STEPS

This preliminary ruling by the CJEU could represent a major change in the UK judiciary's role in ensuring governmental environmental compliance. However the details of enforcement are very much a matter for the courts of the Member States and it will be of interest to see what concrete steps the Supreme Court now takes to apply the ruling.

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IN BRIEF: AIR QUALITY BECOMING TOP OF AGENDAS

Outside of the courtroom, air pollution is increasingly becoming a topic of concern in major cities throughout Europe. Here in the UK, the Mayor of London, Boris Johnson, has called for a central London “Ultra Low Emission Zone” (“**ULEZ**”) to be in place by 2020. Similar schemes are also being considered in Edinburgh and Glasgow.

THE LEGAL POSITION

WHAT IS THE ULEZ?

The proposed zone will cover the same geographical area as the current congestion charge zone and would come into force in September 2020. It will mean that the drivers of vehicles that do not meet the emission standards will face an additional charge of £12.50 for driving through the area.

As well as being promoted as an environmental and health scheme, supporters of the ULEZ focus on the potential economic opportunities in relation to the low emission vehicle market. A public consultation was launched on 27 October and will run until 9 January 2015.

According to Transport for London data, it is estimated that more than 4,000 deaths in 2008 were brought forward due to long term exposure to air pollution. Figures such as these focus the mind and show the importance of improving air quality. Critics of ULEZ argue that the scheme is too little too late and some have called for a total ban in the proposed zone of any vehicles that do not meet emission standards.

The proposal is still in the early stages with a proposal being put together once the public consultation has concluded. It remains to be seen how far the concerns and criticisms raised by stakeholder groups to date will shape the outcome of the consultation and the eventual implementation of the ULEZ.

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