



Department of Trade and Industry

# **The Pressure Equipment Regulations 1999**

## **Proposal to:**

- (i) Amend the regulations for non-commercial manufacture and import for own use by amateur model engineers
- (ii) Adjust the penalty provisions so that they are more consistent with those in other related legislation

## **A Consultation Document**

**13 December 2001**

## INTRODUCTION

1. The Department of Trade and Industry (DTI) would welcome your comments on a proposal to amend the Pressure Equipment Regulations 1999 SI No 1999/2001 ("PER"). A draft of the proposed amendment is at **Annex A**.
2. The PER implement, in the UK, EC Pressure Equipment Directive 97/23/EC which was adopted by the European Parliament and Council on 29 May 1997. The PER came into force on 29 November 1999 but are not mandatory until 30 May 2002. The purpose of the PER is to remove technical barriers to trade for pressure equipment and assemblies across the European Union.
3. This proposed amendment consists of two distinct parts, one relating to amateur model engineers and the other relating to the provisions on penalties in the regulations. The consultation document discusses each of these proposals in turn starting with the one concerning amateur model engineers.

## AMATEUR MODEL ENGINEERS

4. This part of the amendment would exempt equipment made for their own use by model engineers from the placing on the market provisions of the PER. One consultation on this issue has already taken place in March 2000 (see URN 00/704 which provides the background to the issue, further copies are available upon request). On that occasion a choice was posed between an 'Option 1', which would exclude model engineers only for pressure equipment and assemblies (most especially boilers) built before 29 May 2002 when the provisions of the PER become mandatory, and, an 'Option 2', which would deliver an exclusion, in certain circumstances, for such equipment and assemblies from the placing on the market provisions for all time.
5. The responses to the consultation showed a very clear preference for 'Option 2' and so it is this principle which DTI wishes now to put into effect. However, an alternative legal text to the one proposed as 'Option 2' has been devised which, DTI considers, will achieve the desired outcome more efficiently and with greater clarity.
6. The revised approach is no longer based on adjusting the situation of the 'responsible person', i.e. the *person* who deals with the product and would be responsible for its compliance with the PER. It concentrates instead on exempting the *activity* which has been undertaken in relation to the product, i.e. the exemption is based upon the item of pressure equipment or assembly where it has a history of non-commercial usage.
7. The original text for 'Option 2' is reproduced as **Annex B** to illustrate this contrast and **DTI recommends that the new text it has devised is now adopted as the preferred option subject to comments received.**

## PENALTY PROVISIONS

8. This proposal concerns the penalties which are prescribed for offences created by three sets of product safety regulations, administered by the Department. European Directives under the 'New Approach' to establish the Single Market in goods and services across Europe require implementing legislation in each member State. Since the launch of the Single Market campaign in the late 1980's a large number of such directives have been implemented in the UK through product safety legislation, for example the Low Voltage and Personal Protective Equipment directives.
9. The three sets of regulations identified in this exercise are:
  - Supply of Machinery (Safety) Regulations 1992 (as amended),
  - Equipment and Protective Systems intended for use in Potentially Explosive Atmospheres Regulations (1996)
  - Pressure Equipment Regulations (1999)
10. This consultation document deals formally with the proposal to amend the Pressure Equipment Regulations. A specific legal text for amending the relevant regulation of the PER – Regulation 26 – is included in the draft amendment at **Annex A**. However, precisely the same arguments apply across each of the three sets of regulations and parties with an interest in the other two are being asked separately to examine this consultation document and comment on the principle of amendment to the appropriate part of DTI.

### Justification for the changes

11. It has become increasingly apparent that the levels of penalty applicable to offences by manufacturers of unsafe products in these, and arguably in other sets of regulations too, are inadequate for many of the cases which fall under that legislation. This situation has been demonstrated by the growing number of instances of Health and Safety Executive ('HSE') enforcement officers bringing prosecutions under the Health and Safety at Work Act (HASWA) where a serious injury has occurred rather than the more relevant product safety legislation, simply because the HASWA carries the possibility of higher penalties. The maximum fine under the former legislation is only £5,000 – there are custodial penalty provisions but these are very rarely, if ever, invoked – and such a maximum level of penalty cannot be considered appropriate for breaches of duty which, for example, lead to fatalities or major injuries.

12. A Joint Strategic Review Group (JSRG) was therefore set up comprising representatives of DTI, HSE and Trading Standards Co-ordination to consider what options might be available to address this problem. The JSRG took evidence from a number of sources including from HSE field operators and Trading Standards Officers. The full report on its findings is attached as **Annex C**.
13. In short, the report concludes that a change to some of the sets of product safety regulations are desirable so that casework which properly belongs under product safety legislation does not continue to be diverted, inappropriately, into the HASWA arena. It therefore recommends changing the three sets of Regulations outlined above to allow for breaches to be tried in Crown Court as well as by Magistrates (known as 'triability either way' – a draft of a legal text to achieve this can be found at Annex A). The regulations in question were made under powers provided by the European Communities Act 1972 (ECA), which has provision for the possibility of triability either way and will allow the changes to be made through secondary legislation. Some other Regulations made using the ECA already allow for triability either way so this proposal does not set a precedent – rather it extends the process of risk assessment used when setting those Regulations.
14. **The Department would be grateful to receive views on its proposals including on the central questions:**
  - **is it correct to suppose that the penalties available under the PER may on occasions not be suitable for the potential breaches?**
  - **is it appropriate for such cases to be handled in the Crown Court?**
15. In considering our proposals consultees may wish to take account of the following points:

#### Burdens on business

16. The Department believes that this proposal will not impose additional compliance costs as the original impact assessment on these Regulations is based on an assumption of full compliance. In addition, parts of UK industry, which has a good compliance record with these and similar product safety Regulations, have expressed a desire for better enforcement of product safety Regulations or stiffer penalties to justify the cost to law abiding business of compliance. This proposal should go some way to meeting that desire.

### Disproportionate penalties for minor offences

17. The Department considers this to be an unlikely prospect as HSE enforcement officers will continue to use their discretion over when to prosecute and the majority of cases will continue to be taken through the Magistrates' courts. The Health and Safety Commission has produced a leaflet entitled "Enforcement policy statement" which gives a public commitment to adopting a proportionate approach in its casework (*this is available from HSE Books, PO Box 1999, Sudbury, Suffolk CO10 2WA, Tel:01787 881165 Fax: 01787 313995*)

### Consistency of approach across product safety directives

18. It might be asked why similar changes are not being proposed for other product safety legislation, for example for the regulations on Toys or on Medical Devices. The report leaves open the possibility of further work on these (it should be noted that these Regulations are not managed by the Standards and Technical Regulations Directorate within DTI or enforced by HSE) and does not dismiss the principle of their being amended in due course to provide for 'triability either way'. The conclusion of the report is, however, that the three sets of regulations identified above stand out as potentially involving the most serious breaches and should therefore be the first to receive this treatment. A similar approach in respect of the other regulations may subsequently be recommended should experience of the higher penalties being available under the initial three sets of regulations prove positive.

19. DTI would be grateful if comments on either or both of the options could, **where possible**, be co-ordinated through trade or representative organisations. Comments should reach us no later than **22 March 2002**.
  
20. **Co-ordinated responses should be sent to Mike Dodds who would also be pleased to address any questions you may have about these proposals. His contact details are given below. If Email is available this is the preferred option. Printed copies of this document can be obtained from the same address.**

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Your response to the consultation document may be made publicly available in whole or in part at the Department's discretion. If you do not wish all or part of your response (including your identity) to be made public, you must state in the response which parts you wish us to keep confidential. Where confidentiality is not requested, responses may be made available to any enquirer, including enquirers outside the UK, or published by any means, including on the internet.

It is the Department's intention, subject to the results of this consultation, to effect its proposed changes to the PER so that they come into force on or before **29 May 2002**

**Citation and commencement**

**1** These Regulations may be cited as the Pressure Equipment (Amendment) Regulations 2001 and shall come into force on 2001.

**Amendment to the Pressure Equipment Regulations 1999**

**2.- (1)** In regulation 2 of the Pressure Equipment Regulations 1999<sup>(c)</sup>, after regulation 2(3) there shall be inserted the following paragraph –

“(4) For the purposes of these Regulations, pressure equipment or assemblies shall not be regarded as having been placed on the market where the pressure equipment or assembly is placed on the market after it has been used otherwise than in the course of business at all times since manufacture or import by the manufacturer or by the importer of that pressure equipment or assembly from a country or territory outside the Community”.

**(2)** For regulation 26(1) there shall be substituted the following:-

“(1) A person guilty of an offence under regulation 25(a) shall be liable –

- (a)** on summary conviction, to a fine not exceeding the statutory maximum or to imprisonment not exceeding three months or to both;

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<sup>(c)</sup> S.I. 1999/2001.

(b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years or to both.”

(3) In Schedule 8, sub-paragraph 2(d), for the reference to sub-paragraph “(b)” there shall be substituted a reference to sub-paragraph “(c)”.

In regulation 2(2)

“responsible person” means

- (a) the manufacturer or his authorised representative established within the Community; or
  
- (b) where neither the manufacturer nor his authorised representative is established within the Community, the person who places the pressure equipment or assembly on the market or puts it into service as the case may be;

but does not include the manufacturer or other person who has acquired the equipment from him when placing the equipment on the market after the equipment has been put into service by the manufacturer otherwise than in the course of business.

# **REPORT OF THE JOINT STRATEGIC REVIEW GROUP OF DTI, HSE AND LOCAL AUTHORITY REPRESENTATIVES ON THE LEVELS OF PENALTY IN NEW APPROACH DIRECTIVES AND IN HEALTH AND SAFETY AT WORK LEGISLATION.**

## **EXECUTIVE SUMMARY**

The levels of penalty that can be imposed in respect of breaches of Regulations made under section 2(2) of the European Communities Act 1972 to implement certain Single European Market “New Approach” Directives differ from those available for breaches of the Health and Safety at Work etc Act 1974. The Joint Strategic Review Group was established to evaluate whether this difference was justified and to consider whether there was a need to bring the two sets of penalties into line. The Directives and Regulations in question aim to help create a Single Market in the product areas concerned by harmonising requirements on health and safety.

This report examines Directives and implementing Regulations where the Department of Trade and Industry (DTI) is the lead policy department but enforcement in Great Britain is primarily the responsibility of the Health and Safety Executive (HSE). It focuses on three sets of Regulations concerned wholly or predominantly with products supplied for the workplace. Comparison is made to the relationship with penalty provisions in other New Approach Directives and with Health and Safety and Consumer Protection legislation. Detailed evidence reports on the application of six Directives have been analysed. These look at the range of products that are covered and the nature of the associated risks and hazards. They also make a comparison of compliance costs with the likely levels of fines and consider the practical experiences of enforcement officers. The views of other experts have been considered, including those from other Government Departments with responsibility for enforcement or negotiation of (different) New Approach Directives and Regulations. Any references in the report to procedures and institutions in the legal system of England and Wales should be read as applying also to their equivalents in the legal systems of Scotland and of Northern Ireland.

The report does not find any strong justification for continuing to have different levels of penalty in the areas concerned. It concludes that most of the

differences are historical in origin, based more on the nature of enabling legislation and its aims than on the nature of the risks involved. It then goes on to consider the benefits of harmonising the mode of trial and penalty provisions. It looks at evidence from other EU member States and at the links between the level of penalty and the likelihood of a breach of the Regulations. It finds some strong supporting arguments from the nature of public confidence in the Regulations and the Single European Market, and, similarly, in the concerns of legitimate manufacturers who comply with the requirements.

Three options for changing the regulations are considered and assessed against the legal and practical consequences of each. The first option is to accept the status quo and make no changes. This provides a base case against which the other options can be judged. The second option is to bring in legislative changes to apply the same maximum penalty to all regulations. The third option is the one supported by the JSRG. It proposes a case by case approach based on a proper assessment of the risks involved in particular activities along with an assessment of other factors that may encourage or discourage compliance. The report contains a matrix of factors that might be considered, including that of public confidence in the system. This option is not as far reaching as option 2 so it does not have the same immediate simplicity. However, it does offer consistency based on the nature of the potential harm caused by non-compliance and it avoids disproportionate effort.

It is proposed that, initially, three sets of regulations be amended to allow for trial in either lower or higher courts: a status usually referred to as “triability either way”. The Regulations concerned are: The Supply of Machinery (Safety) Regulations 1992 (as amended), The Equipment and Protective Systems intended for use in Potentially Explosive Atmospheres Regulations 1996 and The Pressure Equipment Regulations 1999. On indictment higher fines could be imposed than the maximum of £5,000 on summary conviction. The Enforcement Authorities and the Courts would be able to use their discretion as to the mode of trial. As a result, where convictions are secured, penalties could be applied at appropriate levels so that, for example, low risk offences could still incur low fines.

These changes will not introduce any increased costs for bona-fide manufacturers or importers of compliant equipment. In so far as they act to reduce non-compliance, the changes will benefit manufacturers and importers by reducing any unfair competition they may face from less scrupulous competitors. There may be additional costs for some in defending cases in the higher court but an application to be awarded those costs can be made if found not guilty. The proposed changes to the regulations should not have any effect on the current levels of HSE enforcement activity in these areas.

## SECTION ONE

### THE THINKING BEHIND THE REVIEW

1.1 The Joint Strategic Review Group (JSRG) was formed in November 1999 to examine the different penalty provisions that applied for breaches of Regulations implementing EU New Approach Directives and those for domestic health and safety at work requirements (see chapter two for a description of the legislation). The comparison was made because the New Approach methodology involves harmonising the health and safety requirements that products must meet before they are allowed free circulation within the EU (and EEA). Hence these single market Directives can have a significant health and safety impact. The Health and Safety Commission, in particular, had expressed a concern that the lower penalties available for breaches of the product supply regulations were not proportionate to the risks involved and that they could lead to very different penalties being applied to similar offences.

1.2 The difference in approach and hence penalties arose as a result of the distinction made in the UK between the safety of goods aimed at the general consumer and the safety and safe use of goods in the workplace. In contrast the EU Directives in question looked at product safety across similar types of product rather than at where they were used.

1.3 In dealing with a large number of consumers whose use of a product could not easily be regulated it was found easier to control the product itself to make it as safe as possible and accept that this may make the product less effective. In a work situation on the other hand, unless the hazard is particularly severe, there is an additional possibility of controlling the way products are used and so products that are less intrinsically safe could still be used without unacceptable risk. For example, it might often be necessary to use more dangerous machinery than would be acceptable in a domestic setting but where the risks can be prevented or controlled by training, safe work systems or as a last resort proper use of protective equipment. Consider also the effectiveness of industrial cleaning chemicals compared to those used in the home.

1.4 The procedures developed for consumer safety fit into the European tradition of looking at product safety as one issue and product usage as another and therefore offered a suitable framework of legal provisions for consumer **and** work-related product safety rules. The issue of comparative levels of penalty has arisen because the failure of products approved under the harmonised regulations for use in the workplace could contribute to very similar accidents as failure to follow safe working regulations, for which higher maximum fines are available.

1.5 It was agreed that the issue needed a proper and full consideration that would balance the needs of all interested parties, including those of manufacturers, consumers and the enforcement authorities and would satisfy the public interest. Starting with an examination of the current situation and the way it had developed and going on to look at questions of good regulatory practice and public confidence. As a result the Joint Strategic Review Group was formed and given the following **terms of reference**:

- Examine the mode of trial and penalties provisions in DTI-led/HSE-enforced implementing regulations for Article 95 (New Approach) Directives, taking into account the relationship with penalty provision for other New Approach Directives, other health and safety and consumer protection legislation and enforcement policy;
- Consider the level at which penalties are set, taking into account the health and safety responsibilities of employers, manufacturers and suppliers, the circumstances under which a product is used, and the seriousness of potential offences;
- Explore the scope for proportionate and targeted sanctions regimes;
- If changes are justified, make proposals for penalties or, if necessary, other sanctions which are effective, proportionate, dissuasive, consistent and transparent, in line with the UK's Community obligations, the principles of better regulation, HSC enforcement policy and consumer policy; and
- Consider the legislative route for any proposed changes.

1.6 The Department of Trade and Industry chaired the group with the Health and Safety Executive providing the secretariat.

## SECTION TWO

### EVIDENCE TAKEN AND METHODOLOGY

2.1 Initially the Group devised a four-step model for evaluating the regulations and sub-groups were set up to run the model for each. The first step was to collate information, to examine the objective of the regulation and the duties and responsibilities it imposed on the various parties. Step two would examine the process of compliance, taking account of the incentives for dutyholders, the consequences of failure, societal expectations (and subsequent confidence in the system) and the powers available to the enforcing authority. Step three was to analyse the information to determine whether the regulations took account of the issues raised in step two and met their objectives or whether they needed amendment. The final step was that of agreeing a recommendation to put back to the main group. A full description of the model is contained in Annex 1.

2.2 Prosecution evidence was used to assess levels of compliance with the regulations and to check if the available penalties were considered proportionate to the offences committed. The levels of penalty were also compared with the estimated cost of bringing products into compliance with the regulation. This relationship is particularly important, as the claim has been made by legitimate businesses that they are put at an extra disadvantage if the costs they incur in complying with the regulation are higher than the probable penalties that would be faced by a rogue competitor. An insight into the practical aspects of enforcement comes from the HSE inspectors in the field who have experience of the deterrence effect of earlier prosecutions in their area and who also have experience of using the various powers available to them. Annex 2 contains the full sub-group reports.

2.3 Following the work of the sub-groups the main Group selected six regulations for high-level consideration. The sample was designed to include regulations dealing with products aimed at the consumer market (toys and fireworks) as well as products used primarily in the workplace (Machinery, pressure equipment, explosive atmospheres) and a set of regulations based on an 'old' approach Directive (cosmetics). The following is a summary of the sub-group's findings on the each of the six

#### **SUPPLY OF MACHINERY (SAFETY) REGULATIONS (S.I. 1992/3073 AS AMENDED BY S.I. 1994/2063)**

2.4 These Regulations were deemed to be properly addressing their purpose, which was to provide equality of trading conditions whilst ensuring the supply of safe machines and thereby protecting operators (the workforce), third parties, property and the environment. It was felt that there was a fairly good degree of compliance with the Regulations but that this may have had more to do with commercial factors such as the need to maintain a reputation in the market place than with the threat of enforcement action and the penalties available. There was, however, the potential for non-compliant

products to cause serious harm, including multiple or repeat fatalities, and it was felt that the levels of penalty available did not meet society's expectations for the punishment of wrongdoers in such circumstances. It was also noted that in some cases the cost of complying with the regulations could exceed the level of fine. The sub-group therefore concluded that consideration should be given to increasing the penalties available.

### **THE PRESSURE EQUIPMENT REGULATIONS 1999 (S.I. 1999/2001)**

2.5 These are relatively new Regulations for which compliance is not yet mandatory. The regulations are complex but the requirements were thought to be clear. There was some concern that manufacturers were not yet fully aware of their responsibilities but that did not seem to have any direct correlation to the levels of penalty. A high level of compliance was expected though, again, not primarily as a result of the level of penalty as commercial factors and the possibility of costly liabilities under civil law would come into play. It was felt possible though that a small number of less responsible manufacturers might take the risk of non-compliance as a cheaper option. Risks from accidents involving defective pressure equipment included the possibility of multiple fatalities, severe environmental damage and damage to property. It was felt that in the case of such accidents the levels of fine available under the Regulations would not meet society's expectations or be seen as an effective deterrent.

### **THE TOYS (SAFETY) REGULATIONS (S.I. 1995/204)**

2.6 Along with the other objectives associated with the 'New Approach', and reflected above, these Regulations have an additional concern to protect more vulnerable consumers (children – although the initial consumer will usually be an adult). As consumer legislation these regulations are enforced by Trading Standards Officers who have a broad range of powers and protection measures at their disposal including product bans, which would be expensive for the wrongdoer. It was also noted that action could generally be taken quickly across the EU when products are found to be unsafe. These factors along with the potential costs if consumers use civil remedies (for damages) appear to encourage a high level of compliance. The sub-group reached the view that the current levels of penalty and enforcers' powers were adequate.

### **THE FIREWORKS (SAFETY) REGULATIONS 1997 (S.I. 1997/2294)**

2.7 These regulations are again designed to ensure the supply of safe products. They have a further purpose, which is to restrict the supply of

certain types of product to professional users only and to prevent the supply of any of the product to minors. In the UK these regulations tend to affect suppliers rather than manufacturers. It was felt that the relatively small number of 'players' meant that there was considerable peer pressure to comply with the Regulations and failure to do so would quickly damage a supplier's reputation given the high levels of media coverage surrounding fireworks and firework accidents. Enforcement powers included the ability to seize goods, which was a potent threat in such a seasonal market. The sub group felt that the existing provisions for penalty, mode of trial and enforcement were adequate.

### **The Equipment and Protective Systems for Use in Potentially Explosive Atmospheres Regulations 1996 (S.I. 1996/192)**

2.8 The transition period for these regulations would not end until 2003 so there was limited practical experience of enforcement. However, it was felt that the obligations on duty holders were clear and not unduly onerous so a high level of compliance was expected. Again it was felt that commercial pressures would possibly provide a stronger incentive to comply than the level of penalty. Enforcement powers were thought adequate and there was a possibility of enforcement 'blitzes' because of the relatively small number of manufacturers affected. Failure of this type of equipment would have severe consequences including the possibility of multiple fatalities as well as damage to third parties, property, and the environment. The sub group felt that should such an event occur the level of penalty would not meet society's expectations.

### **THE COSMETICS PRODUCTS (SAFETY) REGULATIONS 1996 (S.I. 1996/2925)**

2.9 Although chosen as an example of Regulations not based on the New Approach these have similar aims to the others: to ensure the supply of safe products, to prevent harm to the consumer and to promote equality of trading conditions. The regulations were found to be complex but clear and, as the original regulations date from a 1976 Directive, well understood within the industry. The market for Cosmetics is price sensitive and subject to intense competition with a high value placed on known and trusted brands. The potential damage to reputation in these circumstances helps ensure a good level of compliance. Enforcement powers were considered adequate and the level of penalty available sufficient for the potential damage that may be caused.

## **SOCIETY'S EXPECTATIONS**

2.10 One theme running through the above summaries is that of penalties not meeting society's expectations. This may need to be explained a little further. Part of the sub groups' examination was to look at the purpose behind the provision of penalties and at what prosecution was expected to achieve. The following themes emerged:

➤ A deterrence to others

Would the possibility of a similar penalty make others comply with the law where they might not have before?

➤ To prevent further breaches

Would the person receiving the penalty be sufficiently deterred to prevent re-offending?

➤ Punishment (and show of disapproval)

Would the penalty be seen by society at large as fitting the severity of the crime? This goes further than simply the effect on the offender or other potential offenders, although of course they are linked, it goes to more philosophical aspects such as the need for suitable retribution. Does the punishment fit the crime?

➤ Redress or compensation for the victim

In most cases the Regulations create criminal offences and although there is provision in the law for the awarding of limited damages it is more usual for damages to be sought through civil action.

2.11 All of these things are quite difficult to measure and the level of penalty that works or is acceptable against each appears to have changed over time and particularly as working conditions have improved more generally. The JSRG felt that in cases where multiple or repeat fatalities or other serious injury might occur a fine of £5000 and/or 3 months imprisonment for someone directly contributing to the accident would not meet the expectation of the general public. It was agreed that this would undermine public confidence in these regulations and could, as a result, damage the commercial interests of legitimate firms through damaging confidence in their product.

2.12 The commercial interests of legitimate firms are also damaged if the level of penalty does not prevent re-offending or deter other offenders from entering the market. These rogue competitors may be able to offer lower prices for a similar looking product but one which does not have the more expensive safety features. They could then use the price advantage to take market share from legitimate enterprises. At an extreme, if the cost of complying with the regulations is higher than any likely fine then those

complying with the rules will feel that the 'system' is working to their disadvantage.

## **ENFORCEMENT**

2.13 The level of penalty is only one consideration faced by would-be manufacturers of defective or non-compliant products. Another consideration is the perceived likelihood of being caught and this will depend on the amount and the public profile of activities undertaken by the enforcement authorities. HSE are responsible for the enforcement in the workplace in Great Britain of the three sets of regulation for which changes are proposed.

2.14 The number of prosecutions made against each of the regulations appears quite low given the range of activities covered. However, it should be remembered that prosecution is generally the last resort of enforcement action - HSE inspectors have at their disposal a range of lesser alternatives which are often used effectively in preference to prosecution - provision of information or guidance, advice or written warnings, improvement or prohibition notices.

2.15 Health and safety legislation is required to be enforced in a way which relates the level of enforcement action to the risks involved, demonstrating a transparent and consistent approach, and targeting inspection primarily on those activities which give rise to the most serious risks or where the hazards are least well controlled. It is the aim of the market surveillance authorities to achieve this balance.

## **SECTION THREE**

### **OPTIONS FOR CHANGE**

3.1 The JSRG reviewed the Regulation specific evidence and considered the enforcement issues in the light of the wider powers that were available for prosecuting employers, and manufacturers, under the Health and Safety at Work etc. Act 1974.

### **CURRENT LEGISLATION AND PENALTIES**

3.2 Section 2(2) and Schedule 2 of the European Communities Act 1972 (ECA) provide a procedure to allow European Directives to be implemented in the United Kingdom by subordinate legislation rather than by Act of Parliament. However, the ECA places restrictions on the level of criminal penalty that can be imposed when creating an offence using this power. The provisions of Schedule 2 (paragraph 1(1)(d)) state that no new offence can be created which is punishable with imprisonment for more than two years or punishable on summary conviction (i.e. in a Magistrates' court) with imprisonment for more than three months or with a fine of more than level 5 on the standard scale. "The standard scale" is defined in law, and level 5 is currently £5,000.

### **THE HEALTH AND SAFETY AT WORK ETC ACT 1974**

3.3 The Health and Safety at Work etc Act 1974 ("HASWA") has effect, amongst other things, for securing the health and safety of persons at work. Section 2 imposes a duty on every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees. Section 3 also imposes a duty on every employer, and every self-employed person, to conduct his business so as to ensure, so far as is reasonably practicable, that persons other than his employees are also not exposed to risks to their health or safety. Sections 2 and 3 are among the duties for which section 33, in identifying an offence of failing to discharge it, prescribes for its commission a penalty, on summary conviction, of a fine not exceeding £20,000, and on conviction on indictment, to a fine (with no pre-set limit).

3.4 The HASWA also contains power to make regulations ("health and safety regulations") for any of its general purposes (Section 15). Such regulations commonly place duties on employers in relation to their employees and others, with a criminal sanction, including duties relating to the choice and use of products used at work. The penalty prescribed by section 33 of HASWA for breach of a duty in health and safety regulations is, on summary conviction, a fine not exceeding "the prescribed sum" (currently £5,000) and on conviction on indictment an unlimited fine.

3.5 Section 6 of HASWA sets out duties on a person who designs, manufactures and imports or supplies articles for use at work. This legislation relates to all articles whether or not specific European Directives cover those articles. It attracts an unlimited maximum fine, or up to £20,000 when dealt with summarily.

## **THE CONSUMER PROTECTION ACT 1987**

3.6 The Consumer Protection Act 1987 (CPA) Part II makes provision for consumer safety in respect of consumer goods and section 10 creates offences in relation to the supply of such goods. Section 11 contains a power to make regulations (“safety regulations”) which relate to the safety of consumer goods. These regulations are enforced not through the creation of offences within these regulations (the CPA prohibits this) but by section 12 of the CPA. Section 12(5) states that a person guilty of an offence under that section shall be liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or both.

## **APPLICATION**

3.7 Numerous Directives relating to technical standards of products have been made by the European Community over the years, many with the legal base of Article 100, but more recently using Article 100A (now Article 95). The requirements set out in these Directives usually relate to design, manufacture and marking requirements with the regulation of the use of products largely being left to domestic legal provisions. Within the UK these Directives have usually been implemented by the exercise of the power set out in section 2(2) ECA. Most of the implementing Regulations have created new criminal offences for failure to observe the requirements regarding the relevant products set out in the Regulations. These offences are usually created to be triable only summarily (e.g. in a Magistrates’ court in England and Wales) where, because of the European Communities Act 1972, the penalty is restricted to three months imprisonment or a maximum £5,000 fine. Some of the Directives in the consumer field do not create bespoke offences but refer to section 12 of the Consumer Protection Act 1987.

3.8 In addition to the bespoke offences created in the Regulations, the general offences in HASWA or the CPA may cover the same situations. Where this is the case the enforcing authority will have a choice of offences from which to charge under HASWA, Consumer Protection Act or the relevant Regulations. This is where the potential for different treatment for similar failures arises, as the choice of charges made by the prosecuting authority will affect the maximum level of penalty that might be imposed.

3.9 In relation to England and Wales in cases other than those where a lower penalty is prescribed the statutory limit to the level of prison sentence which the magistrates can impose is currently six months. The Magistrates Courts Act 1980 also provides that where an offence can be tried either in the magistrates' court or in the Crown Court (an offence described as "triable either way"), but is tried in the magistrates court, a maximum fine applies. This is currently £5,000. If, on the summary trial of such an offence, the magistrates wish to impose a higher fine, they must send the case to Crown Court for sentence.

3.10 At the sentencing stage, clearly the court, whether it be, in England and Wales, a magistrates' court or Crown Court has discretion within the limits, if any, upon the court as set out in the legal provision creating the offence.

## **LEGAL MECHANISM FOR CHANGE**

3.11 There are broadly two legal mechanisms available to change the current situation in England and Wales. Firstly it would be possible to introduce primary legislation to increase the penalties set out in the ECA. Alternatively the Regulations themselves could be re-drafted using secondary legislation to provide that in England and Wales offences can be triable either way. This would create an opportunity for more serious cases to be tried in a court where a higher penalty can be imposed. Within the second option, it would also be possible, should it be required, to create different offences some of which can be tried only summarily and others that are triable either way.

### **The Three Options**

3.12 The JSRG therefore considered the advantages and disadvantages of three options:

#### **➤ Option 1 – The base case**

Maximum penalties in regulations would stay as they are – in most cases a maximum of £5000 and/or three months imprisonment – leaving the enforcing authorities to rely on the sanctions available under the HASWA to deal with more serious breaches.

#### Advantages

This option has the benefit of administrative simplicity, as it would not require any amendment to legislation.

#### Disadvantages

This would not solve the potential for similar offences to be tried under different legislation dependent on the enforcement authority's view of the seriousness of the offence so it does not improve the transparency of

enforcement actions. It also fails to address the concerns about loss of public confidence in the regulations.

➤ **Option 2 – Change everything**

The maximum penalty could be increased in all regulations made under the European Communities Act 1972 to make them equal to those available under the HASWA or to make them triable either way.

Advantages

This would meet all the concerns over consistency and transparency.

Disadvantages

Certain of the changes would require amendments to primary legislation and, more particularly, would also cover many regulations where the JSRG did not feel there was a case for change and so be a disproportionate approach in those cases.

➤ **Option 3 – Targeted change**

The level of penalty would be increased for some regulations on the basis of a need identified using the methodology described in Chapter two. This has produced three candidates for change, the Pressure Equipment Regulations 1999, the Supply of Machinery (Safety) Regulations 1992 and the Equipment and Protective Systems intended for use in Potentially Explosive Atmospheres Regulations 1996. As described in the legal options section above the chosen method for increasing the penalties is through introducing the possibility of offences being triable either way.

Advantages

This deals with the concerns expressed in a proportionate way by changing only those regulations where there is a need for change. By making offences triable either way the courts have more discretion over the level and nature of penalties and can make them also proportionate to the offence.

The same methodology can be used on other Regulations in the future if similar questions about the suitability of penalties arise.

Disadvantages

It introduces a level of discrimination between different product safety regulations that have essentially the same aims. However, this is mitigated and justified by the objective use of the JSRG methodology.

**Conclusion**

3.13 Option 3 was chosen as presenting the most flexible and proportionate solution to the problem identified. The three regulations identified stand out as those where a breach will potentially have the most serious consequences in terms of multiple or repeat fatalities or serious damage to the environment.

The solution proposed is to introduce secondary amending legislation to make offences under those regulations triable in either magistrates' or Crown courts so that more serious offences can be tried in the Crown courts where there is no limit on the potential fine.

## **SECTION FOUR**

### **THE EFFECT ON BUSINESS**

4.1 The proposed change to the level of penalty for the three sets of Regulations will have a direct effect only upon those found in breach of the Regulations. It will not impose any direct cost on legitimate businesses as it does not impose any new duties on any party or increase the costs involved in complying with the current regulations.

4.2 There is a possibility that the change could lead some legitimate businesses to anticipate harsher enforcement of the regulations and that this might lead some of them to devote additional resources to ensuring that they continue to meet the requirements. However, there would be no actual change to the enforcement regime as a result of these changes and the same penalties will apply to minor breaches as apply now. Enforcement officers as well as the courts will continue to be able to exercise their judgement as to the most appropriate course of action in individual cases.

4.3 Legitimate business should welcome higher penalties as a deterrent to less scrupulous competition that may have avoided the more expensive aspects of compliance. These competitors would no longer be able to calculate the probable cost of any fine against the cost of compliance in considering whether to risk non-compliance. The higher potential cost of non-compliance will make such judgements harder to make.

4.4 Because of the above a compliance cost assessment has not been undertaken. It is normal practice when undertaking any regulatory impact assessment to assume full compliance when calculating costs. Any costs arising from this proposal would therefore have already been included in cost assessments for the regulations themselves and would not be additional to them.