The Insolvency Service

Insolvency practitioner regulation – regulatory objectives and oversight powers

Legislative changes introduced on 1 October 2015

December 2015

A BIS SERVICE

Contents

Introduction

The Insolvency Service acts on behalf of the Secretary of State as the oversight regulator in Great Britain for the Recognised Professional Bodies (RPBs) that authorise and regulate insolvency practitioners.[1] Details of these functions are set out in the publication - *Oversight regulation and monitoring in the insolvency profession*.

Significant changes have been introduced to insolvency law, practice and regulation from October 2015. These include:

- The introduction of regulatory objectives for insolvency regulators.
- New powers for the Insolvency Service to take action against insolvency regulators and, where it is in the public interest, insolvency practitioners.
- Changes to the way that some fees and expenses are charged by insolvency practitioners.
- Measures that will enable insolvency practitioners to specialise in either corporate or personal insolvency.
- An end to the direct authorisation of insolvency practitioners by the Insolvency Service following a one-year transitional period.

The current RPBs are:

- Association of Chartered Certified Accountants
- Chartered Accountants Regulatory Board[2]
- Insolvency Practitioners Association
- Institute of Chartered Accountants in England and Wales
- Institute of Chartered Accountants of Scotland
- Law Society of Scotland
- Solicitors Regulation Authority[3]

The Law Society of Scotland and the Solicitors Regulation Authority have announced that they will cease to authorise insolvency practitioners by the end of 2015.

[1] For the purposes of this paper the term Insolvency Service is used throughout.
[2] Acting on behalf of the Chartered Accountants Ireland.
[3] Acting on behalf of the Law Society.

This guidance:

- Explains the new regulatory objectives.
- Sets out the new powers of sanction available to the Insolvency Service.
- Provides an overview of how the Insolvency Service intends to implement these changes.

This publication is general in nature and does not attempt to address all the issues, situations and circumstances that may arise. It is intended to suggest how the RPBs might go about meeting the regulatory objectives. In practice, RPBs are already likely to be carrying out many of the activities covered here as part of their current procedures.

Implementation of these changes will be kept under review and the Insolvency Service will continue to work with the insolvency profession, including providing updates on its approach.

Part 1: Overview of regulatory objectives and sanctions

Regulatory objectives

The new regulatory objectives provide insolvency regulators with a clearer, enhanced structure within which to carry out their functions of authorising and regulating insolvency practitioners. It brings the insolvency system more into line with regulation in other sectors such as the accountancy and legal professions.

A RPB will, when discharging regulatory functions, be required to act in a way which is compatible with the regulatory objectives, and which it considers most appropriate for achieving the following:

- Having a system of regulating insolvency practitioners that secures fair treatment for people affected by their acts, is transparent, accountable, proportionate, and ensures consistent outcomes.
- Encouraging an independent and competitive insolvency practitioner profession whose members provide high quality services at a fair and reasonable cost, act transparently and with integrity, and consider the interests of all creditors in any particular case.
- Promoting the maximisation of, and promptness of returns to, creditors.
- Protecting and promoting the public interest.

The Insolvency Service appreciates that the RPBs may exercise their functions in different ways. While consistency across the RPBs and the adoption of best practice is encouraged, the objectives do not require all the bodies to adopt an identical

approach. Instead the objectives suggest an overall framework which each of the RPBs should work towards.

The Insolvency Service will assess the extent to which these objectives are being met through its existing processes for reviewing and monitoring the activities of the RPBs.

In its role as oversight regulator, the Insolvency Service must also have regard to the new regulatory objectives in carrying out its own functions.

Sanctions

The following new powers of sanction are available to the Insolvency Service:

- Giving directions to a RPB.
- Imposing a financial penalty on a RPB.
- Issuing a reprimand to a RPB.

These sanctions may be used individually or in combination depending on particular circumstances.

Where it would be in the public interest and certain conditions are met, the Insolvency Service would be able to apply to Court for a direct sanctions order against a person who is acting as an insolvency practitioner.

It is expected that these new powers of sanction will be used infrequently, and the Insolvency Service would normally expect the RPBs to take responsibility for timely and robust action where necessary in relation to misconduct or poor performance.

In addition to these powers, the legislation also sets out procedures to be followed where a body wishes to stop acting as an insolvency regulator or where such action is initiated by the Insolvency Service.

Generally, the Insolvency Service aims to resolve any issues through discussion and agreement with the relevant RPB and sanctions are likely to be used only rarely.

Where a RPB or a person acting as an insolvency practitioner fails to comply with a sanction, the Insolvency Service may apply to Court to enforce compliance.

Timing of application of new measures

The regulatory objectives and sanctions both came into effect on 1 October 2015 and will apply to behaviour and activities taking place after that date.

Part 2: Regulatory Objectives

Fair treatment, regulatory principles and consistent outcomes

This objective aims to ensure that the RPBs have appropriate systems and procedures for regulating persons acting as insolvency practitioners, which secures fair treatment, reflects the regulatory principles and ensures consistent regulatory outcomes. (Fair treatment, within the parameters of insolvency law, is of particular importance given that those impacted by the decisions made by insolvency practitioners may often have limited understanding of the insolvency process.)

It is for the RPB to exercise their expertise and judgement in deciding on what fair treatment means in an insolvency context. It is recognised that the person impacted by an insolvency practitioner's decision may not always feel fairly treated if they disagree with the way legislation is framed for example, but the RPB should be able to explain how they have dealt fairly with all parties in the circumstances that have arisen.

The Insolvency Service would expect a RPB to have a complaints system which is accessible, even-handed and transparent. This would include the proper assessment and investigation of complaints, and the provision of timely and appropriate information to all parties and to the Insolvency Service. Where it is necessary, a RPB's disciplinary procedures should secure fair and consistent outcomes, for example, through application of the Common Sanctions Guidance.

A RPB which carries out timely, proportionate and targeted monitoring of practitioners is also likely to be acting in a way which is compatible with this objective. The RPBs should be able to demonstrate that their activities do not impose unnecessary burdens on the industry, for example by adopting a risk-based approach to monitoring, wherever that is appropriate. A RPB should be able to demonstrate how it supports insolvency practitioners to achieve compliance with the professional standards and ethical approach expected of the profession; for example, as set out in the Statements of Insolvency Practice and the Insolvency Code of Ethics.

RPBs will be expected to make use of published information about the outcomes achieved by other RPBs when assessing whether they are producing consistent outcomes. The Insolvency Service will also make use of such information.

Encouraging an independent and competitive profession, which provides high quality services at fair and reasonable cost, acts transparently, with integrity and considers interests of all creditors in a particular case

RPBs will be expected to act to promote an independent and competitive insolvency practitioner profession, free from inappropriate influences and which acts in the best interests of creditors in any particular case. Ensuring high standards of

professionalism and competence would be one way to encourage a competitive industry. RPBs will be expected to be alert to any developments that could be regarded as anti-competitive, for example by ensuring that insolvency practitioners provide accurate and honest information on websites and in other publicity material.

RPBs should be able to provide evidence that they authorise only those individuals that meet the necessary qualification requirements for taking insolvency appointments. RPBs will be expected to tackle anti-competitive behaviour, abuse, including excessive fees, and misconduct through both monitoring and the proper assessment and thorough investigation of complaints from all sources, for example debtors, creditors, regulators and other insolvency practitioners.

RPBs should ensure that both creditors and debtors are informed about the standards of service they can expect, including details about complaint procedures (such as how to complain, and timescales for acknowledging and responding to complaints), the progress of any investigation and any disciplinary outcomes.

Where there is evidence of misconduct or abuse (whether identified through dealing with complaints, monitoring activities, or any other intelligence or source), the Insolvency Service would expect that a RPB should take timely and necessary steps to address this, including the suspension or revocation of an insolvency practitioner's authorisation in appropriate circumstances.

RPBs already have a role in ensuring that insolvency practitioners work to common professional standards, that are reviewed and, where possible enhanced, to enable creditors and others to receive an efficient service and at fair cost. RPBs should also be proactive in promoting training and continuous professional development amongst their members and in contributing to the review and development of standards generally, to promote a high quality of service across the insolvency practitioner profession.

While RPBs currently have procedures in place, as part of their monitoring processes, to identify malpractice in the fees charged by insolvency practitioners, there is now an explicit requirement for bodies to encourage their members to provide services at a fair and reasonable cost. To demonstrate compliance with this objective, a RPB will now need to consider complaints made in relation to the level of fees and other costs. The words 'fair and reasonable' in this context should be seen as having their common interpretation, and should be considered in relation to both the interests of insolvency practitioners, who are entitled to a fair return from the work they do, and of those affected by the fees charged in a particular case.

As a general approach, the RPBs should, for example, consider whether the fees and costs charged by insolvency practitioners in a particular case seem to be set at the right level when taking into account the liabilities and assets realised. RPBs may also need to consider if the time spent is reasonable for the work carried out, that the

appropriate level of expertise has been used, and whether the case has been closed in a timely fashion.

It is also worth noting that for appointments in England and Wales, new rules introduced on 1 October 2015 require insolvency practitioners to provide up front estimates of fees when they propose to charge on a time and rate basis. Where fees charged are in accordance with estimates, this should assist the RPBs in considering whether fees are “fair and reasonable”. RPBs may want to consider the number of occasions on which insolvency practitioners return to creditors for further approval of increases in fees, or indeed where they never request further approval from creditors. However, RPBs should not feel constrained from examining fees and costs where they are within estimates, but should rather be considering whether the amounts charged are fair and reasonable.

Consideration of fees will be different for Scottish appointments, where the legislation provides interested parties with other means to challenge fees charged by insolvency practitioners. Here RPBs should continue to ensure that insolvency practitioners provide debtors and creditors with clear and accurate information on such rights of challenge for Scottish appointments.

This regulatory objective requires the RPBs to encourage their members to act transparently, with integrity and to consider the interests of all creditors in any particular case. While these principles are already embodied in the work of RPBs, for example through the Insolvency Code of Ethics or the RPB’s own ethical code, this objective serves to reinforce their importance.

Promoting the maximisation of the value of and promptness of returns to creditors

This objective recognises that a primary purpose of an insolvency regime is to maximise the value of returns to creditors and to allow returns to be made promptly. This is separate from expectations around encouraging appropriate fee-charging, as it is not only fees that will impact on returns to creditors but also, for example, ensuring that debtors are in the appropriate insolvency process and that cases are effectively and efficiently administered by the office-holder.

To achieve this objective, RPBs should ensure (for example through complaints’ handling, general monitoring activities and case investigations) that insolvency practitioners are providing impartial and accurate advice to debtors, acting efficiently and have suitable processes in place to maximise returns to creditors as a whole, depending on the circumstances of a particular case. RPBs will also need to examine whether insolvency practitioners are bringing cases to an end in a timely manner and distributing funds to creditors in an efficient way at appropriate times.

Protecting and promoting the public interest

This objective recognises that RPBs, through their authorisation and regulation of insolvency practitioners, play an important role in protecting and promoting the public interest. The legislation does not define what is meant by public interest and it may have different interpretations in particular circumstances.

It is expected that RPBs would seek to deal promptly with an act or omission by an insolvency practitioner which is serious enough to cause harm to the public, brings the reputation of the insolvency industry into disrepute by reducing public confidence or fails to uphold proper standards of conduct and performance.

RPBs can also promote the public interest by keeping up to date with Government requirements. They should ensure transparency in guidance and decision-making procedures, develop professional and ethical standards (for example, through the Joint Insolvency Committee) assist with the education of debtors, creditors and the public generally and work with the Insolvency Service to share information and intelligence.

We expect to see RPBs proactively seeking to use intelligence received via complaints or otherwise to direct their activities towards any actions of insolvency practitioners likely to cause harm to the public interest.

Part 3: Sanctions

This section provides an overview of the actions that may be taken against a RPB, or an insolvency practitioner through an application to the court, and summarises those procedures.

The expectation is that these sanctions would not be used frequently and, in general, the Insolvency Service would seek to resolve matters directly with a RPB before commencing these procedures.

Directions

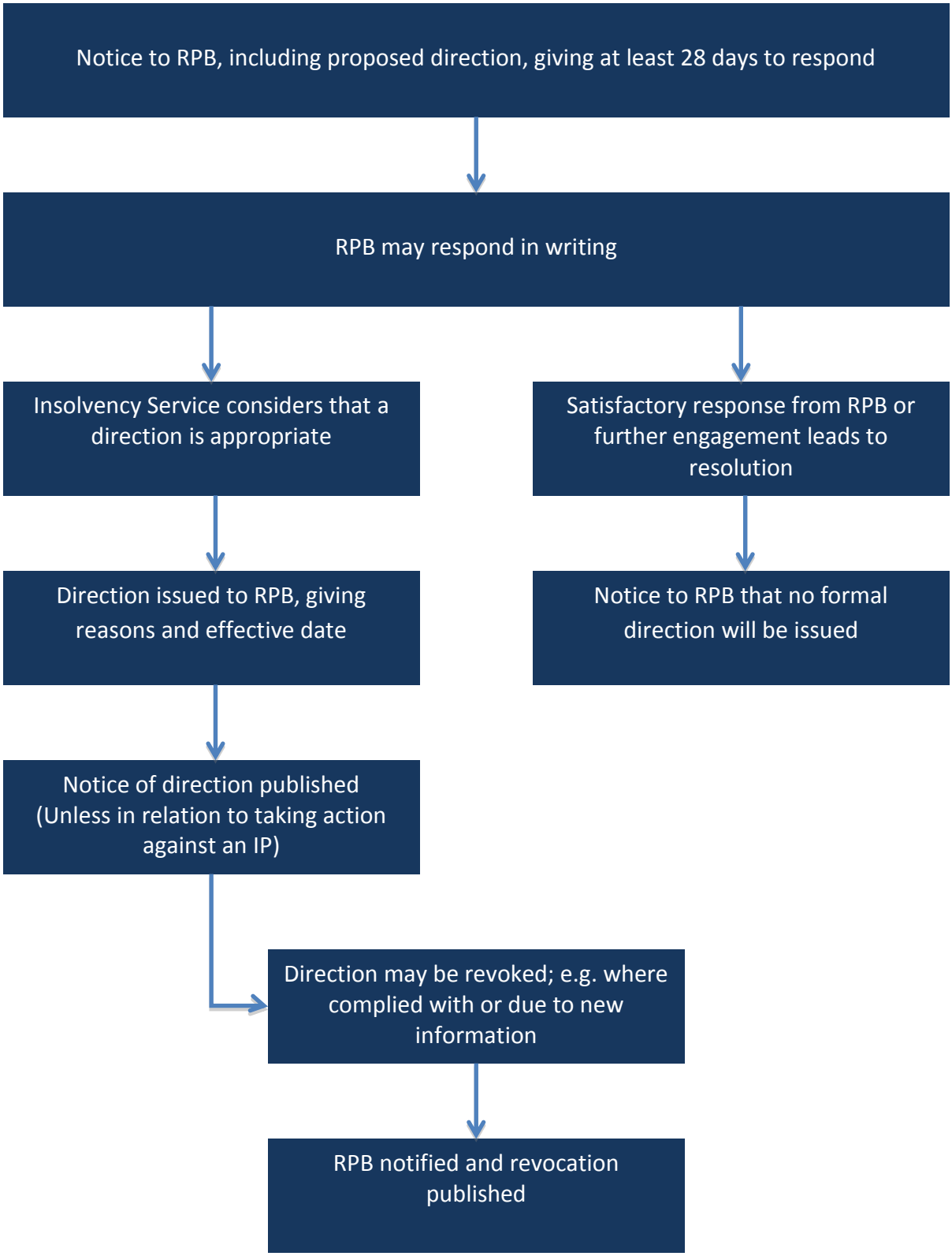
Where an act or omission of a RPB (or series of acts or omissions) in discharging its regulatory functions has had, or is likely to have, an adverse impact on the achievement of one or more of the regulatory objectives, the Insolvency Service may direct the RPB to take steps to counter or prevent its occurrence or recurrence.

A direction could only require a RPB to do something which is within its remit in relation to the authorisation or regulation of insolvency practitioners. This may require a RPB, on occasion, to take steps to modify its own rules and procedures in order to comply with a direction, insofar as those rules and procedures do not support the RPB in achieving the Regulatory Objectives.

If the Insolvency Service considers that a RPB has not complied with a direction, further regulatory action may be initiated and this could, for example, include taking steps to impose a financial penalty.

Any decision to issue a direction may be challenged by an application for judicial review.

The flowchart below summarises the process.


Notice to RPB, including proposed direction, giving at least 28 days to respond
RPB may respond in writing
Insolvency Service considers that a direction is appropriate
Satisfactory response from RPB or further engagement leads to resolution
Direction issued to RPB, giving reasons and effective date
Notice to RPB that no formal direction will be issued
Notice of direction published (Unless in relation to taking action against an IP)
Direction may be revoked; e.g. where complied with or due to new information
RPB notified and revocation published

Financial Penalties

Steps may be taken to impose a financial penalty on a RPB where it has failed to comply with either a formal direction (as detailed above) or a requirement imposed on it under insolvency legislation, and it is appropriate to impose a financial penalty

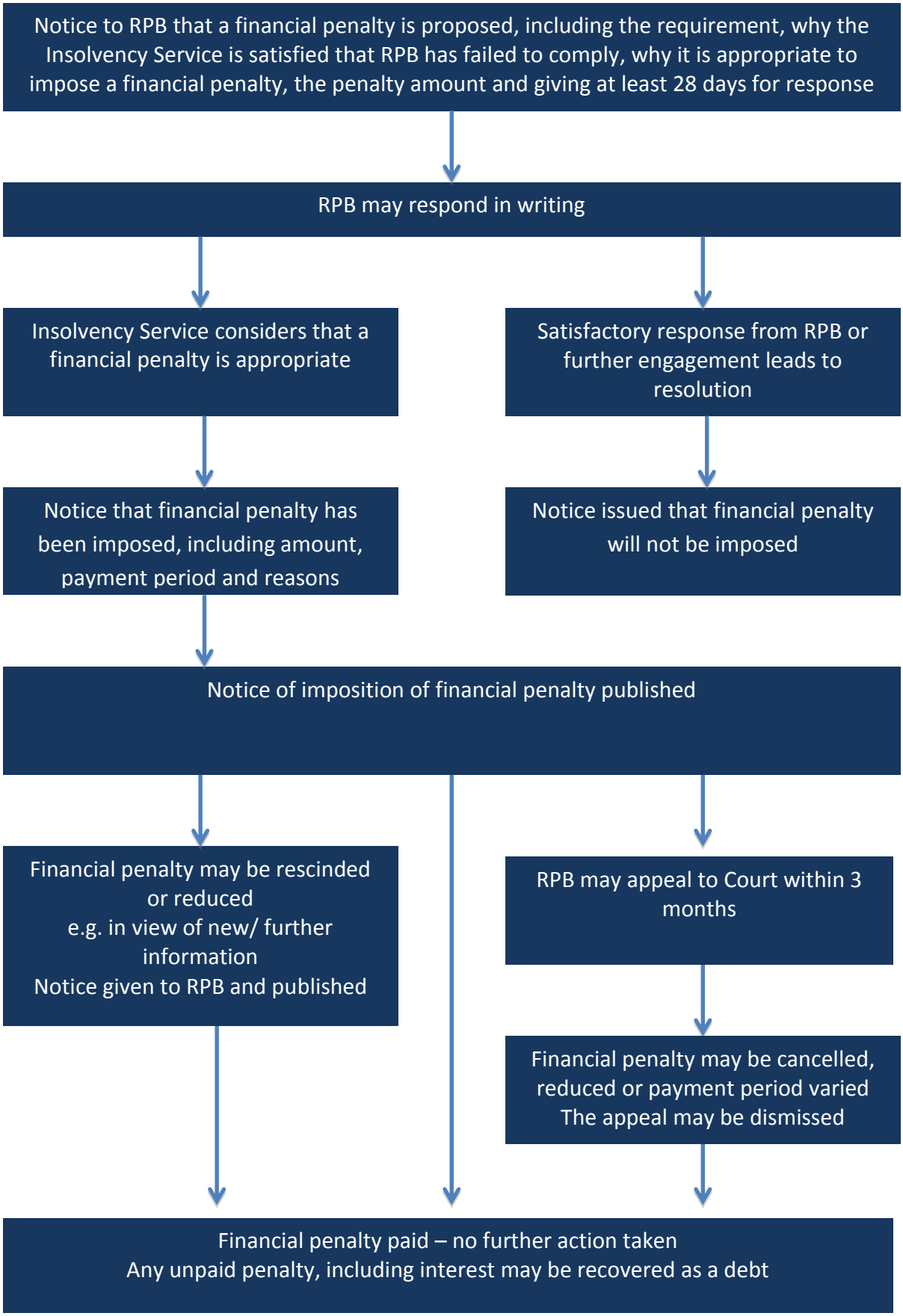
The amount of the penalty should be appropriate and proportionate to the failure, and will be decided by the Insolvency Service which must consider the nature of the requirement which has not been complied with, but must not take into account Departmental costs.

A RPB will be able to appeal against a financial penalty to the Court and the legislation sets out the grounds for appeal, the relevant time period and the powers of the Court.

Under the provisions of the legislation an unpaid penalty would be subject to statutory interest and would be recoverable as an unpaid debt.

Any financial penalty would be paid into the Consolidated Fund held by HM Treasury rather than being retained by the Insolvency Service.

The flowchart below summarises the process.


Notice to RPB that a financial penalty is proposed, including the requirement, why the Insolvency Service is satisfied that RPB has failed to comply, why it is appropriate to impose a financial penalty, the penalty amount and giving at least 28 days for response
RPB may respond in writing
Insolvency Service considers that a financial penalty is appropriate
Satisfactory response from RPB or further engagement leads to resolution
Notice that financial penalty has been imposed, including amount, payment period and reasons
Notice issued that financial penalty will not be imposed
Notice of imposition of financial penalty published
Financial penalty may be rescinded or reduced
e.g. in view of new/ further information
Notice given to RPB and published
RPB may appeal to Court within 3 months
Financial penalty may be cancelled, reduced or payment period varied
The appeal may be dismissed
Financial penalty paid – no further action taken
Any unpaid penalty, including interest may be recovered as a debt

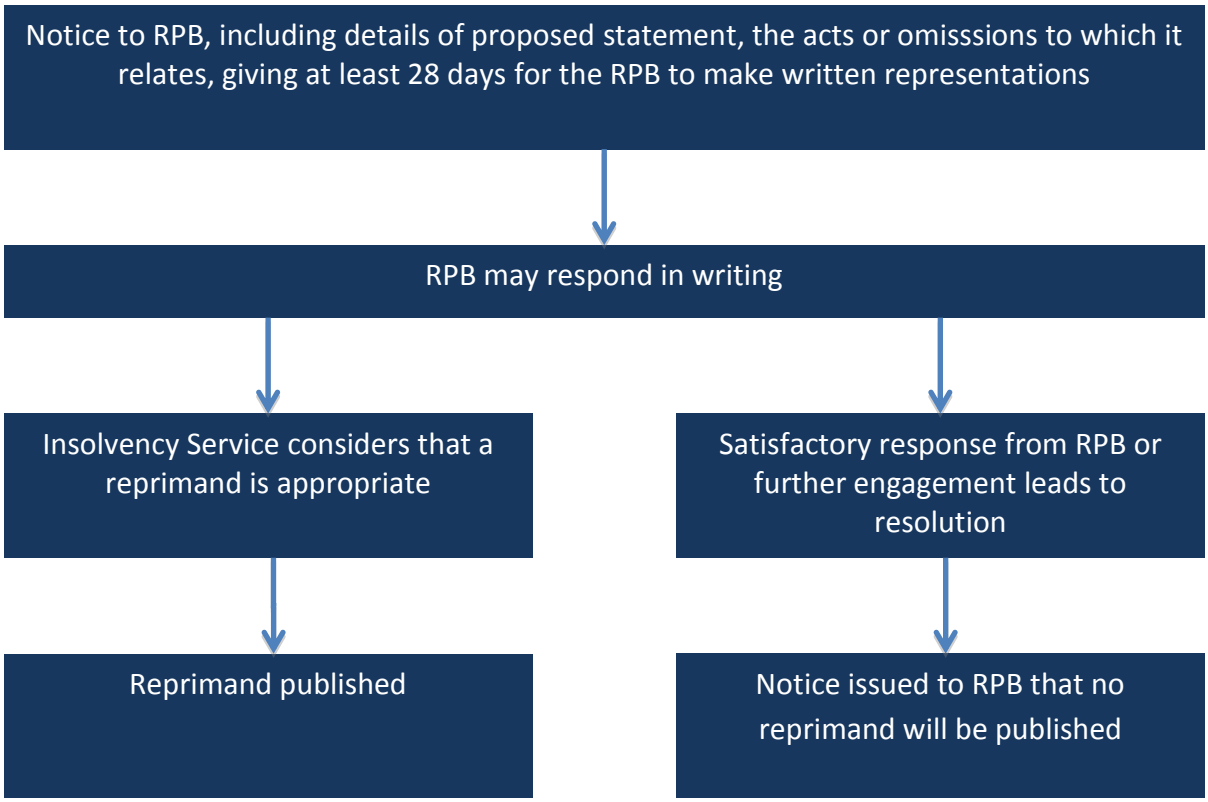
Reprimand

Where an act or omission, or a series of acts or omissions, of a RPB has had, or is likely to have, an adverse impact on the achievement of one or more of the regulatory objectives, the Insolvency Service may publish a statement reprimanding the RPB.

Depending on the circumstances, a reprimand may be a standalone sanction or issued alongside other regulatory action such as the imposition of a financial penalty.

The details of the proposed reprimand may be varied depending on the initial response from the RPB; for example, in view of new or further information.

The flowchart below summarises the process and the same procedure would need to be followed where a proposed reprimand is varied.



Revocation of a RPB’s recognition

The Insolvency Service may revoke a RPB’s recognition to authorise insolvency practitioners. This would require a statutory instrument to be made.

Revocation action may be taken where, for example:

- A body no longer wishes to act as a RPB, or
- the Insolvency Service is satisfied that as a result of actions or omissions by a RPB there is likely to be an impact on achieving the regulatory objectives and, in the circumstances, it is appropriate to revoke recognition.

Revocation of recognition at the request of a RPB

A body may decide that it no longer wishes to authorise insolvency practitioners. A RPB could also decide that it wishes to be recognised to undertake partial authorisation of insolvency practitioners only, i.e. the RPB would authorise its members to undertake either personal or company insolvency, but not both.

A RPB would need to send a formal request to the Insolvency Service to cease to act as a RPB or to be recognised to undertake only partial authorisations. In practice, it is likely that a RPB would consult with its member insolvency practitioners before making such a request.

The Insolvency Service is required to publish a notice setting out why an order is to be made and when it will take effect. The order will state the date that the revocation of recognition takes effect.

In ideal circumstances, to remove any uncertainty for all those with an interest in insolvency cases, the revocation order would normally only be made after arrangements had been effected over a reasonable period of time to allow member insolvency practitioners (or the relevant member insolvency practitioners in case of partial recognition) to transfer to another RPB (it is possible that some member insolvency practitioners may decide not to transfer, but to instead cease to be authorised; for example, due to retirement).

Where this is not reasonably achievable, the order may make transitional provisions so that insolvency practitioners can continue to act in insolvency cases until such time as they are transferred to another RPB. This should ensure that in all circumstances, insolvency cases can continue to be progressed without disruption.

Revocation of recognition initiated by the Secretary of State

This action could be taken where the Insolvency Service is satisfied that an act or omission, or series of acts or omissions, by the RPB has had or is likely to have an impact on the achievement of one or more of the regulatory objectives and also that, in all the circumstances of the case, it is appropriate to revoke recognition.

Before an order is made to revoke recognition, in accordance with the legislative requirements, the RPB must be given notice stating that the Insolvency Service proposes to make a revocation order, the reasons for that and the timescale within which representations can be made with respect to it. The timescale must not be less than 28 days. The RPB, its members or other people likely to be affected by the proposal would be able to make written representations during that period. This notice would need to be published on the same day as it is given.

Where revocation action proceeds, notice would be served on the RPB and published. That notice would specify:

- When the order is to take effect.
- The reasons for making the order.

Where necessary, the order would include transitional provisions so that members of the RPB continue to be authorised thereby ensuring that insolvency cases can continue to be progressed.

The Insolvency Service could make an order to revoke the recognition of a RPB whether or not it undertakes full authorisation of insolvency practitioners or partial authorisation only.

Where a body is recognised for full authorisation, the Insolvency Service may also make an order determining that the body should be recognised for partial authorisation only. As a consequence of such an order, a RPB may only be allowed to authorise insolvency practitioners specialising in either personal or corporate insolvency, depending on the terms of the order.

Court sanction of insolvency practitioners in public interest cases

Where it appears in the public interest, the Insolvency Service may apply to the Court for a direct sanctions order against an insolvency practitioner to:

- End an individual’s (full or partial) authorisation to act as an insolvency practitioner.
- Limit authorisation to either corporate or personal insolvency cases.
- Suspend authorisation for a period of time or until certain requirements are met.
- Allow a practitioner to continue to act subject to complying with certain requirements while acting as an insolvency practitioner.
- Require payments to be made by the insolvency practitioner to creditors of a company, individual or insolvent partnership in relation to which the insolvency practitioner was acting (these payments may not be more than the remuneration received or likely to be received in the relevant case).

The following list, which is not exhaustive, sets out the type of circumstance where the Insolvency Service might consider applying for a direct sanctions order:

- The issue is one of serious public interest where public confidence will be enhanced by the Insolvency Service taking action itself; for example, where significant amounts of money are involved or there is considerable public discussion of the issue.
- The Insolvency Service is in possession of sufficient evidence to refer the action to the Court and it would be in the public interest to proceed with an application rather than refer matters to the RPB.
- The issue is one which impacts across a range of RPBs, and can be more comprehensively dealt with by the Insolvency Service taking action itself.
- A RPB fails to take action through its approved processes and it would be in the public interest to make an application.
- A RPB requests the Insolvency Service to use the direct sanction order process, and the Service agrees that it is in the public interest to do so.
- There has been some defect or procedural irregularity in the RPB's disciplinary or appeals process which it is unable to rectify via its own procedures and it would be in the public interest to make an application.

The decision whether to grant the order will rest entirely with the Court. When considering whether to make an order the Court will need to be satisfied that the person acting as an insolvency practitioner has not complied with their RPB's rules, standards (including Statements of Insolvency Practice), or the Code of Ethics.

The Court must be satisfied that at least one of the following conditions applies:

- The person is not a fit and proper person to act as an authorised insolvency practitioner.
- The person is a fit and proper person to act as an insolvency practitioner only in relation to companies but the person's authorisation is not so limited.
- The person is a fit and proper person to act as an insolvency practitioner only in relation to individuals but the person's authorisation is not so limited.
- That it is appropriate to suspend authorisation for a period of time or until certain requirements are complied with.
- That it is appropriate that the person acting should be subject to other restrictions.

- That loss has been suffered by one or more creditors as a result of the failure to comply with the RPB's rules etc. mentioned above.

The Court should take into account any disciplinary action the relevant RPB may have already taken against the insolvency practitioner and the extent to which the action addresses the failure.

Where the Court makes an order, the relevant RPB would be obliged to take any steps necessary to make the order effective.

An appeal by the insolvency practitioner would be made to the Court of Appeal.

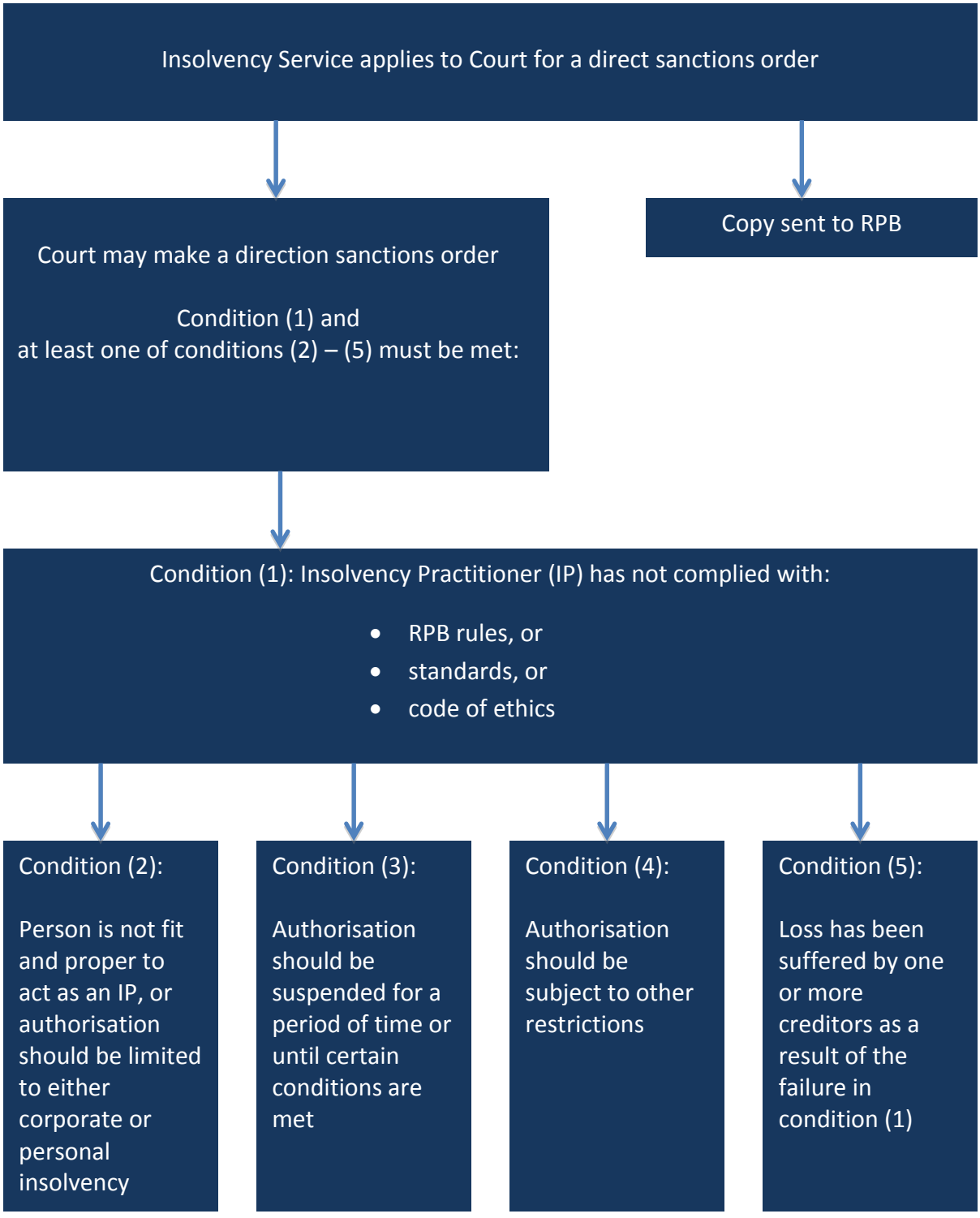
The Insolvency Service taking action through the Court would be an exceptional measure, involving significant costs and resources. As a safeguard, internal governance procedures will ensure that all relevant circumstances are properly considered before commencing action through the Court.

It would generally not be the intention for the Insolvency Service to use this procedure to seek to achieve a different outcome where a case has already completed its journey through a RPB's disciplinary process.

Taking direct action may require the Insolvency Service to carry out its own investigation into the case, seeking representations from any complainant and from the insolvency practitioner concerned, as appropriate. As part of that investigation, the Insolvency Service may require information from the relevant RPB, the insolvency practitioner or from other third parties connected to the practitioner, such as employees.

An outline of the Court process is summarised in the flowchart on the following page.

In cases where the Insolvency Service is satisfied that the first condition and at least one of the other conditions are met, and that it is in the public interest for a direction to be given and the relevant insolvency practitioner provides consent, a 'direct sanctions direction' may be given to the relevant RPB. The effect of that direction would be the same as the making of a direct sanctions order by the Court.


Insolvency Service applies to Court for a direct sanctions order
Copy sent to RPB
Court may make a direction sanctions order
Condition (1) and
at least one of conditions (2) – (5) must be met:
Condition (1): Insolvency Practitioner (IP) has not complied with:
RPB rules, or
standards, or
code of ethics
Condition (2):
Person is not fit and proper to act as an IP, or authorisation should be limited to either corporate or personal insolvency
Condition (3):
Authorisation should be suspended for a period of time or until certain conditions are met
Condition (4):
Authorisation should be subject to other restrictions
Condition (5):
Loss has been suffered by one or more creditors as a result of the failure in condition (1)