

Audit and Enforcement Policy for Compulsory Oil Stocking Obligations

Withdrawn

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Introduction

1. The Department of Energy and Climate Change (DECC) has the UK policy lead for energy emergency preparedness and response covering the operation of oil stocking policy. This guidance is to provide assurance to government, industry, consumers and regulators that reported oil stocks reflect physical stocks that can be released to the international market should they be required. This applies equally to stocks held in the United Kingdom on behalf of companies in other EU or IEA Member States, including stocks held on behalf of Central Stockholding Entities (“CSE”) of other EU Member States.
2. DECC’s aims for Compulsory Oil Stocking Obligations policy are to:
 - Set UK and individual company-level compulsory stocking obligations;
 - Monitor and enforce company-level compliance;
 - Facilitate a stock release during a supply crisis through agreed temporary reductions in individual obligations, and to enforce these where appropriate;
 - Improve industry regulatory compliance; and
 - Regulate without undue burden on the industry, or taxpayer liability.
3. Information on supply and stocking is collected by DECC using either:
 - The Downstream Oil Reporting System (DORS). This data collection is used by refiners or ex-refiners.
 - The Oil Stocking System (OSS) which collects information on imports, exports and stocks for non-refiners.

Both of these documents can be found at the link below:

<https://www.gov.uk/government/publications/emergency-oil-stocking-international-obligations>

4. The UK downstream oil industry is changing over time as the UK has moved to being a net importer in the past ten years and DECC will continue to review the most appropriate way to collect information in consultation with industry. This might lead to changes in the current data collection arrangements.
5. The Secretary of State requires companies which refine and supply oil to complete these forms in the directions issued under section 6 of and Schedule 2(1) to the Energy Act 1976. Provision of this information is a legal obligation, and failure to comply with the direction or provision of information which the person knows to be false or does not believe to be true is an offence under section 18 of that Act.
6. Firm but fair regulatory administration and enforcement of the relevant legislation by DECC officials is an important aspect of achieving these aims. Equally important, DECC officials will give compliance advice to industry and provide information through participating in industry organised conferences, joint industry projects, and DECC’s

internet site. Guidance notes on the formal administration and operation of the policy can be found at the DECC website:

http://www.decc.gov.uk/en/content/cms/what_we_do/change_energy/int_energy/policy/emergency_oil/emergency_oil.aspx

7. This policy applies to all companies supplying petroleum products to the UK market through domestic production or importation that come within the scope of the legislation. This includes refining companies and their affiliated or associated companies, importers and traders. Section 6 of the Energy Act 1976 allows the Secretary of State for Energy and Climate Change to give directions to businesses producing, supplying or using petroleum products within the UK market, requiring them to hold minimum levels of oil stocks.
8. Audit Policy is the primary tool to monitor compliance and it will be primarily on the outcome of those audits (or other significant developments i.e. non-response) that enforcement will be undertaken. In order to provide the necessary assurance, the Policy needs to demonstrate that oil stocking returns are accurate, and supported by independently verifiable evidence.
9. Enforcement methods available to DECC officials include: an informal warning, a warning letter and prosecution. DECC does not operate a system of numerical quotas or targets for the use of any of the enforcement methods.
10. This Policy sets out the general principles that DECC officials shall follow in relation to audit, administration and enforcement including prosecution.
11. This Policy is written in the context of the current legislative regime at the time of publication and continues to apply now that the Oil Stocking Order 2012 is in force. The key principles of this Policy will apply to any future legislation containing offences and powers of intervention. However, DECC reserves the right to change the detail of this Policy without notice and may re-issue it where there are significant changes to the legislative regime or the way it decides to enforce the regulations. DECC is working in parallel with industry to explore whether there are options to meet our obligations more efficiently. One option being considered is the introduction of a central stockholding entity (CSE) for the UK as referenced in the EU Directive. DECC is currently consulting on the future management of the compulsory stockholding obligations in the UK and the consultation closes in June 2013.
12. DECC expects compliance with the relevant legislative requirements. However, DECC officials will not hesitate to consider using enforcement powers when and where appropriate in accordance with this Policy.
13. The effectiveness of these policies will be reviewed after the Commission has performed its first review of the new Directive (expected December 2015).

Purpose and scope of audit and enforcement

14. DECC's **audit** policy is designed to provide assurance to government, industry, consumers and regulators that reported oil stocks are an accurate reflection of those physical stocks that can be released to the market should they be needed. This applies equally to stocks held in the United Kingdom on behalf of companies in other EU or IEA Member States, including stocks held on behalf of the CSEs of other EU Member States.
15. Given the importance of the UK being able to fulfil its EU and international oil stocking obligations, DECC officials will consider **enforcement** powers for the purpose of punishing instances of non-compliance with the legislation in accordance with this guidance.
16. The **necessary** assurance that stocks reflect physical stocks is provided through assessing:
 - Whether the exchange of information between government and industry is sufficiently rigorous in probing of anomalies in returns, and that any concerns over quality and coverage are resolved appropriately;
 - Whether oil stocking returns to government accurately reflect information used by the company to complete the return; and
 - Whether the information used by the company to complete the return is supported by physical stocks held.
17. DECC will use the audit policy as the primary tool to monitor compliance, and it will **be primarily** on the outcome of those audits, or any other significant developments such as non-response, that any enforcement action would be undertaken.

Purpose of Enforcement:

18. Enforcement, including prosecution, has three key purposes. It is to ensure that obligated companies fulfil their duties under the law in that they:
 - have sufficient physical stocks or other coverage measures in place to ensure continuous compliance with their obligations;
 - make agreed quantities of stocks available to the market as agreed by a Joint Response Team (JRT) - if mobilised - during a crisis; and
 - are held to account when failures to comply occur.

Scope of Enforcement:

19. The scope of enforcement is limited to the alleged or potential contraventions that are stipulated as offences of the legislation that makes up the regulatory regime.

Approach and Frequency of the Audit

20. The approach to audit will be proportionate, transparent and consistent. The policy prioritises routine monthly checks of the returned information over site visits, although site visits are an integral part of securing the chain of evidence.
21. Approach and frequency will revolve around the three elements of the policy. They are:
- a) The monthly data returned to DECC are scrutinised for consistency with previous months, and checked for omissions or unusual patterns against general market trends. This scrutiny is assisted by automated checks in the oil stocking returns and by consistency checks conducted by DECC against other data. Data anomalies are discussed, including with companies on a voluntary basis, with a view to resolving them.
 - b) To an agreed and regular timeframe, holding an annual audit meeting with the company to discuss data quality and to provide assurance that the company's reporting systems reflect the oil stocking return and that information is held for the past 5 years – the maximum period for which the Commission may request data - or, if less, for the time in which the company has exercised these functions.
 - c) Checks of physical stocks to ensure that they are reflected in the reported data will also be risk based, and follow on from the audit of the reporting systems. Inspection of physical stocks will be conducted every five years.
22. An obligated company will only be able to count stocks towards its obligations where those stocks are at all times available and physically accessible to the company (article 3(1)(d) of the Oil Stocking Order 2012). Stocks will not be considered available for these purposes unless the obligated company can freely dispose of the stocks when directed to by the Secretary of State. The Oil Stocking Guidance, published October 2012, sets out further detail on the action companies are required to take should events occur that are likely to cause the stocks to fall below the minimum levels stipulated in the Direction.
23. In addition, DECC may request ad hoc audit meetings with the option of physical inspection of stocks at any time following a risk based assessment of potential non-compliance. Typically this may result from significant insoluble anomalies in the monthly checks or from other intelligence or external information. Such meetings are not compulsory and aim to allow DECC to explore solutions with the company.
24. DECC recognises that there will be a variability within reporting systems, and that timing lags and small measurement discrepancies can lead to statistical differences. DECC will work with industry to consider the material impact of these on the monthly return as a whole.

Communicating Outcomes

25. The outcome from annual audit meetings or ad hoc visits will be a summary note prepared by DECC, accompanied by annotated copies of the company's OSS or DORS return, showing the correlation between the returned data and the data available on site. The note and annotated copy of the return will also indicate the physical stocks checked following the on-site inspection, where there has been one.
26. This note will take account of timing and other differences that could affect the reported level.
27. The summary note and template will be communicated to appropriate individuals in the company, DECC's Chief Statistician, DECC legal and DECC's Head of Energy Resilience.

Escalation

28. Where an audit provides indicative evidence that a company's oil stocking returns are not supported by appropriate evidence and the reported physical stocks, the matter will be considered in relation to DECC's Enforcement Policy, set out below. If it reveals that an offence has been committed, an informal warning or formal warning may be given or the matter will be passed onto prosecutors to consider whether there are grounds for a prosecution.

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Principles of enforcement

Key to this Policy are the principles of:

- (i) Proportionality in the method of enforcement used;
- (ii) Targeting of enforcement;
- (iii) Consistency of approach;
- (iv) Transparency in the implementation of the Policy; and
- (v) Accountability of DECC for its actions.

Proportionality:

29. Proportionality means relating the method of enforcement to the seriousness of any non-compliance. In practice, this means that DECC officials will take particular account of how far those who have duties under the law have fallen short of their obligations before deciding the action to be taken..

Targeting:

30. Targeting means making sure that regulatory enforcement effort is directed primarily towards those whose activities:

- Give rise to, or there is a risk of, serious non-compliance;
- Have a history of non-compliance;
- Have been subject to previous warnings with no evidence of improvement; or
- Give rise to, or there is a likelihood of, non-compliance.

31. DECC's Audit Policy for Compulsory Oil Stocking Obligations, set out above, is the integral tool for ensuring inspection and investigation effort is properly focused.

Consistency:

32. Consistency means taking a similar approach in similar circumstances to achieve similar ends. DECC aims to achieve consistency in:

- Advice to those who have duties under the law;
- The response to non-compliance;
- The exercise of powers by DECC officials; and
- Decisions on whether to pursue prosecution.

33. DECC recognises that consistency cannot be as simple as uniformity. DECC officials take into account many factors including, but not limited to, the:

- Scale of any non-compliance;

- Causal factors and circumstances that have given rise to non-compliance including those that arose as a result of something which could not reasonably have been prevented;
- Likelihood of recurrence;
- Obligated company's previous history of compliance record and enforcement;
- Any potential conflict of enforcement with other statutory provisions; and
- The evidence available and gathered to pursue the appropriate enforcement in line with this Policy.

34. The process of making enforcement decisions can be complex. While each situation is unique, DECC officials have discretion, within the framework of this Policy, to exercise their professional judgement so that the appropriate action is taken. DECC has arrangements to promote consistency.

Transparency:

35. Transparency is vital in maintaining public and industry confidence in DECC's ability to regulate. It means helping those being regulated understand what is expected of them and what they can expect from DECC.

36. Transparency is an integral part of the role and DECC has arrangements to ensure:

- Where remedial action is required, it is clearly explained why the action is necessary and by when it must be carried out;
- Where further steps in respect of enforcement are to be pursued the obligated company will, where it would not prejudice the outcome of an investigation, be advised; and
- That publicity and provision of information to the public is up to date and reflects the current legal position

Accountability:

37. DECC, through the functions and roles undertaken by its officials, is accountable to the Secretary of State, Parliament, and to the public for its actions. This means that DECC must have policies and standards against which it can be judged, and an effective and easily accessible mechanism for dealing with comments and handling complaints. The arrangements for handling complaints are described later in this Policy. DECC have arrangements in place so that the Secretary of State and other stakeholders are provided with information as necessary.

38. These principles of proportionality, targeting, consistency, transparency and accountability apply to the administration and operation of the oil stocking policy.

Methods of enforcement

39. Appendix A to this statement notes the administration and enforcement provisions available under the Energy Act 1976 and under the Oil Stocking Order 2012.
40. Enforcement can arise from information received, audit inspections or investigations, or other regulatory contacts where in DECC official's opinion there is, or there is likely to be, a contravention of legislation. DECC policy and statisticians teams meet monthly to review compliance. Prior to these meetings, companies will be provided with the opportunity to explain shortfalls in obligations and to correct their returns where appropriate, although a company is under no obligation to respond to such requests. These meetings will consider any shortfalls and explanations provided by companies, review whether companies have been under-compliant previously, and discuss recommendations for any enforcement action to be taken.

The methods of enforcement include:

- (i) Informal Warning;
- (ii) Formal Warning letter; and
- (iii) Prosecution.

41. The first two methods detailed above are non-punitive in nature. They are forward-looking and are focussed on bringing the obligated company into compliance. DECC have arrangements in place to monitor, follow-up and check compliance where these methods have been used. Punitive enforcement amounts to DECC pursuing further legal proceedings: i.e. prosecution.

Informal Warning:

42. Where action is required to achieve compliance, but a Formal Warning letter is inappropriate for reasons of proportionality, then a DECC official may issue an Informal Warning to the obligated company. The warning may be in the form of an email or letter and will confirm the matters requiring attention and will specify actions to be taken within a given time period.

Formal Warning Letter:

43. This may be sent when a DECC official is of the opinion that an obligated company has failed to meet its obligations under the legislation without good reason. A Formal Warning letter can be issued without an Informal Warning having been given previously. The letter will detail the official's opinion and specify:

- The matters which gave rise to the opinion;

- The steps that must be taken to remedy the non-compliance; and
- The period within which those steps must be taken.

44. The period specified in the letter in which compliance has to be achieved will be discussed with the obligated company. However, it is for the DECC official serving the letter to specify the compliance date.

45. A DECC official may revoke a letter if it later transpires that the letter was sent in error, or if the letter is found to contain an error- in which case the original letter will be revoked and a new letter issued.

46. Where an obligated company to whom a warning letter is addressed has failed to take action required by it within the specified time and the letter has not been revoked, prosecution may follow. If the company is later prosecuted for non-compliance, these warning letters may be used in evidence against the company.

Prosecution

47. Prosecution, when successful, is a punitive form of enforcement. It draws attention to the need for compliance with the law, and conviction may deter others from a similar failure to comply. Different arrangements exist in Scotland as compared to England, Wales and Northern Ireland for pursuing a prosecution and in relation to the choice of forum. However, the same criteria of a general and particular nature are used by DECC officials in considering legal proceedings. DECC has arrangements in place to manage the decision to pursue prosecutions so as to retain confidence in the independence of this process.

Arrangements in Scotland:

48. In Scotland the Procurator Fiscal decides whether to bring a prosecution. This will after consideration of reports submitted by DECC. DECC, using evidence gathered and in line with this Policy, will decide whether to report an incident with a view to prosecution to the Procurator Fiscal.

49. In Scotland before prosecutions can be instituted the Procurator Fiscal will need to be satisfied that there is sufficient corroborated admissible evidence, and that prosecution is in the public interest. In making such a decision the Procurator Fiscal will take into account DECC's views.

Arrangements in England and Wales or in Northern Ireland:

50. In England and Wales, DECC will decide whether to report the matter to prosecutors. In Northern Ireland the decision to report the matter to prosecutors will be taken by the Department of Enterprise, Trade and Investment, following consultation with DECC. The prosecutors will take the decision to proceed with a court case in accordance with the

Code for Crown Prosecutors, or the Public Prosecution Service for Northern Ireland's Code for Prosecutors.

51. For certain offences (see Annex, paragraph (d)), in England and Wales, the decision to proceed shall be taken only by or with the consent of the Secretary of State or the Director for Public Prosecutions. In Northern Ireland the decision shall be taken in respect of those offences only by or with the consent of the Secretary of State or the Director for Public Prosecutions for Northern Ireland.
52. The decision to prosecute shall take account of the evidential test and the relevant public interest factors set down by the relevant Director of Public Prosecutions in the relevant code. Prosecution can be brought against the officers of an obligated company if prosecutors decide that the Full Code Test as set out in the Code for Crown Prosecutors is met.
53. The Full Code Test has two stages: (i) the evidential stage followed by (ii) the public interest stage. Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction. In every case where there is sufficient evidence to justify a prosecution, prosecutors will then consider whether a prosecution is required in the public interest. A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour.

Managing the Decision to Pursue Prosecution:

54. The decision to refer the matter for prosecution at department level is taken not by the individual investigators. Rather, arrangements are in place where a senior manager not involved in the investigation takes the decision.
55. The decision to refer the matter for prosecution may arise where
 - The gravity of the non-compliance justifies this approach;
 - The general record and approach of the alleged offender warrants it; or
 - There has been continued disregard of requirements imposed by the legislation.
56. It is not necessary for a company to have received any warning letters in connection with the offence for DECC to decide to refer the matter for prosecution.

Prosecution of Individuals:

57. In exceptional circumstances, a criminal investigation may lead to the prosecution of a Director, Manager, Secretary or other similar officer of the body corporate (i.e. the company). This may occur where the investigation reveals evidence that an offence may have been committed with the consent or connivance of such an individual or to have been attributable to neglect on their part. Specifically, the investigation will consider the management chain and the role played by individual Directors and Managers.

Concurrent Use of Enforcement Methods:

58. Circumstances could be such that different methods of enforcement may be selected at different stages during and after a regulatory intervention.

Withdrawn

Communicating outcomes

59. DECC is committed to communicating the outcomes of regulatory interventions to ensure that there is no uncertainty as to the approach its officials are pursuing.

Communicating Outcomes:

60. The Head of Downstream Oil Policy will write to the obligated company, or individual, following an investigation to advise them:

- In Scotland, if a report has been sent to the Procurator Fiscal recommending prosecution;
- In England and Wales if a decision to pass the matter to prosecutors has been taken
- In Northern Ireland if the Department of Enterprise, Trade and Investment has taken a decision to pass the matter on to prosecutors; or
- That no further legal proceedings are to be pursued.

61. It should be noted that an investigation may take several months to complete depending on the complexity of the incident or logistical issues in obtaining and gathering evidence.

Publicity and provision of information

62. Information regarding the implementation and outcomes of this enforcement policy shall be subject to release and publication in accordance with the Freedom of Information Act.

63. The Freedom of Information Act gives the public new rights of access to information held by public authorities. These rights are also subject to procedural and substantive limitations. The substantive limitations, or exemptions, ensure a proper balance is achieved between the right to know, the right to personal privacy, and the delivery of effective government. (For more information visit www.foi.gov.uk).

64. Some information relating to oil stocking, for example information on the size of a company's obligations, is likely to be exempt information under the Freedom of Information Act on the ground that its disclosure is prohibited under the Energy Act 1976¹.

¹ Schedule 2 paragraph 7 of the Energy Act 1976 provides that "No information obtained by virtue of this Act shall be disclosed except—

(a) with the consent of the person by whom or on whose behalf the information was given or supplied and, where applicable, of the owner of any goods, or the occupier of any premises, to which the information relates;

Likewise information relating to investigations conducted by DECC with a view to gathering evidence for a potential prosecution and information relating to law enforcement is also exempt information – and in this scenario its exemption from release is not subject to a public interest test.

Appeals, complaints, or comments

65. An integral part of the accountability principle of enforcement is having arrangements in place for dealing with complaints or comments.
66. Where a person has a complaint or comment regarding the implementation of this policy they should bring this to the attention of Head of Downstream Oil Policy by writing to them at the address shown at the end of this policy. They will investigate any complaint and review any comments received and will write back to the person addressing their concerns.

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- (b) for the purpose of the exercise of any of its functions, to a government department (including a department of the government of Northern Ireland);
- (c) to any institution of the European Union, or to the International Energy Agency, in pursuance of obligations incumbent on the United Kingdom to transmit the information or see to its transmission;
- (d) in the form of statistics or otherwise, so that it cannot readily be recognised as relating to any particular person or undertaking;
- (e) with a view to the institution, or otherwise for the purposes, of any criminal proceedings.
- with the permission of the company.”

Withdrawn

Appendix A – Enforcement Provisions in the Energy Act 1976 and in the Oil Stocking Order 2012

Section 18(1) of the Act provides that Schedule 2 has effect with respect to the administration and enforcement of the Act and provision made under it. Article 17(3) of the Order provides that Schedule 2 (to the Order) has effect with respect to the enforcement of an offence under the Order.

The following is a simplified summary of the main investigatory and enforcement provisions in the legislation. Reference should be made to the Act and the Order for the full terms of those provisions.

The Act

(i) Paragraph 1 of Schedule 2 of the Act contains the **powers to obtain information**. Under this paragraph, the Secretary of State (SoS) can give directions to any person carrying on an undertaking to keep books, accounts and records and to furnish estimates and forecasts re the oil stocked. Subparagraph (2) provides that these powers are exercisable where the SoS considers it expedient for any purpose connected with the operation of the Act (including orders such as the Oil Stocking Order or directions made under it). The SoS can also direct such a person to provide information relating to the undertaking itself for the purposes of implementing the UK's obligations as a member of the EU.

(ii) Paragraph 2 of Schedule 2 contains the **power to call for documents**. This includes requiring any person carrying on, or with executive functions in, an undertaking to produce documents relating to the undertaking or its operations, and to give particulars as to where such documents might be or what they may contain. These powers can be exercised by the SoS to secure compliance with the provisions of the Act including obligations contained in an order made under the Act such as the Oil Stocking Order and for verifying the information obtained under paragraph 1.

(iii) Paragraph 3 provides **powers of access to premises** for enforcement purposes. Persons authorised by or on behalf of the SoS may enter 'premises' including vehicles and vessels but not domestic dwellings at all reasonable hours, and make such **enquiries** and **inspections**, and purchase or take such **samples** of any substance, as are allowed by the terms of their authorisation or they think necessary for the purposes of securing compliance with certain sections of the Act and with orders made under the Act, including the Oil Stocking Order .

(iv) Paragraph 4 deals with the circumstances in which a justice of the peace may issue a **warrant of entry** empowering an authorised officer of the SoS to enter the premises, by force if necessary, e.g. if admission under paragraph 3 has been refused or where access is a matter of urgency. A person entering the premises under this provision may search the premises and take possession of any documents which he finds there and which appear to them to be relevant to the purposes for which the warrant was obtained. The warrant lasts for 1 month and items taken during a search can be kept for 3 months or until the end of any proceeding, or until the end of any proceedings commenced within that time for an offence under the Act.

The Order

The **power to call for documents** and the **warrant for entry power** are replicated in Schedule 2 of the Oil Stocking Order to apply to obligations that come from the 2009 Oil Stocking Directive rather than the Energy Act 1976. These requirements are contained in Article 9 (a person must not hold stock in the UK on behalf of another Member State without an authorised delegation arrangement) and Article 11 (a person must not hinder the release etc of emergency or specific stocks held in the UK for another Member State).

(b) Offences:

(i) Section 18(2)(a) of the Act creates a **general offence** of contravention of or failure to comply with the provisions of the Act, or with orders or directions made under it, without reasonable excuse.

(ii) Section 18(2)(b) makes it an offence to **wilfully obstruct** a person exercising a power or performing a duty under the Act.

(iii) Section 18(2)(c) creates an offence of failure to comply with a **European Union obligation** which has direct effect in UK law and is specified in Schedule 3 (obligations arising from certain EEC Council Regulations). This ensures that such obligations are domestically enforceable.

(iv) Section 18(2)(d) creates the offence of knowingly making a **false statement**, for the purposes of a requirement imposed by or under the Act or an order made under it.

(v) Where an offence is committed by a body corporate, any natural persons within the corporation responsible for the offence (by action, neglect or consent) are guilty of the offence as well as the corporation (subsection 18(4)).

(v) Article 17 of the Order creates an offence if, without reasonable excuse, a person contravenes Article 9 or Article 11 of the Oil Stocking Order.

An offence under

(c) Penalties:

(i) Section 19(1) of the Act provides that a person guilty of an offence under the Act will be liable on summary conviction to a fine of not more than level 5 on the standard scale. Subsection (2)(c) of the Act further states that a person failing to comply with a direction given under section 6 (emergency oil stocking) is liable *either* as provided in subsection 19(1) *or*, on conviction on indictment, to an unlimited fine.

(ii) Article 17(2) of the Order provides that a person guilty of contravening Article 9 or Article 11 of the Order is liable on summary conviction in England and Wales to a fine not exceeding the statutory maximum and on summary conviction in Scotland to a fine up to £5000. On conviction on indictment, in both jurisdictions and in Northern Ireland, the penalty is an unlimited fine.

(d) Consent of the Secretary of State or the Director of Public Prosecutions (England and Wales, and Northern Ireland)

Schedule 2, paragraph 6(1) to the Act provides that proceedings for an offence of contravening or failing to comply with a direction of the Secretary of State given under section 6 of the Act be instituted only by, or with the consent of, the Secretary of State or the Director of Public Prosecutions (in Northern Ireland, the Director of Public Prosecutions for Northern Ireland.)

Schedule 2 paragraph 4 to the Order provides the same in relation to contraventions of articles 9 or 11 of the Order.

Withdrawn