

Guidance on creating new regulatory penalties and offences

Introduction

1. This paper sets out guidelines on drafting new legislation to tackle regulatory non-compliance. It sets out:
 - some general principles about when civil sanctions might be more appropriate than criminal offences;
 - the new civil sanctions available to regulators under the Regulatory Enforcement and Sanctions (RES) Act 2008;
 - guidance on formulating criminal offences, where that course of action is appropriate; and
 - contact details for those in the Ministry of Justice and the Department for Business Enterprise and Regulatory Reform with whom proposals for new sanctions should be discussed at the earliest possible stage.
2. The guidelines represent agreed Government policy and following them will help you to get through the clearance process more smoothly. When seeking DA clearance for new proposals, you will have to justify any departure from the principles set out here.

Background

3. In the final report of his review of regulatory enforcement¹, Professor Macrory found that regulators were over-reliant on criminal prosecution as a means of enforcement and that this led to a compliance gap, where some regulators lack the appropriate enforcement tools to address regulatory non-compliance. Professor Macrory also found that criminal sanctions are often an insufficient deterrent to the truly criminal or rogue operators. He recommended introducing a set of administrative penalties that would allow regulators to impose proportionate, flexible and meaningful sanctions. Furthermore, he felt that the courts lacked the necessary tools to tackle non-compliance and recommended a range of improvements to criminal prosecution and sentencing.
4. He also recommended that the following principles should underpin any regulatory sanctioning regime:
 - Aim to change the behaviour of the offender;
 - Aim to eliminate any financial gain or benefit from non-compliance;
 - Be responsive and consider what is appropriate for the particular offender and the regulatory issue;
 - Be proportionate to the nature of the offence and the harm caused;
 - Aim to restore the harm caused by the regulatory non-compliance, where appropriate; and
 - Aim to deter future non-compliance.
5. The Macrory report's recommendations were accepted in full by the Government.

¹ Regulatory Justice: Making Sanctions Effective (Final Report) November 2006

Civil sanctions or criminal offences?

6. In designing new enforcement regimes you will need to consider carefully whether the behaviour warrants the intervention of the criminal law at all, and what alternatives there may be to criminal offences. Professor Macrory envisaged that criminal prosecution should be reserved for the breaches of legislation which have serious consequences. You will need to decide when civil sanctions alone might be more appropriate.
7. In creating any new civil or criminal sanctions, you should consider the following points:
 - Nature and potential harm of the conduct to be targeted
 - a. What is the conduct that you are seeking to target? A particular event such as late filing of compulsory information? Or behaviour such as dishonesty, negligence, or repeated non-compliance?
 - b. What is the range of conduct that you are targeting? Can different kinds of conduct be identified and some of them addressed with more targeted sanctions? For example, can dishonest evasion of a regulatory obligation be separated from the wider non-compliance of failure to provide information to the regulator, where there may be no or little dishonest intent?
 - c. What are the consequences of the conduct you are targeting? Is there harm to particular victims or the environment? Does the conduct prejudice the integrity of the regulatory system?
 - What are you seeking to do about that conduct?
 - a. Is the intention to punish, remedy, raise compliance standards, deter others or to stigmatize?
 - b. How does your proposed sanction fit in with your intention?
 - Who are you targeting?
 - a. Is the person in breach likely to be an individual or company?
 - b. What sanction is that person likely to respond to?
 - c. Is it necessary to have sanctions for both individuals and companies and if so, can their respective conduct be differentiated?
 - What existing sanctions might be available for that conduct?
 - a. Are there any existing criminal sanctions? Criminal courts now have much wider powers than those of fining and imprisonment and you might consider extending them to the conduct in question.
 - b. Are there any existing models of civil or administrative sanctions that you might adopt? Is the RES Act model appropriate? Do you want to follow fixed penalty notice models in, for example, the Road Traffic Act 1991 and the Environmental Protection Act 1990?
 - c. Is there a need to create new kinds of responses to the conduct you are seeking to target, such as publicity orders?

- Are there any constraints on your choice between criminal offences and civil sanctions?
 - a. Is there a need for consistency with existing regimes in similar regulatory areas? It may not always be appropriate to follow a precedent, but you need to take account of any precedents that exist.
 - b. Are you implementing an EU obligation? Does the obligation require “dissuasive and proportionate” sanctions? (In appropriate circumstances this could mean the creation of criminal sanctions.) Be wary of “gold plating” the directive. (When deciding whether to use primary or secondary legislation to import EC law, you should bear in mind that s. 2(2) of the European Communities Act 1972 is limited in respect of the length and severity of sanctions and penalties that can be created under it by Schedule 2, paragraph 1(d) to the Act.)
 - c. Is there a need for consistency with other regimes deriving from EU obligations?
 - d. Are there any existing legislative powers you can use (for example, Order making powers or other secondary legislation making powers) or do you need to create new legislation?

- If you are consolidating existing offences, are they still necessary and proportionate?
 - a. Is there any scope for fully decriminalising some of the conduct they cover?
 - b. How often are the existing offences used?

- 8. If you wish to create new civil sanctions, please see section A below. If you wish to create a new offence, section B gives guidance on how offences should be formulated. If you propose to create parallel civil and criminal regimes, please see section C for further guidance.

A. Civil Sanctions – application to new regulatory regimes

9. The RES Act provides a set of civil sanctions which can be applied to existing relevant regulatory criminal offences by statutory order. The scope of the RES Act provisions is determined by Schedules 5-7 to the Act. There is no power in the Act to add to these. We would expect that new legislation creating regulators or offences that fall outside of the scope of Part 3 of the Act will make its own provision for civil sanctions, but should follow the Part 3 model, regardless of whether the penalties are alternatives to criminal prosecution. The benefits of following this model are that it has been thoroughly debated and scrutinised both by Parliament and through extensive public consultation. The RES Act model also provides robust safeguards which comply with ECHR obligations and following the model will ensure consistency for the regulated community.

10. Not all of the sanctions in the Part 3 model will be suitable for particular regulatory situations. You will be able to pick and choose the appropriate sanctions for your regime. We recognise that this model of civil sanctions will not be appropriate in all regulatory contexts; where there is a divergence, a clear justification should be considered. Such reasons could include the particular needs of the regulated bodies who will be subject to the sanctions. An explanation will be necessary for clearance purposes and increasingly Parliament will press this point.

11. The sanctions in the RES Act are as follows:

- Fixed monetary penalty (FMP) notices – under which a regulator will be able to impose a monetary penalty of a fixed amount, usually capped at £5,000. These are suitable for more minor instances of non-compliance, where for example there are simple facts to prove;
- Discretionary requirements – which will enable a regulator to impose one or more of the following:
 - a variable monetary (VMP) penalty whose amount will be determined by the regulator (although these are capped for summary only offences),
 - a requirement to take specified steps within a stated period to secure that an offence does not continue or happen again (a 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 (a restoration notice);

Discretionary requirements are generally aimed at more complex cases of non-compliance.

- Stop notices – will prevent a business from carrying on an activity described in the notice until it has taken steps to come back into compliance. These are reserved for serious breaches, reflected in the high threshold before issue (there must be a ‘significant risk’ of ‘serious harm’ to human health, the environment or the financial interests of consumers); and
- Enforcement undertakings – 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. (These are a key element of the Macrory package of civil sanctions and will encourage a more collaborative approach to enforcement between the regulator and the business.)

12. An assessment process has been put in place to ensure that regulators are ready to receive the new civil sanctions powers in the RES Act. In particular, before making an order giving a regulator access to the new powers, the Act requires the Minister to 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. Departments should apply the same criteria to regulators whenever new, non-RES Act civil sanctioning powers are to be conferred upon them.

Application

13. You will need to consider to whom the sanctions should apply. In particular, you will need to consider whether the new sanctions apply to individuals or companies (or other bodies corporate) or both. The primary focus of Part 3 of the RES Act is to tackle breaches of non-compliance by businesses, although it does allow some flexibility. (For example, the Act could allow the level of fixed monetary penalty to vary between an individual, such as a sole trader, and a larger business.)

Standard and Burden of proof

14. You will need to consider carefully what elements of the breach or non-compliance the regulator must prove, and to what standard, before imposing the sanction. For example, the standard of proof on the regulator could be balance of probabilities (the civil standard) or beyond reasonable doubt (the criminal standard). The RES

Act requires the criminal standard for the imposition of Part 3 administrative sanctions as they are based on existing criminal offences. There may be some types of non-compliance which require lower standards of proof such as the reasonable opinion of the regulator. Whatever standard chosen, you must be prepared to explain and justify your choice. You will also need to consider on whom the burden of proof falls. These matters are likely to raise legal issues, particularly compatibility with ECHR obligations, on which you should consult your legal advisers.

Contesting a civil sanction - Appeals

15. The Government's preferred option is for appeals against new civil sanctions to be heard by the First-tier Tribunal, created by the Tribunals, Courts and Enforcement Act 2007. In creating appeal rights you will need to discuss your provisions with the Tribunals Service, part of the Ministry of Justice. Contact Glenn Dalton. Email: Glenn.Dalton@tribunals.gsi.gov.uk Tel: 0207 566 1295.

Enforcement of monetary penalties

16. If you are considering civil monetary penalties, consideration needs to be given about how unpaid penalties will be enforced. The wording of your legislation is important. If your legislation simply provides that such unpaid penalties are enforceable as a "civil debt" then, for England and Wales, debt recovery proceedings must be commenced through the civil courts before any enforcement can take place. However, for England and Wales, legislation can give the courts power to order that a debt may be enforced as if it were payable under a court order. Legislation can also state directly that a penalty may be enforced as if it were a court order. In either of these cases enforcement may be made, subject to the provisions of Parts 70 - 74 of the Civil Procedure Rules 1998, directly through the courts without necessarily starting debt recovery proceedings. It may therefore be advisable to have one of these provisions in your legislation to make enforcement easier. The RES Act sets out a model for how unpaid penalties could be enforced through civil procedures and the Ministry of Justice Civil Enforcement Policy Team will be able to advise further on this and the proposed wording of any legislation. Enforcement of monetary penalties does not necessarily require punishment by a criminal offence. Contact Dr Sue Rayner Jacobs, Email Sue.RaynerJacobs@justice.gsi.gov.uk Tel : 0203 334 6354
17. Any receipts from monetary penalties, late payment charges etc. should be paid into the Consolidated Fund. This reflects a key Macrory recommendation that there should be no financial incentives that could influence the sanctioning response.

B. Creating new regulatory criminal offences

18. As discussed above, the Macrory review suggested that the criminal law is used too readily in regulatory situations. Professor Macrory also recommended that the Government review the drafting and formulation of criminal offences relating to regulatory compliance, with a view to considering whether some offences should be decriminalised. If you are considering creating a regulatory offence, you need to consider carefully whether the behaviour warrants the intervention of the criminal law, and what alternatives there may be to criminal offences. If you are consolidating existing offences, you still need to consider whether the offences continue to be necessary and proportionate. Just because something has, historically, been a criminal offence is not justification in its own right. In particular, you will need to look at how often the existing offences are used.

Formulation of offences

19. A criminal offence is normally made up of two parts - the action and the state of mind of the person doing it. The main categories for the mental state are intention, recklessness or neglect. Some actions may be offences whatever your state of mind. You may need specific defences (such as "due diligence") to make sure that, for example, if the action was inadvertent or unavoidable, it would not constitute an offence.

Burden of proof

20. The normal rule is that the prosecution has to prove all the elements of an offence. If you want to have any element in the offence which the accused will have to disprove, you will need to speak to your legal advisers at an early stage. Defences are normally for the accused to raise in their defence, and for them to prove.

Sanctions

21. If you are creating criminal offences you need to consider proportionate sanctions. Custodial penalties should be reserved for serious and violent offenders; such sanctions will be particularly inappropriate where the offenders are likely to be businesses. Fines need to be justifiable and proportionate. Where a business is involved, you may consider the existing statutory maximum fine available in the magistrates' courts (£5,000) to be an insufficient deterrent and that a much higher penalty, or exceptional summary maximum (ESM), is required. The criteria for an ESM are that the offence is serious enough to justify a penalty above the normal statutory maximum and the matters involved should be susceptible to fairly easy proof. The offence should also be lucrative, either because it will give rise to large profits or because it will result in significant savings. Also, it must be likely to be committed by companies or others with considerable resources. Under the ESM, a magistrates' court can issue a penalty of up to £50,000. All proposals for new penalties or changes to existing ones must be referred to the Ministry of Justice (Sentencing Policy and Penalties Unit), for consideration. Contact Chris Morris-Perry. Email: Chris.Morris-Perry@justice.gsi.gov.uk Tel: 0203 334 5039

Application

22. Again, you will need to consider to whom the offence needs to apply. You should consider whether the offence applies only to companies and organisations, only to individuals, or to both. Normally, an offence applies to both. Some offences, by their nature, may be wholly or mainly applicable to companies. In that case, you may need to consider whether the directors and other senior office holders in the company should also be liable for the offence, if the offence was committed with their consent or connivance or was allowed to happen as a result of their neglect.

C. Parallel Criminal and Civil Sanctioning Regimes

23. It is possible to have regimes where the same misbehaviour can attract both a civil sanction and a criminal offence. Health and Safety offences are an example. The RES Act enables civil sanctions to be applied to conduct which otherwise attracts criminal liability. You may need to consider giving guidance to regulators and the public as to what factors might inform whether a civil sanction should be applied or criminal prosecution commenced.

Comparative safeguards

24. Where you are proposing to create parallel criminal and civil sanctions for the same conduct, you will need to consider carefully the procedural safeguards available to

the person accused under either regime. There may be human rights implications and fairness issues that require certain safeguards to be written into the sanctioning process. You may be called to explain the differences in the safeguards available under the criminal and civil sanctioning route in Parliament. You should discuss these issues with your legal advisers.

Double jeopardy

25. Where parallel regimes are created, there is a risk of someone being punished twice for the same behaviour (also called double jeopardy). This could be contrary to domestic legal principles and European ones. If you are proposing to make the same behaviour both a criminal offence and a civil wrong, you need to think carefully about why this is necessary and discuss with your legal advisers at an early stage so as to minimise legal risk.
26. You can have a civil regime which is accompanied by offences to protect the civil enforcement process. For example, there are offences of obstructing inspectors, failing to provide information or failing to comply with an enforcement notice, which supplement a civil sanctioning regime. These are usually acceptable from a double jeopardy perspective as they target different conduct.

D. Costs/regulatory impact of proposed sanctioning regime

27. As well as considering the impact of your proposals on business, you will also need to think about the impact on the justice system: this means the courts, tribunals, legal aid, and correctional services such as prisons and probation. The starting point will be the number of likely prosecutions for the new offence, or number of new civil cases. You will only ever be able to estimate this. Costs can be given as within a range if necessary (for example between £50,000 and £70,000). But the estimate needs to be as accurate as possible. Numbers of prosecutions for similar offences, or for offences affecting the same sector, may be a guide.
28. You must consult the Ministry of Justice over the costs of your proposals, both for the correctional services if relevant, and for costs associated with the trial process, whether civil or criminal, which include aspects such as court costs and legal aid. The Ministry of Justice is likely to ask that your Department meet the cost of any additional burden on the justice system, including the provision of extra judiciary, staff or tribunals or any additional training requirements for them. Contact Sue Rayner Jacobs. Email: Sue.RaynerJacobs@justice.gsi.gov.uk Tel: 0203 334 6354.
29. The RES Act contains a power for regulators to recover certain costs (such as investigation costs) when imposing a discretionary requirement or stop notice. If you wish to replicate such a power you will need to discuss this with the Treasury.

E. Territorial extent

30. This guidance, and particularly section B, relates to England and Wales only. However, where you are creating new sanctions, you will need to consider the effect of these in relation to reserved matters in Scotland and Northern Ireland. (See, for example, the powers in Part 3 of the RES Act, which can apply to Scotland and Northern Ireland in respect of reserved matters.)

F. Contact us

31. The MoJ has a responsibility for oversight of new offences and criminal penalties and must be consulted on any proposals in this area, as well as on costs (for contacts on costs see paragraphs 27-29 above). For new offences, contact Ben Shoben. Email: Ben.Shoben@justice.gsi.gov.uk Tel: 0203 334 5014. For penalties, contact Chris Morris-Perry. Email: Chris.Morris-Perry@justice.gsi.gov.uk Tel: 0203 334 5039.
32. BERR has a responsibility for better regulation generally and for new civil sanctioning regimes for regulatory non-compliance. Contact Dominic Smales. Email: dominic.smales@berr.gsi.gov.uk Tel: 0207 215 0295. If you are considering new regulatory offences please contact us at an early stage of policy development as this could save you time in the long run. You will already have considered and contacted the stakeholders who may have an interest in the legislation. But you may also need to consider whether other Government Departments have an interest and contact them at an early stage.
33. All proposed new powers of entry, search or seizure in England and Wales, whether civil or criminal, must be referred to the Home Office for consideration. The current guidance about such powers is available on the Home Office website at: <http://police.homeoffice.gov.uk/publications/operational-policing/GuidanceonPowersofEntry.pdf>. For further information contact Neil Curtis, Policing Powers and Protection Unit, Home Office, 2 Marsham Street, London SW1P 4DF. Email: neil.curtis@homeoffice.gsi.gov.uk Tel: 0207 035 0881.

Date of issue: 26 January 2009

Date to be reviewed: 1 December 2010