Winter 2010

Review

Regulatory - Safety, Health and Environment, Transport & Licensing

Seasons Greetings! Welcome to the Winter edition of the Regulatory Review, our quarterly update on developments in the fast moving areas of health, safety and environmental law, road transport regulation and licensing. We hope you find the articles useful and interesting. For further information, please feel free to contact the individuals named after each article.

First prosecution of a WEEE producer

One of the first prosecutions for offences under the Waste Electrical and Electronic Equipment (WEEE) Regulations came to trial in September 2010. The Environment Agency brought a prosecution against hairdressing wholesalers Aston and Fincher Limited of Birmingham. The company pleaded guilty to 31 charges relating to failure to comply with Packaging Waste Regulations and failing to register as a producer of electrical and electronic waste. The offences were discovered as a result of routine investigation.

The WEEE Directive and UK Regulations

The WEEE Directive came into force in 2007 and places obligations on importers, re-branders, or manufacturers of new electrical or electronic equipment. The Directive covers a wide range of household and professional EEE electrical and electronic products, although some are exempt from certain requirements. Types of products covered include household appliances, IT and communication equipment and electrical and electronic tools (except large stationary industrial tools).

The WEEE Directive is implemented in the UK by two sets of Regulations:

- The Waste Electrical and Electronic Equipment Regulations 2006 which implement most aspects of the Directive and came into force on the 2nd January 2007; and
- The Waste Electrical and Electronic Equipment (Waste Management Licensing) (England and Wales) Regulations 2006 which cover site licensing requirements and WEEE treatment requirements and came into force on the 5th January 2007.

The WEEE Directive places obligations on importers, re-branders or manufacturers of new electrical or electronic equipment.

High price for non-compliance

The prosecuted company failed to comply with WEEE legislation. It avoided paying registration fees and the unknown costs of financing the recovery and recycling of the WEEE. For the failures under producer responsibility legislation, the company was fined £650 for each offence (a total of £20,150). It was also ordered to pay compensation of £7,135 to the Environment Agency for loss of registration fees, costs of £3,605.11 and a victim surcharge of £15.

An Environment Agency Officer commented that the prosecution “should send a strong message out to all companies who do have producer responsibility obligations to ensure that they comply with the legal requirements placed on them...These Regulations do not set out to criminalise companies who don’t comply, they are about making all producers responsible for their impact on the environment, and helping them to reduce it wherever possible.”

“Businesses have a responsibility for what happens to their waste and ignorance is no defence – it’s a company’s responsibility to ensure that they are fully compliant with all legislation...While registering would have cost less than £11,000 for the years concerned, their appearance in court has cost them well over £30,000. This case demonstrates that flouting the law does not pay.”

If you import, re-brand or manufacture EEE in the UK then you are likely to have responsibilities under WEEE.

“Companies who don’t comply with the Regulations unfairly exploit those that do and we want to help businesses operate on a level playing field, particularly in these difficult economic times. Legal compliance, including environmental regulations, should be high on the agenda for company management, and this company have paid a heavy price for failing to recognise this.”

How do I comply?

If you import, re-brand or manufacture EEE in the UK then you are likely to have responsibilities under WEEE legislation as a producer. If this is the case then:

- Check if your product requires electricity for its main purpose. If it does then it is likely to be covered by WEEE legislation.
- Register with a compliance scheme. If you are a producer then, from March 2007, you should have been registered with an approved producer compliance scheme. Penalties for delaying could be up to a £5,000 fine in the Magistrates Court or an unlimited fine in a Crown Court.
- You will also need to ensure that you can finance the cost of treating and recovering your products and you should have been marking all new electrical products you placed on the market with the crossed out wheeled bins symbol and a producer identification mark since 1 April 2007.

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Recommendations for review of health and safety regulation published

Lord Young's report "Common Sense, Common Safety", published on 15 October 2010, seeks to simplify and improve health and safety regulation by promoting a common sense approach in relation to non-hazardous activities (e.g. in offices, shops, and classrooms) and address a "compensation culture" by moving away from the low risk 'no win, no fee' claims, with the aim of freeing up businesses and other institutions from "unnecessary bureaucratic burdens and the fear of having to pay out".

Lord Young's recommendations include:

- The UK taking the lead in ensuring that EU health and safety regulation is not overly prescriptive.
- The current raft of health and safety legislation being consolidated into a single set of accessible regulations, with clear guidance.
- The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR) being reviewed to determine whether a better approach can be introduced to provide a national picture of workplace accidents.
- Simplified risk assessment procedures without the need for full risk assessments by health and safety officials but with assistance provided by the HSE. Employees working at home and self employed people would be exempt.
- A simplified claims procedure for personal injury claims under £10,000 and clarification that people should not be held liable for consequences due to well-intentioned voluntary acts on their part.
- A requirement that all consultants be accredited to professional bodies as soon as possible, and a directory of accredited consultants produced.
- Insurance companies being engaged in consultation to produce a code of practice to ensure that necessary or worthwhile activities are not curtailed through prohibitive health and safety requirements.

Hazardous industries such as construction, chemicals, manufacturing and farming would be untouched by the report.

Lord Young recommends that the incentives for claiming compensation have to change, in order to shift the perceptions and encourage a more common sense approach to health and safety, focusing on the proportionate management of risk, which for business will mean a movement away from costly insurance policies for protection and a clearer understanding of how to deal with health and safety matters.

The report has however received some criticism, some arguing that the "compensation culture" is a myth created by the media, that none of the recommendations will actually reduce workplace accidents and deaths, and that, with the budget cuts being imposed by the Government, the funds may not be available to put the recommendations into practice.

Lord Young's report recommends a common sense approach to health and safety regulation.

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From 4th January 2011, the Environment Agency will start to use six new civil sanctions.

New civil sanctions for environmental offences

From 4 January 2011, the Environment Agency (EA) will start to use six new civil sanctions. These new sanctions will not replace any of the EA's current enforcement tools but the EA expect that they will use them for hazardous waste, water resources and packaging waste offences committed in England after 6 April 2010 and in Wales after 15 July 2010. In deciding whether to use the new civil sanctions, the EA must apply the criminal standard of proof (beyond all reasonable doubt) to determine whether an offence has been committed.

The six new types of civil sanction are:

1. Compliance Notice – requiring actions to comply with the law, or to return to compliance, within a specified period.
2. Restoration Notice – requiring steps to be taken, within a stated period, to restore the environment from harm caused by non-compliance, so far as possible.
3. Fixed Monetary Penalty – a low level fine that can be imposed for a specific minor offence. This is fixed at £100 for an individual or £300 for a company.
4. Enforcement Undertaking – an offer, formally accepted by the EA, to take steps that would make amends for non-compliance and its effects. Therefore, if your business wishes to repair any environmental damage caused then you can set out how you propose to do this in an Enforcement Undertaking. If the proposals are accepted then the undertaking will become a legally binding voluntary agreement.
5. Variable Monetary Penalty – a proportionate monetary penalty which the Regulator may impose for a more serious offence. The fine can be no higher than the maximum amount allowed by statute for the relevant offence and, in any event, must not exceed £250,000.
6. Stop Notice – requires an immediate stop to an activity that is causing serious harm or presents a significant risk of causing serious harm.

The EA will be able to take legal action in respect of any non-payment of monetary penalties. They may also prosecute for non-compliance with any restoration or stop notices, and in some cases, may recover the costs of the investigation or legal advice.

Hammonds have already seen regulators use the new civil sanctions (they are also available to regulators other than the EA). Any company facing such a sanction should take care to ensure that the use of the civil sanction by the regulator is both lawful and appropriate. Companies should always take legal advice if there is an attempt to impose a sanction on them. They should also remember that this penalty will be publicised by some regulators and can be referred to in future enforcement proceedings as evidence of bad character.

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New clarity on health and safety responsibilities in relation to agency workers

There is often confusion as to whether hirers or agencies are responsible for the health and safety of agency workers, and in many situations both parties argue that it is the other. In reality, both parties have health and safety responsibilities; the extent of those responsibilities will depend on whether the agency worker is the employee of the hirer or the agency. This should be determined by looking at any contracts that are in place, and also what actually happens in practice.

Both hirers and agencies have responsibilities to ensure the health, safety and welfare of the agency workers at work under the Health and Safety at Work etc Act 1974, either under section 2, if the agency workers are their employees, or alternatively under section 3 if they are not, as the agency workers would then be classed as 'persons not in their employment who may be affected. . by their activities'. Hirers also have an express duty to pass on necessary health and safety information to the agency for passing on to the agency workers (Regulation 15 of the Management of Health and Safety at Work Regulations 1999).

The Agency Workers Regulations 2010, which are due to come into force on 1 October 2011, give some clarity to the situation by providing agency workers, after 12 weeks, with the right to equal treatment, meaning that they are entitled to the same basic working conditions as if they were recruited directly by the hirer. These conditions expressly include the duration of working time, length of night work, rest periods, rest breaks and annual leave (Regulation 15), all of which impact on the health, safety and welfare of agency workers at work. Liability for not providing equal treatment in relation to these conditions is split between the hirer and the agency, depending on the extent to which each is at fault (Regulation 14).

Further, the Agency Workers Regulations 2010 insert a new provision into the Management of Health and Safety at Work Regulations 1999, requiring the hirer to change the working conditions or hours of a pregnant agency worker if they pose a risk to her health and safety at work. If the hirer is not able to do this, the agency must continue to pay the agency worker or find them alternative work for the remainder of the original assignment.

These new Regulations force both the agency and the hirer to take responsibility or face split liability, and thus the regular arguments as to who is the agency worker's employer become unnecessary. To avoid any liability, both the hirer and the agency should ensure that agency workers are afforded the same health and safety protection as directly recruited employees.

The Agency Workers Regulation 2010 provide agency workers with the right to equal treatment.

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The CLP regime makes far-reaching changes to the classification, labelling and packaging of chemical products to bring the UK into line with the Global Harmonised System.

The new CLP regime: what does it mean for you?

This article looks at the regime introduced by the EU Classification, Labelling and Packaging Regulations 2008 (the CLP regime). The regime makes far-reaching changes to the classification, labelling and packaging of chemical products to bring the UK system into line with the Global Harmonized System. The regime will affect companies that deal in the supply, manufacture, distribution or retail of chemical products and will create new obligations at every level of the organisation. The focus of this article is on what businesses will need to do in order to prepare for, and avoid falling foul of, the new regime.

Overview of the CLP regime

The EU Classification, Labelling and Packaging Regulations amend and repeal the Dangerous Substances Directive[1] and the Dangerous Preparations Directive[2]. It came into force on 20 January 2009. The purpose of the CLP regime introduced by the Regulations is to implement the Global Harmonized System (known as the GHS) into English law (see below). Manufacturers who place chemicals on the market will be most affected by the regime but there will be concurrent affects on all downstream users of those chemicals as well. Enforcement will be the responsibility of the national and European authorities and the European Chemicals Agency.

The GHS system

The CLP regime introduces the GHS into English law. The GHS is a framework for a global systematic approach to the identification and classification of substances and their potential hazardous qualities. The GHS originated at the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, where most countries in the world were represented. The hope was (and is) that countries will sign up to the GHS and that this will lead to a universal system for the identification and classification of substances, with any geographical disparities eliminated. This means that companies that operate internationally will no longer have to change their classification or packaging to comply with differing national laws.

The essential aspects of the GHS require companies to:

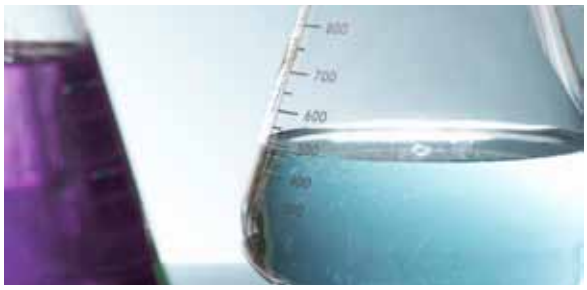
- maintain adequate data regarding substances and their potential hazardous qualities;
- prepare and maintain substance inventories;
- scrutinise chemicals used to ensure they are correctly classified and labelled; and
- train staff at every level of the organisation.

How does the CLP regime affect the REACH regime in the UK?

The implementation of REACH and CLP in the UK will be in tandem and should be applied and planned for in combination. In essence the CLP regime is an addition to REACH. Both regimes are meant to work in unison but the requirements under CLP are slightly more onerous. If a company has prepared effectively for REACH it should be able to use that as a starting point for implementing the CLP regime.

One of the key differences between the two regimes is that there is no tonnage threshold in the CLP regime, but there is one in REACH. However, if a substance or mixture is already registered under the REACH regime, there is no additional requirement to notify under the CLP regime.

1. Dangerous Substances Directive 67/548/EEC
2. Dangerous Preparations Directive 1999/45/EC



Changes from the pre-CLP regime

The previous systems for labelling in the UK were established by the Dangerous Substances Directive (DSD) and Dangerous Preperations Directive (DPD). The EU Commission was heavily critical of the DSD regime in particular and published a White Paper proposing reform[3]. The new CLP regime implements the Commission's proposals. The key changes from the pre-CLP regime are:

- No tonnage threshold;
- Limited availability of exemptions compared to the earlier regime;
- 27 GHS categories compared with 15 in the pre-CLP system;
- The new regime does not cover those categories of hazard that were outside the remit of the pre-CLP regime including, amongst other things, flammable liquids category 5, and acute toxicity category 5. The motivation for this would appear to be to discourage any unnecessary testing on animals;
- The EU (CLP) system distinguishes "dangerous" from "non dangerous" and the GHS system uses a system of hazard classes and categories[4] ;
- The new regime uses different test methods for the classification criteria of physicochemical hazards[5] ;
- GHS refers to acute toxic effects and systematic toxicity whilst the pre-CLP system refers to acute and chronic affects;
- GHS has no comparable classification to the pre-CLP "R-phrases" used in the EU system for chemicals with other toxicological properties[6];
- GHS classifies environmental hazards into acute and chronic aquatic toxicity whereas the pre-CLP regime combined the two methods;
- The appearance of hazard symbols differs between the two regimes, for example the GHS uses diamonds and not squares; and
- CLP identifies specific endpoints for classification and requires suppliers to assess the other endpoints and self-classify accordingly.

Scope of the new regime

The main aim of the CLP regime is to bring a harmonised approach to the identification and classification of chemical substances (in line with the GHS) and to address some of the criticisms made of the DPD and DSD. The regime maintains and enhances the pre-CLP standard of protection.

The CLP regime applies to any substance or mixture placed on the market (there is no tonnage threshold) and to substances subject to registration under REACH. There are limited exemptions for this as follows:

- Articles (except substances contained within) that are subject to registration under REACH, and explosives and pyrotechnical articles;
- Radioactive substances and chemicals subject to customs supervision and non-isolated intermediates;

The CLP regime applies to any substance or mixture placed on the market and to substances subject to registration under REACH.

3. White Paper "Strategy for a Future Chemicals Policy"
4. Based on the nature of physical, health or environmental hazard
5. Such as flammability and toxicity
6. Chemical Watch "Managing CLP Compliance: The Essentials for Business" page 22

Manufacturers and suppliers must either self - classify a substance or use a harmonised classification if one exists.

- Scientific research and development where the resulting substances are not subsequently placed on the market;
- Waste;
- Many products in their finished state ready for the end user (such as medicinal, veterinary and cosmetic products); and
- The transport of dangerous goods by air, sea, road, rail or inland waterways.

The CLP Regime applies to:

- A registrant under REACH;
- A manufacturer or importer of substances or mixtures (preparations) that it places on the EU Market;
- A downstream user that uses substances or mixtures supplied to it for the formulation of other products that it places on the market;
- A distributor that stores and places on the market a substance or mixture for others;
- A producer or importer of articles that are explosive or that contain substances that are intentionally released or are on the Candidate List of Substances of Very High Concern; and
- Anyone involved in research and the development of chemicals.

Manufacturers and suppliers must either self-classify a substance or use a harmonised classification (if one exists) and label and package it appropriately before they place it on the market according to the GHS.

Suppliers/manufacturers

Unlike the old regime, the new CLP regime identifies specific endpoints for classification. Suppliers must assess the other endpoints and self-classify accordingly. Suppliers are defined as a whole under the CLP regime whereas under REACH they are defined as suppliers of substances and preparations as well as suppliers of articles.

Manufacturers are going to have to focus many resources towards achieving compliance with the CLP Regime. They will need to maintain complex inventories of chemicals, classify substances and ensure packaging and labelling compliance. Manufacturers and importers of hazardous substances must notify the use of that substance and add it to the inventory within 1 month of placing it on the market (import is considered as placing it on the market). This can be done via a “group notification” which allows one company to act on behalf of a number of organisations. This notification is done on the REACH-IT portal on the European Chemical Agency’s website.

Downstream users

The CLP regime will have concurrent affects on downstream users in the chemical marketplace. EU legislation uses as a basis for intention the classification of chemicals that they cover[7] . With the likelihood of new substance classification following the information available under REACH this will have a significant impact on the downstream user. This could affect companies dealing in many of the consumer markets such as facial products, household cleaning products and companies that deal in waste management. In fact, two pieces of EU law have been adopted already to amend downstream legislation affecting detergents[8] , paints & varnishes and cosmetics[9] .

7. Chemical Watch “Managing CLP Compliance: The Essentials for Business” page 11
8. Regulation (EC) No. 1336/2008 based on Article 59 of the Treat establishing the European Community
9. Directive 2008/112/EC based on Articles 95 and 175 (1) of the Treat establishing the European Community

Classification requirements

Under the new regime, classification is based on categories and classes of hazard. However, the CLP regime does not cover any categories of hazard that were not covered by the pre-CLP system although there are differences in terminology. The classification requirements rest in the hands of the manufacturers and suppliers who put the product on the market. They must use all information available to them to give the right classification. However there is a danger that companies, in order to stay compliant, will proceed with caution and subject a substance to a stricter classification than required.

Under the new regime, classification is based on categories and classes of hazard.

Companies must:

- Identify the substances to be classified;
- Identify all information available on substances or mixtures relating to the form or physical state in which it is marketed and can be expected to be used;
- Examine the information to make sure it is adequate, reliable and scientifically valid;
- Identify whether adequate or reliable information is available in relation to the physicochemical properties. If not then information must be generated for each hazard class; and
- Cross-reference information by the criteria contained within CLP to define a classification.

Information should be collected from approved test methods. Where there is no information available, other relevant, adequate and reliable information should be used on the individual substances contained within a mixture. If new information subsequently becomes available, suppliers should reassess and update the classification.

Labelling

Many SME's use black pictogram labelling to identify the different hazards on products they produce on a small scale. The CLP regime is silent on this issue and practices such as blacking out pictograms in order to standardise the labelling process but yet produce different labels, is likely to continue. At the moment the options open to businesses are to use multi-coloured thermal transfer printers to print both black and red or to use multiple label formats with up to 5 diamonds per label. Companies in the UK should remember that the CLP regime introduces diamonds rather than squares on the labelling of their products.

The CLP regime prescribes certain information to appear on the label of a packaged classified substance (which must be in the language of the member state where the substance is marketed):

- The name, address and telephone number of the supplier;
- Product identities for a substance or mixture;
- Hazard pictograms (if more than one, the most severe should be used);
- Signal words;
- Hazard statements;
- Precautionary statements (no more than 6); and
- Supplemental information where appropriate.

Businesses should begin to prepare inventories and collate information and data in order to comply with the CLP regime.

If a mixture is not classified, then a company does not need to comply with labelling requirements. However, if the mixture contains a hazardous substance for which there is a labelling requirement, then the appropriate labelling requirement for that substance must be adhered to.

Packaging

The packaging of a chemical substance or mixture must be designed so that:

- Its contents cannot escape;
- It cannot be damaged by the contents or form dangerous compounds within;
- It is strong enough to meet the normal day-to-day strains of handling; and
- It does not attract interest from young children or mislead consumers.

Packaging which meets the requirements of legislation on transport of goods is presumed to meet the requirements of the CLP regime.

Inventories

The deadline for notification to the European Chemicals Agency is 1 December 2010 (see below). In order to achieve this, companies will need to have a clear understanding of all chemicals they are in contact with by way of comprehensive inventories. To produce these, the company should investigate in relation to each chemical it is in contact with:

- The product name and its nature;
- Whether it is the importer, manufacturer or supplier;
- The date first placed on the market;
- The CLP duties that apply;
- The substance characteristics;
- Its known classification; and
- The form or state in which the substance is marketed.

Guidance for businesses

Businesses should:

- Begin to prepare inventories and collate information and data in order to comply with the CLP regime;
- In order to help achieve a global harmonised approach to the identification and classification of chemical products, work with other players in the industry (and use the bulk notification tool);
- Allocate financial resources to train staff at all levels of the organisation on CLP compliance;
- Appoint a person to monitor and ensure compliance with future legislative developments in this area;

- Gather hazard data and assess substances and determine classification using all UN GHS criteria;
- Plan to work towards an agreement of classification with other industries for the same substance both under REACH and outside REACH;
- Check dates for placing on the market; and
- Plan safety data sheets updates with GHS and CLP.

Implementation and enforcement of the CLP regime

Each EU Member State will appoint a competent authority responsible for the preparation of harmonised classification and labelling proposals and the enforcement of CLP. On 20 January 2012 and every 5 years thereafter each authority must report on the enforcement measures they have implemented. It is likely that these authorities will look at whether companies are compliant with the CLP regime as well as REACH.

Current position

Although the CLP Regulation came into force on 20 January 2010, not all obligations are enforceable as yet. Substances that were already on the market before this date are not required to be relabelled and packaged for another two years. Also, until June 2015, companies must classify in accordance with the old DSD regime and the new CLP regime. The DPD will be fully repealed from 1 June 2015 but until then remains amended by the CLP regime.

Key dates to remember

- 1 December 2010 - Deadline for submissions of reclassification of substances inventories to the European Chemicals Agency under the CLP and safety data sheets;
- 3 January 2011 - Deadline for the notification of the classification and labelling of inventory substances placed on the market before 1 December 2010;
- 1 December 2012 – Transitional arrangements for substances already placed on the market on 1 December 2010 and safety data sheets;
- 1 June 2015 - Mixtures reclassification;
- 1 June 2017 - Transitional arrangements for mixtures already placed on the market on 1 June 2015 and safety data sheets.

Next steps

Companies need to begin preparing for the CLP regime now. They can use their preparatory work for REACH to assist in them in achieving compliance with the regime. Companies should maintain detailed and up-to-date inventories of all chemical products they deal in. At the moment, the first deadline for notification is 1 December 2010 for a company placing a chemical on the market. The full force of the provisions does not come into force until 1 June 2015 and so companies have some time to prepare[10].

Although the CLP Regulation came into force on 20 January 2010, not all obligations are enforceable as yet.

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10. The main source of this article is a publication by Chemical Watch “Managing CLP Compliance: The Essentials for Business” written by Andrew Fasey and Mark Blainey and edited by Mamta Patel 2010

In this case the Compliance Committee found that the UK had not complied with its obligations under the Aarhus Convention to provide adequate remedies and fair and inexpensive procedures.

UK's legal costs warrant scrutiny

On 21 February 2008, Mr Morgan and Mrs Baker of Keynsham submitted a communication to the Aarhus Convention Compliance Committee alleging non-compliance by the UK with its obligation to provide adequate and effective remedies and for any procedures to be fair, equitable, timely and not prohibitively expensive.

Morgan and Baker (M&B) commenced private nuisance proceedings again Hinton Organics (Wessex) Limited seeking an injunction to prohibit offensive odours arising from their waste composting site near M&B's homes. The interim injunction was discharged and M&B were ordered to pay Hinton's costs amounting to approximately £25,000.

The Aarhus Convention was ratified in 2005 and recognises every person's right to a healthy environment. It is legally binding on the UK and promotes easy and effective access to justice to challenge any violation of national law relating to the environment or where the authorities have failed to follow the proper procedures. The Convention provides that there must be access to a review process which is fair, equitable, timely and free or inexpensive.

In response to M&B's submission, the Conventions Compliance Committee found that the procedure in respect of private nuisance proceedings did come under the scope of the Convention. The Committee then went on to state that, although it was not raised by M&B, they considered that the UK's compliance with Article 3, paragraph 2 of the Convention warranted scrutiny. Article 3, paragraph 2 states that "each party shall endeavour to ensure that officials and authorities assist and provide guidance to the public, inter alia, seeking access to justice in environmental matters." In the case brought by M&B against Hinton's, the authorities had demanded immediate payment and did not assist M&B in seeking access to justice.

The Committee also found that, in respect of the procedures being fair and equitable, the fact that M&B were ordered to pay the whole of the costs whilst Hinton was not ordered to contribute at all, constituted non-compliance with Article 9, paragraph 4 of the Convention. The UK was failing to ensure that its court procedures were not "prohibitively expensive." The Committee, though, refrained from presenting any recommendations due to there being no evidence presented to substantiate that such non-compliance was due to a systematic error.

It remains to be seen whether the findings will make environmental justice more accessible but they are welcome news for local residents groups and environmental campaigners.

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Government spending review makes important changes to the CRC Energy Efficiency Scheme

The CRC Energy Efficiency Scheme ("CRC") came into effect in April 2010, with participants having to register with the Environment Agency by the end of September 2010. The scheme had been dogged with accusations of being overly complex and the new coalition Government indicated at an early stage its intention to review the CRC.

Background to the CRC

The CRC was designed as a UK-only mandatory cap-and-trade-scheme for carbon, which aims to reduce carbon dioxide emissions through increased energy efficiency and fuel-swapping. Affected organisations have to purchase and then surrender allowances equivalent to the amount of carbon dioxide they emit. The CRC applies to approximately 3,000 large businesses and public sector organisations. It also affects about another 20,000 organisations, which do not have to participate in the scheme but had to provide the Environment Agency with an information disclosure.

The CRC began on 1 April 2010 and is divided into seven phases. Phase 1 (the Introductory Phase) was to run until 31 March 2013. During the Introductory Phase, the first year is a "reporting only" year, so no allowances will be bought or surrendered. Thereafter, there was due to be a sale in April 2011 with an unlimited number of allowances sold at a fixed price of £12 per tonne of carbon dioxide. In subsequent phases, auctioning of a limited number of allowances by the Government was due to take place annually, at prices determined by the market.

Climate Change Committee recommendations

The review of the CRC began with the Climate Change Committee report in September 2010 concluding that a cap on allowances and auctioning would add unwanted complexity to the scheme. It therefore recommended that the approach of the first phase of the scheme (unlimited amount of allowances and fixed price sales) should be extended at least into the second phase.

The Climate Change Committee also discussed other options for re-designing the scheme including setting minimum prices for allowances, and a more fundamental reform of the CRC through abolishing revenue recycling payments or removing the trading element of the scheme altogether. However, it did not include these as specific recommendations.

Comprehensive spending review

The Government followed this up with an announcement, in its comprehensive spending review documentation on 20 October 2010, that:

"The CRC Energy Efficiency Scheme will be simplified to reduce the burden on businesses, with the first allowance sales for 2011-12 emissions now taking place in 2012 rather than 2011. Revenues from allowance sales totalling £1 billion a year by 2014-15 will be used to support the public finances, including spending on the environment, rather than recycled to participants. Further decisions on allowance sales are a matter for the Budget process."

This hard hitting statement is tucked away in the section of the spending review about reforms to the Department of Energy and Climate Change and was not actually included in the Chancellor's speech. It unsurprisingly sparked controversy amongst affected sectors, and gave rise to a large number of questions not addressed by the statement including:

- whether there will be a double auction in 2012, or whether auctions will continue to be retrospective;

The CRC was designed as a UK only mandatory cap-and-trade scheme for carbon.

The most significant impact for most participants is the loss of the revenue recycling mechanism.

- whether there will be any adjustment to the allowance price to reflect the fact that no revenue will be recycled;
- whether league tables would still be published and used for reputational purposes only;
- whether there will be any caps on the numbers of allowances available.

What is clear is that there will be no sale of allowances in 2011, and that there will be a retrospective sale of allowances in 2012 to cover 2011/12 emissions. The most significant impact for most participants is however the loss of the revenue recycling mechanism.

This will effectively turn the CRC into a carbon tax, because participants will pay a given price for every ton of carbon dioxide they emit, and will not see any of that money returned to them. Commentators have already attacked it as a "stealth tax" on business, which not only goes back on the commitments given during the development of the CRC, but removes a major source of incentive on participants to reduce carbon emissions.

The Environment Agency has sent a letter to participants, which provides a little more detail on some of the changes announced in the spending review. This letter confirms that the league table will be retained as a reputational tool and that the metric weightings and publication dates will remain as currently envisaged. The first league table will therefore still be published in October 2011.

The Environment Agency's letter unfortunately did not clarify any further the questions about the sale of allowances, such as whether the sale in 2012 will be a double sale to cover both 2011-12 and 2012-13, and whether there is any intention to amend the allowance sale price.

The Environment Agency has now issued the first of two consultations on how to simplify the CRC further, and legislative proposals to amend the CRC are likely to be put forward in 2011.

The current consultation extends the introductory phase by one year, removes the requirement for information disclosures, as well as addressing a couple of more administrative issues. The extension of Phase 1 allows the decisions about Phase 2 to be dealt with next year because the registration period for Phase 2 has also been deferred as a result.

If any positives can be drawn from these changes, the removal of the recycling payment does reduce to some extent the administrative burden on participants. But at the same time, it significantly increases their financial burden. It also potentially simplifies the relationship between landlords and tenants in relation to the CRC. There were serious complexities around landlords charging tenants for CRC allowances and sharing recycling payments. This revolved around whether landlords' costs could be passed on to tenants through outgoings and service charge provisions, and working out the best way of sharing benefits from recycling payments. Removing the revenue recycling element of the CRC means that landlords are more likely to be able to characterise CRC costs as taxes or similar charges. This would mean that they are more able to pass these costs on to tenants as part of existing service charge arrangements, or as a tax or other outgoing.

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CASE UPDATE

New Look Retailers Limited v The London Fire and Emergency Planning Authority [2010] EWCA Crim 1268

This case considered whether sentencing of offences under the Regulatory Reform (Fire Safety) Order 2005 should mirror sentencing under the Health and Safety at Work etc Act 1974.

A fire occurred at the New Look store on Oxford Street in April 2009 which resulted in the attendance of 30 fire appliances and the closure of Oxford Street for two days. The premises were subsequently demolished. New Look appealed their fine of £400,000 under the Regulatory Reform (Fire Safety) Order 2005. The Court of Appeal rejected New Look's arguments that their breaches of duty did not cause the fire, nor injury or death. Lord Justice Pitchford found that the fine was severe but not manifestly excessive.

The impact of this decision is considerable for determining an appropriate sentence for fires in health and safety offences. At trial, the judge had described New Look's "performance of its fire-safety duties in a large department store in the centre of London" as "lamentable." The Court of Appeal recognised that the trial judge attempted to impose a fine that reflected the seriousness of the offence. New Look had knowingly allowed its customers to be put at risk. The Court of Appeal also applied the new Sentencing Guidelines Council guidelines of February 2010 on corporate manslaughter and health and safety offences. These guidelines recognise that the range of potential fines for these offences is broad and that there is no ceiling on the fine specified. There is no need to wait until a death occurs before imposing a serious fine, although this does not mean that similar fines will be imposed for both breaches that do, and those that do not, have a causative influence in a fire or in death or serious injury.

Harsukhray Bhatt v Fontain Motors Limited [2010] EWCA Civ 863

In considering liability in negligence for a fall from a height by a worker in the workplace, the starting point is to consider whether the accident was a result of a breach of the Work at Height Regulations 2005 and not the conduct of the worker.

Fontain Motors appealed against a decision that it was liable for personal injuries sustained by Mr Bhatt in a fall from a ladder at work. Mr Bhatt was employed in the company's motor garage business, which on relocation stored car bumper kits in a loft space. The loft space was only accessible through a ceiling panel using ladders. The judge held that the accident had occurred as a result of a breach of the Work at Height Regulations 2005, in particular regulation 5 as Mr Bhatt's manager was not competent to engage in organisation and planning in relation to work at height; regulation 6(2) as it was reasonably practicable for the kits to be stored somewhere else; and regulation 7(2) because, if the loft was to be used as a storage area, a fixed pull-down ladder should have been installed. The judge also held that Mr Bhatt's claim in damages was subject to a reduction of one-third for contributory negligence.

The company contended that, in climbing the ladder without waiting for it to be footed, Mr Bhatt had ignored the system, which he had followed before. Alternatively, the company stated that the judge had erred in finding a breach of the Regulations, and that any finding of a breach lacked a proper evidential basis. In particular, relevant considerations such as the size of the business, the small number of kits being stored and the fact that they were dwindling stock should have been taken into account.

In considering liability in negligence for a fall from height in the workplace, the starting point is the Work at Height Regulations 2005 and not the conduct of the worker.

The total amount of the fines for the Buncefield explosion was the fifth highest for a single workplace incident at £9.5 million.

The Court of Appeal found that in determining liability it was appropriate to start with the Regulations, which were directed at avoiding or minimising the risks inherent in working at height, rather than with Mr Bhatt's conduct. Work at height had to be avoided altogether if it was reasonably practicable to carry out the work otherwise than at height (regulation.6(2)). If work at height was unavoidable the risks had to be minimised by, for example, the selection of work equipment which was appropriate (regulation.7(2)).

Breaches of the Regulations had occurred and those breaches exposed Mr Bhatt to a situation of risk to which he would not have been exposed if the company had complied with the Regulations. Mr Bhatt's failure to follow the prescribed procedure when doing work he should not have been required to do at all, and when using equipment that he should not have been required to use, did not mean that the accident was caused by him alone. That failure only went to contributory negligence. The appeal was dismissed.

Buncefield explosion

On 16 July 2010 at St. Albans Crown Court, the five companies held responsible for the explosion at Buncefield Oil Depot were sentenced. Investigations into the incident ultimately found that 'they didn't have control over their safety-critical systems.' During sentencing Mr Justice Calvert-Smith said that it was "little short of miraculous" that nobody lost their lives and that the case was "to do with slackness, inefficiency and a more or less complacent approach to matters of safety."

The total amount of fines was the fifth highest for a single workplace incident at £9.5 million. The five guilty companies were:

1. Total UK who had, in practice, day to day control over the site, the employees and systems. Following the closure of a site nearby, the fuel managed at the site of the explosion had increased by 50% in three years. The site was operating under pressure, and the excess fuel was supplied through a pipeline that Total did not have complete control over. Total UK failed to provide proper technical and engineering support from its head office in Watford. The HSE said Total needed to 'have the expertise to check contractors and monitor performance' and that it was not good enough to say that they relied on the knowledge of the contractor. Total UK was fined £3 million for breaching sections 2(1) and 3(1) of the Health and Safety at Work etc Act 1974 (HSWA) by failing to ensure the safety of its employees; and £600,000 for one offence under s. 85 of the Water Resources Act 1991 (WRA) for pollution of controlled waters. Total was also ordered to pay £2.6 million in costs.

2. Hertfordshire Oil Storage Limited (HOSL), a joint venture between Total UK and Texaco Chevron. Under the COMAH Regulations, HOSL was the site operator, although most of the management came through Total UK. HOSL initially denied the charges against it and the case went to trial. HOSL were fined £1 million for contravening regulation 4 of COMAH, £450,000 for one offence under s. 85 WRA and £1 million in costs.

3. Motherwell Control Systems 2003, an installation and maintenance company who had responsibility for maintaining the gauge which became stuck on the day of the explosion. Although they were aware of the gauges becoming stuck, they never attempted to resolve the problem. The investigation revealed that the gauge had become stuck at least 14 times in the 3 months before the incident. They also had control over the switches without any proper checks or supervision. During the incident, the "independent high level switch" had been left in a position in which it did not operate. Motherwell was convicted of breaching section 3(1) of HSWA and fined £1000 plus £500 in costs.

4. TAV Engineering, the designer, manufacturer and supplier of the safety switch that failed. The design of the safety switch introduced a fault to the system whereby it would not work if not padlocked into a certain position. TAV were convicted of breaches of section 3(1) of the HSWA and fined £1000 plus £500 in costs.

5. British Pipeline Agency (BPA) who constructed the bund around the tank, which was not built to the design standards. If it had been, the HSE alleged, it would have been better able to support itself during the explosion. The BPA also failed to identify appropriate drainage points on the site. Its main failings were not causative of the accident but related to issues under COMAH and the WRA. BPA were fined £150,000 plus £480,000 costs.

It is noteworthy that at least one of these companies had gone into administration when these fines were imposed. Otherwise, it is likely that the fines would have been substantially higher.

If the companies had not gone into administration, it is likely that the fines would have been substantially higher.

Employers' liability trigger litigation

The Court of Appeal has partly overturned the decision of the High Court in 2008 relating to the award of insurance to employees who had contracted mesothelioma as a result of their employment.

The fundamental question on appeal was, for the purposes of the employee's insurance policies, whether it was the occurrence of the cause of the disease (in the case of mesothelioma the inhalation of dust) that identified the policy year for the insurance and so an obligation to pay out; or if it was the time of occurrence of the onset of the disease (the time when the tumor developed) which identified the policy year. Some of the policies used the wording "contracted" the disease and some use "sustained".

The nature of mesothelioma is such that inhalation years earlier can cause the onset of the disease in later life, at a time when the employees would not necessarily have been insured against the risk.

The Court of Appeal held that an injury is "sustained" when the mesothelioma tumor grows and the disease is "contracted" when the victim is exposed to the asbestos dust. Therefore, a policy with disease "contracted" wording refers to the time when the disease was caused and as such the key date is the date of exposure.

This will put some mesothelioma sufferers outside their insurance policies and unable to claim if their exposure to asbestos was during a period where their policy included the "sustained" wording.

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The Regulations cover only the most serious cases of environmental damage and existing legislation will remain in place

Environmental Damage (Prevention and Remediation) Regulations 2009

The Regulations transpose the requirements of Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage into UK law. They introduce new obligations to ensure that the polluter pays for damage caused which have applied since 1st March 2009.

The Regulations cover only the most serious cases of environmental damage and existing legislation will remain in place. They apply to operators of economic activities which includes businesses and many charitable activities and public sector activities. Purely domestic or recreational activities are not covered.

Three types of environmental damage are covered:

- Damage to water – surface water and groundwater;
- Land damage – contamination by substances or organisms which creates a significant risk of adverse effects on human health; and
- Biodiversity damage - includes SSSIs (sites of special scientific interest) or species and habitats protected under EU legislation.

What are the obligations under the Regulations?

Operators are required to:

- take immediate steps to prevent environmental damage and notify the enforcing authority if there is an imminent threat of damage;
- prevent further damage if damage is being caused and there are reasonable grounds to believe that it is, or may become, environmental damage; and
- carry out remediation if environmental damage is caused.

Operators are liable regardless of fault in respect of activities listed in Schedule 2 of the Regulations. These activities include those requiring an environmental permit, discharges to water, use of pesticides, biocides or dangerous substances and transporting dangerous goods.

If damage is caused to SSSIs or EU protected species and habitats and the operator intended to cause damage or was negligent as to whether or not environmental damage would be caused, then he will also be liable, even if his activity is not listed in Schedule 2.

Are there any defences or exemptions?

The Regulations do not apply to damage caused by acts of terrorism, natural disasters or damage falling within certain international conventions.

It is also a defence to any requirement to remediate if the operator can show that the environmental damage was caused:

- as a result of compliance with an instruction from a public authority (provided this does not arise as a result of the operator's own activity);
- by an emission or event expressly authorised by, and fully in accordance with, the conditions of a Schedule 2 permit and provided the operator was not at fault or negligent;
- by an emission or manner of using a product which was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time and provided the operator was not at fault or negligent;
- by the actions of a third party, provided the operator took all appropriate safety measures.

What are the consequences of failure to comply?

Under the Regulations, it is not an offence to cause the damage, although it may be an offence under existing legislation. It is an offence to fail to comply with your obligations under the Regulations. For example, if you fail to prevent further environmental damage or if you fail to notify the enforcing authority that there is an imminent threat of damage. It will also be an offence to fail to comply with a remediation notice.

Failure to comply with the Regulations could lead to an unlimited fine or imprisonment up to 2 years or both. In April 2010, United Utilities were fined £14,000 for a water pollution incident in Southport. The EA felt that United Utilities could have avoided or considerably reduced the damage caused. As this was a serious offence, the Regulations applied and they had to remediate the damage to a level that would have existed if the damage had not occurred.

The Regulations have also been applied in a far wider context by Mid Devon District Council. The Council were the first local authority to use the Regulations in respect of a spill of kerosene heating oil at a residential property caused by a fuel company road tanker delivery. Residents, including children, quickly began to suffer nausea, headaches and sore throats due to the kerosene vapours. The council then worked closely with the company involved to ensure the correct remediation proposals were in place.

What should we do now?

Continual monitoring procedures should be in place to ensure that you can comply with the duty to self report. You may also wish to take additional measures to assess and manage any risks you pose to the environment. This will enable you to reduce the chances of you incurring liability under the Regulations.

Continual monitoring procedures should be in place to ensure that you can comply with the duty to self report.

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