



**BERR** | Department for Business  
Enterprise & Regulatory Reform

**REGULATORY ENFORCEMENT  
AND SANCTIONS ACT 2008**

Guidance to the Act

JULY 2008

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**BETTER**  
**REGULATION**  
**EXECUTIVE**



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# Introduction

This guidance has been developed to help illustrate how the provisions of the *Regulatory Enforcement and Sanctions Act 2008* should work. It is broken down into sections reflecting the main areas of the Act:

- Section 1 deals with the Local Better Regulation Office and the co-ordination of regulatory enforcement;
- Section 2 details the expanded toolkit of regulatory sanctions; and
- Section 3 covers the requirement to remove unnecessary regulatory burdens.

## **Who is this guide for?**

It is aimed primarily at those affected by the provisions in the Act, namely local authorities, national regulators, business, and consumer groups.

It is intended to provide assistance in understanding the provisions contained in the Act.

## **Why was the *Regulatory Enforcement and Sanctions Act 2008* needed?**

Regulation provides essential protections to society and brings invaluable benefits. Regulation ensures that our air is clean our medicines are safe and that the rights of citizens and workers are protected. It can help ensure that businesses treat customers fairly while not standing in the way of effective competition which drives greater choice and value for money for consumers.

However, businesses and frontline public and third sector workers regularly complain about the time they spend on regulation and the many ways in which they find rules frustrating. To address these concerns the Government is committed to pursuing a programme of ambitious and wide-ranging regulatory reform. Key to this is:

- Regulating only when necessary and doing so in a light-touch way that is proportionate to the risk;
- Setting exacting targets for reducing the cost of administering regulation;
- Rationalising inspection and enforcement arrangements; and
- Supporting compliance and tackling businesses that deliberately or consistently flout their regulatory responsibilities.

Better regulation promotes efficiency, productivity, and value for money. Proportionate regulation and inspection arrangements can help drive up standards and deliver outcomes on the ground whether in the form of improving public services, a better environment for business, or driving forward economic reform.

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<sup>1</sup> *Reducing Administrative Burdens: Effective Inspection and Enforcement*, Hampton P, HM Treasury, March 2005.  
<http://www.berr.gov.uk/files/file22988.pdf>

Key to the Government's better regulation agenda is the implementation of the Hampton Review. The Hampton Review '*Reducing Administrative Burdens: Effective Inspection and Enforcement*'<sup>1</sup> set out a vision of regulatory system that is based around risk and proportionality.

The Hampton Review concluded that, while there were many positive aspects to the work of local authority trading standards and environmental health services, there remained wide variations and inconsistencies in the application of national standards set in legislation. These inconsistencies resulted in uncertainty and unnecessary administrative burdens for business. In addition, uncoordinated action on the ground often lead to unnecessary inspection resulting in the provision of conflicting advice and duplication of effort at a local level.

Hampton also found that regulators' penalty regimes were cumbersome and ineffective and recommended that a comprehensive review of these regimes should take place.

The Macrory Review '*Regulatory Justice: Making Sanctions Effective*'<sup>2</sup>, conducted as a result of the Hampton Review, set out a blueprint for transforming the regulatory sanctioning regime in the UK. The Review found that many regulatory sanctioning regimes were over-reliant on criminal prosecution and lacking in flexibility. It made a number of recommendations aimed at ensuring that regulators have access to a flexible set of sanctioning tools that are consistent with the risk-based approach to enforcement outlined in the Hampton Review.

### ***How does the Regulatory Enforcement and Sanctions Act 2008 help?***

The Government has committed to implementing the Hampton agenda. The *Regulatory Enforcement and Sanctions Act 2008* is an important element in delivering that commitment. It seeks to advance Hampton's vision of a regulatory system, at both a national and local level, that is risk-based, consistent, proportionate and effective.

The Act delivers three distinct but related policy areas in four parts:

- Part 1 establishes the Local Better Regulation Office (LBRO) to promote adherence to the principles of better regulation amongst local authorities, and greater co-ordination between them and central government. It will bring financial benefits to businesses through increased clarity and guidance to local authorities helping them work together to keep the burdens of regulation on compliant business to a minimum.
- Part 2 seeks to secure coordination and consistency of regulatory enforcement by local authorities by establishing a Primary Authority scheme. Businesses operating in more than one local authority area that choose to have a Primary Authority Partnership will benefit from improved consistency of advice and enforcement across local authority trading standards, environmental health, licensing and fire and rescue services.

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<sup>2</sup> *Regulatory Justice: Making Sanctions Effective. Final Report.* Better Regulation Executive, Cabinet Office, November 2006. [www.berr.gov.uk/files/file44593.pdf](http://www.berr.gov.uk/files/file44593.pdf)



- Part 3 gives regulators an extended tool kit of alternative civil sanctions as a more proportionate and flexible response to cases of regulatory non-compliance normally dealt with in the criminal courts. In particular, the extended toolkit will allow regulators to remove the financial benefit gained by businesses that deliberately seek an advantage through non-compliance with their regulatory obligations while helping to secure increased compliance.
- Part 4 creates a duty that requires regulators to review their functions, not to impose unnecessary burdens, and unless disproportionate or impracticable, to remove burdens that are found to be unnecessary. Regulators that are subject to the duty must report on progress annually. The duty applies to Gas and Electricity Markets Authority (OFGEM), the Office of Fair Trading (OFT), the Office of Rail Regulation (ORR), the Postal Services Commission (Postcomm), and the Water Services Regulation Authority (OFWAT) immediately. Ministers can apply the duty to other regulators by order where it will further the Government's better regulation agenda.

### ***How does the Act apply across the United Kingdom?***

Part 1 (Local Better Regulation Office) applies only to England and Wales. This means, for example, that LBRO may issue guidance to which local authorities in both England and Wales must have regard. Where LBRO exercises its functions in relation to matters which are the responsibility of Welsh Ministers, provision is made for LBRO to consult or seek the consent of Welsh Ministers

Part 2 (Co-ordination of Regulatory Enforcement), Part 3 (Civil Sanctions) and Part 4 (Regulatory Burdens) apply in England and Wales and, as with Part 1, there are specific procedures for matters in Wales in respect of which the Welsh Ministers exercise functions. Parts 2, 3 and 4 also apply:

- in Scotland in respect of matters that are reserved, and
- in Northern Ireland in respect of matters that are not transferred.

### ***When does the Act come into force?***

The intention is for the Act to come into force on 1st October 2008 apart from provisions in Part 2 relating to the Primary Authority Scheme that should come into force on 6th April 2009.





# Local Better Regulation

## LBRO

### 1. *Why has the Local Better Regulation Office been established?*

In the Budget 2004, the Government asked Philip Hampton to consider the scope for ‘*promoting more efficient approaches to regulatory inspection and enforcement while continuing to deliver excellent regulatory outcomes*’. The Hampton Review examined the regulatory landscape in the UK and made 35 recommendations to Government about raising the quality and effectiveness of regulatory inspection and enforcement.<sup>3</sup> Key recommendations included the adoption of common principles of regulatory enforcement for all regulators; the comprehensive use of risk assessment by every regulator; and the shifting of resources towards improved advice, on the premise that better advice leads to better regulatory outcomes, particularly for small businesses.

Following on from the Hampton Review, the Better Regulation Executive has been working to improve the regulatory system and to reduce the unnecessary burdens on business that can emanate from enforcement of regulation. A large proportion of this enforcement is the responsibility of local authorities: environmental health and trading standards services enforce hundreds of pieces of legislation set by central government and national regulators in a diverse range of areas. Between them, these services carry out approximately 80% of business inspections in the United Kingdom.

The Local Better Regulation Office (LBRO) has been established to drive improvements in local authority regulatory services in accordance with the principles of better regulation.

### 2. *What is LBRO?*

LBRO was established in May 2007 as a Government-owned company. Part 1 of the Act will establish LBRO as a statutory corporation and dissolve the LBRO company. The Act will give LBRO a range of statutory duties and powers to support it in achieving its objectives (*see Question 3 below*). The Act specifies that there should be a review of LBRO, three years after Part 1 of the Act comes into force. LBRO will continue in existence for as long as it is needed and is performing a useful role. However, there is an expectation that LBRO will achieve its objectives and at such a point it should be dissolved. Provision is made in the Act for this eventuality.

LBRO has an independent Board with a Chair and seven Board members who set the strategic direction for the organisation and act as its top-level ambassadors. LBRO is headed by a senior management team under the Chief Executive.

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<sup>3</sup> *Reducing Administrative Burdens: Effective Inspection and Enforcement*, Hampton P, HM Treasury, March 2005 – available at <http://www.berr.gov.uk/files/file22988.pdf>

Details of the current Board members and a full management structure are available at <http://www.lbro.org.uk/Pages/ContactsDirectory.aspx?id=181>.

### 3. **Who will LBRO help?**

If business is to be competitive in a rapidly changing world then regulatory interventions must be proportionate and effective and must be focussed on supporting compliance.

The objective of LBRO is to help local authority regulatory services carry out their functions in a way that is effective, does not create unnecessary burdens, and is consistent, transparent, proportionate, accountable and targeted.

#### The Principles of Good Regulation

Regulatory activities should be carried out in a way which is:

- Proportionate
- Accountable
- Consistent
- Transparent
- Targeted only at cases in which action is needed

LBRO will work in partnership with local authorities, national regulators and policy departments to promote more effective co-ordination of the system which centres on local authority enforcement as a whole. Local authority regulatory services will benefit in terms of clearer priorities and a national framework which allows for more efficient use of resources, whilst government and national regulators will benefit from a source of expertise on local authority regulatory services.

Compliant businesses will benefit from reductions in unnecessary regulatory burdens, and consumers will ultimately benefit from a well-regulated marketplace.

### 4. **How will it help?**

LBRO will have five key functions, through which it will aim to support improvement in local authority regulatory services:

- issuing guidance to local authorities in respect of regulatory services (*see Questions 9 and 10 below*) and, where necessary, ensuring that local authorities comply with this guidance (*see Question 11 below*)
- providing advice to government on enforcement and regulatory issues associated with local authorities (*see Question 14 below*)
- reviewing and revising a list of national enforcement priorities for local authority regulatory services (*see Question 12 below*)
- encouraging best practice, and innovative approaches to the provision of local authority regulatory services, including through the provision of financial support and assistance (*see Question 13 below*)

- improving the coordination and consistency of regulatory functions and enforcement for businesses that operate across local authority boundaries (*see Questions 17-30 below*)

LBRO is required to exercise its functions in accordance with the principles of good regulation and in a way that does not impose or perpetuate unnecessary burdens.

### **5. *LBRO already exists; why is the Act needed?***

LBRO has already been set up as a government owned company but it does not have any of the statutory powers set out in the Act. These will only come into effect once the Act has been passed and entered into force. The rest of this section describes how these powers might be used.

### **6. *Will LBRO work across the UK?***

LBRO will exercise all of its key functions (*see Question 4 above*), including administration of the Primary Authority scheme (*see Question 17 below*), across England and Wales.

The Primary Authority scheme will also operate in Scotland, in relation to reserved matters, and in Northern Ireland, in relation to matters which are not transferred. For instance, in Scotland this will mean that the scheme will extend to much of consumer protection regulation.

It is expected that LBRO will co-operate closely with other bodies with similar objectives across the UK.

### **7. *Will LBRO work with all local authorities?***

In England and Wales, LBRO will work across the whole range of its functions with all local authorities, including all fire and rescue authorities and port health authorities. In Scotland and Northern Ireland, LBRO will work with local authorities where the Primary Authority scheme applies.

LBRO will work with local authorities where they are exercising a **'relevant function'**. In England and Wales, these are the regulatory functions of environmental health, trading standards, licensing and fire safety services. In relation to Scotland and Northern Ireland, relevant functions will be specified by an order to be introduced under powers in the Act.

LBRO's scope in relation to local authority regulation will be kept under review and may be amended by order in the future, for example to extend it to further regulatory functions, or to make different provisions in relation to local authorities in England and Wales.

## 8. *What responsibilities does the Act place on local authorities?*

The Act creates a number of new responsibilities for local authorities. These can be broadly separated into general duties, which are outlined here, and responsibilities related to the Primary Authority scheme, which are explained later in this guidance.

The general duties created by the Act include:

- a duty to have regard to any guidance given to the local authority by LBRO (*see Questions 9 and 10 below*);
- a duty to comply with guidance where it is directed to do so by LBRO (*see Question 11 below*); and
- a duty to have regard to any list of enforcement priorities published by LBRO (*see Question 12 below*).

These duties will work alongside the *Regulators' Compliance Code*<sup>4</sup> and the *Legislative and Regulatory Reform (Regulatory Functions) Order 2007*<sup>5</sup> ('LRR Order').

The Code provides regulators with a detailed set of regulatory principles, based on Hampton's recommendations, to which they must have regard. Under Part 2 of the *Legislative and Regulatory Reform Act 2006*<sup>6</sup>, regulators must also have regard to five statutory principles of good regulation based on the Principles of Good Regulation (*see Question 3 above*).

Regulators need only have regard to the Code and five principles when they exercise regulatory functions specified by the LRR Order. In respect of local authority functions, the order includes environmental health, trading standards, licensing and fire safety functions.

The duties created under the RES Act and the Compliance Code, alongside the five principles will help to ensure that the principles of better regulation are embedded in the delivery of local authority regulatory services. These duties are summarised in the table 1, which also notes the different levels at which the duties are applicable.

LBRO will play a valuable role in advising government on local authority compliance with the principles of better regulation and the Compliance Code. This could for instance provide a basis for advising the Government on granting local authorities the new sanctioning powers outlined in Part 3 of the Act.

<sup>4</sup> Details of the *Regulators' Compliance Code* can be found at: <http://www.berr.gov.uk/bre/inspection-enforcement/implementing-principles/regulatory-compliance-code/page44055.html>

<sup>5</sup> *The Legislative and Regulatory Reform (Regulatory Functions) Order 2007* can be found at: [http://www.opsi.gov.uk/si/si2007/pdf/uksi\\_20073544\\_en.pdf](http://www.opsi.gov.uk/si/si2007/pdf/uksi_20073544_en.pdf)

<sup>6</sup> *Legislative and Regulatory Reform Act 2006* can be found at <http://www.berr.gov.uk/bre/policy/simplifying-existing-regulation/unnecessary-regulation/page44071.html>

## **9. When will LBRO issue guidance to local authorities?**

LBRO may give statutory guidance to local authorities about how to exercise their relevant functions and local authorities must have regard to the guidance. However, LBRO can issue guidance only where this will promote its objective (*see Question 3 above*).

LBRO may give guidance to one or more local authorities and this guidance may relate generally to the exercise of a relevant function or may address a particular case. Before issuing guidance, LBRO must undertake consultation with businesses, and organisations that represent them (for example the Confederation of British Industry, the British Retail Consortium, the Federation of Small Businesses and the British Chambers of Commerce), local authorities, and their representatives (such as Local Government Association and the Local Authorities Co-ordinators of Regulatory Services). LBRO must also consult with such other persons, as it considers appropriate.

This is likely to include:

- national regulators, such as the Food Standards Agency, Office of Fair Trading, Health and Safety Executive, Environment Agency, Gambling Commission or relevant policy department;
- representative bodies for regulatory professionals, such as the Trading Standards Institute, and the Chartered Institute of Environmental Health;
- bodies that speak on behalf of consumers, such as the National Consumer Council.

LBRO will publish the guidance that it issues by the most appropriate means in each case. This may include publication on its website and direct communication with individual local authorities where appropriate.

## **10. What will LBRO issue guidance about?**

LBRO's guidance will have an important role in supporting improvement in local authority regulatory services, and its role here will serve as a basis for gathering and disseminating information on good practice.

LBRO will focus on issues relating to good practice in implementing the principles of better regulation by local authorities. For instance, LBRO might have a role in issuing guidance illustrating good practice relating to the Regulators' Compliance Code and the principles of good regulation, to support local authorities in their work to implement the Code.

LBRO will not necessarily want all local authorities to have to have regard to guidance where practice is already strong. It therefore also has the right to issue guidance to particular local authorities about the way in which they exercise their functions. For example, where LBRO has reason to believe that one or more local authorities might benefit from support on a particular point, then it might issue guidance only to them: this situation might arise where LBRO has gathered evidence from business, regulators and others about a particular practice.

**Table 1: Duties imposed on local authorities**

Reference	Duty	Applicability
RES Act 2008 s.6(3)	LAs <b>must have regard to</b> any guidance given to it, by LBRO, under s.6(3) of the Act.	As it applies – this will vary depending on the guidance.
RES Act 2008 s.7(1)	LAs <b>must comply</b> with guidance when given a direction to do so by LBRO under s.7(1) of the Act.	As it applies – this will vary depending on the guidance.
RES Act 2008 s.11(2)	LAs <b>must have regard to</b> the appropriate list of enforcement priorities published by LBRO in allocating resources to its relevant functions.	Applicable in so far as the local authority exercises functions which appear on the list.
LRRRA 2006 Part 2, s.21	LAs <b>must have regard to</b> the Principles of Good Regulation when exercising a regulatory function specified by the Legislative and Regulatory Reform (Regulatory Functions) Order 2007*.	Applicable at both policy and operational levels.  Local authorities must therefore have regard to the principles when setting relevant policies or providing guidance to officers and individual officers must have regard to the principles in carrying out their duties.
LRRRA 2006 Part 2, s.22(2)	LAs <b>must have regard to</b> the Regulators' Compliance Code in determining general policy or principles which they refer to when exercising a regulatory function specified by the Legislative and Regulatory Reform (Regulatory Functions) Order 2007*.	The Code does not apply directly to the work of an individual officer in relation to individual duty holders. However, the officer should act in accordance with the local authority's general policy or guidance on the activity, which must comply with the Code.
LRRRA 2006 Part 2, s.22(3)	A regulator <b>must have regard to</b> the Regulators' Compliance Code in setting standards or giving guidance generally in relation to the exercise of other regulatory functions.	Also does not apply directly to the work of an individual officer (see above). Note that this also applies where a regulator sets standards or gives guidance to another regulator.

\* In relation to local authorities, the regulatory functions that have been specified include functions relating to environmental health, licensing, trading standards and fire safety.

The Order is available at :[http://www.opsi.gov.uk/si/si2007/pdf/uksi\\_20073544\\_en.pdf](http://www.opsi.gov.uk/si/si2007/pdf/uksi_20073544_en.pdf)

**KEY:** LRRRA 2006: *Legislative and Regulatory Reform Act 2006*  
RES Act 2008: *Regulatory Enforcement and Sanctions Act 2008*  
LAs: Local Authorities  
LBRO: Local Better Regulation Office

LBRO is also able to issue statutory guidance in relation to the Primary Authority scheme and this is explained at Question 17 below.

LBRO will not issue guidance on technical interpretation of legislation, which will remain the responsibility of the relevant national regulator or policy department. For example, the Food Standards Agency will continue to have responsibility for the Food Law Codes of Practice and associated guidance. LBRO will work closely with national regulators to ensure a joined up approach to issuing guidance. LBRO is also required to enter into memoranda of understanding with the Food Standards Agency, Health and Safety Executive, Office of Fair Trading, Environment Agency, and Gambling Commission, which will provide clarity as to how this will be achieved.

### **11. *When will LBRO require a local authority to comply with guidance?***

LBRO is able to give a direction to a local authority to comply with guidance given either by itself or by another regulator.

This power is intended as a reserve measure and can only be used by LBRO subject to the following requirements:

- the Secretary of State, or the Welsh Ministers as applicable, must consent to LBRO giving the direction;
- LBRO must have consulted with any relevant regulator or policy department, and any local authorities that would be subject to the direction, as well as any other bodies that LBRO considers appropriate. For example, where the guidance in question had been issued by the Food Standards Agency in relation to a food safety matter then LBRO must consult with the Agency; and
- LBRO must publish the direction in an appropriate manner.

LBRO might choose to use this power where, for example, a local authority persistently acts with disregard for a particular piece of guidance and the consequences of this disregard are detrimental to businesses or the public.

LBRO is also able to give directions to local authorities in relation to enforcement action referred to it under the Primary Authority scheme and this is explained at 27 below.

Directions affecting more than one local authority may only be made by order subject to the negative resolution procedure whether in Parliament, or the National Assembly for Wales where appropriate.



## 12. **What is the list of enforcement priorities and how is LBRO going to be involved?**

In the Budget 2007, the Government accepted all the recommendations of the Rogers Review<sup>7</sup>, which had evaluated over 60 policy areas enforced by local authority trading standards and environmental health services and proposed six national enforcement priorities. The Rogers Review recommended that these national enforcement priorities should be updated at least every three years to fit with the Comprehensive Spending Review and local authority planning cycles.

### **Current National priorities for local authority enforcement:**

- Air quality, including regulation of pollution from factories and homes
- Alcohol, entertainment and late night refreshment licensing and its enforcement
- Hygiene of businesses selling, distributing and manufacturing food and the safety and fitness of food in the premises
- Improving health in the workplace
- Fair trading (Trade description/ trade marking/ mid-description/ doorstep selling)
- Animal and public health, animal movements and identification (time-limited)

These national enforcement priorities will be given statutory force when LBRO is established. This means that local authorities must have regard to them when allocating resources to their relevant functions.

LBRO will have ongoing responsibility for reviewing enforcement priorities for local authorities in England and Wales. This may involve separate lists for local authorities in England and local authorities in Wales. In preparing these lists, LBRO will consider evidence of the relative risks presented by the regulated activities within its scope, and the effectiveness of regulatory enforcement activity in addressing those risks. LBRO will also consult such persons as it considers appropriate and will publish any representations made to it under the consultation. Consultations will involve national regulators and policy departments; local authority regulatory services and their representatives; regulatory professionals and their representatives; businesses and their representatives; and consumer groups such as the National Consumer Council.

LBRO must publish any list, or updated list, after first having obtained the consent of the Secretary of State, and where appropriate the consent of Welsh Ministers. Local authorities must have regard to the appropriate list of enforcement priorities published by LBRO in allocating resources to their relevant functions and LBRO may issue guidance to local authorities (*see Question 10 above*) on the use of the national enforcement priorities in service planning.

The requirement to have regard to the list will not prevent councils giving due weight to their own local priorities. In addition, local authorities will still have to meet with minimum levels of enforcement or any reporting requirements set by relevant domestic or European legislation.

<sup>7</sup> *National Enforcement Priorities for local authority regulatory services*, Peter Rogers, March 2007 is available from: <http://www.berr.gov.uk/bre/inspection-enforcement/implementing-principles/prioritising-areas/page44051.html>

The lists of enforcement priorities will be available on the LBRO website at [www.lbro.org.uk](http://www.lbro.org.uk)

### **13. How will LBRO spend its money?**

The Hampton Review recognised that much good practice exists within local authority regulators and that innovative approaches to service delivery are being developed by single authorities and groups of authorities. However, there is scope for driving innovation and the development of good practice, and for ensuring that initiatives which have demonstrable benefits are more widely shared across local authorities.

LBRO will use a proportion of its budget to support projects or activities that will help to promote its objective, lower the regulatory burden on business, especially where that burden is related to the actions, approach or policies of local authority regulatory services. Funding may be made available to local authorities in relation to their exercise of relevant functions, or to other organisations for the purpose of assisting local authorities, for example professional associations, business representatives, consumer groups, charities and others. LBRO is also able to take appropriate action to support a local authority to fulfil its duties as a Primary Authority.

Funding will be used to support the development, dissemination and adoption of best practice and to encourage innovative approaches to the provision of local authority regulatory services. For example, LBRO will, from 1 September 2008, take on responsibility for the Retail Enforcement Pilot, which seeks to reduce the number of inspections to compliant businesses by better co-ordination, data sharing and risk based inspections by different local authority regulatory services.

### **14. How will LBRO work with central government?**

In considering the burden of regulation, the Hampton Review identified that there was a lack of effective priority-setting for local authority regulatory services by central government, and a lack of co-ordination of government departments and local authorities at national levels. LBRO will address both of these issues, the first through its work to determine national enforcement priorities, as outlined above, and the second through the provision of practical advice to Ministers.

LBRO will provide UK and Welsh Ministers with a source of evidence-based expertise on local authority regulatory services, for example in relation to the award of Macrory powers or the exercise of those powers by local authority regulatory services. At the same time, LBRO will provide business and local authority regulators with a high-profile voice in relation to issues such as:

- the way in which a current regulation is enforced by local authorities;
- ways in which a policy under development might be tailored better to reflect effective ways of working;
- the resource implications of particular forms of regulation, and how these might be better targeted, or aligned with other types of work; and

- cases where the existing framework set by central government and national regulators makes it difficult for local authorities to pursue an effective, or risk based overall strategy.

In exercising its functions, LBRO will have regard to any guidance given to it by the Secretary of State or, where appropriate, the Welsh Ministers and will comply with any directions that they might give.

### **15. *How will the work of LBRO relate to the national regulators?***

LBRO will work closely with the national regulators, ensuring that their efforts are complementary and consistent. The national regulators and policy departments will remain responsible for issuing guidance on technical interpretation of legislation. LBRO will enter into a statutory memorandum of understanding with the Environment Agency, the Food Standards Agency, the Gambling Commission, the Health and Safety Executive and the Office of Fair Trading.

It is expected that the statutory memoranda of understanding will allow LBRO and the regulators to make agreements for mutual consultation, and other issues arising in their work together.

### **16. *How will the work of LBRO relate to LACORS?***

LACORS is an established local government representative body working with and on behalf of local authority associations across the UK to represent its regulatory services. As well as its representational role, LACORS facilitates networks of regulatory officers and the sharing of best practice and the delivery of consistency in the enforcement of regulatory services. LACORS pioneered the Home Authority Principle for food and trading standards services and provides a range of technical operational and interpretational advice.

In relation to all of the powers and duties set out above, LBRO will work closely with LACORS and will agree areas for collaborative working in order to avoid duplication of effort and to ensure consistency and coherence in their work to support improvement in local authority regulatory services.

## **Primary Authorities**

### **17. *What is a Primary Authority?***

Long-standing voluntary schemes for 'Home Authority' and 'Lead Authority' agreements between local authority regulators and businesses which operate across local authority boundaries, have brought benefits to regulators, businesses and consumers. However, these benefits have not been as wide-ranging as they could be because it has not always been possible to deliver the agreements consistently or effectively.

Part 2 of the RES Act establishes a statutory Primary Authority Partnership scheme across the United Kingdom for businesses and other regulated organisations, such as

charities, that operate across local authority boundaries. LBRO has responsibility for the administration of the scheme.

Under this scheme, a Primary Authority is a local authority registered by LBRO as having responsibility for a particular business or organisation. The registration may relate to a single function of the local authority, for example health and safety, or it may relate to multiple functions, for example, health and safety and trading standards. A local authority can, however, only be a Primary Authority in relation to its trading standards, environmental health, licensing or fire safety functions. Furthermore, it is the Government's intention that only fire safety functions under explosives, fireworks and petroleum legislation be captured by the Primary Authority scheme. Those functions exercised under the provisions of the Regulatory Reform (Fire Safety) Order 2005 will be exempted from the Primary Authority scheme by way of an order.

LBRO may register a Primary Authority Partnership where the local authority and the business, or organisation, have agreed in writing to establish a partnership. Where a business or organisation has not been able to reach agreement with a local authority, the business may request LBRO to nominate a local authority to be its Primary Authority. LBRO will nominate an authority that it considers suitable, having taken into account the location of the business and where it carries out its activities; the resources and capacity of the local authority; and any relevant specialism of the local authority. For example, a local authority may have developed expertise in relation to a particular area of trade such as imported food or recreational craft. LBRO must also consult with the authority and the business or organisation prior to making the nomination.

A Primary Authority is responsible for giving advice and guidance to the partner business or organisation in relation to the relevant function(s) and is also responsible for giving advice and guidance to other local authorities about how they should exercise the relevant function(s) in relation to that business or organisation.

### **18. *What businesses will have access to the Primary Authority scheme?***

All businesses and other organisations that carry on an 'activity' across local authority boundaries in a way that makes them subject to regulatory enforcement by more than one local authority will be entitled to ask for a Primary Authority

'Activity' will include activities carried out directly, like the activities of retailers with outlets across the country, but it is also intended to include activities performed by single site businesses which, indirectly, make them subject to regulatory enforcement by a number of local authorities. This would include activities such as internet-based sales, or manufacture where products are sold on by others.

### **19. *When will the Primary Authority provisions come into effect?***

Further provision, including provision regarding the procedures of and exemptions from the Primary Authority scheme will be set out in orders to be made under the powers in the Act (*see Questions 26, 27 and 28 below*).

It is expected that the orders will come into force on 6th April 2009, and the Primary Authority scheme will come into effect on the same day.

## **20. How will the Primary Authority scheme help?**

The statutory Primary Authority scheme will address many of the concerns expressed regarding local authority regulatory enforcement, including inconsistent advice, wasted resources, duplication of effort and the absence of an effective dispute resolution mechanism when authorities disagree.

The Primary Authority scheme will bring the following benefits:

- Should an eligible business or organisation wish to have a partnership then it will be entitled to ask for one. Eligible businesses and organisations must carry out activities across local authority boundaries and will include, for example, manufacturers whose products are sold regionally or nationally; multi-site retailers (including charitable organisations); internet and mail order businesses;
- LBRO will maintain an up-to-date central register of all Primary Authority relationships which will be a valuable reference point for all local authority regulators. It will allow enforcing authorities to refer matters in a quick, efficient and consistent manner and will provide primary authorities with an accurate picture of issues across the country as they emerge;
- Communication between enforcing authorities and Primary Authorities will be greatly improved by the introduction of the requirement to consult prior to enforcement action and this will reduce the likelihood of businesses suffering inconsistent interpretation or application of the law (*see Question 25 below*);
- LBRO will provide a referrals system to resolve differences of opinion between an enforcing authority and a Primary Authority over a proposed enforcement action; and
- LBRO is able to issue guidance to local authorities with regard to the Primary Authority provisions. For example, LBRO might issue guidance about Primary Authority advice to businesses or to other local authorities; about recovering costs incurred by the Primary Authority; or about any enforcement action that is referred to it under the Primary Authority scheme. LBRO can also give directions to local authorities in relation to enforcement action referred to it. A local authority must comply with such a direction.

The Primary Authority scheme will ensure co-ordinated, consistent and proportionate regulatory enforcement for these businesses and organisations and will assist local authorities to increase their operational efficiency and effectiveness.

## **21. What will the implications of the new Primary Authority scheme be for existing Home / Lead Authority schemes?**

The Home Authority and Lead Authority schemes will continue to operate after the Primary Authority scheme is established if businesses wish to maintain those relationships. LBRO will work with the Health and Safety Executive and with LACORS to maintain clarity as to the requirements of the schemes and to ensure, where

appropriate, a smooth transition to the statutory scheme for both business and local authorities.

The statutory Primary Authority scheme is being established to bring the certainty and consistency that businesses have called for and it will progressively become more established. This will enhance the role of local regulators and improve the service they can offer to business. LBRO's interactive database of Primary Authority relationships will help primary authorities to manage their relationships with their partner businesses.

## ***22. What are the responsibilities of a business with a Primary Authority partner?***

Businesses that have a Primary Authority will be expected to work closely with that Authority, and other local authorities, to ensure they comply with the regulations that apply to them. It is expected that the Primary Authority scheme will not only bring about greater consistency and co-ordination of regulatory enforcement, but also greater compliance amongst businesses.

## ***23. What is the purpose of an inspection plan?***

Primary authorities may, after consultation with their partner business or organisation make an inspection plan recommending how other local authorities should inspect that business or organisation. It is intended that this will help local authorities share strategic knowledge about businesses and organisations that have a Primary Authority.

The practical purpose of this plan may vary according to the circumstances, as is demonstrated by the examples given in Table 2 on the next page.

Where a Primary Authority has made a plan and LBRO has consented to it, the Primary Authority will be required to bring it to the notice of other local authorities. It is envisaged that storing the plans on a secure LBRO Primary Authority database will meet this requirement.

All local authorities will have to have regard to inspection plans and inform the relevant Primary Authority before carrying out an inspection that does not comply with the recommendations in a plan. When drawing up an inspection plan, Primary Authorities will have to have regard to any relevant guidance regarding the frequency of inspections and be conscious of the need for flexibility in dealing with emergencies and unique local circumstances. LBRO is likely to give guidance to local authorities regarding inspection plans, including those reasons that might be deemed acceptable for departing from the recommendations in a plan. LBRO may also issue guidance regarding the content of inspection plans.

## ***24. How will local authorities resource Primary Authority responsibilities?***

It will be for local authorities to decide how to resource their Primary Authority responsibilities. They may, for example, agree Primary Authority Partnerships as a key part of their work to raise the compliance of local businesses and to support economic



**Table 2: Examples of inspection plans**

	<b>Example 1</b>	<b>Example 2</b>
<b>Business</b>	Nationally based business with depots of different sizes.	National supermarket chain.
<b>Area of concern</b>	Health & safety procedures require improvement in most depots.	Ongoing problem with food being displayed past its 'Use-By' date.
<b>Action by Primary Authority</b>	Agrees a risk-based work plan with the business, to improve procedures in each depot in order of priority.	Agrees action required by Head Office and instructions to store managers.
<b>Purpose of an inspection plan</b>	To draw the workplan to the attention of enforcing authorities and to advise them that the business has committed its resources on the basis of a risk assessment of each depot.	To ask enforcing authorities to pay particular attention to this issue and to report on it to the Primary Authority.
<b>Benefits of the inspection plan</b>	Co-ordinated, informed activity by enforcing authorities to ensure a proportionate approach for the benefit of the business.	Targeting of enforcement resources at a known problem and efficient identification of the scale of the problem.

prosperity in their area, and resource this work accordingly. Should it wish to do so, a Primary Authority will also be able to charge fees to a partner business or organisation to recover costs reasonably incurred in acting as Primary Authority for the business or organisation. LBRO will issue guidance on fee charges.

LBRO will only nominate a local authority to be the Primary Authority for a business or organisation after careful consideration of the circumstances. The resources available to the local authority to meet the needs of the business will be relevant to the decision to nominate and LBRO is required to have regard to any representations that a local authority makes to it with regard to resources.

## **25. How will the requirement to consult before taking an enforcement action work?**

Where a business or organisation has a Primary Authority relationship, any other local authority must contact the Primary Authority before taking enforcement action against that business. This only applies where a business has a Primary Authority in relation to its trading standards, environmental health, licensing or fire safety functions. This will ensure early communication between enforcing authorities and primary authorities and will help to promote a consistent approach for businesses. These provisions are summarised in Figure 1.



The Primary Authority provisions will enable businesses to rely on the advice given to them by their Primary Authority, where appropriate and applicable, throughout the whole of the UK. Where a Primary Authority blocks an enforcement action proposed by an enforcing authority because it believes the action to be inconsistent with advice it has previously given (whether to the business in question or to other local authorities relating to the business in question) the enforcing authority can challenge this by referring the decision to LBRO. The Act also makes provision for primary authorities and businesses to refer cases to LBRO in certain circumstances.

When a decision has been referred to it, LBRO will take all relevant factors into account, including any case that is made for legitimate local variation. Consistency will not necessarily mean a uniform approach in all cases. LBRO will then (i) approve the enforcement action proposed by the Enforcing Authority, in which case the action can proceed: or (ii) direct the enforcing authority not to take any enforcement action, in which case the action cannot proceed: or (iii) direct the enforcing authority to take an alternative form of enforcement action. LBRO will also consult with any relevant regulator and such other persons as it thinks appropriate before reaching a decision.

Where an enforcing authority is proposing enforcement action for which there is a statutory time limit, any time during which action is delayed by seeking the views of a Primary Authority, or by a referral to LBRO, can be disregarded in calculating the time limit.

## **26. *What does 'enforcement action' mean?***

Enforcement action is widely defined in the Act to include:

- i. action to secure compliance with a restriction, requirement or condition in relation to a breach or supposed breach;
- ii. action taken in connection with imposing a sanction for an act or omission; and
- iii. action taken in connection with a statutory remedy for an act or omission

What action is or is not "enforcement action" will be specified in an order due to come into force on April 6th 2009. Consultation on the content of this order will begin in September 2008.

## **27. *When will the requirement to seek the Primary Authority's view before taking an action be waived?***

There are a number of circumstances in which delays to enforcement action would not be appropriate or desirable. The Act allows exemptions to be made to the requirement for an enforcing authority to notify the Primary Authority before taking enforcement action. The exemptions will be made in an order that is due to come into force on 6th April 2009 and be consulted on in September 2008. The order will be accompanied by illustrated detailed examples, to assist regulatory professionals in making consistent decisions.



The orders must include exemptions for cases where:

- delay could cause significant risk of serious harm to human health, the environment, or the financial interests of consumers; or
- where the requirement to consult the Primary Authority would be wholly disproportionate.

The two relevant orders are also likely to take into account the following issues:

- whether the delay involved in consultation might inhibit effective evidence-gathering or investigation of a breach;
- whether a rapid response is required at a time when it would be impractical to seek the views of the Primary Authority, for example dealing with a faulty alarm in the early hours of the morning;
- whether the underlying legislation is deliberately local in character, as with many aspects of alcohol, entertainment and gambling licensing; and
- whether the enforcing authority has to seek approval for its proposed enforcement action from another source which will meet the purpose of the notification requirement.

## **28. How will the referrals process operate?**

With the consent of LBRO, the handling of particular enforcement actions may be referred to it by the regulated person, by the enforcing authority, or the Primary Authority. LBRO will have 28 days to reach a determination, taking the factors set out in the diagram above (Figure 1) into account.

Further details as to the procedure to be followed in referring an issue to LBRO will be set out in an order. This might address, for instance, time limits within which a matter may be referred to LBRO.

## **29. What is LBRO's role in the referrals process?**

LBRO will consider referrals regarding specific enforcement actions that are made to it by the Primary Authority, the enforcing authority, or the regulated person. This will provide an important check that the Primary Authority scheme does not work against their respective interests.

LBRO's primary role reflects the importance of consistency in the Primary Authority scheme; it will be taking a view as to whether a specific enforcement action is inconsistent with advice the Primary Authority has given.

LBRO will also be required to consider whether advice or guidance was 'correct' and 'properly given'. This is to help ensure that enforcement actions cannot be blocked on the basis of inconsistency with guidance or advice that should not have been given.

If LBRO is satisfied that the proposed enforcement action is inconsistent with the advice or guidance of the Primary Authority, and that the advice or guidance of the Primary Authority was correct and properly given, the relevant enforcement action may not go ahead.

In reaching a view on whether the advice was correct, LBRO will not be taking the place of the Courts; in particular, it will not be giving the opinion that there is only one correct piece of advice or guidance on a particular matter, but will instead take a view as to whether the advice or guidance is not inconsistent with its understanding of the law as it stands at the time of determination.

When considering whether advice was 'properly given', it may also consider whether due regard has been given to its own guidance for Primary Authorities.

### ***30. Can a Primary Authority be changed?***

There are no specific provisions in the Act for 'changing' from one Primary Authority to another. However, LBRO can revoke a nomination for a Primary Authority, following consultation with the authority and the business or organisation.

This might be used to end a Primary Authority Partnership where the business or organisation no longer requires a Primary Authority, or where a change of Primary Authority is required, for whatever reason. In this case, the nomination of the first authority could be revoked and a nomination made for a second Primary Authority. This is most likely to happen where a business is relocating or where a change of ownership means that the decision-making base of the business moves. However, it could also be used where a partnership is no longer effective due to irreconcilable differences between the partners.

# Effective regulatory sanctions

## Introduction

The Government believes that regulators should have access to effective sanctions that are flexible and proportionate and that ensure the protection of workers, consumers and the environment when tackling non-compliance by businesses. These sanctions should be flexible enough to reflect the regulatory needs of legitimate businesses, as well as being able to ensure that where businesses have saved costs through non-compliance, they do not gain an unfair advantage over those that have complied with their regulatory obligations.

The Act allows a Minister, by order, to give a regulator access to four new civil sanctions:

1. **Fixed monetary penalty (FMP) notices** – under which a regulator will be able to impose a monetary penalty of a fixed amount;
2. **Discretionary requirements** – which will enable a regulator to impose, by notice, one or more of the following:
  - a variable monetary penalty (VMP) determined by the regulator;
  - a requirement to take specified steps within a stated period to secure that an offence does not continue or happen again (compliance notice); and
  - a requirement to take specified steps within a stated period to secure that the position is restored, so far as possible, to what it would have been if no offence had been committed (restoration notice);
3. **Stop notices** – which will prevent a business from carrying on an activity described in the notice until it has taken steps to come back into compliance; and
4. **Enforcement undertakings** – which will enable a business, which a regulator reasonably suspects of having committed an offence, to give an undertaking to a regulator to take one or more corrective actions set out in the undertaking.

The new powers are an alternative to criminal prosecution and it will be for the regulator to determine the appropriate response to a particular instance of regulatory non-compliance.

### 31. Why are these new powers being introduced?

The new administrative sanctions are being introduced in order to provide regulators with a more consistent, flexible and proportionate set of sanctions to use when dealing with regulatory non-compliance.

In 2006 Professor Richard Macrory published a report which looked at the effectiveness of existing sanctioning regimes – *Regulatory Justice: Making Sanctions Effective*<sup>8</sup>. The

<sup>8</sup> *Regulatory Justice: Making Sanctions Effective* – [www.berr.gov.uk/files/file44593.pdf](http://www.berr.gov.uk/files/file44593.pdf)

review noted that many of the current sanctioning regimes were ineffective, over-reliant on criminal prosecution and lacking in flexibility. His recommendations included introducing an alternative system of civil sanctions in order to set up a modern and targeted sanctioning regime that would enable regulators to match the sanctions to the circumstances of different cases. The Government accepted Professor Macrory's recommendations in full.

Part 3 of the Act implements a number of Professor Macrory's recommendations. The purpose of introducing this new approach to regulatory enforcement is to improve current sanctioning regimes by giving regulators access to a range of powers – an extended sanctioning toolkit. Regulators will be able to choose the approach that is best suited to the offence and the circumstances in which it was committed.

These sanctions should be viewed in the context of the better regulation agenda more widely. The new sanctions will not replace more informal methods of enforcement, such as advice or warning letters and should only be used where it is necessary and proportionate to do so.

## **Awarding the powers**

### **32. *Who will have access to the sanctions?***

The Act will allow the powers to be granted to three classes of regulators: first those listed by name in Schedule 5 to the Act (such as the Financial Services Authority, the Environment Agency and the Food Standards Agency); secondly those who enforce offences contained in any Act, or the sections of an Act, listed in Schedule 6; and thirdly, those who enforce offences in secondary legislation made under enactments listed in Schedule 7.

### **33. *How will the new sanctioning powers be awarded?***

These are important new powers, which will have a significant effect on business. The powers will be granted by ministerial order. Regulators will not be given automatic access to them. Before making an order, the Minister must be satisfied that a regulator will use the new powers in a way that is compliant with the principles of good regulation – transparent, accountable, proportionate, consistent and targeted only at cases where action is needed. Much of the evidence for this will be generated through Hampton Implementation Reviews (HIR)<sup>9</sup>. Regulators who have not been through such a review should follow the HIR guidance<sup>10</sup> and provide qualitative evidence based on this.

Once the Minister is satisfied that a regulator within his responsibility is ready to use these additional sanctioning powers, he would, where appropriate, seek the agreement of the Panel for Regulatory Accountability (PRA).

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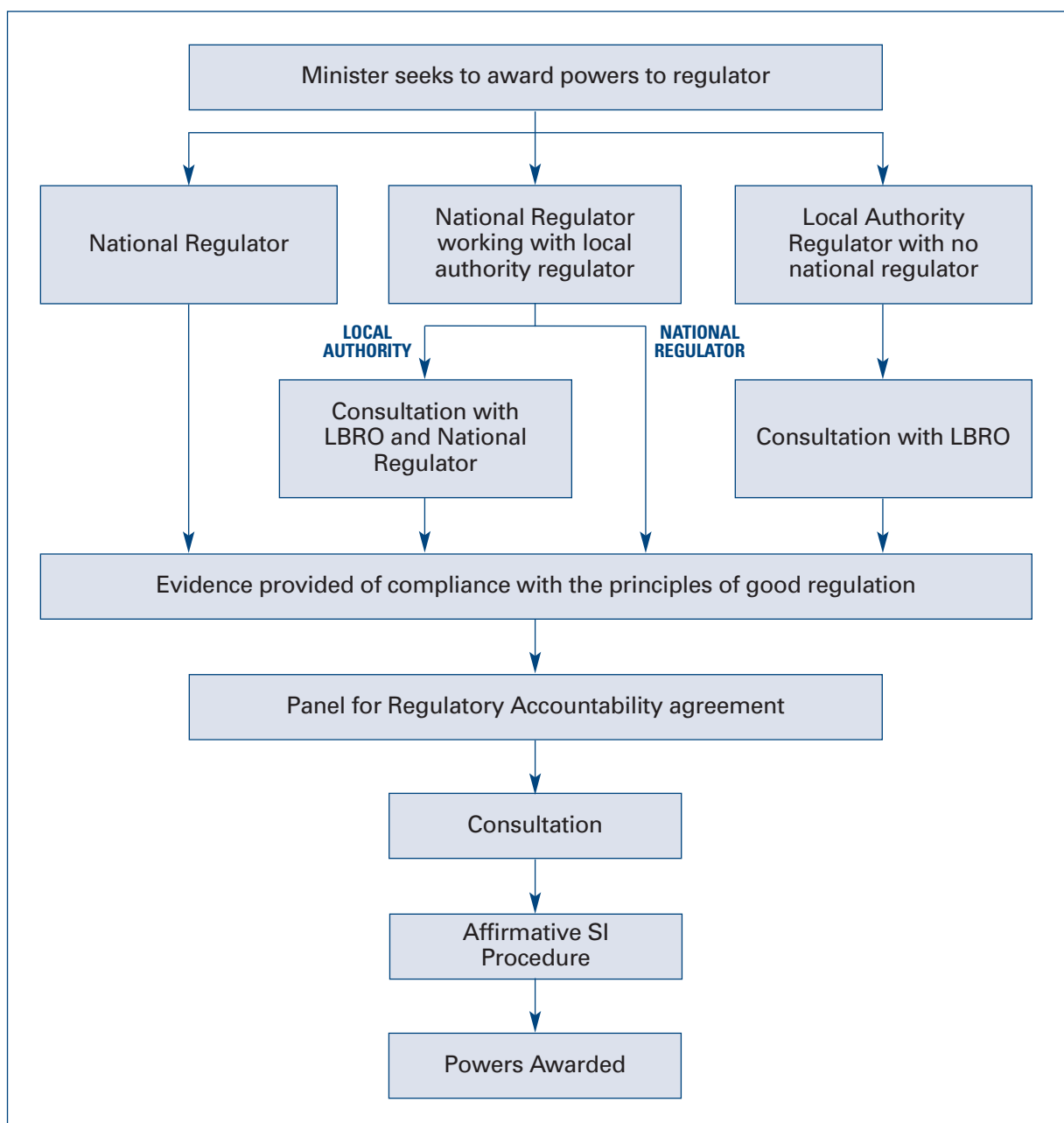
<sup>9</sup> These assessments were announced in the pre-Budget report of November 2006 and focus on the extent to which regulators are performing in line with the Hampton principles and Macrory characteristics.

<sup>10</sup> [http://www.nao.org.uk/publications/workinprogress/HIR\\_Guidance\\_31May07.pdf](http://www.nao.org.uk/publications/workinprogress/HIR_Guidance_31May07.pdf)

For local authority regulators the Government will look to LBRO for advice on whether, in a particular regulatory field, local authorities in general are Hampton compliant. Departments' views will augment LBRO's judgement. Where there is co-regulation, the national regulator may provide additional useful evidence of compliance with the Hampton agenda. These powers will not be rolled out to local authorities one by one.

The process for awarding the new sanctioning powers is set out in the flowchart at Figure 2.

**Figure 2: Process for awarding the new sanctioning**





Before making the order under Part 3, the Minister must conduct a public consultation. The order itself will then be subject to a vote in both Houses of Parliament. This will give the regulated community, interest groups and the general public input to the process, as well as providing a high level of Parliamentary scrutiny.

### **34. *Can the sanctioning powers be suspended?***

The Act enables the Minister conferring the powers on the regulator to suspend the use of the sanctions, where the regulator is found to be persistently misusing the powers. The suspension power is intended to be a safeguard against the disproportionate and improper use of the alternative civil sanctioning powers by a regulator. There are already a number of safeguards against misuse of the powers, particularly in individual cases, such as the right of appeal to an independent tribunal. The power to suspend is intended to be used where there are persistent failures and where other mechanisms have failed to address the regulator's behaviour.

The Minister can direct a regulator not to serve any further notices imposing fixed monetary penalties, discretionary requirements, or stop notices in relation to a particular offence. In addition, a regulator will not be able to accept any further enforcement undertakings in relation to a particular offence.

The power should only be exercised where the Minister is satisfied that the regulator has persistently failed to:

- comply with a duty imposed on the regulator by or under Part 3 of the Act in relation to the particular offence; or
- act in accordance with the regulator's own guidance published in relation to the offence – and particularly the guidance that this Part of the Act requires to be published (see question 69 below); or
- act in accordance with the principles set out in Part 1 of the Act that regulatory activities should be carried out in a way which is transparent, accountable proportionate and consistent and targeted only at cases in which action is needed.

A Minister may give a further direction revoking the original direction if he is satisfied that the regulator has taken appropriate steps to remedy the failures.

Before giving any direction, the Minister must consult the regulator and any other person they think appropriate. The Minister must also notify Parliament or, where appropriate, the National Assembly for Wales.

## THE NEW SANCTIONS

### Fixed Monetary Penalties (FMPs)

#### **35. *What is a fixed monetary penalty notice?***

Fixed monetary penalties (FMPs) are fines for relatively low fixed amounts that are intended to be used in respect of low level, minor instances of regulatory non-compliance.

We see fixed penalty notices as enabling regulators, in suitable cases, to enforce less serious offences in a more proportionate way than a prosecution. FMPs can remove the stigma of a criminal record and could be used for offences such as not maintaining appropriate records.

#### **36. *How will the level of fixed monetary penalty be determined?***

A fixed monetary penalty is one of an amount specified in the order made by the Minister. This may be set at a single amount or the Minister may provide for different amounts based on certain factors, such as size of the business. For example, a sole trader may be given a £50 penalty, whereas a company might receive a £100 penalty, or alternatively, the penalty for carrying out an activity without a licence may be £50 for one week or £100 for two weeks.

The maximum level of penalty will usually be capped at £5,000.

#### **37. *What is the process for imposing a FMP?***

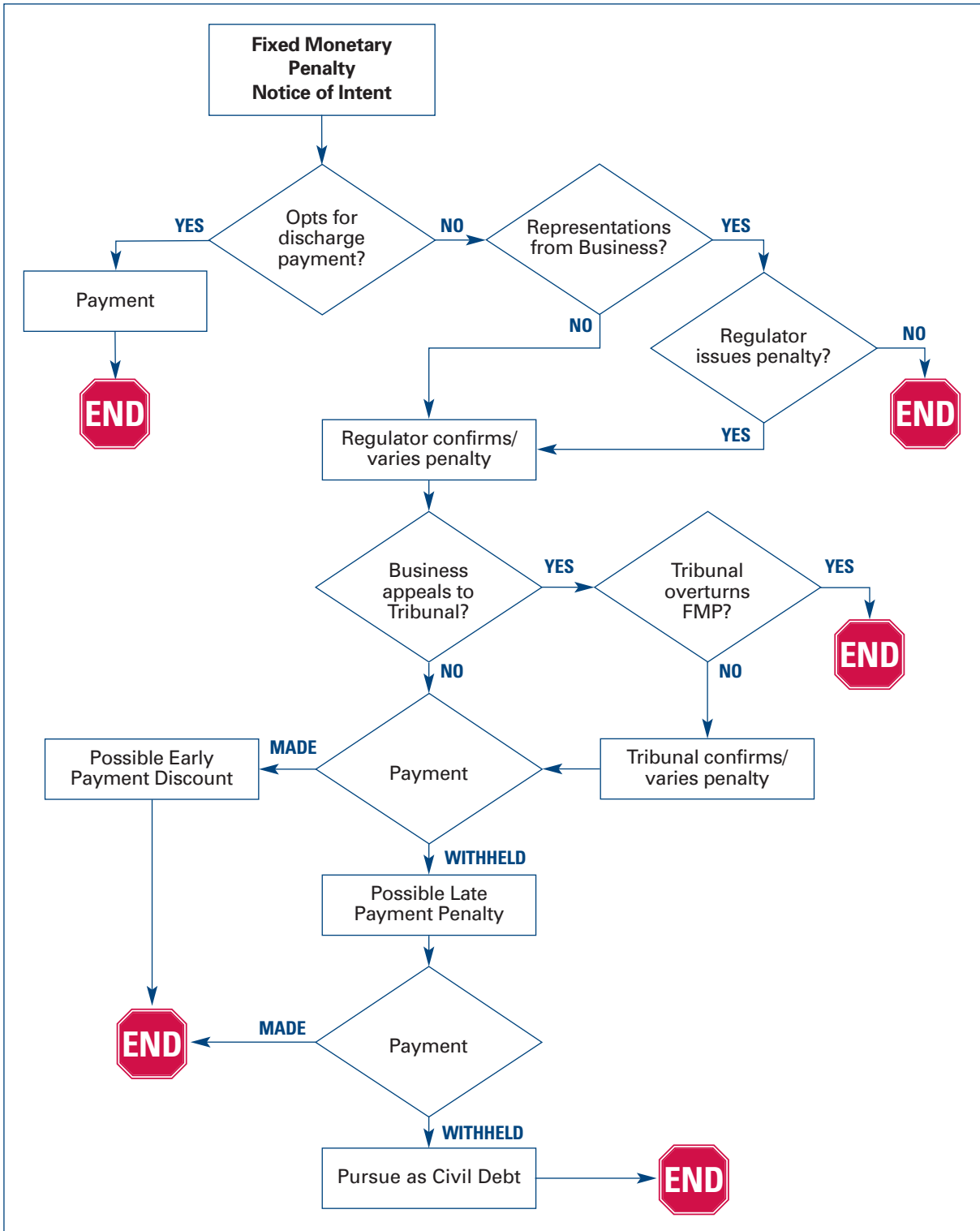
Before imposing a fixed monetary penalty, the regulator must first serve the business with a 'notice of intent' giving notification that it proposes to impose the penalty. The notice must include certain information including:

- the grounds for proposing to impose the penalty;
- the effect of a paying a 'discharge payment';
- the right to make the representations and objections against the proposed penalty;
- the circumstances in which the regulator is not allowed to impose the fixed monetary penalty (for example where a business has a defence);
- the period of time a business has to make representations and objections, which may not exceed 28 days; and
- the period of time which liability for the fixed monetary penalty may be discharged, which may not exceed 28 days.

The business will then have the right to make written representations and objections to the regulator about the proposal to impose the penalty or pay a discharge payment. The business may also raise any defences to the proposed sanction.

After the end of the period for making representations and objections, the regulator must decide whether to impose the penalty (with or without modification).

**Figure 3: Issuing Fixed Monetary Penalties (FMP)**



In order to ensure high quality sanctioning, the regulator should have arrangements in place to review or monitor individual decisions. This will ensure that there is confidence in the regulatory system from the regulated community and the wider public. If it decides to impose a requirement, the regulator must serve a further notice, a 'final notice', which contains certain information as to the following:

- the grounds for imposing the requirement;
- how payment may be made;
- the period within which it must be made and, where they exist, any early payment discounts or late payment penalties;
- rights of appeal; and
- the consequences of failing to pay the penalty.

Following service of the final notice, if the business chooses to pay straight away it could benefit from an early payment discount. Again, such an amount will have to be set out in the order made under Part 3.

### **38. *What is a 'discharge payment'?***

Where a business accepts liability, rather than wait for the period for representations and objections to expire, they may pay a 'discharge payment', which removes liability for the sanction and stops proceedings from progressing further. This payment must be set at an amount that is lower or equal to the level of penalty.

The payment could, for example, be of a lower amount in order to reflect the procedural savings to the regulator of an early admission of liability.

### **39. *What can the business do if it is unhappy with the regulator's decision to impose a fixed monetary penalty?***

The business will have the right to appeal the decision if the business considers the decision to have been based on an error of fact, was wrong in law or was unreasonable. All these grounds of appeal must be provided for in the order but provision can also be made for appeals on other grounds.

### **40. *What will happen if a business fails to pay a fixed monetary penalty?***

If a regulator imposes a fixed monetary penalty on a business, that business cannot later be criminally prosecuted for the original offence. This is for reasons of double jeopardy.

We believe that there should instead be an efficient and streamlined procedure for recovering monetary penalties. Unpaid penalties, any interest arising and late payment charges will be enforced via the civil courts. The procedure may differ depending on whether the business has appealed to the tribunal against the sanction.

#### *Procedure following an appeal*

If a business appeals against imposition of a monetary penalty and the First-tier Tribunal finds in the regulator's favour, the unpaid sum will be recoverable as if it were

payable under an order of a county court or the High Court in England and Wales<sup>11</sup>. Similar provisions apply in Scotland and Northern Ireland.

In practice, this means that the regulator will skip the initial stages of registering a claim for the unpaid sum in the courts and will be able to proceed direct to enforcement (*see question 41 below*).

#### *Procedure where there is no appeal*

The procedure will be slightly different where the business chooses not to appeal against the sanction and does not pay the penalty. The unpaid amount may be pursued in the ordinary way through the civil courts. Alternatively, the Act also allows the Minister making the order giving the regulator access to the new powers, to provide for unpaid sums to be recoverable as if 'on the order of' a county court or the High Court.

Where a Minister chooses to allow for an unpaid penalty or any interest to be recoverable as if it were a court order, the regulator must follow the applicable civil procedure rules<sup>12</sup>. The regulator must apply for an order to the court for the district where the person against whom the award was made resides or carries on business, unless the court otherwise orders. The application can be dealt with by a court officer without a hearing. Once the order has been made, the regulator may proceed to enforcement action. There will be a fee for the application, although the regulator can reclaim this from the defaulter in the event of successful enforcement.

The exact nature of the enforcement process prior to the regulator applying to the court for the court order will be at the Minister's discretion. He could, for example, require the regulator to issue a further notice for the monetary penalty or costs where a business ignores the original notice, including any interest and/or a late payment charge. In the event of further non-compliance, the regulator could then proceed to apply for the court order after a set period of time.

### **41. What enforcement tools do the civil courts have access to?**

Once a court order has been obtained, a regulator will have a number of enforcement options available to it. These include:

- A warrant of execution – allowing a bailiff to seize goods or money to the value of the amount being recovered;
- A charging order – an order of the court placing a 'charge' on the judgment debtor's property (including a house or a piece of land or stocks and shares); and
- A third party debt order – usually made to stop the defendant taking money out of his or her bank or building society account.

The regulator will have to pay a fee to access any of these sanctions, but again this can be recovered from the defaulter in the event of successful enforcement action.

<sup>11</sup> See section 27 of the Tribunals, Courts and Enforcement Act 2007. [www.opsi.gov.uk/acts/acts2007/pdf/ukpga\\_20070015\\_en.pdf](http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga_20070015_en.pdf)

<sup>12</sup> Rule 70.5 of the *Civil Procedure Rules 1998*. [www.opsi.gov.uk/si/1998/19983132.htm](http://www.opsi.gov.uk/si/1998/19983132.htm)

#### 42. *Where will regulators pay the money collected from penalties and late payment charges?*

The regulator must pay any money collected from penalties, discharge payments interest or late payment charges into the Consolidated Fund. It will not be able to retain this money.

### Discretionary Requirements

#### 43. *What are discretionary requirements?*

Discretionary requirements are a package of sanctions that may be imposed either on their own or in combination with each other. Generally, they should be used as a response to mid to high level examples of regulatory non-compliance.

Discretionary requirements are also aimed at addressing offences where a greater degree of flexibility may be required in order to sanction the offence appropriately. This sanction may be more suitable in more complex cases of non-compliance where there are a number of different effects or consequences that need addressing.

#### 44. *How will discretionary requirements work?*

The order made by the Minister will be able to give a regulator the power to impose one or more of the following discretionary requirements:

- to pay a variable monetary penalty (VMP) of an amount determined by the regulator;
- to take steps specified by the regulator, within a stated period, designed to secure that the offence does not continue or recur (a 'compliance requirement'); and
- to take steps specified by the regulator, within a stated period, designed to secure that the position is restored, so far as possible, to what it would have been if no offence had been committed (a 'restoration requirement').

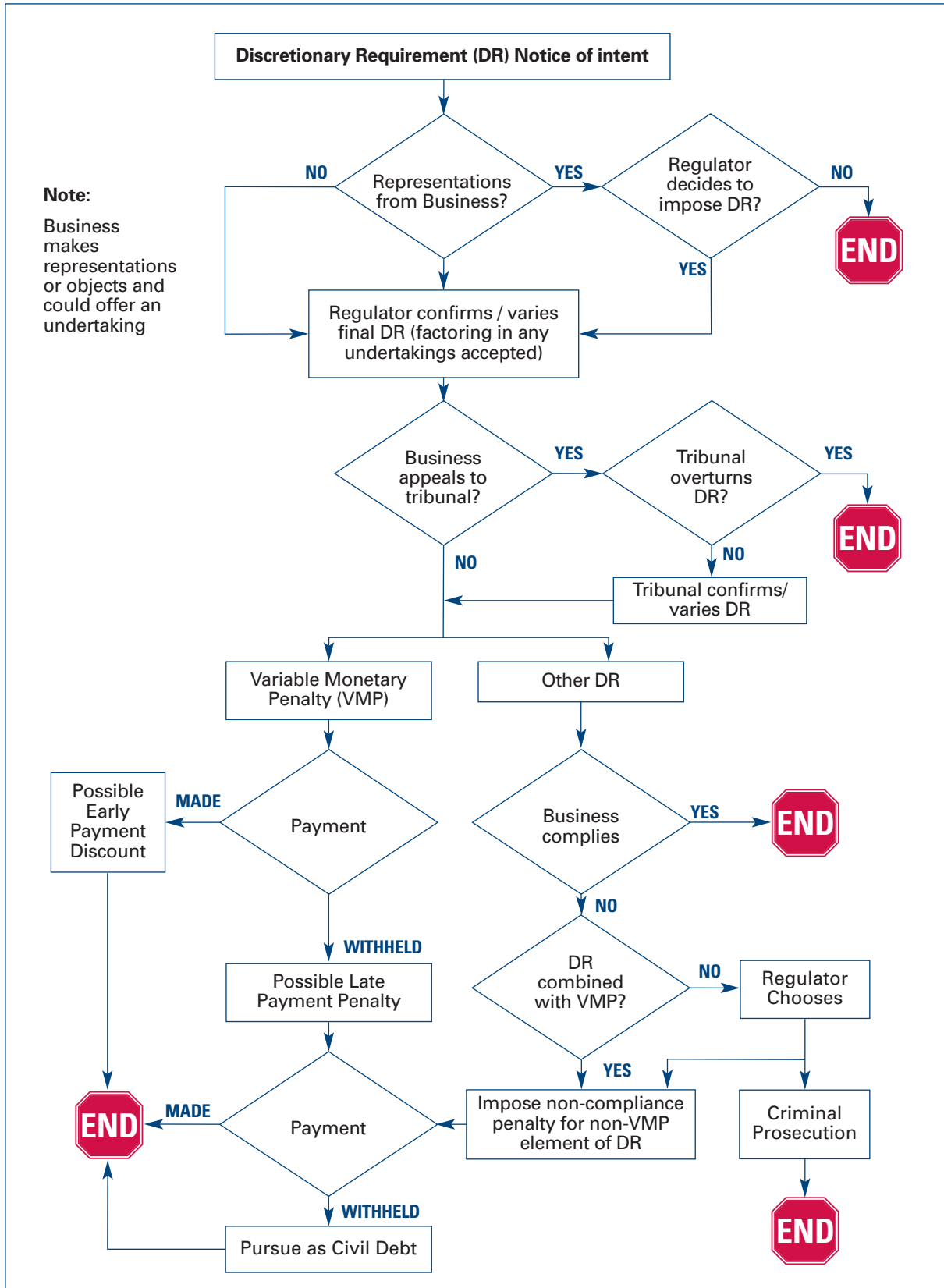
If an order authorises a regulator to impose more than one of the requirements, it will be for the regulator to decide which sanction or combination of sanctions to use in a particular case.

The **monetary penalty** is variable so that the regulator will be able to set it at a level that removes any financial gain from committing the offence and takes account of factors such as the gravity of the failure and the history of compliance.

A **compliance requirement** can be used to secure that a business take the steps needed to bring itself back into compliance, for example, by making good an unsafe piece of equipment, changing a process or providing training.

A **restoration requirement** can be used to ensure that a business deals with the consequences of the offence, for example, by cleaning up the area contaminated as a result of the offence, or reimbursing customers' money.

**Figure 4: Issuing Discretionary Requirements (DR)**





A regulator given all three powers will be able to use them in any chosen combination. The regulator will therefore be able to tailor the sanctions imposed to deal with the different consequences of the offence in the most suitable way. In this way, the discretionary requirements will give regulators a flexible set of powers that enables them to achieve a constructive enforcement outcome that remedies the consequences of an offence and promotes good working relationships between regulator and business; an outcome that is often not served by prosecution.

The process for issuing discretionary requirements is set out in the flow chart at Figure 4.

#### **45. *What is a notice of intent?***

Before imposing a discretionary requirement, the regulator must first serve the business with a 'notice of intent' telling it what is proposed. The notice must include certain information including:

- the grounds for proposing to impose the requirement;
- the right to make the representations and objections and the period within which they may be made – the period must be at least 28 days beginning with the day the notice is received; and
- the circumstances in which the regulator is not allowed to impose the requirement (for example where a business has a defence).

The business will then have the right to make written representations and objections to the regulator about the proposal to impose the requirement. The business may also raise any defences to the proposed sanction.

#### **46. *What happens next?***

After the end of the period for making representations and objections, the regulator must decide whether to impose the requirement (with or without modification) or, where he has the power, to impose a different discretionary requirement.

In order to ensure high quality sanctioning, the regulator should have arrangements in place to review or monitor individual decisions. This will ensure that there is confidence in the regulatory system from the regulated community and the wider public. Such arrangements could, for example, provide that a senior officer within the regulator reviews whether the case should progress to a final notice taking into account the representations and objections made by the business. In order to provide a degree of independence, that officer should not have been involved in the original decision to issue the notice of intent but should work or have worked in the relevant area of regulation, and where possible, be more senior and experienced than the person imposing the notice.

If it decides to impose a requirement, the regulator must serve a further notice, a 'final notice', which contains certain information as to the following:

- the grounds for imposing the requirement;
- if a variable monetary penalty is imposed, how payment may be made, the period within which it must be made and, where they exist, any early payment discounts or late payment penalties;
- rights of appeal; and
- the consequences of failing to comply with the requirement.

#### **47. How will variable monetary penalties be calculated?**

The regulator will determine the level of a VMP but will be required to publish guidance as to the factors it is likely to take into account in determining the level. The following are examples of aggravating and mitigating factors, which regulators could take into account when the level of VMP is being determined. This list is not exhaustive and each decision will depend on the regulatory area and the circumstances of the individual case.

Possible aggravating factors in determining the size of the penalty:

- Seriousness of the regulatory non-compliance, e.g. the harm to human health or the environment, the duration of the non-compliance etc;
- A history of non-compliance by the business;
- Financial gain made by the business as a result of non-compliance with regulations;
- The conduct of the business after the non-compliance has been discovered; and
- Previous actions taken by the regulator, or other regulators, to help the business into compliance.

Possible mitigating factors in reducing the level of a penalty:

- A previously good compliance record;
- Action taken to eliminate or reduce the risk of damage resulting from regulatory non-compliance;
- Voluntary reporting of regulatory non-compliance;
- Actions taken to repair the harm done by regulatory non-compliance; and
- Co-operation with the regulator in responding to the non-compliance.

Where an offence is triable summarily only (i.e. may only be heard in the magistrates' courts), and is punishable by a fine, the maximum level of penalty will usually be £5,000.

#### **48. Can the business do anything to mitigate the discretionary requirement?**

The order giving the regulator power to impose discretionary requirements must provide that a business is able to offer the regulator an undertaking to take action to benefit a third party affected by the offence, including the payment of compensation. Where such undertakings are offered, it will be up to the regulator to decide whether to accept it, and how to take the undertaking into account in making his sanctioning decision.

For example, a regulator could issue a notice of intent to a business, notifying it of its intention to issue a variable monetary penalty. The business could then offer to pay compensation to persons affected by the offence, and the regulator, if it saw fit, could reduce the amount of the VMP to take account of the compensation offered. Such undertakings cannot, however, be offered by a business after a final notice has been imposed.

**49. What can the business do if it is unhappy with the regulator's decision to impose a discretionary requirement or the conditions in the requirement?**

The business will have the right to appeal the decision if it considers the decision to have been based on an error of fact, was wrong in law or was unreasonable. If a variable monetary penalty is imposed, the business will also be able to appeal on the grounds that the amount of the penalty is unreasonable. In addition, if a non-monetary discretionary requirement is imposed, for example, a compliance requirement, the business will be able to appeal on the grounds that the nature of the requirement is unreasonable. All these grounds of appeal must be provided for in the order; provision can also be made for appeals on other grounds.

**50. What happens if a business fails to comply with a discretionary requirement or undertaking?**

This depends on the nature of the requirements imposed. Where the business has been required to pay a variable monetary penalty (whether alone or in combination with non-monetary discretionary requirements or undertakings), the business may not be later criminally prosecuted for the original offence. This is for reasons of double jeopardy. Failure to pay any monetary penalty can lead to the regulator recovering the amount due through civil debt procedures (*see question 40 on fixed monetary penalties above*).

The position is different where non-monetary discretionary requirements are imposed or an undertaking is accepted without the imposition of a variable monetary penalty. The non-monetary discretionary requirements are less punitive in nature than variable monetary penalties and so we take the view that the same issues of double jeopardy do not arise. If the business subject to such requirements fails to comply with them, it may be criminally prosecuted at a later date for the original offence. This will be a decision for the regulator. The regulator could decide that as the civil sanction has failed and the business has refused to comply, it should revert back to the criminal prosecution route instead.

In such cases, the Act does allow for the time limits for criminal prosecution to be extended, although the Minister making the order would not be able to extend these retrospectively in contravention of Article 7 of the *European Convention on Human Rights*.

Alternatively, the order made by the Minister may also allow a regulator to issue a monetary penalty for the failure to comply with the discretionary requirement (a 'non-compliance penalty'). Non-compliance penalties are not available for failure to pay a variable monetary penalty.

If the order provides for non-compliance penalties, it must also provide for:

- the amount of the penalty and how it may be calculated;
- the serving of a notice imposing the penalty by the regulator; and
- rights of appeal against the notice.

## Stop Notices

### **51. What are stop notices?**

Stop notices require a business to cease an activity that is causing harm or presents a significant risk of causing serious harm.

They will perform two related functions. Where the business served with a notice is already carrying on the activity they will prohibit the activity being further carried on until the business has taken the steps specified in the notice.

They may also be used for more preventative purposes. A stop notice may be imposed where an activity, which is likely to be carried on in the near future, will cause, or is likely to cause a significant risk of serious harm.

The objective, in both cases, is to prohibit the business from carrying on the activity until the steps needed to secure compliance with the law have been taken and, by that means, to encourage the business back into compliance.

While the notice is in force, it will serve the further valuable purpose of protecting the public from the effects of carrying on the activity in a way that does not comply with the law.

### **52. When will stop notices be used?**

A stop notice may only be served if the business is carrying on or is likely to carry on the activity and the regulator has the reasonable belief:

- that in carrying it on the business presents, or would be likely to present, a significant risk of serious harm to:
  - human health;
  - the environment (including the health of animals and plants); or
  - the financial interests of consumers; and
- that in carrying on the activity the business is, or is likely to be, committing an offence.

### **53. How will stop notices work?**

An order made by the Minister will give regulators the power to serve a notice on a business prohibiting it from carrying on a specified activity until steps are taken to either remove the risk of harm or fully return to compliance with the law. For example, this could mean that a business carries out its activities according to industry standards of safety.

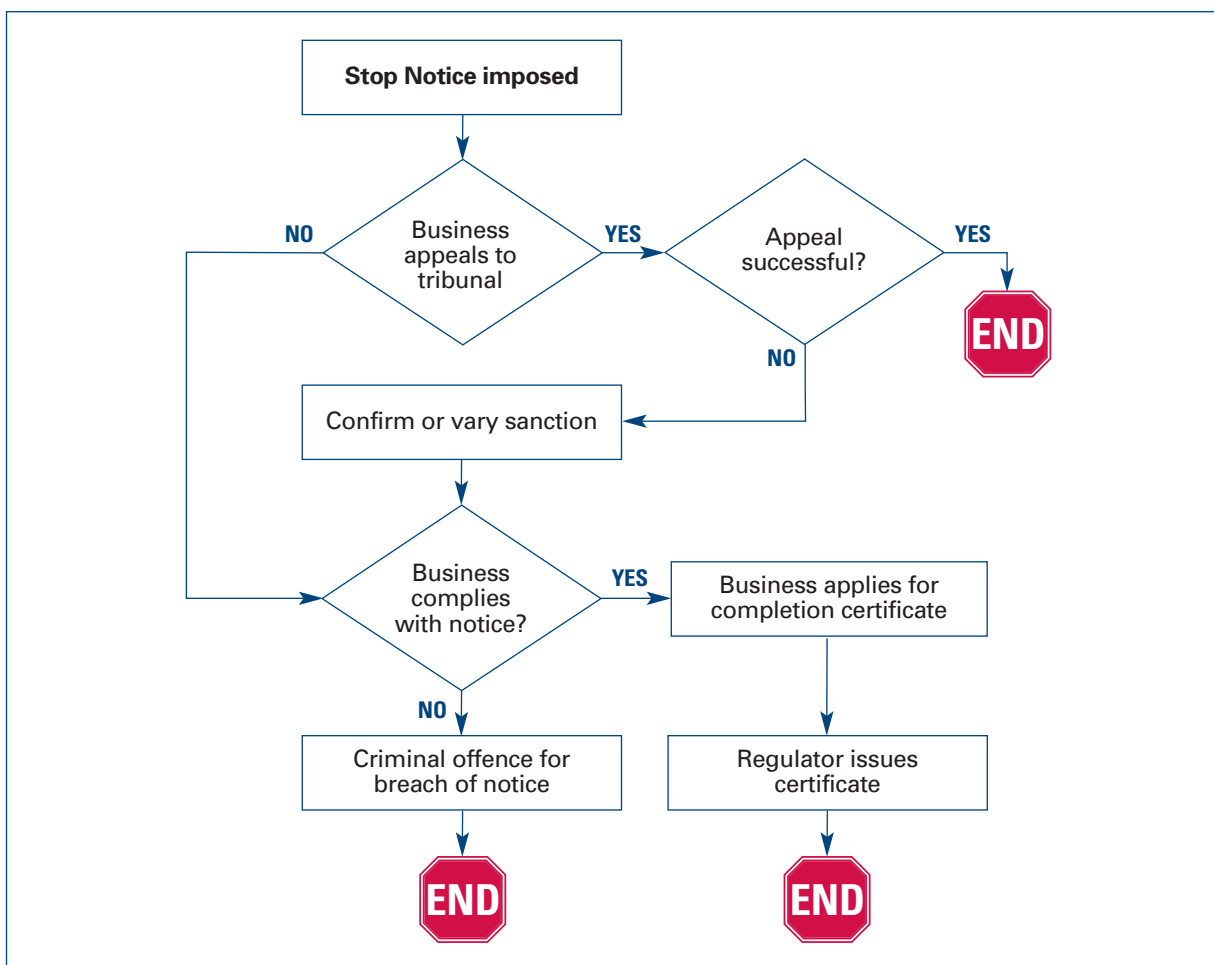
Stop notices have the power to require a business to cease carrying out certain processes or even stop the business trading altogether. As such, the test of significant risk of serious harm is deliberately stringent to ensure that only the most serious cases are captured.

If the regulator is satisfied, after the notice has been served, that the business has taken the steps set out in the notice, the regulator must issue a certificate (a 'completion certificate').

The business may also apply for a completion certificate at any time. If a business makes such an application, the regulator must make a decision as to whether to issue one within 14 days of the request. In practice, the regulator should make this decision as soon as possible.

The process for issuing stop notices is set out in the flow chart at Figure 5.

**Figure 5: Issuing Stop Notices**



**54. *What can a business do if it is unhappy with the decision to impose a stop notice or to refuse to issue a completion certificate?***

A business served with a stop notice will have a right to appeal if it considers that the regulator's decision to serve it was based on an error of fact or was wrong in law; that a requirement imposed by the notice was unreasonable; that it has not and would not have committed the offence if the notice had not been served; or that, because the business has a defence, it would not be liable to be convicted of the offence giving rise to the service of the notice. These grounds of appeal must be provided for in the order but provision can also be made for appeals on other grounds.

Where a business served with a stop notice applies for a completion certificate and the regulator decides not to issue one, the business will be able to appeal against the regulator's decision on the ground that it was based on an error of fact, was wrong in law or was unreasonable. These grounds of appeal must be provided for in the order but provision can also be made for appeals on other grounds.

The Minister will provide in the order whether stop notices are automatically suspended when there is an appeal.

**55. *What happens if a business fails to comply with a stop notice?***

A business that does not comply with a notice will be guilty of a criminal offence.

**56. *What if a regulator wrongly imposes a stop notice? Will a business be entitled to compensation if it suffers a loss in such circumstances?***

The serious nature of stop notices means that compensation should, in certain circumstances, be available where a notice is wrongly imposed. Accordingly, orders giving regulators the power to serve stop notices will have to provide for regulators, on application, to compensate businesses where they have suffered loss because of the service of a stop notice. The Minister will determine the specific grounds for compensation in the order. Compensation might be appropriate where a business wins an appeal against imposition of a stop notice and where the regulator is considered to have acted unreasonably or in serious default. Compensation will not be appropriate in all cases, for example, it may not be appropriate if an appeal was upheld on a technicality.

**57. *What will happen if a business is unhappy with a regulator's compensation decision?***

The business will have a right of appeal against decisions by regulators not to award compensation and against the amount of compensation awarded.

## Enforcement Undertakings

### **58. *What are enforcement undertakings?***

Enforcement undertakings are agreements made between a business and a regulator for the business to undertake specific actions. They are for use where the regulator suspects that the business has committed a relevant offence, although in practice it may well be the business that brings this to the regulator's attention. A regulator is not obligated to accept enforcement undertakings in a particular case.

There is an important difference between enforcement undertakings and the other new sanctions proposed in that it will be for the business to decide whether to propose to give an undertaking.

### **59. *Why is the Government introducing them?***

The Macrory report noted that current sanctioning regimes do not allow for creative ways of addressing regulatory non-compliance. There have been cases where businesses have recognised that they have fallen into non-compliance and proposed innovative and restorative ways of returning to compliance. Until now, there has been no legislative basis to facilitate or encourage this kind of creative measure.

### **60. *How will enforcement undertakings work?***

A regulator should be able to accept an undertaking from a business in any case where it has reasonable grounds to suspect that the business has committed an offence.

The action that a business can offer to undertake must be:

- action to secure that the offence does not continue or recur;
- action to secure that the position is restored, so far as possible, to what it would have been if the offence had not been committed;
- action, including paying money, to benefit any person affected by the offence; or
- other actions specified by the Minister in the order.

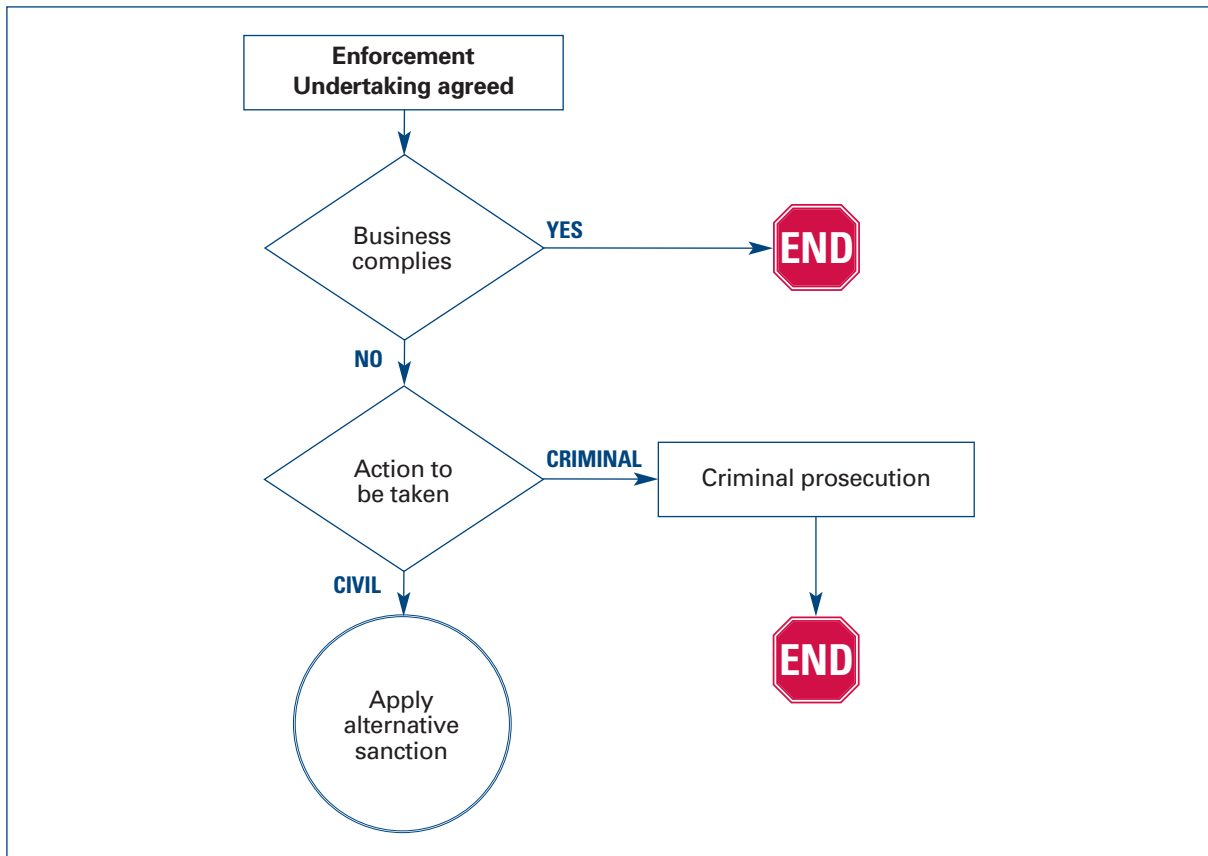
It is for the business to offer such action, perhaps after brief discussions with the regulator.

The Minister may also add to the order detail about the process for publication of undertakings and certification by the regulator that an undertaking has been complied with.

Once an undertaking has been accepted and the business complies with it, the business may not be convicted at any time for the original offence or have an administrative sanction imposed on it.

The procedure is set out in more detail on the flowchart at Figure 6.



**Figure 6: Issuing Enforcement Undertakings****61. Will a business have a right of appeal against an undertaking?**

We do not consider there is a need for a right of appeal against an undertaking because this will be an agreement offered by the business and accepted by the regulator. If, however, the order requires the regulator to issue a certificate to the business on completion of the undertaking, we would expect a business to have a right of appeal if the regulator refuses to do so.

**62. What will happen if a business fails to comply with an enforcement undertaking?**

Where there is a breach of an undertaking or any part of it, the regulator may bring a prosecution against the business for the original offence or impose an administrative sanction such as a discretionary requirement instead.

## Appeals

### **63. Who will hear appeals against the new sanctions?**

All appeals will be either to the First-tier Tribunal, established under the *Tribunals, Courts and Enforcement Act 2007*<sup>13</sup> (the '2007 Act'), or to another statutory tribunal, to be specified by the Minister in the order. This exception is to cater for tribunals that will not form part of the First-tier Tribunal, such as the employment tribunals, which currently hear some health and safety appeals and may be an appropriate venue for hearing certain appeals.

The new First-tier Tribunal will be divided into 'chambers'. It is intended that a 'general regulatory chamber' will hear appeals against the new sanctions. The structure and membership of the First-tier Tribunal is provided for in the 2007 Act. Appeals will be heard by a tribunal judge either sitting alone or with one or two members who are expert in the particular regulatory field.

### **64. What are the grounds for appeal?**

The Act sets out minimum grounds for appeal for each sanction. These grounds differ in detail from sanction to sanction but generally speaking a person can overturn the sanctioning decision by arguing that the decision was based on an error of fact, was wrong in law or was unreasonable. On appeal, the person subject to the sanction will have to raise one of these grounds of appeal.

### **65. What powers will the tribunal have?**

The order made by the Minister may grant the tribunal the power to withdraw or confirm a sanction, to take such other steps which a regulator could take (e.g. impose another sanction upon the person), and a power to remit the sanctioning decision back to the regulator for further consideration. Detailed procedural rules governing how the tribunal will use these powers will be made either under the establishing legislation of the tribunal or under powers in the RES Act. Such rules could provide, for example, the circumstances in which the effect of a sanction is suspended during an appeal.

### **66. What will be the time limits for appeals?**

Time limits will be set in the relevant tribunal procedure rules. These could vary by sanction, by offence, and by regulator. For example the time limit for appeals against stop notices could be much shorter than for other sanctions.

<sup>13</sup> *Tribunals, Courts and Enforcement Act 2007*.

## Costs

### **67. Will regulators be able to reclaim their costs from businesses?**

Yes, orders giving a regulator the power to impose any discretionary requirement or a stop notice will be able to provide for the recovery of costs by the regulator, although any such scheme would need to be approved by HM Treasury. The costs that can be recovered will include, but need not be limited to, investigation costs, administration costs and the cost of obtaining legal and other expert advice.

The provisions in the order will enable the regulator to serve a notice on the business requiring it to pay the costs incurred by the regulator up to the time the discretionary requirement was imposed or the stop notice was served, and must also secure that:

- the amount to be paid is specified in the notice;
- the regulator can be required to provide a detailed breakdown of the amount;
- the business is not liable to pay any costs it can show to have been incurred unnecessarily; and
- the business has a right of appeal against the requirement to pay costs and the amount decided upon by the regulator.

Regulators do not need to pay such monies into the Consolidated Fund and will be able to retain them.

Regulators will not be able to recover costs in the case of fixed monetary penalties or enforcement undertakings.

### **68. What about costs associated with the tribunal hearing?**

The First-tier Tribunal has the power to award ‘the costs of and incidental to’ a tribunal hearing to either party to the hearing, although tribunal procedure rules can restrict this general power<sup>14</sup>. Other tribunals should have similar powers to award costs in their establishing legislation.

## Guidance on enforcement

### **69. What guidance will regulators be required to publish?**

Regulators will be required to publish guidance about the new sanctions (‘Penalty Guidance’) and how it will enforce offences (‘Enforcement Policy’). This is explained in further detail below. In practice, the two forms of guidance may be covered within a single general enforcement policy.

<sup>14</sup> Section 29, Tribunals, Courts and Enforcement Act 2007  
[www.opsi.gov.uk/acts/acts2007/pdf/ukpga\\_20070015\\_en.pdf](http://www.opsi.gov.uk/acts/acts2007/pdf/ukpga_20070015_en.pdf)

### *Penalty Guidance*

The Penalty Guidance will contain information on the new civil sanctions and how they should be used. This will include information about the circumstances in which a civil sanction may be imposed or undertakings accepted. It should also detail where a sanction may not be imposed (i.e. where a defence may be accepted); how a penalty should be calculated including the matters that may be factored in to the calculation (e.g. discounts for voluntary reporting of non-compliance); and a business's opportunity to make representations or objections against the action and their rights of appeal to the tribunal.

Prior to issuing or revising guidance, a regulator must consult with those specified in the ministerial order (e.g. regulators and business). The regulator must revise the guidance where appropriate.

The regulator must have regard to the guidance or revised guidance in exercising its functions.

### *Enforcement Policy*

For each offence, the Enforcement Policy must set out the relevant sanctions to which a person may be liable. The Enforcement Policy must also set out the action which the regulator may take to enforce the offence. For example, it might state that a particular offence will usually be enforced by way of a fixed monetary penalty rather than criminal prosecution. The Enforcement Policy must set out the circumstances in which the regulator is likely to take such action. For example, the policy might say that criminal prosecution may be more likely where the person has a past history of regulatory non-compliance. The Enforcement Policy, in contrast to Penalty Guidance, is focussed on how particular offences are enforced.

Regulators will be able to revise their guidance periodically. The regulator will be required to consult with all persons it considers appropriate before publishing or revising its guidance.

## **70. *Who will write the enforcement policy and penalty guidance documents for local authorities?***

It is the responsibility of the regulator to prepare and publish its own Enforcement Policy as this sets out how it proposes to enforce certain offences.

In relation to Penalty Guidance, the requirement in the Act only concerns the publication of guidance. In terms of preparing the Penalty Guidance, the responsibility will vary depending on the regulatory regime.

Where a regulation is enforced by both national regulators and local authorities, national regulators will take the lead in producing Penalty Guidance, in consultation with the relevant government department, local authorities and the Local Better Regulation Office (LBRO). This will help ensure there is consistent application of the law across different regulators.

Where regulations are only enforced by local regulators, such as environmental health, planning and trading standards, there are no clear national regulators to take the lead in

producing Penalty Guidance. In such cases LBRO (established on a statutory footing by Part 1 of the RES Act) in consultation with the relevant government department can take the lead in providing support to local authorities in producing Penalty Guidance. This will help ensure there is consistent application of the law across the country.

LBRO will be well placed to take on such a role because of their bridging role between local and national regulation. Through its day-to-day work with local authorities they should be aware of the issues and concerns facing them, which they can take into account. At the same time they will have a national perspective and will be looking to improve consistency across the piece.

LBRO will have the power to take on such a role, by virtue of Section 6 of the RES Act – the power to issue guidance to local authorities in England and Wales. Providing LBRO has consulted with the appropriate stakeholders, LBRO may issue guidance, which local authorities will be bound to have regard to. If the authority fails to adhere to the guidance, LBRO will have the power to require the authority to comply with the guidance issues.

## **Publicity**

### ***71. What action will regulators have to publicise?***

Regulators will be required to publish the details of any enforcement action taken, i.e. where a civil sanction is imposed or where an undertaking is accepted. The requirement does not cover any enforcement action not covered by the Act. The regulator could for example append to its annual report a list of the cases it has taken in the year. Alternatively, a regulator may maintain a database on its website of sanctioning decisions it has taken.

### ***72. Will regulators be required to publish details of all enforcement action?***

Regulators will not be required to publish the details of sanctions where the sanction has been overturned at appeal. Also, the Minister making the order conferring the powers may exempt regulators from the requirement where he does not feel it is appropriate. This is to capture cases where there may be data protection implications or other important grounds for not publishing some details of a case.

### ***73. Will this affect a regulator's existing approach to publicity?***

This requirement is specifically concerned with the sanctions provided for in Part 3 of the Act and does not restrict a regulator's other publicity options, such as issuing press releases.

## Regulatory burdens

The RES Act provides a power to allow a Minister to apply a duty to regulators in respect of some or all of their regulatory functions. The duty will require a regulator to keep its functions under review, not to impose unnecessary burdens, and where it is practicable and proportionate to do so, to remove any unnecessary burdens. The regulator must then report on its activities to reduce those burdens, annually.

### 74. *What are unnecessary burdens?*

An unnecessary burden is one, identified by the regulator:

- that is disproportionate to the regulator’s policy objective, in other words goes further than is necessary to achieve that objective; or
- that is targeted at situations where action is not required to achieve that objective; or
- which is imposed in circumstances where it is possible achieve the desired outcome in a less burdensome way.

A burden is not unnecessary where it is a duty or requirement imposed directly by legislation without the exercise of any discretion by the regulator.

#### EXAMPLE

If a regulator required a business to use a particular technology to reduce emissions from a factory but alternative equipment would achieve the same reduction in emissions with a lower level of burden and no ill effects from its use, the burden of requiring a business to use the specified solution could be an “unnecessary burden”.

### 75. *Which regulators will be affected?*

Any person exercising a regulatory function could potentially be made subject to the duty. The duty has been applied to the Gas and Electricity Markets Authority, the Office of Fair Trading, the Office of Rail Regulation, the Postal Services Commission and the Water Services Regulation Authority in the Act. For other regulators, it is intended that regulatory functions will only be listed after a Minister has consulted with relevant regulators and any other appropriate bodies. The duty can only be applied to other regulators by way of a statutory instrument requiring the approval of both Houses of Parliament.

The order will specify the regulatory functions to which the duty is being applied. The duty need not be applied to all regulators exercising a particular function.

## CASE STUDIES: reducing unnecessary burdens

**Environment Agency's "One farm, one form" approach** resulted in the production of a Plain English form and guidance allowing multiple exemptions to be registered in one submission as part of the introduction of the agricultural waste regulations. This has meant that the paperwork faced by an average farmer has been reduced from 75 pages to 5. The project team also engaged with farmers and the National Farmers Union to ensure the forms and guidance were easily understandable. In doing this they were also able to obtain an estimate of the time needed to complete the form.

**Department for Transport** have introduced better targeted safety inspection requirements for goods vehicle and passenger transport (HGV and PSV) operators resulting in a potential reduction in the number of times some more modern vehicles need to be given vehicle inspections (other than annual 'MoT' tests). There are about 400,000 heavy goods vehicles in GB. Some 25% of the fleet will benefit from this change by having newer and more compliant vehicles. Assuming each vehicle needs two fewer safety inspections a year, and each safety inspection costs £500 in lost productivity (i.e. 2 hours downtime) this means approximately £100 million a year saving to industry.

**The Health and Safety Executive** has conducted a fundamental review of all its forms and identified 54 per cent to be removed by the end of 2006. By April 2007, all the identified forms were discontinued and/or deleted. The savings to business from the removal of these forms are approximately £250,000 per year.

## Hampton's principles of regulatory enforcement

- Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources on the areas that need them most;
- Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take;
- All regulations should be written so that they are easily understood, easily implemented, and easily enforced, and all interested parties should be consulted when they are being drafted;
- No inspection should take place without a reason;
- Businesses should not have to give unnecessary information, nor give the same piece of information twice;
- The few businesses that persistently break regulations should be identified quickly, and face proportionate and meaningful sanctions;
- Regulators should provide authoritative, accessible advice easily and cheaply;
- When new policies are being developed, explicit consideration should be given to how they can be enforced using existing systems and data to minimise the administrative burden imposed;
- Regulators should be of the right size and scope, and no new regulator should be created where an existing one can do the work; and
- Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.



## 76. *What will trigger application of the duty?*

A regulator could, if it wished, request that the duty be applied to it. However the most likely scenario is that duty will be applied where the Government believes that to do so would further the better regulation agenda.

## 77. *Shouldn't regulators consider unnecessary burdens as a matter of course?*

Regulators are already doing a great deal to modernise the way they regulate, and in doing so, are reducing regulatory burdens. For example, a number of regulators have published simplification plans which set out measures which reduce the administrative burdens of regulation. Regulators and departments that develop legislation must consider the burdens on business, the public and others of any new regulation and use public consultation to help identify those burdens that might be unintended. Anyone potentially subject to regulation is encouraged to respond to government consultations on proposals. There are already opportunities for those who are regulated to communicate with regulators their concerns on burdens from regulations and policies that are being developed.

### Influencing regulation

Government has launched a website (<http://www.betterregulation.gov.uk>) that provides everyone with an opportunity to influence the way government regulates. This website provides organisations working in the private, public or third (charity and voluntary) sectors the opportunity to submit ideas or suggestions on how the regulations impacting them can be improved. To make this process completely transparent, all ideas along with government's response to them will be published online within 90 days.

In addition, regulators are required to have regard to the *Regulators' Compliance Code*<sup>15</sup>, which came into force on 6th April 2008, when determining any general policy or principles for gaining compliance with regulations and in setting standards or giving guidance in respect of this (including to other regulators).

The Code is framed around the principles of regulatory enforcement from the *Hampton Review*, (see left). Regulators working to these principles should be operating effectively and efficiently, without imposing unnecessary burdens.

Regulators should keep their regulatory activities and interventions under review with a view to considering the extent to which it would be appropriate to remove or reduce the regulatory burdens they impose.

<sup>15</sup> Details of the *Regulators' Compliance Code* can be found at:

<http://www.berr.gov.uk/bre/inspection-enforcement/implementing-principles/regulatory-compliance-code/page44055.html>

## 78. *So what will the new duty add?*

Regulators that are subject to the new duty would be required to:

- Review the burdens they impose in fulfilling their obligations, identifying any that are unnecessary;
- Act to remove any burdens which they have identified as unnecessary, subject to it being proportionate and practicable to do so; and
- Report on action taken.

Where a desired policy outcome can be achieved in a manner which is consistent with lower cost for business, it is a fundamental principle of better regulation that a regulator should take this approach. However, policy outcomes should not be compromised. If the costs of taking action are disproportionate to the savings, the duty does not require that the burden be removed.

This requirement goes further than the requirement to have regard to the following provision in the Regulators' Compliance Code: *"Regulators should keep under review their regulatory activities and interventions with a view to considering the extent to which it would be appropriate to remove or reduce the regulatory burdens they impose"*.

For most of the issues covered in the Compliance Code, a duty to comply in all cases would be too onerous and would narrow the discretion of regulators significantly. However, for this particular aspect, which is fundamental to better regulation, the Government believes there is a strong case to make it a duty in certain circumstances.

Section 6 of the *Communications Act 2003*<sup>16</sup> placed a similar duty on OFCOM and the November 2007 *House of Lords Select Committee Report on UK Economic Regulators*<sup>17</sup> recommended that economic regulators be statutorily required to remove regulatory burdens wherever possible.

## 79. *When would the Minister apply the duty?*

The Government only intends to apply the duty to a particular regulator or regulators when it believes that doing so would help to further the better regulation agenda. In deciding whether to do so, the Government would consider a number of issues including:

- the impact that the Regulators' Compliance Code has had in that particular case or cases;
- the views of those regulated by the regulator;
- the views of the regulator;

<sup>16</sup> *Communications Act 2003*: [www.opsi.gov.uk/acts/acts2003/ukpga\\_20030021\\_en\\_1](http://www.opsi.gov.uk/acts/acts2003/ukpga_20030021_en_1)

<sup>17</sup> Details of the *House of Lords Select Committee Report on UK Economic Regulators* can be found at: <http://www.publications.parliament.uk/pa/ld/lrdgltrs.htm>

- the overall regulatory burden resulting from the sector;
- reports or studies by Select Committees, the National Audit Office, Audit Commission or other organisations, either within or outside the public sector; and
- the views of the Local Better Regulation Office

The Act requires that where a Minister decides to apply the duty he or she must consult with the regulator and other stakeholders.

The Government intends that decisions on whether to apply the new duty to any regulator should be subject to collective agreement through the Panel for Regulatory Accountability.

In order to apply the new duty to a regulator, the Government would be required to lay a statutory instrument before Parliament for approval by resolution of each House.

The Minister who considers the case, conducts the consultation, and lays the statutory instrument will be the relevant Minister in the sponsoring department or, where appropriate, the Minister responsible for better regulation.

The process to apply the duty in Wales is slightly different and will be led by Ministers of the Welsh Assembly Government.

## **80. *What form should the review of regulatory functions take?***

This is a matter for the regulator. However, the review should be effective and proportionate to the scale of any potentially unnecessary burdens that have been noted, if any. There should be no need to map every single burden.

Burdens are often imposed when seeking to deliver a change in behaviour or regulatory outcomes. Any review will need to identify those burdens that are unnecessary (i.e. because the desired change has been achieved) or cannot be justified in the delivery of the desired outcomes.

The review should have sufficient breadth and depth and examine the regulatory function in sufficient detail to make the review worthwhile. A cursory review that presents little evidence of burdens imposed is unlikely to be sufficient. The onus will be on the regulator to demonstrate that it has undertaken a credible review. If the regulator takes no action following an insufficiently thorough review, this may be open to challenge through judicial review.

We intend that a pragmatic approach should be taken and undertaking the review should not divert essential resources from the delivery of the regulatory objectives.

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<sup>18</sup> Simplification Plans set out how each Government Department and some regulators will achieve a reduction in the administrative burdens they impose to meet the Government's target of 25% reduction on 2005 levels by 2010. <http://www.berr.gov.uk/bre/policy/simplifying-existing-regulation/simplification-plans/page44063.html>

The review can use and build on existing evidence. Information would also be available from any internal or external reviews of activities undertaken in recent years, Simplification Plans<sup>18</sup> or other similar activities. It is expected that regulators should also take into account the views of those they regulate.

### **81. Does the regulator need to review the same burdens every year?**

The regulator will need to report annually on the review it has undertaken and what action it has taken as a result. It is not expected that the subsequent annual reviews will be as in-depth as the initial review, although they will need to be sufficient to explore whether any changing circumstances could have led to the creation of unnecessary burdens or whether more could be done to reduce burdens which remain.

### **82. What action should be taken if the review identifies unnecessary burdens?**

The duty requires that any unnecessary burdens identified in the review should be removed save where it would be impracticable or disproportionate to do so. Where the overall costs of lifting the burden outweigh the benefits, the regulator will need to demonstrate this fact to justify no action being taken.

If an unnecessary burden can only be removed through amending or repealing primary legislation, this is unlikely to fall within the regulator's remit and the duty will not bite. The sponsoring department or owner of the legislation may wish to consider whether or not any legislative changes are appropriate, but there is no obligation to do so. A regulator will only be required to act to remove unnecessary burdens where it is proportionate and practicable for it to do so.

The annual statement, reporting on how a regulator is addressing any identified unnecessary burdens, will also need to set out the timetable for removing the unnecessary burdens in so far as possible.

### **83. How should a regulator report on action to remove unnecessary burdens?**

A regulator exercising functions to which the duty has been applied must report on an annual basis:

- the results of its review, or rolling review;
- the action it has taken to remove the unnecessary burdens; and
- where a burden that is unnecessary has not been removed and explain why removal would be disproportionate or impracticable.

The regulator may decide the most appropriate form for the report and the vehicle to be used. This could include, for example, its annual report, or the Simplification Plan.

**84. *How does the duty fit with existing requirements on better regulation?***

The intention is that the duty, where it is applied, will improve the performance of a regulator. Where it will add very little, or may compromise specific regulatory interventions, we do not intend that it should be applied.

In particular, it is not intended that the duty should be used as a tool to intervene in respect of regulatory interventions in specific cases. For example, decisions and remedies in competition cases will not be re-opened by recourse to this duty. The duty does not apply to the regulatory functions exercised by the Gas and Electricity Markets Authority, the Office of Fair Trading, the Office of Rail Regulation, the Postal Services Commission and the Water Services Regulation Authority under competition law.

**85. *How does the duty affect the independence of regulators?***

The power does not allow a Minister to direct any operational decisions of a regulator. It only allows a Minister to apply the duty, requiring that the regulator itself conduct a review of the burdens it imposes in exercising the regulatory functions listed in the order. Where unnecessary burdens are identified and it would not be impracticable or disproportionate for it to do so, the regulator must then act on the findings of its review.

Similarly, where any unnecessary burden is found to be the result of primary legislation, it does not direct a department to amend the legislation.

**86. *What is the territorial extent of this part?***

Part 4 extends to England and Wales, Scotland and Northern Ireland. In Scotland the power is only exercisable in respect of reserved matters and in Northern Ireland in matters that have not been transferred. For England and Wales, this Part can be applied in respect of all regulatory functions.

**87. *What should be specified in the order?***

The Minister will specify to which regulatory functions the duty will apply.

**88. *When will the duty be removed from a regulator's regulatory functions?***

The duty will continue to apply indefinitely, unless specifically time limited in the order. The Minister, when laying the order to apply the duty, can specify that the application of the duty should be subject to review after a specified period. This expected post-implementation review date should also be set out in the accompanying Impact Assessment. The post-implementation review will set out the costs and benefits of the application of the duty.

A Minister can amend the original order by a further order approved by both Houses of Parliament, to remove those regulatory functions on which the Minister no longer wishes the duty to apply.

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