



BERR | Department for Business
Enterprise & Regulatory Reform

**GOVERNMENT RESPONSE TO
THE CONSULTATION ON THE
STATUTORY INSTRUMENTS
UNDER THE REGULATORY
ENFORCEMENT AND
SANCTIONS ACT 2008**

MARCH 2009

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**BETTER
REGULATION
EXECUTIVE**

Government response to the
consultation on the

Statutory Instruments under the Regulatory Enforcement and Sanctions Act 2008

Contents

	Page no
Executive summary	7
Introduction	9
Application to Scotland and Northern Ireland	11
Defining enforcement action	14
<i>What should be regarded as enforcement action?</i>	14
<i>What should not be regarded as enforcement action?</i>	17
Licensing Act 2003, Gambling Act 2005, Regulatory Reform (Fire Safety) Order 2005	22
Exclusions from the requirement to notify the Primary Authority	25
<i>Urgent action to prevent significant risk of serious harm</i>	25
<i>Where the application of the Primary Authority provisions would be wholly disproportionate</i>	27
<i>Urgent preventative action, in relation to minor harm</i>	29
Part 8 of the Enterprise Act 2002 and enforcement undertakings by a business	31
<i>Enforcement undertakings by a business</i>	31
References to LBRO and its determination procedure	34
<i>Deadlines for reference to LBRO</i>	34
<i>Information that LBRO may require before giving consent</i>	35
<i>Matters LBRO may take into account when making a determination</i>	37
<i>Further provisions regarding the determination process</i>	38
Impact Assessment	39
Annex A List of respondents	41
Annex B Analysis of responses to specific questions	43

Executive summary

- i. This document is the Government response to the consultation on the Primary Authority scheme. The scheme is contained within Part 2 of the Regulatory Enforcement and Sanctions Act 2008 (the Act), which received Royal Assent on 21 July 2008.
- ii. The scheme allows businesses, charities or other organisations that operate across more than one site, to enter into a partnership with a local authority for it to become a Primary Authority.
- iii. The response to the consultation was generally of a positive nature and gave broad consideration to both the issues and potential solutions. The Government has adopted several of the suggestions proposed and believes these changes will be beneficial to the successful operation of the Primary Authority scheme.
- iv. All stakeholder groups expressed strong support for regular flows of information between all parties within the Primary Authority scheme. Respondents saw the success of the scheme as being dependent on effective communication.
- v. The importance of finding the right balance between what constitutes enforcement action and therefore within the scope of the Primary Authority scheme, is key to its successful operation. If the definition is too wide, the Primary Authority could be overburdened; too narrow and the impact of the scheme is weakened. The overwhelming majority of consultees accepted that oral advice should not be considered enforcement action, which the Government agrees with.
- vi. The inclusion of written advice within the definition of enforcement action was less clear cut. Business respondents felt strongly that all written advice should be subject to scrutiny by the Primary Authority. Local authorities' views were more divided. Some felt that it would be unworkable and undesirable to cast all letters as enforcement action. Following consultation, we consider that a distinction needs to be made between letters that go beyond written advice threatening penalties if a business does not take a certain action by a certain time.
- vii. The vast majority of respondents felt that investigative activities should not be considered enforcement action for the purpose of the scheme. The Government agrees with this approach.
- viii. The consultation responses largely supported the Government's position to keep genuinely local issues, which have the greatest impact on local communities, out of the scope of the Primary Authority scheme. Therefore, the Licensing Act 2003, Gambling Act 2005 and fire safety under the Regulatory Reform (Fire Safety Order) 2005 will not be part of the scheme. However, these areas will be considered in conjunction with the formal review of LBRO (which will take place as soon as is practicable after October 2011), as required by the Act.

- ix. We consulted on whether to exclude actions taken under Part 8 of the Enterprise Act 2002 from the Primary Authority scheme and local authorities were broadly content with the proposal. However, business respondents expressed concern as it would create the possibility of inconsistent enforcement by local authorities and impose additional burdens on business. As a result, the definition of enforcement action will be amended to include actions taken under Part 8 of the Enterprise Act 2002.
- x. Agreements between business and local authority regulators to set out how the business can be brought back into compliance with the law are often used. Business respondents told us that they often provide undertakings reluctantly to avoid further action. The Primary Authority scheme is underpinned by the effective flow of information between enforcing authorities, primary authorities, regulated bodies and LBRO. We feel that in keeping with the fundamental purpose of the scheme, the interests of wider consistency, defining enforcement undertakings as enforcement action can only be beneficial.
- xi. Almost all respondents felt that provisions were needed to allow enforcing authorities the flexibility to act quickly when harm is imminent and quick action is essential to prevent this harm. The Government agrees and the proposed exclusions from the requirement to pre-notify the Primary Authority in such urgent situations will remain within the scheme.
- xii. Some consultees regretted that the scheme will not uniformly cover the whole of the UK. However, useful suggestions were made regarding legislation that should not be listed as they relate to devolved matters in relation to Scotland or transferred matters in relation to Northern Ireland. Similarly, suggestions were made regarding functions that were not listed in the SI that should be. We have taken into account the views regarding reserved and non-transferred matters in Scotland and Northern Ireland and have refined the list of legislation that will appear in the final SI.
- xiii. There was overwhelming support for the proposal that LBRO should have access to all necessary information in order to make its determination. Respondents felt that LBRO should take consistency with its own guidance into account when making a determination. However, many stressed that each case must be looked at on its own (individual) basis to ensure the correct decision is reached. The proposal of 10 working days to refer the case to LBRO was considered fair.
- xiv. The Government remains committed to the Primary Authority scheme and is extremely grateful for the views put forward to help make the scheme operate as effectively as possible.

Introduction

- i. On 10 September 2008, the Government published a consultation paper seeking views on the Primary Authority scheme. The scheme is contained within Part 2 of the Regulatory Enforcement and Sanctions Act 2008 (the Act), which received Royal Assent on 21 July 2008.
- ii. The scheme allows businesses, charities or other organisations that operate across more than one site, to enter into a partnership with a local authority for it to become a Primary Authority. Where the Local Better Regulation Office (LBRO) has registered a Primary Authority, any other local authority (known as an 'enforcing authority' for the purposes of the scheme) that proposes to take enforcement action against an organisation must contact the Primary Authority first. The Primary Authority can then block the proposed enforcement action if it believes that it is inconsistent with advice or guidance that it has previously given.
- iii. The consultation document was published to gather views on the Statutory Instruments (SIs) which are needed for the effective operation of the scheme.
- iv. The consultation and draft Impact Assessment was sent to over 100 stakeholders, interested organisations, and individuals. This included representatives of business, small and medium sized enterprises, local authorities, trading standards and environmental health professionals, national regulators and legal services. It was also sent to every local authority in the UK.
- v. During the consultation period, officials from BERR organised a number of workshops with businesses, regulators, professional bodies and local authority representatives to discuss the Government's proposals. In addition, at LBRO's inaugural conference on 11 November the Primary Authority was a key theme. Since then, LBRO has worked closely with 30 local authorities and businesses to trial the scheme. The results of the trial will help to shape the final statutory form of the scheme and assist LBRO in finalising the operational details including Partnership Agreements and Inspection Plans.
- vi. 90 responses were received during the 12-week consultation period (See fig.1 for breakdown by sector). A full list of all the consultation respondents, with the exception of those who requested anonymity or confidentiality, can be found at Annex A. Analysis of the responses received to specific questions can be found at Annex B.
- vii. The Government is grateful for all the consultation responses received. This paper seeks to reflect the views offered, although it is not possible to describe all responses in detail.

Responses by sector

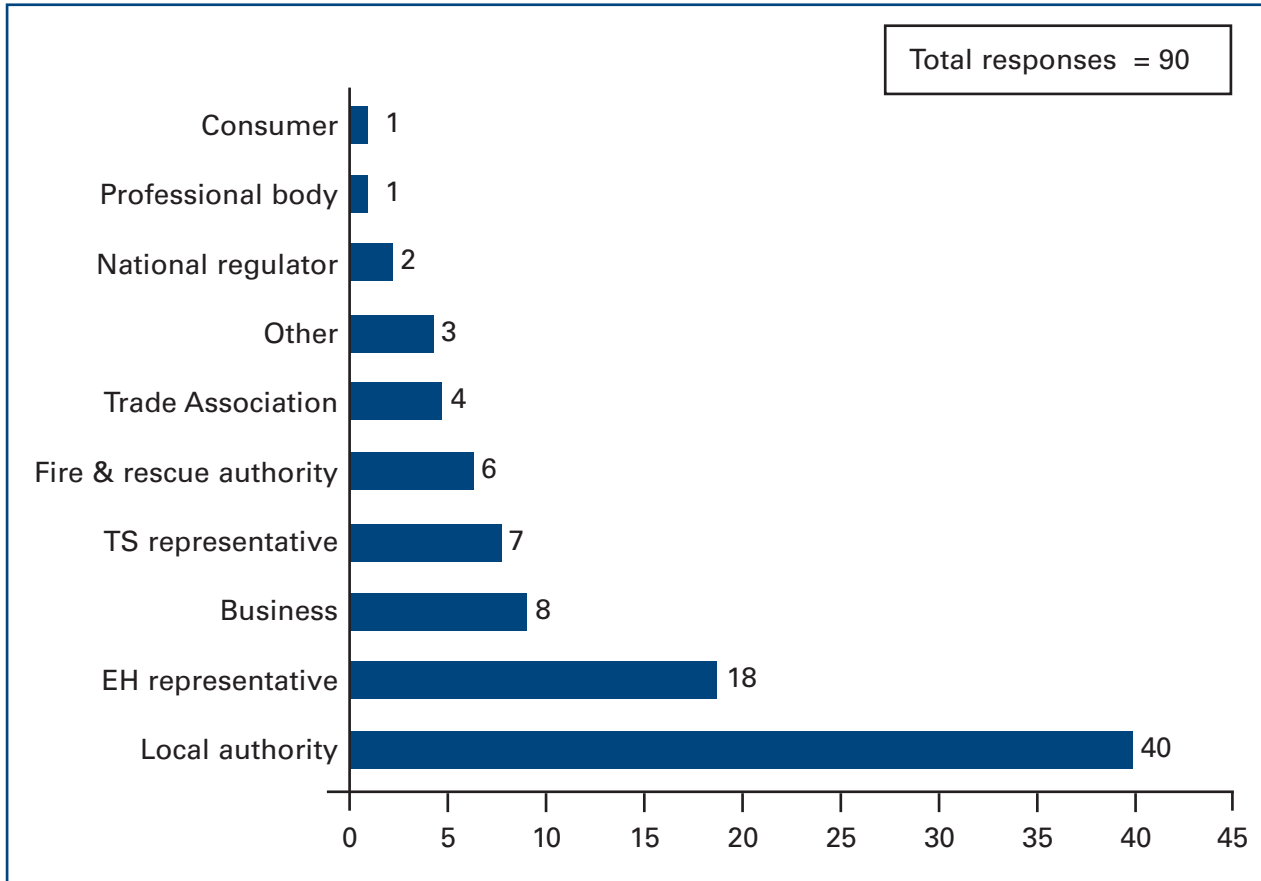


Figure 1

Breakdown of responses by sector

TS = Trading standards
EH = Environmental health

Application to Scotland and Northern Ireland

Proposal

The Primary Authority scheme applies in Scotland and Northern Ireland to local authority trading standards, environmental health, and some fire safety functions. The scheme applies where these are exercised under legislation where the competence to legislate has not been devolved to the Scottish Executive or transferred to the Northern Ireland Assembly.

It is necessary to list the relevant regulatory functions that are exercised by these local authorities to apply the Primary Authority scheme to local authorities in Scotland and Northern Ireland. Question 1 asked whether we had incorrectly included legislation that was devolved and question 2 asked whether there were any omissions from that list.

Question 1

Is there any legislation on these lists that you believe relates to matters which are not reserved matters in relation to Scotland or transferred in Northern Ireland or should for any other reason not be included?

- 1.1 The vast majority of respondents either did not give a view, said that there was nothing further to add or that they would be happy to leave the issue to Northern Ireland and Scottish colleagues to comment upon.
- 1.2 The Society of Chief Officers of Trading Standards in Scotland suggested that the following legislation should not be included:
 - Medicines Act 1968 (section 109)
 - Road Traffic Offenders Act 1988 (section 4)
 - Offshore Safety Act 1992(47) (sections 1 and 2)
 - Development of Tourism Act 1969
 - Fair Trading Act 1973
 - Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987
 - Any function under the Disability Discrimination Act 1995(115) which does not relate to the encouragement of and observance of equal opportunities requirements.
- 1.3 One Northern Ireland council responded that the Noise Act 1996 should be removed from the list of legislation as it only applies to noise from residential dwellings in Northern Ireland.

The Government's position

- 1.4** The list of legislation that we consulted on had inadvertently captured some matters that are devolved to Scotland and Northern Ireland so we were grateful that respondents noted these occurrences. Following consideration and liaison with the devolved administrations, the list has been revised to ensure that devolved or transferred matters have not been captured. The list now also includes full details of secondary legislation implementing European obligations where that also confers functions which are reserved or not transferred.
- 1.5** In relation to Scotland, we have retained in the SI the Medicine Act, the Development of Tourism Act, the Fair Trading Act and the Disability Discrimination Act as they are or have reserved functions contained in them.
- 1.6** The Road Traffic Offenders Act has been removed from the list as it is not in the scope of the Act. The Offshore Safety Act has been removed as it is enforced by the Health and Safety Executive, not local authorities. The Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987 have been revoked, and replaced by the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008.
- 1.7** In relation to Northern Ireland, it was important to note that many regulatory functions are carried out centrally, rather than by district councils. The list in Schedule 2 to the SI lists the legislation which is not transferred and where district councils have functions. The Noise Act 1996 has been removed from the list, as there are not relevant functions (as defined in the Act) for district councils.
- 1.8** Some respondents noted regret that the Primary Authority scheme does not apply across the UK as a whole in a uniform manner, citing lack of UK-wide consistency to the detriment of Scottish based sites. However, due to the devolution process, the decision to legislatively extend the scheme to Scotland and Northern Ireland is for the Scottish Executive and Northern Ireland Assembly to consider independently as they see fit.

Question 2

Is there any legislation that is not on these lists that you believe should be included? This may include Acts of Parliament, statutory instruments or European obligations. Please be as specific as possible.

- 2.1** Around one in six respondents offered suggestions concerning legislation or functions that are not currently on the list but that should be included. For conciseness, the most often cited legislation that respondents felt should be included were:
- Estate Agents Act 1979
 - Motor Cycle Noise Act 1987
 - Education Reform Act 1988
 - Packaging (Essential Requirements) Regulations 2003
 - Various Energy Information regulations.

The Government's position

- 2.2** The Government appreciates the suggestions that were made to list additional legislation that should be within scope of the Primary Authority scheme. We are in the process of revising the list in consultation with the devolved administrations. The final list will be published in the SI.
- 2.3** We have, however, been able to accept most of the recommendations above with the specific exception of the Packaging (Essential Requirements) Regulations 2003, as these relate to devolved matters. Other legislation was suggested, but it was either devolved or transferred.

Defining enforcement action

What should be regarded as enforcement action?

Proposal

Local authorities use a variety of methods to secure compliance. These range from providing advice and guidance to assist the business, through to prosecution. As well as promoting consistency, the scheme is intended to help local authorities decide what action will be necessary and proportionate in a given circumstance to bring about a successful outcome with the minimum burden to business. Given the unique perspective that the Primary Authority has of the business, early contact between local authorities and the Primary Authority is likely to be valuable in determining a proportionate response to non-compliance.

In order to ensure consistency, the Act mandates that enforcement action must be notified in all circumstances to the Primary Authority. Defining enforcement action in a clear way is important as it determines the circumstances in which the opinions of the Primary Authority, and potentially LBRO, must be taken into account. Given the significance of the definition, we asked seven questions (3-9) on matters relating to enforcement action.

Question 3

Do you agree that sanctions listed in the draft statutory instrument at Annex D should be regarded as enforcement action for the purposes of the Primary Authority scheme?

- 3.1 This question brought about two distinct answers: the first looking at the principle behind defining what should be regarded as enforcement action for the purposes of the scheme; the second, (having accepted the principle) the suitability of the specific sanctions listed in the consultation document.
- 3.2 Some businesses and business representative groups felt that enforcement action should be defined widely and that there should be a presumption that *“all forms of enforcement action should be included unless there is a clear practical reason why a specific form of action should be excluded”* (ASDA). These groups were not in favour of a list.
- 3.3 A far larger group was supportive of a list as this makes what should and what should not be considered enforcement action, thus promoting consistency.
- 3.4 However, it was felt that some sanctions should be removed from this list. In particular, abatement notices issued under Section 80 of the Environmental Protection Act 1990 (EPA) as it was felt they are particularly local in nature and should be dealt with solely by the local authority.

- 3.5** LACORS noted that, *“the activities which can constitute a statutory nuisance...which can therefore be the subject of an abatement notice under Section 80, do not automatically become a nuisance at a certain point (e.g. a certain level of noise or density of emissions) and their status as a nuisance (or not) is dependent on local conditions, especially the proximity to residential property at which they occur”*
- 3.6** Moreover, there was a widely expressed view that it was unnecessary to include enforcement actions in section 2 only to exclude them in section 3 of Annex D, although this was often due to a misinterpretation of what is meant by ‘exclusions’.

The Government’s position

- 3.7** In order to specify actions which are defined as ‘enforcement action’, the Government feels that the simplest and most coherent approach is to list them. This is important to limit confusion, promote consistency and increase the workability of the scheme. This is not intended to discourage local authorities from having early discussions with the Primary Authority to achieve effective regulatory outcomes.
- 3.8** There is an important distinction between actions not regarded as enforcement action and exclusions. When an action is not considered to be an enforcement action, it does not require notification to the Primary Authority. In the case of exclusions, the Primary Authority must be contacted, but this does not need to be done in advance of the enforcement action being taken.
- 3.9** There will be situations where action is urgently required to prevent harm and in these circumstances, we wanted to continue to allow local authorities to proceed immediately.
- 3.10** We feel the Primary Authority should still have oversight of the enforcement action so that it is aware of the issues the business faces across the country. This is why Article 3 of the Definition of Enforcement Action SI specifies situations where urgent action can be taken and where the enforcing authority needs to notify the Primary Authority as soon as possible after taking the action.
- 3.11** Therefore, an abatement notice is only served when there is an urgent need to do so and in the vast majority of cases, statutory nuisance under section 80 of the EPA falls under the ‘urgency’ exclusion provided for at Article 3. However, to put the issue beyond doubt, we are listing any action taken under this Act as being excluded from the need to pre-notify the Primary Authority. This will have the effect of keeping the Primary Authority and LBRO informed of the application of abatement notices, which may raise issues of consistency.

Question 4

Are there other sanctions that should be included in this list?

- 4.1** A minority of respondents advised that there were other sanctions that should be included in the list of enforcement actions, while the Confederation of British Industry (CBI) *“believed that all enforcement action as defined in the Regulatory Enforcement and Sanctions Act should be within the remit of the Primary Authority”*

- 4.2 Respondents argued that Police and Criminal Evidence Act (PACE) interviews, simple cautions, fixed penalty notices and Remedial Action Notices under the Food Hygiene (England) Regulations 2006 should be considered enforcement action.
- 4.3 Wakefield Metropolitan District Council noted that, *“a simple caution may, in some circumstances, be deemed more appropriate than a prosecution.”*
- 4.4 Some respondents used this question to promote the regime of enforcement action under the Regulatory Reform (Fire Safety) Order 2005, the Licensing Act 2003 and the Gambling Act to be included within the scheme. These issues are dealt with in full under question 10.

The Government’s position

- 4.5 **The Government believes that the scope of enforcement action under the Act required tighter definition. The SI that defines enforcement action prescribes activities that have the greatest impact on business if regulated inconsistently. We wanted to produce a list to ensure that actions that should be brought to the attention of the Primary Authority are as unambiguous as possible.**
- 4.6 Respondents asked for further clarity around the scope of the sanctions to be included within the scheme. In response to the views of consultees, we will add additional sanctions to the list of what is considered enforcement action.
- 4.7 These include fixed penalty notices, Remedial Action Notices, Variation Notices, Suspension Notices and Revocation Notices. In addition, we have also specifically included the civil sanctions which may be imposed by a regulator by virtue of Part 3 of the Act.
- 4.8 Simple cautions will also be considered enforcement action. They can be used as an alternative to prosecution, albeit generally for first time, low level offences. Therefore, to improve consistency of practice in a business across local authority boundaries, the Primary Authority should be pre-notified before such action is taken.
- 4.9 Conversely, we feel that PACE interviews form part of a local authority’s investigative activity, and so should not be considered enforcement action for the purpose of the scheme. The Government has sympathy with the argument from one borough in the south east of England that such investigative activities, *“provide an effective and essential means of gathering facts of a case upon which ensuing actions may be considered. Although such interviews take place once it is thought an offence has taken place, a case subject to a PACE interview will not necessarily result in a summons”*. This means that, while discussion between the enforcing authority and the Primary Authority will often take place prior to a PACE interview, it is not mandatory to undertake formal notification.

What should not be regarded as enforcement action?

Oral advice

Question 5

Do you agree that oral advice should not be regarded as enforcement action for the purposes of the Primary Authority scheme?

- 5.1 There was an overriding feeling from across the stakeholder groups that oral advice should not be regarded as enforcement action for the purposes of the Primary Authority Scheme. The CBI's view was common in recognising that *"it is impractical for enforcing authorities to contact the Primary Authority each time oral advice is given"*. Many respondents agreed with Trading Standards North West that it would be impossible to prove any alleged inconsistency, while making the scheme burdensome and also *"constrain discussions between business and officers which can only be detrimental to both"*.
- 5.2 However, business representative groups felt strongly that when advice that affects the way in which a business operates, then this should be communicated to the Primary Authority.

The Government's position

- 5.3 **In light of the strong support expressed by respondents, oral advice will not be regarded as notifiable enforcement action for the purposes of the scheme.**
- 5.4 **The Primary Authority will normally be the first point of contact for a local authority that has identified a local compliance issue 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. Oral advice will form a key part in securing compliance and the Government is confident that the Primary Authority scheme and LBRO's management of it will promote frequent dialogue and advice between the regulators and the regulated.**

Written advice

Question 6

Do you agree that written advice, even where it includes a warning regarding the possibility of a sanction, should not be considered enforcement action for the purposes of the Primary Authority scheme? If not, how might this be done without causing unnecessary bureaucracy?

- 6.1 There was a mixed response to this question. Four main viewpoints were highlighted.
- 6.2 First, that written advice in all forms should not be considered enforcement action. This was the view of the majority of local authority respondents. It was felt by some consultees that including it could cause an added burden and undue delays.
- 6.3 Secondly, all written advice should be considered enforcement action. This view was taken by a very small proportion of respondents, but accounted for a third of all business responses. The concern was that the definition of enforcement action was becoming too narrow and that there was no practical reason why written advice should be excluded.
- 6.4 Thirdly, that all written advice should be excluded but that the business could still take matters up with the Primary Authority should it so wish. Another view, from the Institution of Occupational Safety and Health, was that *“if written advice is to be given and it [is] not to be classed as enforcement it should be supported by the relevant guidance or approved code of practice”*. Where this has been suggested, it was often felt that the LBRO should have a greater role to play; *“offering strong advice around this area to Enforcing Authorities”* (West Yorkshire Trading Standards).
- 6.5 Fourthly, that written advice should be excluded with the notable exception of *“letters that indicate that a specific enforcement action will be taken within specified time periods, or at the end of a specified time period, if the business acts/fails to act in a certain way will be considered to be enforcement action”* (LACORS).

The Government’s position

- 6.6 **The Government has analysed the broad range of responses this question produced and looked carefully at the potential consequences of each one.**
- 6.7 **It is felt that if the Primary Authority has no oversight of written warnings, by simply excluding all written warnings from scope, this could undermine the effectiveness of the scheme and lead to inconsistencies in regulatory practice.**
- 6.8 **On the other extreme, the Government feels that primary authorities could be overburdened and potentially overwhelmed if all written advice were in scope.**

- 6.9 The third approach was considered to have some merit. However, the Government believes that guidance (in this case) lacks the necessary statutory backbone to ensure that this option would be successful.
- 6.10 The Government will take the fourth approach, which distinguishes between general advice and letters that include a warning of enforcement action. This clearly sets out the important difference between the two letters. To be classified as a written warning, the letter needs to:
- contain information about a breach of the law
 - contain a deadline to take the corrective action (or stop an infringing action)
 - contain a statement that a specific enforcement action will be taken after that deadline if the organisation does not comply.
- 6.11 An example of the distinction is provided below. Case A – This would not be enforcement action, therefore not requiring the consent of the Primary Authority.

“On 5 January 2009 we visited your branch in High Wycombe. We found numerous items of cosmetics without the necessary ingredient listings. This is a breach of requirements under the Cosmetic Products Safety Regulations. As you will be aware, this labelling is required to help ensure that banned ingredients are not incorporated into any product and that those with allergies can make informed purchases. We will be carrying out follow up inspections and if we find similar problems in the future we may have to consider taking further formal enforcement action.”

Case B – This would be enforcement action, requiring the consent of the Primary Authority.

“On 5 January 2009 we visited your branch in High Wycombe. We found numerous items of cosmetics without the necessary ingredient listings. This is a breach of requirements under the Cosmetic Products Safety Regulations. As you will be aware, this labelling is required to help ensure that banned ingredients are not incorporated into any product and that those with allergies can make informed purchases. If you do not display the required ingredient listings before 6 February 2009, we will institute legal proceedings against you.”

Investigative activities

Question 7

Do you agree that the investigative actions listed in paragraph 44 should not be considered enforcement action for the purposes of the Primary Authority scheme?

- 7.1 There was overwhelming support across stakeholder groups that investigative action should not be considered enforcement action for the purposes of the Primary Authority scheme. The Health and Safety Executive noted that, *“we agree strongly that investigative actions should be exempt from the Primary Authority scheme.”*

- 7.2 Some respondents went into more detail, noting that *“the use of investigatory powers is a vital tool for local authorities in their regulatory role, but they are not the same as taking enforcement action and should not be within the remit of the Primary Authority scheme”* (Chartered Institute of Environmental Health).
- 7.3 In addition, investigative action is seen as a statutory power granted to local authorities via the parliamentary process, and ensures that local authorities can *“secure evidence necessary for a future case”* (Berkshire Environmental Health Managers’ Group).

The Government’s position

- 7.4 **The Government agrees that investigative actions should not be considered as notifiable enforcement action.**

Question 8

If so, can you specify any specific statutory powers under which such action can be taken?

- 8.1 There were some responses suggesting specific statutory powers, but the vast majority of respondents were clear that investigative action should not be considered enforcement action. (Many respondents answered questions 7 and 8 together.)

The Government’s position

- 8.2 **In light of the responses received, the Government has decided that investigatory action should not be considered enforcement action. Therefore, there is no need to specify the specific statutory powers under which such actions are taken.**

Question 9

Are there any other actions that you believe should not be regarded as enforcement action for the purposes of the Primary Authority scheme?

- 9.1 There was a mixed response to this question. Business groups were strongly opposed to the suggestion that there are any other actions which should not be regarded as enforcement action. Conversely, some local authorities and regulators put forward suggestions of action that should not be classed as enforcement action.
- 9.2 For instance, Eastleigh Borough Council lists *“serving of requisitions for information, PACE code notices, taking of photographs, statements, copying documents”*
- 9.3 Some respondents agreed with Birmingham City Council, that the *“seizure and/or detention of items when dealing with imminent danger”* should not be regarded as enforcement action for the purposes of the Primary Authority scheme. Trading Standards North West also felt that voluntary forfeiture of goods should not be considered enforcement action.

The Government's position

- 9.4** The Government feels that respondents captured activities which would be classed as investigatory action and not considered enforcement action. The list of actions used in the consultation document was not meant to be exhaustive; rather examples of investigatory activities. LBRO will outline further information in its guidance.
- 9.5** The example from Birmingham City Council highlights the importance of enforcement action being able to proceed urgently where there is a risk of imminent harm. The scheme is designed to allow action to proceed without the need for pre-notification on the grounds that it is urgent. The issue raised by Trading Standards North West will be considered enforcement action and will be looked at in more detail in response to questions 16 and 18.

Licensing Act 2003, Gambling Act 2005, Regulatory Reform (Fire Safety) Order 2005

Proposal

There are a number of circumstances where regulatory frameworks are deliberately local in character and allow for local discretion. Under these frameworks, the national consistency that the Primary Authority scheme aims to introduce would be inappropriate. We asked for views on proposed specific exclusions in three areas in relation to activities under the Licensing Act 2003 (Licensing Act), the Gambling Act 2005 (Gambling Act) and the Regulatory Reform (Fire Safety) Order 2005 (Fire Safety Order).

Question 10

Do you agree with the proposed approach to removing licensing under the Licensing Act 2003 and the Gambling Act 2005, and fire safety under the Regulatory Reform (Fire Safety Order) 2005, from the definition of enforcement action to be used for the purposes of the Primary Authority scheme?

- 10.1** This question produced a mixed response, although the overwhelming majority of respondents agreed with the specific question that licensing under the Licensing Act and the Gambling Act, and fire safety under the Fire Safety Order should be removed from the definition of enforcement action to be used for the purposes of the Primary Authority scheme.
- 10.2** Many respondents noted that these issues were particularly local in character and allow for local discretion.
- 10.3** For instance, the Trading Standards Institute (TSI) noted that *“licensing and gambling enforcement should be excluded as there is a strict local licensing regime”*, while the London Fire and Emergency Planning Authority suggested that, *“the premises specific consideration of risk makes the Primary Authority scheme methodology inappropriate for the Regulatory Reform (Fire Safety) Order 2005. Similar consideration applies to the Licensing Act 2003.”*
- 10.4** However, some respondents, notably local authorities, stated that there are other issues which are particularly local in character which should also be removed from the scheme.
- 10.5** There were also a number of business respondents, as well as some trading standards representatives and the Association of British Bookmakers which argued for the inclusion of one or all the above to be within the scope of the scheme.
- 10.6** The CBI suggested that, *“if consistency is the aspiration of the Primary Authority scheme then the scope needs to be as wide ranging and comprehensive as possible with no exclusions of licensing, gambling and fire legislation.”*

- 10.7** One Stop said, *“although it is accepted that licensing issues may be considered as arising locally in terms of root causes, the actual effects/outcomes of such issues will be generated and driven centrally (in addition to local initiatives and efforts); licensing may therefore, be described as a good ‘fit’ for Primary Authority partnership working.”*

The Government’s position

- 10.8** The Government accepts that there are strong arguments on grounds of consistency that these issues should be within the scope of the Primary Authority scheme. Conversely, we also recognise that there are arguments to remove them on the grounds of localism.
- 10.9** However, the Government believes that removing the listed local authority actions from the scope of the scheme is the most appropriate course of action at this time.
- 10.10** Licences captured in both the Licensing Act and Gambling Act are subject to tailored, bespoke agreements between a local authority and a business, taking the specific locality into account. At present, we feel that maintaining the current position is preferable, allowing local authorities to build on the recommendations which came out of the 2008 review of the Licensing Act, in order to achieve a more coherent and effective local strategy. In addition, LBRO and the Department for Culture, Media and Sport are working together closely to evaluate where they can achieve wider beneficial social outcomes. This partnership working can operate as effectively without the Primary Authority scheme.
- 10.11** It is envisaged that enforcement action (such as prosecution proceedings) would almost certainly be used as a last resort. If this is the case, the Primary Authority notification requirement would only be applied in this extreme case against an already non-compliant business, which seems illogical.
- 10.12** We feel that including the Fire Safety Order would be impractical as it conflicts with the principles of Integrated Risk Management Plans. The Government is concerned that Primary Authority involvement would be limited to giving extremely high level advice to any business that is partnered. The nature of the risks presented by fire (i.e. that it can spread from one business to another) are extremely localised. Consequently, two identical branches of a multi-business site could be required to take two very different approaches to fire safety because one neighbours a business that stores flammable goods and the other does not. This position was strongly supported by the Chief Fire Officers Association and the majority of Fire and Rescue Services, including the two largest authorities, Manchester Fire and Rescue Authority and the London Fire and Emergency Planning Authority.
- 10.13** The Government also feels that including the Fire Safety Order in the scope of the scheme would require Fire and Rescue Authorities to divert resources from high risk premises to large multi-site businesses and retailers that are, in the main, considered to be low risk. Such an outcome would contradict one of the core principles of Hampton – that regulatory activity should be focused on those businesses that present highest risk.

10.14 The Government is committed to the best possible running of the Primary Authority scheme and acknowledges that circumstances change over time. It is the intention that licensing under the Licensing Act and the Gambling Act, and fire safety under the Fire Safety Order remains outside the definition of enforcement action at the present time. However, the Act commits the Government to a review of LBRO *“as soon as practicable after the end of the period of three years beginning with the day on which this section comes into force”*.¹ This is October 2011. The operation and the exemptions of the Primary Authority scheme will form part of this review.

¹ *The Regulatory Enforcement and Sanctions Act 2008*, Section 17.
http://www.opsi.gov.uk/acts/acts2008/pdf/ukpga_20080013_en.pdf

Exclusions from the requirement to notify the Primary Authority

Urgent action to prevent significant risk of serious harm

Proposal

We proposed that a number of exclusions be made from the requirement to notify the Primary Authority under certain circumstances. In particular, there may be circumstances where action needs to be taken urgently to avoid serious injury, damage to the environment or damage to the financial interests of consumers. We asked for views about our approach to defining these situations. We also proposed that the existing arrangements operated by the Office of Fair Trading (OFT) in relation to Enforcement Orders under Part 8 of the Enterprise Act be exempt from notification. Questions 11-15 asked more about this proposal.

Question 11

Do you agree with this approach to defining emergencies in the statutory instrument?

- 11.1** There was broad acceptance from across the stakeholder groups that it is necessary to exclude cases where action is urgently required in the opinion of the enforcing authority. On the whole, respondents agreed that there are instances where serious harm is imminent and quick action is essential. LACORS *“are generally content with the proposed definition of an emergency as outlined”* and the Chartered Institute of Environmental Health noted that this was an area of concern *“at an earlier stage of the RES Bill, so we are now content with the proposed definition as outlined.”*
- 11.2** However, there was some apprehension expressed, mainly by business groups, that the term ‘urgency’ could be misinterpreted and so action taken without notifying the Primary Authority. For example, the Engineering Employers Federation (EEF) *“is concerned that unless clearly defined, the definition of ‘urgency’ could easily be misapplied”*. These groups felt that a clear explanation of urgency provided through guidance would be useful.
- 11.3** The BRC *“would urge clear guidance on exactly what is meant to avoid the exclusion being used rather too regularly for situations which should come within the Primary Authority remit.”*

The Government's position

- 11.4** The Government acknowledges the high levels of support for defining emergencies in this way and thus excluding them from the requirement to notify the Primary Authority prior to taking the enforcement action.
- 11.5** The Government feels that it is important that enforcing authorities do not inappropriately use this exclusion and ensure that enforcement action is taken as soon as the breach is discovered.
- 11.6** The importance of guidance on this issue has been noted and LBRO is currently consulting on draft statutory guidance. If, once the scheme is operational, additional direction is needed about how these exclusions should be used consistently, LBRO may issue further guidance.

Question 12

Are there other forms of enforcement action which you believe should be excluded so as to allow urgent action to prevent significant risk of serious harm? Please include full references to the relevant legislation if possible.

- 12.1** This question received some specific suggestions from regulators, but none from the regulated. Suggestions of relevant legislation, notably from the London South West Sector Food Coordinating Group and Environmental Services, London Borough of Wandsworth, included:
- The Prevention of Damage by Pests Act 1949
 - Building Act 1984 relating to drainage
 - Section 27 Food Hygiene England Regulations 2006 food found not to have been produced in accordance with the Hygiene Regulations
 - Section 8 Food Hygiene England Regulations 2006 Hygiene emergency prohibition notices and orders
 - Section 9 Food Hygiene England Regulations 2006.
- 12.2** However, there were many more responses that did not volunteer any further forms of enforcement action, such as the TSI: *"we are unaware of any other enforcement actions that should be included and are not encompassed by the suggested wording"*

The Government's position

- 12.3** The Government believes that while some of the exemption suggestions would be valid in particular circumstances, they fall into the provisions already outlined in the SI that defines enforcement action.
- 12.4** Therefore, it is felt that by attempting to list all possible Acts that could be subject to exclusion, there is the distinct possibility that an Act could be missed. Therefore, the Government is confident that the professional judgement of local regulators, looking at issues on a case-by-case basis, combined with clear guidance, will prove sufficient.

Where the application of the Primary Authority provisions would be wholly disproportionate

Question 13

What enforcement actions do you believe should be excluded, on the grounds of proportionality, from the requirement to consult the Primary Authority before taking the action?

- 13.1 The Act Section 29(3)(b) specifies that certain enforcement actions must be excluded through the SI where the requirement of an enforcing authority to consult a Primary Authority prior to taking enforcement action would be 'wholly disproportionate'.
- 13.2 There was a mixed response to what the definition of 'wholly disproportionate' should mean.
- 13.3 There were certain business groups who rejected the premise of its inclusion in the SI. John Lewis suggested that whilst *"it appears attractive to exclude some minor actions on grounds of proportionality, we are concerned that this results in the application of local authority judgment, on what is 'proportionate', in a subjective and therefore inconsistent way"*.
- 13.4 However, there was general support for exempting routine advice which poses no real cost to the business.
- 13.5 Trading Standards North West made the pertinent point that, *"if the action does not already fall into the exclusions, it is not likely to be disproportionate. However, we recommend that such decisions be left to the professional judgement of the officer"*.
- 13.6 LACORS felt strongly that it would not be helpful to try to prescribe what would or would not be disproportionate in too much depth – *"it has to be assessed on a case by case basis and in the reasonable professional judgment of the enforcing officer concerned"*. LACORS, and many others, call for guidance to be given with some examples, but allowing for a certain amount of flexibility on minor matters, as this is the purpose of this exemption.

The Government's position

- 13.7 **The term 'wholly disproportionate' is in the Act, in accordance with one of the five key Hampton Principles, that of proportionality. 'Wholly disproportionate' is part of the test that the local authority would apply to decide whether an issue needs to be dealt with as quickly as possible.**
- 13.8 **A possible example of this could be where an enforcing officer instructs the business to clear up a minor, non-harmful spillage. Clearly, it would be 'wholly disproportionate' to refer this issue to the Primary Authority prior to resolving the issue.**

- 13.9** The Government believes that this provision will be used rarely but it will be left to the professional judgement of the highly skilled enforcement officers to use it as they feel appropriate.
- 13.10** We agree with the respondents who see this as being more appropriately covered in guidance, to be drawn up by LBRO.
- 13.11** Notifiable enforcement action has been tightly defined. Therefore, when local authorities take any other action to secure regulatory outcomes, they do not need to notify the Primary Authority. However, there may be significant benefits for local authorities from communicating with the Primary Authority over these issues.

Question 14

What should enforcement officers take into account when taking a decision as to whether a pre-notification of enforcement action would be wholly disproportionate?

- 14.1** This question brought about a helpful response from respondents, although the majority agreed with West Yorkshire Trading Standards, that 'wholly disproportionate' "is difficult to define".
- 14.2** Some noted that factors such as the impact on business and society, the cost to the business and the cost of the pre-notification process should be taken into account.
- 14.3** Some respondents suggested that LBRO should provide guidance to help consistency in the understanding and application of 'wholly disproportionate' activities. LACORS suggested that, *"it may be helpful for LBRO to issue some guidance on this with perhaps some examples/case studies BUT this should not be too prescriptive as the whole point of the exemption is to allow flexibility for minor matters"*.
- 14.4** Environmental Health Merseyside, *"would caution against trying to prescribe what would or would not be disproportionate in too much depth. It has to be based on a case by case basis and in the reasonable professional judgment of the enforcing officer concerned"*.

The Government's position

- 14.5** The Government is of the view that the vast majority of 'wholly disproportionate' actions are not classed as enforcement action or will be excluded on the grounds of urgency from the obligation to pre-notify the Primary Authority.
- 14.6** However, the professional judgement of enforcement officers should be trusted to assess the rare occasions where actions should be excluded on the grounds of being 'wholly disproportionate'.

Urgent preventative action, in relation to minor harm

Question 15

Do you agree that exclusions should be made where enforcement action is required urgently to prevent or stop relatively minor harm? If so, which enforcement actions should be excluded on this basis?

- 15.1** The response showed a strong level of support for exclusions where enforcement action is required urgently to prevent or stop relatively minor harm. Many respondents thought that the example given in the consultation document concerning noise nuisance was both obvious and necessary to exclude from the obligation to pre-notify the Primary Authority prior to taking action. North East Trading Standards summed up the feeling well: *“the exclusion needs to remain, the example used in the paper, a noise nuisance, is a good model of a common problem”*. Further examples that captured the essence of urgent action to prevent relatively minor harm included:
- Prevention of Damage from Pests Act 1949
 - Prevention of harm and stress to animals
 - Dark smoke under the Clean Air Act 1993
 - Drainage issues under the Local Government Miscellaneous Provisions Act 1974
 - Safety, seizure and retention of items
 - Minor petrol leaks causing contaminated land.
- 15.2** There are three further points to note, however. First, concerns were raised, largely by the business community, that the exclusion could be misapplied, allowing potential for a loophole in the scheme. EEF believed that, *“it would provide a loophole allowing almost any health and safety-related enforcement action to be excluded from consultation. This would cut across the test of emergency...”*
- 15.3** Secondly, that strong guidance was needed to guard against legal uncertainty. However, *“rather than list all possibilities, better to establish a principle for such exclusions and await sensible interpretation”* (Northern Ireland Chief Environmental Health Officers Group). This was the majority view.
- 15.4** Thirdly, many respondents agreed with Birmingham City Council, that, *“the phrase ‘relatively minor harm’ is not one in common use in local authorities and it seems to be almost in contradiction to Section A where there is serious harm. The term ‘relatively minor harm’ therefore requires definition. If there is a need for this section on minor harm, then the section on serious harm is irrelevant because anything that is serious harm must be minor harm where it has regards to the public.”*

The Government's position

- 15.5** The Government recognises that there is confusion about the concept of minor harm.
- 15.6** It is Government policy to ensure that action can be taken urgently where it is required, because of risks to public health, the environment or the financial interests of consumers. In light of this policy objective and the confusion around the division of the concept of harm into 'serious' and 'minor', we have decided to merge the two concepts into one: relating to urgent action to avoid the risk of harm. This allows us to achieve the outcomes required by the Act, and also to cover other harm which might not meet the threshold of 'serious' harm, but where it has been argued that there should be an exclusion because of the urgency required to remedy a harm (such as noise pollution).
- 15.7** However, it is clear that guidance on this issue is needed. The Government does not want to limit the exclusions to a prescribed list, but does see a list of examples in the guidance as a positive step. The Government agrees with the BRC that *"the fewer exclusions and special cases the better"* and wants to ensure this exclusion is used in the way it is intended.

Part 8 of the Enterprise Act 2002 and enforcement undertakings by a business

Enforcement undertakings by a business

Proposal

There are situations in which a business and a local authority regulator come to an agreement on how the business can be brought back into compliance with the law. In circumstances where a business may have inadvertently broken the law, it may offer to take a certain action that would put right the harm it had caused without the need for the imposition of a sanction.

The Enterprise Act 2002 sets out a staged approach to securing compliance that is consistent with how local authorities structure their approach to all enforcement be it through informal resolution, civil or criminal enforcement. We proposed that where an organisation has entered into such an agreement, it would not be necessary for the enforcing authority to have to consult the Primary Authority. We suggested that the Primary Authority should, however, be kept informed of the process. Questions 16-18 asked more about this proposal.

Question 16

Do you agree that where an organisation enters into an enforcement undertaking there should be no requirement placed on the enforcing authority to contact the Primary Authority prior to taking enforcement action?

- 16.1** This question produced a mixed response. There were strong arguments, mainly from local authorities that where an organisation enters into an enforcement undertaking, there should be no requirement placed on the enforcing authority to contact the Primary Authority prior to taking enforcement action. The suggestion was that, by definition, any undertakings must be agreed first by business and so, *“on this basis the business clearly does not consider that the enforcing authority is acting improperly or inconsistently with previous advice thus making the input of the Primary Authority and/or LBRO unnecessary”* (LACORS).
- 16.2** While the first point is accepted by business groups, it was made clear that *“the current wording would also encompass circumstances where an organisation is under pressure to accept enforcement action (such as an enforcement notice) to avoid the explicit or implicit threat of more severe enforcement action”* (EEF). Consequently, business groups believe that the *“enforcing authority should always contact the Primary Authority before action is taken”* (CBI).

- 16.3** The same point is taken up for a slightly different reason by Wakefield Metropolitan District Council which argued that the *“enforcing authority still needs to consult with the Primary Authority prior to accepting the enforcement undertaking as this may affect the advice given by the Primary Authority to the business and/or other enforcers”*. This view is backed up by a small number of local authorities as well.
- 16.4** Dover District Council made the point well that: *“we do not agree that when an organisation enters into an enforcement undertaking that there is no requirement placed on the enforcement authority to contact the Primary Authority prior to taking action...the Primary Authority needs to be made aware of enforcement issues that are a national issue to ensure that they are proactive where necessary and reduce the potential for further incidents to occur”*.
- 16.5** Several respondents suggest that the Primary Authority should be made aware of the enforcement undertaking, but in parallel with the undertaking. This would ensure that the Primary Authority is kept informed of what action is being taken and would promote greater consistency in later conversations with businesses. This would need to be backed up with strong and effective guidance.

The Government’s position

- 16.6** **The Government acknowledges that there are a range of opinions on this issue. We intend that enforcement undertakings (whether statutory or otherwise) should be considered enforcement action and the Primary Authority shall be consulted prior to this action being carried out.**
- 16.7** **There are situations in which dialogue between the regulator and the regulated results in genuine voluntary undertakings. However, we are persuaded by the argument that businesses often give undertakings reluctantly to avoid further action. In addition, accepting an enforcement undertaking in one part of the country could promote inconsistencies within the same business in other part of the country. This could limit the impact of the Primary Authority system.**
- 16.8** **This policy will ensure effective communication between the enforcing authority and the Primary Authority, so the latter will have a more complete view of the business it is partnering, which will be of benefit when issuing future advice.**

Question 17

Do you agree with our proposed approach to excluding Part 8 of the Enterprise Act 2002 from the requirement to consult a Primary Authority before taking enforcement action?

- 17.1** This question generated contrasting views from respondents. Business representatives felt strongly that the exclusion to consult the Primary Authority would seriously undermine the effectiveness of the scheme. The CBI commented that it *“does not agree with the exclusion of Part 8 of the Enterprise Act which is the preferred route of enforcement. If taken out, a large part of potential Primary Authority work is exempt and consequentially will be left with only prosecution and business penalties”*. The BRC said that *“we totally reject the proposal that enforcement actions under Part 8 of the Enterprise Act 2002 should be excluded. The OFT is both a regulator and an*

enforcer. At the very least its enforcement role should be subject to Primary Authority review."

- 17.2** Some local authorities and professional organisations felt that the two schemes could operate effectively in parallel. The TSI maintained, *"the requirement to consult the OFT before seeking an enforcement order is, in our opinion, sufficient and may include consultation with the Primary Authority at some stage"*.

The Government's position

- 17.3** In response to the strength of business opinion, the Government will remove the exclusion of Part 8 of the Enterprise Act 2002. We feel that the exclusion could create situations where any other interventions to address non-compliance within the business would not be seen by the Primary Authority and the OFT. This creates the possibility of inconsistent enforcement by local authorities and additional burdens on business that the Primary Authority scheme is designed to remove.
- 17.4** The Act does not repeal Part 8 of the Enterprise Act, so where an enforcing authority proposes to take action under Part 8 of the Enterprise Act it will still be obliged to notify OFT before taking that action. It will also be under an obligation to notify the Primary Authority. The practical issues raised relating to dual notification to the Primary Authority and to the OFT will be addressed by agreed arrangements between LBRO and the OFT, which will be designed to ensure a streamlined and efficient process.

Question 18

Do you consider there are other occasions where undertakings may be given, for example voluntarily, which should also be excluded from the requirement to consult with the Primary Authority?

- 18.1** Unsurprisingly, this question produced an almost identical response to question 16; indeed many respondents answered questions 16 and 18 together. The BRC noted that *"a business may well give an undertaking reluctantly to avoid further action even though it may believe the undertaking deals inconsistently with matters where it has received advice or guidance"*. It went on to suggest that *"it should be understood that such an undertaking does not just appear out of nothing – it will follow consultation between the enforcer and the business. It may be voluntary but prior discussion will be necessary to ensure it is likely to lead to avoiding prosecution"*.
- 18.2** However, Chiltern District Council spoke for many local authorities by suggesting *"that any undertakings...should be excluded. This is because in order for these to have been made the business concerned has agreed that it is appropriate"*.

The Government's position

- 18.3** The Government has considered the views extremely carefully and has reviewed the potential unintended consequences of all scenarios. Given the similarity of the issues raised, our response is set out at paragraphs 16.6-16.8.

References to LBRO and its determination procedure

Deadlines for reference to LBRO

Proposal

The role of the Primary Authority is to give advice and guidance to the organisation that it partners, regarding specific areas of regulatory compliance and to review enforcement actions that other local authorities propose to take against that organisation. The scheme includes provision for a determination process if a local authority and Primary Authority are unable to agree on a regulatory approach. In these situations, a proposed enforcement action can be referred to LBRO for determination.

However, should there be a disagreement between the local authorities, the Primary Authority scheme includes a procedure for LBRO to determine whether or not an enforcement action should go ahead.

We asked four questions on matters relating to the determination process (19-23). We sought views on a wide range of issues, including the proposed deadlines for references to LBRO.

Question 19

Do you agree that ten working days is a reasonable amount of time for a proposed enforcement action to be referred to LBRO? If not, how many days do you think would be reasonable?

- 19.1** The vast majority of respondents agreed that ten working days is a reasonable amount of time for a proposed enforcement action to be referred to LBRO.
- 19.2** However, there were some respondents who suggested a shorter time period to avoid unnecessary delay. This includes the Northamptonshire Heads of Environmental Health Group which suggested that the time period should be *“as short as reasonably possible and no more than five days”*.
- 19.3** On the other hand, some businesses noted a preference for a longer time period with both 21 days and 28 days suggested. This would *“allow more time to overcome the risk that relevant people are on leave etc”* (John Lewis).
- 19.4** It was felt that the Government must be clear and consistent on whether working or calendar days are being used and also clearly define when the first day begins.

- 19.5 In addition, some respondents argued that “*some allowance or provision must be given for exceptional circumstances*” (Manchester City Council).

The Government’s position

- 19.6 The Government believes that 10 days strikes the right and suitable balance between quick action and allowing each party enough time to take a considered decision regarding a particular enforcement action.
- 19.7 However, we agree with the sentiment that there should be scope for LBRO to allow extra time for referrals in exceptional circumstances. We envisage that flexibility may be appropriate for particularly complex matters, for example, where further testing of a product may be required. The Government will leave this to the discretion of LBRO which will deal with this matter in its guidance.
- 19.8 The Government is committed to consistency and so proposes that working days are used for defining all time periods in the SI, as is stated in the Act. Paragraph 10(5) of Annex E of the draft SI contained a drafting error; five working days rather than seven calendar days should be in the text. The Act spells out what constitutes a ‘day’ in Section 28 (9) and (10).
- 19.9 As an example, if a Primary Authority informs an enforcing authority that it should not take a particular enforcement action at lunchtime on Tuesday 11 March, the first working day would be Wednesday 12 March and the end of the 10 working day would be close of play on Tuesday 25 March.

Information that LBRO may require before giving consent

Question 20

Do you agree that relevant information should be provided to LBRO when a proposed enforcement action is referred to it? If so, what information do you believe LBRO should be given?

- 20.1 There was total agreement that relevant information should be provided to LBRO when a proposed enforcement action is referred to it. It is clear that respondents believed this is the only way in which LBRO can come to an informed decision in which all relevant factors can be considered.
- 20.2 LBRO is currently seeking consultation responses to this issue, but it is proposing that LBRO will only give consent to undertake a determination once it has obtained the following information:²
- full details of the proposed enforcement action
 - full details of the Primary Authority’s decision to direct against taking the enforcement action

² Consultation on Primary Authority Guidance, Paragraph 76, p. 21.
http://www.lbro.org.uk/FileUploads/2008125_Consultation_on_the_draft_Primary_Authority_Guidance.pdf

- 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
- in the case of referrals from a business, the advice that business has previously received from the Primary Authority.

20.3 Several respondents noted that a template referral form should be provided for consistency and ease of use for both parties.

20.4 Finally, Manchester City Council made the point that a further paragraph could be added to the SI that sets out the procedure for referrals to LBRO, *“a statement as to why the enforcing authority considers that the enforcement action it proposes to take is necessary [should be provided to LBRO]”*.

The Government’s position

20.5 The Government will continue to support LBRO in developing its guidance, noting the respondents’ preference for clear information and a template referral form.

20.6 The Government agrees that the enforcing authority should provide reasons for the proposal to take enforcement action to the Primary Authority. This will be provided for within the relevant SI.

Question 21

Do you agree that the information we have specified should be given to LBRO before it consents to a referral? Is there any other information that you believe should be provided?

- 21.1** Respondents agreed that the information specified should be given to LBRO before it consents to a referral. This includes providing the LBRO with details regarding the proposed enforcement action. The TSI noted that *“the specified information will be essential for LBRO to make a speedy decision”*.
- 21.2** Kirklees Metropolitan Council agreed and suggested that *“a relevant information pro-forma or checklist be provided for completion before sending to the LBRO”*.
- 21.3** LACORS also suggested that *“where a Primary Authority vetoes proposed action by an enforcement authority, the Primary Authority should be obliged to provide the enforcing authority with its reasons for doing so”*.
- 21.4** However, there were some concerns that LBRO has the option not to consent to a referral made to it by the enforcing authority, Primary Authority or regulated entity.

The Government's position

- 21.5** The Government agrees with the respondents' views that the reasons behind the Primary Authority's decision should be provided to LBRO. LBRO will produce a template which sets out what information it will need in order to consent to a referral.
- 21.6** As set out by the Act, LBRO must consent to a referral. LBRO will need to take a view on whether it has the power to make the determination, and whether it will have access to sufficient information to allow it to make a determination. However, if insufficient evidence is provided at the initial stage, LBRO can require further information to be provided from any party. It can then consent to the referral when such information has been received.

Matters LBRO may take into account when making a determination

Question 22

Do you agree that LBRO should be able to take consistency with its own guidance into account when making a decision on an enforcement action referred to it?

- 22.1** This question received a generally positive response. Respondents believed it important for LBRO to be able to take consistency with its own guidance into account when making a decision on an enforcement action referred to it. This reflects the importance of consistency within the Primary Authority scheme.
- 22.2** Some business groups strongly felt that, *"where the LBRO determines that the advice was not properly given or that it is inconsistent with the LBRO's own advice, the enforcement action should not proceed"* (ASDA).
- 22.3** The TSI believed that *"guidance consistency will be an essential ingredient for the Primary Authority system's credibility"*.
- 22.4** The main concern that arose from regulators was that by following guidance too closely, LBRO would be too rigid in focus and not consider each case on its own (individual) basis. West Midlands Fire Service noted that *"consistency is important but each case must be considered on its own merits"*.
- 22.5** Central England Trading Standards Authorities supported this by suggesting that, *"LBRO should be able to take this [consistency] into account but [should] not [be] bound by any requirement to do so. Consistency is fine as long as the initial decision was a reasonable one"*.
- 22.6** Some respondents voiced concerns that LBRO would take the role of the court in acting as an arbiter on Primary Authority decisions. *"We are concerned that LBRO will usurp the power of the Courts as their advice has to, by definition, be based on their understanding of the law"* (East of England Trading Standards).

The Government's position

- 22.7** The Government supports the view that LBRO should take consistency with its own guidance into account when making a decision on an enforcement action referred to it, while addressing each issue on its individual merits.
- 22.8** The Primary Authority scheme provides an administrative mechanism to enable the local regulatory system to decide if an enforcement activity is appropriate.
- 22.9** The Government would like to stress that in no way is the LBRO going to usurp the power of the Courts: LBRO's role is one of determination not arbitration. The responsibility for the interpretation of legislation remains firmly the preserve of the courts.

Further provisions regarding the determination process

Question 23

Are there any other matters relating to the statutory instrument at Annex E, which you want to raise? Please give details, and where possible, specify any alternative approach that you believe should be explored.

- 23.1** Around a half of those regulators that responded to this question suggested other matters related to SI on the determination procedure for Primary Authority. However, this question generated responses that generally reiterated comments on the other questions. Some of the main points that were raised included:
- time extension within the referral process to allow for exceptional circumstances to be addressed
 - the costs and benefits of the Primary Authority scheme
 - the duration of the time periods in relation to the Primary Authority scheme.
- 23.2** The representative for Wakefield Metropolitan District Council said, *"I would add that I am broadly very much in favour of the scheme and look forward to sharing ideas with other colleagues in other local authorities, perhaps in a Primary Authority role. I believe there are benefits to be derived from the scheme and know there are inequalities to be addressed by authorities"*
- 23.3** West Midlands Health and Safety Liaison Group stated *"circumstances may arise that require information from a third party expert e.g. an engineers report or results of microbiological analysis, this may delay the timings as the third party may have their own constraints. Failure to acknowledge the possibility of such a delay could prejudice any determination"*

The Government's position

- 23.4** Given the strength of opinion, the Government agree that LBRO should be enabled to grant an extension of time or otherwise allow 'out of time' applications in exceptional circumstances; we have amended the SI to provide for this.

Impact Assessment

Question 24

Do you believe the assessment of costs and benefits in the Impact Assessment are realistic? If not, is there any further evidence that you can provide that should be taken into account?

- 24.1 Many respondents either disagreed with the costs and benefits laid out in the Impact Assessment (IA) or did not reply to the question. However, there were few suggestions made which will help us in revaluating our figures.
- 24.2 The London South West Sector Food Coordinating Group believed that the start up costs had been underestimated: *“the impact assessment states that an average cost to the local authority to be 75 hours per scheme, at a cost of £2100. We believe this is a significant underestimate of the resources required”*
- 24.3 Environmental Services at Wandsworth Council stated that *“the costs and hourly rates stated do not reflect employment costs in London in any respect. A more realistic hourly rate would be £45 per hour”*
- 24.4 There was the overall feeling from respondents that *“the estimation of local authorities’ resources is too generalised as much will depend on the size of the company [which] partners the local authority”* (North Wales Health and Safety Task Group).
- 24.5 Furthermore, a small number of respondents felt that the target of 900 Primary Authority partnerships within 5 years was unrealistic.

The Government’s position

- 24.6 **The Government is considering this information and will update the IA. It will be laid alongside the SIs for parliamentary consideration in March 2009.**
- 24.7 **We have taken on board suggestions that the costs for some Primary Authority partnerships have been underestimated. These are partnerships that are based in London, Primary Authority partnerships with the biggest businesses and those partnerships in which the business requires additional assistance to become compliant.**
- 24.8 **However, we are trying to determine the average set up and running cost (and benefit) of the average Primary Authority partnership. Therefore, we are aware that primary authorities based in London may incur higher costs. The average hourly cost of work in the consultation document was revised upwards by 50% from the figure given in the consultation on the draft Regulatory Enforcement and Sanctions Bill (from £18.50 to £27.75). This represents the additional marginal salary and on-costs involved. The Government is satisfied with this stance.**

- 24.9** Nevertheless, due to the evidence given in the consultation responses, we feel it prudent to increase the average amount of set-up time that a local authority is predicted to take to become a Primary Authority. We have raised this from two weeks' work (75 hours) to 90 hours.
- 24.10** In addition, we have revised the business cost of setting up a Primary Authority partnership. We feel that, on average, three days' work remains appropriate, but the 'senior manager' tariff has been revised upwards from £16.23 per hour in the Primary Authority consultation to £21.75.³
- 24.11** We acknowledge that this is an average figure and that Primary Authority partnerships with larger companies could well be more costly both in terms of set-up and running costs. However, such larger partnerships may have greater associated benefits.
- 24.12** Larger businesses may want to enter into more than one Primary Authority partnership for its different regulatory activities. In this case, each Primary Authority will have a smaller individual cost. Consequently, we believe that 900 Primary Authority partnerships is realistic: we are counting all partnerships in this figure, which will be greater than the sum of individual regulated bodies which are taking part.
- 24.13** However, we realise that the figure is open to conjecture, so we feel it prudent to use a range to capture the sensitivity in the analysis. 900 partnerships set up by 2014 will be the mid-point, but the range of 700-1100 is used in this Impact Assessment.
- 24.14** The Act provides that the costs incurred by a local authority acting as a Primary Authority can be recovered from the business on a cost recovery basis.
- 24.15** We believe that costs incurred as an enforcing authority will be similar to the current situation where a local authority takes an enforcement action against a business and incurs the costs such as taking a prosecution.
- 24.16** The enforcing authority will need to provide the Primary Authority with information about the proposed action, but this information is what any local authority would normally have to collect at present in order to take formal action.

³ Source: *ONS Annual Survey of Hours and Earnings (ASHE) – 2008*.
http://www.statistics.gov.uk/downloads/theme_labour/ASHE_2008/2008_occupation.pdf.

Annex A List of respondents

There were 90 responses to the public consultation. These are listed below, with the exception of 10 respondents who wished to remain anonymous.

Organisation

ASDA
 Association of British Bookmakers
 Association of Greater Manchester Authorities Public Protection Partnership
 ATS Euromaster
 Berkshire Environmental Heath Managers' Group
 Birmingham City Council - Public Protection Committee
 British Retail Consortium
 Confederation of British Industry
 Central England Trading Standards Authorities
 Chartered Institute of Environmental Health
 Chiltern District Council
 Citizens Advice Bureau
 Convention of Scottish Local Authorities
 Conwy County Borough Council
 Derbyshire Chief Environmental Health Officers Food Liaison Group
 Directors of Public Protection, Wales
 Dover District Council
 Dundee City Council
 Durham County Council
 East Ayrshire Council
 East of England Trading Standards Association
 Eastleigh Borough Council
 Engineering Employers Federation
 Environmental Health Merseyside
 Environmental Services, London Borough of Wandsworth
 Food Standards Agency
 Halfords
 Hampshire and Isle of Wight Environmental Health Managers' Group
 Harrogate Borough Council
 Health and Safety Executive
 Herefordshire and Worcestershire' Chief Environmental Health Officers' Group
 Hertfordshire and Bedfordshire Food Liaison Group
 Highland Council
 Huntingdonshire District Council

Sector

Business
 Trade Association

 Local Authority
 Business
 Local Authority
 Local Authority
 Business
 Business
 TS Representative
 EH Representative
 Local Authority
 Consumer
 Local Authority
 Local Authority

 EH Representative
 EH Representative
 Local Authority
 Local Authority
 Local Authority
 Local Authority
 TS Representative
 Local Authority
 Trade Association
 EH Representative
 Local Authority
 National Regulator
 Business

 EH Representative
 Local Authority
 National Regulator

 EH Representative
 EH Representative
 Local Authority
 Local Authority

Organisation

Individual from Dumfries and Galloway Council
 Individual from Reigate & Banstead Borough Council
 Institution of Occupational Safety and Health
 John Lewis
 Kirklees Metropolitan Council
 Leicestershire Fire and Rescue Service
 Licensing Act Active Residents' Network
 Local Authorities Coordinators of Regulatory Services
 London Borough of Harrow Commercial Services
 London Borough of Havering
 London Fire and Emergency Planning Authority
 London Trading Standards Association
 Manchester City Council
 Norfolk Better Regulation Partnership
 North East Trading Standards Association
 North Wales Health and Safety Task Group
 Northamptonshire Heads of Environmental Health Group
 Northern Ireland Chief Environmental Health Officers Group
 Nottinghamshire Environmental Strategic Health Managers' Group
 One Stop
 Pedlars Association
 Royal Borough of Kensington and Chelsea
 Ryedale District Council
 Sandwell Metropolitan Borough Council
 Scottish Environment Protection Agency
 Sefton Metropolitan Borough Council
 Simetric Matters
 Society of Chief Officers of Trading Standards in Scotland
 South Holland District Council
 South Lanarkshire Council
 South West London Food Coordinating Group
 Southampton City Council
 Suffolk Health and Safety Liaison Group
 Surrey Chief Environmental Health Officers Group
 The Royal Environmental Health Institute of Scotland
 Trading Standards Institute
 Trading Standards North West
 Tunbridge Wells Borough Council
 Tyne and Wear Joint Trading Standards Committee
 Wakefield Metropolitan District Council, Environmental
 Health Services
 Welwyn Hatfield Council
 West Midlands Fire Service
 West Midlands Health and Safety Liaison Group
 West Yorkshire Fire and Rescue Service
 West Yorkshire Trading Standards Service
 Wychavon District Council

Sector

Other
 Other
 Professional Body
 Business
 Local Authority
 Fire
 Trade Association
 Local Authority
 Local Authority
 Local Authority
 Fire
 TS Representative
 Local Authority
 Local Authority
 TS Representative
 TS Representative
 EH Representative
 EH Representative
 EH Representative
 EH Representative
 Business
 Trade Association
 Local Authority
 Local Authority
 Local Authority
 EH Representative
 Local Authority
 Other
 Local Authority
 Local Authority
 Local Authority
 EH Representative
 Local Authority
 EH Representative
 Local Authority
 EH Representative
 Local Authority
 EH Representative
 TS Representative
 TS Representative
 Local Authority
 TS Representative
 Local Authority
 Local Authority
 Fire
 EH Representative
 Fire
 Local Authority
 Local Authority

Annex B Analysis of responses to specific questions

It is important to note that, although we had 90 individual responses, not everyone answered all the specific questions raised in the consultation with a 'yes' or a 'no'. If a respondent did not specify 'yes' or 'no', but answered the question, we examined the answer and, where it appears clear, have allocated a 'yes' or 'no' answer. Where the comments did not answer the specific question, they have not been included as 'responses' for this analysis.

Questions 8, 13 and 14 did not require a 'yes' or 'no' answer.

We have split the analysis of question 10 into three categories. This is because we asked about three different regulatory issues and some respondents specifically addressed one of the three issues.

Question 1	<i>Is there any legislation on these lists that you believe relates to matters which are not reserved matters in relation to Scotland or transferred in Northern Ireland or should for any other reason not be included?</i>	Number of responses	32	Yes	9%	No	91%
Question 2	<i>Is there any legislation that is not on these lists that you believe should be included? This may include Acts of Parliament, statutory instruments or European obligations. Please be as specific as possible.</i>	Number of responses	36	Yes	22%	No	78%
Question 3	<i>Do you agree that sanctions listed in the draft statutory instrument at Annex D should be regarded as enforcement action for the purposes of the Primary Authority scheme?</i>	Number of responses	64	Yes	56%	No	44%
Question 4	<i>Are there other sanctions that should be included in this list?</i>	Number of responses	64	Yes	31%	No	59%
Question 5	<i>Do you agree that oral advice should not be regarded as enforcement action for the purposes of the Primary Authority scheme?</i>	Number of responses	78	Yes	97%	No	3%

Question 6 *Do you agree that written advice, even where it includes a warning regarding the possibility of a sanction, should not be considered enforcement action for the purposes of the Primary Authority scheme? If not, how might this be done without causing unnecessary bureaucracy?*

Number of responses **76** Yes **86%** No **14%**

Question 7 *Do you agree that the investigative actions listed in paragraph 44 should not be considered enforcement action for the purposes of the Primary Authority scheme?*

Number of responses **73** Yes **92%** No **8%**

Question 8 *If so, can you specify any specific statutory powers under which such action can be taken?*

Number of responses **N/A** Yes **N/A** No **N/A**

Question 9 *Are there any other actions that you believe should not be regarded as enforcement action for the purposes of the Primary Authority scheme?*

Number of responses **62** Yes **50%** No **50%**

Question 10 *Do you agree with the proposed approach to removing licensing under the Licensing Act 2003 and the Gambling Act 2005, and fire safety under the Regulatory Reform (Fire Safety Order) 2005, from the definition of enforcement action to be used for the purposes of the Primary Authority scheme?*

a) Licensing Act 2003

Number of responses **64** Yes **88%** No **12%**

b) Gambling Act 2005

Number of responses **60** Yes **88%** No **12%**

c) Regulatory Reform (Fire Safety Order) 2005

Number of responses **55** Yes **84%** No **16%**

Question 11 *Do you agree with this approach to defining emergencies in the statutory instrument?*

Number of responses **67** Yes **84%** No **16%**

Question 12	<i>Are there other forms of enforcement action which you believe should be excluded so as to allow urgent action to prevent significant risk of serious harm? Please include full references to the relevant legislation if possible.</i>					
Number of responses	<table border="0" style="display: inline-table;"> <tr> <td style="padding: 0 10px;">67</td> <td style="padding: 0 10px;">Yes</td> <td style="padding: 0 10px;">46%</td> <td style="padding: 0 10px;">No</td> <td style="padding: 0 10px;">54%</td> </tr> </table>	67	Yes	46%	No	54%
67	Yes	46%	No	54%		
Question 13	<i>What enforcement actions do you believe should be excluded, on the grounds of proportionality, from the requirement to consult the Primary Authority before taking the action?</i>					
Number of responses	<table border="0" style="display: inline-table;"> <tr> <td style="padding: 0 10px;">N/A</td> <td style="padding: 0 10px;">Yes</td> <td style="padding: 0 10px;">N/A</td> <td style="padding: 0 10px;">No</td> <td style="padding: 0 10px;">N/A</td> </tr> </table>	N/A	Yes	N/A	No	N/A
N/A	Yes	N/A	No	N/A		
Question 14	<i>What should enforcement officers take into account when taking a decision as to whether a pre-notification of enforcement action would be wholly disproportionate?</i>					
Number of responses	<table border="0" style="display: inline-table;"> <tr> <td style="padding: 0 10px;">N/A</td> <td style="padding: 0 10px;">Yes</td> <td style="padding: 0 10px;">N/A</td> <td style="padding: 0 10px;">No</td> <td style="padding: 0 10px;">N/A</td> </tr> </table>	N/A	Yes	N/A	No	N/A
N/A	Yes	N/A	No	N/A		
Question 15	<i>Do you agree that exclusions should be made where enforcement action is required urgently to prevent or stop relatively minor harm? If so, which enforcement actions should be excluded on this basis?</i>					
Number of responses	<table border="0" style="display: inline-table;"> <tr> <td style="padding: 0 10px;">66</td> <td style="padding: 0 10px;">Yes</td> <td style="padding: 0 10px;">89%</td> <td style="padding: 0 10px;">No</td> <td style="padding: 0 10px;">11%</td> </tr> </table>	66	Yes	89%	No	11%
66	Yes	89%	No	11%		
Question 16	<i>Do you agree that where an organisation enters into an enforcement undertaking there should be no requirement placed on the enforcing authority to contact the Primary Authority prior to taking enforcement action?</i>					
Number of responses	<table border="0" style="display: inline-table;"> <tr> <td style="padding: 0 10px;">68</td> <td style="padding: 0 10px;">Yes</td> <td style="padding: 0 10px;">82%</td> <td style="padding: 0 10px;">No</td> <td style="padding: 0 10px;">18%</td> </tr> </table>	68	Yes	82%	No	18%
68	Yes	82%	No	18%		
Question 17	<i>Do you agree with our proposed approach to excluding Part 8 of the Enterprise Act 2002 from the requirement to consult a Primary Authority before taking enforcement action?</i>					
Number of responses	<table border="0" style="display: inline-table;"> <tr> <td style="padding: 0 10px;">54</td> <td style="padding: 0 10px;">Yes</td> <td style="padding: 0 10px;">94%</td> <td style="padding: 0 10px;">No</td> <td style="padding: 0 10px;">6%</td> </tr> </table>	54	Yes	94%	No	6%
54	Yes	94%	No	6%		
Question 18	<i>Do you consider there are other occasions where undertakings may be given, for example voluntarily, which should also be excluded from the requirement to consult with the Primary Authority?</i>					
Number of responses	<table border="0" style="display: inline-table;"> <tr> <td style="padding: 0 10px;">64</td> <td style="padding: 0 10px;">Yes</td> <td style="padding: 0 10px;">89%</td> <td style="padding: 0 10px;">No</td> <td style="padding: 0 10px;">11%</td> </tr> </table>	64	Yes	89%	No	11%
64	Yes	89%	No	11%		

Question 19 *Do you agree that ten working days is a reasonable amount of time for a proposed enforcement action to be referred to LBRO? If not, how many days do you think would be reasonable?*

Number of responses **69** Yes **80%** No **20%**

Question 20 *Do you agree that relevant information should be provided to LBRO when a proposed enforcement action is referred to it? If so, what information do you believe LBRO should be given?*

Number of responses **69** Yes **99%** No **1%**

Question 21 *Do you agree that the information we have specified should be given to LBRO before it consents to a referral? Is there any other information that you believe should be provided?*

Number of responses **66** Yes **97%** No **3%**

Question 22 *Do you agree that LBRO should be able to take consistency with its own guidance into account when making a decision on an enforcement action referred to it?*

Number of responses **64** Yes **84%** No **16%**

Question 23 *Are there any other matters relating to the statutory instrument at Annex E, which you want to raise? Please give details, and where possible, specify any **alternative approach that you believe should be explored.***

Number of responses **53** Yes **53%** No **47%**

Question 24 *Do you believe the assessment of costs and benefits in the Impact Assessment are realistic? If not, is there any further evidence that you can provide that should be taken into account?*

Number of Responses **37** Yes **16%** No **84%**

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