



Better regulation of party and election finance

Report on the 2009 enforcement policy
consultation

July 2010

Translations and other formats

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Contents

1	Introduction to the report	1
	Overview	
	Background to the consultation	
	Who responded to the consultation	
2	Summary of responses to our proposed approach to risk based regulation	4
3	Summary of responses to our proposed enforcement policy	6
	Deciding when to review or investigate a suspected breach of the law	
	Sanctioning	
	Appendix A – Organisations the Commission met with during the consultation	12

1 Introduction to the report

Overview

1.1 This report summarises the outcome of the consultation that the Electoral Commission held in late 2009 on our future enforcement policy.¹ It explains the consultation process, summarises the responses we received to the consultation and sets out the expected next steps.

Background to the consultation

1.2 The Political Parties and Elections Act 2009 (PPE Act), which received Royal Assent in July 2009, includes provisions to improve the Electoral Commission's ability to regulate party and election finance, by strengthening our existing supervisory and investigatory powers and providing us with access to a range of new civil sanctions which we can apply to breaches of the law. The Act requires that before we begin to use these new powers and civil sanctions, the Commission must consult and publish guidance on how we will use the new powers and civil sanctions.

1.3 After the PPE Act received Royal Assent we held a 15 week public consultation on our proposed future approach to risk assessment and enforcement. The consultation had two purposes: to invite views before we finalised and published a comprehensive statement of our enforcement policy (what our objectives are in using our powers to enforce the law, and how we go about delivering those objectives) for the first time; and to seek views about our detailed proposals on how the new civil sanctions should be applied.

1.4 During the consultation period we met with a range of political parties and individuals affected by our regulatory work, including holders of elected office, central party officials and local party volunteer officers from across the United Kingdom. A list of consultation meetings is at Appendix A. We are extremely grateful to those parties that engaged in the consultation and helped us to make contact with their volunteer treasurers.

1.5 The overall response of consultees to the new powers and sanctions introduced by the PPE Act, and to our proposed approach to using them, was supportive. Submissions in response to the consultation raised a number of questions about our proposed approach, and sections 2 and 3 of this report summarise the issues raised and our response to them.

1.6 We are publishing a penultimate draft of our enforcement policy in June 2010, alongside this report, to inform Parliament's consideration of the draft

¹ Electoral Commission, July 2009, *Better regulation of party and election finance: a public consultation on our proposed future enforcement policy following changes made by the Political Parties and Elections Act 2009*, available at: www.electoralcommission.org.uk/_data/assets/pdf_file/0004/83074/Better-regulation-of-party-and-election-finance-consultation-2.pdf .

SI². We will publish the final policy after Parliament has considered the SI and before we begin to use the new powers and sanctions. This will enable us to take into account any points made during debate in Parliament.

1.7 An issue frequently raised in our meetings with party officials and in formal consultation responses was how our new powers and sanctions would apply to the registered treasurers of party accounting units (such as branches and constituency associations), who often have little financial expertise and perform the role as volunteers in their spare time. In practice, most of the direct legal obligations in the legislation that we regulate, and the associated sanctions for non-compliance, relate to the obligations of central parties rather than their accounting units. The main exception is the requirement for the registered accounting units of parties to keep statements of accounts, and to submit these to the Commission if their annual income or expenditure exceeds £25,000.

1.8 The penultimate draft of our enforcement policy highlights the role of volunteer officers in the regulatory framework and the consequent need for us to apply the rules proportionately, taking the facts of each case into account and only taking action when it is necessary to achieve our objectives. It is important that volunteer officers have a clear understanding of their obligations, and we intend to publish a simple introductory guide for party treasurers, which will include the responsibilities of accounting unit treasurers, later in 2010.

1.9 Before we can begin to use the new powers and civil sanctions, Parliament must approve secondary legislation in the form of a statutory instrument (SI), which was laid in April 2010³. The SI sets out in detail how the civil sanctions will work, for example by listing the breaches of the law to which a civil sanction may apply, and specifying the value of fixed monetary penalties. We advised the Government of the responses to our consultation questions on these issues, so the Government's decisions on the contents of the SI have been informed by the views of those we regulate. Subject to Parliament's consideration of the SI, we anticipate that the new powers and sanctions will come into effect on 1 December 2010. Where relevant, this report comments on the way in which the outcome of the consultation has been reflected in the SI.

Who responded to the consultation?

1.10 In addition to the many helpful comments we received in meetings with party officials, compliance staff, volunteer treasurers and elected officials, we received 16 formal responses to the consultation. Several respondents requested that we keep their responses confidential, and we have published the others on our website at: www.electoralcommission.org.uk/party-finance/enforcement. Most respondents commented on all 17 questions in the

² The Electoral Commission's future enforcement policy: penultimate draft, June 2010, available at www.electoralcommission.org.uk/party-finance/enforcement.

³ The Political Parties, Elections and Referendums (Civil Sanctions) Order 2010. www.opsi.gov.uk/si/si2010/draft/ukdsi_9780111498163_en_1.

consultation paper, while a small number responded only to the questions of interest to them, or made general comments on the broader themes covered in the consultation.

1.11 To supplement our consultation process, we commissioned independent research to seek views on the new sanctions, and our proposals for applying them, from members of the public and volunteer officers of party accounting units. The agency Brahm Insight carried out this research in late 2009 using a mix of focus groups and individual interviews. The findings of the research broadly confirmed the support expressed in consultation responses for the Commission's proposed approach. We are publishing the report on the research by Brahm Insight in June 2010 alongside this report.⁴

⁴ Brahm Insight, February 2010, *Political Parties and Elections Act 2009: Research to support the Electoral Commission's consultation on its future enforcement policy*. This is available at: www.electoralcommission.org.uk/party-finance/enforcement.

2 Summary of responses to our proposed approach to risk based regulation

2.1 The consultation paper described our proposals to introduce a formal risk-based approach to our regulatory role. This is intended to help us target our regulatory activities effectively, to support our objective of ensuring the transparency and integrity of party and election finance. We invited views (questions 1-4) on whether: our proposed approach was appropriate; whether there are criteria other than financial information, compliance history and governance and external factors that we should take into consideration when developing risk profiles of political parties and accounting units; and whether the resulting risk profiles should be made publicly available.

2.2 The majority of respondents welcomed the move to a more risk based approach and broadly agreed with the principles underpinning our proposed approach. However, some practical concerns were raised, which included:

- the possibility that if risk profiles become publicly available, this could result in reputational damage to those we regulate, for example if profiling scores are seen a 'league table' of high-risk parties
- whether the risk assessment approach proposed in the consultation paper should extend to accounting units
- whether the fact that many local party treasurers work on a voluntary basis could be taken into account when developing a risk profile
- that a formal systematic approach to risk may deter parties from contacting the Commission for advice on particular issues, for fear of affecting their risk "rating"

2.3 The responses to the consultation have been carefully considered by the Commission Board. We agree that since risk profiles may at some point become public, it is important to ensure that their content is not misconstrued. We have therefore refined our planned approach to the format of our risk profiling, to separate out clearly the various factors that we will take into account and to thus avoid an overly simplistic 'league table' based on a single risk profiling score for each party or accounting unit. This will provide a clearer and more meaningful profile of each regulated entity in terms of income, size of operation and compliance history. All this will be drawn from publicly available information. The Board is giving further consideration to risk profiling and the Commission will discuss our intended approach with the Parliamentary Parties Panel before putting it into practice.

2.4 We intend to extend risk profiling to the larger accounting units of parties where appropriate, since the resulting profiles will inform our approach to auditing statement of accounts provided by accounting units. We think this is appropriate because some large accounting units control more funds than many registered political parties. As noted above, we recognise the need to apply our regulatory resources in a proportionate way when dealing with volunteer treasurers.

2.5 We do not expect the introduction of formal risk profiling to affect the willingness of those we regulate to seek advice from us. As we said in the consultation paper, we understand that in some cases people may be reluctant to seek our advice about an issue if it could mean admitting to non-compliance. Where a request for advice throws up evidence of non-compliance, we will look at the circumstances of each case and will take voluntary reporting into account as a mitigating factor when deciding on any subsequent action.

2.6 To give those we regulate and others a clear view of how we assess risk, and how we will use risk profiling to inform the way in which we carry out our advice, audit and supervisory roles, we will publish a risk assessment policy in late summer 2010. We intend to put the new policy into practice by generating risk profiles from late 2010, taking into account the information contained in statements of accounts submitted to us during 2010 and other statutory returns.

3 Summary of responses to our proposed enforcement policy

3.1 The consultation paper invited views (questions 5-17) on the key aspects of our proposed future enforcement policy. Our proposals covered the various stages of the regulatory 'life cycle': how we decide when to review or investigate a potential breach of the law; how we use our supervisory and investigatory powers; and how we decide on an appropriate sanction where we find there has been a breach of the law. The consultation paper described the sanctions available to us following the passage of the PPE Act, and how we intend that they should apply to different types of breach. It also provided factual information about the sanctions, (such as the proposed amount of fixed monetary penalties), the processes that will apply to their use, (including rights to make representations and appeal sanctioning decisions to the courts), the consequences of non-compliance with a sanction and our approach to the new statutory requirement for us to publish information about our enforcement and sanctioning activity. The responses to the questions we asked on each of these areas are summarised below.

Deciding when to review or investigate a suspected breach of the law

3.2 The consultation paper set out the factors we plan to use to determine what action to take arising from a new matter, and invited comments [question 5]. The majority of respondents to this question agreed with our proposals, with one respondent suggesting that the Commission should seek to confirm the accuracy of information provided by a person making an allegation before making an initial decision on what action to take. Our decision-making process takes into account the credibility of any information provided to us, and we do not consider that the double-checking of such information at the initial assessment stage will always be an appropriate or proportionate use of our resources, although we will of course seek to verify information with the affected person or organisation at the outset where appropriate.

Sanctioning

3.3 The consultation paper set out the factors we propose to use to determine whether there are public interest grounds not to impose a sanction [question 6]. All those who responded to the question supported the proposed approach, with some comments about the need for clarity and consistency in the way in which the Commission considers public interest factors. We have amended the description of our approach to public interest factors in the penultimate draft of our enforcement policy to make it clear that public interest factors are considered as part of the wider sanctions decision-making process.

3.4 Some consultees suggested that there should be an explicit presumption that the Commission will consider sanctioning where there is a breach. The penultimate draft enforcement policy [section 9.2] makes it clear that where

the evidential test for the existence of a breach is met, the Commission will always proceed with the sanctioning process and, at that stage, will then consider all relevant factors in determining what sanction, if any, is appropriate.

The civil sanctions available to us

3.5 The consultation paper set out the new sanctions that the PPE Act makes available in respect of criminal offences and other specified contraventions of the law on party and election finance. The civil sanctions include:

- fixed and variable monetary penalties,
- notices requiring a regulated entity to take certain types of action (compliance notices, restoration notices and stop notices), and
- enforcement undertakings which may be entered into at the suggestion of a regulated individual or organisation.

3.6 During Parliamentary debate on the PPE Act⁵ the Government stated its policy intention that the civil sanctions should not be applicable to certain criminal offences in PPERA, such as those involving deliberate intent to undermine the law, or wilful or malicious attempts to destroy or conceal evidence. The consultation paper supported this view and invited views on it [question 7], and respondents broadly supported this approach.

3.7 The PPE Act also provides for civil sanctions to apply to certain contraventions of the law that do not amount to a criminal offence. The consultation paper proposed [question 8] that civil sanctions should be available for a small number of important contraventions - failure to notify changes in a party's registered details, failure to keep accounts, failure to maintain accounts for six years, and failure to give details of non-cash donations. Responses broadly supported these proposals. The Statutory Instrument laid before Parliament in April 2010 follows the proposals in the consultation paper in respect of the application of civil sanctions to criminal offences and contraventions.

Fixed monetary penalties

3.8 The new civil sanctions include fixed monetary penalties intended to be used for low level non-compliance. The consultation paper proposed [question 9] that fixed monetary penalties should be set at £200.

3.9 Responses to this proposal were varied. Some agreed that £200 was a reasonable penalty for breaches with a low impact. Others suggested that it would be insufficient to encourage compliance, particularly by larger parties. Two responses suggested a two-tier approach, with breaches by party headquarters attracting a higher penalty (£500 or £750) than breaches by other regulated organisations or individuals.

⁵ House of Lords Debate, 15 June 2009, column 879.

3.10 The Commission Board considered carefully whether a two-tier system would be preferable to a single fixed penalty of £200. The fixed monetary penalties need to be considered in the context of the range of other civil sanctions provided for in the PPE Act. These include variable monetary penalties and non-financial measures such as compliance notices. Where appropriate (e.g. in cases of continued non-compliance by a party headquarters) the Commission will expect to use these more substantial sanctions, rather than a fixed monetary penalty.

3.11 We have therefore concluded that it would be appropriate to keep the fixed monetary penalty provisions in the SI as simple as possible, with a single penalty of £200 as proposed in our consultation paper, while ensuring that there is flexibility to impose variable monetary penalties of a relatively low value in order to deal with breaches where a slightly higher penalty than £200 is appropriate (see paragraph 3.15 on variable monetary penalties below). The Statutory Instrument laid before Parliament in April 2010 follows this approach and specifies a value of £200 for fixed monetary penalties.

Variable monetary penalties

3.12 The PPE Act provides for variable monetary penalties which are intended to provide a flexible sanctioning response to different breaches. The consultation paper set out proposals [questions 10-12] for the use and calculation of variable monetary penalties. The key proposals were that aggravating and mitigating factors should be considered when calculating variable penalties; that the minimum value of a variable penalty should be £500; and that while penalties relating to summary offences (i.e. those that can only be tried by a magistrates' court) are capped at £5,000 by the PPE Act, others should be calculated with reference to the financial transaction involved in the breach, or (where there is no such transaction) to the historic level of donations received by the entity concerned.

3.13 Most responses to the consultation indicated support for this overall approach. One response suggested that penalties not relating to a specific transaction should be set by reference to a party's annual accounts rather than donation returns; we had considered this in developing our proposed approach but concluded that donation returns would give a more accurate measure of the resources available to a party at the relevant point in time.

3.14 Two responses asked how an organisation or individual's ability to pay a penalty would be taken into account. The consultation paper proposed that when considering whether a sanction is in the public interest, the Commission should take into account whether the effect of the sanction on the offending organisation or individual would be disproportionately detrimental. The penultimate draft of our enforcement policy [section 9.5] confirms that we will consider ability to pay both when taking sanctioning decisions and when considering representations about those decisions.

3.15 Following the consultation process, the Government decided in developing the Statutory Instrument laid before Parliament in April 2010 that variable monetary penalties that are not capped at £5,000 by the PPE Act

should be capped at £20,000 in secondary legislation. We have therefore amended our proposals for setting variable monetary penalties, both to reflect this cap and to ensure that variable monetary penalties can be set at a level only slightly higher than a fixed monetary penalty where appropriate, to allow a fully proportionate response to the breaches (see paragraph 3.11 above). The penultimate draft of our enforcement policy therefore states that we will set variable penalties in a range between £250 and £5,000 (for summary offences) and between £250 and £20,000 (for other offences). The level of the fine in each case will be determined by the circumstances of the breach and aggravating and mitigating factors, as set out in the penultimate draft of the enforcement policy.

Non-compliance penalties

3.16 The PPE Act provides for the Commission to impose a non-compliance penalty in circumstances where we have issued a compliance notice or restoration notice, and the recipient of the notice has not complied with it. In our consultation we argued that it would be impractical to prescribe a standard non-compliance penalty, given the range of requirements that a compliance or restoration notice might cover.

3.17 We suggested (paragraph 4.58 of the consultation paper) that such penalties should be set at an amount higher than the anticipated cost to the regulated entity of compliance with the notice, in order to incentivise compliance with the original notice. This suggestion attracted no comment in responses to the consultation and we have maintained this approach in our penultimate enforcement policy published alongside this report. The Statutory Instrument laid before Parliament in April 2010 provides for non-compliance penalties to be set in a range between £500 and £20,000.

Enforcement undertakings

3.18 The PPE Act allows a regulated organisation or individual to propose a legally binding enforcement undertaking on its own initiative in order to make amends for a contravention of the law. The Commission is not obliged to accept an undertaking but must seriously consider one if offered. The consultation paper set out the criteria we propose to use when considering whether to accept an enforcement undertaking, and invited views on them (question 13). Most respondents agreed with our approach. Some requested that we consider the volunteer nature of many treasurers in deciding whether to accept an undertaking. As noted above, our penultimate draft enforcement policy recognises the role of volunteers in political funding and the need to take all the relevant circumstances into account when taking regulatory decisions, including in relation to whether to accept an enforcement undertaking. One respondent said that it would be important to have more information about how enforcement undertakings work in reality. Enforcement undertakings are a new regulatory option, and we will publish information about our use of them as it becomes available.

Public information about our enforcement and sanctioning work

3.19 The consultation paper set out our current disclosure policy⁶ and our proposed approach to meeting the new statutory obligation on us to publish information about our use of our enforcement and sanctioning powers. We invited views on the latter (questions 14 and 15), particularly on whether there are any circumstances in which we should publish more than anonymous information for cases where there has been no breach of the law, and what level of detail we should publish about cases where we have imposed sanctions.

3.20 In response, there were some suggestions that we should publish anonymous information only and that any disclosure about our investigation and enforcement activities should only occur following the conclusion of an investigation. There was one suggestion that any cases where there has been a clear intent to deceive should be publicised to act as a deterrent to others.

3.21 In particular, two responses argued that the Commission's current disclosure policy should be amended so that we only issue a press release at the conclusion of an investigation, rather than when an investigation is launched as at present. The Commission Board considered the arguments for and against amending the current disclosure policy. Given the high level of public and media attention paid to allegations of breaches of the law in this area and to the Commission's enforcement activity, the Board concluded there are strong practical arguments in favour of a policy of proactive disclosure of such activity. It concluded that the benefits to transparency from issuing a press release confirming the fact that the Commission is investigating a matter outweigh the potential for mischief and consequent reputational harm. It was agreed that the Commission will also publicise the conclusions of the investigation, regardless of the outcome. After careful consideration of all points made in relation to the Commission's approach to disclosure, we intend to maintain the approach outlined in the consultation paper.

3.22 On the new statutory obligation to publish information, the majority of respondents agreed with our approach and the amount of detail we propose to include in the annual report. A number of respondents suggested that we should publish more detailed information about more serious offences. Some of the responses suggested explicitly that individuals working in a voluntary capacity, for example as an accounting unit treasurer should not feature in any reports and that details of the party's headquarters should feature instead. We take the status of volunteers into account in our decisions on sanctioning, as described above, and where we consider it appropriate to sanction an individual, it will generally be appropriate in the interests of transparency to publish this information. We are amending our disclosure policy to set out our proposed approach to the statutory obligation to publish information.

⁶ Our disclosure policy is available at www.electoralcommission.org.uk

Late payment charges

3.23 The PPE Act provides for the Commission to impose a late payment charge where it has issued a fixed or variable monetary penalty that has not been paid within the required timescale. Our consultation questionnaire invited views [questions 16 and 17] on our proposed approach to using late payment penalties. Responses to the consultation raised no objections to the proposals, which have been reflected in our penultimate draft enforcement policy (sections 11.6 and 12.6)

Appendix A – Organisations the Commission met with during the consultation

During the consultation Commission staff met with a range of party officials and volunteers from political parties. These meetings are listed below.

Meeting	Location
Parliamentary Parties Panel (Westminster)	London
Labour Party (Regional Directors)	London
Plaid Cymru (Conference)	Llandudno
Liberal Democrats (Head of compliance and regional treasurers)	London
Political Parties Panel (Scotland)	Edinburgh
Scottish Greens	Edinburgh
Assembly Parties Panel (Northern Ireland)	Belfast
Labour Party (accounting unit treasurers)	London
Labour Party (accounting unit treasurers)	Edinburgh
Political Parties Panel (Wales)	Cardiff
Labour Party (accounting unit treasurers)	Cardiff
Social Democratic and Labour Party	Belfast
Democratic Unionist Party	Belfast
Ulster Unionist Party	Belfast
Sinn Fein	Belfast
Alliance Party	Belfast
Conservative Party (Association Finance Board)	London

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We are an independent body set up by
the UK Parliament. Our aim is integrity and
public confidence in the democratic process.
We regulate party and election finance and
set standards for well-run elections.

Democracy matters