

REGULATORY ENFORCEMENT AND SANCTIONS ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part Three: Civil Sanctions

Section 36: Power to make orders providing for civil sanctions

104. **Section 36** allows a Minister of the Crown or Welsh Minister (referred to in this part of the notes as “a Minister”) to make an order providing for the new alternative civil sanctioning powers. This order must be made by statutory instrument and will be subject to the affirmative resolution procedure (by virtue of section 61).

Section 37: “Regulator”

Section 38: “Relevant Offence”

Schedule 5: Designated regulators

Schedule 6: Enactments specified for the purposes of orders under Part 3

105. **Section 37** defines the terms “regulator” and “designated regulator”, while section 38 defines “relevant offence”. The Act confers powers to enable regulators to have access to the new sanctions for certain relevant offences.
106. A “regulator” is a body that is listed at Schedule 5 to the Act or is a body who exercises an enforcement function in relation to an offence under enactments listed at Schedule 6. It does not include police or prosecution authorities. Regulators will be allowed to use the new sanctions contained in Part 3 once the Minister with responsibility for that particular policy area has passed secondary legislation to grant them the relevant powers. The Minister will decide which relevant offences should be covered.
107. The first group of regulators are those listed at Schedule 5 (“designated regulators”). For these regulators, “relevant offence” (as defined in section 38(2)) means an offence in an Act in relation to which the regulator has an enforcement function (defined in section 71), such as investigating an incident of regulatory non-compliance.
108. The second group of regulators are those bodies with an enforcement function in relation to an offence contained in any enactment listed at Schedule 6. This group will largely consist of local authorities and Ministers. For these regulators, “relevant offence” means an offence which is contained in the enactments listed at Schedule 6 in relation to which the regulator has an enforcement function. The enactments at Schedule 6 cover regulatory areas such as agriculture, animals, the environment, food safety, consumer protection, transport and health and safety.
109. Orders under Part 3 only confer powers in relation to offences in existing Acts. Those are offences in existing Acts enforced by those regulators listed in Schedule 5; and

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offences in the enactments listed in Schedule 6. It is intended that in future Acts which create regulatory offences will themselves create whatever civil sanctions are necessary.

110. Offences in subordinate legislation are dealt with in section 62 and Schedule 7 (see later).

Section 39: Fixed monetary penalties

111. This section enables a Minister to grant a regulator the power to issue a fixed monetary penalty on a person in relation to a regulatory offence.
112. Regulators may only impose a fixed monetary penalty when satisfied beyond reasonable doubt that the person has committed the relevant offence.
113. The amount of a fixed monetary penalty will be specified by the order made by the Minister. The regulator will not be able to exercise discretion in determining the amount of the fixed monetary penalty in any individual case.
114. Subsection (4) caps the level of fixed monetary penalty for offences triable summarily, and punishable by a fine on conviction, at the maximum fine applicable to that offence (which is usually £5,000).

Section 40: Fixed monetary penalties: procedure

115. **Section 40** specifies certain minimum requirements that the order implementing fixed monetary penalties must include. In particular, before the regulator can impose a penalty it must first issue a 'notice of intent'. The person subject to this notice will then have the opportunity to make written representations and objections against the penalty. Alternatively, the person could choose to discharge their liability for the penalty by paying a discharge payment, the level of which will be set out in the order and must be no more than the penalty. Any representations or discharge payment must be made within 28 days of receipt of the notice, or such shorter period as prescribed by the notice of intent. If a discharge payment is made, no further action will be taken against that person.
116. After this period, if the regulator chooses to impose the penalty, it must issue a 'final notice' setting out certain specified information such as the grounds for imposing the penalty and how payment may be made. Subsection (4) provides that a regulator must not impose the penalty if it is satisfied that a person would not be liable to conviction for the relevant offence because of a defence. It also provides the power for the Minister to set out further circumstances in which a regulator may not impose a penalty, for example, by creating new defences to the offence. Section 40 also sets out the right of appeal against the sanctioning decision and the minimum grounds for that.

Section 41: Fixed monetary penalties: criminal proceedings and conviction

117. Imposition of a fixed monetary penalty removes the person's liability to criminal prosecution for the relevant offence in respect of the act of regulatory non-compliance in question. Section 41 requires the order implementing fixed monetary penalties to secure this. Similarly, if a person is served with a notice of intent under the provisions in section 40, no criminal proceedings may be taken against them within the 28 day opportunity for the discharge payment (or other shorter period as specified in the notice) following receipt of the notice. Where a person pays a discharge payment, no criminal proceedings can be taken against him in relation to the commission of the relevant offence.
118. An order under Part 3 may allow a regulator to recover any fixed monetary penalty issued, and any additional late payment charges that are relevant, as a civil debt recoverable through the courts or as if payable under a court order (by virtue of section 52).

Section 42: Discretionary requirements

119. This section enables a Minister to grant a regulator the power to impose, by notice, one or more requirements (“discretionary requirements”) on a person. These requirements are:
- The payment of a monetary penalty of an amount that the regulator will determine, though where the relevant offence is triable only summarily and punishable by a fine, then the penalty is capped at the level of this fine;
 - To take steps within a time period as may be specified that ensure that the incident of non-compliance does not continue or recur;
 - To take steps within a time period as may be specified that restore the position, as far as possible, to what it would have been had the non-compliance not taken place.
120. The regulator must be satisfied beyond reasonable doubt that a person has committed a relevant offence before imposing such a requirement.
121. [Section 42](#) also prohibits a regulator from imposing discretionary requirements on a person on more than one occasion in relation to the same act or omission.

Section 43: Discretionary requirements: procedure

122. [Section 43](#) specifies certain minimum requirements that the order implementing discretionary requirements must include. In particular, the order must require the regulator to serve a notice on the person of its intention to impose discretionary requirements on that person and the time within which he can make representations and objections (which cannot be less than 28 days from receipt of the notice) against the proposed sanction.
123. The order must also permit the person the opportunity to offer an undertaking to benefit any person affected by the offence and for the regulator to take that into account when making its determination. For example, if a regulator was minded to issue a variable monetary penalty, the person could offer to pay compensation to a third party affected by their actions. The regulator could then adjust the level of the variable monetary penalty to take account of this. The regulator can, however, reject an offered undertaking.
124. After the end of the time for making representations and objections, and offering undertakings, the regulator can then decide whether to impose, withdraw or vary the discretionary requirement or replace it with a different requirement.
125. Where the regulator decides to impose a discretionary requirement, this must be done by way of a notice. The notice must contain the information set out in subsection (6) of this section, including the person’s right of appeal against the sanction.
126. Subsection (7) of this section sets out the minimum grounds for appeal against the discretionary requirement that must be available.

Section 44: Discretionary requirements: criminal proceedings and conviction

127. [Section 44](#) provides that where the person has been required to pay a variable monetary penalty (whether alone or in combination with non-monetary discretionary requirements or undertakings), the order made by the Minister must provide that the person may not be later prosecuted for the same incident of regulatory non-compliance. (This does not extend to a case where non-monetary discretionary requirements are imposed or an undertaking is accepted without the imposition of a variable monetary penalty. In this case, if the person subject to the sanction fails to comply with it, the person may be prosecuted at a later date for the original offence.)

Section 45: Discretionary requirement: enforcement

128. By virtue of this section, the order 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. Failure to pay any monetary penalty can lead to the regulator recovering the amount due through civil debt procedures or as if payable under court order (see section 52).
129. [Section 45](#) also sets out the minimum grounds for appeal against the non-compliance penalty that must be available.

Section 46: Stop notices

130. This section enables a Minister, by order, to confer on a regulator the power to serve on a person a notice prohibiting that person from carrying on an activity specified in the notice (a “stop notice”). For example, that activity might include a manufacturing process, use of a particular piece of equipment or sale of a particular product. The stop notice will remain in place until the person has taken steps specified in the notice.

Section 47: Stop notices: procedure

131. This section sets out certain procedural requirements that the order must include when granting a regulator the power to serve stop notices. In particular, a notice must contain the grounds for issuing the notice, the person’s rights of appeal and the consequences of non-compliance. Where, after service of the notice, the regulator is satisfied that the person has taken steps specified in the stop notice, the order must require a regulator to issue a “completion certificate”. The person will also have a right of appeal against a regulator’s refusal to issue such a certificate.
132. [Section 47](#) also sets out the minimum grounds for appeal against both the imposition of the stop notice and the regulator’s refusal to issue a completion certificate.

Section 48: Stop notices: compensation

133. This section provides that the Minister making the order must make provision for a compensation scheme. The Minister must also provide a right of appeal to a tribunal against a decision by the regulator not to award compensation or against the level of compensation awarded by the regulator.

Section 49: Stop notices: enforcement

134. [Section 49](#) provides that a person who fails to comply with a stop notice is guilty of a criminal offence, which is triable either way. Where the offence is tried summarily in Scotland, a person is liable to 12 months imprisonment. Where the offence is tried summarily in Northern Ireland, a person is liable to 6 months imprisonment. Where the offence is tried summarily in England and Wales, a person is liable to 6 months imprisonment until section 154(1) of the Criminal Justice Act 2003 comes into force; a person committing an offence after the commencement of that section, which is tried summarily, is liable to 12 months imprisonment.

Section 50: Enforcement undertakings

135. [Section 50](#) enables a Minister to make an order allowing a regulator to accept “enforcement undertakings” offered by a person. An enforcement undertaking is an undertaking or promise by a person to take certain actions. A regulator will not be able to impose enforcement undertakings.
136. The regulator may only accept enforcement undertakings when it has reasonable grounds for suspecting that an act or omission of the person constitutes a relevant offence. Once that enforcement undertaking is accepted, the person may not be

prosecuted for the act or omission or have a fixed monetary penalty or discretionary requirement imposed on them, unless they fail, or are deemed to have failed, to comply with the undertakings. Where there is such non-compliance, the regulator will be able to prosecute the person for the original offence or impose a fixed monetary penalty or discretionary requirement.

137. A person may offer the following type of action as part of its undertakings:
- Actions that ensure that the person does not repeat or continue their non-compliant actions. For example, the person may undertake to fix faulty equipment that breaches safety standards;
 - Actions that restore the position, as far as possible, to what it would have been had the non-compliant action not taken place. For example, the person may undertake to clean up an area that has been contaminated by its non-compliant actions;
 - Actions that benefit any person affected by the non-compliant actions of the person (including payment of money). For example, the person may set up a compensation scheme for victims of its non-compliance; and
 - Other action that may be prescribed by the Minister in the order.
138. Subsection (5) of this section enables the Minister to include further provision in the order such as the procedure for entering into the enforcement undertaking, certification by the regulator that the undertaking has been complied with and the consequences for a person providing misleading or inaccurate information.
139. There is no right of appeal against the enforcement undertaking itself, as the undertaking is volunteered by the person and is not imposed by the regulator. There may be, however, a right of appeal against a regulator's refusal to certify that the undertaking has been completed, where the Minister provides for such right in the order.

Section 51: Combination of sanctions

140. This section provides that a regulator cannot be granted power to impose -
- both a fixed monetary penalty and a discretionary requirement; or
 - both a fixed monetary penalty and a stop notice;
- in relation to the same offence.

Section 52: Monetary penalties

141. This section allows an order made by the Minister under this Part of the Act to make provision for discounts for early payment of a monetary penalty and for the payment of interest or a financial penalty for late payment of the original penalty. The total amount of any late payment penalty must not exceed the total amount of the penalty imposed.
142. **Section 52** provides for the enforcement of unpaid penalties (and any interest or late payment charges) through the civil courts. It also allows the order to create a more streamlined process of recovery by treating the penalty as if it were payable under a court order.

Section 53: Costs recovery

143. This section enables a Minister to include provision for a regulator to recover its costs, by notice, from a person on whom a discretionary requirement or a stop notice is imposed. This provision does not extend to fixed monetary penalties and enforcement undertakings. The costs are those incurred by the regulator in relation to the imposition of the sanction, up to the point of imposition, and include investigation costs, administration costs and the costs of obtaining expert (including legal) advice. The

person is not required to pay any costs he can show have been unnecessarily incurred. Section 53 requires that where a costs notice is served, the person subject to the notice has a right of appeal against both the regulator's decision to impose the costs notice and the amount of the costs.

Section 54: Appeals

144. This section requires that appeals under Part 3 of the Act must be heard by either the First-tier Tribunal (created by section 3 of the Tribunals, Courts and Enforcement Act 2007) or another statutory tribunal specified by the Minister in the order made under this Part. 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 under this Part.
145. Subsection (3)(a) of this section allows the Minister when setting out this power to make provision for the suspension of the effect of a fixed penalty or other requirement during an appeal. This might include provision such as:
- During appeal, a person may apply for the effect of the stop notice to be suspended pending the result of the appeal. If this application is unsuccessful then the notice will remain in force during the appeal; or
 - Should the person appeal, the effect of the stop notice may be automatically suspended until the result of the appeal is known.
146. In particular, subsection (3)(b) enables the Minister to make provision about the powers of an appellate body. Examples of the possible powers an appellate body might have are set out in subsection (4) of this section. The appellate body may have power to withdraw or confirm a sanction, power 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.

Section 55: Other provision

147. This section enables an order made under Part 3 to make consequential and other supplementary provisions.
148. Subsection (2) gives examples of what consequential provision might be made. Paragraph (a) may, for example, be used to allow the civil sanctions to be regarded as previous convictions for the purposes of other enactments. The power in paragraph (b) could be used to extend existing provisions in other legislation to apply to these civil sanctions. For example, the power could extend a provision that a convicted person must pay the clean up costs of the regulator, such as that under 33B Environmental Protection Act 1990, to apply to these civil sanctions as well.
149. Subsection (3) gives examples of how the supplementary power under subsection (1) might be used. The power might be used to grant a regulator powers to require information or extend a regulator's existing information gathering powers in order to allow a regulator to investigate a matter that might lead to the use of the alternative sanctioning powers under this Act. The power may also be used in a similar way in relation to a regulator's powers of entry, search, or seizure. Where the legislation setting out the relevant offence contains an authorisation to use certain evidence in criminal proceedings, e.g. an exception to the prohibition of collateral use of information, the power under subsection (1) might be used to allow that authorisation to also apply to the imposition of civil sanctions for that offence. This can only be done in relation to authorisations that exist currently. The power can be used in these ways only for the purpose of facilitating the use of the alternative sanctioning powers contained in this Act. It would be for the Minister to determine whether the use of the power in subsection (1) would, in any given case, be compatible with ECHR rights.

Section 56: Excluded provision: Scotland

Section 57: Excluded provision: Northern Ireland

150. **Section 56** prohibits (save for consequential purposes) an order made under Part 3 of the Act from making any provision which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament. This would prevent the order being used to grant regulators the alternative sanctioning powers under this Act for offences that relate to matters that have been devolved to the Scottish regulators, such as environmental health. There is no prohibition on using the powers in the Act for matters that have been reserved to the UK Parliament, such as consumer protection.
151. **Section 57** makes similar provision for Northern Ireland.

Section 58: Consultation and consent: Scotland

152. If a Minister proposes to make an order that affects the prosecution of any offence in Scotland, he is required to obtain the agreement of the Lord Advocate.
153. If a Minister proposes to make an order that affects the powers of a regulator that is a local authority in Scotland, then he will be required to consult with Scottish Ministers because they will have an interest in the functions of local authorities in Scotland.

Section 59: Consultation and consent: Wales

154. The powers contained within this Part of the Act given to a Minister of the Crown can also be used by Welsh Ministers in relation to matters that affect Wales, and which are the responsibility of Welsh Ministers.
155. Under subsection (1), a Minister of the Crown must consult with Welsh Ministers before making an order under Part 3 that will affect the sanctioning of an offence that applies in or in relation to Wales.
156. Subsection (2) requires a Minister of the Crown, after consulting with Welsh Ministers on the provisions of an order under Part 3, to also seek the agreement of Welsh Ministers if the order affects the sanctioning of an offence which applies in or in relation to Wales and relates to functions that are exercised by Welsh Ministers.
157. Subsection (3) requires the Welsh Ministers to consult the Secretary of State for the particular policy area before making an order under Part 3.

Section 60: Consultation: general

158. This section requires a “relevant authority” (a Minister of the Crown or the Welsh Ministers) proposing to make an order under Part 3 to consult with the regulator that will be the recipient of the powers to be granted by the order and such other persons the relevant authority considers appropriate. The relevant authority will also be required to consult with relevant organisations that it considers represents the interests of persons substantially affected by the proposals.
159. If as a result of this consultation exercise there are substantial changes to any part of the proposals, the authority will be required to undertake further consultation on the revised proposals as it considers appropriate.

Section 61: Parliamentary and Assembly procedure

160. **Section 61** requires that any order made by a Minister under this Part of the Act must be made by statutory instrument and will be subject to the affirmative resolution procedure.
161. A statutory instrument made under this Part of the Act by Welsh Ministers requires the approval of the National Assembly for Wales.

Section 62: Offences under subordinate legislation

Schedule 7: Enactments specified for the purpose of section 62

162. This section extends any power of a Minister of the Crown or Welsh Minister to create criminal offences in secondary legislation to include the powers to create alternative civil sanctions under this Part of this Act. This applies only to those powers contained in enactments listed in Schedule 7. This would allow, for example, the Minister when amending or consolidating criminal offences contained in secondary legislation made under a listed enactment, to make provision for fixed monetary penalties. These provisions only apply in relation to existing powers to create criminal offences. Any such power created in future will need to make its own provision. There is no power to amend Schedule 7 to this Act.
163. The enactments listed at Schedule 7 generally cover the same regulatory subject matter as covered by Schedules 5 and 6. Section 2(2) of the European Communities Act 1972 is not listed in Schedule 7 as it is considered that this power is sufficiently wide to allow for the creation of civil sanctions.
164. Subsection (3) requires that any statutory instrument conferring the power to impose any of these civil sanctions made under the enactments listed at Schedule 7 must be subject to the affirmative resolution procedure. The power may be used to make any provision which could be made under Part 3 of the Act, and thus any substantive restrictions on the sanctions will apply when the extended power is used, for example, in relation to devolution.

Section 63: Guidance as to use of civil sanctions

165. A Minister may not make an order that gives a regulator the powers under this Act unless the order requires the regulator to publish guidance in relation to the imposition of a sanction and the acceptance of enforcement undertakings (“Penalty Guidance”). The order must also require that the regulator consult persons specified in the order (for example, persons affected by the new sanctioning powers) before publishing or revising the Penalty Guidance. The Penalty Guidance must also be revised by the regulator where appropriate, for example, where there has been a change in the rules. The order must also stipulate that the regulator must have regard to the Penalty Guidance when exercising its functions.
166. The Penalty Guidance must contain information about the circumstances in which a sanction is likely to be imposed or undertakings accepted, the defences available to the person, and the person’s rights of appeal. For particular sanctions under this Act, there are further specific requirements for the Penalty Guidance set out in subsections (3) to (5).

Section 64: Guidance as to enforcement of relevant offences

167. This section requires that, where a Minister grants a regulator any alternative sanctioning power under this Act, the regulator should prepare and publish guidance about how the offence to which the power relates is enforced (“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 history of regulatory non-compliance. The Enforcement Policy, in contrast to Penalty Guidance, is focussed on how particular offences are enforced.

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

Section 65: Publication of enforcement action

169. This section requires that an order granting a regulator any alternative civil sanctioning power under this Part ensures that a regulator must publish, from time to time, reports specifying the cases in which one of the new civil sanctions under Part 3 of the Act has been imposed, where a person has discharged their liability to a fixed monetary penalty under section 40 or where an undertaking is accepted under section 43. The reports should not list those cases where civil sanctions have been overturned on appeal. Further, the reports may not need to list certain cases where the Minister thinks it inappropriate for such cases to be publicised, for example, for data protection reasons.

Section 66: Compliance with regulatory principles

170. Before making an order under or by virtue of Part 3 and allowing a regulator access to the new sanctions, section 66 provides that the relevant Minister must be satisfied that the regulator will exercise the new powers in accordance with the Principles of Good Regulation, as set out in section 5(2).

Section 67: Review

171. **Section 67** places a duty on a Minister making an order under Part 3 of the Act conferring a power on a regulator to impose fixed monetary penalties or discretionary requirements, serve a stop notice or accept an enforcement undertaking, to conduct a post-implementation review of the order. The review must take place three years after the order was made and must consider whether the order has implemented its objectives efficiently and effectively.
172. In conducting such a review, the Minister must consult such persons, as he considers appropriate. The Minister must also publish the results of the review and lay a copy of the review before Parliament (or National Assembly for Wales if the review is conducted by Welsh Ministers).

Section 68: Suspension

173. **Section 68** enables the Minister making the order conferring the sanctioning powers on a regulator to be able to direct the regulator not to issue any further notices imposing one of the new sanctions or to accept enforcement undertakings. The Minister will only be able to do so if satisfied that the regulator has failed on more than one occasion to comply with any duty imposed on it under this Part of the Act, to act in accordance with its published Penalty Guidance or Enforcement Guidance, or to act in accordance with regulatory principles (as set out in section 5(2)) or other principles of regulatory best practice. This provision is a safeguard against persistent misuse of the new sanctioning powers by a regulator.
174. The Minister may revoke the original direction given to the regulator if it is satisfied that the regulator has taken appropriate steps to remedy the identified failures.
175. Before making any direction under this section (including revocation of a direction), the Minister must consult the regulator and other persons he considers appropriate. The Minister must lay a copy of the decision before Parliament (or the National Assembly for Wales if the direction is given by Welsh Ministers). The regulator must publish the direction and take other steps to inform affected persons of it.

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Section 69: Payment of penalties into Consolidated Fund etc

176. **Section 69** provides that any monetary penalty, including any additional late payment or interest charges, or any discharge payment made under section 40 received by the regulator must be paid into the Consolidated Fund. This section requires the payment of such monies to the Consolidated Funds for Scotland, Northern Ireland and Wales, where appropriate.

Section 70: Disclosure of information

177. This section permits the Crown Prosecution Service or the police to disclose information to a regulator that has had the new sanctioning powers conferred on it. Information may only be disclosed where the regulator has an enforcement function in relation to a criminal offence and for the purposes of the regulator exercising one of the new powers. The police will not have access to the new sanctioning powers but if, for example, they have begun a criminal investigation but think that it no longer merits a criminal prosecution, this section would allow them to pass information to the regulator to determine whether to issue an alternative sanction.

Section 71: Interpretation of Part 3

178. **Section 71** defines various terms used in Part 3.