

**Consultation on  
Primary  
Authority  
Guidance**

**LBRO**  
Local Better Regulation Office

Regulatory Enforcement  
and Sanctions Act 2008

December 2008

## CONSULTATION ON THE DRAFT PRIMARY AUTHORITY GUIDANCE

<i>Who should read this document?</i>	It is relevant to anyone with an interest in the Government's approach to better regulation at the local level. This may include, in particular, large and small businesses, national regulators, trade associations, local authorities, fire and rescue authorities and professional bodies.
<i>Making your views heard</i>	We are keen to gather all views on the subject of the Primary Authority scheme and any supporting evidence. You should not feel constrained by the specific questions nor feel obliged to offer responses to all of them. Concentrate on those in which you have most interest.
<b>Views are requested by 28 February 2009</b>	
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<i>Your details</i>	Representative groups may wish to give a summary of the views of the people and organisations they represent, and, where relevant, how they consulted with those people or organisations. You may wish to include contact details for follow-up (e.g. name, phone number, email address).
<i>Confidentiality</i>	The position regarding the confidentiality of any information provided is set out at the back of this document. Unless you state otherwise (and an automatic disclaimer generated by your IT system does not constitute such a statement), we will assume you are happy for us to publish your response and to share it with government officials.
<i>Additional copies</i>	This consultation document is available for download from <a href="http://www.lbro.org.uk">www.lbro.org.uk</a>

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**This guidance is issued by LBRO under section 33 of the Regulatory Enforcement and Sanctions Act 2008 and should be read in conjunction with the Act and Orders under it.**

**Section 33(3) requires a local authority to have regard to any guidance given to it under this section.**

## FOREWORD

Current circumstances serve to raise awareness of the vital role of local regulation in supporting economic prosperity and protecting communities. In challenging times, it is clearly appropriate to take action to encourage a level commercial playing field, to help businesses retain the confidence to invest and grow. As effective local regulation requires a consistency of approach, this is an apt moment to prevent any contradiction in the application of environmental health and trading standards legislation by local authorities.

Under the new Primary Authority scheme, for the first time companies gain the right to form a *statutory* partnership with a *single* local authority, which then provides robust and reliable advice on compliance other councils must take into account when carrying out inspections or dealing with non-compliance. The operation of the scheme is a statutory responsibility of the Local Better Regulation Office (LBRO). Our role will be to register partnerships, issue guidance and resolve disputes.

The provision of proactive, expert advice on regulatory issues that is appreciated and can be trusted by the recipients will deliver sizeable benefits to businesses and local authorities alike. For example, time and cost savings will arise for both parties through the consistent application of legislation across the UK, in tandem with a reduction in the number of unnecessary inspections and unwarranted enforcement actions.

It is with the aim of maximising the advantages of the Primary Authority scheme to participants that we seek your views on our approach to its administration. Your answers to the questions posed in this consultation on the draft guidance will be both appreciated and considered. We look forward to your feedback.



Clive Grace  
Chair  
Local Better Regulation Office



Graham Russell  
Chief Executive  
Local Better Regulation Office

## INTRODUCTION

The proper protection of consumers and workers – regardless of their location within the UK – requires consistent local regulation. This also supports the creation of a level commercial playing field, giving businesses the confidence to invest and grow. Although local authorities should apply environmental health and trading standards legislation in a similar way in similar circumstances, companies have reported that this is not always the case. Their concerns included contradictory advice, wasted resources and duplicated efforts, augmented by the lack of an effective means of resolving disputes when councils disagree.

The Primary Authority scheme was introduced to address these issues. From 6 April 2009, any business operating across council boundaries – regardless of its size – has the *statutory* right to form a partnership with a single local authority in relation to regulatory compliance. This builds on the foundation created by voluntary home and lead authority initiatives, but entails a fundamental shift in the nature of the relationship between the regulated and the regulators towards cooperation – bringing benefits to both parties.

The principles of the scheme are set out in Part 2 of the Regulatory Enforcement and Sanctions Act 2008, but significant scope remains to shape its final form. We have already carried out stakeholder consultation workshops to this end, and are now testing and refining the framework with major retailers and leading councils, to confirm that it is fit for purpose and capable of meeting changing needs in the years ahead.

Cooperation is at the core of the scheme. By liaising closely with companies to gain a detailed understanding of their operations, local authorities will be in a better position to focus on securing compliance by providing specific advice. A central register of the partnerships established will allow proposals for local enforcement activities to be compared with the guidance given to companies by primary authorities, helping to prevent inconsistency. In addition, where they are produced, national inspection plans will assist with risk assessments of local businesses, and in the better targeting of environmental health and trading standards resources.

The Primary Authority scheme is based on effective communications. We expect that in the overwhelming majority of cases, local authorities will reach informal agreements relating to compliance issues. Where disagreements do occur, we will assist in their resolution, aided by the reasoning from both parties, as well as by information from national regulators.

This draft guidance sets out the structure of how we propose the scheme will operate, with some important provisos. A consultation is taking place in parallel on the *secondary* legislation that will spell out the legal detail. This is being led by the Department for Business, Enterprise and Regulatory Reform (BERR) and covers aspects such as the definition of 'enforcement action', exclusions from the scheme, the provisions for our determination process, and the applicability of the scheme in the devolved areas. We cannot be prescriptive about these issues until the outcome of BERR's consultation is known. The scheme will be supported by a secure web-based IT system that will facilitate dialogue. The final arrangements for its use will be set out once details of the scheme are finalised. Finally, it is crucial to remember that ultimate responsibility for the interpretation of legislation remains the preserve of the courts.

We are particularly interested in the answers to the questions overleaf.

## QUESTIONS

### General

1. The guidance is set out in five sections – characteristics of a partnership; establishing a partnership; providing effective advice; inspection plans; and supporting consistent enforcement. For each section, please comment on whether you believe the information is:

- sufficiently clear about what the requirements of the scheme are; and
- sufficiently detailed to enable the scheme to be successfully implemented.

Please be specific in your answers and make detailed suggestions.

2. Are there any other aspects of the scheme that you would like to see further guidance on?

### Specific

1. To enable the partnerships to be implemented in a consistent way, the relevant functions have been organised in 15 categories. Do you believe that the proposed categories provide the basis of workable partnerships?
2. Is the proposed scope of the inspection plans appropriate? How might it be improved?
3. How might the template agreement be improved?
4. Is the proposed process for resolving disputes appropriate? How might it be improved?
5. Is the guidance regarding the application of the Primary Authority scheme to Scotland, Wales and Northern Ireland sufficient?

## CHARACTERISTICS OF A PARTNERSHIP

### Who can have a partnership?

- 1 A partnership is available to any business, charity or other organisation (referred to throughout this guidance as 'the business') that is regulated by two or more local authorities in respect of a relevant function (see glossary). Relevant functions are defined in the Regulatory Enforcement and Sanctions Act 2008 ('the Act')<sup>1</sup> and Orders made under it. Relevant functions cover matters that are commonly referred to as 'trading standards', 'environmental health' and 'licensing' legislation.
- 2 The following are examples of businesses that might want to have a partnership:
  - multi-site retailer with branches in a number of local authority areas;
  - food manufacturer whose goods are distributed for sale across a number of local authority areas;
  - internet retailer whose goods or services are sold over a wide area;
  - tour operator whose customers may be located in any area;
  - chain of gyms with outlets in a number of local authority areas;
  - charitable care home provider with premises in several local authority areas; and
  - restaurant company that offers franchises across several local authority areas but retains central control of particular relevant functions.

### What scope can a partnership have?

- 3 There are various elements to the scope of a partnership, as outlined in the sections below.

#### *Regulatory scope*

- 4 A local authority can only form a partnership in respect of those relevant functions for which it has regulatory responsibility. For example, a county council could take primary authority responsibility for food standards matters, but not food safety and hygiene matters.
- 5 A business can have a partnership for a single relevant function or for multiple relevant functions. This means that a business could have partnerships with different local authorities for different relevant functions. For example, retailer 'A' may enter into a partnership with district council 'B' for health and safety, with county council 'C' for consumer and product safety and food standards, and with fire authority 'D' for petroleum safety and licensing.
- 6 LBRO recommends that, wherever possible, partnerships should cover one or more complete categories of relevant function. The available categories, which are listed below, are defined in Annex 1:
  - Age-restricted sales
  - Animal establishments and companion animal welfare
  - Animal feed
  - Consumer and product safety
  - Consumer credit
  - Environmental protection

<sup>1</sup> [www.opsi.gov.uk/acts/acts2008/pdf/ukpga\\_20080013\\_en.pdf](http://www.opsi.gov.uk/acts/acts2008/pdf/ukpga_20080013_en.pdf)

- Explosives licensing
- Fair trading
- Farm animal health
- Food safety and hygiene
- Food standards
- General licensing
- Health and safety
- Housing
- Metrology
- Petroleum licensing
- Road traffic

7 It should be noted that the proposed categories are based on the intended legislative scope for the scheme that is currently proposed in the draft secondary legislation. If there were to be changes as a result of BERR's consultation process, additional categories would be created to take account of this.

### ***Geographic scope***

- 8 The scheme applies differently in the different parts of the United Kingdom, as set out in the Act. The details of the scope of the scheme in relation to Scotland and Northern Ireland will be defined in the secondary legislation. This draft guidance is based on BERR's current proposals.
- 9 In England and Wales, the scheme is available for all the relevant functions exercised by local authorities.
- 10 In Scotland, the relevant functions that remain the responsibility of the UK Government are within the scope of the scheme. In brief, these are included in the following categories:
- Age-restricted sales
  - Consumer and product safety
  - Consumer credit
  - Explosives licensing
  - Fair trading
  - Health and safety
  - Metrology.
- 11 Relevant functions that have been devolved to the Scottish Government – for example food standards and food hygiene – are outside the scope of the scheme.
- 12 In Northern Ireland, the relevant functions that remain the responsibility of the UK Government are within the scope of the scheme, but only where they are delivered by local authorities. In brief, these are included in the following categories:
- Consumer and product safety
  - Noise (within the 'Environmental protection' category).

- 13 The complex way in which the scheme will operate for different functions in different areas is indicated in the examples below:

A Scottish local authority can enter into a partnership in respect of health and safety that would apply across Scotland, England and Wales but would not extend to Northern Ireland.
A Scottish business trading across the UK that wanted a partnership for food hygiene would not be able to enter into a partnership with a Scottish local authority but could enter into a partnership with an English or Welsh local authority. In this case the partnership would extend only to England and Wales.
A manufacturer based in Wales could enter into a partnership covering product safety with a local authority in any part of the UK, and this partnership would be applicable across the whole of the UK.

- 14 LBRO will provide specific guidance on request to any local authority or business affected by issues concerning the geographic scope of the scheme.

### **Company structures**

- 15 A partnership may encompass more than one legal entity. For example, a parent company with a number of subsidiaries based in different locations may choose to have one partnership covering all of its operations, or to have separate partnerships for the separate legal entities.
- 16 A single legal entity can have only one partnership in respect of a particular category of relevant function.

### **What resources will be needed to operate an effective partnership?**

- 17 In establishing a partnership, the partners will need to determine the resources required to deliver:
- i) the advice and guidance requirements of the business. These will vary between partnerships. From the outset both parties will need to have a clear understanding of the expectations of the business and the scope of the service being provided by the local authority; and
  - ii) the requirements of other local authorities, in respect of:
    - a. providing advice and guidance about how they should exercise their relevant functions in relation to the partner business
    - b. setting inspection plans where appropriate; and
    - c. advising on and responding to proposed enforcement actions.
- 18 In determining the resources required, the partners should consider the amount of staff resource and the level of expertise needed, both in terms of knowledge of the relevant function and understanding of the business and its practices.

### **How should the required resources be provided?**

- 19 Having made an assessment of the resource requirements of the partnership, the local authority and the business will need to agree how costs will be met.

- 20 The local authority may charge the business for services supplied through the partnership. In deciding whether, and to what extent, to make a charge to the business, the local authority should consider the following:
- the local authority's policy in respect of supporting local economic prosperity;
  - any responsibility to provide free advice and guidance to the business under the Regulators' Compliance Code;<sup>2</sup>
  - the requirement of the Regulators' Compliance Code, where applicable, that where advice and guidance goes beyond basic advice and guidance, any charges should be reasonable; and
  - that where advice and guidance has been developed for use with more than one business, the partner business should pay no more than a reasonable proportion of the costs.
- 21 Where a local authority decides to charge for some or all of the services provided to a partner business, it can recover only the costs reasonably incurred in providing the service.
- 22 In calculating these costs, the local authority must have regard to the guidance issued by HM Treasury in *Managing Public Money*.<sup>3</sup>

### **Partnership agreement**

- 23 A partnership nomination must be supported by a written agreement between the local authority and the business. The agreement should include the following:
- the name of the legal entity or entities covered by the agreement;
  - the category or categories of relevant function covered;
  - the geographic scope of the partnership – this should coincide with all the areas of the UK where the relevant function is within scope;
  - the limitations of liability;
  - contact details for the local authority partner;
  - contact details for the partner business;
  - a description of any services provided by the local authority that are in addition to those required by the scheme;
  - details of the resource requirements of the partnership and how these will be provided, including the basis for any charges that will be made;
  - a statement about the status of information provided to and by the local authority and LBRO in respect of the Freedom of Information Act 2000;
  - arrangements for handling notifications of proposed enforcement action;
  - arrangements for reviewing the agreement; and

<sup>2</sup> [www.berr.gov.uk/files/file45019.pdf](http://www.berr.gov.uk/files/file45019.pdf)

<sup>3</sup> [www.hm-treasury.gov.uk/psr\\_mpm\\_index.htm](http://www.hm-treasury.gov.uk/psr_mpm_index.htm)

- arrangements for terminating the agreement.
- 24 Partnerships should use the template primary authority agreement included at Annex 2. If a local authority or partner business has concerns about an element of the template, they should consult LBRO.

## ESTABLISHING A PARTNERSHIP

### How is a primary authority nominated?

- 25 Where a business and a local authority agree that they wish to establish a partnership, they must apply to LBRO via the website at [www.lbro.org.uk](http://www.lbro.org.uk). The application should be accompanied by a primary authority agreement endorsed by both parties, which will enable LBRO to assess the local authority's suitability to enter into the partnership. Where it is satisfied that the local authority is suitable for nomination, LBRO will enter the partnership into its register of nominations and both parties will be notified. Where LBRO has concerns about the suitability of the proposed arrangements, it will seek to work with the parties to enable the suitability criteria to be met.
- 26 Where a business wishes to enter into a partnership but has not yet found a willing and suitable local authority, it can request LBRO to nominate a primary authority. LBRO will consult with any local authority that it considers might be suitable, in particular the one in whose area the business is administered or principally carried out.
- 27 Where a suitable local authority is identified by LBRO, the local authority will then need to work with the business to develop a partnership agreement.

### How will LBRO assess suitability?

- 28 The suitability of a local authority will be assessed at the point at which a partnership is being considered. The criteria used by LBRO will include:
- the location of the business, and where it carries out its activities;
  - the adequacy of the proposed arrangements for resourcing the partnership;
  - any relevant specialism of the local authority; and
  - any proposed arrangements for preparing relevant local authority staff for the primary authority role.
- 29 It is important to note that a local authority that is suitable for nomination as the primary authority for one particular business may not be suitable for another. Each nomination will be considered on its own merits.

### How can a partnership end?

- 30 The agreement should set out arrangements for either party to end the partnership by notifying LBRO. When a notification is received, LBRO will consider whether it is appropriate to consult with the parties before revoking its nomination of the partnership.
- 31 When LBRO is satisfied that it is appropriate to revoke its nomination, it will do so and will amend the register.
- 32 When a partnership is no longer operating effectively, then LBRO may review its nomination. Having consulted both parties, LBRO may decide to revoke its nomination and, in this circumstance, both parties will be formally notified and the register amended.

## PROVIDING EFFECTIVE ADVICE TO SUPPORT COMPLIANCE

### How should the primary authority provide advice and guidance to the business?

- 33 In entering a partnership, the local authority accepts responsibility for being the principal source of advice and guidance to the business. Advice and guidance should cover matters relating to compliance in the relevant function categories defined in the agreement.
- 34 In fulfilling this responsibility, the primary authority should ensure that advice:
- is specific and tailored to the particular needs of the business, where appropriate;
  - is considered and well researched;
  - takes into account the relevant legislation and codes of practice;
  - takes into account guidance from the Government, national regulators, LBRO and others, including, for example, LACORS (the Local Authorities Coordinators of Regulatory Services) and professional bodies;
  - takes into account industry practices and is consistent with advice being given to other businesses within the sector;
  - takes into account advice and guidance given to the business by other primary authorities with responsibility for different relevant functions;
  - supports the business in identifying a method of achieving compliance;
  - is delivered in accordance with the Regulators' Compliance Code, where applicable;
  - is provided in a form that enables the business to rely upon it; and
  - is reviewed at appropriate intervals, and when circumstances change, to ensure that it remains current.
- 35 Advice is provided by different means, depending on the circumstances, for example by letter, in an email, during a meeting or by telephone. The primary authority will need to consider, and agree with the partner business, how and in what circumstances advice will be recorded. In considering this, the primary authority will need to have regard to its responsibility to review advice at a future date, for example to ensure that it remains current, or if the compliance of the business is challenged by another local authority.

### What is the role of the primary authority in relation to other local authorities?

- 36 The primary authority will normally be the first point of contact for a local authority that has identified a compliance issue at a local level in a business that has a partnership. During these informal discussions the primary authority may provide information and should seek to assist the local authority in deciding how best to resolve the issue.

37 In addition to these informal discussions with individual local authorities, the primary authority accepts responsibility for giving formal advice and guidance to other local authorities. This formal advice may be given to one or more local authorities where they have responsibility for the relevant functions covered by the partnership, and will relate to the exercise of those functions in relation to the partner business.

38 Advice to local authorities:

- should be communicated through LBRO's secure website;
- should relate to a specific issue where the primary authority is actively addressing compliance on a national level with the business;
- should be time limited where it relates to improvement activity;
- should not relate to the frequency or conduct of inspections, or the risk assessment of a business (which may be dealt with in an inspection plan);
- may relate to the precautions that a business is taking to achieve compliance, but should not relate to the local exercise of due diligence in following the nationally agreed precautions; and
- should, as far as possible, respect businesses' wishes in relation to confidentiality.

39 LBRO anticipates that advice and guidance provided by the primary authority to other local authorities will help to deliver consistent, proportionate and targeted regulatory activity in relation to the business. In particular, advice may be used to help ensure a proportionate response to a specific compliance issue where a course of action has already been agreed between the primary authority and the business.

### Practical examples

A minor error has occurred in the labelling of a batch of food product. The primary authority for the food manufacturer has considered the issue and has confirmed to the business that a product recall is not necessary. The defect has been remedied for all future batches. The primary authority may notify all local authorities of the specific details of the affected batch, explain the remedial action taken, and advise that no further action is required.

The primary authority for a national pub chain agrees to a 12-month risk-based improvement programme to check electrical safety at all premises, beginning with its oldest installations. The primary authority may notify all enforcing authorities of the specific details of the programme, including indicating when the installation at each specific premises will be checked. The primary authority may also advise all enforcing authorities that no further action should be taken to require the certification of installations at premises prior to the due date in the programme.

The primary authority for a national supermarket agrees to an approach to administer all of its product recalls on a national basis. The primary authority should notify all enforcing authorities of the details of the scheme and how to refer matters to it. The primary authority should also advise all enforcing authorities not to require product recalls except via the national system operated by the primary authority.

## INSPECTION PLANS

### What is the purpose of an inspection plan?

- 40 An inspection plan may be produced where a primary authority identifies that this would assist other local authorities in the risk assessment of premises, or in allocating resources within inspections.

### What are the requirements for an inspection plan?

- 41 The primary authority must consult the partner business, and LBRO recommends that this happens at an early stage.
- 42 Inspection plans must be consistent with guidance published by relevant national regulators and others. In particular, the plan should take account of the risk assessment methodologies of relevant national regulators. In addition, where a national regulator plays a significant role in the regulation of the business in respect of the relevant function, it should be consulted and offered the opportunity to be engaged in the development of the plan. For example, a large bakery firm that is both a producer and a retailer will be regulated in respect of health and safety by local authorities and the Health and Safety Executive (HSE). The primary authority should consult with the HSE in developing an inspection plan for the business.
- 43 Where an inspection plan is proposed for a business that is regulated in respect of the relevant function by both a national regulator and local authorities, the inspection plan will only apply to regulation undertaken by local authorities. However, LBRO recommends that the national regulator is provided with a copy of the inspection plan and that the business is made aware that this step has been taken.
- 44 Where the partner business has more than one partnership, the primary authority that is considering making an inspection plan should consult with the other primary authorities for the business to ensure that their plans are compatible.
- 45 An inspection plan must be submitted to LBRO for its consent. LBRO will assess the proposed inspection plan and, if it finds that the plan has been prepared in accordance with this guidance and with the principles of better regulation, LBRO will consent to the inspection plan and will publish it on behalf of the primary authority. If LBRO is not satisfied that the proposed inspection plan has been prepared in accordance with this guidance, it will work with the partners to address any issues.
- 46 An inspection plan:
- should not address reactive interventions in response to a specific complaint or intelligence, or responses to specific local issues;
  - should relate to a defined period, which may be revised by agreement with LBRO;
  - should define the scope of the relevant functions covered, and the geographic applicability of the plan;
  - may provide information to assist local authorities in developing their risk-based and intelligence-led programmes of proactive interventions, including inspections, sampling and test purchasing;

- may inform local authorities of national inspection strategies co-ordinated by the primary authority in respect of the partner business and invite participation in those strategies;
- may recommend areas where local inspection resources might best be allocated; and
- may assist local authorities by identifying matters that are being dealt with nationally by the primary authority, for example where the primary authority has reviewed and given advice in respect of the business' health and safety policy.

**How does a local authority meet its statutory duty in relation to inspection plans?**

47 When an inspection plan has been published, a local authority must have regard to the plan when inspecting the business.

48 The local authority should satisfy this requirement by:

- reviewing its risk assessment of the business and its programmed activity to consider whether they are consistent with the plan; and
- ensuring that contact with the business is in accordance with the inspection plan, except where the local authority or one of its officers considers it appropriate to deviate from the plan.

**When is it appropriate to deviate from an inspection plan?**

49 It is appropriate to deviate from an element of an inspection plan only where a local authority or one of its officers has an evidenced need for doing so, which relates to local complaints, local intelligence or particular local needs. In these circumstances, the local authority should notify the primary authority in advance, giving its reasons via LBRO's secure website.

50 Where it is impractical to notify a deviation from an inspection plan in advance due to unforeseen circumstances that have arisen in the course of an interaction, the local authority should notify the primary authority retrospectively, at the earliest practicable opportunity.

## SUPPORTING CONSISTENT ENFORCEMENT

### How should an enforcing authority respond to possible non-compliance?

- 51 Wherever an enforcing authority finds possible non-compliance in a business, its first step is to consider the options available for addressing the non-compliance. Any decision made will need to be in line with the local authority's enforcement policy, the Regulators' Compliance Code (where applicable) and the principles of better regulation. The enforcing authority will also need to consider at an early stage whether the non-compliance is:
- (a) a local failure to implement a nationally agreed procedure, for example a local warehouse is not being kept tidy in accordance with instructions from head office, with potential health and safety implications; or
  - (b) a matter that is likely to be a local example of wider non-compliance, for example a price promotion that is misleading.
- 52 In the case of (a), the enforcing authority should seek to work with the local management to resolve the issue, and is unlikely to feel it necessary to consult with the primary authority. However, if the enforcing authority is considering formal enforcement action, it would need to consult with the primary authority.
- 53 In the case of (b), the enforcing authority should consult with the primary authority before deciding what action to take. The primary authority will be a source of valuable information that will assist in determining a consistent and proportionate response to the non-compliance.
- 54 Safeguards exist to enable the enforcing authority to take action immediately under certain circumstances; these are set out in the draft secondary legislation.

### How should an enforcing authority propose enforcement action?

- 55 The Act requires an enforcing authority to notify the primary authority of proposed enforcement action prior to taking that action (see box 1 of Figure 1).
- 56 Enforcement action will be defined by the Primary Authority Scheme (Definition of Enforcement Action) Order 2009, which will also set out the limited circumstances in which notification of the proposed action will not be needed. The Order is currently in draft and is subject to consultation.<sup>4</sup>
- 57 Notification should be made via LBRO's secure website by a person with the authorisation to initiate the enforcement action proposed. The notification should include:
- full details of the contravention, including, where appropriate, the address of the relevant premises;
  - full details of any affected products or services;
  - details of the proposed enforcement action; and
  - the reason for proposing the enforcement action.

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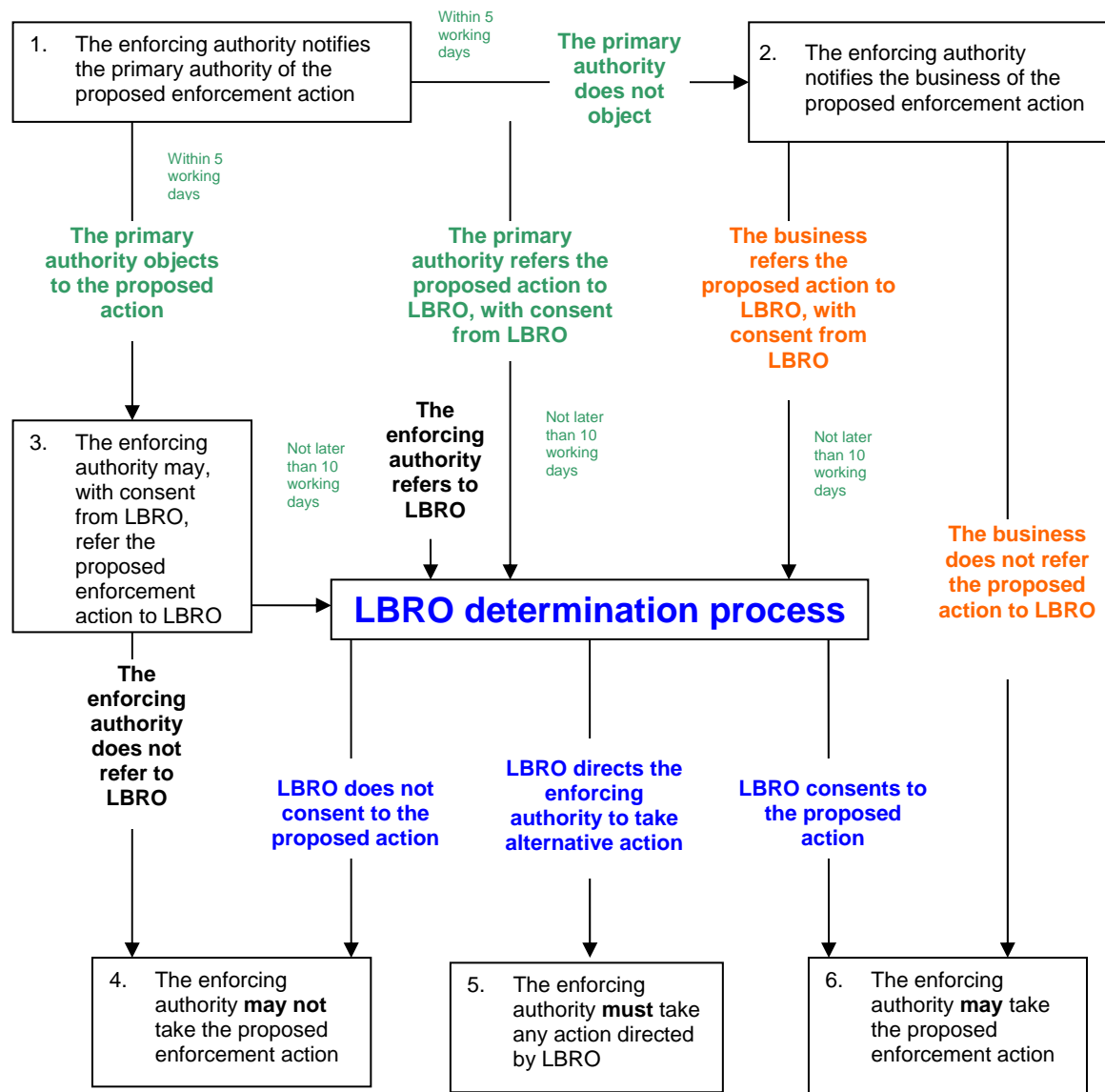
<sup>4</sup> [www.berr.gov.uk/files/file47801.pdf](http://www.berr.gov.uk/files/file47801.pdf)

- 58 The primary authority must then decide if the proposed action is inconsistent with its previous advice; the notification must therefore include sufficient information to enable the primary authority to make that decision.
- 59 The enforcing authority cannot normally proceed with the proposed action within a period of five working days, beginning on the day after notification is made. More immediate action can be taken if it is covered by the exemptions listed in Primary Authority Scheme (Definition of Enforcement Action) Order 2009, and in this case the enforcing authority should notify the primary authority retrospectively, as soon as it reasonably can.
- 60 LBRO anticipates that in most cases, through informal discussion, the enforcing authority and primary authority will already have reached agreement on a proportionate and consistent approach prior to any formal notification being made.

**How does the primary authority impact on investigative activities?**

- 61 Investigative activities are not intended to be defined as enforcement action. Enforcing authorities can conduct these activities without prior notification to the primary authority. Such activities include:
- inspection of goods, records and documents;
  - exercise of powers of entry into premises;
  - seizure of goods, records and documents for evidential purposes;
  - test purchasing of goods;
  - sampling of goods;
  - deployment of surveillance or covert human intelligence sources under Part 2 of the Regulation of Investigatory Powers Act 2000; and
  - interviewing suspects under caution.

FIGURE 1



### What should the primary authority do when it receives a notification?

- 62 The Act allows the primary authority five working days to respond to a notification.
- 63 In responding, the primary authority should consider only whether the proposed enforcement action is inconsistent with any advice or guidance that it has previously given to the partner business or to one or more local authorities.
- 64 Responding to notifications about proposed enforcement action is a key factor in achieving an effective partnership. The primary authority will need to have robust internal arrangements in place for handling notifications of proposed enforcement action within the statutory timescale. In developing these arrangements, consideration should be given to:

- the appropriate person to receive notifications;
  - the appropriate person to respond to notifications of different levels of enforcement action. For example, the primary authority may consider it appropriate for a field officer to consider a proposed notice, whereas it may feel that a proposed prosecution should be considered at a more senior level; and
  - the availability and form of information that will be needed to support any decision to direct an enforcing authority not to take a proposed enforcement action. For example, consideration should be given to recording advice and to the availability of key staff.
- 65 The primary authority should use the five working days to review its previous advice and guidance and to discuss the matter with relevant parties; these may include the enforcing authority, the partner business, LBRO and any relevant national regulator.
- 66 The primary authority may respond either to confirm that the proposed action is not inconsistent with advice previously given, or to intervene where it believes that the action is inconsistent with advice previously given. The primary authority may also, with LBRO's consent, refer the matter to LBRO for determination. See the section below on LBRO's determination process for more information.
- 67 The Act allows the primary authority to refrain from responding to a notification. However, LBRO's view is that a primary authority's failure to respond to notifications may raise concerns about its suitability.
- 68 The response must be made via LBRO's secure website and, where the primary authority directs the enforcing authority not to take the proposed action, the response should include:
- details of the advice previously given with which the proposed enforcement action would be inconsistent;
  - details of how and when the advice was previously given; and
  - the rationale for why the proposed enforcement action would be inconsistent with the advice previously given.
- 69 The Act does not allow a primary authority to revoke or revise its response to a notification once the five working days have elapsed.

#### **What happens if the primary authority objects to the proposed action?**

- 70 If the enforcing authority still feels that the proposed enforcement action is appropriate, then it may seek the consent of LBRO to refer the matter to LBRO for determination (box 3 of Figure 1). See the section below on LBRO's determination process for more information. This referral must be made within a period defined by the Primary Authority Scheme (Procedure for References to LBRO) Order 2009. This order is in draft and is currently subject to consultation.
- 71 If the enforcing authority does not refer the matter to LBRO, or if LBRO does not consent to a referral, then the enforcing authority may not take the proposed enforcement action (box 4 of Figure 1).

### **What happens if the primary authority does not object to the proposed action or does not respond?**

- 72 If the primary authority does not object to the proposed action or does not respond, the enforcing authority can proceed with its proposed enforcement action. Before proceeding with the proposed enforcement action, the enforcing authority must notify the business in writing (box 2 of Figure 1). The notification should be addressed to the person within the business identified for this purpose in the primary authority agreement, and should be copied to the primary authority. This notification should confirm that the enforcing authority has notified the primary authority of the proposed action and that the primary authority did not object to it.
- 73 On receiving notification of a proposed enforcement action, the business may seek the consent of LBRO to refer the matter to LBRO for determination, if the business believes that the proposed action is inconsistent with advice previously given by the primary authority. (See the section below on LBRO's determination process for more information.) This referral must be made within a period defined by the Primary Authority Scheme (Procedure for References to LBRO) Order 2009. This Order is in draft and is currently subject to consultation.
- 74 The enforcing authority cannot proceed with the proposed action until the end of the defined period allowed for the business to refer that action to LBRO.

### **How is a request for an LBRO determination made?**

- 75 The procedure is set out in more detail in the Primary Authority Scheme (Procedure for References to LBRO) Order 2009, which is the subject of consultation.
- 76 LBRO will only give consent to undertake a determination once it has obtained the following information:
- full details of the proposed enforcement action;
  - full details of the primary authority's decision to direct against taking the enforcement action;
  - detailed evidence demonstrating a case for determination;
  - information requested from any national regulator or policy department to inform the determination;
  - in the case of referrals from primary authorities, justification as to why it is most appropriate for LBRO to make the determination; and
  - in the case of referrals from a business, the advice that business has previously received from the primary authority.
- 77 Where LBRO does not consent to undertake a determination, it will notify the relevant parties, giving its reasons.

### **What is LBRO's role in supporting decision making within the Primary Authority scheme?**

- 78 The Act allows all three parties involved in a proposed enforcement action – the business, the primary authority and the enforcing authority – to refer the proposed action to LBRO with LBRO's consent. The referral must be made within the defined period relevant to the party making the referral. This period is currently subject to consultation.

79 LBRO is only able to consider whether:

- the advice or guidance previously given by the primary authority was correct; or
- the advice or guidance from the primary authority was properly given; or
- the proposed enforcement action is inconsistent with the advice or guidance previously given.

80 LBRO will work to resolve any disagreements. LBRO anticipates that only in exceptional circumstances will parties feel the need to refer a proposed enforcement action for determination.

**What factors can LBRO take into account in making a determination?**

81 LBRO will consider any evidence that:

- the proposed enforcement action is inconsistent with advice or guidance previously given by the primary authority; or
- the advice or guidance is incorrect. In forming its view on whether advice or guidance is correct, LBRO will seek to establish whether the advice is consistent with its understanding of the law. It will not be seeking to establish that this is the only correct interpretation of the law; or
- the advice or guidance was not properly given.

**How long will the determination process take?**

82 The Act requires LBRO to notify all parties in writing of the outcome of any determination within 28 days of giving its consent to undertake a determination. During this period the proposed enforcement action may not be taken and this period is disregarded in calculating statutory time limits for enforcement action.

**What are the outcomes of an LBRO determination?**

83 There are two possible outcomes of a determination made by LBRO, which will be notified to all parties:

- the enforcing authority will be informed that it may proceed with its proposed action; or
- the enforcing authority will be informed that it may not proceed with its proposed action.

84 Either the primary authority or the enforcing authority will be given guidance by LBRO on what action to take.

## GLOSSARY

Consent (to determination)	LBRO must consent to a referral for determination in order for it to proceed. In effect, this allows LBRO to check that a case meets certain requirements before starting the formal decision-making process of determination.
Determination	Where disputes arise between any of the three parties involved in a proposed enforcement action (the primary authority, the enforcing authority and the regulated business), any party may refer the proposed enforcement action to LBRO for it to decide whether the enforcement action should proceed. This decision-making process operated by LBRO is known as the determination process.
Enforcement action	Enforcement actions are those actions defined in the draft Primary Authority Scheme (Definition of Enforcement Action) Order 2009. They are those actions that must be notified to the primary authority in advance and include prosecution, the issuing of a Simple Caution, and many formal legal notices.
Enforcing authority	All local authorities take on the role of enforcing authority in respect of relevant functions in their geographical area. This means that, for example, a primary authority for a business will also act as the enforcing authority within its own geographical area.
Inspection plan	A primary authority may develop an inspection plan to assist other local authorities in discharging their relevant functions relating to proactive interactions with the business. All local authorities are required to have regard to these plans when planning interactions with the business.
Local authority	A local authority is defined in the Regulatory Enforcement and Sanctions Act 2008 to include county, district and unitary councils, port health authorities, and fire and rescue authorities.
Nomination	Nomination is the formal process through which a local authority is designated as a primary authority by LBRO.
Notice	A notice is a formal document issued by a local authority that requires a business to take action: for example, a prohibition notice requiring a machine not to be used until a guard is fitted, or an improvement notice requiring damaged flooring to be repaired within a certain time period.
Notification (of deviation from an inspection plan)	Where an enforcing authority plans to deviate from an inspection plan, it must notify the primary authority. Where an unanticipated deviation has occurred, a retrospective notification must be made. It is not necessary for the enforcing authority to gain any form of consent for these notifications from the primary authority, and it is not intended that the primary authority will respond to them.

National regulator	Within the Primary Authority scheme, national regulators play a part in terms of providing advice on whether proposed enforcement action is appropriate. These regulators include the Health and Safety Executive, Food Standards Agency, Office of Fair Trading, Gambling Commission, Environment Agency and National Weights and Measures Laboratory.
Notification (of proposed enforcement action)	Where a primary authority partnership is in place, other local authorities are required to notify the primary authority of any enforcement action that they intend to take.
Primary authority	<p>The primary authority is the local authority nominated by LBRO that provides advice and guidance to the business in the partnership and provides advice and guidance to other local authorities on the exercise of their relevant functions in relation to the business. The primary authority is also responsible for advising on and responding to proposed enforcement actions by other local authorities.</p> <p>Note: a business may have one primary authority for one relevant function, and another primary authority for another relevant function.</p>
Primary authority agreement	This is a document produced at the start of a primary authority partnership that sets out how it will operate.
Register of primary authorities	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 primary authority partnership, for example health and safety, or fair trading.
Referral (for determination)	Referral is the process through which a party asks LBRO to take a decision on whether a proposed enforcement action should proceed.
Relevant function	The functions are defined in terms of legislation listed under Schedule 3 of the Regulatory Enforcement and Sanctions Act 2008 and legislation made under the European Communities Act 1972. The functions fall within the categories of agricultural produce (quality standards and labelling); animal health and welfare; animal feed; consumer protection; environmental protection; food hygiene and standards; public health and safety; and weights and measures (including measuring instruments).
Relevant period	This refers to a defined period of time set out in the Regulatory Enforcement and Sanctions Act 2008, the draft Primary Authority Scheme (Definition of Enforcement Action) Order 2009, or the draft Primary Authority Scheme (Procedure for References to LBRO) Order 2009.

## Annex 1: Categorisation of relevant enactments

It should be noted that the proposed categories are based on the intended legislative scope of the scheme that is currently proposed in the draft secondary legislation. If there were to be changes as a result of BERR's consultation process, additional categories would be created to take account of this.

### **Age-restricted sales**

- Relevant enactments and secondary legislation that control the sale and supply of goods that have an age restriction associated with them
- Unitary and county
- Some applicability in Scotland where matter is reserved
- Not applicable in Northern Ireland

### **Animal establishments and companion animal welfare**

- Relevant enactments and secondary legislation concerning the licensing of animal establishments and the welfare of companion animals
- Unitary and district
- Not applicable in Scotland or Northern Ireland

### **Animal feed**

- Relevant enactments and secondary legislation concerning the manufacture, composition and labelling of animal feed
- Unitary and county
- Not applicable in Scotland or Northern Ireland

### **Consumer and product safety**

- Relevant enactments and secondary legislation concerning the safety and labelling of consumer products
- Unitary and county
- Applicable in Scotland and Northern Ireland

### **Consumer credit**

- Relevant enactments and secondary legislation concerning the licensing and operation of consumer credit
- Unitary and county
- Applicable in Scotland
- Not applicable in Northern Ireland

### **Environmental protection**

- Relevant enactments and secondary legislation concerning environmental protection, including the control of noise, pollution, statutory nuisance, contaminated land, waste and pests
- Unitary and district
- Not applicable in Scotland
- Some applicability in Northern Ireland in relation to noise

### **Explosives licensing**

- Relevant enactments and secondary legislation concerning the licensing and storage of explosives
- Unitary, county and fire and rescue authorities
- Applicable in Scotland
- Not applicable in Northern Ireland

### **Fair trading**

- Relevant enactments and secondary legislation concerning business operations relating to business-to-consumer transactions, including pricing, description of goods and services, trading practices and intellectual property
- Unitary and county
- Applicable in Scotland
- Some applicability in Northern Ireland in relation to hallmarking

### **Farm animal health**

- Relevant enactments and secondary legislation concerning the movement, importation and marking of farm animals and the control of animal disease
- Unitary and county
- Not applicable in Scotland or Northern Ireland

### **Food safety and hygiene**

- Relevant enactments and secondary legislation concerning the safety and hygiene of food and the controls under which food is manufactured, prepared and sold
- Unitary and district
- Not applicable in Scotland or Northern Ireland

### **Food standards**

- Relevant enactments and secondary legislation concerning the labelling and composition of food
- Unitary and county
- Not applicable in Scotland or Northern Ireland

### **General licensing**

- Relevant enactments and secondary legislation concerning the licensing of people, places and vehicles, including hackney carriage and private hire licensing, house-to-house collections, sex establishments, Sunday trading, charity collections, scrap metal dealers and pavement cafes
- Unitary and district
- Not applicable in Scotland or Northern Ireland

### **Health and safety**

- Relevant enactments and secondary legislation concerning the health and safety of workers and visitors to local authority-regulated premises, but not fire safety
- Unitary and district
- Applicable in Scotland
- Not applicable in Northern Ireland

**Housing**

- Relevant enactments and secondary legislation concerning housing, provisions for area improvement, overcrowding, responsibilities of landlords, compulsory purchase, housing in multiple occupation and licensing of housing
- Unitary and district
- Not applicable in Scotland or Northern Ireland

**Metrology**

- Relevant enactments and secondary legislation concerning the control of weighing and measuring equipment and the sale of goods by quantity
- Unitary and county
- Applicable in Scotland
- Not applicable in Northern Ireland

**Petroleum licensing**

- Relevant enactments and secondary legislation concerning the licensing and storage of petroleum
- Unitary, county and fire and rescue authorities
- Not applicable in Scotland or Northern Ireland

**Road traffic**

- Relevant enactments and secondary legislation concerning the control of overloaded and inappropriately loaded vehicles
- Unitary and county

**The following have not been proposed for inclusion in the scheme:**

- Alcohol licensing
- Fire safety
- Gambling

## Annex 2: Template primary authority agreement

**DATED**

**Draft (2): 04.12.08**

**VK/RXP.637778.07000**

**(1) [AUTHORITY NAME]**

**(2) THE PERSONS LISTED IN SCHEDULE 1**

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**AGREEMENT**

**Relating to Participation in the  
Primary Authority Scheme**

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**THIS AGREEMENT** is made on [ ] 20[ ]

**BETWEEN:**

- (1) **[AUTHORITY NAME]** of [ ] (the “**Authority**”); and
- (2) **THE PERSONS LISTED IN SCHEDULE 1** (the “**Regulated Person**”).

**BACKGROUND**

- A. The Authority is a “Local Authority” as defined in Part 2 of RESA and is carrying out Relevant Functions.
- B. The Regulated Person operates a business in the areas of two or more Local Authorities and is a “Regulated Person” as defined in Part 2 of RESA.
- C. The Regulated Person and the Local Authority have agreed that the Local Authority should be the Primary Authority for the Regulated Person in relation to the Relevant Functions subject to and within the terms of this Agreement.

**IT IS AGREED** as follows:

**1. INTERPRETATION**

- 1.1 In this Agreement the following words and phrases have the meanings given below.

<b>Agreement</b>	means this Agreement together with the documents which are referred to herein.
<b>Charges</b>	means the charges for the provision of the Services, calculated in accordance with Schedule 3.
<b>Commercially Sensitive Information</b>	means the subset of Confidential Information: <ol style="list-style-type: none"> <li>(a) which is provided by the Regulated Person to the Authority and is marked confidential; and/or</li> <li>(b) which constitutes a trade secret.</li> </ol>
<b>Confidential Information</b>	means any information which has been designated as confidential by either party in writing or that ought to be considered as confidential (however it is conveyed or on whatever media it is stored), including information which relates to the business, affairs, properties, assets, trading practices, Services, developments, trade secrets, intellectual property rights, know-how, personnel, customers and suppliers of either party, all personal data and sensitive personal data within the meaning of the Data Protection Act 1998 and the Commercially Sensitive Information.
<b>Environmental Information Regulations</b>	means the Environmental Information Regulations 2004.

<b>FOIA</b>	means the Freedom of Information Act 2000 and any subordinate legislation made under this Act from time to time, together with any guidance and/or codes of practice issued by the Information Commissioner in relation to such legislation.
<b>Good Practice</b>	means the exercise of that degree of skill, diligence and foresight which would reasonably and ordinarily be expected from a skilled and experienced body engaged in the same type of business as the Authority under the same or similar circumstances.
<b>Group of Companies</b>	means, in relation to a Regulated Person, its subsidiaries and its holding companies (and any subsidiaries of such holding companies), “subsidiary” and “holding company” being interpreted in accordance with section 736 of the Companies Act 1985 (as amended).
<b>Information</b>	shall have the meaning as set out in section 84 of FOIA.
<b>LBRO</b>	means the Local Better Regulation Office.
<b>Legal Requirements</b>	<p>means:</p> <ul style="list-style-type: none"> <li>• any act, statutory instrument, by-law, obligation of the European Community or ordinance in force from time to time to which either party is subject;</li> <li>• the common law and the law of equity as applicable to the parties from time to time;</li> <li>• any binding court order, judgment, decree or requirement;</li> <li>• any applicable industry code, policy or standard enforceable by law; or</li> <li>• any applicable direction, guidance, policy, rule or order that is binding on a party and that is made or given by any regulatory body having jurisdiction over a party or any of that party’s assets, resources or business, including but not limited to any local or supranational agency, inspectorate, minister, ministry, official or public or statutory person,</li> </ul> <p>in any jurisdiction that is applicable to this Agreement.</p>
<b>Local Authority</b>	shall have the meaning as set out in Part 2 of RESA.
<b>Primary Authority</b>	shall be construed in accordance with RESA.
<b>Relevant Function</b>	shall have the same meaning as set out in Part 2 of RESA, under or by virtue of the relevant enactments which are listed or referred to in Schedule 2.
<b>Request for Information</b>	shall have the meaning set out in FOIA or any

apparent request for information under FOIA or the Environmental Information Regulations.

**Revocation Notice**

means a notice issued by LBRO pursuant to section 26(4) of RESA revoking the nomination of the Authority as the Primary Authority for the Regulated Person in relation to any or all of the Relevant Functions.

**RESA**

means the Regulatory Enforcement and Sanctions Act 2008.

**Services**

means:

- the giving of advice and guidance to the Regulated Person and other Local Authorities pursuant to section 27(1) of RESA;
- if applicable, directing an enforcing authority not to take enforcement action pursuant to section 28(2) of RESA;
- if applicable, making an inspection plan in accordance with section 30 of RESA;
- such other services as the Authority is required to carry out in the discharge of its functions under RESA or any other Legal Requirement in respect of the Relevant Functions;
- the additional services set out in Schedule 4; and
- such other services as the parties agree shall be provided by the Authority under this Agreement.

**Service Levels**

means the Service Levels detailed in Schedule 5.

1.2 The clause headings in this Agreement are for the convenience of the parties only and shall not limit or govern or otherwise affect its interpretation in any way.

1.3 A reference to any statutory or legislative provision includes a reference to that provision as modified, replaced, amended and/or re-enacted from time to time and any subordinate legislation made under it.

1.4 References to the masculine in this Agreement include the feminine, and the singular includes the plural and vice versa.

**2. SCOPE AND CONDITION PRECEDENT**

2.1 This Agreement shall apply to [England] [Wales] [England and Wales] [Scotland] [Northern Ireland] [amend Governing Law and Jurisdiction clause accordingly].

2.2 The Regulated Person and the Authority have agreed that the Authority shall be the Primary Authority for the Regulated Person for the Relevant Functions.

2.3 The parties agree that they shall apply to LBRO to nominate the Authority as the Primary Authority for the Regulated Person for the Relevant Functions.

- 2.4 For the avoidance of doubt, nothing in this Agreement shall:
- 2.4.1 fetter the Authority's discretion to exercise any right or obligation which it is entitled to exercise at law; nor
  - 2.4.2 require the Authority to act or cease to act in any way which is contrary to any Legal Requirement.
- 2.5 The parties agree to provide LBRO with all advice and support that it may reasonably require in carrying out its functions pursuant to RESA.
- 2.6 This Agreement shall be conditional on LBRO nominating the Authority as the Regulated Person's Primary Authority pursuant to section 25 (1) of RESA (the "**Nomination**"). Both parties agree to use their reasonable endeavours to attain the Nomination. It shall be a condition precedent of this Agreement that the Nomination be awarded and this Agreement (with the exception of this Clause 2.6) shall be of no force and effect until such time as the Nomination is made. If such a Nomination has not been made within **15** days of the date of this Agreement or if another Local Authority is appointed in relation to the Relevant Functions, this Agreement shall be null and void.

### 3. **AUTHORITY'S OBLIGATIONS**

- 3.1 The Authority agrees that it shall provide the Services and act as the Regulated Person's Primary Authority in relation to the Relevant Functions subject to the provisions of this Agreement.
- 3.2 The Authority agrees that the Services shall be provided:
- 3.2.1 by suitably qualified staff and in a professional and courteous manner;
  - 3.2.2 with reasonable skill and care;
  - 3.2.3 [in accordance with the Service Levels;]
  - 3.2.4 in accordance with any timescales agreed between the parties outside the Service Levels (and if no such timescale is agreed then the Services shall be performed within a reasonable timescale);
  - 3.2.5 in a timely manner (but time shall not be of the essence in relation to the delivery of the Services by the Authority under this Agreement);
  - 3.2.6 in accordance with RESA; and
  - 3.2.7 without prejudice to Clause 3.2.6, in accordance with all Legal Requirements.

### 4. **REGULATED PERSON'S OBLIGATIONS**

- 4.1 The Regulated Person shall:
- 4.1.1 co-operate with the Authority in relation to the provision of the Services;
  - 4.1.2 inform the Authority as soon as reasonably practicable of any material change affecting the Regulated Person (or its Group of Companies) that may impact upon the Services or the volume of Services required;
  - 4.1.3 provide information to the Authority with regard to its requirements for Services which is accurate in all material respects;

- 4.1.4 provide the Authority with reasonable notice of its requirements for provision of the Services; and
- 4.1.5 act reasonably in performing its obligations under this Agreement.
- 4.2 The Regulated Person hereby agrees that it will provide the Authority and its employees, representatives and agents with such information and assistance as the Authority may reasonably require in order to enable or facilitate the Authority duly and punctually to comply with its obligations under this Agreement.
- 4.3 If and to the extent that the Regulated Person breaches this Agreement and the Authority is unable to perform any obligation as a direct result of such breach or any other act or omission by the Regulated Person, any such breach by the Authority of its obligations shall not constitute a breach of this Agreement; the Authority shall be entitled to rely on such breach by the Regulated Person as relieving it from the performance of its obligations to the extent that and for so long as such default by the Regulated Person precludes or restricts performance by the Authority of its obligations under this Agreement but not further or otherwise.
- 5. CHARGES AND PAYMENT**
- 5.1 The Regulated Person shall pay the Authority the Charges in consideration of the provision of the Services.
- 5.2 The Authority shall be entitled to invoice the Regulated Person for the Charges on a monthly basis.
- 5.3 The Regulated Person shall pay any amounts owing within [60 days from the date of the Authority's invoice].
- 5.4 The Charges shall be exclusive of VAT (if applicable).
- 5.5 The Regulated Person shall pay all sums to the Authority without set-off, deduction or any withholding whatsoever. Notwithstanding this, in the event of a bona fide dispute in relation to any invoice (of which the Regulated Person has notified the Authority in writing prior to the due date for payment), the Regulated Person shall be entitled to withhold only the amount relating to the specific element of the invoice which is in dispute until such time as the dispute is resolved.
- 5.6 If the Regulated Person fails to pay on the due date any amount which is payable to the Authority under this Agreement, then (subject to Clause 5.5 above) that amount shall bear interest from the due date until payment is made in full, both before and after judgment, at 4 per cent per annum over the base rate of Lloyds TSB Bank plc (or any successor to its business) from time to time.
- 5.7 The parties acknowledge that the Charges are intended to reflect the cost to the Authority of providing the Services. Therefore, should there be a change affecting either party that materially impacts on (or could be expected to have a material impact on) the cost to the Authority of providing the Services, it shall notify the other party as soon as is reasonably practicable and the parties shall discuss in good faith any amendment to the Charges that may be required.
- 6. DURATION AND TERMINATION**
- 6.1 Subject to Clause 2.6, this Agreement shall come into force on the date on which it is signed and shall continue in force unless and until it is terminated in accordance with its terms.
- 6.2 This Agreement shall terminate automatically in relation to any Relevant Function for any Relevant Person if LBRO issues a Revocation Notice in relation to that Relevant Function and Relevant Person pursuant to section 26(4) of RESA.

- 6.3 A Regulated Person or the Authority shall be entitled to request LBRO to issue a Revocation Notice in relation to all or any number of the Relevant Functions for a Regulated Person by giving the other party at least [two months] written notice.
- 6.4 A Regulated Person or the Authority shall be entitled to request LBRO to issue a Revocation Notice in relation to all or any number of the Relevant Functions for a Regulated Person if:
- 6.4.1 the other commits any material and adverse breach of any of the provisions of this Agreement and, in the case of such a breach which is capable of remedy, fails to remedy the same within 30 days after receipt of a written notice giving particulars of the breach and requiring it to be remedied;
- 6.4.2 the Regulated Person:
- (a) has any act or step (whether by application to the court or otherwise) taken in respect of it by any person seeking to appoint a trustee in bankruptcy, administrator, liquidator, receiver or administrative receiver which is not discharged within seven days or takes any such act or step itself;
  - (b) is unable to meet its debts as they fall due or makes a composition or arrangement with its creditors;
  - (c) suffers any analogous event to those specified in Clauses 6.4.2 (a) or (b) under the laws of a jurisdiction other than that of England and Wales; or
  - (d) ceases, or threatens to cease, to carry on business; or
- 6.4.3 the Authority is dissolved or ceases to exist.
- 6.5 No party will request LBRO to issue a Revocation Notice in relation to all or any number of the Relevant Functions other than in the circumstances set out in Clause 6.3 or 6.4.
- 6.6 If a party requests LBRO to issue a Revocation Notice under Clause 6.4, it shall give the other written notice of such a request as soon as is reasonably practicable.
- 6.7 Notwithstanding Clauses 6.3 and 6.4, termination of this Agreement in relation to any Relevant Function for any Regulated Person shall only take effect when LBRO issues a Revocation Notice in relation to that Relevant Function and Regulated Person. Until such Revocation Notice is given, the Agreement shall continue in full force and effect.
- 7. CONSEQUENCES OF TERMINATION**
- 7.1 Termination of this Agreement for any reason shall be without prejudice to any right or remedy of any party which may have accrued prior to such termination.
- 7.2 Termination or expiry of this Agreement shall not affect those provisions which impliedly or expressly continue following termination or expiry.
- 7.3 On any termination or expiry of this Agreement, each party shall return any Confidential Information or other materials belonging to the other to that other party as soon as is reasonably practicable.
- 7.4 On termination of this Agreement, the Authority shall provide such support as may be reasonably required to transfer the Services to any other Primary Authority. The Regulated Person agrees that it shall pay the Authority's costs that it incurs in providing such support.
- 7.5 If this Agreement is terminated in relation to any specific Regulated Person, the Agreement shall continue in full force and effect in relation to the other Regulated Persons.

## 8. SCOPE OF ADVICE AND LIABILITY

8.1 The parties agree that:

8.1.1 the fundamental reason for the provision of advice by the Authority is to promote consistent interpretation;

8.1.2 the interpretation and guidance provided by the Authority is open to scrutiny by both LBRO and the courts;

8.1.3 the advice and guidance provided by the Authority may not prevent enforcement action in the future;

8.1.4 the advice or guidance provided by the Authority may become obsolete; and

8.1.5 the duty in relation to compliance remains with the Regulated Person.

8.2 Except as expressly stated in this Agreement, all implied warranties are excluded to the fullest extent permissible in law.

8.3 Neither party excludes or limits liability to the other party for fraud nor for death or personal injury caused by its negligence (as defined in the Unfair Contract Terms Act 1977) or any breach of any obligations implied by section 2 of the Supply of Goods and Services Act 1982 or for any other liability for which it is not possible to exclude or limit liability by operation of law.

8.4 The Authority's liability to the Regulated Person arising out of or in connection with this Agreement, RESA or any other Legal Requirements (whether in contract, tort, negligence or otherwise) shall be limited in any year to the amount paid by the Regulated Person in that year for the Services.

8.5 Without prejudice to Clause 8.3, in no event shall either party be liable to the other (whether in contract, tort, negligence or otherwise) for:

8.5.1 any loss of profits (whether direct or indirect);

8.5.2 loss of business;

8.5.3 loss of opportunity;

8.5.4 loss of revenue;

8.5.5 loss of goodwill;

8.5.6 loss of anticipated contracts;

8.5.7 loss of anticipated savings; and/or

8.5.8 indirect or consequential loss or damage.

## 9. CONFIDENTIALITY

9.1 Each party:

9.1.1 shall treat all Confidential Information belonging to the other party as confidential and safeguard it accordingly; and

- 9.1.2 shall not disclose any Confidential Information belonging to the other party to any other person without the prior written consent of the other party, except to such persons and to such extent as may be necessary for the performance of the Agreement or except where disclosure is otherwise expressly permitted by the provisions of the Agreement.
- 9.2 Both parties shall take all necessary precautions to ensure that all Confidential Information obtained from the other party under or in connection with the Agreement:
- 9.2.1 is given only to such of the staff and professional advisers or consultants engaged to advise it in connection with the Agreement as is strictly necessary for the performance of the Agreement and only to the extent necessary for the performance of the Agreement; and
- 9.2.2 is treated as confidential and not disclosed (without prior approval) or used by any staff or such professional advisers or consultants otherwise than for the purposes of the Agreement.
- 9.3 Neither party shall use any Confidential Information it receives from the other party otherwise than for the purposes of the Agreement.
- 9.4 The provisions of Clauses 9.1 to 9.3 shall not apply to any Confidential Information received by one party from the other which:
- 9.4.1 is or becomes public knowledge (otherwise than by breach of this clause);
- 9.4.2 was in the possession of the receiving party without restriction as to its disclosure before receiving it from the disclosing party;
- 9.4.3 is received from a third party who lawfully acquired it and who is under no obligation restricting its disclosure;
- 9.4.4 is independently developed without access to the Confidential Information; or
- 9.4.5 must be disclosed pursuant to a statutory, legal or parliamentary obligation placed upon the party making the disclosure, including any requirements for disclosure under FOIA or the Environmental Information Regulations 2004 pursuant to Clause 10.
- 9.5 Nothing in this clause shall prevent the Authority:
- 9.5.1 disclosing any Confidential Information for the purpose of:
- (a) the examination and certification of the Authority's accounts; or
- (b) any examination pursuant to sections 44 and 46 of the Audit Commission Act 1998 of the economy, efficiency and effectiveness with which the Authority has used its resources; or
- 9.5.2 disclosing any Confidential Information obtained from the Regulated Person:
- (a) to any government department or any other Local Authority. All government departments or Local Authorities receiving such Confidential Information shall be entitled to further disclose the Confidential Information to other government departments or other Local Authorities on the basis that the information is confidential and is not to be disclosed to a third party which is not part of any government department or any Local Authority; or

- (b) to any person engaged in providing any Services to the Authority for any purpose relating to or ancillary to the Agreement,

provided that, in disclosing information under sub-paragraph (b), the Authority discloses only the information which is necessary for the purpose concerned and requires that the information is treated in confidence and that a confidentiality undertaking is given where appropriate.

## 10. FREEDOM OF INFORMATION

10.1 The Regulated Person acknowledges that the Authority is subject to the requirements of FOIA and the Environmental Information Regulations and shall assist and co-operate with the Authority (at the Regulated Person's expense) to enable the Authority to comply with these Information disclosure requirements.

10.2 The Authority shall be responsible for determining at its absolute discretion whether the Commercially Sensitive Information and/or any other Information:

10.2.1 is exempt from disclosure in accordance with the provisions of FOIA or the Environmental Information Regulations; and/or

10.2.2 is to be disclosed in response to a Request for Information.

In no event shall the Regulated Person respond directly to a Request for Information unless expressly authorised to do so by the Authority.

10.3 The Regulated Person acknowledges that the Authority may, acting in accordance with the Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part 1 of FOIA (issued under section 45 of FOIA, November 2004), be obliged under FOIA or the Environmental Information Regulations to disclose Information:

10.3.1 without consulting the Regulated Person; or

10.3.2 following consultation with the Regulated Person and having taken its views into account.

10.4 The Regulated Person acknowledges that any lists, schedules or notices provided by it outlining Confidential Information are of indicative value only and that the Authority may nevertheless be obliged to disclose Confidential Information in accordance with Clause 10.3.

## 11. DISPUTE RESOLUTION

11.1 The parties shall attempt in good faith to negotiate a settlement to any dispute between them arising out of or in connection with the Agreement and such efforts shall involve the escalation of the dispute to the finance director (or equivalent) of each party.

11.2 Nothing in this dispute resolution procedure shall prevent the parties from seeking from any court of the competent jurisdiction an interim order restraining the other party from doing any act or compelling the other party to do any act.

11.3 The performance of the Agreement shall not be suspended, cease or be delayed by the existence of a dispute and the parties shall comply fully with the requirements of the Agreement at all times.

## 12. **ASSIGNMENT/SUBCONTRACTING**

- 12.1 This Agreement is personal to the parties and the Regulated Person shall not assign or subcontract any of the Regulated Person's rights and obligations under this Agreement without the prior written consent of the Authority.

## 13. **SEVERABILITY**

- 13.1 In the event that any of the terms of this Agreement are determined by any competent authority to be invalid or unenforceable to any extent, such term shall to that extent be severed from the body of this Agreement, which shall continue to be valid and enforceable to the fullest extent permitted by law.

## 14. **ENTIRE AGREEMENT**

- 14.1 This Agreement sets out the entire agreement and understanding between the parties and supersedes all prior agreements and understandings relating to its subject matter. No party has entered into this Agreement in reliance upon any representation, warranty or undertaking of any other party which is not set out or referred to in this Agreement.

## 15. **STATUS OF PARTIES**

- 15.1 Nothing in this Agreement shall be construed as establishing or implying a partnership or joint venture between the parties or shall be deemed to constitute either party as the agent of the other or to allow either party to hold itself as acting on behalf of the other.

- 15.2 Where the Regulated Person is more than one party:

15.2.1 the obligations of the Regulated Person shall be joint and several; and

15.2.2 references to the Regulated Person shall be deemed to be a reference to each individual person listed in Schedule 1.

## 16. **VARIATION AND CHANGE CONTROL**

- 16.1 If either party wishes to request a change to this Agreement (a "**Change**"), it shall issue a written notice to the other detailing the Change proposed (a "**Change Request**").

- 16.2 Within **[seven]** working days of receipt of the Change Request, the parties shall meet to discuss:

16.2.1 the likely impact of the Change;

16.2.2 the desirability of the Change;

16.2.3 the work required to achieve the Change; and

16.2.4 the impact of the Change on the Charges.

- 16.3 If the parties agree the Change, the Change shall not be implemented until the parties have agreed and signed a written agreement (a "**Change Agreement**").

- 16.4 Neither this Agreement nor any of its terms or conditions can be varied or waived unless expressly agreed in writing and signed on behalf of the Authority and the Regulated Person.

**17. COUNTERPARTS**

- 17.1 This Agreement may be executed in any number of counterparts, each of which, when executed and delivered, shall be an original, and all counterparts together shall constitute one and the same instrument.

**18. THIRD PARTY RIGHTS**

- 18.1 This Agreement is not intended to create any benefit, claim or rights of any kind whatsoever enforceable by any person who is not a party to this Agreement. Accordingly, the parties confirm that no term of this Agreement is enforceable under the Contracts (Rights of Third Parties) Act 1999 by a person who is not a party to this Agreement.

**19. NOTICES**

- 19.1 Any notice to be given hereunder shall be in writing. Any notice to be given to the Authority or the Regulated Person shall be sufficiently served either if delivered personally or sent by recorded delivery post to the address set out in this Agreement (or such other address in the United Kingdom as the addressee may from time to time notify for the purposes of this clause). Any notice, if posted, shall be deemed to have been served at the time when in the ordinary course of postal delivery such notice would have been received, or, if delivered by hand, any notice shall take effect on delivery.

**20. GOVERNING LAW AND JURISDICTION**

- 20.1 This Agreement is governed by [English] law and, subject to Clause 10, the parties submit to the exclusive jurisdiction of the [English courts] over any matter or claim arising under or in connection with this Agreement.

**EXECUTED** by the parties.

**SCHEDULE 1**  
**REGULATED PERSONS**

Name	Details

**SCHEDULE 2**  
**RELEVANT ENACTMENTS**

[Description of Services, with reference made to the relevant legislation.]

### SCHEDULE 3

#### FEES

[Details of Charges to be included. This section will need to cover elements such as:

- level of Charges;
- any ability to vary the Charges year on year; and
- where there is more than one Regulated Person, how the fees amass across these parties. This will be particularly important if one Regulated Person leaves the group.]

**SCHEDULE 4**  
**ADDITIONAL SERVICES**

**SCHEDULE 5**  
**SERVICE LEVELS**

**EXECUTED for and on behalf of [Authority]**

acting by:

Signature:

Signature:

Name: [ ]

Name: [ ]

Position: [ ]

Position: [ ]

Date: [ ]

Date: [ ]

**EXECUTED for and on behalf of [Regulated****Person]** acting by:

Signature:

Signature:

Name: [ ]

Name: [ ]

Position: [ ]

Position: [ ]

Date: [ ]

Date: [ ]

**EXECUTED for and on behalf of [Regulated****Person]** acting by:

Signature:

Signature:

Name: [ ]

Name: [ ]

Position: [ ]

Position: [ ]

Date: [ ]

Date: [ ]

## Annex 3: List of Organisations to be Consulted

Advertising Standards Authority  
 Age Concern  
 Alliance Boots  
 Amicus  
 Asda  
 Association of Convenience Stores  
 Audit Commission  
 Audit Scotland  
 Better Regulation Executive  
 British Cement Association  
 British Chambers of Commerce  
 British Contract Furnishing and Design Association  
 British Hospitality Association  
 British Retail Consortium  
 Camelot  
 Cattles plc  
 Chartered Institute of Environmental Health  
 Chartered Institute of Public Finance and Accountancy  
 Chemical Industries Association  
 Chief Fire Officers' Association  
 Citizens Advice  
 Commission for Equality and Human Rights  
 Communities and Local Government  
 Companies House  
 Competition Commission  
 Confederation of British Industry  
 Consumer Council for Water  
 Consumer Focus  
 Convention of Scottish Local Authorities  
 Co-operative Group  
 Department for Business, Enterprise and Regulatory Reform  
 Department for Culture, Media and Sport  
 Department for Environment, Food and Rural Affairs  
 DSG International  
 Engineering Employers' Federation  
 Enterprise Directorate (formerly Small Business Service)  
 Environment Agency  
 Environment and Heritage Service  
 Environmental Industries Commission  
 Federation of Small Businesses  
 Financial Reporting Council  
 All Fire and Rescue Authorities in England, Wales, Scotland and Northern Ireland  
 Food and Drink Federation  
 Food Standards Agency  
 Foodaware  
 Forum of Private Business  
 Gambling Commission  
 Halfords  
 Health and Safety Executive  
 Help the Aged  
 Home Office  
 Home Retail Group  
 Iceland Foods  
 Improvement and Development Agency  
 Improvement Service  
 Institute of Directors  
 Institute of Licensing

John Lewis Partnership  
Justices' Clerks' Society  
Kingfisher plc/B&Q  
Law Society  
Littlewoods  
All Local Authorities in England, Wales, Scotland and Northern Ireland  
Local Authorities Coordinators of Regulatory Services  
Local Government Association  
Local Government Employers  
London Hazards Centre  
Marks & Spencer  
Morrisons  
Moto  
National Audit Office  
National Weights and Measures Laboratory  
Northern Ireland Assembly  
Northern Ireland Audit Office  
Northern Ireland Local Government Association  
Office for National Statistics  
Office of Fair Trading  
Office of the Scottish Charity Regulator  
One Stop Stores  
Pennon Group plc  
PricewaterhouseCoopers  
Professional Contractors Group  
Provision Trade Federation  
Risk and Regulation Advisory Council  
Royal Environmental Health Institute of Scotland  
Sainsbury's  
Scottish Environment Protection Agency  
Scottish Government  
Scottish Trades Union Congress  
Security Industry Authority  
Small Business Council  
Society of Chief Trading Standards Officers  
Society of Local Authority Chief Executives and Senior Managers  
Sommerfield  
Tesco  
Trade Association Forum  
Trades Union Congress  
Trading Standards Institute  
UK Environmental Law Association  
UK Intellectual Property Office  
UNISON  
Unite  
United Kingdom Accreditation Service  
Waitrose  
Wales Audit Office  
Welsh Assembly Government  
Welsh Local Government Association  
Which? (formerly Consumers' Association)

## Annex 4: About this Consultation

This consultation document has been prepared in accordance with LBRO's policy on the production of statutory guidance.

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes. If you want the information that you provide to be treated as confidential, please be aware that, under the Freedom of Information Act, there is a statutory code of practice with which public authorities must comply. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.

### Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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Director of Policy and Engagement  
Local Better Regulation Office  
The Axis  
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Birmingham  
B1 1TG

Telephone: 0121 226 4000

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Website: [www.lbro.org.uk](http://www.lbro.org.uk) (see: Our Publications/Consultations)

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