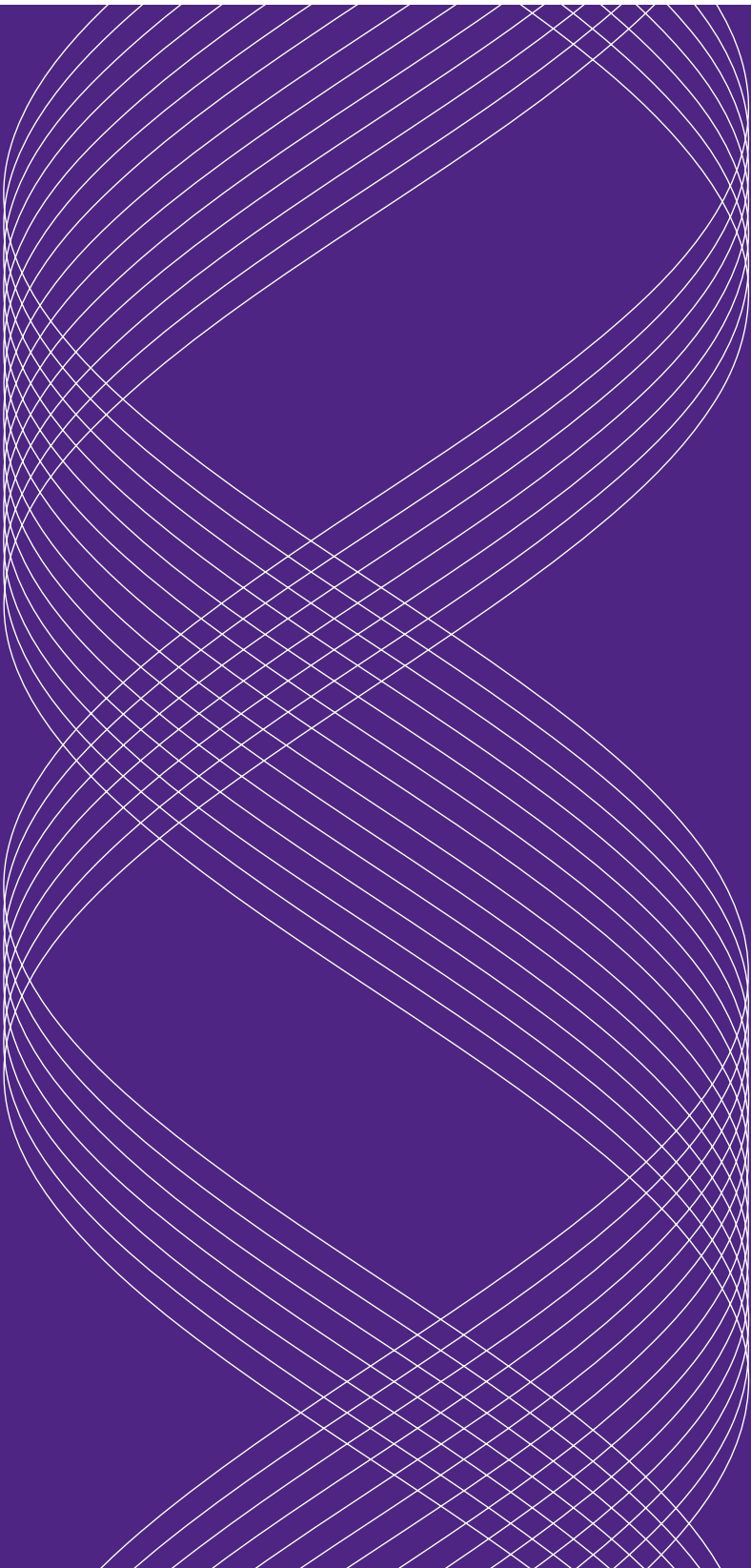




Regulatory Justice: Sanctioning in a post-Hampton World



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Executive Summary

Introduction

1. The final report of the Hampton Review,¹ published in March 2005, recommended that the Better Regulation Executive (BRE) should undertake a comprehensive review of regulators' penalty regimes.² Following this recommendation, the BRE established a Penalties Review, under the guidance of Professor Richard Macrory, Professor of Law at University College, London, which is due to report in late 2006.

2. The purpose of this paper is to set out the key issues previously identified in the Hampton Report and identify areas which the review is interested in exploring when considering reform. Where this paper draws tentative conclusions, this is to promote discussion rather than to predetermine issues or policy choices before the programme of research and consultation is complete. The review team hopes that the paper will provoke a full and open discussion of views.

The BRE Penalties Review

3. The aim of the review is to bring the penalty system into line with the risk-based, proportionate model of regulation set out in the Hampton report. Although Hampton envisaged the introduction of tougher and quicker penalties for more serious offences, the principal purpose of this review is not a blanket strengthening of penalty regimes. Rather, the review wants to consider options that could add to regulators' enforcement toolbox, broadening the flexibility available to both regulators and the judiciary to better meet regulatory objectives and improve compliance. A reformed penalty regime would increase public confidence, and would also benefit industry, providing a transparent system with sanctions that would aim to facilitate future compliance, provide a level playing field for business and pursue offenders that flout the law repeatedly.

4. The major tasks in the review's terms of reference are:

- a. to articulate a set of principles relevant to the introduction and operation of civil, administrative and criminal sanctions;
- b. to clarify the relationship between civil penalties, administrative penalties and criminal penalties;
- c. to identify the areas where the provision of administrative or alternative sanctions may be appropriate, how, where appropriate, these penalties can be expressed and the limitations in the use of such sanctions; and

¹ *Reducing administrative burdens: effective inspection and enforcement*, HM Treasury, March 2005.

² In this report, references to 'the regulators' refers only to those regulators that are within scope. A full list of regulators within our remit can be found at the start of Annex B.

- d. to establish mechanisms through which departments and regulators assess the adequacy and effectiveness of their toolkit with options for change.
- 5.** Considerable work has been done in the area of regulatory sanctioning and penalties by academics, regulators and Government departments. The review team is considering this body of work and will draw upon some of the conclusions reached over the course of the coming months as part of our work. The review will also be drawing on international comparisons.

The situation today

6. The Hampton Report documented views from both regulators and business that the current penalty regime is often cumbersome and inefficient. It was commonly felt that there was an over-reliance on criminal prosecution – a slow and expensive route – as the major mechanism for penalty delivery. The Report also found that, due to the expense of the prosecution process and generally low penalties handed down on conviction, few prosecutions were actually pursued.³ Regulators also noted that criminal courts have a limited number of sanctioning options, mostly relying on fines and occasionally (for individuals) imprisonment. Comparison of long-standing regulations such as those made in relation to trading standards with more modern regulatory systems such as those established under the Financial Services and Markets Act 2000 suggest that more recently established regulators tend to be provided with more flexible sanctioning tools.

7. The review has heard further evidence that penalties imposed by the Courts are often too low and there can be substantial inconsistencies in different parts of the country. In cases of serious fraud in the food industry, which may involve large quantities of unfit food being reintroduced into the food chain, penalties provided in the relevant legislation have been found to be too low to act as an effective deterrent. In these cases, local authorities often seek charges of conspiracy to defraud as a route to higher penalties.

Structure of this document

8. The next chapter outlines the current sanctioning regimes and issues. Chapter two considers the experience of two OECD countries, Germany and Australia, in the use of administrative and alternative sanctions. Chapter three outlines the emerging questions the review wants to consider. Finally, Chapter four calls for evidence from regulators, the business community, magistrates, legal professionals and other interested parties.

Call for evidence

- 9.** The review invites those with an interest in these matters to submit a response to the call for evidence outlined in Chapter four. The areas where the review would welcome views are set out in Chapter three. They include:
- a. experience of the current sanctioning regimes;
 - b. criminal sanctions and proceedings;

³ *Reducing administrative burdens: effective inspection and enforcement*, pg 38-41, HM Treasury 2005.

- c. intermediate sanctions in between the formal severe option of pursuing a criminal prosecution and the informal sanction of warning letters;
- d. categorising regulatory offences;
- e. decriminalising some regulatory offences;
- f. administrative penalties;
- g. alternative sanctions such as reputational sanctions or mandatory audits;
- h. financial penalties; and
- i. venues for hearing cases and appeals relating to regulatory offences.

10. The review team will also consult extensively with key stakeholders, experts and interested members of the public with the intention of publishing a consultation document in the Spring of 2006. Its final report will be published in Autumn 2006.

Chapter One: Penalty Regimes Today

This chapter considers the context of the review, what sanctions are available to regulators and current practice across the UK regulatory landscape.

The BRE Penalties Review

1.1 This review is taking place as a result of recommendations in the Hampton Report, published in March 2005.¹ It is being co-ordinated by the Better Regulation Executive,² and is part of the Government's wider better regulation agenda, alongside the implementation of the recommendations of the Hampton Report and the Better Regulation Task Force's work, *Less is More*³. As part of the Government's commitment to risk-based regulation, the BRE Penalties Review aims to ensure that the sanctioning regimes operating within the UK are proportionate, effective and fit for purpose.

The Hampton Report

1.2 The Hampton Report was commissioned in Budget 2004, and ran for twelve months. During the review, both regulators and the business community expressed the view that the current penalty system is often slow, ineffective, inconsistent and complicated. Businesses were concerned that the complexity of the system prevented effective action being taken against rogue businesses which undercut honest operators. Regulators were concerned that financial penalties, in many cases, did not exceed the financial benefit of non-compliance, creating in effect perverse incentives for businesses not to comply with regulatory obligations. Heavy reliance on criminal sanctions made the resolution of cases a costly and time-consuming exercise for both business and regulator.

1.3 A penalty regime should aim to have an effective deterrent effect on those contemplating illegal activity. It should apply appropriate sanctions to those who have failed to comply with regulatory requirements, and send effective signals to ensure compliance by others. Low financial penalties mean weaker deterrence and can leave even sanctioned businesses in possession of commercial benefits from their illegal activity. Weak incentives reduce the willingness of businesses to comply, and consequently require more intensive engagement from regulators, including more frequent and more intrusive checks.

¹ Ibid.

² <http://www.cabinet-office.gov.uk/regulation>.

³ *Better Regulation Task Force*, Cabinet Office, March 2005.

1.4 The Hampton Report concluded that the existing penalty regime in many areas of regulation fails to provide effective deterrence because:

- the penalties handed down by courts are not seen to reflect either the severity of the offence, or the economic benefit a business has gained from its non-compliance;
- the application of regulators' penalty powers is sometimes slow and can be ineffective in targeting persistent offenders;
- the range of enforcement tools available to many regulators is limited, giving rise to the disproportionate use of criminal sanctions; and
- the structure of some regulators, particularly local authorities, makes effective and co-ordinated action against persistent offenders difficult. For example, an offender who is breaking the law in different regions may be pursued for similar charges by several different local authorities independently.

What the Penalties Review is trying to do

1.5 The BRE Penalties Review will examine whether regulators' sanctioning powers, an important element of the regulators' toolbox of enforcement options, are appropriate, effective and fit for purpose. To allow flexible, compliance-led enforcement, sanctioning regimes must be flexible, and must ultimately enable action against potentially all non-compliant businesses. Furthermore, sanctioning regimes, as part of the wider better regulation agenda, merit review to ensure consistency in the context of better regulation as a whole. This review will make recommendations with the intention of ensuring that this is the case.

1.6 The Penalties Review should be considered in the context of the other initiatives being taken forward by the BRE in order to implement the recommendations the Government adopted following the Hampton Review. These include a consolidation of the number of regulators that business must deal with, simplification and/or removal of inappropriate regulation, and ensuring a more consistent adoption of risk-based regulation and an approach towards regulatory enforcement that is focussed on ensuring effective outcomes rather than regulation for its own sake.

1.7 The review recognizes that in many areas of regulation, industry and the regulators have to deal with a broad range of actors and outcomes. In some sectors there may be a substantial presence of rogue traders or organized crime deliberately seeking to profit by flouting the law. Regulatory regimes in different areas are varied with some regimes using licences or permits containing explicit conditions negotiated or imposed by the regulator while others are based on the requirement to comply with general legal standards. Legitimate businesses from both ends of the economic spectrum may fall within a particular area of regulation, from single traders and small businesses to large multi-nationals. Some regulatory breaches, even if committed unintentionally, may have severe external consequences (such as pollution of a river) and in such cases the public would rightly expect to see some action taken by regulators. A key question for this review is whether the current range of legal tools available to regulators is as effective as it could be to handle the range of situations in which regulation is breached or may be breached, and whether the tools can be used in a way that commands both public and business confidence.

1.8 The Hampton Review endorsed the benefits of maintaining co-operation between regulators and legitimate businesses. Indeed, the Hampton Report articulated a way forward that relies upon improving co-operation and developing regulators' ability to act in a way that encourages compliance, and improves outcomes. In many instances, non-compliance is based not upon intentional recalcitrance but an understandable ignorance of the complex set of regulatory duties businesses have to comply with. Recognising this, Hampton emphasised the need for regulators to help to build businesses' capacity for compliance through education and advice.

1.9 This recognition of the need for education and advice to increase compliance is the starting point for this review of penalty regimes. The review does not seek a shift of regulators' priorities towards pursuing more prosecutions and other sanctions at the expense of the appropriate use of advice, support and education. Such a move would be likely to be detrimental to compliance rates. Over-reliance on prosecution encourages a legalistic atmosphere in regulatory relationships which can leave firms tempted to 'creatively comply' – complying in strict legal terms alone whilst not complying with the sentiments behind the regulation. In addition, firms with insufficient knowledge of their duties will remain non-compliant as the distant regulatory relationship undermines any attempts by regulators to communicate improvement and best practice messages.

1.10 However, Hampton did recognise that the availability of effective sanctions plays a critical role in the regulatory process. To ensure efficient compliance – good regulatory outcomes with, where appropriate, low regulatory burdens – regulatory interaction should be backed by a credible threat of severe sanctions should businesses consistently and persistently flout the rules. The review wants to examine whether regulators have an optimal range of enforcement options, beyond the current prevailing picture of an all or nothing situation of either prosecuting through the criminal courts, or sending repeated warning letters.

Sanctioning and penalties applied to regulatory offences in the UK

1.11 Regulators within the scope of this review have access to a range of enforcement tools to deliver effective enforcement. Some of these tools are informal and can be exercised by the regulator, while other options may be more formal and rely upon the intervention of the courts. In general, the range of enforcement options, starting with the least severe and escalating in severity and threat, form what is known as an 'enforcement pyramid'. An example of such a pyramid is illustrated below in Figure 1.1. Regulators can use a range of different enforcement mechanisms, depending on the underlying statutory provisions, the level and degree of non-compliance or breach, and the regulatory style of an agency⁴.

⁴ Regulators retain discretion in terms of whom to prosecute, but in strict liability offences, the intent or recklessness of the act is not considered and technically all such cases can be prosecuted should the regulator have the appropriate evidence.

Figure 1.1 Sample enforcement pyramid

1.12 The legal framework for regulatory offences in the UK offers substantial powers to bring action and impose sanctions against non-compliant businesses. Regulators have several different tools available when businesses fail to comply with their regulatory obligations. The broad range of options (described in more detail below) include:

- informal cautions, advice or support;
- warning letters or other pre-enforcement action;
- enforcement notices which require businesses to do or to refrain from doing particular things. Non-compliance with these notices is usually a criminal offence;
- order business to cease trading immediately or close down a premises (principally in cases where there is an immediate risk to the public, such as in food safety);
- for some regulators, financial penalties through an administrative procedure;
- enforceable undertakings;
- order a business to make restoration;
- name and shame firms to disclose regulatory performance;
- prosecution for a criminal offence against a company leading to a fine; and
- prosecution for a criminal offence against individuals (including directors) leading to a fine and/or imprisonment.

Common sanctions

1.13 The discussion below elaborates on some of the more commonly used sanctions set out in the list above.

1.14 *Warning Letters:* Regulators can issue warning letters as a precursor to the pursuit of formal sanctions. Such warning letters are found at the base of the ‘enforcement pyramid’ and are used as a first response by regulators when a regulatory breach by a legitimate business is identified. Warning letters are a useful tool for informing non-compliant businesses about their regulatory performance, and can provide advice to the business on how to improve. Warning letters are most effective when the regulator has access to more serious sanctions if the warning letter is ignored. The business should know that the regulator will move up the enforcement pyramid should they fail to comply.

1.15 The Hampton Report made reference to the use of warning letters as a desirable first step for regulators to take in non-serious cases, notifying the business of a potential wrong-doing and giving that business the opportunity to respond and correct the failure before moving to more formal proceedings.

1.16 *Statutory Notices:* Businesses can be issued with a statutory notice. Different types of notices can have different objectives, but in general a notice requires a business to do or to refrain from doing particular things. In general, failure to comply with a statutory notice is a criminal offence and, if a notice is ignored or contravened, the defendant will generally (although specific legislative provisions can impose different levels of penalty) be subject to a maximum of six months in jail, or a fine not exceeding £20,000 (or both), on summary conviction. On indictment this rises to a maximum of two years imprisonment or an unlimited fine (or both). Examples of some types of statutory notices businesses can be subjected to are given below:

- improvement notices – demanding certain improvements to work practices while allowing time for the recipient to comply.
- prohibition/suspension notices – prohibits an activity until remedial action has been taken in order to prevent serious harm from occurring.
- works notices – to prevent or remedy water pollution.
- enforcement notices – served where it is believed that a breach of regulatory consent or licence has occurred. The notice specifies the steps to rectify the breach and the timescale for these changes, and, depending on the statutory provisions, may include remediation provisions relating to the damage caused by the breach.

1.17 The issuing of statutory notices is one of the main means used by enforcement agencies to achieve their enforcement goals. The scale of their use is illustrated below in Table 1.1, which outlines the numbers of the different types of notices handed down by different enforcement bodies. The use of the range of tools varies across regulators. For instance, in the area of food law, local authorities issue approximately 4,500 improvement notices, while the Vehicle & Operator Services Agency issues almost 87,000 prohibition notices.

1.18 It should be noted that these notices are not the same as administrative penalties as the enforcer must always go to court to secure a sanction if the business remains in non-compliance of the notice.

Table 1.1 – Annual number of statutory enforcement notices⁵ served by different enforcement bodies:⁶

	Improvement Notices	Prohibition Notices	'Minded to' Notices	'Statutory Notices' ^{*7}	Stop Now orders	Formal Cautions
HSE	6,798	4,537				
EH* – Health & Safety	3,937	1,043				
EH – Pollution Control				4,766		
EH – Noise Control				11,989		
EH – Public Health, Drainage & Pest Control				47,119		
EH – Housing Standards			9,891	19,452		
local authority – Food Law Enforcement	4,524	190				443
Environment Agency				737		
VOSA**		86,978				
Trading Standards					17	2,385

* EH – local authority Environmental Health

** VOSA – Vehicle and Operators Service Agency

Sources:

– *Trading Standards Statistics 2004*, CIPFA, 2005.

– *Environmental Health Statistics 2003-04 actuals*, CIPFA, 2004.

– Enforcement agencies & related bodies – HSE, FSA, VOSA, TSI, and Environment Agency

1.19 Some enforcement agencies, including the Health and Safety Executive, publicly disclose information about the notices and prosecutions they hand down. This enhances the deterrent effect of these sanctions because of the associated reputational implications they can have.

⁵ Figures are for the 2003–04 financial year, other than Trading Standards (which is 2004), Environment Agency (which is 2004), and Food Standards (which is 2001).

⁶ Figures are for England and Wales, apart from HSE and VOSA which also include Scotland.

⁷ 'Statutory notices' incorporates all the different types of enforcement notice where the statistics do not break them down.

Administrative Penalties:

1.20 Administrative penalties are penalties imposed by a regulator without the intervention of a court, although usually with a right to appeal to a court or similar independent tribunal. These penalties can be used in instances where a regulator is of the opinion that a sanction is necessary, but where the nature of the wrongdoing in the case is insufficient to warrant criminal proceedings and the imposition of a criminal conviction.

1.21 There are many different possible models for the framing of 'administrative penalties' regimes. These include variations on:

- rights of appeal: a standard appeal body may reconsider the full merits of the case, consider the size of the sanction or concentrate merely on the administrative process;
- the magnitude of sanction that can be imposed; and
- the discretion afforded to the regulator in deciding the size of the sanction. For minor infringements, there are many examples of 'fixed penalty' regimes, but the concept encompasses regimes where the regulator has more extensive discretion to determine a penalty.

1.22 With the exception of fixed penalty regimes, administrative penalties are used on a limited basis in the UK. Chapter three explores administrative penalties in more detail.

Criminal Prosecution:

1.23 The legislative provisions setting out regulatory requirements and consequent offences make it clear that, for the most part, failure to comply with a regulatory obligation is a criminal offence. Criminal offences can lead to a fine or imprisonment and by their very nature, although not in a formal sense, are often accompanied by some element of moral condemnation. Criminal prosecution, whether for breach of regulations or breach of enforcement orders, is heavily used as a means of delivering sanctions for regulatory offences in the UK.

1.24 Regulators can prosecute businesses for violations of some of the regulations that they enforce. Cases generally begin in a Magistrates' Court where the majority of cases remain and are heard. Fine maxima in this jurisdiction are most frequently either £5,000 (level five on the standard scale) or £20,000 (where the relevant legislation provides for this maximum) per offence, with a maximum possible custodial sentence of six months (although this may change).⁸ A small proportion of very serious cases proceed to the Crown Court where judges have the discretion to impose unlimited fines and/or a term of imprisonment of, usually up to two years or five years, depending on the term set out in the relevant regulatory legislation.

1.25 Comparing the numbers of statutory notices handed down with the numbers of criminal prosecutions pursued by enforcement agencies (Table 1.2), shows the relative level of use of these mechanisms in regulators' formal enforcement processes.

⁸ The amendments made to the sentencing powers of magistrates by the Criminal Justice Act 2003 are yet to be commenced.

1.26 The table below also illustrates the numbers of prosecutions brought by different regulators, the numbers of convictions that result, and the levels of sanctions that are handed down. The Environment Agency has a success rate of 96% in its prosecutions while the Health and Safety Executive has a success rate of 77%. The average fines in both of these areas are below £10,000.

Table 1.2: Annual prosecutions and convictions⁹ across enforcement agencies¹⁰

	Offences Prosecuted	Convictions	Average financial penalty
Health & Safety Executive	1,720	1,317	£9,633
Environment Agency	1,559	1,502	£2,038
local authority – Food Law Enforcement ¹¹	640	N/A	N/A
Companies House	5,867	2,944	N/A
Trading Standards	4,692	N/A	N/A
Heavy Goods Vehicle offences (VOSA)	17,255	14,066	£186
Public Service Vehicle offences (VOSA)	1,836	1,021	£194
Light Goods Vehicle offences (VOSA)	1,841	1,732	£243
HMRC	104	99	N/A

Sources:

– *Trading Standards Statistics 2004*, CIPFA, 2005.

– Relevant enforcement agencies – HSE, FSA, VOSA, Companies House, HMRC, Defra, and the Environment Agency.

Some of the shortcomings identified with current practice

Heavy reliance on criminal proceedings

1.27 While many regulators have access to several tools to deal with regulatory breaches, a common approach is either a warning letter at the informal end of the spectrum or a criminal prosecution at the other. There is a more limited use of intermediate sanctions by some regulators. This pattern can occur for a number of reasons including the regulatory style of the agency, a lack of effective intermediate options, ineffectiveness of informal options such as warning letters or statutory requirements set out in the original legislation.

⁹ Figures are for the financial year of 2003-04, other than Food Standards (which are 2001), Trading Standards and the Environment Agency (both 2004).

¹⁰ Figures are for GB (England, Scotland & Wales), except the Environment Agency, which is for England & Wales only.

¹¹ Figures for prosecutions refer to the number of different types of offence per establishment prosecuted in the year as opposed to the absolute number of food law infringements. This is an EU requirement for food law data.

1.28 Criminal prosecution or the threat of such prosecution remains the primary sanction in practice. The use of criminal prosecution is an expensive process for both the regulator and business. It attaches a severe moral condemnation and a criminal record to a business or individual, which may not be appropriate for all regulatory breaches, especially where no intention or recklessness is involved.

1.29 In addition to the cost of criminal proceedings, the volume of other cases going through the Magistrates and Crown Courts results in cases taking several months or even years to reach conclusion. This can impose immense strain on a business which has committed a regulatory breach, perhaps when overstretched or under financial pressure, and may inhibit future regulatory compliance or other improved outcomes.

Regulatory breaches

1.30 Criminal proceedings may not be the best way for the regulator to secure future compliance and it is arguable that they should be reserved for only the most serious breaches of the law. This can be recognized in regulators' enforcement policies which should outline their approach when considering whom to prosecute. Only having one formal option of sanctioning forces a 'one size fits all' approach to enforcement, and hence inevitably produces disproportionate responses in some cases.

Strict liability offences

1.31 In the UK, the predominant approach to addressing different types of non-compliance in the regulatory field has been to place heavy reliance on strict liability offences. In general, intention, recklessness or even negligence are not pre-requisites for being convicted of this type of offence. This is a general rule but there are exceptions.¹² A 'due-diligence' defence may be available, although the statutory provisions are not consistent in this respect. The due diligence defence allows someone who is facing legal action to defend themselves by showing that they have taken all reasonable precautions and exercised due diligence but the use of strict liability removes the requirement to prove criminal intent. This entrenches criminal proceedings at the very heart of regulatory law and does not permit any differentiation between companies that intentionally flout the law, and those that make their best efforts to comply, other than through the discretion to prosecute available to regulators and the sentencing practice of the courts.

1.32 In addition, this lack of differentiation and imposition of strict liability can lead to resentment on the part of businesses that are found guilty of offences without any apparent requirement of moral fault. Alternatively, particularly for large companies who are subject to repeated prosecution, prosecution can be just another legal event, and a fine merely a business cost. Neither outcome is desirable.

1.33 Given the lack of intent or recklessness in these types of cases, the end result is often a fine that takes little account of the actual damage or economic gain that was achieved as a result of the non-compliance, as a court may feel uncomfortable in imposing a high financial penalty for a non-violent, negligent act. Therefore, for many types of regulatory breach, criminal prosecution may be a disproportionate tool.

¹² For example, under the Trades Descriptions Act 1968, *mens rea* is not generally required for an offence to be committed, but the offence under s14(1) requires knowledge or recklessness.

Lack of specialist knowledge by magistrates

1.34 The infrequency of prosecutions means that magistrates rarely see regulatory offences. A magistrate will typically see a health and safety offence every 14 years and an environmental case every seven years.¹³ Infrequency of contact with regulatory cases, and the complex nature of the legislation and offences, can lead to inconsistent judgments, or fines that do not reflect the gain a business has taken from its illegal activity.

Low fines

1.35 Hampton concluded that one of the main problems in UK regulatory penalties regimes was the inappropriately low fines imposed by magistrates. As their day-to-day workload is dominated by cases that fall within the common conception of criminal, such as assault or burglary, courts tend to look upon regulatory offenders as having committed lesser offences, even when the consequences for society as a whole are equally or more serious.

1.36 Although nearly 25,000 fines, formal cautions and prosecutions were brought against business in 2003-04, the resulting fines were very low. In 2004, the Environment Agency prosecuted 1,559 offences, of which 1,502 resulted in a conviction. The average fine handed down for companies in a Magistrates' Court was £6,680 and for 19 cases in a crown court, £35,594. In 2003-04, the Health and Safety Executive prosecuted 1,720 cases, with an average fine on conviction of £9,633. However, this figure includes 24 fines in excess of £100,000, which when removed, gives an average of £6,534.¹⁴ The deterrent effect of the fines on this scale is likely to be low. For any company other than the smallest, an average fine in the region of £5,000 – £10,000 is likely to be seen as an insignificant sum.

1.37 Regulators only prosecute the most serious cases, reflected in the small number of prosecutions, and the high conviction rate, yet the average fines set out above are comparatively low, compared to the economic benefit companies can gain from illegal operation. The Hampton Report set out some examples of fines that do not reflect economic benefit gained:¹⁵

- a man was paid almost £60,000 to dump drums of toxic waste illegally. The waste cost the local authority £167,000 to incinerate, yet the offender was fined only half the amount he had been paid;
- a waste company failed to register for a waste disposal license for two years, saving £250,000. It was fined £25,000; and
- a company in the land management sector illegally dumped several thousand tonnes of spoil and garden waste over a ten-year period. On prosecution, it was fined £830.

1.38 These penalties fail to achieve even the most basic of the objectives referred to at the beginning of this chapter. If regulators are pursuing, as they should, a compliance based enforcement strategy, prosecution will be used as a last resort. It is reasonable to infer therefore, that these prosecutions are for genuinely recalcitrant businesses, and that the consequence should be a fine of sufficient scale to deter.

¹³ Department for Constitutional Affairs.

¹⁴ HSE.

¹⁵ Ibid.

1.39 Ineffective deterrence compromises the effectiveness of the regulatory relationship. Without a credible and meaningful sanction at the apex of their enforcement pyramid regulators are forced to pursue more burdensome and bureaucratic enforcement policies. Legitimate businesses on the other hand see their more unscrupulous competitors cut corners, and hence gain competitive advantage, without any serious consequence.

Inconsistency

1.40 Regulators often complain of inconsistency in decisions at the magistrates level. A typical example comes from the Food Standards Agency, who cited the case of a company prosecuted for very similar offences in two different parts of the country. In the one instance, the business was fined £20,000 and in the other, £5,000. This type of inconsistency also contributes to the lack of effective deterrence characteristic of the current penalty regime.

Conclusion

1.41 This chapter set out the current practise in the UK and the issues that arise as a result. The next chapter looks at the experience of two other OECD countries in the area of penalties and sanctioning, namely Germany and Australia.

Chapter Two: International practice – two examples

2.1 The last chapter considered the sanctioning regimes within the UK and some of the limitations. This chapter looks at the experience of two OECD countries and their approach to sanctioning powers. It should be noted at the outset that these countries have different legal systems and their own regulatory approach. The review nonetheless believes that the experience of Germany and Australia provide some insights that would be beneficial for the review to consider.

Germany

2.2 The review is interested in examining the German system of regulation because of its extensive use of administrative sanctions. In many areas of regulation, regulatory goals are now derived from European Community legislation, and being another member of the European Union, Germany is therefore pursuing the same regulatory outcomes as the United Kingdom but with a different mix of enforcement tools.

History

2.3 The German system of ‘Administrative Offences’ was introduced by the ‘Act on Administrative Offences’ of 1968.¹ This Act allowed for the shift of a number of offences, as well as a large volume of cases, from the criminal jurisdiction into this new category of administrative offences. Using that framework, there has been a steady shift of caseload away from the criminal courts into the administrative jurisdiction. This has resulted in the majority of regulatory enforcement agencies using the administrative offence system for most of their sanctioning needs, with only the most serious cases prosecuted in the criminal courts.

2.4 The German use of the administrative system enables regulators to impose a sanction for violations of the law and regulations which, while worthy of a penalty, are not sufficiently serious to warrant a criminal prosecution. The nature of this system allows the state to distinguish between serious violations that are intentional or reckless and require criminal sanctions and those that are not but still need penalizing. The commission of most administrative offences requires negligence at the very least, and an accidental breach of regulation, even one with serious consequences, would not appear to give rise to a criminal or administrative offence.

2.5 The German system appears to be able to deliver a proportionate response from regulators through the clearer distinction it makes between criminal behaviour and other regulatory breaches.

¹ Gesetz über Ordnungswidrigkeiten.

2.6 The German system, however, still uses the criminal courts as the appeals mechanism of the administrative system. The courts are thus still involved in regulatory offences, though they manifest some of the shortcomings of the UK system – lengthy delays and local magistrates having to consider regulatory offences alongside crime in its more common conception. In addition, criminal courts are used to focus on the personal guilt of the offender whilst the nature of the administrative offence, as a more technical matter, would require looking more at the seriousness of the consequences of the deed. This is the reason why administrative officials are often frustrated by the mildness of criminal court judges in sentencing and would prefer to make administrative courts responsible for appeal proceedings.

Options for enforcement within German Regulatory Law

2.7 Regulatory enforcement agencies have three sets of options available to them when deciding that a regulatory violation is worthy of a sanction. Each of the three options has different procedural features and is designed to serve different objectives.

Criminal prosecution

2.8 The few criminal prosecutions for regulatory offences are always brought against the individual or manager who has the *mens rea*² behind the violation. There is no provision in the German legal system to bring criminal prosecutions against corporate entities. The individual or manager, not the corporation, will be punished. Criminal prosecutions are brought by public prosecutors rather than the regulatory agencies themselves.

2.9 Once a ‘crime’ has been committed in Germany, as defined by German statutes, a prosecutor has an obligation to take forward criminal proceedings against the perpetrator(s) if there is sufficient evidence. This differs from the British system where discretion is retained by public officials, under the Code for Crown Prosecutors,³ allowing the possibility of foregoing prosecutions that are judged not to be in the public interest.

Ordnungswidrigkeiten – Administrative prosecution

2.10 Administrative offences, afforded to German administrative agencies under the ‘Act on Administrative Offences’⁴ provide the bulk of regulators’ sanctioning and deterrence needs.

2.11 The type of behaviour that is regulated through these means ranges from breaches of environmental and health regulations, economic law in the fields of banking and competition, all the way through to violations of road traffic rules.

2.12 The sanctions afforded under this Act are exclusively Geldbuße (administrative fines). These administrative fines are imposed directly by the relevant administrative agencies (‘Verwaltungsbehörden’) of the Bund, and the Länder or the local authority.

² *Mens rea* is a criminal law concept which focuses on the mental state of the accused and requires proof of a positive state of mind such as intent, recklessness, or willful blindness.

³ The Crown Prosecution Service.

⁴ Gesetz über Ordnungswidrigkeiten.

2.13 Unlike in the criminal jurisdiction these penalties can be imposed on corporate entities, but only if an individual person acting for the corporation was identified and proven to have committed the offence and with the relevant mens rea. The aim of imposing the fine on the corporation is to charge the final beneficiary of the offence and to disregard the financial restrictions of the individual actor.

2.14 The federal Ordnungswidrigkeitengesetz (OWiG, or administrative court) rules on the general construction of the offence including causality, participation and guilt, with the state administrative authorities having the powers for setting the fines for administrative offences for specific undesirable behaviour. The procedure and decision to impose a fine, as well as the rights and procedure of an appeal clarifying the issues relating to federal and state legislation empowers the state authorities. Often, such legislation is passed in Acts that also make provision for criminal offences for related, but more serious, wrongdoings. These statutes will specify the maximum (and sometimes minimum) fines that can be imposed administratively for each type of violation.

2.15 Whilst these maxima are important, they are not entirely binding. Section 17 of the Act on Administrative Offences established the principle that fines shall exceed the financial benefit that an offender has gained from an administrative offence. Hence, if the legally assessed maximum is insufficient for the financial benefits to be eliminated, the fine may exceed the specified maxima. The statutory maxima can range from $\text{€}1,000$ to $\text{€}1,000,000$.

2.16 In addition to fines, secondary measures can also be ordered by administrative authorities which also fit under this category. These can include the confiscation of objects that have been used to commit an offence. If a fine is not ordered in cases of unproven guilt for example, the forfeiture of benefits can still be ordered.

2.17 Financial benefits, and indeed any punitive sanction imposed over and above these benefits, are in the first instance decided by the administrative authority. This decision and the factual basis of wrongdoing are subject to appeal to a court based in the criminal jurisdiction.

Appeals mechanism

2.18 The fining order imposed by an administrative authority ('Bußgeldbescheid') can be challenged by a protest ('Einspruch') addressed to the administrative authority.

2.19 This challenge will be considered by an internal appeals process. If the administrative authority refuses to withdraw the fining order, the protest will be decided on by a professional judge of the Local Court ('Amtsgericht') or, in cartel matters, by a Higher Regional Court ('Oberlandesgericht').

Zwangsgeld – Pressure Payment

2.20 The third and final option available to administrative agencies for the enforcement of regulation in Germany is known as 'Zwangsgeld'. This mechanism does not involve the direct imposition of a sanction. Instead, conditions are placed on an individual or corporate entity asking them to perform certain actions within a certain period of time. If the conditions are not met then a fine will be payable to the relevant administrative authority. This mechanism is similar in nature to British statutory improvement notices, but is coupled with the threat of an administrative sanction for non-compliance rather than a criminal offence as in the United Kingdom.

Australia

2.21 The Australian system of regulatory enforcement bears many similarities to the British model. Traditionally, as in Britain, Australian regulatory enforcers have relied upon criminal prosecution as the primary means to bring regulatory violations to account.

2.22 What makes the Australian regulatory system particularly interesting, however, is that Australia – in recognition of the undesirability of only allowing regulators such a blunt toolkit – has undertaken reforms to extend regulators' options.

2.23 Though the process of reforming penalties in Australia is far from complete, there are important lessons that the UK can learn from the experience the Australian state has had in designing and using the new apparatus that has been developed so far.

Australia's alternative sanctions

2.24 One area that is quite advanced in the Australian reform process is the area of environmental regulation. This section will focus on the innovative practice in this field to illustrate some of the options the BRE Penalties Review could consider.

Australian environmental regulation

Administrative options

2.25 *Enforcement notices*: Similar to the UK, at the base of enforcers' hierarchy of formal enforcement options, Australia uses administrative notices. Australia relies on this option more than in the UK.⁵

2.26 *Penalty infringement notices*: This option allows a non-compliant business the opportunity to make amends for its behaviour through the payment of a specified monetary amount. The amount is set according to guidelines outlined in Australian law. If the business accepts the suggested penalty, then no criminal conviction is recorded. Alternatively, if the business disagrees with either the facts of the case, or the size of the penalty, the matter is referred to a court hearing.

2.27 Most companies do not exercise the appeal option since, if the regulator's decision is upheld, the judge usually imposes a higher fine than the original infringement notice. In addition, a conviction in the court is a matter of record and the resulting reputational consequences are generally undesirable. As a result, very few firms choose to contest these notices⁶. These sanctions are used far more widely than the environmental field for behaviour ranging from littering to vehicle offences.

⁵ In 2002/03 in Victoria the Environmental Protection Agency issued 213 pollution and clean-up notices in comparison to 30 prosecutions. In contrast, the Environment Agency in England and Wales served only 370 enforcement notices compared with 1,712 criminal charges it brought against polluters.

⁶ For instance, in New South Wales, from the thousands of penalty notices imposed only 50 businesses elected to take matters to court.

2.28 *Licence suspension and revocation:* When an alleged offender operates under an environmental license, regulators may also have the option of revoking or suspending all or part of that license. This type of sanction can deal a severe economic blow when compared with a criminal prosecution. This type of power is preventative, is much more punitive in nature than a prosecution and should be reserved for only the most serious case. In the province of New South Wales, the environment regulator issued five notices of intention to suspend in 2002/03 which led to three license suspensions. The Environment Agency in the UK also has access to this type of power but it is rarely used.

2.29 *Mandatory audits:* Another alternative sanction available to Australian environmental enforcers is the power to compel an environmental audit. This type of enforcement action is utilised to build the capacity to comply in organisations that consistently fail to meet their regulatory obligations.

Alternative criminal sanctions

2.30 The use of alternative options is not limited to administrative penalties. Australia has also introduced alternative sanctions in relation to criminal prosecutions which are discussed below.

2.31 *Publicity orders:* Monetary sanctions alone are often criticised for failing to impact upon the behaviour of businesses. The costs are seen to be absorbed by innocent third parties, such as workers who may be laid off to keep the business afloat, or consumers who see the fine treated as a ‘business cost’ which is transmitted into price increases. *Negative Publicity Orders* are a more controversial sanction utilised in Australia. Criminal judges can impose an obligation on an offending business to take out an advertisement in a local or national newspaper⁷. The company uses the advert to explain the transgression, articulate a public apology, and to outline steps taken to rectify the harm caused.

2.32 *Environmental service orders:* These orders require an offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit. All negative publicity orders are imposed alongside environmental service orders so as to illustrate to the community a positive outcome of enforcement action.

Conclusion

2.33 This chapter outlined the experience of two OECD countries that have taken different approaches to sanctioning. Germany has relied heavily upon administrative sanctions, while Australia has explored both administrative sanctions as well as alternative criminal sanctions.

2.34 The next chapter discusses some of the emerging questions the review is considering.

⁷ A considerable financial cost in and of itself.

Chapter Three: Emerging Questions

The previous chapter considered the experience of Germany and Australia with regard to the system of penalties available. This chapter looks at the areas of work that the review intends to investigate further, including the use of administrative penalties, decriminalising some regulatory offences and introducing alternative sanctions.

3.1 This chapter lays out some tentative views, which should be seen as attempts to promote discussion and debate rather than to pre-determine issues or confine policy choices. The review has an extensive programme of work and consultation ahead of it, and this chapter is intended to provoke a broad discussion.

3.2 Chapter one outlined some of the concerns expressed in relation to current sanctioning regimes available within the UK. These include a reliance on criminal prosecution and few meaningful intermediate sanctions between informal warning letters and criminal proceedings. Regulators also expressed concern regarding the low level of financial penalties, unreflective of the economic gains derived from the non-compliance and the low deterrent effect this had for others in the regulated community. Lastly, inconsistency was an issue identified by several stakeholders with regards to sentencing patterns across courts in the UK as well as in the variety of powers available to different regulators.

3.3 As discussed in Chapter one, the review believes that a 'one size fits all' approach to regulating impacts of regulatory breaches is inappropriate when other alternatives could be available that might better match the nature and seriousness of the action in question, and more effectively achieve positive outcomes. Regulators already use enforcement notices and other more informal means of seeking compliance. However, criminal prosecution or the threat of such prosecution still remains the primary sanction once the less formal means have been exhausted.

3.4 The review is interested in exploring options to address some of the shortcomings outlined in chapter one, of the current sanctioning regimes. The areas of particular interest are set out below:

- a. experience of current sanctioning regimes;
- b. criminal sanctions and proceedings;
- c. intermediate sanctions in between informal and formal proceedings;
- d. categorising regulatory offences;
- e. decriminalising some regulatory offences;
- f. administrative penalties;

- g. alternative sanctions such as reputational sanctions or mandatory audits;
- h. financial penalties; and
- i. venues for hearing cases and appeals relating to regulatory offences.

Issues with the current sanctioning regimes

3.5 Chapter one highlighted some of the shortcomings of the current system. Most regulatory offences are underpinned by the threat of criminal sanctions, yet criminal prosecution appears to be a very rigid approach for all but the most serious offences. It focuses on achieving punishment rather than prevention and this in itself can undermine regulatory efficiency. The review is keen to discover whether this is a representative view of regulators, industry, legal practitioners, and the wider public.

Criminal sanctions and proceedings

3.6 Criminal proceedings may seem a disproportionate tool in the case of many regulatory offences. The review is considering whether the criminal route should be reserved for the most serious offences. The review has been made aware that when cases are heard in magistrates' courts, a number of issues can be problematic.

3.7 First, many magistrates do not see regulatory offences on a regular basis and are consequently less experienced in setting fines in this area. The review has been told that sentencing guidelines, including guidance from the Court of Appeal, is of only limited effect. Second, magistrates see a range of offences as part of their duties including violent and anti-social behaviour. In contrast to such offences, regulatory breaches may not seem as serious, even if they have large costs to society as a whole. This can result in the magistrate imposing what others see as a low financial penalty, which neither serves as an adequate deterrent to business, nor signals to the regulator that criminal prosecutions are worth pursuing.

3.8 In the case of strict liability offences, where a business has not acted with any intent or recklessness, criminal sanctions may also seem a disproportionate tool. The business's guilty intent does not need to be shown, and many may just attribute the financial penalties imposed in such cases as a business overhead. The entrenchment of criminal proceedings at the very heart of regulatory law in the context of strict liability offences does not permit any differentiation between companies that intentionally flout the law and those that make their best efforts to comply, other than through the discretion of the regulator as to whether to prosecute or through the sentencing practice of the courts.

3.9 The wholesale use of criminal proceedings to sanction regulatory offences also imposes a burden on the court system. This results in long waits for regulators and business in having cases heard. In addition, it also prolongs the resolution of the issue for the business. For example, an underlying breach could have been rectified within weeks of knowledge of the infraction, but criminal proceedings can still be ongoing up to one year after the breach took place and was remedied. The lack of timeliness can add a further burden to the business, as dealing with criminal proceedings can render it unable to focus its full attention on running its business.

3.10 The review is interested in exploring some solutions to address these shortcomings. How can magistrates be better equipped to consider the factors relevant to setting fines in regulatory cases? Should regulatory offences be treated as seriously as more conventional crime such as offence of violence or dishonesty, and how can this be best achieved?

3.11 If criminal proceedings are reserved for the most serious offences, what should be considered as a serious offence? Should accidental breaches of regulatory obligations with serious external consequences be treated as a criminal offence, or be subject to other appropriate sanctions such as remediation orders, where a company agrees to undertake work to correct or repair the damage caused by the breach. Should there be a more consistent availability of defences such as due diligence for regulatory offences? How should less serious regulatory breaches be handled?

Intermediate sanctions between formal proceedings and informal ones

3.12 The review is interested in exploring options that can allow the regulator to have access to some intermediate sanctions that would be available when informal options (like warning letters) have proven ineffective, but where prosecution is an overly harsh or inappropriate response.

3.13 As mentioned in Chapter one, some regulators can use improvement notices which specify actions that a business must undertake in order to become compliant. The failure to comply with such a notice can result in a criminal prosecution. Other regulators can require a firm to stop operations to make improvements before being allowed to reopen. Both of these options are less severe than a criminal prosecution, but more meaningful to the business and to the regulator than a letter, although they too may ultimately result in prosecution if businesses do not comply.

3.14 Another potential option the review may consider is the role and appropriateness of administrative sanctions as an intermediate tool. This idea is discussed in more detail in paragraph 3.17.

Categorising regulatory offences

3.15 In distinguishing between serious and less serious offences, the review is considering whether regulatory offences should be categorised according to seriousness. This would enable the less serious offences to be addressed with a more proportionate response from the regulator or department rather than bringing criminal proceedings for minor or technical offences. However, the review is considering whether this would be feasible in the UK context and whether this would unnecessarily complicate the regulatory landscape.

Decriminalise some regulatory offences

3.16 One logical extension of this is to consider the decriminalisation of some regulatory offences to remove them from the criminal remit altogether. This could benefit the system by lifting the burden of criminal prosecution and procedure from the regulator, industry and the courts, while enabling a more suitable response from regulators to deal with non-compliance such as the use of civil or administrative penalties.

Administrative penalties

3.17 Administrative penalties are penalties imposed by a regulator without the intervention of a court, although usually with the right of appeal to a court or other independent tribunal. These penalties can be used in instances where a regulator is of the opinion that a sanction is necessary, but where the element of moral wrongdoing in the case, or the degree or nature of the breach, is insufficient to warrant criminal proceedings.

3.18 Fifteen UK regulators already use administrative penalties. Examples include the Financial Services Authority and many of the economic regulators such as Ofwat and Ofgem. These regulators can impose fines on non-compliant businesses or businesses that have breached their licensing agreements. The business then has the option to either accept the penalty or to appeal and have the case heard by a specialist tribunal.

3.19 There are two types of administrative penalty that the review has examined, namely fixed administrative penalties and variable administrative penalties.

Fixed penalties

3.20 Fixed penalties can be thought of as administrative penalties in the most literal sense. They are automatic, non-discretionary monetary administrative penalties, generally found to be for small amounts and generally applied in relation to technical breaches of regulation such as the failure to submit returns of information on time. Fixed penalties can be used in the criminal context as well as civil. A good example of this is the use of fixed penalty notices in the area of road traffic offences.

3.21 In the area of fixed penalties, the legislation determines when a breach has occurred as well as the nature, imposition and amount or method of calculation of the penalties to be imposed. The regulator has no power before the penalty is imposed to determine the level of penalty other than in accordance with the relevant legislation, nor to determine whether there are any circumstances that might warrant a variation in its imposition. The regulator does have a limited discretion on whether to impose the penalty for the breach at all or to withdraw the penalty if the facts surrounding the case are inaccurate.

3.22 These types of administrative penalties are usually suited to minor, high-volume breaches, involving strict or absolute liability and therefore, little or no forensic enquiry. Administrative procedures carry a right of appeal and utilise either the courts, or a dedicated appeals tribunal. Companies House is a regulator that has the power to impose fixed administrative penalties. In 2004-05, Companies House issued approximately 180,000 administrative fines in England and Wales for the late filing of accounts by limited companies. The majority of the fines (66%) were for £100, while 6,731 fines were for £1,000.¹

¹ *Companies in 2004-2005*, page 32, Department of Trade and Industry, October 2005.

Variable administrative penalties

3.23 Similar to the fixed administrative penalty, a variable administrative penalty is broadly understood to be a sanction imposed by the regulator, or those that enforce the legislation, without the intervention of a court or a tribunal.

3.24 Instead of it being for a small, fixed amount pre-determined by the relevant legislation, a variable administrative penalty can be for a more significant financial amount and is determined at the discretion of the regulator, in accordance with a published scheme. The Financial Services Authority (FSA) is an example of a UK regulator that can impose these types of penalties.

3.25 For example, in August 2004, the FSA imposed a fine of £17m on Shell for serious misconduct amounting to market abuse. In June 2005, the FSA imposed a fine of close to £14m on Citigroup Global Markets Limited for failing to conduct its business with due skill, care and diligence and failing to control its business effectively when it executed a trading strategy on European government bond markets in August 2004. The penalty had two elements: firstly, a relinquishment of the profits earned from the bond trading of close to £10m, and secondly, an additional penalty of £4m.²

3.26 The review is interested in exploring whether fixed or variable administrative penalties could be more widely utilised across the UK regulatory system. There are many different possible models for the framing of 'administrative penalties' regimes. This includes variations on:

- the rights of appeal – appeal to a standard independent body; full merits of the case or procedure in imposing the penalty or the size of the sanction subject to appeal;
- the magnitude of sanction that can be imposed administratively; and
- the level of discretion afforded to regulator in deciding size of sanction.

3.27 There are also a number of advantages and disadvantages to such a system and the review is interested in hearing your views on whether an administrative system would be appropriate for greater utilisation within the UK regulatory space.

Improvement notice coupled with administrative penalty

3.28 A third variation which the review would like to explore is the potential for coupling improvement notices with an administrative penalty for non-compliance. This combination does not appear to be used in UK regulatory law, though is used in Germany as discussed in Chapter two. It focuses on securing positive compliance in the future (rather than being as a means of penalizing companies without the full protection of the criminal system), but may provide a more effective and efficient inducement to comply with such notices rather than relying upon subsequent criminal prosecutions and all the difficulties they can present. As is presently the case, companies would still retain a right to appeal against the notice on grounds such as being unwarranted, imposing too harsh a time-scale, or, perhaps, that the proposed administrative fine for non-compliance was excessive. However, if they declined to exercise that right, they would be exposed to the penalty automatically for failure to comply. The review will, of course, examine all aspects of such a proposal, including human rights considerations.

² <http://www.fsa.gov.uk/Pages/doing/regulated/law/focus/penalties.shtml>

Alternative sanctions

3.29 At present, for cases that do proceed to criminal prosecution, the courts generally have two options when considering sentencing, namely financial penalties or imprisonment. The Criminal Justice Act 2003 (section 142) suggests that courts should have regard to five purposes of sentencing including:³

- a. the punishment of offenders;
- b. the reduction of crime (including its reduction by deterrence);
- c. the reform and rehabilitation of offenders;
- d. the protection of the public; and
- e. the making of reparation by offenders to persons affected by their offence.

3.30 In some instances, a financial penalty in isolation may not be an effective sanction if it does not take into account the restorative or preventative elements mentioned above. Fining a company a large amount of money may not have any impact in securing future compliance in the instance where there is a lack of capacity within an organisation.

3.31 A financial penalty may also not serve to improve the relationship of a company with its community in the case of a serious environmental breach without a restorative or corrective element.

3.32 The review is interested in exploring whether the courts should have options beyond just a financial penalty or imprisonment when considering sentencing to ensure that the other objectives of the sanction are achieved. These alternative sanctions might include reputational sanctions, mandatory audits and corporate probation orders, all of which are used in Australia.

Financial penalties

3.33 In cases where financial penalties alone are appropriate, the review is interested in understanding at what level the fines should commence. Many have suggested that the starting point should be the financial gain of the non-compliance. This may be easier to calculate in some areas of regulation than others. Other models have suggested including the firm's ability to pay, the company's annual turnover, the firm's co-operation with the regulator or the harm caused to the victim or the environment as part of the calculation.

3.34 In many instances, the fine maxima available to magistrates is high enough to eliminate the economic benefits of a non-compliance. However, as we indicated in paragraphs 1.35 to 1.39, the Magistrates do not appear to consider this the main objective in their sentencing policy, appearing to rely more on the comparison of regulatory offences with other more conventional criminal acts such as offences of violence or dishonesty. The review wants to consider how magistrates could be better informed of the economic benefits of non-compliance to ensure more meaningful financial penalties are imposed where appropriate.

³ *Overarching Principles: Seriousness Guideline*; Sentencing Guidelines Council, December 2004.

Venue for hearing cases and appeals relating to regulatory offences

3.35 The review is considering the view that in some instances the criminal courts may be an inappropriate forum to hear some regulatory offences. This raises the issue of whether regulatory offences should be considered in a more specialised environment where those handling the cases can be better trained in dealing with the specific and sometimes technical issues that arise in the context of regulatory offences. Considerations must also include whether a specialist forum would be suitable for dealing with criminal and/or non-criminal cases, which has obvious implications that have to be addressed concerning procedures and the appropriate burden and standard of proof.

Conclusions

3.36 This chapter has raised some potential areas of work that the review could explore including administrative penalties and alternative sanctions. The next chapter highlights some specific questions that we would like to raise for public comment.

Chapter Four: Call for evidence

4.1 Chapter three set out the issues that the review aims to explore and develop policy recommendations for. The review would welcome views from all stakeholders on any of the issues raised in the report. A list of questions for the evidence gathering phase of the review is outlined in this chapter, building on the discussions of Chapter three. Respondents should not feel bound by the list of questions – any response on any issue would be welcomed.

4.2 Responses should be sent, by 18 February 2006, to:

Sowdamini Kadambari
BRE Penalties Review
Cabinet Office – Better Regulation Executive
Kirkland House
22 Whitehall
London SW1A 2WH

Or to

BRE-Penalties.Review@cabinet-office.x.gsi.gov.uk

4.3 Responses to this call for evidence received after the February 18th deadline may not be considered for this stage of the review. The review plans to publish a consultation document in Spring 2006 which will refine and explore in more depth potential options in the light of evidence received and further research. The consultation document will provide a further opportunity to submit comments and evidence. Following publication of this discussion paper, the review intends to establish a web-site to allow the dissemination of further ideas and proposals as they develop. The website address is www.cabinetoffice.gov.uk/regulation/penalties

4.4 All information in responses, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004). If you want your response to remain confidential, you should explain why confidentiality is necessary and your request will be acceded to only if it is appropriate in all the circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department. Contributions made to the review will be anonymised if they are quoted.

4.5 The review would particularly welcome responses that provide evidence of appropriate or inappropriate use of regulatory powers, and how the current system might be improved.

4.6 The review would like to hear your views on the following subjects:

The Review

1. What would you like the review to achieve for your organisation?
2. Considering the issues set out in Chapter three, what changes would you like to see arising from the review?
3. What would be the most positive outcome for you?
4. What would be the worst outcome for you?

Please provide supporting comments with your reply. It would be helpful to understand your relationship with the private sector/regulators.

Enforcement strategy and enforcement toolkit (for regulators)

5. Please outline the enforcement approach and strategy your organisation pursues including any safeguards in the process and appeal routes
6. Please describe what powers you have available in your enforcement toolkit and when you use them.
7. Of the regulatory breaches that are pursued each year, how many are normally subject to criminal sanctions?
8. Was the use of criminal sanctions appropriate or would alternative approaches (which may or may not be available) have been a more proportionate response?
9. Please identify enforcement tools that you would like to have access to but currently do not.
10. Please discuss the effectiveness of your enforcement strategy and how it is measured, and how you think it could be improved.

Data (for regulators)

11. Please outline any quantitative data you have relating to your enforcement policy such as:
 - the number of prosecutions;
 - the number of inspections;
 - the number of informal notices;
 - the number of enforcement notices served and compliance rates;
 - the level of fines handed down by the courts;
 - consistency of decisions from different courts in different parts of the country;
 - enforcement budget;
 - cost of prosecution; and
 - any other relevant data measures.

Data (for business)

12. Please tell us about your business – industry, number of employees and estimated annual turnover.
13. Please tell us about your experience with regulators in cases of a regulatory breach and the use of both formal proceedings or informal options.
14. Have you ever appealed against any such decisions? How easy or difficult did you find the appeal process?
15. Where competitors have been in breach of regulatory requirements, do you feel that the sanctions applied have been appropriate?

Data (for magistrates)

16. How often do you see regulatory offences?
17. How do you decide at what level to set the fine?
18. Do you feel you have the necessary expertise for cases of regulatory breaches?
19. What problems do you see in the way regulatory cases are presented?

Criminal prosecutions

20. Is criminal prosecution an effective tool in dealing with regulatory offences?
21. Are there benefits in using criminal prosecution?
22. Please give your views on whether you think regulatory offences should or could be re-categorised with some offences becoming decriminalised.
23. Please outline your experience with criminal proceedings including the knowledge of Magistrates or Crown Court judges of your regulatory area, the level of fines, the duration of cases from initial proceedings to final resolution and whether cases settle before proceeding to court.
24. In general, do you think the current system is adequate? If not, how would you suggest it be improved?

Intermediate sanctions

25. Should the review look to the greater use of administrative penalties as an option for intermediate sanctioning?
26. What type of model would be appropriate? Consider the safeguards, appeals mechanisms and standards of proof that the model should embrace.

Enforcement notices

27. Do you feel the current use of enforcement notices requiring compliance in the future achieves their goal?
28. Would coupling such notices with an administrative penalty for non-compliance be more effective in securing compliance than the threat of a criminal prosecution?

Alternative sanctions

29. Should the review consider the case for introducing alternative sanctions by the courts or by regulators in the case of regulatory offences such as reputational sanctions, probation orders or restorative orders?
30. Could the effect of alternative sanctions of this type be as effective as economic or criminal sanctions?

Financial penalties

31. Please tell us if you think the financial penalties handed down in both the Magistrates or Crown Courts are appropriate and effective for regulatory offences?
32. Should the financial penalty in the case of regulatory breaches reflect the economic gain derived from the non-compliance?
33. Should the financial penalty in the case of regulatory breaches reflect the level or harm or potential harm caused?
34. Should the financial penalty consider other factors such as previous compliance record, ability to pay, and the seriousness of the offence, annual turnover of the business etc? Which of these factors are the most important?

Other considerations

35. Please mention any other areas relating to sanctions and penalties that the review should consider.

Provide supporting comments as to why this should be included in the review including any appropriate evidence with your response.

Annex A: The Review's Work

The Review

A1 The terms of reference for the review were set in September 2005 in agreement with the then Chancellor of the Duchy of Lancaster, John Hutton:

“to set out general principles for the use of penalties in the enforcement of regulation; and to consider

- a. how sanctions can be changed to ensure that they act as an effective deterrent and eliminate all of the economic benefits of non-compliance;
- b. how administrative penalties might best be used to eliminate economic gains and speed up the penalty process;
- c. how measures can be taken to enhance consistency between and within penalty regimes;
- d. the role of alternative sanctions for regulatory offences such as restitutive and restorative justice;
- e. whether there is a role for a regulatory tribunal in the regulatory system; and
- f. to make general recommendations on the use of regulatory penalties and specific recommendations for change where that is thought appropriate.”

A2 The review covers regulatory authorities in England and activity in Scotland, Wales and Northern Ireland where this is carried out by bodies also covering England. If the review's conclusions are implemented, implementation of recommendations as they affect Scotland, Wales, or Northern Ireland, would be carried out in consultation with the relevant devolved authority.

The Reviewer

A3 Richard Macrory is a Barrister and Professor of Environmental Law at University College London. He holds an MA in Jurisprudence from Oxford University and is a Barrister at Laws, Grays Inn, London. Professor Macrory has held several academic appointments at international academic institutions including Imperial College, Linacre College, University of Oxford, University College London, City University, and University of Melbourne (Australia).

A4 Professor Macrory has served as a specialist advisor in Environmental Law to the House of Commons Select Committee on Environment, specialist advisor for the House of Lords Select Committee on the European Communities inquiry into enforcement and implementation of EEC legislation and as a Board member of the Environment Agency.

Annex B: The Regulators

B.1 This Annex lists all the regulators in the scope of the review.

B.2 All local authority regulatory functions that affect businesses, including but not limited to:

- Environmental Health
- Planning
- Building Control
- Trading Standards and related services.

B.3 Core departmental functions considered within scope:

- Drinking Water Inspectorate (Defra)
- Egg Marketing Inspectorate (Defra)
- Global Wildlife Division – Wildlife Inspectorate, and Licensing and Bird Registration (Defra)
- Horticultural Marketing Inspectorate (Defra)
- Plant Health and Seeds Inspectorate (Defra)
- Plant Varieties and Seeds Division (Defra)
- Rural Development Service – Dairy Hygiene Inspectorate, and National Wildlife Management Team (Defra)
- Cites and Wildlife Licensing, Global Wildlife Division (Defra)
- Pharmaceutical Price Regulation Scheme (DH)
- Companies Investigation Branch (DTI)
- Employment Agency Standards Inspectorate (DTI)
- Engineering Inspectorate (DTI)
- Animals (Scientific Procedures) Inspectorate (HO)

B.11 Non-Ministerial Departments considered within scope:

- Assets Recovery Agency
- Charity Commission for England and Wales
- Food Standards Agency
- Forestry Commission
- Office of Fair Trading

B.12 Non-Departmental Public Bodies considered within scope:

- British Hallmarking Council (sponsored by DTI)
- British Potato Council (Defra)
- Coal Authority (DTI)
- Competition Commission (DTI)
- Disability Rights Commission (DWP)
- English Heritage (DCMS)
- English Nature (Defra)
- Environment Agency (Defra)
- Equal Opportunities Commission (DTI)
- Financial Reporting Council (DTI)
- Football Licensing Authority (DCMS)
- Gaming Board for Great Britain (DCMS)
- Gangmasters Licensing Authority (Defra)
- Health and Safety Commission/Executive (DWP)
- Hearing Aid Council (DTI)
- Home Grown Cereals Authority (Defra)
- Housing Corporation (ODPM)
- Human Fertilisation and Embryology Authority (DH)
- Information Commissioner's Office (DCA)
- Occupational Pensions Regulatory Authority (DWP)
- Sea Fish Industry Authority (Defra)
- Security Industry Authority (HO)
- UK Sport (DCMS)
- Wine Standards Board (Defra)

B.13 Executive Agencies considered within scope:

- Agriculture Wages Inspectorate (Part of Rural Payments Agency, Defra)
- Fish Health Inspectorate (Part of CEFAS, Defra)
- Sea Fisheries Inspectorate (Part of Marine Fisheries Agency, Defra)
- State Veterinary Service (Defra)
- National Bee Unit (Part of the Central Science Laboratory (Defra)
- Companies House (DTI)

- Driving Standards Agency (DfT)
- Insolvency Service (DTI)
- Maritime and Coastguard Agency (DfT)
- Meat Hygiene Service (FSA)
- Medicines and Healthcare Products Regulatory Agency (DH)
- National Weights and Measures Laboratory (DTI)
- Patent Office (DTI)
- Pesticides Safety Directorate (Defra)
- Rural Payments Agency (Defra)
- Vehicle and Operator Services Agency (DfT)
- Vehicle Certification Agency (DfT)
- Veterinary Medicines Directorate (Defra)

B.14 Other bodies considered within scope:

- Financial Services Authority
- Civil Aviation Authority Safety Regulation Group, Aviation Regulation Enforcement Department and Consumer Protection Group (sponsored by the Department for Transport)
- Adventure Activities Licensing Authority (funded by DfES)

B.15 Economic Regulators considered for comparison purpose only:

- Office of Communications (Ofcom)
- Office of Gas and Electricity Markets (Ofgem)
- Office of the Rail Regulator (ORR)
- Office of the Water Regulator (Ofwat)
- Postal Services Commission (Postcomm)

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