

Local Authority guidance: The Environmental Protection (Plastic Straws, Cotton Buds and Stirrers) (England) Regulations 2020

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Contents

Introduction	4
Scope	5
Plastic definition	5
Supply and offering to supply	5
End user	5
Exemptions	5
Identifying single-use plastic straws, plastic stemmed cotton buds and plastic drink stirrers and applying the restriction of supply	7
Plastic drinking straws	7
Exemption: registered pharmacies	7
Exemption: catering establishments	7
Exemption: relevant devices and medical purposes	7
Exemption: packaging	8
Exemption: other establishments	8
Alternatives	8
Plastic stemmed cotton buds	9
Exemption: relevant devices and medical purposes	9
Exemption: forensic purposes	9
Exemption: scientific purposes	9
Alternatives	9
Plastic drink stirrers	10
Enforcement and sanctions guidance	11
Who is responsible for enforcement?	11
How can we investigate?	11
What actions can we take?	11
Annex 1: Detailed enforcement and sanctions guidance	13
Detailed Enforcement Options	13
Option 1: Non-Statutory Approaches	13
Option 2: Civil Sanctions	13
Variable Monetary Penalties (VMP)	13
Protocol for serving a VMP	13
Compliance Notices	15
Stop Notices	17
Protocol for serving a Stop Notice	17
Enforcement Undertakings	19
Third Party Undertakings	20

Non-Compliance Penalties.....	20
Option 3 – Criminal Sanctions	21
How we recover our costs.....	22
How we recover payments.....	22
Annex 2: First-tier Tribunal actions.....	23

DRAFT

Introduction

A restriction on the supply of plastic straws, plastic drinks stirrers and plastic-stemmed cotton buds in England will come into force from the 1st October 2020, in order to prevent pollution of the environment and/or harm to the health of humans and animals.

Plastics are strong, durable and versatile materials, bringing many economic and environmental benefits. For example, plastic packaging can prolong the shelf life of food products and the lightness of plastic reduces the fuel costs, and therefore carbon impact, of transporting goods compared to other packaging formats. However, plastics have become a global environmental issue, as reuse and recycling has not kept up with production, causing them to be disposed of incorrectly. On current trends, it is predicted there will be a three-fold increase in the amount of plastic in the sea between 2015 and 2025.

Plastic straws, cotton buds and drink stirrers are not commonly recycled or re-used, causing multiple environmental harms particularly when they are discarded incorrectly. Marine litter has come to the fore as a major challenge for society, and the effect that plastic is having both in the terrestrial environment and in the air is still being researched. Whilst plastic has become ingrained in modern society, plastic pollution has become ubiquitous, particularly in the marine environment, posing major threats such as harming marine life, impacting commercial fish stocks and degrading important habitats.

These negative costs are experienced across society and are not always accounted for within the market price of these items. Providers of these items do not have incentives to cover these externality costs. Intervention is therefore required in order to shift the market away from these single-use plastic products to reusable or less environmentally damaging alternatives which already exist.

On 22nd May 2019 2016 the Government announced its intention to restrict the supply of plastic straws, cotton buds and plastic drink stirrers in England. The restrictions are implemented by the Environmental Protection (Plastic Straws, Cotton Buds and Stirrers) (England) Regulations 2020 which are available to view on legislation.gov.uk, along with the accompanying Explanatory Memorandum

Single-use plastic drinking straws and cotton buds do, however, have a number of vital medical and scientific uses where the properties offered by plastic cannot currently be matched by the available alternatives. Therefore, there are exemptions in these regulations for plastic straws and cotton buds for medical, scientific, and forensic purposes. There are no exemptions for plastic drinks stirrers.

The Environmental Protection (Plastic Straws, Cotton Buds and Stirrers) (England) Regulations 2020 are made under powers in the Environmental Protection Act 1990 and the Regulatory Enforcement and Sanctions Act 2008.¹ The Secretary of State has designated local authorities as the Regulator, and provision has been made for the use of civil sanctions as an alternative to criminal sanctions.

¹ The Secretary of State makes these Regulations in exercise of the powers conferred by section 140(1)(b) and (c), (3)(c) and (d) and (9) of the Environmental Protection Act 1990(1) (“the 1990 Act”) and section 62(2) of the Regulatory Enforcement and Sanctions Act 2008(2) (“the 2008 Act”).

Scope

The Regulations make it an offence to:

- Supply or offer to supply single use plastic straws to any end user, with exemptions.
- Supply or offer to supply single use plastic stemmed cotton buds to any end user, with exemptions.
- Supply or offer to supply single use plastic drink stirrers.

The restrictions on the supply of straws, cotton buds and stirrers apply in relation to England only.

The offences apply only to persons acting in the course of a business. They do not apply, for example, to individuals supplying the restricted items to other family members or to house guests.

Plastic definition

Plastic means a material consisting of polymer (as defined in Article 3(5) of Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)) which means a substance consisting of molecules characterised by the sequence of one or more types of monomer units. Such molecules must be distributed over a range of molecular weights wherein differences in the molecular weight are primarily attributable to differences in the number of monomer units. To which additives or other substances may have been added, and which can function as a main structural component of final products, with the exception of natural polymers that have not been chemically modified.

Supply and offering to supply

Supply means supply, whether by way of sale or not.

A person will be taken to be offering to supply an item if, for example, they:

- display the item for sale in a shop or on a market stall;
- advertise the item for sale in print or online; or
- offer to supply the item to another person verbally.

End user

An end user is any person to whom the product is supplied. For the purposes of these restrictions, an end user does not include anyone obtaining a product for:

- the purpose of supplying it another person in the course of a business;
- the purpose of a manufacturing process;
- or in the case of a single use plastic straw, supplying them within catering establishments, care homes, schools, premises used for early years provision, prisons or other places of detention.

Exemptions

These exemptions stem from extensive engagement with relevant stakeholders and responses to the consultation. From these responses, it became clear that plastic

straws are essential for people with disabilities or accessibility needs. The exemptions will ensure that plastic straws will continue to be available for use as medical devices and for people with disabilities who rely on them to eat and drink safely and independently.

Plastic straws will continue to be available as medical devices and packaging. They will also still be able to be supplied through registered pharmacies (in store and online) and in catering establishments on demand only. Some other establishments, such as care homes, prisons, and educational establishments, will also be able to provide plastic straws for the same purpose.

The supply of plastic-stemmed cotton buds will be exempt for medical, scientific, and forensic purposes due to the importance of the use of plastic in ensuring the item provides the requisite strength, stiffness, hygiene, and reduced contamination risk.

There are no exemptions for plastic drinks stirrers.

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Identifying single-use plastic straws, plastic stemmed cotton buds and plastic drink stirrers and applying the restriction of supply

Plastic drinking straws

A single-use plastic straw means a straw that is made wholly or partly from plastic and that is not designed or intended to be re-used.

The restrictions that come into force on [date] apply to all single-use plastic straws except for straws which are attached to the packaging of a drink product and intended to be used to consume that drink. A prohibition on the supply of drink products with attached plastic straws will come into force on 3rd July 2021.

Exemption: registered pharmacies

The restriction on the supply of single-use plastics straws does not apply to the supply of single-use plastic straws by a retail pharmacy business, either at a registered pharmacy or by means of online or other distance selling arrangements, provided that the following conditions are met:

- straws must not be advertised to customers by the retail pharmacy business
- if straws are supplied at a registered pharmacy they must not be kept in a place where they are visible to customers, or where customers can access them, and they must not be offered or provided to a customer unless the customer has requested them.

The condition that straws must not be advertised does not prohibit them from being displayed for sale online.

Exemption: catering establishments

The restriction on the supply of single-use plastic straws does not apply to the supply of single-use plastic straws by a catering establishment together with food or drink which is supplied for immediate consumption, provided that the following conditions are met:

- straws must not be kept in a place where they are visible to customers, or where customers can access them
- straws can only be provided to customers that request them
- straws cannot be offered verbally or in writing to customers.

A catering establishment means a restaurant, canteen, club, public house or similar establishment (including a vehicle or a fixed or mobile stall) which supplies food or drink that is ready for consumption without further preparation.

Exemption: relevant devices and medical purposes

The restriction on the supply of single-use plastic straws does not apply to the supply of single-use plastic straws that are relevant devices, or that are supplied:

- for use for medical purposes by or under the direction of a health professional, or
- by a health professional for medical purposes.

A 'relevant device' is defined by reference to the Medical Devices Regulations 2002; in essence, it means a medical device or an accessory to a medical device.

Health professionals includes registered medical practitioners, registered nurses or midwives, registered dentists, registered pharmacists, registered pharmacy technicians, registered dieticians, occupational therapists and physiotherapists.

Use for medical purposes means using plastic straws for the purposes of preventative medicine, medical diagnosis, medical research and the provision of medical care and treatment.

Exemption: packaging

The restriction of supply of single-use plastic straws does not apply to the supply of single-use plastic straws that are packaging. For example some medicines are dispensed through straws and are supplied in pre-filled straws.

Exemption: other establishments

The restrictions on the supply of single-use plastic straws do not apply to the supply of single-use plastic straws in:

- care homes
- premises used for early years provision;
- schools
- prisons or other places of detention.

This is to ensure that end-users in these establishments that require single-use plastic straws are still able to access them in a safe and convenient manner. Other than where this requirement exists, Defra expects these establishments and their suppliers to switch to alternatives to single-use plastic straws.

Alternatives

Some paper straws contain adhesives containing some plastics within the inner lining of the straws. These are acceptable to use as alternatives to single-use plastic drinking straws. Straws made from bio-based or biodegradable plastics are not acceptable as alternatives under these regulations.

Plastic stemmed cotton buds

A single-use plastic stemmed cotton bud means an item that consists of a rod made wholly or partly of plastic with cotton wrapped around one or both ends and that is not designed or intended to be re-used.

Exemption: relevant devices and medical purposes

The restriction on the supply of single-use plastic stemmed cotton buds does not apply to the supply of single-use plastic stemmed cotton buds that are relevant devices, or that are supplied:

- for use for medical purposes by or under the direction of a health professional, or
- by a health professional for medical purposes.

A 'relevant device' is defined by reference to the Medical Devices Regulations 2002; in essence, it means a medical device or an accessory to a medical device.

Health professionals include registered medical practitioners, registered nurses or midwives, registered dentists, registered pharmacists, registered pharmacy technicians, registered dietitians, occupational therapists and physiotherapists.

Use for medical purposes means using cotton buds for the purposes of preventative medicine, medical diagnosis, medical research and the provision of medical care and treatment.

Exemption: forensic purposes

The restriction on the supply of single-use plastic stemmed cotton buds does not apply to the supply of single-use plastic stemmed cotton buds to a forensic service provider.

Exemption: scientific purposes

The restriction on the supply of single-use plastic stemmed cotton buds does not apply to the supply of single-use plastic stemmed cotton buds for scientific purposes.

Scientific purposes means diagnostic, educational or research purposes.

Alternatives

Cotton buds made from bio-based or biodegradable plastics are not acceptable as alternatives under these regulations.

Plastic drink stirrers

A single-use plastic drink stirrer means an implement made partly or wholly of plastic designed and intended for stirring drinks.

There are no exemptions to the restriction on the supply of single-use plastic drink stirrers.

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Enforcement and sanctions guidance

Who is responsible for enforcement?

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

“Local authority” means, in relation to:

- (a) the City of London, the Common Council for the City of London;
- (b) an area in the rest of London, the London borough council for that area;
- (c) the Isles of Scilly, the Council of the Isles of Scilly;
- (d) an area in the rest of England, the county council for that area or where there is no county council for that area, the district council for that area.

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?

The regulator must investigate in accordance with the Regulations.

The regulator will also have regard to the Regulators’ Code when exercising their responsibilities in this area.

When exercising powers of entry the regulator must 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?

The regulator must work in accordance with the enforcement policy of the Local Authority they work for. In addition to the options listed in their Local Authority’s enforcement policy, regulators 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 the regulator. The regulator should 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.

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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

The regulator may give a warning or provide advice to the business in question. A warning is a written notification that states that the regulator believes that an offence has been committed. This type of non-statutory option provides the offender 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 the regulator considers a civil sanction to be the most appropriate approach they 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 the regulator may impose for the cases of non-compliance where the regulator decides 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, the regulator 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

The regulator must 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 the regulator within 28 days of the notice being received
4. the circumstances in which the regulator 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 the regulator must 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 the regulator has the power to impose.

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

The regulator must consider any third party undertaking it accepts 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 the regulator should 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 the regulator
- 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 offender takes action to stop the non-compliance, 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. The regulator would be 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. The regulator 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

The regulator must 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
4. the circumstances in which the regulator may not serve the compliance notice
5. how to make representations and objections to the regulator, and the time limit for them,
6. the opportunity to propose Enforcement Undertakings or TPU.

The person may make representations and objections to the regulator 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 the regulator must 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 the regulator has the power to impose.

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

The regulator must consider any TPUs it accepts 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 the regulator reasonably believes that the person is likely to continue the activity and the aim of enforcement is to stop them. The regulator 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 the regulator after the service of an SN if they 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.

The regulator must 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 the regulator decides 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 the regulator not to award compensation or the amount of compensation awarded:

- on the grounds that the regulator's 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 the regulator accepts the proposals then a legally binding voluntary agreement is entered in between the regulator and the person who made the proposal. The regulator may accept EUs from a person in a case where the regulator has 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 the regulator must issue a certificate to confirm this.

If the regulator decides 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, non-compliance penalty or stop notice. The regulator may also begin criminal proceedings.

If a person partially complies then this must be considered by the regulator 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 the regulator 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 the regulator 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 the regulator 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 the regulator that imposes 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.

The regulator determines 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 the regulator can recover the amount through the civil courts.

Option 3 – Criminal Sanctions

The sanction of prosecution is available to the regulator.

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 the regulator believes 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

The regulator can take action to recover the costs of imposing a VMP or CN including:

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

When recovering costs, the regulator should 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.

The regulator must be able to 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:

- the decision of the regulator to impose the requirement to pay costs
- the decision of the regulator 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

The regulator should 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 the regulator 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 the regulator.

DRAFT