

INVESTIGATION AND ENFORCEMENT:

**THE ELECTORAL COMMISSION'S PROPOSED
APPROACH**

JANUARY 2009

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INTRODUCTION

1 A central aim of the Electoral Commission is promoting confidence in the democratic process in the United Kingdom. Political parties are vital to the health of our democracy and they need to raise money to develop policy, campaign and communicate with voters. However, for voters to retain confidence in the integrity of the democratic process it is also important that we have rules and that those rules are enforced fairly and effectively.

2 The Political Parties and Elections (PPE) Bill currently before Parliament proposes new supervisory and investigatory powers for the Electoral Commission, and a range of new civil sanctions which the Commission would be able to apply to criminal offences under party funding legislation. The Commission has been calling for these new powers and sanctions for some time, as have other interested parties including Sir Hayden Phillips, the Committee on Standards on Public Life and the former Constitutional Affairs Committee of the House of Commons, because it is widely acknowledged that the current provisions in the Political Parties Elections and Referendums Act 2000 (PPERA) are deficient. Voters expect us to regulate political funding in a fair, transparent, effective and proportionate way, and the new powers and sanctions proposed in the PPE Bill will significantly improve our ability to act in line with the principles of good regulation.

3 During the debate at Second Reading and in Public Bill Committee Members raised a number of questions and proposed a number of amendments focused on the use of investigatory powers, many aimed at ensuring that these are safeguarded appropriately. During the Public Bill Committee stage the Commission submitted a Memorandum setting out broadly how the new investigatory powers would be used. We also undertook to provide further information to Parliament about our future enforcement policy, including the way in which we would apply the new civil sanctions, by January 2009.

4 This paper provides that information. It expands on the information provided in our Memorandum to the Public Bill Committee, by setting out how we use our existing supervisory powers and our proposed approach to enforcement using the new civil sanctions in a proportionate way. We have invited initial comments on the paper from our Parliamentary Parties Panel. In the light of Parliament's further consideration of the Bill we will prepare a detailed guidance document on our enforcement policy and penalty guidance, based on this paper, on which we will consult following enactment of the Bill and before seeking access to the new powers and sanctions.

5 It is important to note that while the paper naturally focuses on the enforcement aspects of the Commission's function as a regulator, most regulated entities comply with their obligations under PERA, and wherever possible we aim to support and encourage compliance through advice and

guidance, only taking enforcement action where it is necessary and proportionate to do so.

Contents of this paper

6 The paper consists of four sections and some reference material in annexes:

- section 1 gives a brief overview of the Commission's approach to enforcement
- section 2 explains how we use our current supervisory powers to secure compliance with the law
- section 3 sets out our proposed use of the new investigatory powers in the PPE Bill
- section 4 explains how we intend to use the new civil sanctions in a proportionate way to secure compliance in future
- annexes provide detail on the workings of the civil sanctions, with reference to guidance produced by the Government on the Regulatory Enforcement and Sanctions (RES) Act 2008, which is the model for the PPE Bill sanctions.

1. Overview

1.1 The Electoral Commission is an independent regulator established by the United Kingdom Parliament. One of our primary objectives is ensuring the integrity and transparency of party and election finance. The Political Parties, Elections and Referendums Act 2000 (PPERA) sets out controls on donations to and spending by political parties and some other regulated entities, including campaigning ‘third party’ organisations, bodies participating in referendums, and ‘regulated donees’ including members of political parties, holders of elective office and associations of party members. The Commission is responsible for ensuring that these regulated entities comply with the requirements of PERA.

1.2 The new investigatory powers proposed in the PPE Bill would provide the Commission with an extended capacity to investigate failures to comply with the PERA regulatory framework. The range of flexible and proportionate civil sanctions would provide the Commission with an alternative to referral for criminal prosecution under PERA making it easier for us to apply sanctions that are appropriate to the nature of each contravention. We would also be able to use new and constructive approaches to secure compliance with the law where appropriate, rather than imposing a traditional penalty such as a fine, or referring a case for criminal investigation. For instance, we could issue a notice requiring a non-compliant body to take specified steps in order to become compliant, such as amending systems or training party officers in how to fulfil their legal obligations.

1.3 We will only seek access to these powers and sanctions after a public consultation on detailed guidance on our enforcement policy and penalty guidance. This paper sets out the key elements that we expect the detailed guidance to be based on, subject to Parliament’s further consideration of the Bill.

The context of our enforcement work

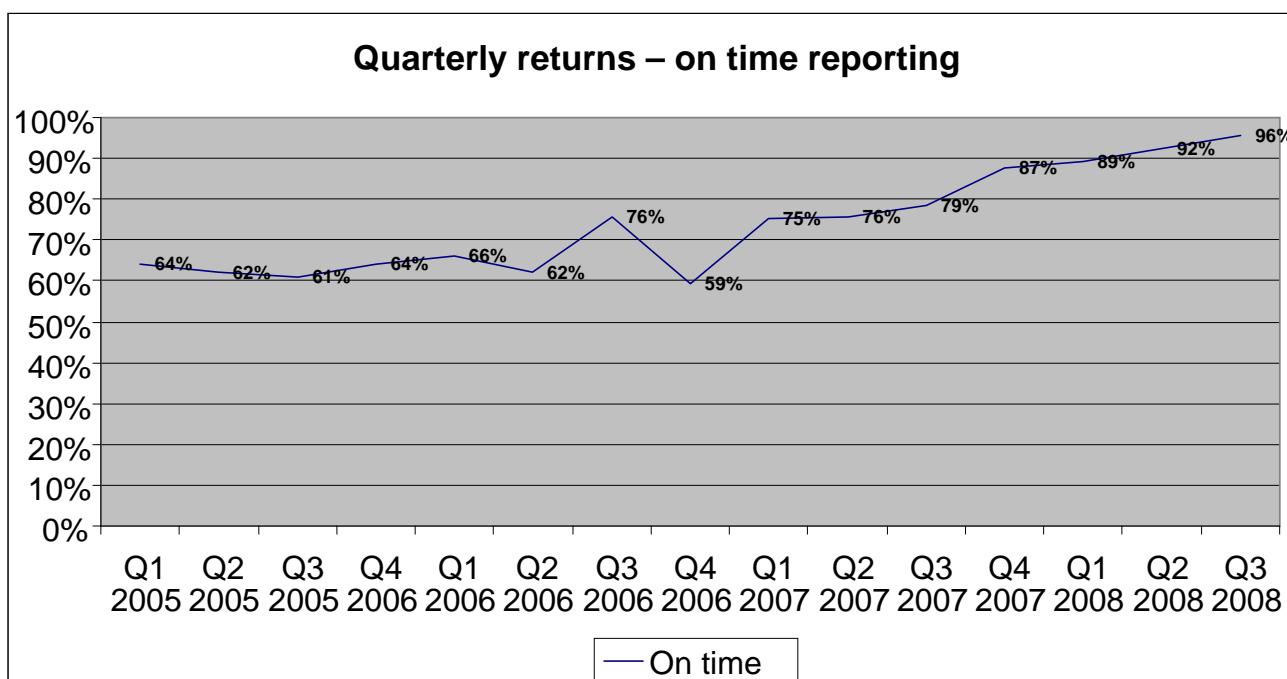
1.4 It is vital for the democratic process in the UK that political parties are able to develop policy, campaign and get their messages across to voters. To do so they need to raise money, and the purpose of the Commission’s regulatory activity is to build and maintain confidence that the rules on donations, loans and spending are followed, and to ensure transparency. It is particularly important that we follow the principles of good regulation, taking a proportionate approach, because political parties rely heavily on the contribution of volunteers.

1.5 Wherever possible, we seek to use **advice and guidance** in order to secure compliance, in line with good regulatory practice. We are committed to providing those we regulate with a clear understanding of their regulatory obligations. Political parties, recognised third parties and permitted participants in referendums are required to register with us; when they do so, we explain the requirements of PERA and what they need to do in order to comply with the law. We produce guidance on a wide range of subjects, respond to requests for advice, and provide training where requested. We only take **investigatory and**

enforcement action where it is necessary and proportionate to do so in order to secure compliance.

1.6 To help us target our advisory and regulatory resources effectively, we are developing formal **risk assessment** tools in line with Hampton principles.¹ These will assess the likelihood of regulated organisations running into problems with compliance. This assessment will draw on information such as the size of each organisation, the level of donations it receives and the nature of its compliance systems. We will consult on our planned approach to risk assessment, alongside the consultation on our enforcement policy, after the PPE Bill is enacted.

1.7 This paper sets out how we use our current supervisory powers in this context, and how we intend to use the new investigatory powers and civil sanctions proposed by the PPE Bill to secure compliance with PPERA in a more flexible and proportionate way than our current powers allow. Our recent experience demonstrates that the limited civil penalties currently available to us for the failure to deliver documents can be used effectively to secure better compliance. Since 2007 the Commission has issued fines to deter the late submission of statutory returns by political parties. As the chart below shows, the proportion of parties submitting quarterly returns on time has risen from 76% in the first quarter of 2007 to 96% in the third quarter of 2008.



The objectives of our enforcement work

1.8 The overall objectives of our enforcement action are:

¹ The Hampton report (*Reducing Administrative Burdens: Effective Inspection and Enforcement*: <http://www.berr.gov.uk/files/file22988.pdf>), published in 2005, set out principles including the use of comprehensive risk assessments, provision of authoritative and accessible advice, and proportionate and meaningful sanctions

- To ensure the transparency of party and election finance that voters expect;
- To eliminate any financial gain or benefit from non-compliance;
- To bring non-compliant bodies into compliance; and
- To deter future non-compliance by regulated entities.

Section 2 of this paper sets out how we seek to use our current powers to achieve these objectives.

1.9 When concerns about compliance come to our attention, we intend to use the new investigatory powers to assess the existence and scope of non-compliance, as the basis for timely and proportionate action. The new powers fill some important gaps in the current legal framework. In particular, they will allow us for the first time to require information from bodies other than those we regulate, in circumstances where we have grounds to believe that the law has been broken. Section 3 of this paper sets out how we will use these powers.

1.10 We plan to use the new civil sanctions in a proportionate and risk based way. This approach would allow us to take into account the severity of non-compliance and the circumstances of each case when taking decisions on sanctioning, as described in section 4 of this paper, and decide whether to:

- **offer support**, encouraging the regulated entity to use the advice and guidance available;
- **require improvement**, giving the regulated entity a clear direction to change the way they do things in order to come into compliance, and backing this up with civil sanctions where needed; or
- **seek restitution and deter future non-compliance**, particularly in cases involving repeated non-compliance, those relating to high value transactions and those involving deceit. This may include investigation of potential criminal offences where appropriate.

2. How we use our current supervisory powers to secure compliance

Monitoring compliance with reporting requirements

2.1 A key aspect of the Commission's work as the regulator of UK party and election finance is monitoring how regulated entities comply with the statutory reporting requirements in PPERA. Under the legislation, political parties and other regulated entities can only accept funding from certain sources. To ensure transparency, parties have to submit quarterly returns providing information about donations and loans that they have accepted and have to send us their accounts each year for publication. Regulated donees have to report donations and loans within thirty days of their acceptance.

2.2 At present the penalties for breaching controls in PPERA are mainly criminal offences. Where evidence suggests that a case of non-compliance is serious enough to require consideration of criminal prosecution, we will liaise and work with the relevant police and prosecutory authorities.

Our current powers to seek information

2.3 The Commission currently has 'supervisory powers' to monitor compliance with controls imposed by PPERA on the entities we regulate. These enable us to seek financial records and information from all regulated entities in relation to us carrying out our supervisory function. For this purpose we may also enter (at a reasonable time) the premises of a political party, registered third party or permitted participant to inspect and copy any relevant financial information – for instance, as part of our work to audit the use of the Policy Development Grants to political parties that we administer.

2.4 While we seek information on a voluntary basis, these powers underpin and support the Commission's ability to access information. We do not have the power to ask non-regulated entities, such as donors, to provide information, which fundamentally limits our ability to conduct thorough and timely investigations. The new powers proposed in the PPE Bill would overcome this problem.

Dealing with concerns that the law is being broken

2.5 We consider enforcement activity, in relation to any breach of the legislation, to be:

- any action which relates to securing compliance with controls imposed by the legislation; or
- any action taken relating to the imposition of any sanction, criminal or otherwise, in respect of a breach of controls imposed by the legislation.

2.6 There are three ways in which an issue may lead to our beginning enforcement activity:

- we monitor the timeliness and content of returns to ensure their accuracy and compliance with statutory requirements, taking enforcement action where appropriate;
- we receive complaints about alleged breaches of the law. To ensure consistency, we have introduced a formal process to consider allegations and establish whether there are grounds for enquiry, which is published on our website²; and
- we may take action on our own initiative, for instance if information that becomes known to us, but is not a formal allegation, suggests a potential breach of the law.

2.7 Where a review of a statutory return, an allegation or other information suggests that further enquiry or investigation may be needed, we consider each case systematically to ensure that any action we take is necessary, proportionate and consistent.

How we decide when to investigate

2.8 The policy criteria determining whether we will investigate an issue are set out below. **Our criteria are intended to ensure that we only use our supervisory and enforcement powers where it is reasonable and proportionate to do so.** Our action is likely to include an investigation in cases where we decide that we need more information before we can reach a decision on whether a breach has occurred, or (if a breach clearly has occurred) whether to impose a civil sanction (in the limited number of cases where this is currently possible under PPERA) or determine that a case should be considered for criminal prosecution.

2.9 Our policy is to investigate where a case meets the following criteria:

- there is evidence or credible information indicating a possible breach of party and election finance legislation – not merely assertion of or speculation about a breach; **and**
- we consider that it is in the public interest for us to investigate, taking into account the potential impact of the possible breach on the integrity or transparency of party and election finance, the cost of investigating relative to the overall impact of the breach, and any other considerations that may be relevant.

2.10 Each case is considered on its particular facts. Specific factors which we may take into account in considering a potential breach of the law against the ‘public interest’ criterion include:

- the seriousness of the breach and therefore the extent to which it may undermine the integrity and transparency of party and election finance;
- the likely quality and quantity of information indicating a possible breach;
- the level of intent or recklessness involved;

² <http://www.electoralcommission.org.uk/party-finance/enforcement/making-allegations>

- whether attempts have been made to rectify the breach; and
- whether there are more appropriate alternatives to enforcement action.

How we use our powers to require information and enter premises

2.11 The Commission aims to promote compliance with the law firstly through advice and guidance and where appropriate through enforcement. Where issues of non-compliance trigger further enquiries or investigation, we seek the voluntary provision of information where possible. We routinely ask political parties, regulated donees and other regulated entities for information as part of our monitoring role, and have a good record of obtaining this information on a voluntary basis. We use our current statutory information-seeking powers under section 146 of PPERA as a backstop while monitoring compliance with the controls in PPERA. Similarly the Commission's policy is to seek co-operation from political parties when we authorise our staff to visit party premises to audit the use of statutory policy development grants.

2.12 While the existence of statutory powers to require information is an important backstop where individuals and organisations do not co-operate, at present our powers to require information are limited, since they apply only to regulated entities. This means that we can rely only on voluntary cooperation from individuals and organisations that are not regulated under the PPERA, including donors and lenders.

Our use of civil sanctions

2.13 The Commission currently has access to a limited number of civil sanctions under PPERA to secure compliance with the Act. One is an application to a Magistrate's court in England and Wales (to the Sheriff in Scotland and to a court of summary jurisdiction in Northern Ireland) for forfeiture of a donation from a source which is impermissible or unidentifiable. The other is a fine for the late submission of statutory returns by political parties and accounting units.

2.14 Since February 2007, the Commission's policy has been to seek forfeiture of impermissible donations which a regulated entity has accepted. We gave the regulated community notice of this approach before putting it into effect. Similarly, we generally seek to recover penalties for the late submission of returns, although we consider representations from regulated entities as to why a fine should not be recovered. The chart in para 1.7 above shows the quarterly compliance rates for donations and loans returns by parties since the Commission started issuing fines from the first quarter of 2007.

How cases are referred for investigation and prosecution

2.15 Where we suspect that a criminal offence may have been committed in England or Wales, we will seek to gather evidence using the supervisory powers available to us under PPERA before deciding whether to impose no sanction or to refer the matter to the police. Our decisions are based on consideration of:

- whether there is sufficient corroborated evidence that an offence may have been committed, and
- whether it is in the public interest to refer the matter to the police.

The Crown Prosecution Service ultimately decides whether to bring a prosecution.

2.16 The position in Scotland is slightly different because the expectation of the Procurator Fiscal in Scotland is that the Commission may wish to investigate, rather than the police. The Procurator Fiscal will then decide, on referral, whether to bring a prosecution.

2.17 In Northern Ireland we are in discussion with the police and Public Prosecution Service as to their required approach.

3. Using the new investigatory powers to support effective enforcement

The proposed new powers

3.1 The proposed investigatory powers in the PPE Bill would enable the Commission to fulfil its function, as restated in clause 1 of the Bill, of ensuring that regulated entities comply with their obligations under PPERA. The proposals in Schedule 1 of the PPE Bill would:

- restate and slightly expand the existing supervisory powers of the Commission, which are discussed in section 2 of this paper, while specifying that the supervisory power of entry to premises may not be used for investigatory purposes. The Government indicated at Public Bill Committee stage that it would review the expanded supervisory power to enter premises in response to concerns expressed by Members of Parliament, and has tabled amendments for Report stage providing that this power will not apply to regulated individuals;
- provide new investigatory powers in circumstances where the Commission reasonably suspects the law has been broken, allowing us to require the production of information or documents via a disclosure notice, and to require individuals who have relevant information to be interviewed; and
- provide the Commission with a way of following up requests for information via a disclosure notice, if these are not complied with. The Bill currently provides for this to be done via a warrant to enter premises, but the Government indicated at Public Bill Committee stage that it would review this mechanism in response to Parliament's concerns. The Government has tabled amendments for Report stage to replace the warrant power with a procedure to apply to a court for an order requiring the delivery of documents.

How we will use the powers

3.2 Our overall approach to investigation will remain the same as at present, as set out in paras 2.8-2.10 above. **We will only use our supervisory and investigatory powers where it is reasonable and proportionate to do so.** We will investigate where a case meets the two key criteria that there is evidence or information indicating a potential breach of the law, and that we consider it is in the public interest for us to investigate.

3.3 The wider investigatory powers in the PPE Bill would enable the Commission to carry out effective investigations of non-compliance with PPERA, in cases where we have reasonable grounds to suspect the law has been broken. We would expect to go through each of the following steps

when seeking information as part of an investigation into a potential breach, unless there is good reason³ to do otherwise:

3.3.1 we will seek information on a voluntary basis;

3.3.2 if the individual or organisation does not voluntarily co-operate with requests for information, we will use our statutory powers under the Bill (Schedule 1 para 2) to require information by notice and/or to require persons to attend an interview. These additional investigatory powers would enable us to obtain information from any person by a disclosure notice in circumstances where we have reason to suspect that the law has been broken, whereas currently we can only obtain financial information from the entities we regulate. This power would therefore underpin our ability to access the necessary information and to conduct effective investigations. It would help us to secure compliance with the statutory requirements where advice and guidance has not been sufficient.

3.3.3 if the individual or organisation does not comply with a disclosure notice, and if it is necessary and proportionate to take further action, we will use our powers under the PPE Bill to seek compliance with the notice. As noted above, the means by which we will do this are to be considered further by Parliament at Report stage. We would only expect to need to use the courts to secure compliance with a disclosure notice in exceptional circumstances, but the ability to do so is an important backstop in cases where we cannot secure voluntary compliance.

Investigation timescales

3.4 The time taken to complete an investigation depends on the nature and facts of the case. Where there is a great deal of evidence to collect and assess, or where the potential breach relates to a particularly complex or untested area of the law, the investigation is likely to take longer. We recognise that it is important to conclude investigations as quickly as possible, in the public interest and in the interests of natural justice for those involved and will balance with our first priority to conduct a fair and thorough investigation. We are currently reviewing our target of completing 90% of our investigations within four months.

Annual reporting on the use of Investigatory powers

3.5 The PPE Bill requires the Commission to publish information annually about its use of the new investigatory powers. We will consult on the scope of that information as part of the public consultation on our enforcement policy. Our current assumption is that these reports should not identify those

³ The reference to 'good reason to do otherwise' reflects the fact that on rare occasions, it could be necessary in the public interest for the Commission to use its statutory powers immediately. This may for instance be required if crucial evidence is at risk of being destroyed or removed.

individuals and organisations that are the subject of the powers. Regulated entities that receive a sanction as a result of a Commission investigation will be included in our reports of sanctioning activity (see para 4.12 below). We do not think it would be reasonable to identify regulated entities that are not sanctioned following an investigation in our reports of investigatory activity.

4. Using sanctions proportionately to secure compliance

4.1 This section deals with the Commission's future decision-making process in cases where we are satisfied that a regulated entity has not complied with one of the legal requirements we regulate. It sets out how the Commission will use the new civil sanctions set out in the PPE Bill and the existing sanctions available under PPERA. We will deploy them in a proportionate way, consistent with our objective of promoting confidence in the integrity of party and election finance, in order to meet the aims of our enforcement policy - to eliminate benefits obtained from non-compliance, to bring non-compliant bodies into compliance and to deter future non-compliance by regulated entities.

4.2 In every case where we consider applying a sanction, the sanctioning process will ensure that the regulated entity has opportunities to put its case and to appeal. The precise nature of the process and the appeals available will depend on whether the Commission decides to impose a civil sanction or to refer a case to the relevant police and/or prosecutory authorities. The annexes to this paper set out the detailed appeal provisions for the new civil sanctions.

4.3 This section explains the framework that the Commission will use in deciding the sanctioning approach to any given contravention of the law. It then outlines how the new civil sanctions and the existing PPERA sanctions will be applied within that framework. Annexes to this paper contain detailed explanations of the mechanics of the new civil sanctions and the decision and appeal processes relating to them. These are based on the guidance prepared by the Government for implementation of the Regulatory Enforcement and Sanctions Act 2008 which is the model for the new civil sanctions in the PPE Bill.

The decision-making framework

4.4 When we have clear evidence to the required standard of proof, that a regulated entity has contravened the law, we will consider the facts of the case and our ongoing risk assessments (see para 1.6 above) to decide which sanctioning response will best meet our regulatory objectives. Broadly, in cases where a contravention has occurred there will be four types of response available to us when the new civil sanctions in the PPE Bill are in place:

4.4.1 **Take no action.** This will be appropriate where we conclude that the contravention was so trivial or inadvertent, and the risk of the regulated entity failing to meet the relevant obligation in future so slight, that it is not appropriate to take any action.

4.4.2 **Offer support, and sanction where needed.** This will be appropriate where we conclude that the contravention points to a need

for the regulated entity to change its behaviour or improve its capacity to comply with the law, but we are satisfied that the entity in question is willing and able to bring itself into compliance without the ongoing threat of sanctions. Our usual response in such cases will be to explain to the regulated entity that it has contravened the law, and to offer support such as advice or training, to help it comply in future. Where the contravention is of a kind that attracts a standard penalty such as a fixed monetary penalty (see para 4.9.1 below), that will apply in the usual way.

4.4.3 Require improvement. This will be appropriate where a regulated entity is repeatedly failing to meet its legal obligations, but the failures are not sufficiently material to require consideration of a criminal or very substantial civil sanction. In such cases we will offer support such as advice or training to help the entity comply in future, but will seek to back this up with appropriate sanctions - for instance, a fixed or variable monetary penalty (see para 4.9.3 below) to incentivise future compliance, and/or a compliance notice (see para 4.9.4 below) requiring the entity to take certain steps to bring itself into compliance with the law. Our decision in each case will take into consideration the need to deter future non-compliance by those we regulate.

4.4.4 Seek restitution and deter future non-compliance. This will be appropriate in cases that may have a significant impact in confidence in the transparency and integrity of party and election finance – for instance, those involving significant amounts of money, repeated material failures to comply, or offences involving deliberate intent to get around the rules. Where we conclude it is in the public interest to do so, we will refer such cases to the police (the Procurator Fiscal in Scotland) in the same way as at present (see section 2). Otherwise, we will seek to impose appropriate civil sanctions, such as a substantial variable monetary penalty and/or a restoration notice (see para 4.9.5). Our decision in each case will take into consideration the need to deter future non-compliance by those we regulate.

4.5 The graduated nature of the new civil sanctions means that where a case is on a borderline between these categories, we will have more flexible sanctioning options than at present. For instance, we would be able to impose a variable monetary penalty of appropriate scale, or a compliance notice dealing either with a particular failing (e.g. the lack of a system to ensure reporting of particular information on time) or a more general lack of capacity (e.g. requiring a regulated entity to co-operate in training its officers in their legal obligations).

4.6 There is one exceptional circumstance in which a new sanction in the PPE Bill – the stop notice - would enable us to take action without proof that the law had been contravened. We could use a stop notice (para 4.9.6 below) to prevent an imminent contravention of which we were aware (e.g. an intention by a regulated entity to take campaigning action which would breach spending limits). This has the advantage of allowing us to avert illegal action aimed at influencing an election, rather than waiting until the damage is done before applying a sanction. Given the absence of a need for proof of a

contravention having occurred, the PPE Bill sets a high threshold for the use of stop notices; there must be a significant risk of seriously damaging public confidence in the effectiveness of the regulatory regime.

How sanctions will apply within the framework

4.7 When Parliament has completed its consideration of the PPE Bill and the scope of our sanctioning powers is confirmed, the Commission will consult publicly on its detailed enforcement policy and penalty guidance. Our future policy will be consistent with the Government's guidance on the implementation of the Regulatory Enforcement and Sanctions (RES) Act, on which the proposed sanctions are based. We intend to set out our approach to each offence and contravention prescribed by the Secretary of State under PPERA, in terms of the sanctions for which a regulated entity may be liable, the actions the Commission may take and the circumstances in which the Commission is likely to take such steps, based on the framework outlined above. The policy will however make it clear that decisions in each case will be on a "case by case basis", depending on the facts and evidence and on consideration of the public interest.

4.8 Before the new civil sanctions can come into effect, Parliament will decide on the prescribed criminal offences and contraventions of PPERA for which each of the civil sanctions will be available. Where PPERA currently provides for a criminal offence, criminal prosecution for that offence will remain available after the introduction of the new civil sanctions. However, we will of course only refer cases to the police or Procurator Fiscal for consideration of a criminal offence where it is reasonable and proportionate to do so, as set out in the decision-making framework discussed earlier. The most serious offences in PPERA, such as knowingly giving false information, are likely to continue to attract criminal sanctions only.

4.9 In outline, we envisage that the new civil sanctions should apply as follows, subject to the agreement of the Secretary of State and of Parliament. The table at the end of this section summarises our proposed approach. As noted above, the wider context is that we will continue to use advice and guidance, rather than enforcement and sanctioning, to drive compliance wherever possible.

Fixed monetary penalties [PPE Bill, Schedule 2, Part 1]

4.9.1 Fixed monetary penalties are fines of a specified amount, to be determined by the Secretary of State. They will be applied in cases of low-level non-compliance, such as the late delivery of statutory information (e.g. details of registered officers, statements of accounts). The Commission will only be able to apply them where it is satisfied to the criminal standard of proof (beyond reasonable doubt) that a contravention has occurred. They can only be imposed after the Commission has given both a preliminary notice to the regulated entity in question, explaining the grounds for the penalty and the right to make representations about it, and a final notice confirming the penalty and explaining payment arrangements and rights of appeal. We will

set out the proposed fines and the circumstances in which they would apply when we consult on our enforcement policy.

Discretionary requirements [PPE Bill, Schedule 2, Part 2]

4.9.2 The PPE Bill introduces a set of ‘discretionary requirements’ which the Commission may use on their own or in combination. These are **variable monetary penalties, compliance requirements and restoration requirements**. They are intended to allow a flexible, proportionate response to cases of non-compliance which are more serious than those involving fixed penalties, but not material enough to require referral to the police. We would expect to use them in enforcement action aimed at requiring improvement or seeking restitution, as described above. We are therefore likely to ask Parliament to make them available for most PPERA offences. As with the other new civil sanctions, they can only be applied where we are satisfied that the criminal standard of proof has been satisfied. They are also subject to a number of notice and appeal provisions.

4.9.3 The Commission will be able to set the value of **variable monetary penalties** [PPE Bill schedule 2, paragraph 5(5)(a)] at an appropriate level, which removes any financial benefit arising from the offence and takes account of the gravity of the offence. The factors that we will take into account in setting the level of penalties include the existence of aggravating and mitigating circumstances (e.g. past compliance history, whether non-compliance was disclosed voluntarily etc) which are discussed in more detail in Annex B. When we consult publicly on our enforcement policy after the Bill is enacted, we will invite views on our draft criteria for calculating variable monetary penalties, and we will publish the final criteria. In the case of offences that are only triable summarily the level of the penalty will usually be capped at £5,000.

4.9.4 We will be able to use **compliance requirements** [PPE Bill schedule 2, paragraph 5(5)(b)] to set out things a regulated entity must do, within a specified period, so that the offence does not continue or recur – for instance, changing internal processes or undertaking training in the requirements of the law.

4.9.5 We will be able to use **restoration requirements** [PPE Bill schedule 2, paragraph 5(5)(c)] to set out things a regulated entity must do, within a specified period, to restore the position to what it would have been if no offence had been committed, as far as possible – for example, to surrender benefits obtained as the fruits of an impermissible transaction.

Stop notices [PPE Bill, Schedule 2, Part 3]

4.9.6 Stop notices require a regulated entity to cease activity that poses a serious risk of damaging public confidence in the regulation of political funding. As discussed in para 4.6 above, this high threshold

for the use of stop notices is needed because this sanction may be used pre-emptively, before an offence has been committed.

Enforcement undertakings [PPE Bill, Schedule 2, Part 4]

4.9.7 A regulated entity may offer to enter into an enforcement undertaking on its own initiative, in order to make amends for a contravention of the law. The Commission will not be obliged to accept an offer of an enforcement undertaking, but will always take offers of such undertakings seriously and give them careful consideration. This mechanism is intended to allow regulated entities and the Commission to consider innovative ways of making restitution and promoting compliance. Since they will only be used at the initiative of regulated entities, the Commission will consider whether their use is appropriate on a case by case basis. We will invite views on when it will be appropriate to accept enforcement undertakings offered by non-compliant bodies when we consult on our enforcement policy later this year.

Summary of the Commission’s proposed use of sanctions

Sanction (the numbers below refer to sections of this paper)	Example
No action 4.4.1	where a contravention is trivial and inadvertent and the entity is considered unlikely to repeat it in future
Fixed Monetary Penalty 4.9.1	low level non-compliance such as the late delivery of statutory information
Variable Monetary Penalty 4.9.3	more serious breaches than for fixed penalties where a fine can be set at a level to reflect the gravity of the offence and remove any financial benefit resulting from non-compliance
Compliance requirement 4.9.4	where we identify that a regulated entity needs to improve its capacity to comply, e.g. by training staff or changing systems
Restoration requirement 4.9.5	to ensure a non-compliant entity makes good a contravention, for example giving up benefits received as a result of the contravention
Stop notice 4.9.6	a ‘real time’ sanction only to be used where there is a serious risk of damage to public confidence in the regulation of party funding

Sanction (the numbers below refer to sections of this paper)	Example
Enforcement undertaking 4.9.7	can be offered by a regulated entity that is aware it is non-compliant, in any circumstances
Forfeiture (existing sanction) 4.10	limited to donations and loans over £200 from impermissible and unidentifiable sources accepted by a regulated entity
Referral for criminal prosecution (existing sanction) 4.4.4	cases with significant impact on confidence in the transparency and integrity of party and election finance, such as those involving large amounts of money, repeated material failures to comply, or deliberate intent. Will only apply where the Commission decides that it is in the public interest to refer.

Existing sanctions in PPERA and their future use

4.10 As noted in para 4.8 above, criminal proceedings will remain a sanctioning option where proportionate, alongside the new civil sanctions. The existing civil penalties in PPERA section 147 will be repealed and replaced by the new civil sanctions. The other sanction currently available to the Commission under PPERA, as outlined at para 2.13 above, is the ability to go to a magistrates' court to seek forfeiture of donations from impermissible sources. The Commission's policy is to seek forfeiture of impermissible donations which a regulated entity has accepted. We would expect to continue to take this approach in future. We have said that it would be helpful to repeal the current forfeiture provisions and restate them as part of the new suite of civil sanctions, in order to create a unified sanctions regime, although the Bill as drafted does not do this.

Defences and rights of appeal

4.11 As noted above, the new civil sanctions (with the exception of stop notices and enforcement undertakings) would only be available in cases where the Commission '*is satisfied beyond reasonable doubt*' that an offence has occurred. The PPE Bill provides for the Commission to give notice of its intention to impose a sanction on the affected entity, which then has the right to make representations before the Commission takes a final decision. After the decision, the entity has the right of appeal to the county court (or in Scotland to the Sheriff). It may be possible for parties to appeal further to the High Court on points of law. The sanctions will also be accompanied by ancillary mechanisms to encourage early compliance, such as the opportunity

to discharge liability before a monetary penalty is imposed by making a payment.

Reporting on enforcement activity

4.12 The PPE Bill requires the Commission to publish information about its use of the new civil sanctions. We would in any case expect to publish information about our enforcement activity on a regular basis, as part of our commitment to transparency and good regulation. It is common regulatory practice to publish the names of such entities after the period for any appeal has elapsed. However, we are aware that in some cases (e.g. where individuals have been sanctioned) other regulators withhold or anonymise some information. When we consult on our enforcement policy following enactment of the PPE Bill, we will invite views on the extent to which this information should identify regulated entities that have been sanctioned.

Annex A – Fixed penalty notices

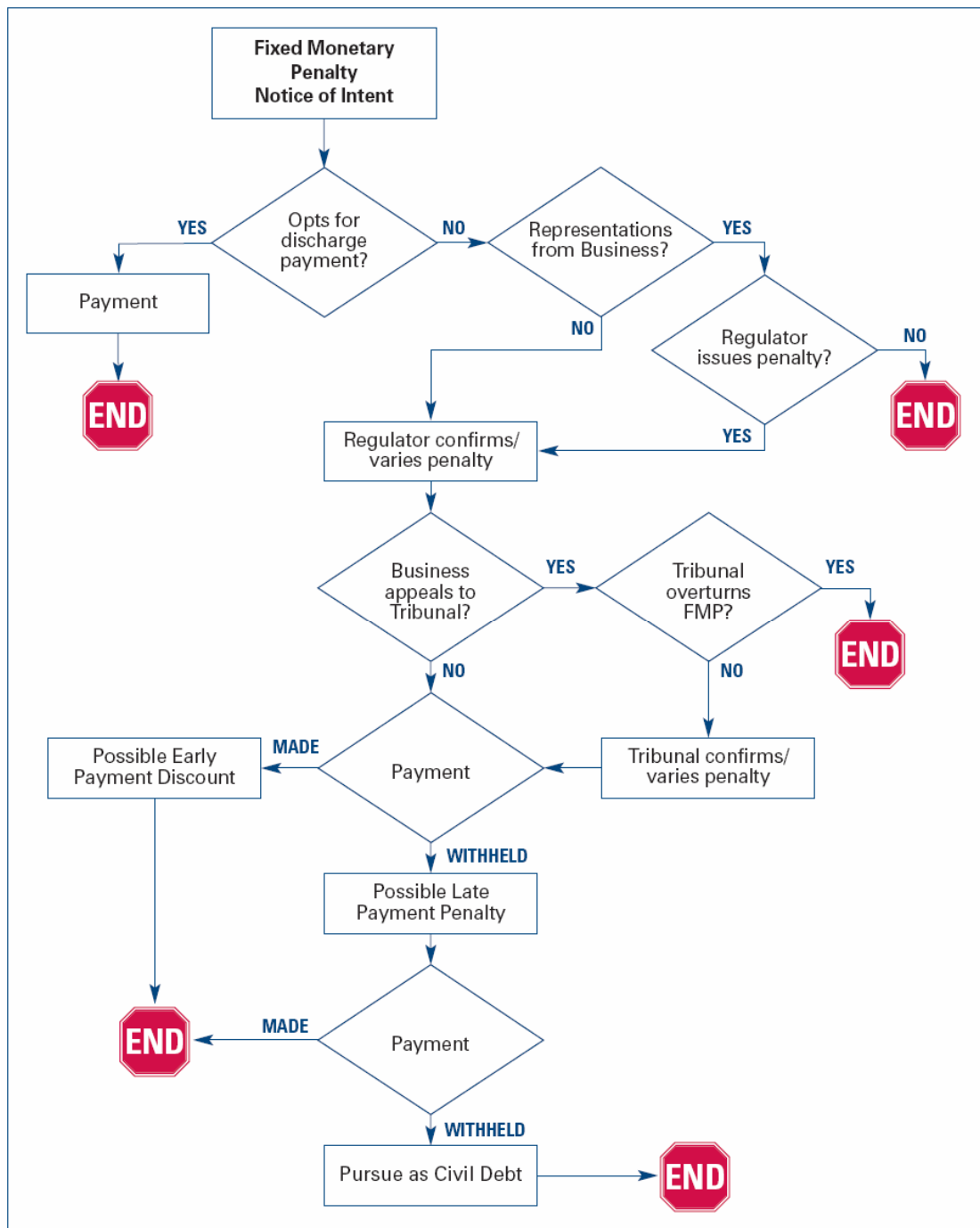
Fixed Monetary Penalties

A fixed monetary penalty (FMP) is a fine intended to be used for low levels of regulatory non-compliance. We see FMPs helping the Commission, in suitable cases, to enforce less serious offences in a more proportionate way than a prosecution. FMPs avoid the stigma of a criminal record and may be used for offences such as not maintaining appropriate records, or the late or erroneous submission of statutory returns. It is important to note that the criminal standard of proof provides a high evidentiary threshold before a Fixed Monetary Penalty (or discretionary requirement, discussed below) can be issued.

An FMP is an amount prescribed in a supplementary order by the Secretary of State. This may be set at a single amount or the Secretary of State may provide for different amounts based on certain factors, such as size of the party. For example, a small party or regulated donee may be given a £50 penalty, whereas a larger party might receive a £100 penalty, or alternatively, the penalty for late submission of a donation return may be £50 for one week or £100 for two weeks. We plan to consult over possible options for the basis for fines. The maximum level of penalty will usually be capped at £5,000.

The process for issuing an FMP is illustrated by the Better Regulation Executive in its Guidance for regulators using civil sanctions in the RES Act. The approach for the Commission will be broadly the same, although the mechanism for appeals in respect of the Commission's new civil sanctions is proposed to be via a civil court, rather than a First Tier Tribunal as for the RES Act .

RES Act process for issuing Fixed Monetary Penalties



Before imposing a fixed monetary penalty, the Commission must first serve the regulated entity with a notice of what is proposed, giving notification that it proposes to impose the penalty.

This notice must include the following information:

- the grounds for proposing to impose the penalty;
- the effect of a paying a 'discharge payment';
- the right to make representations and objections against the proposed penalty;
- the circumstances in which the Commission is not allowed to impose the fixed monetary penalty (for example where a regulated entity has a defence);

- the period of time a regulated entity has to make representations and objections, which may not exceed 28 days; and
- the period of time over which liability for the fixed monetary penalty may be discharged, which may not exceed 28 days.

The regulated entity will then have the right to make written representations and raise defences and/or objections to the Commission about the proposal to impose the penalty or pay a discharge payment. The Commission must decide whether to impose the penalty (with or without modification).

Should the Commission decide to impose an FMP, it must serve a further 'final' notice, which contains certain information as to the following:

- the grounds for imposing the FMP;
- how payment may be made;
- the period within which it must be made and, where they exist, any early payment discounts or late payment penalties;
- rights of appeal; and
- the consequences of failing to pay the penalty.

In order to ensure appropriate and proportionate sanctioning, the Commission has arrangements in place to review or monitor individual decisions. Under this arrangement a scheme of delegation will provide for a senior officer within the Commission to review whether the case should progress to a final notice taking into account the representations and objections made by the regulated entity. That officer will not have been involved in the original decision to issue the notice of intent.

Following service of the final notice, if the regulated entity chooses to pay straight away it could benefit from a prescribed early payment discount.

Where a regulated entity accepts liability, rather than wait for the period for representations and objections to expire, they may pay a 'discharge payment', which removes liability for the sanction and stops proceedings from progressing further. This payment must be set at an amount that is lower or equal to the level of penalty. The payment could, for example, reflect the procedural savings to the Commission of an early admission of liability. This is again something the Commission will consider in its consultation.

The regulated entity will have the right to appeal the decision if it considers the decision to have been based on an error of fact, was wrong in law or was unreasonable.

If the Commission imposes an FMP on a regulated entity, for reasons of double jeopardy that regulated entity cannot later be criminally prosecuted for the original offence.

Unpaid penalties, any interest arising and late payment charges will be enforced via the civil courts. The Commission must pay any money collected from penalties, discharge payments interest or late payment charges into the Consolidated Fund. It will not retain this money.

Annex B – Discretionary Requirements

Discretionary requirements are a package of sanctions that may be imposed either on their own or in combination with each other. They are to be used as a response to mid to high level examples of regulatory non-compliance.

Discretionary requirements are intended to provide a greater degree of flexibility to sanction the offence appropriately. These sanctions may be more suitable in more complex cases of non-compliance where there are a number of different effects or consequences that need addressing.

The order made by the Secretary of State will provide the Commission with the power to impose one or more of the following discretionary requirements on a regulated entity for prescribed offences or contraventions:

- payment of a **variable monetary penalty (VMP)** of an amount determined by the Commission;
- taking steps specified by the Commission, within a stated period, designed to secure that the offence does not continue or recur (a '**compliance requirement**'); and
- taking steps specified by the Commission, within a stated period, designed to secure that the position is restored, so far as possible, to what it would have been if no offence had been committed (a '**restoration requirement**').

If an order authorises the Commission to impose more than one of the requirements, it will be for the Commission to decide which sanction or combination of sanctions to use in a particular case.

The **monetary penalty** is variable so that we will be able to set it at a level that removes any financial gain from committing the offence and takes account of factors such as the gravity of the failure and the history of compliance.

A **compliance requirement** can be used to secure steps needed for a regulated entity to bring itself back into compliance, for example, by changing a process or providing training.

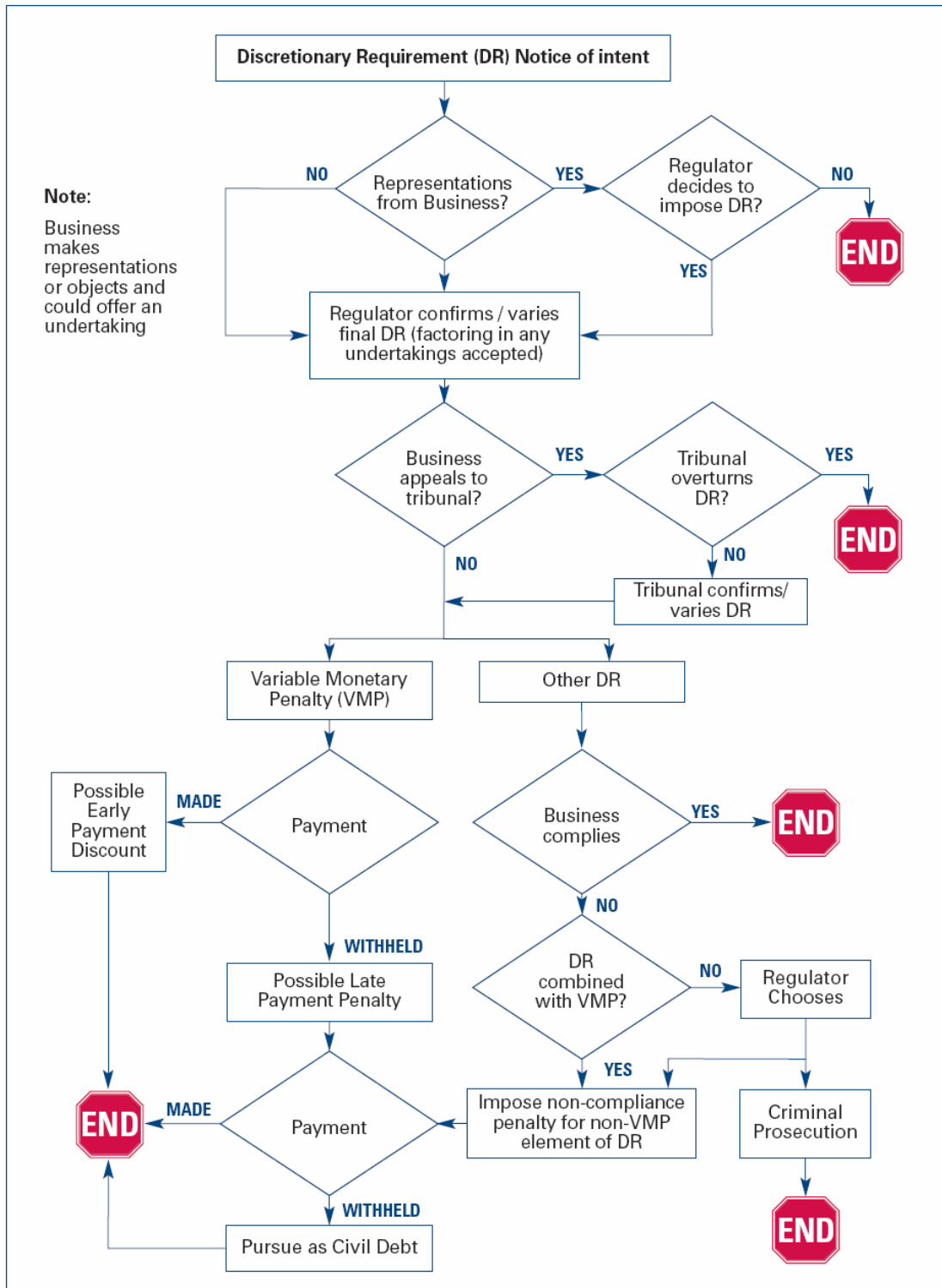
A **restoration requirement** can be used to ensure that a regulated entity deals with the consequences of the offence, for example, where a registered party enters into a regulated transaction (loan) with an unauthorised participant (e.g. overseas resident not on the electoral role), a restoration notice would enable the Commission to act in relation to the use of such funds involved in the transaction, such as surrendering the direct benefits derived from the transaction. Where the funds had been used to produce leaflets, the same restoration notice could require those leaflets to be destroyed and not used.

The Commission may use the three discretionary requirements in any chosen combination and the individual circumstances of each case will determine the most effective means.

The Commission will be able to tailor the sanctions it imposes to deal with the different consequences of offending in the most suitable way. In this way, discretionary requirements will give the Commission a flexible set of powers enabling us achieve a constructive enforcement outcome that remedies the consequences of an offence, secures future compliance and promotes good working relationships between the Commission and our regulated community; an outcome often not served by prosecution.

A process for issuing discretionary requirements by regulators for businesses is set out in the flow chart below taken from the RES Act Guidance issued by the Better Regulation Executive. The process is similar to that proposed in the PPE Bill, with the exception that in the case of the PPE Bill regulated entities will have the opportunity to appeal to a civil court rather than a First Tier Tribunal.

RES Act process for issuing a discretionary requirement



Before imposing a discretionary requirement, the Commission must first serve the regulated entity with a ‘notice of what is proposed’. The notice must include the following information:

- the grounds for proposing to impose the requirement;
- the right to make the representations and objections and the period within which they may be made – the period must be at least 28 days beginning with the day the notice is received; and

- the circumstances in which the Commission is not allowed to impose the requirement (for example where a regulated entity has a defence).

The regulated entity will then have the right to make written representations and objections to the Commission about the proposal to impose the requirement including any defences to the proposed sanction.

After the end of the period for making representations and objections, the Commission must decide whether to impose the requirement (with or without modification) or, where we have the power, to impose a different discretionary requirement.

In order to ensure appropriate and proportionate sanctioning, the Commission has arrangements in place to review or monitor individual decisions. Under this arrangement a scheme of delegation will provide for a senior officer within the Commission to review whether the case should progress to a final notice taking into account the representations and objections made by the regulated entity. That officer will not have been involved in the original decision to issue the notice of intent, but should have regulatory experience, and where possible, be more senior than the person imposing the notice.

If it decides to impose a requirement, the Commission must serve a 'final' notice, which contains certain information as to the following:

- the grounds for imposing the requirement;
- if a variable monetary penalty is imposed, how payment may be made, the period within which it must be made and, where they exist, any early payment discounts or late payment penalties;
- rights of appeal; and
- the consequences of failing to comply with the requirement.

The Commission will determine the level of a VMP taking into account aggravating and mitigating circumstances in each case.. The following factors are examples that we will take into account when considering individual cases:

Aggravating factors may include:

- Magnitude of the breach, e.g. the harm caused to public confidence in the democratic process, the duration of the non-compliance etc;
- A history of non-compliance by the regulated entity;
- Financial gain or other advantage to the regulated entity or others as a result of non-compliance with regulations;
- Unco-operative conduct of the regulated entity after the non-compliance has been discovered; and
- Previous action by the Commission, or other regulator, to help the regulated entity into compliance, has not been adhered to.

Mitigating factors that may contribute to a reduced penalty include:

- A previously good compliance record;

- Action taken to eliminate or reduce the risk of damage resulting from regulatory non-compliance;
- Voluntary reporting of regulatory non-compliance;
- Actions taken to repair the harm done by regulatory non-compliance; and
- Co-operation with the Commission in responding to the non-compliance.

Where an offence is triable summarily only (i.e. may only be heard in a magistrates' courts), and is punishable by a fine, the maximum level of a VMP will usually be £5,000.

The regulated entity will have the right to appeal the Commission's decision to impose a discretionary requirement on several grounds, including if it considers the decision:

- to have been based on an error of fact,
- was wrong in law
- or was unreasonable.

If a VMP is imposed, the regulated entity will also be able to appeal on the grounds that the amount of the penalty is unreasonable. If a non-monetary discretionary requirement is imposed, for example a requirement for an entity to cause an organisation to act where it has no power over the organisation the regulated entity may be able to appeal on the grounds that the nature of the requirement, or the timescale specified, is unreasonable

If a regulated entity fails to comply with a discretionary requirement or undertaking, the enforcement activity will depend on the nature of the requirements imposed. Where the regulated entity has been required to pay a VMP (whether alone or in combination with non monetary discretionary requirements or undertakings), double jeopardy will prevent the regulated entity from criminally prosecution for the original offence at a later time.

As with an FMP, the failure to pay a variable monetary penalty can lead to the regulator recovering the amount due through civil debt recovery procedures.

The position is different where non-monetary discretionary requirements are imposed or an undertaking is accepted without the imposition of a VMP.

The non-monetary discretionary requirements are less punitive in nature than VMPs so issues of double jeopardy do not arise. If the regulated entity subject to such requirements fails to comply with them, it may be criminally prosecuted at a later date for the original offence. This will be a decision for the Commission. The Commission could decide that as the civil sanction has failed and the entity has refused to comply, it should revert back to the criminal prosecution route instead.

In such cases, the Act does allow for the time limits for criminal prosecution to be extended, although the Secretary of State would not be able to extend these retrospectively as this would contravene Article 7 of the *European Convention on Human Rights*.

Alternatively, the Commission may by notice issue a monetary penalty for the failure to comply with the discretionary requirement (a 'non-compliance penalty'). Non-compliance penalties are not available for failure to pay a variable monetary penalty.

Annex C: Stop Notices

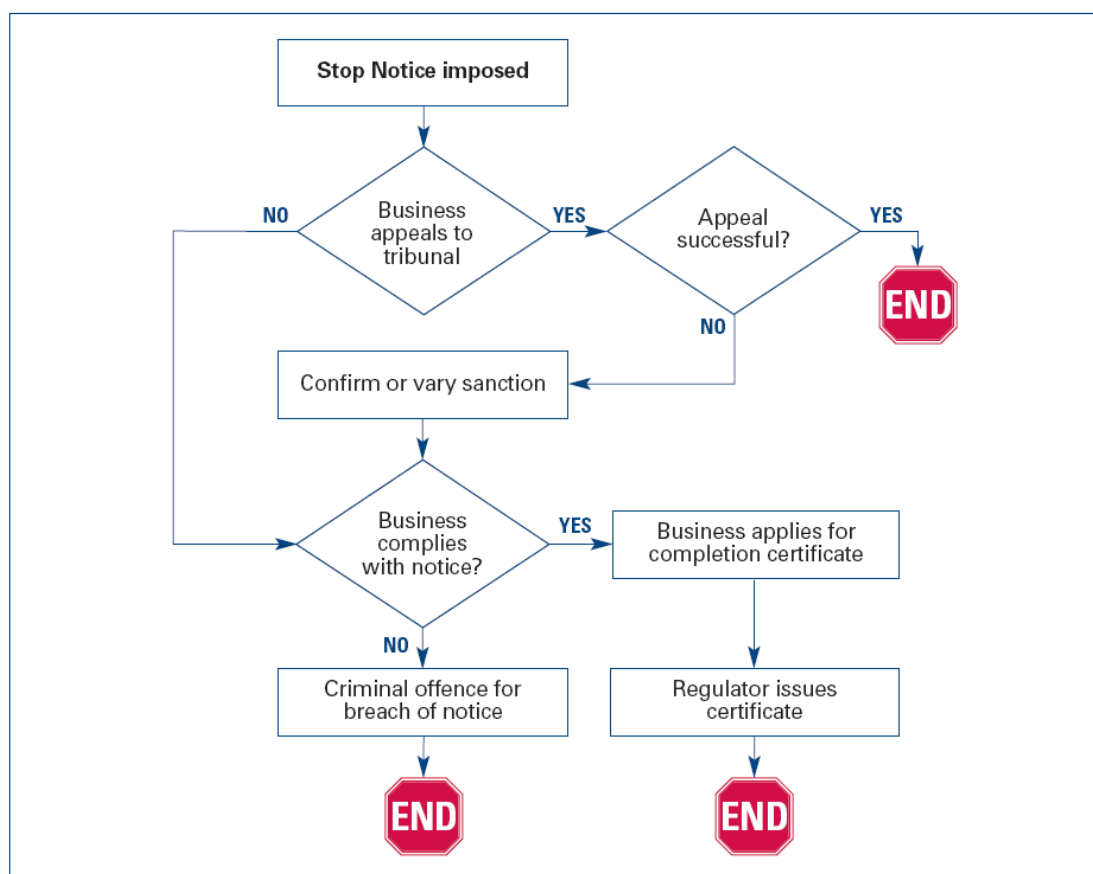
Stop notices require a regulated entity to cease an activity that presents a significant risk of seriously damaging public confidence in the democratic process. These powers will help the Commission stop non-compliance in real-time regulatory situations, for example advertising by a third party exceeding the spending limit during an election campaign.

A high threshold will need to be reached before a stop notice may be served, which include the following:

- the person is carrying on or is likely to carry on the activity,
- the Commission has the reasonable belief that the activity being carried on involves, or is likely to involve, the person committing an offence under PPERA or contravening a prescribed restriction or requirement provided by PPERA, and
- the Commission reasonably believes that the activity as carried on, or likely to be carried on by the person will seriously damage confidence in the democratic process or presents a significant risk of doing so.

The process for issuing a Stop Notice set out below is from the RES Act Guidance issued by the Better Regulation Executive. The RES Act process is similar to the process proposed in the PPE Bill.

RES Act process for issuing a Stop Notice



Stop notices will serve two related functions. Where the regulated entity served with a notice is already carrying on the activity they will prohibit the activity being further carried on until the regulated entity has taken the steps specified in the notice.

They may also be used for more preventative purposes. A stop notice may be imposed where an activity, which is likely to be carried on in the near future will cause, or is likely to cause, a significant risk of damaging public confidence in the democratic process.

The objective, in both cases, is to prohibit the regulated entity from carrying on the activity until the steps needed to secure compliance with the law have been taken and, by that means, to encourage the regulated entity back into compliance.

While the notice is in force, it will serve the further valuable purpose of protecting the public from the effects of carrying on the activity in a way that does not comply with the law.

An order made by the Secretary of State will give the Commission the power to serve a notice on a regulated entity prohibiting it from carrying on a specified activity until steps are taken to either remove the risk of harm or fully return to compliance with the law. For example, this could mean that a regulated entity carries out its activities in accordance with the requirements of PPERA.

A regulated entity served with a stop notice will have a right to appeal if it considers that the Commission's decision to serve it was based on an error of fact or was wrong in law; that a requirement imposed by the notice was unreasonable; that it has not and would not have committed the offence if the notice had not been served; or that, because the regulated entity has a defence, it would not be liable to be convicted of the offence giving rise to the service of the notice. These grounds of appeal will be provided for in the order but provision can also be made for appeals on other grounds.

A completion certificate will be issued by the Commission where it is satisfied the person has taken the steps in the notice. Where a regulated entity served with a stop notice applies for a completion certificate and the Commission decides not to issue one, the entity will be able to appeal against the Commission's decision on the ground that it was based on an error of fact, was wrong in law or was unreasonable. These grounds of appeal will be provided for in the order but provision can also be made for appeals on other grounds.

A regulated entity that does not comply with a notice will be guilty of a criminal offence.

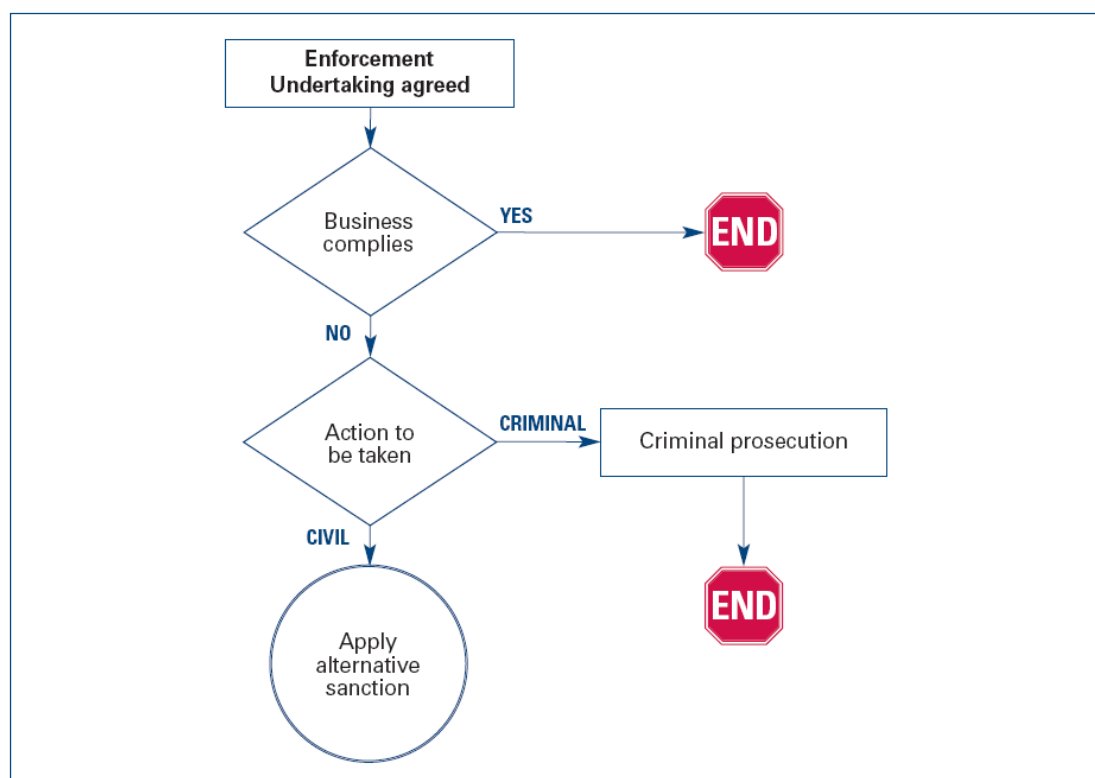
Annex D - Enforcement Undertakings

Enforcement undertakings are a different approach to regulatory enforcement (notably sanctions) in that they provide the means for a regulated entity to offer to undertake specific actions. The Commission cannot impose such undertakings, but we need to consider whether or not to accept an undertaking. They would be appropriate where the Commission suspects that the regulated entity has committed a relevant offence, although in practice it may well be the regulated entity that brings this to the Commission's attention. The Commission is not obliged to accept enforcement undertakings in a particular case. An important difference between enforcement undertakings and the other new sanctions proposed, is that it will be for the regulated entity to decide whether to propose to give an undertaking.

In his 2006 report, *Regulatory Justice: Making Sanctions Effective*, Professor Richard Macrory noted that sanctioning regimes do not allow for creative ways of addressing regulatory non-compliance. There have been cases where businesses have recognised that they have fallen into non-compliance and proposed innovative and restorative ways of returning to compliance. Until now, there has been no legislative basis to facilitate or encourage this kind of creative measure.

The Commission should be able to accept an undertaking from a regulated entity in any case where it has reasonable grounds to suspect that the regulated entity has committed a prescribed offence or contravention. The equivalent process in the RES Act is set out below.

RES Act process for entering into an Enforcement Undertaking



The action that a regulated entity can offer to undertake must be:

- action to secure that the offence or contravention does not continue or recur;
- action to secure that the position is restored, so far as possible, to what it would have been if the offence or contravention had not been committed; or
- any other actions prescribed in the order.

It is for the regulated entity to offer such action, perhaps after brief discussions with the Commission.

Once an undertaking has been accepted and the regulated entity complies with it, the regulated entity may not be convicted at any time for the original offence or have an administrative sanction imposed on it.

Where there is a breach of an undertaking or any part of it, the Commission may consider whether a criminal sanction against the regulated entity for the original offence should proceed, or may impose an administrative sanction such as a discretionary requirement instead.