PART I

REGULATORY ENFORCEMENT AND SANCTIONS ACT 2008
General Scheme of the Act

JEREMY PHILLIPS

Provenance of legislation

Over the past decade we have seen a host of ostensibly deregulatory measures create a wealth of new and ever more complex legislation. Such is the price of transparency and procedural fairness! The milestones on this road to legislative enlightenment have brought about the destruction of a swathe of forests to support the work of the committees and consultants seeking this regulatory Nirvana:

- 1997 - Deregulation Task Force appointed as an independent advisory group to advise the Government on improving the quality of regulation in the United Kingdom. Focused on the 'Principles of Good Regulation': regulation and its enforcement to be
    - Proportionate
    - Accountable
    - Consistent
    - Transparent; and
    - Targeted.
- 2000 - 'Alternatives to State Regulation', published by the Task Force. Recognised that state regulation, enforced through the courts, not necessarily always the best way to achieve policy objectives.
- 2003 - 'Imaginative Thinking for Better Regulation' (also a Task Force report) recommended "alternatives to [legal] regulation" across the public sector
- 2004 - Hampton Review published. Addressed "scope for reducing administrative burdens by promoting more efficient approaches to regulatory inspection and enforcement". These approaches included the adoption of common principles of regulatory enforcement; the comprehensive use of risk assessment by every regulator; and the shifting of resources towards improved advice. Significantly recommended that "powers should be established in such a way that offenders can be deprived of all of the economic benefit of long-term illegal activity".
- 2006 - 'Regulatory Justice: Making Sanctions Effective', by Professor Richard Macrory published in November 2006. Proposes a more flexible and proportionate approach to the imposition of sanctions whilst also providing regulators with a greater range of sanctions to meet the 'Principles of Good Regulation'. Macrory also followed the Task Force's lead and expressed the view that "where a regulatory breach justifies a formal sanction, the system should be less reliant on criminal prosecutions" and make greater use of financial penalties.
- 2008 - *Regulatory Enforcement and Sanctions Act 2008* ('the Act') was drafted as a direct response to the Macrory review. It therefore establishes a regulatory model which encourages authorities to use alternative 'civil' penalties to encourage compliance, rather than pursuing prosecutions in the criminal courts. These new civil sanctions offer, arguably, a more flexible and effective response to regulatory breaches, removing the need for regulators to rely on enforcement through the courts.

Outline of the Act

The Act received Royal Assent on 21 July 2008. It comprises four distinct, but linked, elements: Parts 1 (Local Better Regulation Office), 3 (Civil Sanctions) and 4 (Regulatory Burdens) commenced on 1 October 2008; Part 2 (Coordination of Regulatory Enforcement) on 6 April 2009.

Part 1: Local Better Regulation Office (LBRO)

First, it gives the Local Better Regulation Office (LBRO), statutory powers. Originally a limited company, established as a shadow authority in 2007, the LBRO seeks to develop greater consistency in the way local authorities enforce regulations and work with central government. Current National priorities for local authority enforcement are:

- 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 now have statutory force. Local authorities must have regard to them when allocating resources to their relevant functions.

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

1. issuing guidance to local authorities in respect of regulatory services and ensuring that local authorities comply with this guidance
2. providing advice[1] to government on enforcement and regulatory issues associated with local authorities
3. reviewing and revising a list of national enforcement priorities for local authority regulatory services
4. encouraging best practice in the provision of local authority regulatory services, (including through the provision of financial support and assistance)
5. improving the coordination and consistency of regulatory functions and enforcement for businesses that operate across local authority boundaries

LBRO will also enter into a statutory memorandum of understanding with the Environment Agency[2], 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.

The Act specifies that there should be a review of LBRO in 2011 (i.e. three years after Part 1 of the Act came 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

[1] 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; and bodies that speak on behalf of consumers, such as the National Consumer Council.

[2] During initial consultation on the Bill the Environment Agency indicated that it would not make any detailed response to Part 1 of the Bill as the Agency is not directly affected by the Local Better Regulation Office

objectives and at such a point it should be dissolved. Provision is made in the Act for this eventuality.

Part 2: Coordination of Regulatory Enforcement

The second part of the Act establishes the 'Primary Authority' principle, to be run by the LBRO. It fulfils the Government's previous commitment to place Home and Lead Authority Principles on a statutory footing. Implementation of Part 2 required Statutory Instruments (SIs) to be made dealing with four key issues:

1. The application of the scheme to Scotland and Northern Ireland[3];
2. The specific[4] definition of enforcement action[5];
3. Exclusions from the requirement to notify the Primary Authority; and
4. Determination by LBRO[6].

The SIs can be accessed at http://www.opsi.gov.uk/si/

Under the scheme of the Act, 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.

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.

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. 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.

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.

Further, Article 3 of *Co-ordination of Regulatory Enforcement (Enforcement Action) Order 2009* provides that the obligation to refer shall not apply in the following circumstances:

(a) where the enforcement action is required urgently, or in the opinion of the enforcing authority is required urgently, to avoid a significant risk of harm to human

[3] SI 2009 No 669

[4] SI 2009 No 665: Article 2 describes what is, and what is not, to be regarded as enforcement action for the purposes of the primary authority scheme. Article 3 prescribes the circumstances in which the enforcing authority does not have to notify the primary authority before it takes enforcement action.

[5] Widely defined in the Act to include: action to secure compliance with a restriction, requirement or condition in relation to a breach or supposed breach; action taken in connection with imposing a sanction for an act or omission; and action taken in connection with a statutory remedy for an act or omission

[6] SI 2009 No 670: Article 3 sets out the information to be provided to LBRO by an applicant. Articles 4 to 7 set out time limits for making an application.

health or the environment (including the health of animals or plants) or the financial interests of consumers;
(b) where the enforcement action is the service of an abatement notice under section 80 of the *Environmental Protection Act 1990* or an emergency prohibition notice under specified Food Safety and Feed Hygiene legislation; or
(c) where the duty to refer would be (or in the opinion of the enforcing authority, would be) wholly disproportionate.

LBRO undertook several activities to prepare for the running of the Primary Authority scheme, including:

- A pilot scheme with a range of national businesses and local authorities to form partnership for particular regulatory functions.
- Development of training materials to assist local authorities in understanding the operational detail of the scheme.
- Series of regional road shows to help local authorities prepare for the scheme and explore the opportunities it provides for them and the businesses they regulate. Places for the training can be booked through the Trading Standards Institute website: http://www.tradingstandards.gov.uk/events/Training_Courses.cfm

Further details of these initiatives can be found on the LBRO's own website at http://www.lbro.org.uk/Pages/Article.aspx?id=292

Part 3: Civil sanctions
Part three of the Act provides a framework of administrative sanctions that will allow regulators to tackle non-compliance in ways that are:

- transparent
- flexible
- proportionate to the offence.

As the Guidance[7] explains:

> '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 though non-compliance with their regulatory obligations while helping to secure increased compliance'

The proposals were warmly received by certain regulators; the Environment Agency, for example, responded:

> 'We welcome the proposed new enforcement powers progressed in Part 2. This enhanced toolkit is necessary to enable regulation to be more meaningful and effective. Implementation is key to the delivery of significant benefits to legitimate business and those genuinely trying to comply with their obligations. There are a number of key points that we want to highlight in our response:
> • provided the implementation of the tools progresses smoothly, we want access at the earliest opportunity, across regimes and in both England and Wales at the same time..'

[7] 'BERR – Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act' (July 2008)

and further:

> 'The existing enforcement toolkit that we and the courts have access to is inadequate for modern regulators and often does not allow the offences and offenders that we are confronted with to be tackled in an effective and meaningful way. We need a broader range of proportionate penalties and sanctions that allows illegal activity and non-compliance to be tackled.'

The new civil sanctions are, briefly:

- **Fixed Monetary Penalty Notices (FMPs)** – under which a regulator will be able to impose a monetary penalty of a fixed amount;
- **Discretionary requirements –** which will enable a regulator to impose, by notice, one or more of the following:
  - Variable Monetary Penalties (VMPs) - determined by the regulator;
  - **Requirement to take specified steps (Compliance Notice)** - within a stated period to secure that an offence does not continue or happen again; and
  - **Requirement to take specified steps within a stated period (Restoration Notice)** - to secure that the position is restored, so far as possible, to what it would have been if no 'offence' had been committed;
- **Stop Notices –** which will prevent a business from carrying on an activity described in the notice until it has taken steps to restore compliance; and
- **Enforcement Undertakings –** which will enable a business, which a regulator reasonably suspects of having committed an offence, to give an undertaking to take one or more corrective actions set out in the undertaking.

Fixed Monetary Penalties (FMPs)

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 noncompliance. They will enable 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.

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.

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[8] 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).
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.

If the business is unhappy with the regulator's decision to impose a fixed monetary penalty it 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.

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. 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. Where there is no appeal, 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.

If a regulator imposes a fixed monetary penalty on a business, that business cannot later be criminally prosecuted for the original offence. The new powers are an alternative to criminal prosecution. It will be for the regulator to determine the appropriate response to a particular instance of regulatory noncompliance.

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

[8] Responding to the Bill the EA suggested that "FMPs will be issued for lower level infringements in cases which are clear cut. We do not propose to issue FMPs 'in the field'. They would be issued following full consideration and review of the facts. It follows that it would be extremely unlikely that any FMP would be withdrawn, rendering an internal review an unnecessary stage."

(HIR). Regulators who have not been through such a review should follow the HIR guidance 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).

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.

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.

Monetary Penalty (VMP)
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[9] such as the gravity of the failure[10] and the history of compliance.

Possible aggravating factors in determining the size of the penalty will include the usual *Friskies* factors, (i.e. seriousness of the regulatory non-compliance (e.g. the harm to the environment, the duration of the non-compliance etc); history of non-compliance by the business; financial gain made by the business as a result of non-compliance with regulations; 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: previously good compliance record; action taken to eliminate or reduce the risk of damage resulting from regulatory noncompliance; 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 and is punishable by a fine, the maximum level of penalty will usually be £5,000.

Compliance Requirement
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.

[9] 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.
[10] The EA suggested at the Bill stage: "We accept that the notice of intent stage is necessary prior to the issue of a VMP, since these are potentially very significant monetary sanctions. This will allow the defaulter to make representations and offer undertakings."

Restoration Requirement
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.

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.

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 to prevent an activity, which is likely to be carried on in the near future, which will, or is likely to, cause a significant risk of serious harm.

The serious nature of stop notices means that compensation[11] 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.

Enforcement Undertakings
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. 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.

Regulators' costs
Orders giving a regulator the power to impose any discretionary requirement, or a stop notice, will be able to provide for the recovery[12] of costs by the regulator. The costs that can be

[11] The EA responded to consultation on the Bill: "A compensation scheme would discourage us from making use of cessation notices (i.e. Stop Notices). Any compensation scheme that is introduced should only require regulators to make payment where their actions were clearly unreasonable. To ensure that regulators do not face significant claims, the appeals process will need to hear cases in a timely manner."
[12] Although any such scheme would need to be approved by HM Treasury. Responding to this element of the scheme in the Bill the EA drew Ministers attention to the general position: "Section 18 of the Prosecution of Offences Act 1985 enables a court to order the defendant to pay to the prosecutor such costs "as it considers just and reasonable." It has also been established in case law that the courts can order that the defendant pays reasonable investigation and legal costs (R v Associated Octel 1997, Criminal Appeal Reports, Volume 1 and

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.

Appeals against the new sanctions

All appeals will be either to the First-tier Tribunal[13], or to another statutory tribunal, to be specified by the Minister in the order. The latter 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 'general regulatory chamber' of the First-tier Tribunal 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.

Part 4: Regulatory burdens

Finally, the Act places a duty on specified regulators to:

- review the burdens they impose
- reduce any that are unnecessary and unjustifiable
- report on their progress annually.

The Act requires 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 annually report on its activities to reduce those burdens.

An unnecessary burden is one that is identified by the regulator as being:

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

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

Neville v Gardner Merchant 1983, Criminal Appeal Reports, Volume 5). The courts can also order that the defendant pays compensation costs associated with, for example, clean-up under s130 and s131 of the Powers of Criminal Courts (Sentencing) Act 2000."

[13] Established under the Tribunals, Courts and Enforcement Act 2007

PART II
CONSULTATION BY DEFRA ON PROPOSALS TO IMPROVE ENVIRONMENTAL ENFORCEMENT
'Fairer And Better Environmental Enforcement'
(July 2009)

In the second part of my paper I propose to address the Consultation document on 'Environmental Enforcement' issued by DEFRA in the summer, which closed within the past month.

The Introduction to the document (2.1-2.3) explains its scope:

> "2.1. This consultation document contains proposals to make enforcement in environmental cases in England and Wales fairer, more proportionate and more effective.
> 2.2. This document proposes a scheme for Environment Agency, Natural England, and Countryside Council for Wales to be able to use new civil sanctions that have been made available by the Regulatory Enforcement and Sanctions Act 2008."

As to implementation:

> "2.3. This scheme will be implemented by proposed secondary legislation which accompanies these proposals. This draft legislation consists of:
> - The Environmental Civil Sanctions Order 2010 (Annex 2)
> - The Environmental Sanctions (Miscellaneous Amendments) (England and Wales) Regulations 2010 (Annex 3)"

Setting the scene generally (para 1.5):

> "The Government proposes that Environment Agency, Natural England and Countryside Council for Wales should be able to use the civil sanctions enabled by the Regulatory Enforcement and Sanctions (RES) Act 2008. "Civil sanctions" are sanctions that are imposed by the regulator in accordance with their published enforcement policy and more detailed guidance. These regulators will then have an effective alternative to criminal prosecution in appropriate cases. Typically these will be cases in which a person has a good record of operating within regulatory requirements. Civil sanctions will also allow a proportionate sanction in some cases where no such measure is available at present, cases in which belated compliance alone is not a sufficient spur to complying with the law."

Addressing the position of the EA and Natural England ('NR'), the DEFRA said (1.8-9):

> "The Better Regulation Executive (BRE) will assess whether regulators can be deemed to be Hampton compliant and, for national regulators, will base this decision on the regulator's Hampton Implementation Review (HIR)5, together with evidence of its progress in implementing the recommendations
> 1.9. The Environment Agency's HIR, conducted in November 2007, found that overall the Agency 'has taken significant steps to implement the Hampton agenda' but that there was 'further progress to be made' 6. Since then the Agency has been given access to civil sanctioning powers in limited areas. Before the wider new RES Act powers can be awarded to the Agency, the BRE will therefore need to assess whether the Agency has made sufficient progress in implementing the recommendations from its HIR for it to be deemed to be fully Hampton compliant. This decision will be informed by a further review of the Agency, to be conducted by an independent

review team in the autumn of 2009. BRE will also assess in the autumn whether Natural England has made sufficient progress in implementing the recommendations from its HIR, which was conducted in March 2009.
1.10. The powers will not be awarded to Environment Agency and Natural England unless or until the BRE has deemed the organisations to be Hampton compliant."

Following the consultation DEFRA indicated:

> "A summary of the responses to this consultation will be published by Defra at http://www.defra.gov.uk/environment/enforcement/index.htm and by WAG at www.countryside.wales.gov.uk . Each response will be considered. The Government will publish a response to consultees' views in the autumn. Depending on the outcome of the consultation, the Government intends in 2010 to lay before Parliament the draft Order and draft Regulations needed to introduce civil sanctions."

Considering its review of environmental enforcement, Defra suggested (3.27-28):

> "The review found that the courts took environmental cases seriously and considered the key sentencing factors. But it was not possible to see a clear enough link between sentences and the facts of the particular case. Sentencing was heavily influenced by past cases, which could undermine proportionality in the sanctions that were imposed. Overall, the purposes of enforcement were not consistently and proportionately achieved. As Macrory found, there were environmental cases in which restoration was practicable but was not secured, and financial benefit from non-compliance that was not removed. In most environmental cases, the courts lacked a key power to order environmental restoration."

As regards initial implementation, the consultation indicated:

> "The Environment Agency and Natural England are planning to phase in their proposed use of civil sanctions in selected regulatory areas so as to allow experience to be assessed and lessons learned."

And as to scope (4.6):

> "The proposed scheme will cover a wide range of existing environmental regulation in England and Wales, including for example waste, water and land quality, freshwater fisheries, flood risk management, and wildlife and protected sites[14]. The proposals do not cover any legislation to do with land-use planning, or consumer protection."

Defra also point out that the potential for using the civil sanctions will be considered separately when new legislation[15] is proposed.

Benefits of the new system are identified by Defra as (4.15-16):

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[14] 19 The proposed civil sanctions will not be used generally in cases that fall in scope of the Environmental Damage Regulations (EDR) 2008 and The Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009. These regulations transpose into English and Welsh law, the provisions of the Environmental Liability Directive. The EDR require those who cause especially serious environmental damage (termed "significant" in the regulations) to restore the harm they have caused. EDR provides a range of enforcement notices that regulators can use to help secure restoration in such cases. In some cases a proportionate sanction and proper deterrence may require prosecution for related requirements – alternatively it may be appropriate to use a civil Variable Monetary Penalty.

[15] For example, the Marine and Coastal Access Bill 2009.

- enabling regulators to respond more fairly with civil sanctions in suitable cases to businesses and individuals that have a generally good approach to complying with the law, instead of having to rely too much on criminal prosecution
- providing a framework for fair and proportionate use of civil sanctions so that prosecution is normally reserved for the worst offenders; and
- assisting the courts in proportionate and effective sentencing of the worst offenders.

4.16. The proposals also seek to address a number of irritation factors by:

- creating a framework for more proportionate enforcement that will promote consistency through Enforcement Undertakings, enabling responsible businesses and individuals to volunteer to address the non-compliance and its effects, avoiding the need for other sanctions in many cases;
- giving priority to restoration of environmental harm and adverse effects on local communities, instead of fines, which is good for the environment, for society and for the reputation of business; and
- removing benefits gained from non-compliance thus creating a more level playing field for typically compliant businesses."

The consultation advises that:

"Sections 45, 53 and 55 of the Act provides for the statutory instruments introducing the civil sanctions to contain other powers that regulators will need to make the new system work effectively. The proposals set out in this consultation document include:

- *Non-compliance Penalty (NCP)*: a written notice issued by the regulator imposing a monetary penalty for failing to comply with a Restoration Notice or Compliance Notice that has been imposed with or without a VMP, or a Third Party Undertaking that the regulator has accepted
- *Regulatory Cost Recovery Notice (RCRN)*: a written notice issued by the regulator which requires an operator to pay the regulator's investigation, legal or administrative costs when these have been incurred in imposing a VMP, Restoration Notice, Compliance Notice or Stop Notice
- *Request for Financial Information* - a power for regulators to require a person to provide information that the regulator needs in order to determine any financial benefit from non-compliance, for the assessment a Variable Monetary Penalty

Addressing the Orders which have been drafted to introduce the new civil sanctions for environmental breaches, Defra explain (4.33-40):

General –

Parts 1 and 2 of the draft Order are introductory;

Part 3 sets out provisions requiring payment to central government funds of all monetary penalties received by the regulator, penalties for non-compliance, recovery of unpaid penalties and enforcement costs;

Part 4 deals with certain appeal provisions, requirements on regulators to consult on and publish revised enforcement policies and guidance on the way they will use the civil sanctions, and on making information publicly available.

Schedules 1 – 4 of the draft Order set out detailed provisions for the various civil sanctions:

Schedule 1 – Fixed Monetary Penalties

Schedule 2 – Compliance Notices, Restoration Notices, and Variable Monetary Penalties

Schedule 3 – Stop Notices
Schedule 4 – Enforcement Undertakings
Schedule 5 will list each offence the Order covers, and the civil sanctions to be made available for each offence. A full listing of all the Environment Agency, Natural England and Countryside Council for Wales enforced offences that are included in these proposals, and the proposed availability of civil sanctions, are set out in Annex 4.

A similar approach has been adopted in relation to offences in secondary legislation in the draft *Environmental Sanctions (Miscellaneous Amendments) (England and Wales) Regulations 2010*. The proposal is that the draft Order and draft Regulations will both set out which civil sanctions regulators would be able to use for which offences. These proposals would make civil sanctions widely available for environmental offences, unless there are good reasons not to introduce them.

Crucially, the paper sets out the 'broad approach' that would be applied in respect of each sanction (4.44):

> "Civil sanctions would not be appropriate for fault-based offences where a regulator only deals with those cases that should be prosecuted in the public interest, having regard to the factors set out in section 3 of the draft government guidance. Civil sanctions will therefore not be available for offences of illegal waste disposal (fly-tipping) that are enforced by EA; EA deals only with "big, bad, and nasty" fly-tipping cases.
>
> - **Fixed Monetary Penalties** will be made available for clear cut instances of offending that do not involve creation of significant environmental harm or risk of harm, and where Fixed Penalty Notices do not already exist. This would include for example, failure to provide timely monitoring data despite regulator advice and guidance on the matter.
> - **Variable Monetary Penalties** will be available for a wide range of offences, where non-compliance may be more serious. This would include making VMPs available for breach of enforcement notices in cases when the regulator considers there are strong mitigating factors. However, VMPs will not be available for breach of enforcement notices issued under the Environmental Damage Regulations. Cases that fall under the Environmental Damage Regulations will involve especially serious environmental damage, and coupled with the seriousness of failing to comply with an enforcement notice, this suggests that use of civil sanctions could not be an proportionate response.
> - **Variable Monetary Penalties would be made available for certain offences that require evidence of intent or other fault (**fault-based offences), also for offences of obstruction, and providing false or misleading information – this is for cases when the regulator finds strong mitigating factors that point away from prosecution26. This reflects the considerable variety of circumstances in these kinds of cases.
> - **Fixed or Variable Monetary Penalties** will be available for certain offences, such as failure to comply with a permit, which can involve a range of more and less serious kinds of breaches. Regulators will consult on clear cut, lesser aspects of such offences that they propose should normally be subject to a Fixed Monetary Penalty – this will be specified for each offence in the regulators' draft Sanctions Guidance

- **Enforcement Undertakings** will be available for most offences, except where there are specific reasons why they are not appropriate. For example, Enforcement Undertakings will not be available for the serious offence of failing to comply with an enforcement notice, as the regulator has already had to take formal action to secure a response – this failure to co-operate rules out accepting assurances through an Enforcement Undertaking.

Consultation Paper: The Three Options
Outlined in paragraphs 4.22-25:

- **Option 1** "Do nothing". Option 1 is to maintain the existing system of environmental enforcement without introducing the measures included in options 2 or 3. The purpose of including this option is to ensure that the new proposals are compared with the current situation – i.e. as a baseline.

- **Option 2** involves the introduction of RES Act civil sanctions, with no measures to strengthen the role of the criminal courts in proportionate sentencing of the worst cases.

- **Option 3** involves introducing RES Act civil sanctions, and separate initial proposals to strengthen the role of the criminal courts.

Defra advise that (4.59):

> "The Government proposes Option 3. Option 3 would involve strengthening the role of the criminal courts as well as introducing civil sanctions. This will ensure a properly graduated system of sanctions, creating incentives to comply and to co-operate in regulation. It would be clearer to all concerned that a criminal conviction for an environmental offence signals the more serious offence, bringing the toughest sanctions, and the greatest stigma. The net benefits of Option 3 ("net present value") are greater than those for Option 2.
>
> 4.60. Key findings from Option 3 are:
>
> - More effective and structured sentencing would be available for several thousand convictions over the period covered by the Impact Assessment.
> - There would be some additional policy costs and benefits
> - There would be some one-off costs to the courts in preparing for more structured sentencing
> - Option 3 (which includes both the civil sanctions and structured sentencing) would lead to an estimated net benefit of £164m (present value over 15 years) within a range of -£19m to £312m

The Civil Sanctions
Indications are given as to how the new regime would operate in practice (5.10):

> "There would be three steps to working out the VMP. This section introduces these steps and how they are to be worked out. The steps are:
>
> 1. **Regulator's estimate of the financial benefit from non-compliance.** This is, as a first step, to remove any financial benefit (in terms normally of costs avoided) associated with the specific case.
> 2. **Add an appropriate deterrent component.** Removing the financial benefit associated with the specific cases of non-compliance, and

requiring compliance and restoration where appropriate, will often not be sufficient to deter offending. This is largely because non-compliance is not always detected and enforcement action not always taken. Therefore some proportion of the time businesses and others who do not comply will retain some financial benefit. It is not feasible to base this component on probability of detection directly. There are, however, factors which point to what effort the person has invested to prevent the non-compliance and what action has been taken to address non-compliance where it does happen. These factors will be taken into account in determining the deterrent component.

3. **Deduct any other costs incurred by the recipient of the VMP.** The first two steps above aim to approximate the total costs necessary to deter non-compliance. The purpose of a VMP is, in situations where the other costs a person faces as a result of offending do not already reach this level, to apply an additional penalty to increase the costs to a level sufficient to deter non-compliance. This step ensures that the penalty reflects the difference between costs already incurred and the total costs necessary to deter non-compliance. However, the costs that may be deducted would not include the cost of works done to such an unsatisfactory standard that they have to be replaced rather than modified to achieve compliance.

A detailed explanation is given as to the criteria that would be applied in calculating these sums. A multiplier (which could not exceed four times the base tariff) would be applied.

The consultation recognises the difficulties that are likely to be experienced in assessing these sums:

> "There would be varying degrees of uncertainty. In some cases it will be clear that a penalty additional to the costs already incurred is needed to remove the advantage but unclear precisely what level of penalty is required. In such cases, it would be better for the regulator to impose some penalty even if the uncertainty merits using a cautious level. This is because it is better to move closer towards a situation where the advantage of not complying is removed. In other cases where it is not clear that a penalty additional to the costs already incurred is needed to remove the advantage from non-compliance, the draft guidance advises regulators against using them."

As regards maxima for 'either way' offences, the paper (which does not favour an arbitrary upper limit) suggests that 'The RES Act sets no upper limit to VMPs imposed in these potentially more serious cases. If an upper limit was to be considered in environment cases, possible options would be to limit a VMP to:

- 10% of business turnover, similar to Competition law
- A cash limit – for example, related to the largest criminal fines in past cases'

Enforcement Undertakings (EUs)

Of these, the consultation says (5.35):

> "The Government proposes to allow regulators to accept an EU for a wide range of offences, so as to give business maximum flexibility. This is expected fit well with the self-regulatory approach of persons who actively manage risk and compliance. Offering an EU provides a further opportunity for responsible businesses to stand apart from others and more quickly restore their reputation.

> Where appropriate, restoration of harm should include steps to make amends to individuals or communities or others adversely affected by the non-compliance. This may include monetary compensation or practical action. Practical steps could include for example, cleaning up when non-compliance has caused nuisance in the form of dust or dirt, or restoring or providing alternative amenities where these have been damaged.
> Where restoration of the actual harm is not possible, the Government expects that responsible businesses will consider making equivalent restoration in some alternative way."

It is made clear that Enforcement Undertakings will not be available for the serious offence of failing to comply with an enforcement notice.

Fixed Monetary Penalties (FMPs)
It is made clear that FMPs would not be appropriate for other than minor offences.

Enforcement notices
Enforcement notices would be used typically when the regulator finds significant non-compliance or harm that needs to be put right, and pressure needs to be brought to bear on the operator to take the necessary action. The enforcement notice also serves to put significant non-compliance on the record.

Restoration Notice
EA considers that in many of their cases, all or at least some of the necessary restoration is generally secured. The Impact Assessment therefore makes cautious assumptions about how much more restoration will be done. Full restoration will not be possible in many cases. However, wider use of RNs is expected to help to level the playing field for persons who responsibly take swift steps to restore harm they have caused to the environment and to reduce risk of further damage.

Compliance Notice (CN)
A Compliance Notice formally sets out what a person must do to achieve compliance, and by when those steps must be taken. Compliance is the minimum result required from any enforcement action. A Compliance Notice may be issued with VMP, or a Restoration or Stop Notice, but not with a FMP. The procedures for imposing a Compliance Notice are the same as those for a Restoration Notice.

Stop Notice
The paper notes (5.79):

> "At present, EA lacks stop notice powers that can be used to order a halt to the illegal dumping of waste; or to halt any activity that brings a significant risk of serious groundwater contamination. NE and CCW need to be able to use the RES Act Stop Notice power to stop activities that are causing harm to protected sites or to the breeding places of protected species. The Government proposes to introduce the RES Act Stop Notice power for these purposes."

When would regulators use civil sanctions?
This key issue is addressed at para 5.99:

> " Any person who has to comply with environmental regulation will wish to have a general understanding of what factors would in future tend to point regulators towards prosecution instead of the alternative civil sanctions.
> 5.100. Section 3 of the draft government guidance (Annex 5) illustrates the basis on which regulators are likely to take enforcement decisions in the future with the expanded toolkit that will include civil sanctions. Regulators will continue to have regard to the Code for Crown Prosecutors when deciding whether or not to prosecute. The guidance illustrates how typical enforcement scenarios may result in prosecution or civil sanctions, while maintaining ultimate prosecutor discretion"

The Consultation also sets out (paras 6.1 – 10) proposals for 'strengthen the role of the criminal courts in proportionate sentencing of the worst cases'.

Section 7 then deals with the safeguards available to ensure proportionate and fair use of civil sanctions, summarised as (7.1):

- Regulators must be satisfied beyond reasonable doubt that an offence has been or is being committed in order to impose one or a combination of the following civil sanctions: a Variable Monetary Penalty, Fixed Monetary Penalty, Restoration or Compliance Notice;
- Regulators will normally investigate to the standard expected of any criminal investigation. This includes protections for the rights of individuals provided by the Codes made under the Police and Criminal Evidence Act 1984;
- There will be a right to make representations against the imposition of VMP, RN, CN and FMP when they receive the regulator's Notice of Intent to impose one of these sanctions. Representations may be made within 28 days of receiving the Notice of Intent;
- The regulator will take account of a person's resources in finally determining a VMP or requirements for restoration;
- Regulators will be accountable for their decisions - a person may appeal against all civil sanctions to the independent and impartial First-tier Tribunal, except for Enforcement Undertakings, which are volunteered;
- The government will publish high level government guidance (Annex 5) to regulators on the way civil sanctions would be applied, building in proportionality, and transparency, and ensuring broad consistency of approach across environment regulators. Each Regulator will have regard to this in developing and consulting on their Enforcement Policy;
- Each regulator must also consult on and publish guidance on the use of the new sanctions, including more detail on the methodology for arriving at VMPs and Non-compliance penalties, further increasing transparency;
- All monetary penalties will be paid into the Consolidated Fund, so there will be no financial incentive for a regulator to impose monetary penalties – regulator decisions will be based on published criteria.

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