SQUIRE SANDERS

ENVIRONMENTAL, SAFETY & HEALTH REVIEW

Autumn 2012

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INTRODUCTION

Welcome to the Autumn 2012 issue of the UK Environmental, Safety and Health Review prepared by the Squire Sanders' Environmental, Safety and Health Practice Group. Since our last issue, there have been a number of significant legislative developments, at both a European and a domestic level. As you will see in this issue, the coalition Government's deregulatory agenda (and the resulting reports from Lord Young and Professor Löfstedt) looks like it will have a significant impact on the regulatory landscape in the UK. As ever, we will strive to keep you up-to-date on these developments, as and when they occur.

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HSE's Fee for Intervention scheme to come into operation from 1 October 2012

From 1 October 2012, the Health and Safety Executive's ("HSE") controversial Fee for Intervention (FFI) scheme will come into effect. The thrust of FFI is to ensure that the HSE can recover its costs of carrying out its regulatory functions from those who are found to have committed a material breach of health and safety law.

FFI will be implemented via the Health and Safety (Fees) Regulations 2012 (the "Regulations"), which place a duty on the HSE to recover the costs of carrying out its regulatory functions. Prior to the Regulations coming into effect, the HSE has published much-awaited guidance on the application of FFI ("FFI Guidance") (http://www.hse.gov.uk/pubns/hse47.pdf), in order to provide a greater degree of clarity to those who will be subject to the regime.

Who will FFI apply to?

FFI will apply to health and safety dutyholders, namely those who currently have duties under the Health and Safety at Work etc Act 1974 and any regulations made under it, where the HSE is their enforcing authority. This will include employers, self-employed people who put others (including their employees or members of the public) at risk, and some individuals acting in a capacity other than as an employee (for example, partners in commercial partnerships). Notably, it will not include breaches by employees, and other enforcement bodies, such as local authorities, will not recover their costs under FFI.

What is a material breach?

The FFI scheme will only apply to material breaches of health and safety law. The FFI Guidance defines a material breach as when "*in the opinion of the HSE inspector, there is or has been a contravention of health and safety law that requires them to issue notice in writing of that opinion to the dutyholder*".This written notification can come in the form of a notification of contravention, an improvement or prohibition notice, or a prosecution, and it will have to make clear which contraventions are material breaches. Where inspectors merely give advice or warnings verbally, or written advice that is not about a contravention, FFI will not apply. Where the HSE pursue a prosecution, they will have to recover any subsequent costs incurred through the courts.

HSE inspectors will apply the FFI Guidance when deciding whether a dutyholder has committed a material breach, in addition to the principles established in the HSE's long-standing enforcement decision making frameworks, the *Enforcement Policy Statement* (http://www.hse.gov.uk/pubns/hse41.pdf) and the *Enforcement Management Model* (http://www.hse.gov.uk/enforce/emm.pdf). Consequently, the principles of proportionality, targeting "high risk" businesses, consistency, transparency and accountability, will still feature heavily in enforcement decisions.

The FFI Guidance provides some indicative examples of what would constitute a material breach, under four broad areas – health risks, safety risks, welfare breaches and management of health and safety risks. For example, asbestos is listed as a potential health risk. An example of a material breach in relation to asbestos would be the failure to address the results of an asbestos survey in an up-to-date management plan for asbestos-containing materials.

However, it should be noted that the FFI Guidance stresses that it is does not provide an exhaustive list of examples, nor do the examples given serve as a checklist of all the issues an inspector would cover on any visit.

What will FFI cost?

The HSE will charge an hourly rate of £124 when FFI commences in October, although this may be revised in the future. The HSE will only be able to recover costs that it "*reasonably incurs*". This includes all work to identify and remedy the breach and includes "*associated work*". The FFI Guidance provides an extensive list of what will fall under the sphere of "*associated work*". This includes preparing and serving improvement and prohibition notices; taking statements; gathering evidence and any follow-up work required to ensure compliance. Other costs, such as travel expenses and training of inspectors, will not be charged for separately, as they have already been accounted for in the hourly rate. FFI fees will also not be subject to VAT.

Invoices will usually be sent to the

dutyholder's workplace address every two months and will include a full breakdown of the activities or services being charged for and the time spent on each activity. A dedicated team will be able to assist with queries relating to invoices, rather than dutyholders having to address payment issues with HSE inspectors. The HSE envisages that some of the queries that may be made by dutyholders, in relation to their invoices, will include whether the work billed for was necessary and the time taken to regulate a material breach was reasonable.

Appealing FFI invoices

If dutyholders are not happy with the response received after any initial query, they can choose to formally dispute the whole invoice, or a specific part of it that they do not agree with. This will involve the dutyholder writing to the HSE (at *Health and Safety Executive, FFI Team, 6.4 Redgrave Court, Merton Road, Bootle, L20 7HS*), setting out the specific reasons why they believe the charge is not valid. Any dispute will initially be considered by a HSE senior manager, who is independent of the management chain responsible for the work at issue.

If necessary, any dispute will then be escalated to a panel of HSE staff and an independent representative to resolve the issue.

Notably, this disputes procedure, unlike the initial enquiry, will not be free and the HSE will be entitled to recover the costs of any dispute that is not upheld. This will be charged at the £124 hourly rate. In addition, fees will be repaid if an improvement or prohibition notice is subsequently cancelled after an appeal to an Employment Tribunal.

Savings or safety?

Given the Government's austerity drive, there is little surprise that there is a focus on transferring some of the cost of health and safety regulation from the public purse to businesses and organisations that break health and safety laws. The HSE have confirmed that FFI is forecast to raise between £37 and £39 million each year.

Crucial to the success of FFI, will be the maintenance of the bonds of trust and working relationships that have been built between dutyholders and HSE inspectors. Critics of the new cost-recovery regime believe it has been introduced as a way to bolster the HSE's stretched budget, rather than being motivated by a genuine desire to improve health and safety. Whether or not this is the case can only be assessed once those dutyholders, found to have committed material breaches post-October 2012, receive their first FFI invoices, most likely to be in December this year.

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RIDDOR consultations could see reporting duties shrink

The HSE has launched two consultations on the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 ("RIDDOR"). One seeks to simplify the reporting requirements under RIDDOR and the other contains proposals to exempt many of the self-employed from health and safety law. Both consultations are scheduled to end on 28 October 2012.

Revision of RIDDOR

Lord Young's recommendation, in his "*Common Sense Common Safety*" report (http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf), to extend to seven days from the previous three day milestone, the period before an injury or accident needs to be reported, has already been adopted by the Government and has been in force since April this year.

One of the conclusions of the Löfstedt review (http://www.dwp.gov.uk/docs/lofstedt-report.pdf) was that the categories of accident under RIDDOR were "*unnecessarily complicated*", leading to businesses making time-consuming decisions as to when to report accidents and incidents. This uncertainty leads to "*inconsistency of reporting between organisations*". Professor Löfstedt also noted that the current state of considerable under-reporting may be exacerbated by the HSE's Fee for Intervention scheme. As a result, RIDDOR and its associated guidance, were ear-marked for review.

The HSE's initial proposals (http://consultations.hse.gov.uk/gf2.ti/f/16770/444133.1/PDF/-/CD243.pdf) include the removal of four current reporting requirements. These are cases of occupational disease (other than those resulting from a work related exposure to a biological agent); non-fatal accidents to people not at work; dangerous occurrences outside of higher risk sectors or activities; and reporting of self-employed people of injuries or illness to themselves. The HSE has particularly defended the first category, citing the current poor level of reporting and, when information is received, it is often too late to be a "*reliable trigger for an investigation*". In addition, it feels that in a number of these areas, this data can be better obtained from other sources.

All deaths to workers and members of the public, as a result of an employer's activity, would still need to be reported, along with a simplified list of ten major injuries to workers. In addition, the majority of reports would continue be made via the HSE's online database if dutyholder's wished to do so.

Self-employed exemption

One of Professor Löfstedt's most controversial recommendations was to exempt from health and safety law (including the reporting obligations under RIDDOR), those self-employed whose work activities pose no potential risk of harm to others. The review stressed how the UK currently goes beyond EU requirements for the regulation of the self-employed.

Consequently, the HSE's consultation document (http://consultations.hse.gov.uk/gf2.ti/f/16802/442789.1/PDF/-/CD242%20Complete.pdf) lays out three options for implementing the recommendation, along with another option of retaining the current regime. The HSE favours exempting the self-employed who pose no potential risk of harm to others and who do not work in a high risk sector (as prescribed by the Government). These prescribed sectors would include the construction sector, agricultural activities, mining, offshore activities and gas fitting and installation. Described by the HSE as more "*prescriptive approach*", it would ensure sufficient coverage of high risk sectors and activities, ensuring standards are maintained in those industries where health and safety law is most warranted.

Drive to de-regulate

The HSE's proposed reduction of the reporting requirements under RIDDOR, and the deregulatory rationale articulated in Lord Young's and Professor Löfstedt's respective reports, clearly shows the Government are keen to follow through on their de-regulatory agenda. Businesses and dutyholders should take advantage of these consultations whilst they are ongoing, as they provide a golden opportunity to air their views on proposals which could lead to a marked reduction in their reporting requirements.

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HSE to review Approved Codes of Practice to provide clearer guidance to businesses

One of the recommendations of Professor Löfstedt's independent review of health and safety legislation, *'Reclaiming health and safety for all"* (http://www.dwp.gov.uk/docs/lofstedt-report.pdf), was for the Health and Safety Executive ("HSE") to review its Approved Codes of Practice ("ACOPs"), in order to provide clearer guidance to businesses.

The Löfstedt review recognised that ACOPs formed the key link between goal-setting legislation and guidance. However, it also reported that, whilst a wide range of stakeholders supported the principles of ACOPs and saw them as a crucial part of the system, many stakeholders recognised that there was room for improvement.

Consequently, the HSE dutifully launched a consultation of its ACOPs in June this year, which was scheduled to end on 14 September 2012 (http://www.hse.gov.uk/consult/condocs/cd241-acops.htm).

What are the changes?

The review aims to make sure that ACOPs are practical and proportionate, making it easier for employers to understand and meet their legal obligations.

Two main categories of changes were suggested in the consultation document:

- Proposals to revise, consolidate or withdraw ACOPs – to be delivered by the end of 2013,
- Proposals to make minor revisions or no changes to ACOPs - to be delivered by the end of 2014.

In a further move, aimed at improving simplification and understanding, there is a generic proposal to limit all ACOP documents to a maximum length of 32 pages, other than in exceptional circumstances.

Removal of Management of Health and Safety at Work ACOP ("MHS ACOP")

A significant change is the proposed removal of the existing MHS ACOP, which accompanies the Management of Health and Safety at Work Regulations 1999 (the "MHSWR"). The MHS ACOP came under scrutiny in both the Löfstedt review and in Lord Young's report "*Common Sense Common Safety"* (http://www.number10.gov.uk/wp-content/uploads/402906_CommonSense_acc.pdf).

The Löfstedt review felt that the MHS ACOP would benefit from a "*comprehensive review*", with particular attention directed towards "*what information is included and how it is presented (with an SME audience in mind)"*. Lord Young's report struck a similar note; it felt that there was a need to make the MHS ACOP more "*accessible for businesses*" and criticises it for a lack of user-friendliness.

These comments are significant, given that the existing ACOP provides a framework for practical management of health and safety. If dutyholders follow this advice, like other ACOPs, they will usually be deemed to be in compliance with the law. The HSE has taken on board the criticism and has admitted that, in most cases, there is no single recommended method of managing health and safety to be used to achieve compliance. Compliance will vary depending on the size and nature of a business and, consequently, the MHS ACOP fails to describe methods of compliance with the precision needed to allow dutyholders to be confident that they have complied with their legal obligations. As a result, the MHS ACOP will be replaced with more specific, updated guidance.

New ACOP for the Management of Health and Safety at Work

The HSE's proposed replacement for the existing MHS ACOP is a set of structured, user-friendly guidance documents. This will include a number of existing guidance documents (such as "*Health and Safety Made Simple*" (http://www.hse.gov.uk/pubns/indg449.pdf)), as well as revision of the guidance previously branded as "*Essentials of health and safety at work*" (http://www.hse.gov.uk/pubns/priced/essentials.pdf), the current "*Five steps to risk assessment*" (http://www.hse.gov.uk/pubns/indg163.pdf) and HSG65 (http://www.hseni.gov.uk/hsg65_successful_h_s_management.pdf). The HSE has stated that any remaining advice currently provided by the existing MHS ACOP would be carried across to these existing publications.

The current version of HSG 65 provides guidance and advice on good practice in health and safety management and promoting effective control through actively managing health and safety systematically. The HSE propose to publish a refreshed version of HSG 65 later this year, which will seek to understand the *'who, what, when, where and how'* of responsible health and safety management.

The new version will be tailored to fit the needs of individual organisations depending on their level of risk and complexity and also the knowledge of the user. The revised HSG 65 will then be incorporated into the set of core guidance on the fundamentals of health and safety, referred to above.

By adopting this approach, the HSE hopes to meet head on some of the criticisms of the Löfstedt and Lord Young reports, by providing comprehensive advice to businesses. This will be particularly aimed at SMEs and safety representatives, making it more tailored to their businesses and therefore easier for dutyholders to understand and meet their legal obligations.

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Are the CDM Regulations 2007 fit for purpose?

The Construction (Design and Management) Regulations 2007 ("CDM 2007") are a key piece of health and safety legislation, which apply to the majority of construction projects in the UK, regardless of their size. CDM 2007 has been under the policy spotlight for over a year and are currently under review.

One of the items on the coalition Government's policy agenda was a concerted drive to reduce regulation which they felt was unnecessarily hampering UK business. This drive was manifested in several forms and, unsurprisingly, CDM 2007 did not escape scrutiny.

The "Red Tape Challenge" and the Löfstedt review

In April 2011, the Cabinet Office launched the "Red Tape Challenge". This sought the views of the public, allowing them to suggest amendments to, or the removal of, existing legislation during the two year period of the initiative. Health and safety at work was named as one of six cross-cutting themes and was also the focus of a two week 'spotlight' period in July 2011. The comments to date have highlighted that, whilst CDM 2007 has improved on their predecessor, concerns remain. These include concerns that CDM 2007 adopts a "one-size-fits-all approach" to regulation and, worryingly, that a two-tier system of compliance has emerged, particularly in the construction industry.

As part of its commitment to reforming health and safety legislation, the Government also commissioned the Professor Lofstedt Report, as well as publishing a response to the report, outlining the steps it proposed to take by the end of 2014 (http://www.dwp.gov.uk/docs/lofstedt-report-response.pdf). The Löfstedt report noted that consolidating or revoking existing regulations, and providing clearer guidance through approved codes of practice ("ACoP"), could ease the regulatory burden on UK business. CDM 2007, and the associated ACoP, were singled out for review by April 2012, with an over-arching aim of ensuring a clearer expression of duties, reduced bureaucracy and better guidance for smaller construction projects.

The consequent independent evaluation of CDM 2007 produced by the Health and Safety Executive ("HSE") stated that, whilst the regulations had gone a long way to meeting their objectives and the benefit of complying with them outweigh the accompanying cost, concerns regarding the regulation of the construction industry remain (http://www.hse.gov.uk/research/rrpdf/rr845.pdf).

UK no longer going for gold in Europe

The HSE Board has agreed that work to reform CDM 2007 should begin in earnest. The path this reform will take will no doubt be influenced by the coalition Government's attitude to regulation. As has already been said in this Review, a deregulatory agenda is being pursued, in which the burden of EU legislation on business and enterprise is to be eased, and regulatory savings identified.

For example, the Government's implementation of EU directives is now governed by a set of guiding principles (http://www.bis.gov.uk/policies/bre/improving-eu-regulation/guiding-principles-eu-legislation). These specify that the text of EU directives should be copied out directly into UK law, except where this would adversely affect UK interests. This seeks to end gold-plating, which involves exceeding the requirements of EU legislation and avoids UK interpretations of European law unfairly restricting UK companies. The Government's "one in, one out" rule also prevents any Government department introducing new regulations that would impose a direct net cost on business, unless commensurate savings can be found by removing or modifying existing regulations.

The cumulative effect of this deregulatory stance points to a significant simplification of CDM 2007. The HSE Board has agreed that a reformed CDM 2007 should be based on a copy out of the Temporary or Mobile Construction Sites Directive ("TMCSD"). The HSE's Construction Industry Advisory Committee ("CONIAC") highlighted that CDM 2007 go beyond the TMCSD in a number of ways, with the most significant being in the area of competence, where evaluation has shown that industry response to the current requirements is often disproportionate and adds little value to health and safety (http://www.hse.gov.uk/aboutus/meetings/iacs/coniac/200612/m2-2012-2.pdf). CONIAC also noted their concern regarding the apparent two-tier approach to compliance in the construction industry. Whilst established and larger operators adopt a diligent attitude to complying with CDM 2007, smaller sites account for a disproportionate amount of serious and fatal accidents in the construction industry.

This reform will include consideration of the current ACoP and guidance framework. The challenge is to provide an effective regulatory framework for smaller construction sites which is more accessible and simpler than the current regime and prevent the adoption of an overly-bureaucratic approach, whilst also achieving the HSE Board's aim to avoid a reduction in safety standards.

When will the new regime be in place?

A revised draft package, with an accompanying impact assessment and consultation document, is to be submitted to the HSE Board by the end of 2012. A public consultation is likely to be held early in 2013, with a revised CDM 2007 coming into force by April 2014 at the earliest.

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Removal of cap on magistrates' court fines and abolition of defence cost orders

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") received Royal Assent on 1 May 2012. Two of the most striking, and significant changes, proposed under LASPO are the abolition of defence cost orders for companies and the removal of the current cap on fines that magistrates' courts can impose for criminal offences.

Removal of cap on magistrates' court fines

The changes proposed by LASPO can be summarised as follows:

- Fines payable on summary conviction, or for either way offences, which are currently capped at the statutory maximum of £5,000 or at a higher amount (eg. £20,000 for breaches of the general health and safety duties in the Health and Safety at Work Act 1974), will become a fine of an unlimited amount in England and Wales;
- The changes will apply to summary offences and either way offences set out in any primary and secondary legislation;
- Fines below £5,000 (standard scale or fixed fines) will continue to be capped; and
- Civil fines (fixed or variable) imposed by regulators will remain the same.

It is worth noting that LASPO gives the Secretary of State the power to disapply these changes and set new caps for specific legislation through secondary legislation. At the moment, there has been no indication that the Government has any plans to do so for environmental or health and safety legislation.

When are the changes coming into effect?

Whilst LASPO received Royal Assent on 1 May 2012, the removal of the cap on fines has yet to be commenced. A commencement order will be needed to bring the changes into force. The Ministry of Justice anticipates that the earliest these changes will be implemented is towards the end of 2012.

Rationale for the removal of existing caps

Given the removal of the existing caps will apply to all primary and secondary legislation, it will have a significant impact across a wide range of business sectors and legislation, including health and safety and environmental law. It continues the trend started by the Health and Safety (Offences) Act 2008, which increased the maximum penalty available to magistrates' courts for breaches of most health and safety offences from £5,000 to £20,000.

The primary aim behind the 2008 Act was to penalise breaches of health and safety legislation more severely, to hold those responsible for unsafe working practices to account and persuade duty holders to take their health and safety responsibilities seriously.

The removal of the cap was not part of the LASPO Bill when it was first laid before Parliament. The changes were tabled by the Ministry of Justice in October 2011 and they received the immediate support of the Labour Party. As a result, there was very little debate on the proposals during the Bill's progression through Parliament.

Given the lack of Parliamentary debate, the Ministry of Justice's *Equality Impact Assessment* provides the best insight into why the removal of the cap was inserted (http://www.justice.gov.uk/downloads/legislation/bills-acts/legal-aid-sentencing/eia-sentencing-punishment-laspo.pdf). To summarise, the coalition Government:

- wishes to encourage greater use of fines in the magistrates' courts;
- believes that the court which has heard all the evidence and facts about the offence, and the offender, is in the best position to make a just decision over sentencing. This will avoid the need to commit the case to the Crown Court solely because of the lack of sufficient sentencing powers; and
- feels that committing offences to the Crown Court for sentencing in either way offences (solely because of a lack of sentencing powers) can be bureaucratic, time consuming & costly.

The coalition Government recognises that the proposals will have a differential impact on commercial organisations. The assessment states that around 60% of all fines of £5,000 or more that are imposed in the magistrates' court are issued to commercial organisations. The Government believes it is those commercial organisations that currently commit summary offences and get fines of £5,000 or more who are most likely to be affected.

However, they feel this differential impact is justified as, generally, commercial organisations are likely to have greater funds at their disposal than individuals and are therefore more likely to be able to pay higher fines set by reference to their financial means. This fits with the aim to impose more proportionate fines on "*wealthy or corporate offenders and organisations*".

Commercial organisations and their directors, who have previously taken a less stringent approach to health and safety offences, because of the hitherto relatively minor level of the fines involved, should bear these changes in mind.

New Sentencing Guidelines?

Given the coalition Government's focus on imposing larger fines on corporate offenders, there is an obvious fear that some magistrates' courts may impose disproportionate fines on corporate bodies, because they are perceived to have "deeper pockets" than an individual.

The Ministry of Justice has announced that it will be discussing with the Sentencing Council the impact of the changes on current sentencing guidelines. Given that magistrates' courts will be able to impose unlimited fines when the changes come into effect, there is an obvious need for magistrates to be provided with updated guidance on what fines are appropriate in each given case. In the meantime, commercial organisations will wait with bated breath.

Abolition of defence cost orders for companies

The Government's impending reforms to the criminal costs regime, particularly those in relation to payments made out of central funds, mean that companies will be ineligible for defence cost orders. The Government has now laid legislation before Parliament, which will ensure that the controversial reforms will come into effect on 1 October.

The new criminal costs regime will have significant ramifications for companies. In the event that they are wrongly accused of a crime, pay for the costs of their own defence and are subsequently acquitted, companies will no longer be able to reclaim the costs they have incurred whilst proving their innocence, unless they can prove the prosecution has been improper, unreasonable or negligent.

Much like the removal of the cap on fines in the magistrates' courts, the Government has again appeared to adopt the attitude that companies can well afford to shoulder the financial burden. Regardless of whether this is the case, which is highly debatable, there are wider concerns regarding the divergence from the usual principles ensconced in our legal system, and those of natural justice. The abolition of defence cost orders appears to be aimed at forcing companies into a commercial decision to plead guilty, in order to avoid incurring large legal fees. Yet a company wrongly accused of a serious offence, such as Corporate Manslaughter, should not suffer financially as a result of exercising its right to defend itself and proving its innocence.

A delicate balance needs to be struck between, on the one hand, protecting the already stretched taxpayer from paying extravagant and unnecessary legal costs and, on the other, refunding defendants who have been wrongly accused. However, a blanket abolition of defence cost orders for companies certainly doesn't achieve the right balance.

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What does the recasting of the WEEE Directive mean in practice?

What is WEEE?

The first waste electrical and electronic equipment ("WEEE") Directive came into force in January 2007 and was the foundation of the EU's regime to reduce the amount of WEEE, by encouraging its separate collection, re-use, recycling and proper disposal. The WEEE Directive was unique for its focus on "extended producer responsibility", in which producers are required to take financial responsibility for the environmental impact of products that they place on the market. The intention is to force product designers to consider the eventual recycling of their products at the outset of the process.

The first WEEE Directive was implemented in the UK via the WEEE Regulations 2006 ("2006 Regulations"), which placed obligations on the producers and distributors of electrical and electronic equipment ("EEE") in the UK, to finance the costs of the collection, treatment, recovery and environmentally sound disposal of WEEE. The Environment Agency adopted the role of the main enforcement body under the 2006 Regulations. Because there is no exemption for small businesses under the Directive, the UK regime applies to all businesses, regardless of size.

The European Commission originally published its proposals to recast the WEEE Directive in December 2008. After years of disagreement regarding the precise scope of the recast Directive, it was formally adopted on the 7 June 2012 and came into force on 13 August 2012.

The new WEEE regime

The underlying purpose of the WEEE regime remains intact, namely to improve the collection of WEEE and reduce waste and promote the efficient use of resources. However, the recast Directive did introduce a number of changes, with some of the most important including:

Broader scope

Initial drafts of the Directive proposed widening the scope of the regime so that it would cover all EEE. Whilst the final version of the Directive does now encompass a wider spread of producers (by way of example, fluorescent lamps containing mercury will be caught by the regime for the first time), some EEE will continue to be excluded. For example, large-scale stationary industrial tools still fall outside of the remit of the WEEE Directive. The expanded sphere of EEE caught under the new regime, will be subject to the obligations within six years of the Directive becoming law (by mid-2018).

Introduction of higher collection targets

The previous regime required 4kg of EEE to be collected per person. Under the recast Directive, more ambitious collection targets require a notable increase in the volume of used EEE to be collected.

The current target will stay in place until 2016, after which the annual collection target will be set at 45% of the average weight of EEE placed on each Member State's national market. A further increase will kick in from 2019, with Member States having the choice to comply with one of two collection rate targets (either 65% of EEE placed on their national markets or 85% of EEE generated in their national market).

Firmer restrictions on the illegal export of WEEE

Stricter shipping rules will be introduced, in order to prevent producers from by-passing the WEEE regime by processing EEE in countries outside the EU, where the conditions are hazardous to the environment and workers. For example, proof must be given that EEE is being shipped for repair and reuse, rather than disposal.

Take-back obligations for small EEE distributors

In an extension of producer responsibility, large electrical goods retailers must provide for collection areas at retail shops for small EEE (for example, electronic toothbrushes), which are free of charge to end-users.

UK timetable for implementation

Members States must update their national legislation in order to comply with the recast Directive by 14 February 2014. It will be interesting to see what amendments are made to the 2006 Regulations in order to incorporate the changes ushered in by the new WEEE regime. In particular, it will be worth noting how heavily the Government relies on the views of the various stakeholders, including producers and distributors of EEE, compliance schemes and environmental groups, prior to amending the existing legislative framework.

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New requirement for companies to report greenhouse gas emissions

New regulations are to be introduced requiring quoted companies to report their greenhouse gas emissions in the directors' report of their annual report from April 2013. In 2016, the Government will decide whether to extend the mandatory reporting obligations to all large companies.

Such reports should enable investors to see which companies are effectively managing the hidden long-term costs of greenhouse gas emissions by allowing for transparency and a level playing field, as well as encouraging companies to manage and reduce their emissions and save money through reduced energy costs.

The Climate Change Act 2008 required the Government, by 6 April 2012 (a deadline that has been missed), to pass regulations requiring the directors' report of a company to include information about greenhouse gas emissions, or to lay a report before Parliament explaining why no such regulations have been made. A consultation was issued by the Department for the Environment, Food and Rural Affairs (DEFRA) on 11 May 2012 and following this consultation (which closed on 5 July 2011), DEFRA announced that it would introduce regulations (rather than pursue voluntary methods). The UK is the first country to make this reporting requirement mandatory.

Reports of emissions must be made on the same organisational basis as financial reports, including emissions from overseas activities where appropriate. There will be an ability for companies to explain why they have not reported emissions where data could not be collated.

The reports must include:

- All six greenhouse gases covered in the Kyoto Protocol where they are material.
- Material scope 1 (direct) and scope 2 (indirect from energy) emissions. Reporting of significant scope 3 (other indirect) emissions will be voluntary.
- An intensity ratio (comparing emissions with a business or financial indicators, e.g. sales revenue or square metres of floor space) of their choice.
- A base year of the company's choice and a statement if the base year has been recalculated.

The report must also state the method used to calculate emissions (by reference to guidance or another recognised standard or framework).

The initial consultation responses can be found at http://www.defra.gov.uk/consult/files/20120620-ghg-consult-sumresp.pdf.

DEFRA issued a further consultation on the draft regulations on 25 July 2012. This consultation will close on 17 October 2012 and more information can be found at http://www.defra.gov.uk/consult/2012/07/25/ghg-reporting-draft-regs/.

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CRC penalties show importance of compliance despite doubt over future of scheme

The CRC Energy Efficiency Scheme (CRC) is a mandatory emissions trading scheme, that came into force on 1 April 2010, for large businesses and public sector organisations in the UK. Organisations that must participate are those that, during the 2008 calendar year, had at least one half-hourly electricity meter, settled on the half hourly market and consumed at least 6,000 MWh (megawatt hours) through all half-hourly meters.

The current CRC scheme requires organisations to report on (through a 'footprint report' and an annual report by a yearly deadline (for 2011, the 29th July)) energy use and then buy and surrender CO2 allowances equating to those emissions. It then ranks organisations in a performance league table, theoretically providing an incentive to improve their energy efficiency.

However, the planned recycling of allowance sale revenues to participants that was to accompany the league table has been scrapped. The aim of CRC was that organisations would save enough on energy bills to offset the administrative costs of participating but the removal of the revenue recycling element has led many to label it a new tax.

The Environment Agency (EA) have recently taken action against companies who failed to meet the 2011 deadlines and have secured civil penalties totalling £99,000. Henkel, the company which makes Schwarzkopf hair products and Pritt Stick, paid £38,000 for breach of reporting provisions in CRC. Utility company, Saur (UK) Ltd, paid £41,000, engineering company, BI Group plc, £10,000 and manufacturing group, Tomkins Ltd, £10,000. Late reports submitted within 40 working days of the cut-off date can be subject to a maximum £5,000 penalty plus an escalating fine of £500 for each working day past the deadline. The EA has the discretion to modify penalties if an organisation has taken reasonable steps to rectify the problem once it became aware of it. This discretion was used to reduce the fines for BI Group plc and Tomkins Ltd.

The Government is in the process of making significant changes to CRC (which will apply from April 2013) in order to simplify it. The scheme is not popular. The Chancellor has said he will scrap CRC if the administrative burden cannot be reduced and replace it with a simpler environmental tax.

A consultation was published by the Government on 27 March 2012 to consider:

- the effectiveness of the CRC framework for driving energy efficiency in large private and public sector organisations, in the light of wider policy developments in other areas.
- The perceived complexity of the CRC scheme and hence the administrative burden on:
  - those organisations that are subject to the scheme
  - the administrators of the scheme
- Optimising the projected energy savings attributable to the CRC scheme.

This consultation closed on 28 June 2012 and the results are eagerly awaited.

Despite the uncertainly of CRC's future, given the fact that the EA is taking enforcement action in this area, it is important for organisations caught by CRC to ensure they continue to comply with it in its current form until any changes to the scheme come into force. Annual reports for the reporting year 2011/12 had to be submitted by 31st July 2012. Allowances had to be purchased and paid for by the same date (31 July 2012). Those allowances should strictly also be surrendered by 31 July, but the EA has indicated via an enforcement position that it will not penalise those who surrender them by the 28th September 2012.

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Making the economic case for forests

In February 2011, following a public outcry, the Government abandoned its proposals to sell off up to 15% of public forests by 2015. In the aftermath, the Independent Panel on Forestry was appointed to investigate the current state and future of forestry in England, and has recently published its findings. Apart from the more obvious benefits of woodlands to people (such as recreation) and wildlife (such as providing habitats), the panel's report highlights the advantages that a strong, well-managed networks of forests can bring to the economy.

The leisure industry has long appreciated the value of woodland in England: it is estimated that the New Forest alone supports £400 million worth of tourism activities. However, the report notes that woodlands present other economic opportunities. The global low carbon economy was worth over £3.2 trillion in 2009/10 and is projected to rise to £4 trillion by 2015. Wood from English forests provides a low carbon alternative as material for construction and other goods, and also as fuel. Furthermore, wood prices have been increasing for the last 5 years. It has been estimated that English forestry, wood-processing and paper industries already directly contribute £4.2 billion to the economy and employ around 110,000 people. Nevertheless, the UK is one of the world's largest net importers of wood and wood-based products, with 80% of wood used in the UK originating overseas. Therefore, the report notes that there significant opportunities for the creation of thousands of additional jobs in the forestry and wood processing sector.

The report recommends financial support from the new Green Investment Bank in the development of wood-based industries and technologies. It also advocates investment by local enterprise partnerships in the wood industry supply chain to create woodland enterprise zones in rural areas which would promote job creation.

Local authorities are urged to use their local plans to introduce a 'wood first' policy for construction projects to increase the use of wood in buildings, and to adopt planning strategies which complement wood and forestry business and woodland and leisure and tourism.

The idea of cutting down trees and processing timber as an environmentally-friendly activity may seem counter-intuitive, but the report does not favour deforestation. Instead, one of the key messages in the report is to underline the importance of the responsible management of woodland through replanting in order to maintain it as a sustainable resource. The hope is that, in future, not only will forests pay for themselves but that they will help with the wider economic regeneration of rural areas

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