# Response to the 'Regulatory Justice: Sanctioning in a post-Hampton World' Consultation Document

## Introduction: the Professional Contractors Group and its members

PCG is the cross-sector representative body for freelance contractors and consultants in the UK. Its members provide their services to a range of clients using their own one or two-person companies. They work in IT, engineering, project management, oil and gas extraction, marketing and many other sectors.

The UK's freelance contractors and consultants are a highly skilled, highly flexible and highly mobile workforce. The UK's model of freelancing is uniquely sophisticated and, by affording companies the ability to acquire specialist skills on a flexible basis, offers the UK a meaningful competitive advantage, particularly in the knowledge-based industries on which its future growth depends.

As the smallest of small businesses, and also a significant part of the growing number of people choosing to work for themselves, freelancers are a group that sit outside the traditional divide of employer and employee. They also have specific needs and concerns, not always within the scope of other small business issues.

Regulatory issues affecting freelancers can vary considerably from case to case. Employment issues are not relevant, but sectoral ones can be, as many freelancers may move between companies in different sectors. The issue of non-compliant "rogue traders" is not a signficant concern for freelancers: only 4% of members cited them as a problem facing their business in PCG's 2006 annual survey.

PCG has engaged with the Better Regulation agenda over the last eighteen months, including providing comment on the draft Regulators Code, which is attached as an appendix to this response.

The following document offers some brief general comments on the broad issues discussed within the consultation document, and then answers most of the questions posed in it. Where a question has not been answered, PCG offers no specific comment on that issue.

## Principles of sanctioning

PCG welcomes this consultation document and feels that the developments considered by the Review are broadly positive. It is heartening that consideration has been given to the fundamental questions of why sanctions are applied in the first place. PCG would observe, further to the consultation, that ultimately the object of the exercise must be to achieve the outcomes envisaged when the regulations in question were brought into being. For most recent regulations, these will be – or at least, should be – set out in the Regulatory Impact Assessment(s) drawn up at the time. PCG hopes, therefore, that the Review's work will ultimately feed into developments in the regulatory process from the identification of a problem to the enforcement of the final regulations. Moreover, we would urge that regulations whose desired outcome is not clear should be subjected to a new RIA and, if necessary, re-thought from scratch or even abolished. Although impact assessment is therefore outside the scope of the present Review, sanctioning issues nonetheless provide a useful lens through which it can be viewed.

The acknowledgement in the consultation document that sanctions should not be used at the expense of offering advice is also welcome. For many small businesses, and even more so for freelancers who may move between sectors, the biggest problem regarding regulation can be that they are regularly faced with the question "how do I know what I need to know?" or is it often very obvious where to find out what regulatory requirements might apply. Its position relative to other means of achieving the desired results is another issue that must frame all consideration of sanctioning.

## Redress, transparency and neutrality

PCG strongly feels that means of redress must be considered alongside any review of sanctioning. Mistakes do happen and individual regulators do occasionally get carried away, so sanctioning cannot be entirely divorced from consideration of what recourse is available when things go wrong, both to victims of non-conforming businesses, and to compliant businesses who are wrongly adjudged to have failed to meet regulatory requirements.

PROFESSIONAL CONTRACTORS GROUP

The consultation document already touches on how things can go wrong: the development of an "adversarial ticket-writing culture" can be very damaging to any regulator, and to those they have to regulate: the widespread perception among small businesses that HM Revenue and Customs has developed in exactly that way over recent years is a salutary lesson in that regard, albeit that HMRC is outside the scope of this review. PCG feels that redress, transparency and neutrality are key to preventing, or remedying, such difficulties.

PCG therefore urges all regulators to adopt some basic safeguards: an independently-audited culture of neutrality among inspectors is desirable; it may be desirable to establish a "regulators standard" along the lines of ISO9001, by which the neutrality of regulators can be assured. Inspectors must not be under pressure to meet any quota of "results", and that term should certainly not be synonymous with sanctions. Given the disparity of resources between the state on the one hand and a small business or individual on the other, it is also only fair that a regulator should be obliged to prove non-compliance beyond reasonable doubt, whether in court or in a tribunal. When tribunals are used, they should be independent from the regulator in question, and ultimately the business should be able to appeal to a tribunal independent of the government department concerned.

Also of vital importance is monitoring: as the consultation document discusses, the outcomes that are being achieved must be monitored. PCG feels that this is a key area in which the Better Regulation agenda has much distance still to make up. This is essential for ascertaining whether the intention of the regulation has been fulfilled, how effectively any sanctioning regime is operating, and how well each regulatory body is dealing with those it regulates.

## Responses to Questions

1 *Do you agree that criminal prosecution and the criminal courts should be reserved for the truly egregious offenders or where regulatory breach leads to severe actual or potential external consequences?*
- Yes: they should not be the first resort in most cases
- Courts can, however, offer an opportunity for a business or other alleged offender to clear their name. This opportunity should always be available, either via a court or tribunal, and the burden of proof on the regulator should be beyond reasonable doubt in both cases.

2 *Do you agree with the vision that is laid out in Figure 1.3 of a contemporary regulatory enforcement toolkit?*
- Yes.

3 *Do you agree or disagree with the 'Penalties Principles' proposed in chapter one? If you disagree with one or all of the Principles listed below, please elaborate?*

- Agree, with the following notes.

a. *Principle # 1 – Sanctions should change the behaviour of the offender to prevent regulatory non-compliance.*
    - Could this be better phrased as "Sanctions should change the behaviour of the offender to assure regulatory compliance," thus avoiding the negatives?

c. *Principle # 3 – Sanctions should be responsive and take into account what is appropriate for the particular offender and the particular regulatory issue.*
    - The point made on page 20 regarding potential inconsistency under this approach is sound; PCG agrees that consistency in regulatory outcomes is the key consideration.

PROFESSIONAL CONTRACTORS GROUP

4 *Are there any principles that should be added to this list? If yes, please provide details including supporting comments and evidence.*

- Sanctions should be designed with clear and comprehensive mechanisms for redress developed alongside them.

5. *Do you agree that a regulator must ensure the following characteristics to be present in order for a sanctioning regime to be most effective?*
   - Yes, with the following comments.

   a. *The regulator should have a published enforcement policy*
      - This should include an explanation of the regulator's view of commercial realities and risk, including how it trains its staff in these matters and how it gather information and formulates its analysis; this will be vital to inform its consideration of the commercial impact of any actions, including sanctions.

   b. *The regulator should attempt to measure regulatory outcomes (such as compliance rates) and as well as outputs (such as the number of enforcement actions taken).*
      - outcomes should be measured against criteria set out in the regulations' Regulatory Impact Assessment, where one has been carried out.
      - if an RIA has been carried out but no criteria for assessing the regulatory outcomes are included within it, the RIA should be revisited and the rationale for the regulations reconsidered from scratch.

   e. *The regulator should be transparent in the enforcement actions it takes*
      - If publishing details of regulatory actions carried out, the regulator must take into account any potential commercial impact on the business concerned, and offset any penalties against it when appropriate.
      - Details of investigations, including the fact that they were carried out, should not be made publicly available if no wrongdoing was found to have occurred.

   f. *The regulator should be transparent in the methodology it uses for setting and calculating monetary administrative penalties.*
      - This must include the possibility of appeal to a body independent of the regulator and, preferably, independent of the government department that oversees it.

   An additional characteristic:
      - The regulator must at all times have due consideration for the commercial impact of its activities on businesses, and must not act to the commercial detriment of the business other than by imposing an official sanction.

6 *How should regulators be required to report their performance and progress against their enforcement strategies?*
   - with reference to outcomes stated in RIAs.
   - to parliamentary committees as appropriate, as well as to ministers.

7 *Should regulators make a more focused effort to communicate their strategy for targeting businesses that are deliberately non-compliant? If yes, how should they approach this?*
   - Yes, in principle. Regulators must ensure when they do this that they have a full understanding of commercial realities and practices, and do not end up targeting businesses who are compliant but who do not match the preconceptions of inspectors.

PROFESSIONAL CONTRACTORS GROUP

9 *Is there need for increased investigative powers to be afforded to regulators to better deal with rogue businesses?*
- Not at this stage. Too often new powers are taken by government departments and agencies because of a failure to utilise existing powers fully. It would make more sense to reform sanctioning along the sensible lines suggested in this review and then consider whether new powers are needed when the changes have had a few years to bed in. Changing both at once would make it very difficult to assess the impact of each.

10 *Should due diligence defences be included in all areas of criminal offences involving regulatory breach?*
- Yes, in principle. It may be felt desirable to exclude such defences from the most serious cases, for instance when a fatality has resulted from non-compliance, but this would be a political judgment.

11 *Would more training be appropriate for judges in the area of regulatory non-compliance and appropriate sentencing?*
- On the evidence presented in this report, yes.

12 *Should sentencing guidance be prepared for areas of regulatory non-compliance?*
- Yes. An increased use of tribunals should allow for a better definition of serious non-compliance, which is likely to reach the courts; this should allow for more focused sentencing guidelines and training.

13 *Should the fine maxima in criminal courts be abolished? Should a cap be set?*
- Yes and yes.

14 *Should the cap follow the principles laid out in the Competition Act 1998 which provides that administrative penalties may not exceed ten percent of the relevant turnover of the undertaking concerned?*
- Yes, in principle. There should be consultation before the level is set; it need not necessarily be 10%.

15 *Should profits gained from non-compliance be subject to a separate profits order which is intended to remove any economic gains from non-compliance as well as a separate fine element?*
- Yes. This will enhance transparency considerably.

16 *In general, do you agree that regulators should have Monetary Administrative Penalties available to them as an additional sanction option in their enforcement toolkits? If no, then please elaborate on your views.*
- Yes.

17 *Do you prefer Model # 1 (paragraphs 3.40 – 3.44), Model # 2 (paragraphs 3.45 – 3.47) or Model # 3 (paragraphs 3.48 – 3.51). Please explain why you would prefer one particular model?*
- On balance, Model #3, providing that:
  - the burden of proof on regulators remains beyond reasonable doubt.
  - the tribunals are fully independent of the regulatory bodies and, preferably, fully independent of the government department which oversees the regulators.
- Failing this, Model #2 is a strong option. We feel that improved sentencing guidance as discussed above could answer the point about a lack of deterrence due to light sentencing.

PROFESSIONAL CONTRACTORS GROUP

18 *Should regulators have FMAPs available to them? For what types of offences (either in general or giving specific examples) would they be appropriate? What level of financial penalty would be appropriate for FMAPs?*
- Yes, preferably for low-level cases only, not calculated non-compliance. Penalties should be in the low hundreds of pounds only, given that they are fixed.

19 *Should regulators have VMAPs available to them?*
- Yes.

20. *Should the level of VMAPs be determined with regard to one or more of the following aggravating or mitigating factors:*
- Yes to all except:
    - *The co-operation of the offender* – "co-operation" is hard to define, and the possibility of an increased penalty for failing to "co-operate" to a regulator's liking could be used as a means to pressure businesses into admitting non-compliance when a court might find there to be none.
    - *The timely and accurate reporting of the issue* – businesses who have acted in good faith could still have failed to report an issue for entirely innocent reasons; penalising them for this seems to reintroduce the problem of non-compliance traditionally having been a "strict liability" offence.

*Please provide other relevant factors which you feel should be included*
- The general level of compliance with the regulation/s in question: if a regulation is not widely complied with, either because it has been little-promoted or generally ill-understood, or because businesses have broadly perceived that they can get away with it, this should be taken into account when penalties for individual companies are calculated. It may be that companies have been unaware, or felt obliged not to comply for fear of letting competitors have a cost advantage over them.

21 *Should the level of VMAP be unlimited?*
22 *Should the maximum level of VMAPs set out in legislation be capped to never exceed ten percent of the relevant annual turnover as per the details of the Competition Act 1998?*
- Yes, though see the point about setting the percentage level above.

23 *Should there be provision to supersede the cap if the financial benefit is greater than the capped amount?*
- Yes: such calculations must be transparent, with separate fines and profits elements as detailed elsewhere.

24 *Should there be an option for settlement as an alternative to a MAP? In what sort of cases should this be considered?*
- Yes, but in low-level cases only. The provision for a settlement could result in companies being pressured into accepting a deal rather than taking the option of full due process, by which they could clear their name.

25 *Should regulators follow-up statutory notices such as Enforcement or Improvement Notices on a risk adjusted basis?*
- Yes, providing that regulators' grasp of commercial reality is sufficiently strong to make the risk-adjustment accurate and meaningful.
- The same point applies to the point about pre-emptive Enforcement Notices in box 4.2: regulators' grasp of commercial reality must be sufficiently strong for these notices to be issued appropriately.

PROFESSIONAL CONTRACTORS GROUP

26 *If a statutory notice is not complied with, should regulators be able to apply a Monetary Administrative Penalty for non-compliance with an Enforcement Notice?*
- Yes, so long as it is made clear in the Notice that a penalty could ensue, and how much it would be (an approximation if necessary, though ideally an accurate figure).
- Similarly, if a regulator wishes to reserve the right to prosecute (4.22), this must be stated in the Notice,

27 *If a regulatory appeals tribunal exists, should appeals for statutory notices be heard in this venue?*
- Yes, provided that the tribunal is independent from the regulator and ideally from the government department that oversees it.

28 *Do you think Enforceable Undertakings are a good alternative sanction to have available to regulators?*
- Yes, if full explanation and advice accompanies them they could prove very useful.

29 *Does the described model suggest the correct key elements for introducing Enforceable Undertakings in the UK?*
- Yes.

30 *Should business be able to apply to the regulator to enter an Enforceable Undertaking or should it be solely at the discretion of the regulator to suggest an Enforceable Undertaking?*
- Yes. The regulator can always decline the request and opt for another route, after all.

31 *Should Enforceable Undertakings be disclosed publicly? Should regulators follow-up Enforceable Undertakings?*
- Enforceable Undertakings should not be disclosed publicly: if a regulator wishes to use reputational sanctions, they should be deliberately applied, and not just occur as a side-effect of something else.
- If an Undertaking's terms are breached, there is a stronger case for publication.
- Regulators should follow-up Enforceable Undertakings.

32 *Would Enforceable Undertakings in principle be appropriate for all types of offences, or are they more appropriate for particular types of offences (please provide details of types of offence or specific offences)?*
- Enforceable Undertakings would perhaps be excessive for very trivial and unintentional non-compliance; for other instances, however, they could be considered.

33 *Should enforceable undertakings be accompanied by a Monetary Administrative Penalty in order to effectively sanction serious offences?*
- Not routinely, though regulators should have the option available to them.

34 *What sort of conditions on a business should an Enforceable Undertaking seek to impose.*
- This will vary with circumstances, but generally:
    - Future compliance
    - Rectification of past non-compliance
    - Removal of profit / advantage if appropriate
    - Restorative action if appropriate

35 *Do you agree that Restorative Justice is something that can be applied to the area of regulatory non-compliance? Please elaborate on your views.*
- Yes. Reversing the impact of non-compliance is not included in other sanctions.

PROFESSIONAL CONTRACTORS GROUP

36 *For what types of offences would it be appropriate?*
- When a victim, wronged party or impact requiring rectification can be identified.

37 *Do you agree with Option #1 (paragraphs 5.27 – 5.29) of RJ as a pre-court diversion? If you disagree, please elaborate on your views.*
- Yes.

39 *Should RJ be an alternative to administrative penalties as set out in Option #2 (paragraph 5.30 - 5.31)?*
- Yes.

42 *Should regulators undertake pilots to explore the potential of Restorative Justice to improve outcomes for victims, offenders, and communities in business regulation?*
- Yes. Such a proposal should definitely be piloted before being rolled out more broadly.
- During any pilot, it must be made clear to potential participants the basis on which the pilot is taking place, whether or not participation is compulsory and any possible sanction for non-participation (witness the current trials of controversial new interventions by HMRC for an example of the confusion and ill-feeling that arises during a badly-conducted pilot)

43 *Who should contribute to the cost of the RJ process?*
- The regulator and the offender, in proportions to be decided on a case-by-case basis.

44 *What safeguards are necessary in the RJ process?*
- The alleged offender must not be pressured into an RJ process: their right to decline to take part and to try to clear their name in a court or tribunal must be made absolutely clear to them.

45 *Does Restorative Justice have a role to play in remedying regulatory breaches where no identifiable individual victim(s) exists such as in cases of environmental damage?*
- Yes, using the same principle as profit orders: the fine, profits order and restorative element must be set out separately, so that it is clear what is being demanded of the offender, and why,

46 *RJ is a voluntary process, so should it ever be suggested by a judge or a regulator as an alternative to a more formal sanction?*
- Yes, provided that the right to decline to participate is clearly set out as above (Q44).

47 *Will corporate or business offenders be under pressure to accept an offer to enter into an RJ process because it is seen as a lesser or softer alternative?*
- If the regulator, tribunal or court feels that RJ would represent a “softer option”, then it should surely not be on offer; if not, provided that the implications of choosing RJ, and the alternatives, are fully explained, it does not matter whether the offender perceives it as a softer option or not.

48 *What should happen if a company does not adhere to the agreed upon outcomes of an RJ process?*
- The process should revert to whatever procedure would otherwise have applied (tribunal, court proceedings etc.).
- The company must not be penalised for any such failure: it is the nature of Restorative Justice that it will not always work.

49 *Are financial penalties or imprisonment adequate sanctions for addressing regulatory non-compliance in a criminal setting?*
- Potentially. The points regarding removing the advantages of non-compliance by use of profits orders are well-made and should be kept in mind in this regard.

PROFESSIONAL CONTRACTORS GROUP

51 *Should judges be afforded a broader range of sentencing options to deal with companies and individuals who have not met their regulatory obligations?*
- Broader, yes, but not more harsh. It must be remembered in this context that the ultimate objective should be to secure the regulatory outcome desired when the regulations were introduced.

52 *Are financial penalties alone sufficient to deter companies from not complying with regulatory obligations?*
- Potentially – this is not an easy generalisation to make.

53 *Should regulators and government departments look to amend their legislative provisions to extend the sanctioning options available to judges?*
- Yes, particularly to make them more consistent between different regulations. Again, it must be remembered in this context that the ultimate objective should be to secure the regulatory outcome desired when the regulations were introduced.

54. *Would the following potential extended sanctioning options be appropriate for sentencing in cases of regulatory non-compliance?*
- Yes to all, with the following comments:
    - *Publicity orders*: the commercial impact of these must be considered, so that any adverse effect is offset against any penalties or profits orders.
    - *Mandatory audits*: the culture of neutrality recommended in the introductory remarks to this response will be necessary in all regulators to prevent such audits becoming confrontational and hostile "fishing expeditions"

56 *Which firms would be considered appropriate for alternative sanctions?*
- Generally those with a local or community presence; it is hard to see this form of sanction being relevant to knowledge-based freelancers who obtain their work all over the country.

58 *Should judges seek to remove all of the financial benefit obtained as a result of regulatory non-compliance in their sentencing through a profits order plus a fine?*
- Yes, although any impact on a company's future profitability must be taken into account when calculating any fine or profits order, so that the company is not punished twice for the same offence.

PROFESSIONAL CONTRACTORS GROUP

## Appendix: Comment on draft Regulators' Compliance Code

- **Addition to Section 4: in the event of an appeal against action over a suspected breach, the onus must be on the regulator to prove the breach and not on the business to prove their innocence.**
    - In clear-cut cases, this will present no difficulty to the regulator and appeals will in any event be unlikely
    - In more marginal cases, it is unreasonable that a business should have to prove compliance if regulators would struggle to prove non-compliance
- **Addition to Section 5: businesses should not be penalised or obliged to remedy their actions if they have followed official advice in good faith**
    - It has been known for businesses to follow official advice in good faith, only to be penalised by another government agency which disagrees with that advice
    - One such case involves PCG member Arctic Systems Ltd, who followed advice on the Business Link website regarding their company structure, only to be taken to court by HMRC for extra tax; the fact that the company acted in line with official advice was of course not admissible as a point of law in Arctic's defence
    - The onus should therefore be on regulators to ensure that the information they provide is correct; if it is not, or another agency believes that it is not, businesses who follow it should not be penalised for this error or confusion.
- **Amendment to Section 6: it is wrong to state that regulators should not discriminate *between* small and large businesses; it should say that regulators must not discriminate *against* small businesses.**
    - The burden of regulation falls disproportionately heavily on small businesses; the larger a business is, the easier it finds it to spread costs associated with compliance across its operations
    - Small businesses find it much harder to find the time to investigate the regulatory landscape and ensure compliance
    - Regulatory processes that do not acknowledge the differences between small and large businesses therefore risk discriminating against small businesses by unintentionally making compliance overly arduous
    - Regulators should therefore be obliged to ensure that they do not discriminate against small businesses when they formulate regulations and processes
- **Amendment to Section 7: the final stages in complaints procedures must allow referral to an independent person, not just an external person as currently stated**
    - It is not currently clear what is meant by an "external" person, but this phrasing risks appeals being referred to somebody outside the regulatory body but still, say, part of the same overall department
    - The Tribunals White Paper of 2005 recommended that all appeals to tribunals should ultimately be taken, if desired, to a body independent of the government department originally involved; PCG recommends that this principle is extended to all regulatory appeals
- **Addition to Section 7: provision should be made for dealing with appeals where there is ambiguity, or alleged ambiguity, in the regulations themselves**
    - The regulator should state publicly what is being challenged, the basis for the challenge, the interpretation being used by the regulator, the reason the regulator believes the interpretation is correct and any action being taken to resolve the issue.
- **Additional point for consideration: monitoring of regulations and their effectiveness by regulators**
    - Current guidelines for Regulatory Impact Assessments state that the impact of regulations should be assessed after implementation; this is by no means always observed and PCG will continue to press for it to be respected in all instances
    - Regulators have a role to play in this by monitoring levels of compliance and related issues: whether businesses find it easy to comply and if not why not; whether the circumstances that invited regulation still apply and therefore whether the regulations are still required