

Primary Authority Scheme—easing the regulatory burden?

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Corporate Crime analysis: Ben Williams, barrister at Kings Chambers, analyses changes to the Primary Authority Scheme (the PAS) heralded by the implementation of the Enterprise Act 2016 (EA 2016).

Original news

The Enterprise Act comes into force, LNB News 05/05/2016 122

EA 2016 has received Royal Assent. The government envisages EA 2016 will benefit around 5.4 million businesses through, among other things, cutting red tape, tackling late payment and improving apprenticeships.

What is the PAS?

The PAS was established under Part 2 of the Regulatory Enforcement and Sanctions Act 2008 (RESA 2008). By 4 March 2016, over 9,000 businesses had entered partnerships with 169 different local authorities. The policy and object of the PAS is essentially two-fold:

- to promote efficient regulation, and
- to ease the administrative burden on businesses by providing consistent advice from a primary authority (PA)

RESA 2008 enables businesses that operate in more than one local authority area to nominate a single authority in relation to the discharge of its regulatory functions. For example, a coffee shop may have a number of shops throughout the country and the PAS would allow that business to nominate a PA, which could in turn provide advice to it in respect of any regulatory function—for example, product labelling.

How does the PAS benefit those businesses regulated by local authorities?

Once a PA has provided advice then that business is able to rely on that advice in respect of all its businesses regardless of the local authority it lies. To continue the above example, the shop may obtain advice from a local authority in the North West, and would be able to apply the principles of that advice throughout the rest of its shops in England and Wales. This would plainly provide financial advantages in terms of ensuring consistency throughout that business, without having to enter into a protracted dialogue with each local authority where a shop may be located.

If a local authority disagreed with the advice, they would be unable to move to take enforcement action against the business without notifying the PA, which could then block any proposed enforcement action. The local authority would then have to challenge that advice by way of a reference to the Secretary of State—the Better Regulation Delivery Office (the BRDO)—acting as an independent adjudicator. The BRDO would then determine whether:

- the enforcement action was inconsistent with the PA advice
- the PA advice was in fact correct, and
- the PA advice was properly given

What changes have been made by EA 2016 to the PAS and what will these changes mean for businesses in practice?

EA 2016 received Royal Assent on 4 May 2016. It is intended that it will extend the PAS so that businesses find it easier to access consistent, tailored and assured advice, and hence retain greater confidence in progressing and growing their business.

One significant change is EA 2016 has widened the scope of PA advice so that businesses may seek to obtain advice prior to starting up as a business. In theory, this would allow a business to begin its life from a stable position, and this would likely provide certainty in moving that business forward. As well as opening up the PAS to those persons who are

not yet trading, by amending the definition of ‘regulated person’, the PAS will also now capture businesses that are not yet regulated in respect of a particular function—for example, where a growing business is taking on health and safety responsibilities for employees for the first time.

How effective will these changes be in helping business obtain consistency and clarity in the advice and enforcement approach of local authority regulators?

In theory, these changes, together with the existing foundation of the PAS as a whole, should help breed consistency throughout businesses in England and Wales. *Kingston Upon Hull City Council, R (on the application of) v Secretary of State for Business, Innovation and Skills & Ors* [2016] EWHC 1064 (Admin) has thrown some doubt into the way in which the PAS is being used, however. Greggs benefited from PA advice from Newcastle City Council in relation to the provision of sanitary accommodation in its food on the go shops. That advice had been provided in 2011 and was later revised in September 2014. Pursuant to that advice, Greggs adopted a ‘blueprint’ for the numbers of tables and chairs it would install to its premises, without having to also install any wash basins or toilets.

Hull City Council disagreed with the advice that had been provided to Greggs, and challenged the matter through the consent to reference the PAS with the BRDO—the first such reference of the the PAS since its inception. The BRDO upheld the advice and so Hull City Council judicially reviewed the matter. In a hearing before the High Court sitting in Leeds in April 2016, Kerr J allowed Hull City Council’s claim. He agreed that the advice was not correct and went on to provide some guidance as to how the PAS was intended to run in his view. The matter has since been appealed to the Court of Appeal by both Greggs and the BRDO—therefore this matter will take some time before it is closed.

Businesses will rightly want assured advice that they may rely on going forward. The PAS allows for such advice, but local authorities need to ensure any advice they provide is correct. If it is not then the advice may well be deemed unlawful and this could have a significant and detrimental impact on that business. It is hoped that the Court of Appeal will provide clarity in due course—thus the object of the PAS can be achieved in the right way.

Interviewed by Lucy Trevelyan.

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