

The Environmental Protection (Plastic Straws, Cotton Buds and Stirrers) (England) Regulations 2020

Enforcement and sanctions guidance

In England, local authorities have powers to take enforcement action to ensure that businesses comply with the restrictions on the supply of plastic straws, plastic drinks stirrers and plastic-stemmed cotton buds.

“Local authority” means, for the Metropolitan Borough of Barnsley, Barnsley Metropolitan Borough Council.

The Regulations do not specify which local authority may take enforcement action in a particular case. Thus, for example, where supplies are made by an online retailer or other distance seller, the local authority where the supplier is located and the local authority for any place to which supplies are made would each have power to take enforcement action.

The function of local authorities of enforcing these Regulations is a relevant function which is in scope of Primary Authority. Where a business has entered a Primary Authority partnership with a single local authority (the ‘primary authority’), they can obtain advice from their primary authority on complying with the requirements of the restriction on the supply of plastic straws, plastic drinks stirrers and plastic-stemmed cotton buds, and this advice will be respected by all local authorities.

The primary authority will be notified of any enforcement action by another local authority under the restriction on the supply of plastic straws, plastic drinks stirrers and plastic-stemmed cotton buds, provisions that are proposed by a local authority against the business, and may ‘block’ an enforcement action that is inconsistent with advice that it has given the business. Further information on Primary Authority is available at <https://www.gov.uk/guidance/local-regulation-primary-authority>.

How can we investigate?

We will investigate in accordance with the Regulations.

We will also have regard to the Regulators’ Code when exercising our responsibilities in this area.

When exercising powers of entry we will also act in accordance with the code of practice issued under Section 48 of the Protection of Freedoms Act 2012.

What actions can we take?

We will work in accordance with our enforcement policy.

In addition to the options listed in our enforcement policy, we are able to take the described actions or civil sanctions while enforcing the restriction on the supply of plastic straws, plastic drinks stirrers and plastic-stemmed cotton buds. This guidance details the criminal and civil sanctions relevant to these Regulations.

The Regulations create a criminal sanction for non-compliance with the ban which can result in prosecution. As an alternative to prosecution civil sanctions can be imposed in response to unlawful activity. Non-statutory options are also available to us. We will also give consideration to the recommendations given in the Regulators’ Code when deciding which enforcement action to take.

Civil Sanctions available: Variable Monetary Penalties, Compliance Notices, Enforcement Undertakings and Stop Notices.

Non-compliance penalties are also available for use if compliance notices or third party undertakings are not complied with.

For detailed enforcement and sanctions guidance see Annex 1.

Annex 1: Detailed enforcement and sanctions guidance

Detailed Enforcement Options

The powers of entry and examination can be found in provision 20 of the Regulations.

Option 1: Non-Statutory Approaches

We may give a warning or provide advice to the business in question. A warning is a written notification that states that we believe that an offence has been committed. This type of non-statutory option provides the recipient with the opportunity to correct their actions without escalation to civil or criminal sanctions.

Warnings may be given as:

- a warning letter; or
- a site warning that is normally issued on-site or otherwise as a result of a compliance visit to a site or activity.

It will be recorded and may, in the event of further non-compliance, influence the subsequent choice of sanction.

Option 2: Civil Sanctions

If we consider a civil sanction to be the most appropriate approach we have the option of using Variable Monetary Penalties (VMPs), Compliance Notices (CNs), Stop Notices (SNs) or accepting Enforcement Undertakings. Civil sanctions can be used alone or in combination. The actions the First-tier Tribunal may take are outlined in Annex 2.

Variable Monetary Penalties (VMP)

A VMP is a penalty fine which is used to remove illicit financial benefit achieved through gain or cost avoidance, and to deter future non-compliance. VMPs are proportionate monetary penalties which we may impose for the cases of non-compliance where we decide that prosecution is not in the public interest. They can be used as an alternative to prosecution if:

1. the offence is classed as medium;
2. the offence is classed as significant but there are strong mitigating factors.

For a VMP to be used the standard of proof required is beyond reasonable doubt.

A VMP may not be imposed on a person on more than one occasion in relation to the same act or omission.

Before serving a notice relating to a variable monetary penalty on a person, we may require the person to provide such information as is reasonable for the purpose of establishing the amount of any financial benefit arising as a result of that offence.

Protocol for serving a VMP

We are required to first serve a notice of intent which must include:

1. the grounds for the VMP (including the offences which are believed to be committed)
2. the amount to be paid along with justification (the amount may not be more than 10% of the annual turnover of the business)
3. the rights of the person to make representation and objections to us within 28 days of the notice being received
4. the circumstances in which we may not impose the VMP (for example, if the regulator accepts an enforcement undertaking and the person complies with the undertaking)
5. the opportunity to propose enforcement undertakings and third party undertakings, both of which are explained below.

Once the 28 days allowed for representations and objections has passed we will consider any that have been received and decide whether to impose the VMP as set out in the notice of intent, impose a VMP of a different amount, or impose any other requirement that we have the power to impose.

When imposing the final notice we must be satisfied that the person would be convicted of the offence which the notice relates to, and will not impose a final notice if we are not so satisfied.

We will consider any third party undertaking we accept when deciding whether to serve the final notice or not, and the amount of the VMP it imposes.

The final notice must include:

1. the grounds for imposing the penalty
2. the amount to be paid, which may not be more than 10% of the annual turnover of the business
3. how payment may be made
4. the period within which payment must be made (which must not be less than 28 days)
5. the rights of appeal
6. consequences of failing to comply with the notice.

When deciding the amount of the VMP we will consider the following aggravating factors:

- degree of blameworthiness
- history of non-compliance
- attitude to the non-compliance (e.g. lack of prompt action to eliminate or reduce the risk of damage resulting from regulatory non-compliance)
- foreseeability and the risk of environmental harm
- ignoring earlier advice, guidance and warnings.

And the following mitigating factors:

- preventative measures taken in advance of the offence

- co-operation with us
- voluntary reporting of regulatory non-compliance
- restoration undertaken
- attitude to offence and prompt response
- personal circumstances
- other case-specific mitigating factors.

The Government has published guidance about how to calculate the amount of a VMP on their website

This document provides details about the calculations, aggravating factors and deductions to consider when calculating a VMP

<https://webarchive.nationalarchives.gov.uk/20130403221233/http://archive.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf>

The grounds for appealing against the final notice are:

1. that the decision was based on an error of fact
2. the decision was wrong in law
3. the amount of the VMP is unreasonable
4. the decision is unreasonable for any other reason
5. any other reason.

Appeals against VMPs are made to the General Regulatory Chamber of the First-tier Tribunal. Appeals must be made so that they are received by the Chamber within 28 days of the date on which the notice was served.

The notice is suspended during the appeal.

If a VMP is imposed or a third party undertaking (TPU) is accepted then the person may not at any time be convicted of the offence that the VMP relates to.

If an individual does not pay they cannot be prosecuted for the original offence. Instead the debt can be recovered through the civil courts.

Compliance Notices

A Compliance Notice (CN) corrects a specific issue and tells a business the steps it must take to fix it. The notice must ensure that the recipient takes action to stop the noncompliance, addresses the underlying causes and comes back into compliance. These are often used where previous advice or guidance to encourage compliance was not been followed and a formal notice is necessary to ensure compliance.

The notice is appropriate when the aim of enforcement is to secure future compliance and prevent harm to the environment. We are unlikely to use them for offences classified as technical or minor but may do so if its attempts at obtaining voluntary future compliance have been ignored. We may consider their immediate use for offences classified as medium or significant.

The standard of proof required before a compliance notice can be served is beyond reasonable doubt.

If the business or person is uncooperative in informal discussions, a VMP may be issued alongside the CN.

Protocol for serving a CN

We will first serve a notice of intent which must include:

1. the grounds for the proposed compliance notice (including the suspected offences)
2. the requirements of the proposed compliance notice, including the actions required, why and by when
3. the circumstances in which we can not serve the compliance notice
4. how to make representations and objections to us, and the time limit for them,
5. the opportunity to propose Enforcement Undertakings or TPU.

The person may make representations and objections to us in relation to the proposed imposition of the compliance notice within 28 days beginning with the day on which the notice was received.

Once the 28 days allowed for representations and objections has passed we will consider any that have been received and decide whether to impose the requirements as set out in the notice of intent, impose a CN with modifications, or impose any other requirement that we have the power to impose.

When imposing the final notice we must be satisfied that the person would be convicted of the offence which the notice relates to, and will not impose a final notice if we are not so satisfied.

We will consider any TPUs we accept when deciding whether or not to serve the final notice.

The final notice must contain:

1. the grounds for imposing the notice
2. what compliance is required and the period within which it must be completed
3. rights of appeal
4. the consequences of failing to comply with the notice

The grounds for appealing against the final notice are:

- that the decision was based on an error of fact
- that the decision was wrong in law
- that the nature of the requirement is unreasonable
- that the decision was unreasonable for any other reason
- any other reason

Appeals against compliance notices are made to the General Regulatory Chamber of the First-tier Tribunal. Appeals must be made so that they are received by the Chamber within 28 days of the date on which the notice was served.

A criminal prosecution may be pursued if:

1. a CN is imposed on a person or a TPU is accepted from a person and no VMP has been imposed
2. the person fails to comply with the CN or TPU

The person is liable to be convicted of the offence for which the compliance notice was served.

Stop Notices

A Stop Notice (SN) is a notice prohibiting a person from carrying on the activity specified in the notice until the person has taken the steps outlined in the notice.

The regulator may issue a stop notice if it reasonably believes that:

1. the person is carrying on or is likely to carry on the activity
2. the activity being carried on or likely to be carried on is, or is likely to, cause or present a significant risk of causing serious harm to the environment (including health of animals)
3. the activity that is being carried on or is likely to be carried on by that person involves, or is likely to involve, the commission of an offence under the Regulations.

SNs are appropriate when we reasonably believe that the person is likely to continue the activity and the aim of enforcement is to stop them. We would be unlikely to issue SNs in response to technical or minor offences but will do so if all attempts at stopping an activity voluntarily have been exhausted. The immediate use of stop notices for offences classified as medium or significant should be considered. If an offence is classified as significant a prosecution is likely to accompany a SN.

A SN can be issued together with any other civil sanction, and SNs can also be served in combination with steps leading to a criminal prosecution.

Protocol for serving a Stop Notice

There is no requirement to serve a notice of intent when serving a SN, however a SN must include:

1. the grounds for serving the notice
2. the steps the person or business must take to comply with the notice
3. associated rights of appeal
4. the consequences of non-compliance

The recipient may decide to appeal. The grounds of an appeal are:

- that the decision was based on an error of fact
- that the decision was wrong in law
- that the decision was unreasonable
- that any step specified in the notice is unreasonable
- that the person has not committed the offence and would not have committed it had the notice not been served

- that the person would not, by any reason of defence, have been liable to be convicted of the offence had the SN not been served
- any other reason.

Appeals must be made so that they are received by the First-tier Tribunal within 28 days of the stop notice being served. SNs are not suspended during the appeal process.

A completion certificate must be issued by us after the service of an SN if we are satisfied that the person has taken the steps specified in the stop notice.

Once a completion certificate has been issued the stop notice ceases to have effect.

The person who received the SN can apply for the completion certificate at any time.

We will give a written notice of the decision of whether to issue a completion certificate within 14 days of receiving the request for the completion certificate.

If we decide not to issue the completion certificate then the person who made the application may appeal. Grounds of an appeal are:

- that the decision was based on an error of fact
- the decision was wrong in law
- the decision was unfair or unreasonable
- that the decision was wrong for any other reason.

There are also cases in which a person on whom a SN is served may be entitled to compensation for loss suffered as a result of the service of an SN or the refusal of a completion certificate. These are when:

- the SN is subsequently withdrawn or amended by the regulator because the decision to serve it was unreasonable or any step specified in the notice was unreasonable
- the person successfully appeals against the SN and the First-tier Tribunal finds that the service of the notice was unreasonable
- the person successfully appeals against the refusal of a completion certificate and the First-tier Tribunal finds that the refusal was unreasonable.

The person is also able to appeal against a decision by us not to award compensation or the amount of compensation awarded:

- on the grounds that our decision was unreasonable
- on the grounds that the amount offered was based on incorrect facts
- for any other reason.

Non-compliance with an SN is an offence and the persons/business is liable to summary conviction or conviction on indictment and the associate fine or imprisonment.

On summary conviction the person is liable to a fine or imprisonment for up to twelve months, or both. On conviction on indictment the person is liable to imprisonment for up to two years, a fine, or both.

Enforcement Undertakings

Enforcement Undertakings (EUs) are voluntary proposals presented to the enforcement agency as a means of making amends for non-compliance and its effects. If we accept the proposals then a legally binding voluntary agreement is entered in between us and the person who made the proposal. We may accept EUs from a person in a case where we have reasonable grounds to suspect that the person has committed an offence.

EUs provide an opportunity to recompense and, if completed, mean that the person can avoid civil or criminal sanctions for that particular case. They will only be accepted if there is reason to believe that the terms will be delivered. They are unlikely to be accepted if another sanction is being considered or is underway. Once accepted the person cannot be convicted for the offence to which the EU relates, unless there is non-compliance with the EU. They cannot be served in combination with a VMP, CN or SN.

An EU must specify one or more of the following:

- action to be taken to ensure that the offence does not reoccur
- action (including the payment of a sum of money) to be taken to benefit any person affected by the offence
- action to be taken that will secure benefit to the environment equivalent to restoration of what has been, or is likely to have been, damaged or destroyed by the commission of the offence.

It must also:

- specify the period within which the action must be completed
- include a statement that the undertaking is made in accordance with the Schedule to the Environmental Protection (Plastic Straws, Cotton Buds and Stirrers) (England) Regulations 2020
- include the terms of the undertaking
- include information as to how and when the person giving that undertaking is to be considered to have discharged the undertaking

The EU and its timeframe may be altered if both parties agree in writing.

Once the EU has been complied with we will issue a certificate to confirm this.

If we decide not to issue the completion certificate then the person who made the application may appeal.

Grounds of an appeal are:

- that the decision was based on an error of fact
- the decision was wrong in law
- the decision was unfair or unreasonable
- that the decision was wrong for any other reason.

Appeals are made to the First-tier Tribunal.

If the person does not comply with the EU then the regulator may serve a VMP, CN, noncompliance penalty or stop notice. We may also begin criminal proceedings.

If a person partially complies then this will be considered by us when considering the next sanction to impose.

If a criminal proceeding is begun then it must be started within 6 months of the date on which we notified the person who offered the EU that they have failed to comply with it.

Third Party Undertakings

When a person has received a notice of intent to impose a compliance notice or a variable monetary penalty they are able to offer a TPU. A TPU involves taking actions to benefit a third party affected by the offence. When such an undertaking is offered it is up to us to accept it and how to take the undertaking into account in making its sanctioning decision. TPUs must be offered before the final notice has been imposed. Measures can include directly taking action to reduce harm, or providing compensation.

Non-Compliance Penalties

A Non-Compliance Penalty (NCP) is a monetary penalty that we can impose when a business doesn't complete all of the steps required by a CN or TPU by the completion date. The NCP can be imposed even if a VMP was also imposed for the offence. NCPs can be served where there are strong mitigating factors, as failure to comply with a compliance notice or TPU would usually lead to prosecution. NCPs are written notices issued by us that impose a monetary penalty. The payment of the NCP does not preclude the prosecution of the person or business for the original offence if the person continues their non-compliance, as even once a NCP has been served the TPU and CN are still outstanding.

The person who has been served the NCP does not have to pay if the steps required by the CN or TPU are completed within the time specified for paying the NCP.

We determine the amount of the NCP. It may be up to 100% of the cost of fulfilling the requirements of the CN or TPU. If the notices have been partially complied with then the penalty will be reduced accordingly.

The NCP notice must include:

1. the grounds for imposing it
2. the amount to be paid
3. payment deadline
4. how to pay
5. consequences of failing to pay
6. rights of appeal
7. if appropriate: how payment can be avoided e.g. by a future deadline by which to comply with the original CN or TPU

An appeal can be made to the First-Tier Tribunal. The grounds for appeal are:

- the decision to serve the notice was based on an error of fact
- the decision was wrong in law

- the decision was unfair or unreasonable for any reason
- the amount of the penalty was unreasonable
- any other reason.

The notice imposing the NCP is suspended during the appeal. If the penalty is not paid we can recover the amount through the civil courts.

Option 3 – Criminal Sanctions

The sanction of prosecution is available to us.

If it is decided that a criminal sanction is appropriate the case must be assessed in accordance with the requirements of the Code for Crown Prosecutors before commencing a prosecution.

A prosecution should only be pursued for an offence under the Regulations if we believe that the circumstances of the offence warrant this response. A prosecution should usually be pursued if a person who has been given a SN, CN or EU does not comply with it.

Criminal proceedings may not be brought if more than 3 years have elapsed since the commission of an offence under regulation 3. Information relating to an offence pursuant to regulation 3 must be tried within 12 months of it coming to the knowledge of the prosecutor.

The factors which must be considered when deciding on the type of sanction to carry out are vast. The circumstances of the offence should be considered, as should the outcome that is desired.

Listed are some factors to consider:

- intent: an offence committed wilfully or due to gross negligence is more likely to result in prosecution than one committed by accident or genuine mistake (which may be dealt with by warning, advice, guidance or a civil sanction)
- foreseeability: not taking precautions to avoid a foreseeable breach is likely to result in a civil sanction rather than advice, guidance or a warning
- environmental effect
- nature of the offence
- financial implications
- deterrent effect
- previous history
- attitude of the offender
- personal circumstance
- serious offences: when criminality, gross negligence or reckless behaviour or the seriousness of an offence makes it a topic which is of interest to the public then a prosecution will usually be pursued.
- minor breaches
- repeat offending
- failure to comply with a notice.

How we recover our costs

We can take action to recover our costs of imposing a VMP or CN including:

- investigation costs
- administration costs
- costs of obtaining expert advice (including legal advice).

When recovering costs, we will send an 'enforcement costs recovery notice', which states:

- the grounds for the enforcement cost recovery notice
- how much the business must pay
- how to pay
- when to pay (within 28 days or more from when the business receives the notice)
- the businesses right of appeal
- the consequences of failure to pay by the due date.

We will provide a detailed breakdown of the costs. A business doesn't have to pay those it can show to have been unnecessary.

Appeals against enforcement cost recovery notices may be made against:

- our decision to impose the requirement to pay costs
- our decision as to the amount of those costs
- any other reasons

Appeals are to be made to the First-tier Tribunal. The notice will be suspended while the appeals is pending a decision.

How we recover payments

We will recover VMPs and NCPs as if they were payable under a court order.

Annex 2: First-tier Tribunal actions

The First-tier Tribunal may in relation to the imposition of a requirement or service of a notice under this Schedule –

- withdraw the requirement or notice
- confirm the requirement or notice
- vary the requirement or notice
- take such steps as we could have taken in relation to the act or omission giving rise to the requirement or notice, or
- remit the decision whether to confirm the requirement or notice or any matter relation to that decision to us.