
November 2009

Review

Commercial & Dispute Resolution



‘Primary authorities’ and new sanctions under RES 2008 – guidance for businesses

The final part of the Regulatory Enforcement and Sanctions Act 2008 (RES) recently came into force. It introduces a ‘primary authority’ scheme for the regulation of multi-location businesses. Businesses are likely to benefit from this but to do so they must sign up to the scheme.

What is RES?

Businesses are subject to a raft of legislation regulating their behaviour in matters such as consumer protection, environmental health and planning. Local authorities are responsible for administering much of this legislation by guiding businesses on compliance, monitoring business activities and bringing criminal prosecutions where there is a breach of the legislation. This means that a business located in, for example, Tower Hamlets would be guided, monitored and potentially prosecuted by the London Borough of Tower Hamlets.

In 2005, a government report highlighted that local authorities were exercising these functions ineffectually and inconsistently, for example guidance on compliance with the same legislation often differed from one local authority to another and some local authorities were more heavy handed in taking enforcement action than others. RES was introduced to remedy the position.

Key to RES is the creation of the Local Better Regulation Office (LBRO). Its remit is to create greater consistency and accountability by local authorities in the exercise of their regulatory functions. LBRO acts as a central body giving guidance to local authorities on how they should exercise these functions, providing them with financial assistance and helping them set enforcement priorities. It also acts as a central point of liaison between local authorities and central government.

RES introduces a primary authority scheme and new civil sanctions for failure to comply with regulatory legislation

Why does my business need to know about RES?

RES was brought into force in stages. Most of the Act is now a year old. However, Part 2 of the Act came into force only recently and this introduced the 'primary authority' scheme.

Where a regulated business (RB) operates in the area of just one local authority, it is clear that that authority will have the responsibility of ensuring that the RB complies with the relevant regulatory legislation. The position is more difficult where an RB operates in more than one local authority area, for example where a retailer has branches located in five different district councils in England. That RB would be regulated by multiple local authorities each potentially applying the regulations differently and providing contradicting guidance. The primary authority scheme was introduced to deal with this issue. It determines which local authority will regulate an RB which operates in the area of two or more local authorities.

Under the primary authority scheme, LBRO may nominate one of those local authorities to be the primary regulatory authority for that RB. LBRO may only make such a nomination if either the RB has asked it to do so or if the RB and the nominated authority have already agreed in writing, by means of a partnership agreement, that the nominated authority will act as the RB's primary authority.

Would my business benefit from the primary authority scheme?

The key benefit for an RB with a primary authority is consistency of approach. Only one local authority will be giving focused guidance on how the RB is required to act and an RB will be able to rely on this guidance with greater confidence. This is likely to mean that an RB will have reduced regulatory burdens and more clarity and certainty about what its regulatory obligations are. This will be enhanced by new powers given to primary authorities to block enforcement action against an RB by any other local authority, where that RB has acted in accordance with advice previously given by the primary authority (unless the action is urgent or approved on appeal to LBRO).

There is a risk, however, that any guidance issued by a primary authority will err on the side of caution, potentially limiting the scope of the business activities that the RB can carry out. There is also no guarantee that following the guidance will give immunity from prosecution. A number of the standard partnership agreements currently being issued by local authorities make it clear that compliance with the guidance they issue does not later fetter their ability to take enforcement action against an RB, even where that advice has been conscientiously followed.

A primary authority may charge an RB a fee to cover its costs "reasonably incurred". It is difficult to give a ballpark estimate of what those fees will be, as they are likely to vary considerably from authority to authority.

What does my business need to do?

To participate in the primary authority scheme, your business will need to sign a formal partnership agreement with its chosen partner authority. This would involve making an approach to that authority. Careful consideration should be given to which primary authority to select. This could be the authority in which your business principally trades, for example where the head office is located, or the authority with which your business has already developed a sound working relationship. An examination of the

resources available to each potential primary authority to carry out its services to your business will also be important in selecting the right partner.

Many authorities now have standard partnership agreements. Your primary authority will be able to send a copy of theirs to you. You should take legal advice on its terms although it is likely to be non-negotiable.

You should avoid disclosing confidential or commercially sensitive information to your primary authority in your dealings with them. They may be obliged by the Freedom of Information Act 2000 or the Environmental Protection Regulations 2004 to disclose any such information on request, effectively releasing it into the public domain. They are not required to obtain your prior consent to this disclosure, or even to notify you that the information has been disclosed.

My business is in the marketing and advertising sector. Does RES apply?

Yes. Your business will be subject to a variety of regulatory legislation, not least the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008. These regulations protect consumers from unfair trading practices and businesses from misleading marketing, consolidating some of the old legislation on matters such as trade descriptions and price advertising. The regulations are enforced by the trading standards arm of local authorities. If your marketing or advertising business operates in the area of two or more local authorities, you should consider entering into a primary authority partnership agreement with one of them.

What are the sanctions for non-compliance under RES?

Non-compliant businesses are usually prosecuted in criminal proceedings. RES gives local authorities and other regulators, including the Environment Agency and the Information Commissioner, a range of new civil sanctions for non-compliance instead of criminal proceedings. These include:

- Fixed monetary penalty notices – a fine of a fixed amount;
- Variable monetary penalty notices – the regulator can set the level of the fine;
- Compliance notice – the business has a limited time within which to take steps to ensure that an offence does not continue or happen again;
- Restoration notice – the business has a limited time within which to take steps to restore the position to what it would have been if no offence had been committed;
- Stop notices – a business is prevented from carrying on specified activities until it has taken steps to come back into compliance; and
- Enforcement undertakings – where a business is reasonably suspected of having committed an offence, it can undertake to take corrective action.

Regulators can choose which sanction is the most appropriate in the circumstances and impose it on a non-compliant business directly without needing to go through the courts. They are required to publish guidance on how they intend to go about using

these new sanctions. However, the regulators do not yet have the powers to impose them. More legislation is needed to give them these powers, but this is expected imminently.

The new civil sanctions are intended to be more flexible than criminal proceedings, proportionate to the offence and effective in ensuring that businesses comply with their regulatory obligations. Businesses need to be aware that there will be soon be a greater range of sanctions for non-compliance, which will still include criminal prosecution. The new civil sanctions are not a 'soft option', for example a restoration notice could require a business to incur substantial clean up costs or the costs of introducing improved safety measures. However, they are creative, in that they encourage future compliance and restoration where an offence has been committed, rather than being merely punitive. They represent an opportunity for a non-compliant business to avoid the stigma and adverse publicity associated with criminal prosecution. A business facing action by a regulator should ensure that they seek immediate legal advice on how to work with the regulator so as to make the most of this opportunity and avoid a criminal conviction.

How can Hammonds help?

Hammonds has a team of lawyers specialising in regulatory issues. They can advise your business on:

- primary authority schemes, whether it would be beneficial to enter into a formal partnership agreement with a primary authority and on how to go about establishing that partnership;
- the terms of the partnership agreement itself;
- queries about how a regulatory investigation is being conducted by a regulator; and
- criminal prosecutions and the imposition of civil sanctions for regulatory non-compliance.

FURTHER INFORMATION

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