

Rethinking regulatory sanctions – Regulatory Enforcement and Sanctions Act 2008 – an exchange of letters



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Dear Richard

Your Review¹ criticized the heavy reliance on criminal sanctions in most areas of regulations and advocated that regulators should have access to a greater range of sanctions, including civil penalties. Part III of the Regulatory Enforcement and Sanctions Act 2008² is intended to give effect to that. It amounts to quite a revolution in the way we have traditionally designed regulatory sanctions in this country. We are starting to see how the RES Act 2008 might be used in practice in Defra's consultation on 'Fairer and Better Environmental Enforcement'.³

The RES Act 2008 takes the sanctions for non-compliance with regulatory regimes out of the criminal courts, and ultimately paves the way for a new enforcement regime placing considerable discretion into the hands of the regulators. Questions will inevitably be raised about the appropriateness of moving the focus away from the criminal courts and therefore away from the procedural protections provided for in the criminal process. Parliament has, in some 144 Acts of Parliament⁴ created particular criminal offences to support regulatory regimes across a range of areas, including in particular environmental issues. The RES Act 2008 allows the Government to create schemes which will result in the sanctions for committing those offences being imposed directly by the regulator.

Can this significant shift away from the criminal process be justified as a matter of principle, particularly when consideration is given to the consequential removal of some of the protections accorded to the defendant in the criminal courts?

Dear James

My Review covered an enormous number of regulatory regimes well beyond the environmental – some 61 national regulators and all local authorities – ranging from health and safety, food standards, trading standards and security guards. As you note, what is so striking was the extent to which, in so many of the areas I looked at, the only formal sanction available to regulators is a criminal prosecution. Even where there is power to serve improvement or enforcement notices, failure to comply with such a notice is a criminal offence. I believe strongly that in dealing with legitimate businesses, regulators should first and foremost advise and persuade. But you still need system of sanctions to underpin any regime and to ensure that those businesses that fully comply are not disadvantaged by those who do not.

Most of the regulatory offences that have been created are strict liability offences, sometimes with defences of reasonable care or the equivalent. In nearly every area of regulation I looked at there were at one end of the scale truly criminal operators who knew exactly what they were doing and were often adept in exploiting legal processes. But there were also legitimate businesses who, through oversights, poor management or indeed genuine accidents, failed to comply with regulatory requirements. Sometimes warnings or cautions will be suitable in those circumstances, but sometimes the consequences of such a breach, even if it was unintentional, are sufficiently serious that a sanction is required. With the present system, we are making the criminal law do a great deal of work and there are real dangers that we devalue its power and impact by doing so, and that regulators may under-enforce the law because a criminal prosecution quite rightly is a serious and time-consuming business.

In other areas of UK regulatory law such as competition or utility regulation we are familiar with the use of administrative penalties as well as the criminal law. Other countries such as Australia, Canada, and the United States also make use of a much richer range of sanctions. I felt it was about time this was also happening in the United Kingdom. The criminal law remains of importance, but regulators should also be able to impose sanctions for certain types of regulatory breach without the parties having to go through the full criminal process and all the stigma which that entails.

1 R Macrory 'Regulatory Justice: Making Sanctions Effective' Cabinet Office November 2006.

2 Royal Assent 21 July 2008.

3 <http://www.defra.gov.uk/corporate/consult/env-enforcement/> (12 July 2009). The consultation closed on 12 October 2009.

Dear Richard

The concerns you raised about the difficulties in relying on enforcement in the criminal courts alone are clearly justified. However, it can also be argued that the nature of the offences we are concerned with means that nothing short of the ‘full criminal process’ will be acceptable.

Although the RES Act 2008 attempts a partial reclassification of these offences as civil matters, one also has to consider whether the sanctions proposed are genuinely ‘civil’ as opposed to ‘criminal’ for the purposes of Article 6 of the European Convention on (the Human Rights Convention). It is worth me quoting from the European Court of Human Right’s judgment in *Öztürk v Germany* (1984) 6 EHRR 409, which concerned a German law allowing certain minor traffic offences to be treated as ‘regulatory’ as opposed to criminal matters. The court said:⁵

By removing certain forms of conduct from the category of criminal offences under domestic law, the law-maker may be able to serve the interests of the individual as well as the needs of the proper administration of justice, in particular in so far as the judicial authorities are thereby relieved of the task of prosecuting and punishing contraventions – which are numerous but of minor importance – of road traffic rules. The Convention is not opposed to the moves towards ‘decriminalisation’ which are taking place – in extremely varied forms – in the Member States of the Council of Europe. The Government quite rightly insisted on this point. Nevertheless, if the Contracting States were able at their discretion, by classifying an offence as ‘regulatory’ instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.

We therefore need to look at whether the sanctions proposed in the RES Act 2008 can properly be considered to be civil as opposed to criminal measures. The essential nature of the liability carries more weight than its domestic classification in assessing whether the matter should be considered to be a criminal offence for the purposes of the Convention.⁶ In my view there are a number of features of the sanctions regime in the RES Act 2008 that point towards the measures being criminal in nature. First, many of the offences concerned are of general application in the sense that they are not limited to people or industries that are the subject of particular licensing or regulatory regimes.⁷ Secondly, the sanctions are imposed by the

regulator under statutory enforcement powers.⁸ Thirdly, there is clearly a punitive and deterrent element to the sanctions.⁹ That is expressly recognised in Defra’s consultation draft ‘Guidance to regulators on how the civil sanctions should be applied’, which gives advice on the setting of variable monetary penalties. The regulator is encouraged to include ‘an appropriate deterrent component’ in any penalty it imposes.¹⁰

We also need to consider the nature and severity of the penalty. The RES Act 2008 provides no upper limit for a variable monetary penalty, and nor does Defra’s consultation Draft Environmental Civil Sanctions Order 2010.¹¹ The only limit is where the original offence is only triable summarily, in which case the penalty may not exceed the statutory maximum. Many environmental regulatory offences (such as illegal disposal of waste or the core water pollution offences) are, in fact, triable either way, meaning there is in theory no upper limit to a variable penalty. Defra proposes to encourage regulators to assess the level of a monetary penalty by reference to, among other things, the degree of blameworthiness.¹² In *International Transport Roth GmbH v SSHD* [2003] QB 728, the Court of Appeal had to decide whether fixed penalties imposed on haulage companies for transporting illegal immigrants into the UK were criminal in nature. Simon Brown LJ held that where liability involves blameworthiness, ‘by its very nature it may be thought to include a punitive (in the sense of retributive) element.’¹³

In respect of fixed monetary penalties under the RES Act 2008 (ss 39–41), the classification of the penalty as criminal or civil will depend in part on how high the regulator sets the penalty. Again, the only limit on the size of a fixed monetary penalty is the statutory maximum where the relevant offence is triable summarily (s 39(4)). A modest monetary penalty may be civil in nature: see for example *R (POW Trust) v Chief Executive and Registrar of Companies* [2004] BCC 268. But it is by no means clear that these fixed penalties will be ‘modest’: in theory they could be set at very high levels.

Although the RES Act 2008 prevents criminal proceedings being pursued when a sanction has been imposed in respect of the relevant offence, this seems to me to confirm rather than deny the criminal nature of the liability under a penalty imposed pursuant to the Act. The sanctions do not run in parallel to the criminal law: in a particular case, they replace it.

Applying the principles from the Convention and domestic case law, I think it is very likely that for the purposes of the Convention the sanctions would be considered criminal in nature.

4 Regulatory Enforcement and Sanctions Act 2008 ss 37–38 and Sch 5–6.

5 Paragraph 49, p 420–1.

6 *Jussila v Finland* (2007) 45 EHRR 39, [38].

7 *Bendenoun v France* (1994) 18 EHRR 54, [47].

8 *Benham v United Kingdom* (1996) 22 EHRR 293, [56].

9 *Öztürk v Germany* (1984) 6 EHRR 409, [53].

10 Annex 5 to the ‘Proposals for Fairer and Better Environmental Enforcement’ (n 3). <http://www.defra.gov.uk/corporate/consult/env-enforcement/govt-guidance.pdf> (see para 2.28 onwards).

11 Annex 2 (n 3) <http://www.defra.gov.uk/corporate/consult/env-enforcement/civil-sanctions.pdf>.

12 See the Draft Guidance (n 3) para 2.33.

13 At [38].

Dear James

I certainly agree that it is clear from the case law of the European Court of Human Rights that the way a sanction is described under national law does not determine how it should be categorised under the European Convention. As you rightly say, the size of the penalty is one of the factors. I always envisaged that fixed penalties should be pretty small and deal with minor infringements, and as such I suspect they would not be considered criminal under the Convention. But the RES Act doesn't specify maximum limits (other than where a summary only offence is involved) and one cannot really address this issue until the details are seen in an implementing Order. I suspect that the sizes being proposed in the current Defra consultation paper mean that these would not be considered criminal under the Convention.

But variable penalties are another matter. In my Review I did consider specifying an upper limit (such as a percentage of the company's turnover) not for the purposes of classification under the Convention but to provide some degree of certainty and proportionality. But in the end I decided that no upper limit should be laid down in the legislation unless a summary only offence is involved. As you say, most of the core serious regulatory offences are 'either way' with no upper limit on fines in the Crown Court, and it seemed simpler and more straightforward simply to match that structure. Variable penalties could therefore be pretty substantial, depending on the circumstances of the breach and the seriousness of the consequences. I have long taken the view that variable penalties as such would be considered 'criminal' under the European Convention, and agree with you on that score. But I think you have to look at the system as a whole to see whether it is compliant with the Convention, and I think it would be difficult on most counts to argue that it was not.

Dear Richard

Let's look at the implications of the civil penalties being considered criminal under the Convention. First, Article 6(2) provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty. Under Part III of the RES Act 2008 of the issue of a Notice of Intent would seem to amount to a criminal charge,¹⁴ and the imposition of a penalty will follow unless the regulator is persuaded to do otherwise following representations from the person subjected to the Notice. In the time between the charge and imposition of the penalty, there is no adjudication in any meaningful sense. What happens to the presumption of innocence where the only preconditions of the liability are that the regulator is satisfied that the offence has been committed, and it has served a Notice of Intent? I am concerned that a person subjected to a sanction may argue that the system undermines the presumption of innocence, and deprives him of his fair trial rights under the Convention.

14 See *Deweere v Belgium* (1979–80) 2 EHRR 439, where 'charge' was defined (at [46]) as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'.

The case of Deweer v Belgium (1979–80) 2 EHRR 439 is of particular interest here. That case concerned a butcher who had allegedly sold meat for an illegal profit. Under Belgian law, he was entitled to waive his right for the case to be determined in a criminal court by paying a monetary penalty. He had done so because he feared that, unless he accepted the penalty, his shop would be compulsorily closed by the authorities. In the circumstances, the European Court of Human Rights held that his waiver of the right to a fair trial was 'tainted by constraint' and therefore his rights under Article 6 had been violated. Is it not possible to see the same criticism being made of the sanctions under the RES Act 2008?

Dear James

I was conscious that the European Convention does not prescribe a standard of proof even for offences considered criminal in nature under the Convention, and in theory (and indeed in many jurisdictions) the standard of proof in what is a civil matter under UK law could be the balance of probabilities. But I did not see the administrative sanctions system I proposed should be a way for regulators to score easy victories, and during work on the Review received little evidence from regulators that it was evidential standards that were causing problems. Instead the new system is designed to ensure that more appropriate forms of sanctions are applicable and reflect more fairly the very different circumstances in which breaches occur.

So I tied in the new system to existing regulatory offences and recommended that the regulator had to be satisfied beyond all reasonable doubt that the offence had been committed before an administrative penalty could be initiated. This is now provided for in s 39(2) (fixed penalties) and s 42(2) (variable penalties). Regulators will in practice investigate suspected offences according to current criminal procedures with all the safeguards, including those contained in the Police and Criminal Evidence Act 1984, that this implies. Only after investigation will they decide which is the most appropriate sanction route. In this sense, the new system will not save time and money during the investigation phase, but it should lead to more appropriate routes after investigation has been completed. Coupled with a right of appeal to an independent tribunal, I think that the procedures must satisfy the requirements of the Convention and the presumption of innocence. I realise that in the case of criminal procedures a defendant can do nothing and wait for the prosecution to prove his case before being convicted, whereas under the administrative systems they must at least initiate an appeal if they wish to challenge the regulator's final decision. But I don't believe that this structure, which is inherent in any administrative penalty system, is contrary to the Convention.

Dear Richard

The provisions on appeals also raise concerns. The new Regulatory Tribunal (which will be the normal forum for appeal) of course meets the Convention's requirements for an independent tribunal. But the grounds of appeal specified in

the Act appear to be very restricted. In the case of fixed penalties, the Act only requires an appeal to be available on the basis that the decision was based on an error of fact or an error of law, or that the decision was unreasonable (s 40(6)). For variable penalties, an appeal can also be brought on the ground that the amount of a monetary penalty, or another discretionary requirement, was unreasonable (s 43(7)).

Importantly, it is not clear that the Tribunal can determine for itself whether the offence has been committed, and there is a danger it might consider itself constrained by a 'Wednesbury' test: would a reasonable regulator be satisfied beyond all reasonable doubt that the offence has been committed? This is potentially incompatible with the presumption of innocence and the right under the Convention to a full hearing before an independent court or tribunal. The fundamental basis for the liability would be determined by the regulator, subject only to a reasonableness test resembling that seen in conventional judicial review proceedings.

It is interesting to note that Defra's draft Order provides that 'the regulator must prove the commission of the offence beyond reasonable doubt' (Article 10(2)(a) Draft Civil Sanctions Order 2010). This requirement appears to go beyond the grounds of appeal set out in the Act itself, but in my view it will be a welcome development should it be adopted. The Defra consultation document asks for consultees' comments on 'whether or not it is necessary for the Order to state this in the interests of transparency'.¹⁵ That would seem to suggest that the Government presumes a regulator would have to prove the commission of the offence at any appeal.

Defra says that it wants there to be 'broad grounds for appeal' and to 'avoid disputes between parties over whether an appeal falls within the stated grounds'.¹⁶ This will give some reassurance to those who might be the subject of the penalties that they will not be deprived of the right to fully argue against the imposition of a sanction in front of the Tribunal.

Ultimately it is difficult to comment on the adequacy of the appeal mechanisms in the abstract: we simply do not know how the Tribunal will deal with appeals against these sanctions. But I have a real concern that unless the Tribunal allows the basis of the sanction to be questioned – in other words, allows the appellant to question whether the offence has been committed – the system as a whole will be vulnerable to challenge on the basis that it deprives appellants of the right to a full hearing before an independent and impartial tribunal. I have that concern whether or not the liability is considered to be criminal in nature. Of course, the fuller the appeal right, the more complex the appeals will become. In turn, the benefits of the RES Act 2008 sanctions over the existing criminal court regime will be eroded. There will be an important balance for the new Tribunal to strike when it begins to hear this type of appeal.

Dear James

My Review recommended that there should be a full right of appeal by which I meant that someone served with a penalty notice should not only be able to question the size of the penalty but also argue that the original offence had not been committed in the first place. Given that with variable penalties at least we are talking of potentially large sums of money, it seemed to me this was only fair to all concerned, whatever the position under the European Convention. Appeals could have gone back to the ordinary courts, but the reforms to the tribunal systems currently taking place allowed me to recommend these appeals went to a new Regulatory Tribunal, meaning that once a decision had been taken to go down the administrative route the procedures stayed within an administrative system throughout. When it comes to the grounds of appeal, it is true that for fixed and variable penalties the RES Act states three grounds only as a minimum – error of law, error of fact and unreasonableness of the amount imposed. When I first saw this, I assumed this would be sufficiently broad to encompass a full right of appeal in the way I have described it. But I now have doubts. The gap between appeals on an error of law/fact and a full right of appeal may be narrow but I tend to agree with you that this is not a full right of appeal as envisaged by the Convention. I am reinforced in this view by the appeal provisions for Stop Notices in s 47 RES Act which, in addition to an error of law and error of fact, include a ground that 'the person has not committed the offence and would not have committed it had the stop notice not been served'. This indicates the draftsmen did consider that an error of law or fact does not completely cover the fact that the offence has not been committed. The grounds of appeal in the Act are, however, only the minimum grounds of appeal and can be extended by implementing orders. I think the argument for more restricted grounds of appeal for fixed or variable penalties was that in those cases the person served had a first opportunity to make representations to the regulator before the final notices were served. But, and I am sure you agree, I do not think this satisfies the Convention's requirements for an independent court or tribunal. I have therefore been urging Government to ensure that in any implementing Order the grounds are extended to include a further ground that the offence was not committed in the first place.

Dear Richard

It appears that Defra has taken on board your words of warning in its draft Order. The next question is who should have the burden of proof? The draft Order says that in any appeal the burden of proof is on the regulator (Article 10(2)). However, that is not a requirement of the Act, which is silent on the question of burdens of proof. It is also slightly surprising, because in a criminal court the burden of proof would rest on the defendant in respect of evidential issues surrounding any defence which was being raised. I wonder if a better solution would have been for the Act expressly to impose the burden on the regulator simply to show that the

15 Note 11, para 7.8

16 Consultation document (n 3) paras 7.14–7.15

offence has been committed, and then the subordinate legislation would not have to deal with this point.

Dear James

Once again I agree with you. This was an issue raised during Parliamentary discussions on the Bill and I have to say never properly answered by Government. During the Review a number of businesses and trade associations were quite fairly concerned as to whether we were creating a system where the odds were all being stacked in favour of the regulator. Once served with a large administrative penalty notice (and the amounts might well be higher than current fines) the burden might be on the business concerned not just to initiate an appeal but to prove its innocence. My proposed system already required the regulator to be satisfied beyond all reasonable doubt that an offence had been committed before imposing an administrative penalty and it therefore did not seem an undue burden to require it to prove its case before a Tribunal if there was an appeal. I was also aware that in the *Alphasteel* appeal¹⁷ the Environment Agency accepted that the burden of proof rested on it, but this was a concession for one case, and did not mean that this would always be the position. It is no secret that during the passage of the Bill I urged amendments to make it clear that the burden of proof in appeals rested on the regulator, but Government at the time appeared to feel this was a matter for the Tribunal to determine. However, I am pleased to see that the Defra proposed Order makes it clear that the burden of proof rests on the regulator, and I think this is the right approach, and is consistent with the presumption of innocence contained in the European Convention.

I would imagine that if a statutory defence is raised to disprove the existence of the offence, then the burden would shift to the appellant under familiar principles and would need to be proved on the balance of probabilities. It may be the Tribunal will need to give early guidance on this issue. It is also worth adding that I think the Government was concerned that specifying burdens of proof might lead to a danger that any appeal to the tribunal might turn into effect the equivalent of a magistrates' court hearing. That may indeed be the case if the appellant challenges whether the offence was committed in the first place, but any Tribunal should be able to handle this. In practice, however, it may be rare for an appeal to turn into a full question concerning the committal of the original offence, and I suspect that administrative penalties will often be used in cases where there is no doubt about the committal of the offence and the business concerned would have pleaded guilty anyway. Arguments are more likely to be concerned about the size of the penalty. But I may turn out to be proved utterly wrong on this score, and it is important the legal position is clarified as early as possible.

Dear Richard

Once it is conceded that variable penalties at least are criminal for the purposes of the Convention, then other implications follow. Article 6(3) provides a number of minimum rights for anyone charged with a criminal offence – for example the right to examine witnesses, and of particular significance in the context of Tribunals, the right to free legal assistance when the interests of justice so require and the person subject to the charge has inadequate means.

In Benham v UK (1996) 22 EHRR 293 the European Court held that proceedings which resulted in imprisonment for non-payment of the community charge were criminal for Article 6 purposes and that the absence of a general right to legal aid violated Article 6(3)(c). The obligation to provide legal aid is limited to where the interests of justice so require. The interests of justice allow consideration of issues such as complexity, the ability of the individual to represent himself and the severity of the potential sentence. A variable monetary penalty may be a very severe penalty indeed, and issues regarding the compliance with environmental law are often of considerable complexity. For example, expert evidence may be required in cases where it is disputed that a particular form of pollution has occurred. Whilst we might anticipate that many sanctions will be imposed on private companies with adequate means to secure legal representation, that will not always be the case.

The position of legal aid and the appellate Tribunal remains uncertain. It must be possible to envisage a case where the sanction under appeal, the appellant's means and the complexity of the issues requiring resolution demand that financial assistance is provided to the appellant to pursue his appeal. This will in turn add to the overall cost to the public purse of the new system.

Dear James

Yes, I agree with your analysis. We do not as yet know all the procedures of the new Regulatory Tribunal, including issues concerning costs and the availability of legal aid. I have no doubt that the Tribunal will wish, where it is appropriate, to keep procedures as cost-effective, informal and efficient as possible. But equally those establishing the system must be alive to the requirements of the European Convention and that at times they will be dealing with issues considered criminal under the Convention.

Dear Richard

There is another problem with fixed penalties. If they are set too high, they again carry the risk of running foul of the Convention because they might amount to disproportionate penalties. In International Transport Roth GmbH v SSHD [2003] QB 728, Simon Brown LJ held that the 'hallowed principle that the punishment must fit the crime is irreconcilable with the notion of a substantial fixed penalty',¹⁸ an observation which contributed to his view that the fixed penalty regime under consideration was incompatible with Article 6. Jonathan Parker LJ's comments in the same case are of particular interest.¹⁹

¹⁷ Alphasteel Ltd appealed (31 July 2007) against a civil penalty imposed by the Environment Agency for failure to meet the requirements of the EU ETS (ed).

¹⁸ At [47].

In considering the penalty in the context of Article 6, it seems to me that the degree of severity of the penalty must be a matter which falls within Parliament's 'discretionary area of judgment': in other words, it is matter for Parliament and not for the courts. The courts are, however, concerned to ensure that the nature of the penalty is not such as to breach Article 6. In this context, the fact that the penalty is not merely severe but fixed seems to me to be of the highest importance. The fact that it is fixed means, by definition, that in imposing the penalty where liability has been determined no account can be taken of the facts of particular cases, or of the circumstances of a particular defendant. Nor is there any scope for mitigation.

Both judges found that the fixed penalties were incompatible with Article 6, and further that they constituted a disproportionate interference with property rights contrary to Article 1 of the First Protocol to the ECHR. The International Transport Roth case is a salutary warning to those who are in the process of prescribing fixed penalties that the punishment should still fit the crime.

Dear James

My Review always envisaged that fixed penalties would be suitable for only very minor regulatory infringements (such as failure to submit a statutory return in time), and the sums specified would be pretty small. The Act is of course framework legislation and the real detail must depend on any implementing Orders. The Defra proposals (the first from a Government Department) seem fully alive to the need to keep fixed penalty levels small – £100 for an individual and £300 for a company – that is quite a different order from the sums involved in the *Roth* case where average administrative penalties imposed on road haulers for carrying illegal migrants were in the order of £12,000.

Dear Richard

Given all these uncertainties, would it not have been preferable for the RES Act 2008 to provide that someone served with a fixed or variable penalty notice could opt to have the case prosecuted before the criminal courts in the normal way? Such an amendment was proposed by Lorely Burt MP during the passage of the Bill.²⁰ Subject to the potential difficulties which might arise if for some reason the person felt obliged to accept the penalty (as I have already mentioned in the case of Deweer) it would seem to me such a provision would close off any argument that there was a deprivation of fair trial rights. The person could elect to have a full criminal trial, or could waive the rights attendant on that by accepting the penalty.

Such a provision exists in relation to the fixed penalty notice provisions in Part 1 of the Criminal Justice and Police Act 2001, and in the well-known fixed penalty notice provisions in Part III of the Road Traffic Offenders Act 1988. If you receive a penalty notice for speeding, you can pay up or elect to have a criminal

trial to challenge the evidence. I would have thought that most people choose to pay up: surely the same would happen under this regime?

Dear James

I have agreed with you on a fair number of points but not this one! This is a seductive model and one proposed to me during the course of the Review, not least by the Environment Agency. It is seductive because it appears to offer advantages with minimal upheavals to the existing system, with no need to set up new regulatory tribunals. In addition, as you say, it might avoid any problems with the European Convention. I considered it carefully, but it is a model I rejected, and I remained convinced I was right to do so.

From the regulator's perspective it begins to look like what I dubbed the 'blackmailer's model' – pay up or we prosecute. And for a business served with an administrative penalty, I could see unattractive scenarios of defence teams delaying and playing brinkmanship games until the last moment – 'reduce the penalty and we won't exercise our rights to a full trial in the criminal courts'. This seemed to me to miss the fundamental rationale for introducing a distinction between criminal and administrative sanctions. Once the regulator has investigated the alleged offence and decided that a formal sanction (rather than, say, a warning) is justified, then I want the regulator to make the decision whether a criminal or administrative response is appropriate – having regard to the penalty principles contained in my Review, the regulator's own enforcement policy and the regulatory outcomes he wishes to achieve. I think this is a question of regulatory judgment and that regulators should be in the best position to make that decision. It is not, in my view, something that should be left to the tactical choice of the defendant and his legal advisers.

I realize that this gives considerable discretion to regulators and other recommendations in my Review concerning regulatory governance are designed to ensure that this choice is not unduly influenced by perverse or irrelevant factors. The RES Act, for example, expressly prohibits any revenue from penalties going directly to the regulator, and I advocated against internal target setting based, for example, on the numbers of penalty notices served or the amounts secured. These sorts of issues have dogged and I believe harmed the acceptability of other administrative penalty systems such as parking fines. I cannot believe the European Convention and the way that the European Court has interpreted it was intended to prohibit the development of this sort of carefully constructed regulatory sanctions system which draws on some of the best contemporary practice in Australia and Canada, amongst others. If the Convention does do so, then I begin to share Lord Hoffmann's concerns about an over intrusive court.²¹

19 At [138].

20 See Hansard Commons Debates 10 July 2008, cols 1586–7.

21 Lord Hoffmann 'The Universality of Human Rights' Judicial Studies Board Annual Lecture 19 March 2009: 'In practice, the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe.'