HOUSE OF LORDS

Merits of Statutory Instruments Committee

First Report of Session 2007-08

Draft Payments into the Olympic Lottery Fund etc. Order 2007

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Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

(1) The Committee shall, subject to the exceptions in paragraph (2), consider—

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).

(2) The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;

(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives.

(4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Membership

The members of the Committee which met on 13 November 2007 under Standing Order 65 (*Sessional Committees*) are:

Baroness Adams of Craigielea	Viscount Eccles	Baroness Maddock
Lord Armstrong of Ilminster	Lord Filkin (*Chairman*)	Baroness Thomas of Winchester
Viscount Colville of Culross	Lord James of Blackheath	Lord Tunnicliffe
Baroness Deech	Lord Jopling	

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Publications

The Committee's Reports are published by the Stationery Office by Order of the House. All publications of the Committee are on the internet at: www.parliament.uk/parliamentary_committees/merits.cfm

Contacts

If you have a query about the Committee and its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; facsimile 020-7219 2571; email merits@parliament.uk. The Committee's website, www.parliament.uk, has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

First Report

INSTRUMENT REPORTED

The Committee has considered the following instrument and has determined that the special attention of the House should be drawn to it on the ground specified.

Draft Payments into the Olympic Lottery Distribution Fund etc Order 2007

Summary: This order allows the Secretary of State to transfer £1085 million from the National Lottery Distribution Fund (NLDF) to the Olympic Lottery Distribution Fund between February 2009 and August 2012. The sum represents a previously agreed transfer of £410 million plus an additional £675 million. The order has an effect on each of the distributors of lottery funds (including the four regional sports sponsors, e.g. Sport England, Sport Scotland) except UK Sport, which is responsible for funding the training of Olympic athletes: the order makes provision to ensure that it does not contribute to the £1085 million transfer. We found the Impact Assessment provided with the instrument inadequate and so asked the Government for additional information: published at Appendix 1. The information includes a statement of the anticipated benefits from the Olympic programme and the uses to which the money sought will be put. DCMS have declined to offer any material on other funding options which they considered.

This Order is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

1. The Department for Culture, Media and Sport (DCMS) have laid this Order under section 29A of the National Lottery etc. Act 1993 and sections 25 and 36 of the Horserace Betting and Olympic Lottery Act 2004, together with an Explanatory Memorandum (EM) and Impact Assessment (IA).

2. The Order confers on the Secretary of State for Culture, Media and Sport the power to make payments from the National Lottery Distribution Fund ("NLDF") into the Olympic Lottery Distribution Fund ("OLDF"). Article 2 allows the Secretary of State to make payments from the NLDF to the OLDF amounting to £1085 million (the previously agreed £410 million plus an additional £675 million). These payments will be made in 13 equal payments of £73 million starting on 1 February 2009 and for the next 12 quarters; and in 2 payments of £68 million on 1 May and 1 August 2012.

3. DCMS state that the proposed £675 million additional transfer from non-Olympic Lottery income is significantly less than might have been sought under the terms of the Memorandum of Understanding between the Government and the Mayor of London. The arts, heritage, sport and health / education / environment / charitable good causes will collectively have £1085 million less available to them to distribute between 2008-09 and 2012-13 than they might otherwise have expected, although the staggered contribution will assist distributors in the management of their grant commitments. The Government aim to repay the additional £675 million contribution from the Lottery from the profits from land sales after the Games.

4. The Order also ring-fences the money provided to UK Sport which is responsible for funding the training of Olympic athletes but seeks a pro rata contribution from all other fund distributors including the four regional Sports sponsors, e.g. Sport England, Sport Scotland.

5. Paragraph 7.5 of the EM states that "the Government is confident that the revised Olympic budget is robust, and does not expect to make any further call on the Lottery". It also gives the commitment that any Lottery funding that is not drawn down by the Olympic Delivery Authority will be transferred back to the NLDF. These were key concerns raised by those responding to the consultation exercise. Other concerns expressed related to the effect of these transfers being compounded by a reduction in receipts to the National Lottery Fund due to competition from Olympic scratch cards and the potentially detrimental impact on the Cultural Olympiad which will precede the Games, if arts monies are diverted to sports causes.

6. The Committee found the Impact Assessment provided with the instrument to be inadequate and asked for additional information on the basis for the proposals being made. The information provided is printed at Appendix 1; it includes a statement of the anticipated benefits from the Olympic programme and the uses to which the money sought will be put. DCMS have declined to offer any material on other funding options considered.

OTHER INSTRUMENTS OF INTEREST

7. The Ministry of Defence (MOD) have laid the draft **Armed Forces (Redress of Individual Grievances) Regulations 2007**, and the draft **Armed Forces (Service Complaints Commissioner) Regulations 2007**. These Regulations (under the Armed Forces Act 2006) implement a new service complaints system for the armed forces in recognition of the need for members of the armed forces (who have no contract of employment and no system of collective bargaining) to have an effective way of obtaining redress for grievances. The Committee has been advised by MOD that the possibilities for redress provided to service personnel by these Regulations are already available to civilians employed by MOD.

8. The Department for Environment, Food and Rural Affairs (DEFRA) have laid the draft **Environmental Permitting (England and Wales) Regulations 2007**. The draft Regulations introduce a single streamlined environmental permitting and compliance regime to apply in England and Wales, by integrating the existing regimes covering waste management licensing (WML) and Pollution Prevention and Control (PPC). DEFRA carried out consultations with a wide range of interested parties between early 2006 and autumn 2007, and have said that respondents were generally supportive of the ideas and aims of the initiative. However, the Explanatory Memorandum (EM) states that industry expressed concern at the proposal that the due diligence defence currently available under the WML system should be dropped, at the same time as the emergency defence, available only to waste operators at present, is to be extended to PPC. We felt that the EM did not deal fully enough with the proposed removal of the due diligence defence. At our request, DEFRA have now provided more information to explain their proposal, which is printed at Appendix 2. We trust that, while DEFRA view strict liability as "an important tool to secure convictions of

corporate entities", they will see as the prime objective of the new regime not the achievement of such convictions but the maintenance of environmental and human health standards, as stated in the EM.

9. The draft **Legislative and Regulatory Reform (Regulatory Functions) Order 2007** and accompanying draft **Regulators' Compliance Code** have been laid by the Department for Business, Enterprise and Regulatory Reform (DBERR). Under the Legislative and Regulatory Reform Act 2006, regulators specified in the Order must have regard to the Code in exercising regulatory functions. We considered that the Explanatory Memorandum to the Order and Code did not provide enough information about the changes which DBERR made to the Code in response to concerns expressed by certain regulators. We received further information from DBERR, printed at Appendix 3. We welcome the Code as a clear written expression of the "better regulation agenda" in the context of regulatory activity, but it will be important that the Government monitor what it in practice achieves, not least in the face of competing legislative requirements.

10. HM Treasury have laid the **Social Security (Contributions) (Amendment No. 9) Regulations 2007 (SI 2007/2905)** which revoke the disregard in respect of National Insurance Contributions (NICs) for holiday pay for all but the construction sector. The construction sector will be allowed a further five years of the disregard before it is withdrawn completely. The Chancellor of the Exchequer announced these changes in his statement on the Pre-Budget Report and Comprehensive Spending Review, on 9 October 2007. The Impact Assessment submitted by HM Treasury states that the cost of the additional NICs at risk if the disregard were not restricted in this way would be £1.2 billion by 2012-13.

11. The Department for Children, Schools and Families (DCSF) have laid the **Education (Pupil Referral Units) (Management Committees etc.) (England) Regulations 2007 (SI 2007/2978)** and the **Education (Pupil Referral Units) (Application of Enactments) (England) Regulations (SI 2007/2979)**. The main purpose of the Regulations is to make it mandatory for local authorities to establish management committees for their pupil referral units ("PRUs": schools run by local authorities for pupils who cannot attend mainstream schools). In the Explanatory Memorandum, DCSF state that they carried out a consultation from December 2006 to March 2007, and sought the views of local authorities, members of existing management committees, staff and teachers in charge of PRUs, head teachers and governors of schools, and national organisations with an interest in pupil referral units. DCSF have told the Committee that they did not consult young people or organisations representing them because they saw the making of management committees mandatory as a technical change impacting mainly on PRU governance. We note this reasoning, but consider that direct consultation of young people or their representative organisations can often provide useful input, even to the formulation of technical policy.

INSTRUMENTS NOT REPORTED

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

<u>Draft Instruments requiring affirmative approval</u>

	Armed Forces (Redress of Individual Grievances) Regulations 2007
	Armed Forces (Service Complaints Commissioner) Regulations 2007
	Crime and Disorder Act 1998 (Additional Authorities) Order 2007
	Environmental Permitting (England and Wales) Regulations 2007
	Legislative and Regulatory Reform (Regulatory Functions) Order 2007
	Regulators' Compliance Code

<u>Instruments subject to annulment</u>

SI 2007/2905	Social Security (Contributions) (Amendment No. 9) Regulations 2007
SI 2007/2977	Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment and Specification) Order 2007
SI 2007/2978	Education (Pupil Referral Units) (Management Committees etc.) (England) Regulations 2007
SI 2007/2979	Education (Pupil Referral Units) (Application of Enactments) (England) Regulations 2007
SI 2007/2982	Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) (Amendment) Regulations 2007
SI 2007/2983	Contaminants in Food (England) (Amendment) (No. 2) Regulations 2007
SI 2007/2996	Bluetongue (Compensation) Order 2007
SI 2007/2998	Pesticides (Maximum Residue Levels in Crops, Food and Feeding Stuffs) (England and Wales) (Amendment) (No. 3) Regulations 2007
SI 2007/2999	Civil Aviation (Contributions to the Air Travel Trust) Regulations 2007
SI 2007/3007	Feed (Corn Gluten Feed and Brewers Grains) (Emergency Control) (England) (Revocation) Regulations 2007
SI 2007/3008	Feed (Specified Undesirable Substances) (England) Regulations 2007
SI 2007/3011	Magistrates' Courts Warrants (Specifications of Provisions) (Amendment) Order 2007
SI 2007/3012	Accession (Worker Authorisation and Worker Registration) (Amendment) Regulations 2007
SI 2007/3013	Plant Health (Import Inspection Fees) (England) (Amendment) (No. 2) Regulations 2007
SI 2007/3014	Occupational Pension Schemes (EEA States) Regulations 2007

SI 2007/3075	Merchant Shipping and Fishing Vessels (Control of Noise at Work) Regulations 2007
SI 2007/3076	Crime and Disorder (Formulation and Implementation of Strategy) (Wales) Regulations 2007
SI 2007/3077	Merchant Shipping and Fishing Vessels (Control of Vibration at Work) Regulations 2007
SI 2007/3100	Merchant Shipping and Fishing Vessels (Health and Safety at Work) (Carcinogens and Mutagens) Regulations 2007
SI 2007/3102	Asylum Support (Prescribed Period following Appeal) Regulations 2007
SI 2007/3105	Agricultural Land Tribunals (Rules) Order 2007
SI 2007/3132	Road Vehicles (Construction and Use) (Amendment) (No. 3) Regulations 2007
SI 2007/3135	Motor Vehicles (EC Type Approval) (Amendment No. 2) Regulations 2007
SI 2007/3137	British Nationality (General and Hong Kong) (Amendment) Regulations 2007
SI 2007/3139	British Nationality (British Overseas Territories) Regulations 2007
SI 2007/3143	Community Drivers' Hours and Working Time (Foot-And-Mouth Disease) (Temporary Exception) (Amendment) Regulations 2007
SI 2007/3149	Prison (Amendment No. 2) Rules 2007

APPENDIX 1: EXPLANATORY INFORMATION

Draft Payments into the Olympic Lottery Distribution Fund etc. Order 2007

Q1. *A more detailed consultation analysis needs to be provided – the Committee will want to see evidence that the Arts, Film and Heritage sectors are in agreement. Para 7.10 of the EM does not make it clear whether the consultation was public or only involved the limited circle of lottery distributors. Please clarify.*

A1. The second sentence of paragraph 7.10 states 'All the Lottery distributing bodies were consulted, along with key representative bodies of the affected sectors and the Devolved Administrations.' They were:

Big Lottery Fund

Heritage Lottery Fund

Arts Council England

Scottish Arts Council

Arts Council of Wales

Arts Council of Northern Ireland

UK Film Council

Scottish Screen

Sport England

Sport Scotland

Sport Council for Wales

Sport Northern Ireland

UK Sport

Olympic Lottery Distributor

National Council for Voluntary Organisations

Scottish Council for Voluntary Organisations

Wales Council for Voluntary Action

Northern Ireland Council for Voluntary Action

Heritage Link

Central Council of Physical Recreation

Voluntary Arts Network

Scottish Executive

Welsh Assembly Government

Northern Ireland Executive

The consultation was also public in the sense that it was announced publicly by Tessa Jowell on 15th March 2007, and mentioned on the DCMS website.

In the event, as the number of responses was manageable - and in the interests of openness - we have chosen to publish all 21 responses we received in full at http://www.culture.gov.uk/Reference_library/Publications/archive_2007/Responses-OlympicLotteryTransferOrder.htm

Q2. *The Impact Assessment is supposed to give fuller background information into the costs and benefits of the policy and the other options considered - including what happens if you do not pursue the proposed course. The whole evidence section of the document is missing.*

A2. There is no prospect of further funding from either the Government, which has increased its contribution from £1,044 million to £5,975 million, or from the Mayor of London, who has already increased his contribution by £300 million.

Nor is there any prospect of raising private funding in lieu of the Lottery funding, within the tight timescales remaining.

That is why there is no alternative to Lottery funding to deliver the Olympic Programme. Without this funding there will be no Games and the benefits of this huge regeneration programme will be lost.

Of the £1,085 million that we are seeking through this Lottery Order £410 million was part of the original funding package for the Games announced in 2003. The additional £675 million that we are seeking, we aim to refund by sharing with the London Development Agency the profits from land sales after the Games.

Between the submission of the Olympic bid in November 2004 and the announcement of the revised funding package in March 2007 the Government has increased its funding contribution nearly six-fold but we are requesting an additional contribution from the Lottery of just 45% (the £675 million), which we aim to repay from profits from land sales after the Games.

In consequence the Government would now bear 64% of the cost compared with 26% at bid, and the Lottery would bear 23% of the cost compared with 37.5% at bid.

The evidence section cross-refers to the Explanatory Memorandum which includes details of the policy background and the net effects of the Order on each Lottery distributor. As the section in the Impact Assessment 'What is the Problem under Consideration' states, this is an essential part of the funding stream to deliver the 2012 Olympic and Paralympic Games. We do not intend to disclose the funding options considered by Ministers or discussed with the Mayor. However, we think it important to note that under the terms of the Memorandum of Understanding between the Government and the Mayor of London, the contribution from the National Lottery could have been much higher than now proposed.

There was cross party support for the arrangements announced in 2003 for bidding for the Olympics including that key elements of the cost would be met by the National Lottery. It was always clear, under the Memorandum of Understanding between the Government and the Mayor of London that, if costs increased, the National Lottery would have to contribute extra. Negotiations between DCMS Ministers, the Chancellor and the Mayor of London resulted in the Government's proposals as set out in the Order and EM. The Government is now providing £6 billion to the 2012 budget and the Mayor of London is contributing an additional £300 million.

The arts, heritage, sport and health / education / environment / charitable good causes will collectively have £1,085m less available to them to distribute between 2008-09 and 2012-13 than they might otherwise have expected. However, it is not possible to describe what benefits might have been from forthcoming Lottery applications that have yet to be submitted. What the Impact Assessments seeks to make clear is that no differential impact is expected. The compensating benefit will be much greater certainty that we can deliver a successful Olympic and Paralympic Games in 2012, with all the regeneration, social, economic and other gains that this will bring. These benefits are summarised below:

London specific benefits

- The Olympics will act as a catalyst for the most ambitious regeneration programme in recent memory. It includes:
  - The largest urban park in Europe in over a century.
  - Five new permanent sports venues.
  - A one million square foot media centre for the Games which will provide state of the art high quality business space after the Games.
  - 4,000 homes converted from the Village and a further 5,000 elsewhere in redevelopment.
  - An improved transport infrastructure including the railways, roads, bridges, waterways, footpaths, cycle routes and towpaths.
  - One of the largest shopping centres in Europe – a £7 billion private sector investment
- The Games are expected to create:
  - 7,000 full-time equivalent jobs in the construction industry
  - 30,000 jobs in staging the Games
  - 6,700 jobs in the wider visitor economy
- Jobcentre Plus has placed over 110 local people into jobs on the Murphy Powerlines Project on the Olympic site – 66 from host boroughs
- The London 2012 Employment and Skills Taskforce aims to reduce worklessness in London by 70,000 by 2012 – including 20,000 in the 5 boroughs.

UK Wide Benefits

- There will be several venues outside London, these are: Football in Glasgow, Cardiff, Newcastle, Manchester and Birmingham; Sailing in Weymouth; rowing in Eton Dorney; canoeing in Broxbourne and mountain biking in Weald Country Park
- Tourism benefits from the Games are estimated to be worth up to £2.1bn. Over half a billion of this (£0.6 billion) will be UK Wide. Source: VisitBritain commissioned research for the recent Tourism Strategy (Winning: A Tourism Strategy for 2012 and beyond)
- 70,000 volunteers will be engaged in the London 2012 Games, and it will be the largest volunteer force ever seen in peacetime UK
- A Legacy Action Plan will be published by the end of this year, detailing the legacy benefits to be gained from the 2012 Games and how they will be delivered. These will include:
  - Making the UK a world-class sporting nation
  - Transform the heart of East London
  - Inspire a new generation of young people to take part in local volunteering, cultural and physical activity
  - Make the Olympic Park a blueprint for sustainable living
  - Demonstrate the UK is a creative, inclusive and welcoming place to live in, visit and for business

- All 8 English regions have now published their plans for realising the benefits of 2012; For example, East of England estimates that with the right strategy a potential £600 million boost could be delivered to the economy from the Games. Devolved Administrations are continuing to work on their plans for 2012.
- 79% of the public support the Games taking place in London in 2012. Source: Sports Marketing Surveys Ltd research conducted for LOCOG –published December 2006
- LOCOG will be contributing around £9 million to encourage overseas Olympic and Paralympic teams to use pre-Games training camps across the UK
- A Legacy Trust will be launched shortly to give £40m of grants to community projects and encourage young people to get involved.

Q3. *The table in the EM is very helpful but the explanation in the text does not make the rationale for the 2 tranches sufficiently clear. Is it simply two contributions from the same source, i.e. the mainstream National Lottery Games, just announced at different times?*

A3. Yes. Paragraph 7.10 of the EM explains the genesis of the £410m and the Government's confirmation in June 2006 that the sum would be required. Para 7.2 describes the events leading to a further call of £675m from the Lottery announced to Parliament on 15th March 2007. Para 7.8 sets out the proposed contributions of Lottery distributors to the £410m and £675m elements and the resulting totals. The sums are to be transferred from the balances held on behalf of each distributor in the National Lottery Distribution Fund using the 15 quarterly payments described in the Order, a formula agreed upon after a period of intense discussion with the Lottery distributors following the March announcement, in preference to the earlier proposal of larger annual transfers.

Q4. *The EM says that UK Sport will not have to surrender any of its allocation but does not make it clear why Sport England, Sport Scotland etc do - are they not also involved in preparing competitors? Please can you clarify.*

A4. UK Sport is responsible for supporting the development of elite athletes from across all parts of the UK, by investing public funds in sport's National Governing Bodies to run high performance programmes. The other Sport distributors do not have responsibility for directly supporting Olympic and Paralympic athletes (although devolved administrations do support talent development in their countries).

The Lottery was established to fund unique projects and to aid regeneration and few projects better meet those criteria than London 2012. We are transferring Lottery funds – after very careful consideration and consultation – from one good cause to another. The other sports distributors, e.g. Sport England which is the lead agency for community sport, are contributing but will certainly see a benefit as a result of the increased focus on sport and the unique opportunity presented by the Games.

Q5. *Could you specify what the £1,085m set out in the Order is for – if UK Sport is training the athletes what is this sum for?: is it infrastructure e.g. building stadia, the Olympic village, transport links. You say that the OLDF will distribute it but readers are not familiar with the role of that organisation- can you please be more specific.*

A5. The **Olympic Lottery Distributor** (OLD) was established under the Horserace Betting and Olympic Lottery Act 2004 to distribute funds from the Olympic Lottery Distribution Fund. Under the legislation, the distributor can make a grant or a loan to fund any facility, function or service which it considers is necessary or expedient to provide or undertake for the staging of the 2012 Games. The distributor's main grant recipient will be the Olympic Delivery Authority (ODA).

The **Olympic Delivery Authority** (ODA) was established under the London Olympic Games and Paralympic Games Act 2006. The ODA is the body responsible for delivering the venues, facilities, infrastructure and transport for the London 2012 Olympic and Paralympic Games.

Lottery funding is not ring-fenced to specific ODA expenditures. It may be used to meet both capital and resource expenditures.

The Board of the Olympic Lottery Distributor is responsible for determining the purposes for which the Lottery funding that it issues is used. It could contribute to meeting any of the following expenditures, subject to the grant memorandum to be agreed between the Olympic Lottery Distributor and the ODA.

> A) **Preparation of the site platform**, including enabling works, such as land remediation, demolitions and construction of bridges, highways and other infrastructure
>
> B) **Construction of the venues**, including the Olympic Stadium and warm-up track, water-polo, handball, BMX circuit, and the venues for hockey, basketball fencing and a number of off-Park venues.
>
> C) **Logistics**: the organisation and movement of manpower, equipment and materials onto, and on and off the site
>
> D) **Transport**: Contributions to the cost of constructing new infrastructure and transport operations
>
> E) **Village**: Associated infrastructure and other costs in relation to the Olympic Village.
>
> F) **ODA Management costs**: Including the costs of operating the ODA and its delivery partner

Olympic Lottery funding may also be used for other appropriate purposes under the Horserace Betting and Olympic Lottery Act 2004.

The Olympic Funding package of £9.325 billion announced on 15 March 2007 includes provision for a programme contingency of £2.747 billion. This is funding that is intended to manage the inevitable uncertainties around a project of the size, scale and complexity of the Olympics. Funding from the contingency will be allocated only if and when it is absolutely necessary. This contingency will be met primarily from Government funds but the Olympic Lottery Distributor have indicated that around 20% of this contingency could be met from the Lottery funds included in the £9.325 billion package. This would help to push back further the point at which some of the additional Lottery funding we are seeking would be drawn down.

Department for Culture, Media and Sport

November 2007

APPENDIX 2: EXPLANATORY INFORMATION

Draft Environmental Permitting (England and Wales) Regulations 2007

Supplementary Note on the proposed removal of the Due Diligence Defence from sites formerly covered by Waste Management Licensing

Introduction

1. This note provides further detail to the House of Lords Committee on the Merits of Statutory Instruments on the proposed removal of the due diligence defence from Waste Management Licensed operations that will fall under a common permitting and compliance framework created by the proposed Environmental Permitting (England and Wales) Regulations (the draft Regulations).

Acknowledgement of a significant change

2. The Department acknowledges that the loss of the due diligence is a significant change and regrets that it did not take the opportunity to more fully explain the background to this issue and its reasoning in the Explanatory Memorandum that accompanied the draft Regulations.

Background to the development of the Environmental Permitting Regulations

3. The draft Regulations introduce a single streamlined environmental permitting and compliance regime to apply in England and Wales. They do this by integrating the existing regimes covering waste management licensing (WML) and Pollution Prevention and Control (PPC). The Explanatory Memorandum to the draft Regulations notes that they replace two different approaches and compromises between these have been required to develop a simpler common system that reduces the administrative burden of regulation while still protecting the environment and human health. The draft Regulations seek to balance the rights of the public to be protected against harm against the rights of industry to operate within a controlled framework.

4. The draft Regulations aim to provide a common and unified approach to permitting and compliance, within Directive constraints. There are no specific Directive requirements concerning due diligence. Initially only the WML and PPC regimes will be unified but the Government has designed a regime that is flexible and capable of incorporating other broadly similar environmental regimes as a next step and is currently considering the costs and benefits of such an extension of the system.

Strict Liability and Due Diligence

5. The existence of strict liability in environmental regulation is the result of a deliberate choice made by successive administrations to secure higher environmental standards in those areas than would otherwise be the case.

6. There are objections to strict liability for environmental offences:

- they are sometimes not seen as truly “criminal” and are therefore not always treated seriously by the Courts; and
- legitimate operators can face prosecution without evidence of fault,

but there are significant advantages to a system of strict liability regulatory offences as:

- it improves deterrence;
- without criminal offences which do not require the proof of a mental element the regulator's power to advise and warn the regulated would be seriously jeopardized;
- it is an important tool to secure convictions of corporate entities;
- business operating in regulatory areas implicitly accept the risk of criminal liability; and
- perceptions of injustice arising from strict liability are reduced in practice as some aspects of fault influence the choice of enforcement approach.

7. The current due diligence defence changes the nature of the strict liability system and provides a defence to an offence under waste management legislation where a defendant shows "*that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.*"[1]

8. The existence of a due diligence defence can enable industry to avoid responsibility for the consequences of the actions that they have chosen to conduct. This is because operators only need to do what they think was reasonable to prevent those consequences rather than what was objectively possible to prevent those consequences even though on occasions severe damage can be caused to the environment and/or human health. The draft Regulations cover a range of activities from low to high risk.

How the Due Diligence defence has applied in practice so far

9. WML is the only regime from the 4 largest environmental permitting systems likely to ultimately fall under the common system created by the draft Regulations (PPC/WML/Water Discharge Consenting/Radioactive (RSR) regulation) which currently has a due diligence defence. PPC contains no statutory defences nor does RSR regulation. Water Discharge Consenting contains a single defence covering emergency situations.

10. The due diligence defence applies equally to fly-tipping or to operating a site without a waste management licence or in breach of licence conditions. The Environment Agency's experience is that although the defence is rarely used it is as likely to be raised in fly-tipping cases (where it may be particularly inappropriate) as it is for breach of permit condition. Statistics are not maintained on the number of investigations and subsequent prosecutions where the due diligence defence is raised although the Environment Agency considers that it is raised in relatively few cases.

The concerns expressed by industry

11. The Government recognised in its First and Second Consultations that the proposed removal of the due diligence defence was a significant issue.

12. The waste industry did not provide specific examples of situations where the removal of the due diligence defence would result in an unjust results, but was strongly in favour of retaining the defence for the following reasons:

- that the due diligence defence is a fundamental right;
- that there will be problems in recruiting staff as a consequence of its loss, particularly Directors;
- that there may be problems insuring activities; and

[1] See Section 33(7)(a) of the Environmental Protection Act 1990.

- that it may cause problems specifically in relation to subjective issues such as odour.

13. The responses from non-Waste industry (to the extent they can be identified) were more mixed with a majority against its removal but some supported the proposals and all welcomed the proposed extension of an emergency defence across the entire system. The emergency defence provides a defence in circumstances where it would be unjust to prosecute, where a person proves:

> *"that the acts alleged to constitute the contravention were done in an emergency in order to avoid danger to human health in a case where—*
>
> *(i) he took all such steps as were reasonably practicable in the circumstances for minimising pollution; and*
>
> *(ii) particulars of the acts were furnished to the regulator as soon as reasonably practicable after they were done."*

14. In contrast regulators and other public bodies generally agreed that the due diligence defence has caused practical enforcement challenges in the past and supported its removal. An NGO also supported its removal. Regulators generally did not object to the extension of an emergency defence across the entire system.

Why the Government considers that the retention of the defence in a common system is not justified

15. The Government recognises that, in particular, the waste management industry has concerns about Government's proposal. The Government wants to develop a common simplified permitting and compliance system. As noted above, better regulation within a common regulatory system involves balancing the need to continue to protect the environment and human health through adequate regulatory powers and the need of industry to have adequate protections against unreasonable enforcement action being taken.

16. The Government does not consider that an due diligence defence could be applied across the draft Regulations. This is because PPC permit conditions are required to be based on the application of the EU concept of Best Available Techniques[2] – compliance with such conditions therefore implies diligence and non-compliance would imply a lack thereof. The existence of an additional due diligence defence would inevitably undermine this concept.

17. The provision of separate defences in a common system, apart from failing to deliver an integrated simpler system, would be problematic at permitted sites where, for example, a waste operation and an IPPC activity are carried out. The system would be very difficult to work with in practice and this would have knock-on costs for all. For, example, regulators would have to conduct investigations on the basis that the due diligence defence would apply in every case leading to longer more costly and disruptive investigations. The concerns raised by industry, at paragraph 12 above, are addressed in the following paragraphs.

18. **Fundamental right** - The Government does not consider that a due diligence defence in this context is a fundamental right. A very significant proportion of the waste industry, those who have fallen under PPC, already do not have this defence. The Government is not aware of any problems that have arisen from the lack of such a defence within the PPC system. There is no objective reason to continue with this defence for residual waste activities in a common system. Further, in 2005, offences under the

[2] The application of Best Available Techniques is required by the Integrated Pollution Prevention and Control Directive (96/61/EC).

Producer Responsibility Obligations (Packaging Waste) Regulations were changed so that producers could no longer rely on having taken "reasonable steps" to comply with their regulatory obligations. In addition to its absence from PPC, this form of defence does not exist in radioactive substances legislation nor in water quality legislation.

19. **Recruiting staff and Directors** - The Government understands that operators in other areas such as those operating PPC activities, water discharge and nuclear sites where this defence does not exist appear able to recruit and retain directors and managers. The Government is not aware of any evidence as to why the Waste Management sector is different. It therefore considers that there are no reasons to draw a different conclusion for the Waste Management sector. The Government does not therefore consider that there would be substantial problems in recruiting staff or directors if the defence was removed.

20. **Obtaining insurance** - The Government understands that operators in other similar areas where this defence does not exist are able to obtain insurance and is not aware of evidence as to why this sector is different. Operators are not of course, as a matter of public policy, able to obtain insurance against criminal liability.

21. **Problems in relation to subjective issues** – The Government has provided a right of appeal against permit conditions[3]. The Government considers that the removal of the due diligence defence would not have an impact on subjective issues. Rather then waiting until enforcement issues arise if operators consider that permit conditions are not suitable the Government considers that operators should exercise their rights of appeal against such conditions.

22. **Safeguards in the enforcement and prosecution system** - There are a number of safeguards in the regime established by the draft Regulations:

- any system which depends upon enforcement through the criminal courts is protected by the Attorney General's Code for Crown Prosecutors which is adopted by all regulators. These require evidential sufficiency and public interest tests to be satisfied prior to prosecutions being commenced. Further prosecution would also have to be in accordance with a regulators own accessible policy or it will be regarded as an abuse of process;
- the operator is given a right of appeal against permit conditions (such as those relating to odour)4 and enforcement notices (the draft Regulations strengthen the rights of the waste industry in this area) before criminal proceedings are brought;
- whether Courts would be likely to impose small or negligible sentences is a factor to be taken into account in deciding whether or not to prosecute under the Code for Crown Prosecutors;
- the operator chooses to join the permitting system – the permit makes lawful an activity that would otherwise be unlawful;
- the emergency defence is being applied across the regime generally.

23. The Government is not aware of evidence that suggests that the Environment Agency or local authorities use their enforcement powers in an unreasonable manner. The Environment Agency considers itself a modern regulator and so focuses its resources on those areas of serious risk / harm. It primarily addresses breach of permit conditions

[3] The right of appeal applies to bespoke permit conditions. No right of appeal lies against the fixed rules in standard permits because they are voluntary mechanisms that operators opt into and instead they can choose to apply for a bespoke permit if they do not wish to accept standard rules.

[4] See footnote 3, above.

through discussion and, if necessary, through enforcement notices and the safeguards applied above would apply.

24. In 2005 the Agency undertook 883 prosecutions (excluding fisheries) of which 85 related to breach of a permit condition. In 2005 it served 515 enforcement notices (26 prosecutions resulted from breach of those enforcement notices). 29 of the 85 prosecutions concerned waste sites. These statistics need to be read against the scale of the Environment Agency's regulation[5] which demonstrates, it believes, that it is not over zealous in relation to legitimate business in terms of enforcement.

25. Finally, where a defendant raises a due diligence defence, the regulator must test it. The defendant's systems / procedures are scrutinised, increasing the cost of the investigation and of any subsequent proceedings for both the regulator and the regulated. A defendant can at any point refer to the processes and procedures they have adopted to avoid the offence and that will information will be assessed in the decision whether to prosecute and in the scale of any sentence. The Code for Crown Prosecutors requires this.

26 The Government considers that removing the due diligence defence would:

- improve deterrence and so encourage compliance, particularly among the poor performers;
- provide an important tool to secure convictions especially of corporate entities;
- not remove fault from the enforcement process entirely because culpability is always relevant to decisions as to which enforcement options regulators should adopt;
- reduce the need for the regulated business' systems and procedures to be subject to intense disruptive and time consuming investigations; and
- decrease the duration and cost of any proceedings.

27. The Government therefore considers for the above reasons that the proposal to remove the due diligence defence from the residual parts of WML that would transfer into the common system is justified.

Department for Environment, Food and Rural Affairs

November 2007

[5] The Agency regulates process industries (around 3,600 permits by 2007), more than 100,000 consents to discharge to inland waters and more than 9,000 waste management licences. It also manages 23,000 water abstraction licences ranging from those for water companies for public supply to licences for individual abstractors

APPENDIX 3: EXPLANATORY INFORMATION

Draft Legislative and Regulatory Reform (Regulatory Functions Order 2007

Draft Regulators' Compliance Code

Summary of the Government's Policy Responses to the Consultation on the draft Regulators' Compliance Code

Background

1. The Government's response to the consultation on the draft Regulatory Compliance Code stated that the views expressed by the respondents would, so far as possible, be taken into account before the final drafts of the Code and Listing Order were laid before Parliament. The Explanatory Memorandum to the draft Order further states in paragraph 7.14 that the key concerns of those who will be affected by the provisions of the Code were tackled before the Code and the Order were laid before Parliament. The purpose of this note is to set out the specific actions that the Government has taken in addressing these concerns.

2. To enable the Government to fully understand and deal with the concerns of key stakeholders who will be affected by the Code, the Chief Executive of the Better Regulation Executive (in the Department for Business, Enterprise and Regulatory Reform, BERR) and some of his senior managers met with heads of the major regulators immediately after the consultation closed on 15 August 2007.

3. The purpose of this meeting was to discuss the reactions of the regulators to the consultation and agree changes to be made to the Code in the light of these reactions. Each of the regulators' concerns was discussed and agreement was reached on how to tackle these. The key regulators in attendance at this meeting were: the Financial Services Authority (FSA), the Office of Fair Trading (OFT), the Food Standards Agency (FoodSA), the Health and Safety Executive (HSE) and the Environment Agency. The outcomes of this meeting and subsequent discussions with the regulators and departments influenced the Government's policy responses to the consultation as indicated in the response document, published on 5 October 2007. These issues are set out below.

Issues raised and how Government responded:

Concerns about the expectations raised by the Code and the clarity of the Code itself (see chapter 3 of the response document)

4. Some regulators said that certain provisions of the Code might raise high expectations among regulated entities which the regulators could not meet. As such, they suggested that ambiguous words that might contribute such expectations be removed to clarify the intention of the Code. Other points of clarification related to phrases such as "have regard to" and "general and individual functions". The Government promised to revise the Code in the light of these comments with a view to making it easier to understand.

Action taken:

5. The Government has revised the draft Code in the light of these comments before laying it before Parliament. For instance, a new paragraph (2.6) was added to clarify what it would mean to have regard to the Code. An example was added to clarify the terms "general and individual levels" (see paragraph 2.4). While in an earlier draft, regulators had been required in paragraph 5.4 to provide advice that meets the specific needs of regulated entities, the underlined word was deleted as suggested by the Environment

Agency. The phrase "specific intelligence" in paragraph 6.1 was changed to "relevant intelligence" in response to the concerns raised by the Environment Agency. Several drafting changes suggested by regulators were also accepted.

Concerns about the activities of illegal operators (see response to question 4 on page 18 of the response document)

6. Some regulators felt that the Code was skewed too much in favour of businesses and other regulated entities. In particular, the Environment Agency felt strongly that the Code could limit its ability to tackle illegal operators who might invoke it as an additional basis of argument in an abuse of process application to delay prosecution and other enforcement actions.

7. The Government made it clear that it felt that illegal or rogue businesses should take no comfort in the Compliance Code, as its intention is to allow regulators to be able to target more effectively these entities. However, the Government promised (paragraph 3.15 of the response document) to amend the Code to clarify its position about rogue businesses.

Action taken:

8. To tackle the concerns about illegal or rogue operators, a new paragraph 1.4 was added to the Code. This new paragraph states that:

> "The Code supports regulators' responsibility to deliver desirable regulatory outcomes. This includes having effective policies to deal proportionately with criminal behaviour which would have a damaging effect on legitimate businesses and desirable regulatory outcomes. The code does not relieve regulated entities of their responsibility to comply with their obligations under the law"

9. The wording of this new paragraph was agreed with the Health and Safety Executive (HSE) and the Environment Agency, both of which agreed that it was a significant step towards addressing their concerns.

Concerns about the requirement to support economic progress (see chapter 7 of the response document at page 35)

10. The draft of the Code that the Government consulted upon required regulators to ensure that their regulatory activities "support" economic progress and to adopt a regulatory measure only if the benefits justify the costs and it entails the minimum burden compatible with achieving their objectives.

11. Some of the regulators, including the Food Standards Agency and the Financial Services Authority questioned the rationale behind the requirement to support economic progress given that their primary objective might not lead them towards that goal. The Government promised (paragraph 7.11 of the response document) to clarify these phrases, although it stressed that the link between regulatory enforcement and economic progress should be maintained.

Action taken

12. The Government accepted the suggestion of the Food Standards Agency that the actual words used in the Hampton Report should be used instead of the word "support", which suggests taking a proactive step. As a result, the Government has replaced the word "support" with the phrase "allow or even encourage" economic progress, as used in the Hampton report.

13. In response to a request by the Department for Environment, Food and Rural Affairs (DEFRA) that the Code should recognise sustainable development as a policy goal, a compromise was reached with DEFRA, as a result of which a footnote was added to para 3.1 of the Code, stating that the costs and benefits which regulators should take into

account “include economic, social and environmental costs and benefits”. This footnote also addresses the concerns of some regulators, such as the Environment Agency about whether the cost-benefit analysis required in paragraph 3.1 of the Code only allowed for a consideration of economic costs and benefits. Both DEFRA and the Environment Agency are satisfied that the insertion of this footnote addresses their request.

Concerns about the application of the Principles of Good Regulation and the regulatory functions specified in the Listing Order (see chapters 4 and 5 of the response document)

14. Some regulators felt that certain of their functions should not be specified in the Listing Order or that the five Principles of Good Regulation specified in section 21 of the Legislative and Regulatory Reform Act 2006 should not apply to their individual level actions. In particular:

- The UK Intellectual Property Office (UKIPO) argued that it should not be subject to the Code because it did not carry out regulatory functions as such.
- The Insolvency Service (INSS) argued that some of its functions should not be specified in the Listing Order because they are not regulatory functions as defined in the 2006 Act.
- The Financial Services Authority requested that its individual level actions be excluded from the scope of the five regulatory principles specified in section 21 of the Legislative and Regulatory Reform Act 2006.
- The Environment Agency asked for the exclusion of its activities respect of illegal operators from the scope of the regulatory principles.

15. In its response to the consultation, the Government promised to consider these requests and to decide on the basis of evidence produced by the regulators and the views expressed by those they regulate.

Action taken

16. Following several bilateral meetings with the regulators concerned, the above concerns were addressed as follows:

- UKIPO was excluded from the Code and the all the functions that the INSS requested to be excluded from the Code were excluded. These decisions were taken following legal advice.
- The Financial Services Authority withdrew its opposition to subjecting its individual actions to the five Principles having concluded that it could not provide evidence showing that such actions would be exposed to any risk of vexatious litigation if the principles were to apply to them.
- The Environment Agency agreed that new paragraph (1.4) added to the Code was helpful in addressing its concerns about illegal operators and was, therefore, happy to withdraw its opposition to the application of the five principles to its activities in relation to illegal operators, such as fly tippers.

Concerns about the draft Impact Assessment (see chapter 6 of the response document)

17. Some regulators said that the estimates of costs and benefits of the compliance code did not adequately take into account the fact the many regulators were already implementing some of the measures required under the code. As such the estimates of benefits were overstated while those of costs were understated. DEFRA specifically wanted the Impact Assessment to be revised to deal with issues around costs of implementing the Code. The Government promised to revise the Impact Assessment in the light of evidence received.

Action taken

18. The Government has revised the Impact assessment, primarily by adjusting downwards the potential benefits to business, especially to reflect (a) regulators' views that they had made more progress in reducing burdens and (b) business concerns that regulators might not fully comply with the Code's provisions.

Conclusion

19. The draft Code and the draft Order now laid before Parliament have been much improved as a result of proper consultations involving extensive interactions between BERR officials and stakeholders who will be affected by the provisions of the Code. The opinions expressed by these stakeholders have, so far as possible, been taken into account in producing final drafts of these documents. In its clearance letter to the Ministerial Committee on Economic Development (ED) and the sub-committee on Panel for Regulatory Accountability (ED)(PRA), DEFRA noted that its key concerns on the draft Code had been resolved and appreciated efforts to find a way forward.

Department for Business, Enterprise and Regulatory Reform

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