



# Government Legal Department

## Guidance Note on Legal Risk

### Meaning of legal risk

A risk involves a threat and the possibility of suffering harm or loss. 'Legal risk' means any risk of court action occurring whether domestic, European or international, or the risk of any penalty resulting from non-compliance with legal requirements. Losing a court action may lead to harm to the policy objectives and financial or reputational loss.

### Why is legal risk important?

As civil servants, our job is to advise Ministers. Before deciding upon a policy or course of action they will want to understand the risks associated with it. Legal risk is one, but not the only, type of risk that they will want to consider. All legal advice should be risk-based and offer options for mitigating or avoiding risk. It is important that Ministers and officials have confidence that lawyers are acting in their interests and looking actively for ways to deliver policy objectives while identifying ways of minimising risks.

### How to assess legal risk

In conjunction with policy colleagues you need to consider:

#### 1. Likelihood of a legal challenge being brought

Policy colleagues are likely to be in a better position than lawyers to assess who, if anyone, might want to challenge and the likelihood of this occurring. The timeframe of such a challenge should also be considered.

#### 2. Likelihood of that challenge being successful

This will depend on the robustness of the legal arguments on both sides and is for lawyers to assess with policy input.

#### 3. Impact and consequences of that challenge, whether successful or not

You will need to work closely with policy colleagues when assessing impacts. Examples include financial penalties (infraction fines, disallowance, Francovich damages), reputational damage, quashing of decisions that have to be retaken, regulatory confusion and enforcement gaps, criticism by the Ombudsman and resource implications. Many of these impacts may result from the challenge process itself irrespective of the outcome e.g. defending a judicial review or infraction can be very resource-intensive. You should also consider mitigation that can be put in place to reduce risks and impacts.

## Presenting legal risk

It is important that legal risks are fully integrated into policy analysis and the appraisal of options. It is also vital it is communicated **accurately and clearly** to senior decision makers and to Ministers (including in any submission). Make sure that the legal risk section of the submission is clear and succinct (even if you attach a more detailed annex). Any subsequent changes must be checked by a lawyer so that it still properly reflects the legal advice.

When presenting legal risk to policy colleagues and Ministers, lawyers sometimes use the same words to mean different things, and different words to mean the same thing. In addition, policy colleagues might interpret those descriptors in different ways to how they are intended. Consequently, Ministers have not always had a clear or accurate picture of the legal risks involved. For example, some colleagues use percentages, others refer to weak/ good/strong or significant chance of winning, others use a traffic light system etc. What percentage does 'a significant chance of winning' equate to for example?

To achieve greater transparency and clarity in the assessment and presentation of legal risk, lawyers should use the percentage bands referred to below, in conjunction with a narrative based on these descriptors. The key point is that when describing a risk as (for example) red or high it should be accompanied by the relevant percentage band so that a red or high chance of losing a case does not mean 55% to one lawyer and 90% to another. The narrative describing the risk should also be based around these three elements. Ministers may legitimately decide to proceed with a proposal even if it carries a high risk (70%+).

| Likelihood of legal challenge being brought | Likelihood of a challenge being successful * | Impact of challenge          | Colour key         |
|---|--|------------------------------|--------------------|
| Policy lead with Legal input                | Legal lead with policy input                 | Policy lead with Legal input |                    |
| <b>High - 70% +</b>                         | <b>High - 70%+</b>                           | <b>High</b>                  | <b>red</b>         |
| <b>Medium High - 50-70%</b>                 | <b>Medium High - 50-70%</b>                  | <b>Medium High</b>           | <b>amber/red</b>   |
| <b>Medium Low - 30-50%</b>                  | <b>Medium Low - 30-50%</b>                   | <b>Medium Low</b>            | <b>amber/green</b> |
| <b>Low - Less than 30%</b>                  | <b>Low - Less than 30%</b>                   | <b>Low</b>                   | <b>green</b>       |

\* If there is no respectable legal argument that we could put to the Court, then you will need to advise that the proposed action is unlawful. This is likely to be highly exceptional and if you are in this territory you should refer the matter to your line manager and Legal Director before you advise (a respectable legal argument is a credible argument the Government could properly run in court).