

Primary authority scheme

A new Primary Authority scheme will be available to all businesses that operate across two or more local authorities from 6 April 2009. This statutory partnership scheme was introduced to address the current inconsistencies in regulatory enforcement that occur where businesses trade across council boundaries.

At present, there are two existing voluntary schemes for agreements between local authority regulators and businesses which operate in more than one local authority area – the Lead Authority scheme which was set up by HSE to cover health and safety advice to business and the Home Authority scheme operated by LACORS which covers food and trading standards advice. However, although these partnerships had the potential to offer significant benefits to business, regulators and consumers, they were undermined by fundamental weaknesses and their potential was never realised. It is currently intended that the new arrangements will run alongside the existing home and lead authority partnerships, but it is envisaged that primary authority partnerships will gradually take precedence.

The Primary Authority scheme is established by the Regulatory Enforcement and Sanctions Act 2008 (the Act) and introduces a new type of regulatory partnership. From 6 April 2009 all eligible businesses will have the statutory right to form a partnership with a single local authority in relation to regulatory compliance. The Primary Authority will be responsible for providing consistent compliance advice and guidance to the partner business that other local authorities must take into account when carrying out their inspection and enforcement activities.

Eligible Business

Any business, charity or other organisation that is subject to regulatory enforcement by more than one local authority in respect of a 'relevant function' will be entitled to ask for a Primary Authority, whatever the size of the business.

This would encompass a range of different types of business such as multi-site retailers, internet and mail order businesses, manufacturers whose products are sold across the country, franchise operations etc.

Relevant function

The regulated business activities described as 'relevant functions' are those that are generally referred to under 'trading standards', 'environmental health' and 'licensing' legislation and include the following categories:

- Age-restricted sales
- Animal establishments and companion animal welfare
- Animal feed

- Consumer and product safety
- Consumer credit
- Environmental protection
- Explosive licensing
- Fair trading
- Farm animal health
- Food safety and hygiene
- Food standards
- General licensing
- Health and safety
- Housing
- Metrology
- Petroleum licensing
- Road traffic

However, alcohol licensing, gambling and fire safety have not been proposed for inclusion in the scheme.

Scope of scheme

A local authority can only take primary authority responsibility in respect of those activities for which it has regulatory responsibility. Thus, a unitary authority could take primary authority responsibility for all relevant functions. However, in the absence of a unitary authority, a partnership relating to trading standards matters would be made with the relevant County Council, whereas one relating to environmental health matters would be made with the relevant District Council.

A business can choose to have a partnership for either a single relevant function or for multiple relevant functions, and therefore could have partnerships with a number of different local authorities for different relevant functions.

Where a company is structured such that there is a parent company with a number of subsidiary companies based in different locations, it is possible for a primary authority partnership to be formed either between the parent company and a local authority that covers all its subsidiary operations or for the separate subsidiary companies to have their own separate partnerships. However, a single legal entity can only have one partnership in respect of a particular category of relevant function.

In England and Wales the scheme is available for all the relevant functions exercised by local authorities. However, in Scotland and Northern Ireland only those functions that remain the responsibility of the UK Government are within the scope of the scheme. In addition, in Northern Ireland these are limited to those functions that are also delivered by local authorities.

Nominating a primary authority

There are two ways of nominating a local authority as a primary authority. Where a business and a local authority have agreed in writing to establish a partnership, they make an application to Local Better Regulation Office (LBRO). Alternatively, where a business has not been able to identify a suitable, willing local authority, they can request that the LBRO nominate a primary authority.

In either case the LBRO will have to assess the suitability of the authority being considered taking into account such matters as the location of the business, where it carries out its activities, and the resources available to the local authority.

There is no provision in the Act for a local authority to refuse to be a primary authority if nominated by the LBRO. However, the LBRO must consult with any authority it is considering nominating and must take into

account any representation made by that authority with regard to the resources available to it.

Partnership Agreement

Where the business and local authority agree to a primary authority partnership, their application to LBRO must be accompanied by a partnership agreement, endorsed by both parties. This should set out the terms of the partnership including relevant functions, geographic scope, limitations of liability, additional services, resource requirements, and arrangements for reviewing or terminating the agreement.

Where a local authority is identified by LBRO, they will then have to work with the business to develop a suitable partnership agreement.

LBRO is required to maintain a list of local authorities acting as primary authorities. This register will identify the local authority, the business and the scope of the partnership.

Resourcing the partnership

No provision is made in the Act as to how primary authority responsibilities will be resourced. However, there is the power to charge businesses for the services supplied through the primary authority partnership and it is for the local authority to decide how the resources should be provided taking into account a number of factors including their policy in respect of supporting local economic prosperity, responsibilities and requirements under the Regulators Compliance Code and other Government guidelines.

In developing their partnership agreement the two parties will have to make an assessment of the resources required by the local authority to deliver the required services and will normally agree how these costs are to be met.

Primary authority responsibilities

A primary authority has three main responsibilities. Firstly, it has to provide accurate and consistent advice and guidance to the partner business in relation to the relevant function(s) and to other local authorities in relation to the partner business. Secondly, it may make an inspection plan. Thirdly, it is responsible for ensuring consistency of enforcement against its partner business. Additional services may also be agreed and included in the partnership agreement.

Advice and guidance

The advice and guidance provided by the primary authority to the business will relate to compliance in the relevant function categories defined in the partnership agreement. This should be specific and tailored to the particular needs of the partner business.

The advice and guidance provided by the primary authority to other local authorities may either be formal advice given to one or more local authorities in relation to the partner business or may relate to a specific compliance issue that has been identified.

Inspection plan

An inspection plan can only be made after consultation with the partner business. The plan will recommend how other local authorities should inspect that business, particularly in respect of the frequency of, or circumstances in which, inspections should be carried out and what an inspection should consist of. Where a primary authority has developed an inspection plan and LBRO has consented to it, the primary authority is required to bring it to the notice of other local authorities. All local authorities will have to have regard to inspection plans and inform the relevant primary authority before carrying out an inspection that does not comply with the recommendations in the plan.

Consistency of enforcement

The most controversial of the primary authority responsibilities is that relating to enforcement. Any other local authority proposing to take enforcement action against a business that has a primary authority relationship must notify the primary authority before taking that action. If the primary authority considers that the proposed action is inconsistent with advice or guidance previously given to the partner business or to one or more local authorities, it may direct the enforcing authority not to take the proposed enforcement action. The enforcing authority can either accept the direction or challenge this by referring the decision to the LBRO for determination, with the consent of the LBRO. If the LBRO does not give consent for referral, the enforcing authority may not continue with the proposed enforcement action.

If the primary authority does not object to the proposed action or does not respond, the enforcing authority must then notify the business of the proposed enforcement action before proceeding. If the business believes the enforcement is contrary to advice and guidance it has previously received from the primary authority, it may, with consent, refer the proposed action to the LBRO.

When notified of any proposed enforcement action, the primary authority may, instead of objecting to it, refer the proposed action to LBRO for determination, again with the consent of LBRO.

In making a determination the LBRO can only consider whether: the proposed enforcement action is inconsistent with previous advice or guidance; or the advice or guidance is incorrect; or whether the advice or guidance was not properly given.

Following determination, LBRO will notify the enforcing authority either: that it may **not** take the proposed enforcement action; or that it **may** take the proposed enforcement action; or that it **must** take alternative action.

Enforcement action

Enforcement action is broadly defined in the Act, but there is provision for Regulations to be made which define this term more specifically. These Regulations, the Primary Authority Scheme (Definition of Enforcement) Order 2009, are currently under consultation.

The Draft Regulations propose that oral advice, written advice, enforcement undertakings and written warnings indicating that a sanction or further action may be taken if a particular type of action is not taken do not constitute enforcement action.

Furthermore, investigative activities are not intended to be included in the definition of enforcement action. Thus a local authority's powers of inspection, sampling, entry, detention, seizure etc and interviewing under caution can all be undertaken without having to give prior notification to the primary authority.

However, it is proposed that enforcement action would be defined to include written warnings indicating that further action will be taken if a specified action is not undertaken within a specified time period. Service of improvement notices, abatement notices, stop notices, prohibition notices and other similar enforcement notices would also be defined as enforcement action as would commencement of proceedings in court or tribunals and imposition of the civil sanctions provided for under Part 3 of the Regulatory Enforcement and Sanctions Act 2008.

Exemptions to enforcement notification

The Draft Regulations also set out the circumstances in which the requirement to notify the primary authority prior to taking enforcement action should not apply. These relate to situations where the enforcement action is required urgently to avoid significant risk of serious harm to human health or the environment or where delays to enforcement action would not be appropriate or desirable. In such cases the enforcing authority is obliged to notify the relevant Primary Authority of the enforcement action it has taken as soon as it reasonably can.

Pilot Schemes

The primary authority scheme will commence on 6 April 2009. Prior to that in order to trial the system and ensure that the procedures and associated guidance are comprehensive, six national retailers, B&Q, Boots,

John Lewis, Tesco, Sainsbury's and Waitrose, have been working with LBRO since September 2008 on a pilot test of the Primary Authority partnerships. The regulators involved are Bracknell Forest, City of London, Dundee, Eastleigh, Hertfordshire, Highlands, Nottinghamshire, Wakefield, West Yorkshire and Westminster. From January 2009 LBRO will be running a live test of the scheme for three months to assess how the operational guidance for regulators works in practice.

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