

REGULATORY ENFORCEMENT AND SANCTIONS ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Co-Ordination of Regulatory Enforcement

Introduction

Section 22: Scope of Part 2

61. **Section 22** defines the scope of Part 2 of the Act. Part 2 applies where a regulated person carries on an activity in the area of two or more local authorities, and each of those authorities has the same relevant function in relation to that activity. For example, Part 2 will apply where a business sells a product in two different local authorities and is subject to regulatory enforcement by trading standards in both those authorities.

Section 23: “Local Authority”

62. **Section 23** defines “local authority” for the purposes of Part 2. Subsection (2) gives the definition of local authority in England and Wales, subsection (3) the definition of local authority in Scotland and subsection (4) the definition of local authority in Northern Ireland.

Section 24: “Relevant function”

63. **Section 24** defines “relevant function” for this part of the Act. Under subsection (1)(a) “relevant function” has the same meaning in relation to a local authority in England and Wales as for Part 1 (set out in section 4).
64. For local authorities in Scotland and Northern Ireland, “relevant function” means a regulatory function, which is exercised by an authority under an enactment to be specified in an order made by the Secretary of State.
65. Subsections (3) and (4) prevent the Secretary of State specifying in an order a regulatory function in Scotland that is not reserved and in Northern Ireland that is transferred.

Primary Authorities

Section 25: Primary authorities

66. This section allows LBRO to nominate a local authority to act as the “primary authority” for the exercise of a relevant function in relation to a particular regulated person as defined at section 22.
67. The functions of primary authorities are set out in sections 27 to 30.

Section 26: Nomination of primary authorities

68. **Section 26** sets out the procedure for nomination of a local authority as a primary authority. Where an authority has agreed in writing to act as a primary authority for a particular regulated person, LBRO may nominate that local authority as a primary authority. Where a regulated person has been unable to agree with a local authority that it will act as its primary authority, LBRO may nominate a local authority to act as a primary authority for the regulated person.
69. Subsection (2) provides guidance to LBRO regarding which authorities might be suitable candidates to be primary authorities in respect of a relevant function for a regulated person. For example, where a business has its head office in one local authority area and operational premises in a number of different local authority areas, LBRO may choose to nominate as a primary authority either the authority in whose area the most significant operational premises are located, or the authority in whose area the head office is located. It may be that LBRO nominates one local authority as the primary authority in respect of one relevant function for the business in question, for example trading standards matters, and a different authority in respect of another relevant function, for example environmental health matters. Subsection (3) requires LBRO to consult with the regulated person making the application and the authority that it proposes to nominate as the primary authority, before nominating a local authority.
70. Subsection (4) requires LBRO to pay particular regard to any representations made by the proposed primary authority regarding the resources available to it.
71. Subsection (6) requires LBRO to maintain a register of any such nominations. Registration can be revoked under subsection (5) where LBRO considers that the authority is no longer suitable for nomination, or that it is appropriate to do so for any other reason.

Functions of primary authorities

Section 27: Advice and guidance

72. This section charges the primary authority with the task of giving advice and guidance both to the regulated person in respect of the relevant function, and to other local authorities regarding how they should exercise the relevant function in relation to the regulated person. The primary authority and regulated person may make such arrangements as they see fit in order to manage their relationship. This might include entering into an agreement or memorandum of understanding which sets out the rights and obligations of each party. Such agreement or memorandum might supplement any inspection plan approved by LBRO under section 30.

Section 28: Enforcement action

Schedule 4

73. This section requires any local authority other than the primary authority to notify the relevant primary authority before taking enforcement action against a regulated person that has a primary authority partnership.
74. Under subsection (2), where an enforcing authority notifies the primary authority of a proposed enforcement action, the primary authority must determine within the relevant period (that being five working days or a longer period as directed by LBRO under the provisions of subsection (9)) whether the proposed enforcement action is inconsistent with advice or guidance it has previously given. If the primary authority determines that the proposed enforcement action is inconsistent with its advice or guidance, it may direct the enforcing authority not to take the proposed enforcement action.

These notes refer to the Regulatory Enforcement and Sanctions Act 2008 (c.13) which received Royal Assent on 21 July 2008

75. Under subsection (3), where a primary authority does not direct an enforcing authority not to take the proposed enforcement action *and* the enforcing authority chooses to proceed with the proposed enforcement action, the enforcing authority must notify the regulated person of this.
76. Under subsection (4), an enforcing authority cannot proceed with a proposed enforcement action:
- a) at any time during the relevant period; or,
 - b) if directed not to do so by the primary authority.
77. “Enforcement action” is defined at subsection (5). Under subsection (6) the Secretary of State may specify by order action which is or is not to be regarded as enforcement action. This is intended to allow for development of detailed guidance specifying the types of action that should not count as enforcement action for the purposes of this Part. An order under subsection (6) may, for example, specify that informal advice given to a business by a local authority should not be considered to be enforcement action.
78. Subsection (7) gives effect to Schedule 4, which makes provision for:
- a) an enforcing authority to refer a proposed enforcement action to LBRO if the primary authority has directed it not to take the proposed enforcement action (paragraph 1 of Schedule 4);
 - b) a regulated person to refer a proposed enforcement action to LBRO if the primary authority *does not* direct the enforcing authority not to take the proposed enforcement action (paragraph 2 of Schedule 4); and
 - c) the primary authority to refer a proposed enforcement action to LBRO instead of determining itself whether or not a proposed enforcing action is inconsistent with advice or guidance that it has previously given (paragraph 3 of Schedule 4).
79. Where a proposed enforcement action is referred to LBRO, LBRO must satisfy itself as to whether:
- a) the proposed enforcement action is inconsistent with advice or guidance previously given by the primary authority;
 - b) the advice or guidance given by the primary authority was correct; and
 - c) the advice or guidance was properly given by the primary authority (paragraphs 1(3), 2(3) and 3(3)).
80. If the proposed enforcement action has been referred to LBRO by an enforcing authority, LBRO must confirm the direction given by the primary authority to the enforcing authority not to take the proposed enforcement action if it is satisfied as to all the points at paragraph 80 above. In any other case, LBRO must revoke the direction given by the primary authority.
81. If the proposed enforcement action has been referred to LBRO by the regulated person, LBRO must direct the enforcing authority not to take the proposed enforcement action if it is satisfied as to all the points at paragraph 80 above. In any other case it must consent to the proposed enforcement action.
82. If the proposed enforcement action has been referred to LBRO by the primary authority, LBRO must direct the enforcing authority not to take the proposed enforcement action if it is satisfied as to all the points at paragraph 80 above. In any other case it must consent to the action.
83. Where LBRO confirms the direction of the primary authority under paragraph 1(2)(a) of Schedule 4, or directs an enforcing authority not to take the proposed enforcement action under paragraph 2(2)(a) or 3(2)(a) of Schedule 4, it may direct the enforcing

authority to take some other enforcement action under the provisions in paragraphs 1(4), 2(5) and 3(5) of Schedule 4.

84. Under paragraph 5 of Schedule 4, LBRO must, before determining any matter referred to it, consult any relevant regulator, and may consult such other persons as it thinks fit.
85. [Paragraph 6\(1\)](#) of Schedule 4 requires LBRO to make a determination within 28 days of the date on which the reference is made. [Paragraph 6\(2\)](#) allows the Secretary of State to make further provision regarding the procedure to be followed under Schedule 4. This might include, for instance, time limits within which referrals may be made.
86. [Paragraph 7](#) of Schedule 4 enables LBRO to give guidance or directions to any one or more local authorities about any enforcement actions referred to it under Schedule 4.
87. [Paragraph 8](#) of Schedule 4 allows LBRO to require the primary authority, the enforcing authority, or the regulated person, to provide it with information that it may specify.
88. Subsection (8) of section 28 provides that where an enactment specifies a time limit within which enforcement action can be taken, any time during which the authority is prohibited from proceeding with the enforcement action under this section of Schedule 4 does not count when calculating that time period.

Section 29: Enforcement action: exclusions

89. Subsection (1) allows the Secretary of State to prescribe by order the circumstances in which the procedure set out at section 28(1) to (4), requiring consultation before taking an enforcement action, shall not apply.
90. Under subsection (2), where an enforcing authority takes enforcement action against a regulated person where the provisions of an order made under subsection (1) apply, the enforcing authority must inform the relevant primary authority of the enforcement action as soon as it reasonably can.
91. Subsection (3) requires the Secretary of State to include in any order made under subsection (1) exclusions where:
 - a) the enforcement action is urgently required to avoid a significant risk of serious harm to human health or the environment (including the health of animals or plants) or the financial interest of consumers;
 - b) the application of section 27(1) to (4) would be wholly disproportionate.
92. An order under subsection (1) may also, for example, specify that consultation with a primary authority is not required where:
 - a) the regulatory provisions in question are deliberately local in character;
 - b) it would be impractical to contact the primary authority.

Section 30: Inspection plans

93. This section makes provision for primary authorities that exercise the function of inspection to draw up inspection plans in respect of the regulated person with whom they have a relationship. These inspection plans are intended to act as a guide for other local authorities who also carry out inspections in relation to that person.
94. Subsection (3) provides examples as to what can be set out in an inspection plan. These include the frequency at which inspection should be carried out, the circumstances under which an inspection should take place and what an inspection should consist of. It is intended that an inspection plan can also include other information such as risk assessments detailing the risk of non-compliance and the potential consequences of non-compliance, and improvement plans detailing intended actions that will ensure compliance with regulatory requirements.

95. Under subsection (4) the primary authority must consult with the regulated person before drawing up an inspection plan.
96. Under subsection (5) a primary authority is required to take into account any relevant recommendations and guidance relating to inspections when drawing up an inspection plan.
97. Under subsection (6) a primary authority is required to bring any inspection plan to the notice of other local authorities. Before doing so, the primary authority must obtain the consent of LBRO.
98. Subsection (7) requires a local authority to have regard to an inspection plan that has been brought to its attention when proposing to inspect the regulated person to which the plan refers. Under subsections (8) and (9), a local authority other than the primary authority must notify the primary authority before it exercises a function of inspection in relation to a regulated person in a manner that departs from the recommendations in an inspection plan and specify their reasons for this departure.

Primary authorities: supplementary

Section 31: Power to charge

99. **Section 31** allows the primary authority to charge the regulated persons reasonable fees in respect of the functions it performs under this Part. Any such charges may be subject to guidance from LBRO, as described at section 33.

Section 32: LBRO support

100. **Section 32** confers powers on LBRO to do anything it considers appropriate, including making grants, to support a primary authority in the exercise of its functions under this Part. Any such grants would be subject to the usual rules associated with local government finance.

General

Section 33: LBRO guidance

101. **Section 33** permits LBRO to give guidance to local authorities about the operation of Part 2. Local authorities must have regard to guidance issued under this section. Where this guidance affects the power to charge under section 31, it is subject to consent by the Secretary of State, and consultation with the Welsh Ministers.

Section 34: Orders under Part 2

102. This section specifies that orders made under Part 2 must be made by statutory instrument subject to the negative resolution procedure.

Section 35: Interpretation of Part 2

103. This section sets out definitions used in this Part. Subsection (1) sets out the meanings to be given to “LBRO”, “local authority”, “the regulated person” and “relevant function” in this Part.