



Market Mechanisms in Environmental Regulation: An invitation to litigate?

The shift in environmental regulation over the past decade from command and control mechanisms to more innovative approaches such as market mechanisms is often lauded as a more business friendly approach, but the other side of the coin is that the implementing regulations themselves are often complex and difficult to interpret. As a result, there can often be disputes and even litigation on how the mechanisms are intended to operate.

The REPIC litigation on the operation of the WEEE Regulations 2006 is a good example (*R. (on the application of REPIC Ltd) v. Secretary of State for Business Enterprise and Regulatory Reform and Others* [2010] Env. L.R. 24). When the judicial review came before the Court, there were no fewer than six advocates representing differing views held by three producer compliance schemes, the Environment Agency, SEPA and the Secretary of State. The case provides helpful guidance on the operation of producer compliance schemes under the WEEE Regulations and clarifies that schemes which intentionally over-collect WEEE to sell evidence of compliance to other schemes at the end of the compliance period are unlawful. It is also of wider interest because it demonstrates the difficulties that businesses can face when attempting to interpret these complex areas of regulation and provides a useful reminder of the discretion permitted to regulators in exercising their enforcement powers.

The application for judicial review was commenced by REPIC Limited, a not-for-profit producer compliance scheme operated by producers of EEE, against the Secretary of State for Business, Enterprise and Regulatory Reform and the Environment Agency. The Claimant was seeking a declaration that other schemes which had deliberately over-collected WEEE during the first two compliance periods were in breach of the obligations under the WEEE Regulations and accordingly that the Environment

Agency and the Secretary of State had acted unlawfully in failing to take enforcement action against those schemes. The matter came before Wyn Williams J in the Administrative Court in the Summer of 2009. The Scottish regulator, SEPA, and two of the schemes which had intentionally over-collected WEEE during the compliance periods in question, were included in the proceedings as interested parties.

Wyn Williams J noted that the WEEE Regulations dictated that a scheme had to have a viable plan for the collection of an amount of WEEE "equivalent" to the amount of WEEE for which it was to be responsible for financing. It was beyond doubt that a scheme that did not produce a viable plan to collect sufficient WEEE would be in breach. The question was whether the word "equivalent" meant that schemes which planned to over-collect WEEE would also be in breach of the WEEE Regulations. Wyn Williams J held that "equivalent" meant "no more or no less" than was necessary to meet its obligations. Accordingly, schemes that deliberately planned to over-collect WEEE in order to generate income from the sale of evidence of compliance would be in breach of the WEEE Regulations. Wyn Williams J held that trading allowances was permissible "at the margins", to adjust for over-collection or under-collection that is the inevitable result of an inability to predict exactly how much WEEE would be required despite careful planning, but made it clear that the WEEE Regulations did not permit deliberate over-collection for the purposes of trading evidence of compliance. The impact of this decision, implicit in the judgment, is that the producer compliance schemes that had deliberately over-collected (of which two schemes were interested parties in the litigation) had breached the WEEE Regulations and therefore committed a criminal offence.

Wyn Williams J was then asked to consider whether the failure of the regulator to take enforcement action was itself unlawful. The Secretary of State, the Environment Agency

and SEPA had all concurred with REPIC that a deliberate plan to over-collect WEEE was a breach of the Regulations. However, the regulators had decided that the first compliance period should be a period of "bedding in" and had not commenced prosecutions or issued enforcement notices against any scheme whether for over- or under-collection. No decision had been taken about enforcement action for the second compliance period, which had only just concluded when the judicial review proceedings had been filed.

Wyn Williams J emphasised that enforcement covered a wide spectrum of actions, from warning letters through to prosecution. Therefore, warning letters sent to schemes that had either under-collected or over-collected had been a form of enforcement. The question before the Court was whether the choice of enforcement action, and in particular the failure by the regulators to prosecute or issue an enforcement notice, had been unlawful.

Acknowledging that there was a wide discretion available to regulators, Wyn Williams J held that the failure to prosecute or issue an enforcement notice was not unlawful because the claimant had failed to prove that the action of the regulators was unreasonable or irrational at domestic law. The further argument advanced by the claimant that failure to prosecute or issue an enforcement notice was a breach of the European Community legal principle of equal treatment was also rejected on the grounds that the enforcement response was both consistent and rational and thus satisfied EU principles.

Wyn Williams J was also asked to decide if the WEEE Directive had been lawfully transposed into domestic law by the Regulations and concluded that there was nothing in the Regulations that was inconsistent with the Directive.

The WEEE Regulations are just one or several regimes for producer responsibility for waste streams, all of which have nuances and subtleties in their operation, and beyond waste there are other environmental regulations creating complex regimes such as the EU ETS for greenhouse gas trading and the new Carbon Reduction Commitment Energy Efficiency Scheme. Many of these regimes have come under serious criticism from the business community and the legal profession because they are difficult to interpret and, often, leave a number of questions unanswered. Arguments, disputes and, ultimately, litigation, will not be far behind.

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