

ENFORCEMENT STRATEGY OF THE ENVIRONMENTAL PROTECTION AGENCY

Written by Abha Patel

2nd year LLB student, Symbiosis Law School, Pune

INTRODUCTION

Imagine if you were to wake up one morning and notice that the empty patch of land by your home is now going to be developed into a cement factory. You wonder who gave them the permission for this and what about the possible emissions from such a factory and the repercussions on the environment and human health. A large scale activity like this along with the location is enough for the developer to require a license to carry out such a project. In order to seek information one may consider going to the Environmental Protection Agency [hereinafter – EPA].

The EPA is a statutory body formulated with an objective of sustainable development along with the protection of the environment. Established in July, 1993 under the EPA Act, 1922, it deals with issues like that of licensing, enforcement of environmental laws, in-depth study of various environmental factors in relation to effects of various projects on the environment.

The EPA consists of a board with one director general who is accompanied by four directors and they are assisted by an advisory committee comprising of twelve members who not only discuss important issues but also advise the board on various issues.

For ease of access of information the EPA is divided on geographical as well as thematic basis with four departments under them who focus on various issues. They also maintain a register and the License Enforcement Access Portal [hereinafter- LEAP] for public access to information. However there are various other organizations working with similar objectives and for coherence and co-ordination of work the EPA also has the

Network for Ireland's Environments Inspection [hereinafter- NIECE]. Most importantly the EPA, under it has the Office of Environmental Enforcement [hereinafter- OEE] which enforces the granted licenses and the inspectors investigate environmental effects of such projects along with compliance of laws thereafter. They also bear the responsibility to look after the compliance and enforcement of the existing environmental laws in place.¹

ENFORCEMENT STRATEGIES

The OEE which as the name suggest looks into the enforcement aspect of the various environment laws. The OEE follows three kinds of strategies which are the deterrence, compliance and risk based methods. The deterrence method as the name suggests is more assertive in nature and possess a strong legal basis wherein strict laws are applied along with strict legal action and punishments as and where it may be applicable. The compliance method however is much milder in nature and can be viewed as more 'persuasive' in nature in comparison to the deterrence method.

However it must be noted that the ultimate objective of both the methods is the same but the means of achieving these objectives are the basic grounds where these methods differ from one another.²

The common question which arises in a person's mind while having to choose between the two is; *when to punish and when to persuade?*³

There have been many contentions and arguments by various scholars as to which would be more effective and appropriate method. Many have argued that the compliance method is more effective as it is harmonious in nature and comparatively inexpensive as compared to the deterrence method⁴ and thus more effective in the long run. However

¹ EPA, Environmental inspection plan, inspection plan for industrial emissions directive, integrated pollution control, and waste licensed installations. September, 2014.

² Abbot C, Enforcing Pollution control Regulation, page 43.

³ Ayres and Braithwaite, Abbot C, Enforcing Pollution Control Regulation, page 44.

⁴ R Baldwin and M Cave, understanding Regulation: theory, Strategy and practice (Oxford, OUP 1999) 98.

on the other hand it has been extensively argued that deterrence has in fact brought about long lasting changes and the social disapproval to a certain conduct will also foster positive social pressure to comply.⁵

However there are always two sides to every coin and likewise both the methods have their negative aspects as well which must be weighed effectively. While the deterrence method may be seen as overly strong and hard hitting, the compliance method may be seen as a rather naïve⁶ method where the presumption of an offender being innocent is present method and the fact that the compliance method is mild there is a higher risk of it not being taken seriously.

Thus, in my opinion, it is essential that it be understood that every case is unique and thus in order to have an effective system in place there must be a system formulated which is the amalgamation of both the deterrence as well as the compliance system in order to effectively enforce laws in a fair and just manner which is not too harsh but not too mild either. For this purpose one may also refer to the game theory in economics as well as the works of John Braithwaite and Ian Ayres.⁷

On the other hand we also have the risk based system which actually looks to strike a balance between any enforcement action as well as the possible risks to human health or the environment. The risk based and targeted system as one would call it actually goes on to look in various aspects and study or analyze the same in order to decipher the activities or projects which cause the maximum amount of harm to the environment and human health along with those that are relatively less harmful and tackle the extremely harmful ones first. However one must note that the projects causing lesser damage in comparison will not be neglected merely because they were minor breaches of a

⁵ Abbot C, Enforcing Pollution control Regulation, page 43.

⁶ Abbot C, Enforcing Pollution control Regulation, page 43.

⁷ Abbot C, Enforcing Pollution control Regulation, page 44.

regulation. It must also be noted that the risk based target system uses 'sanctions' in form of punishments as opposed to that of deterrence and compliance.⁸

Whilst deciding what enforcement action to take the EPA looks at various factors such as; seriousness of the breach and non-compliance along with the duration of such non-compliance, evidence for intention, the history of compliance and non-compliance, financial gains due to non-compliance, and the conduct after such non-compliance is discovered.⁹ Based on the above mentioned criteria along with the significance of the breach, various punishments may be decided upon. The EPA may use methods ranging from; verbal warning, compliance meeting, enforcement notice or warning letter to more stringent methods for more significant breaches such as, administrative penalties, section notice or direction, circuit court injunction, prosecution in the district court etc. and in cases of serious breach of legislation they may go on to impose high court injunctions, revocation of license, submission of file to director of Public Prosecutions etc.¹⁰

To my mind these above mentioned penalties and punishments are apt for the purpose as they clearly demarcate the boundaries based on the significance of the various types and degrees of non-compliance and thus have enumerated the various penalties that would apply on the basis of the nature of the situation at hand as every case is unique as I mentioned earlier.

⁸ EPA, Focus on Environmental Enforcement in Ireland 2009-2012, page 2.

⁹ EPA, Draft compliance and Enforcement Policy, page 7.

¹⁰ EPA, Draft compliance and Enforcement Policy, page 8.

ESTABLISHMENT OF COURTS

The Aarhus Convention provides that the State provide the public with Access to review procedures that are “fair, equitable, timely and not prohibitively Expensive.”¹¹ There are no specialized courts in Ireland and only tribunals like that of the An Board Pleanala. However there are few concerns I would like to throw light upon. Few of the most important concerns would be that of the initial capital investment of setting up such courts and the basis for the decision of the location of such courts. Secondly and most importantly, there would be a requirement of a number of judges who are experts in environmental law which in my opinion would be hard to find on account of the lack of popularity among masses as well as the lack of sufficient work load. Most importantly it must also be noted that setting up of such courts will not be easy because such courts would also require a panel like that of the An Board Pleanala and EPA who are experts in the areas concerning the environmental aspects and technicalities and on what basis would such a panel be selected and it would be crucial for the judges as well as the legal experts to work in collaboration over such issues. Another pressing issue would be that of the requirement of a proper and adequate litigation material that one may rely on while deciding on various matters and who must have the authority to create such a material suitable for the purpose.¹²

We must also note that when we as citizens are dissatisfied with the decisions offered by the court we have the option to appeal to a higher court in order to review the matter and the highest court being the Supreme Court. However such a system seems difficult to establish given the unpopularity of the subject matter and the lack of legal experts in the field. Not providing for a higher body to review and rectify various cases would not exactly be a very fair system in itself because where must a person go to appeal and without a separate body in place for regulation it will become almost impossible to ensure

¹¹ Aarhus Convention, Article 9(4).

¹² Áine Ryall , A Framework for exploring the idea of Environmental Court for Ireland

just and fair trials to one and all and thus a higher authority formed to keep a check is imperative and must be provided for.

The issue of jurisdiction would yet be another aspect as it becomes close to impossible to decide upon the exactness of the jurisdiction of such a court. Let us consider that a special court of the sort has been set up in Ireland but would this court only have jurisdiction over issues within a particular city that it is located in or the entire country and on what basis must such decisions be made.

In my personal opinion there are a plethora of issues surrounding the idea of such a special court being established and thus it may be better if a body like that of the An Board Pleanála which already exists must set up a legal wing of its own wherein they work in collaboration with the legal experts in this field and offer speedy justice in such a manner. This inevitably will lead both the bodies collaborating into one for speedy justice to those who wish to avail of it.

Though law touches every field possible it is impossible to set up various special courts separately for all such fields.

Most laws pertaining to the environment are still being formulated while some are in the nascent stage yet and thus a body like the Supreme Court would be required to interpret such laws and regulations and thus a special court will become redundant in such matters.¹³ It must also be noted that the environment is a very dynamic concept and thus new laws will have to be formulated on a frequent basis and the interpretation of existing laws may also need a change based on changing situations or the dynamic nature of the environment in itself and thus it is important that in order to provide for speedy and inexpensive justice in such matters there must be a legal wing to boards like the An Board Pleanála and rules must be set in order to make it more approachable and inexpensive so

¹³ Áine Ryall, A Framework for exploring the idea of Environmental Court for Ireland

that people are not discouraged from approaching to seek remedies because any facility that cannot be utilized is only window dressing and a mere visage of 'facilities'.

CONCLUSION

In my opinion the EPA being the sole authority associated with decision making upon the granting and not granting of licenses and various other functions does not seem like the most apt methodology. This will always leave open some amount of room for corruption to creep in. There must always be another body constituted to ensure a just and fair process.

Another issue arising is the fee that one is required to pay when seeking to object or challenge the 'proposed determination'. A very high fee of 126 euros has been imposed which actually discourages many people on account of how expensive it is. Therefore even if the provision to raise contentions is available it comes at a rather high price and thus it seems as it is more of a 'window dressing' rather than actual facility provided. Not only this but even the oral hearing requires a fee of 100 euros which in a way filters the number of people asking for an oral hearing and even after payment of such a fee the decision of whether or not to conduct such a hearing rests with the EPA. The fact that only the EPA goes through the material in depth and is the sole decision maker who is not answerable to anyone is highly unjust in my opinion. The only method to challenge a license is that of Judicial Review in the High Court and one must note that the judicial review proceeding is NOT an appeal.

One must also keep in mind that when challenging a big company and the license granted to them, the lay person doing so may not be equally equipped as the company in terms of finances and a legal team or an advisory boards of experts at their disposal to combat such procedures and this may in turn even become emotionally draining for such individuals.¹⁴

¹⁴ Para3.5, Review Report Group.

However given the existent problem in relation to setting up a special court in Ireland solely to deal with such matters, in my opinion the best solution to such a problem would be a legal wing in collaboration with the EPA so that the legal experts and environmental experts can come together at one place to harmoniously work out various issues and such a legal wing must function in a similar methods of courts and its main objective should be the interpretation of various laws and its applicability along with quick and inexpensive alternative to procure justice. Such a collaborative body will also be useful in terms with the fact that EPA will no longer remain the sole decision maker and thus no matter will be decided upon without mutual consent. Along with this a few regulations as to subsidization of fees for such processes must also be considered so that it becomes accessible in the literal sense to one and all and people are not discouraged.