



Department for
Energy Security
& Net Zero

Draft guidance on the criminal and civil sanctions and draft procedure for entering enforcement undertakings

Core Fuel Sector Resilience measures,
Energy Act 2023

May 2024



© Crown copyright 2024

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third-party copyright information you will need to obtain permission from the copyright holders concerned.

Any enquiries regarding this publication should be sent to us at:
downstreamoilteam@energysecurity.gov.uk

Chapter 1 - Introduction

1. This guidance is aimed at a person or persons carrying on core fuel sector activities as defined in section 268 of the Energy Act 2023 (the Energy Act or the Act). This document provides guidance as to:
 - the sanctions to which a person who commits an offence under the core fuel sector resilience measures in the Energy Act, may be liable;
 - what enforcement action can be taken;
 - under what circumstances enforcement action is likely to be taken;
 - how the Secretary of State intends to exercise functions in relation to enforcement undertakings.
2. This guidance relates to offences under Part 12 of the Energy Act - Core fuel sector resilience. Offences in this Part are offences under sections 271 (failure to comply with a direction), 275 (failure to comply with a notice) and 280 (making a false or misleading statement) of the Energy Act.
3. This guidance is issued under section 285 of the Energy Act. A draft of the guidance has been laid before both Houses of Parliament in accordance with section 286 of the Energy Act.
4. In this guidance, the term “responsible person” refers to the party that has, or is suspected to have, failed to comply with the obligations set out in core fuel sector resilience measures of the Energy Act.

Core fuel sector resilience measures

5. The core fuel sector resilience measures in the Energy Act enable the Government to proactively protect fuel supply in a critical but largely unregulated sector. The relevant measures set out in the Act are:
6. Powers to direct downstream oil sector businesses (including hauliers) for the purposes of resilience or to restore or reduce risk to continuity of fuel supply. This may be individually (by notice) or as a class (by regulation). These powers are set out in sections 269 and 272 of the Energy Act.
7. Powers to require information (or make regulations to do so) for the purpose of resilience in terms of both incident reporting and routine information about the supply chain. These are set out in sections 273, 274 and 276 of the Energy Act.
8. Power to provide financial assistance for resilience and continuity purposes. This is set out in section 287 of the Energy Act.
9. An offence is committed if:
 - There is failure to comply with –

- a direction requiring a core fuel sector participant to do something under section 269. Section 271 of the Act sets out details of the offence of failure to comply with a direction and penalties for this;
 - a notice requiring information to be provided under sections 273, 274 and regulations made under 276. Sections 277 and 230 of the Act set out further details of offences related to breaches of information requirements;
 - a false or misleading statement is knowingly made, in response to an information notice or otherwise, under section 280.
10. Enforcement measures apply when there are reasonable grounds to suspect that one of these offences has been committed.
11. The Energy Act also enables regulations requiring persons to do anything to maintain or improve resilience or address risk to continuity of supply or requiring information to be provided at specified intervals (under section 272 or 276) to make provision for offences. Section 281 of the Act addresses this.

Why sanctions are necessary

12. The Department for Energy Security and Net Zero ('the Department') works closely with the industry to address any resilience issues as they arise. While the measures in the Act are complementary to the Government's relationship with the industry, they aim to strike a balance between limiting the burden on the industry and providing Government with sufficient powers to ensure a resilient sector.
13. Where a responsible person fails to comply with the requirements under these measures, the Department will need to address this. We would seek to work with a responsible person to achieve the desired outcomes in the first instance; there will be situations when this approach on its own might not secure the desired outcome and a form of enforcement action will be appropriate. Where we have identified non-compliance, the outcomes we seek to achieve by taking enforcement action are to:
- Restore to the original position, where appropriate, and/or
 - Deter future non-compliance and re-offending.

Chapter 2- What are the sanctions to which a person who commits an offence may be liable?

14. The Energy Act provides for civil or criminal sanctions in respect of the offences under Part 12 of the Act.

Civil sanctions

15. The government can agree on an enforcement undertaking with fuel sector participants to address non-compliance. These undertakings might involve implementing specific resilience measures or engaging in corrective actions. See Chapter 4 for further details.

Criminal sanctions

16. If convicted, a person committing an offence under Part 12 of the Energy Act may be liable to imprisonment, a fine, or both.
17. The offences are all “either-way offences”, meaning they may be tried either summarily or on indictment – that is (in England and Wales and Northern Ireland), either the Magistrate’s Court or in the Crown Court. A case will start in the Magistrate’s Court but may be transferred to the Crown Court if the court considers this necessary or the defendant requests this.

Fines

18. Where a fine is imposed, the court will determine the amount, considering the specific offence and its severity, and how much the responsible person can pay. There is no statutory limit on the maximum fine allowed on indictment, or on summary conviction in England and Wales. A fine imposed on summary conviction in Scotland or Northern Ireland may not exceed the applicable statutory maximum.
19. As stated above, a fine may be the sole penalty imposed, or may be imposed in addition to imprisonment.

Imprisonment

20. The terms of imprisonment that may be imposed are:
 - For failure to comply with a direction issued by the Secretary of State concerning core fuel resilience measures (section 271) –

- On summary conviction (in the Magistrate's Court) in England and Wales, up to the general limit, currently 6 months (for a single offence);
 - On summary conviction in Scotland, up to 12 months;
 - On summary conviction in Northern Ireland, up to 6 months;
 - On conviction on indictment (in the Crown Court), up to 2 years.
- For failure to comply with a requirement imposed by a notice under section 273(1) or (2) or 274(4) (section 275) -
 - On summary conviction (in the Magistrate's Court) in England and Wales, up to the general limit, currently 6 months (for a single offence);
 - On summary conviction in Scotland, up to 12 months;
 - On summary conviction in Northern Ireland, up to 6 months;
 - On conviction on indictment (in the Crown Court), up to 2 years.
 - For knowingly providing false or misleading information, in response to an information notice or otherwise (section 280) -
 - On summary conviction (in the Magistrate's Court) in England and Wales, up to the general limit, currently 6 months (for a single offence);
 - On summary conviction in Scotland, up to 12 months;
 - On summary conviction in Northern Ireland, up to 6 months;
 - On conviction on indictment (in the Crown Court), up to 2 years.

Liability of officers of a body corporate

21. Where an offence under Part 12 of the Act has been committed by a body corporate, certain officers also commit the offence and may be the subject of enforcement action if the offence was committed with their consent or connivance¹ or is attributable to their neglect.
22. The persons who can be liable in these circumstances are any director, manager, secretary or similar officer, or any person purporting to act in the capacity of these roles. This includes members of a body corporate whose affairs are managed by members (rather than directors).
23. Where a Scottish partnership commits an offence under Part 12 of the Act, and the offence was committed with consent or connivance or is attributable to the neglect of a partner, then the partner also commits the offence and can be proceeded against.

¹ Consent and connivance imply both knowledge and a decision made on the basis of that knowledge, whether agreeing to conduct business in a certain way or letting it continue, and can be by inference as well as by express agreement.

Chapter 3- The action that may be taken to enforce an offence

24. To enforce offences under Part 12 of the Act, the Secretary of State may accept an enforcement undertaking or refer the case for prosecution. Alternatively, it may be appropriate to provide information or guidance, or to issue a warning. These actions are explained below.

Information/guidance

25. We can support an individual or a business who is suspected to have committed an offence or where an offence may be but has not yet been committed by giving information or guidance. For example, if a notice to provide information under section 273 of the Energy Act has been issued and the deadline is imminent without any information provided. Information/guidance can be verbal or written and may be recorded for compliance reasons. Any continued or further breach may influence subsequent enforcement action.

Warning letter

26. A warning letter aims to outline a particular suspected non-compliance. It provides a reasonable opportunity for the responsible person to stop the non-compliance from continuing or recurring. The warning will set out the offence we believe has been committed, the action we expect the responsible person to take and by when; and what will happen if action is not taken. We will be clear about the steps that need to be taken to rectify or prevent further non-compliance in order to avoid enforcement action being taken. A copy of the warning letter will be kept on record.
27. We may take enforcement action without issuing a warning letter particularly in urgent cases where immediate action is required to prevent a serious breach (which can result in significant disruption to fuel supply), where issuing guidance and/or a warning will not be appropriate. Please note that a warning letter is not a prerequisite to us taking another form of enforcement action including a referral for consideration of prosecution.
28. We are unlikely to issue a warning letter where a warning letter has previously been issued to the same responsible person for similar non-compliance. Our main objective is to provide an opportunity for the individual or business to return to compliance and stay compliant.

Enforcement undertakings

29. An enforcement undertaking is a commitment, offered voluntarily by a responsible person and formally accepted by the Secretary of State, to take certain action within any period specified in the undertaking. The action committed to must be in order to (i) prevent continuation or recurrence of the offence, (ii) restore the position to what it would have been without the offence or (iii) benefit an affected person -action for this purpose can include paying money. The Secretary of State may make regulations to specify descriptions of action that an enforcement undertaking may cover. The Secretary of State may accept an enforcement undertaking where they have reasonable grounds to suspect that the responsible person has committed one of the offences under Part 12 of the Energy Act, and the undertaking relates to the act or omission that comprises the offence.
30. An enforcement undertaking is a flexible enforcement option and provides an opportunity for someone who is not compliant to design their own response to non-compliance rather than the Government imposing requirements. It:
- Enables a responsible person to address the offence in a constructive way
 - Can be tailored to the circumstances
 - Is a faster and more effective resolution to achieve our objective of maintaining and improving resilience
 - Protects the responsible person from criminal proceedings for the offence in issue and the reputational damage that may arise from prosecution, provided they comply.
31. We will normally consider an enforcement undertaking before considering criminal sanctions. For the undertaking to take effect, the Secretary of State must accept the proposals in the enforcement undertaking and could require further action from the responsible person before accepting the undertaking.
32. If an enforcement undertaking is offered by the responsible person, it is not an admission of guilt for any offence. If the Secretary of State accepts the enforcement undertaking, it becomes a binding agreement and must be complied with.
33. An enforcement undertaking is intended to encourage positive behaviour and is used rather than referring the matter for prosecution. It may be appropriate in some circumstance for financial resources to be put towards remediation such as upgrading site security or systems rather than money penalties or monetary fines being imposed by the court if the matter is prosecuted. In these circumstances, we would encourage a responsible person to consider offering an enforcement undertaking.
34. We consider an enforcement undertaking an appropriate enforcement in most cases; therefore, operators are encouraged to consider one. Prosecution may be considered if no undertaking is offered, and we consider action needs to be taken.

35. We are under no obligation to accept any offer of an enforcement undertaking. The responsible person should consider seeking legal advice before making an offer of an enforcement undertaking. Chapter 3 provides guidance on how the Secretary of State's functions in respect of enforcement undertakings are expected to be exercised. The Annex sets out the procedure to make an offer and enter into an enforcement undertaking.
36. Accepting an undertaking does not prevent prosecution if the responsible person does not comply with the undertaking. If the Secretary of State is satisfied that a responsible person has given inaccurate, incomplete or misleading information about their enforcement undertaking, the Secretary of State may treat the person as having failed to comply with the undertaking, in which case any compliance certificate issued in respect of that undertaking must be revoked (paragraph 4 of Schedule 20 to the Energy Act) – see Chapter 5 for further details.

Prosecution

37. The Secretary of State may refer offences for prosecution, which may result in the sanctions set out in Chapter 2.
38. Criminal proceedings, to prosecute an offence under Part 12 of the Act, cannot be brought unless:
- in England and Wales, the Secretary of State or Director of Public Prosecutions consents;
 - In Northern Ireland, the Secretary of State or Director of Public Prosecutions for Northern Ireland consents.
39. The tests set out in the [Code for Crown Prosecutors](#) will be considered to determine whether prosecution is appropriate, including that prosecution is in the public interest.
40. Prosecution is intended as a last resort. See Chapter 4 for when prosecution or other actions are likely to be taken.

Chapter 4 – Circumstances in which enforcement actions are likely to be taken

41. The immediate priority will be to ensure that the risk of disruption to security of supply is mitigated, and disruption is not imminent. The appropriate action in respect of an offence under Part 12 of the Act will differ depending on the circumstances, including the outcome we are seeking to achieve and the significance of the offence.
42. Where the behaviour comprising the offence is expected to be corrected and any impact rectified by advice, guidance or a warning, these actions are likely to be taken. Where more immediate enforcement action is appropriate, it is likely the civil approach of enforcement undertakings would be used in the first instance.
Prosecution is intended to be the last resort. The factors below set out how we will be systematic and consistent in our approach.
43. However, this does not mean that every enforcement decision on what action to take will be the same, as each set of circumstances will differ. The Secretary of State will make a decision as to whether enforcement action is required and, if so, what type of action, taking into account relevant details which may include the impact and financial implications of the non-compliance, the likely deterrent effect, the attitude and actions of individuals and managers of the businesses and any history of previous offences or non-compliance. These factors are set out more fully below.

Factors that may be considered to determine the appropriate action in respect of an offence

Impact

44. We will consider the impact of the offence including the extent and significance of the potential or actual disruption to continuity of supply of core fuels or impact on resilience, caused by the offence or to which the offence relates.

Financial implications

45. We will consider the level of financial benefit gained by non-compliance, and whether costs have been avoided, such as costs saved by not carrying out certain actions that would minimise the risks of disruption?
46. If the responsible person has gained financial benefit, we may consider an enforcement undertaking as an enforcement action. Where there is a particularly significant and broader economic impact e.g. disruption to public services or infrastructure, we might review the enforcement action and might consider referring the offence for consideration of prosecution.

Deterrent effect

47. We will consider the deterrent effect on the responsible person when considering which action is most appropriate.

Co-operation

48. We will consider whether the responsible person has taken steps to rectify the non-compliance and mitigate any disruption.

Previous history

49. We will consider past behaviour of the responsible person to compliance:

- How well has the responsible person responded to any advice and guidance or warning that we have given in the past?
- What (if any) previous enforcement actions have been taken against the responsible person in the past? Is there a history of compliance and the offending is uncharacteristic.
- What is the degree of any previous offending and is there any evidence of wider criminality?
- The general attitude of the responsible person toward meeting their statutory duty. Has the responsible person worked proactively with DESNZ in the past?
- Where offending has continued or has been repeated, despite taking enforcement action, we may consider changing our enforcement response.

Prosecution

50. Generally, prosecution is likely to be considered in cases where the impact or disruption to core fuel supply and its consequences are particularly severe and/or if there is repeated offending.

When prosecution cannot be brought

51. Criminal proceedings cannot be brought for a particular offence when we have accepted an enforcement undertaking for that offence, unless the responsible person fails to adhere to any or all of the terms of the enforcement undertaking.

Chapter 5 - Enforcement Undertakings- How the Secretary of State's functions are expected to be exercised

Consideration of an enforcement undertaking

52. An enforcement undertaking is likely to be appropriate in most cases unless there are particularly severe impacts or repeated offending. We encourage responsible persons to make an enforcement undertaking offer at an early stage and proactively. Generally, we will consider accepting an offer when we are confident that the terms of the enforcement undertaking will be complied with and:

- We are confident that the offence will not continue or recur, or
- We are confident that the position will, so far as possible, be restored to what it would have been if the offence had not been committed, or
- We are confident that it will benefit any person affected by the offence.

Accepting or refusing an offer

53. We may consider providing some feedback on a draft proposal for an enforcement undertaking if requested and where appropriate. We will, however, not enter into negotiations about the offer. We will either accept or refuse an offer based on its content. The Secretary of State will consider the particular offer, including whether the action proposed would ensure the offence does not continue or recur, would restore the position to what it would have been had the offence had not been committed or would benefit any person affected by the offence. The more clearly an offer demonstrates that the action to be taken would ensure this, the more likely it is to be accepted.

54. We will confirm in writing our decision of whether or not we accept an offer.

55. If there has been a failure to comply with the enforcement undertaking either fully or in part, we are likely to do one of the following:

- Prosecute for the original offence
- Vary or extend the time for complying with an enforcement undertaking.

When the offer is rejected

56. If the offer is rejected, the responsible person may decide to submit a different offer. Any revised offer should be submitted as quickly as possible.

Variation of an enforcement undertaking

57. An enforcement undertaking may be amended if both parties agree to the amendment in writing. In particular, the action(s) specified and the period in which action(s) are to be taken may be amended by agreement. The action(s) would still need to be for any of the purposes in s284(4) of the Act (see Chapter 3).
58. The responsible person could propose amendment(s) if it becomes impossible for the responsible person to comply with the enforcement undertaking as accepted by the Secretary of State. It is at the Secretary of State's discretion whether or not to agree any amendments proposed by the responsible person.
59. As with an initial offer, the Secretary of State will consider the details of the particular proposal, including whether the amended action proposed would ensure the offence does not continue or recur, would restore the position to what it would have been had the offence had not been committed or would benefit any person affected by the offence. If the amended offer is rejected, the responsible person may decide to submit a further amendment. This should be submitted as quickly as possible.

Consideration of compliance and issue of compliance certificate

60. Once the responsible person has fully complied with the enforcement undertaking, they can apply for a compliance certificate (paragraph 3 of Schedule 20 to the Energy Act). The responsible person must write to the Secretary of State, requesting a compliance certificate, providing evidence that they have fully complied with the enforcement undertaking (further detail on the application process is set out in the Annex).
61. Compliance may be monitored or verified by liaising with the responsible person and requesting evidence regarding any commitments made in an enforcement undertaking. If we are satisfied that a person has complied with the terms of the enforcement undertaking, we will issue a compliance certificate. The responsible person must include sufficient information with their application to enable us to determine whether or not the undertaking has been fully complied with. This can include documentary evidence such as receipts or reports on what has been completed to comply with the undertaking. Failure to provide such information might inform our decision not to issue a compliance certificate.
62. Once we have assessed the application, we will make a decision whether or not to issue a compliance certificate and give the responsible person written notice within 14 calendar days after our receipt of the application by either issuing the compliance certificate or sending a refusal notice, outlining the reasons for the decision not to issue the certificate.

Inaccurate, incomplete or misleading information and revoking a certificate

63. If the Secretary of State considers that inaccurate, incomplete or misleading information has been provided by a person in relation to the enforcement undertaking they have given, the Secretary of State may treat that person as not complying with the enforcement undertaking. The Secretary of State will consider the circumstances and the information in question, to decide whether to treat this as a failure to comply. If a compliance certificate has been issued in respect of an undertaking for which a person is treated as failing to comply, the certificate will be revoked. The revocation will be notified in writing to the person who gave the undertaking and will include the grounds and reasons for revocation.

Appeals

64. The responsible person can appeal a decision not to issue a compliance certificate or to treat them as failing to comply with the enforcement undertaking (see Chapter 3 above). Either of these decisions can be appealed on one of the following grounds:

- The decision was based on an error of fact;
- The decision was wrong in law;
- The decision was unreasonable or unfair; or
- The decision was wrong for any other reason.

Failure to comply with the terms of an enforcement undertaking

65. Failing to comply with an enforcement undertaking either in part or fully might result in the Secretary of State considering prosecution for the original offence. Where part of an undertaking has been complied with, this partial compliance will be taken into account in considering whether to prosecute.

Annex – Procedure for entering into Enforcement Undertakings

66. This Annex sets out the procedure for entering into enforcement undertakings, in accordance with paragraph 1 of Schedule 20 to the Energy Act.
67. An enforcement undertaking is a commitment, offered voluntarily by a responsible person and formally accepted by the Secretary of State, to take certain action within any period specified in the undertaking. The action committed to must be in order to prevent continuation or recurrence of the offence, restore the position to what it would have been without the offence or benefit an affected person.

Initial Engagement with the Responsible Person

68. Responsible persons are encouraged to make an enforcement undertaking offer at an early stage and proactively. The responsible person should write to the Secretary of State through the Downstream oil resilience team (downstreamoilteam@energysecurity.gov.uk) stating what offence has been committed and complete the enforcement undertaking form.
69. The Secretary of State may, at their discretion and taking into account the specific circumstances of the case, inform a responsible person in writing that an offence is suspected to have been committed. The alleged offence will also be outlined and the potential consequences of non-compliance. This approach will be applied on a case-by-case basis, considering the nature and severity of the suspected offence.

Completing the enforcement undertaking offer form

70. The enforcement undertaking form is available on gov.uk. We will not enter into negotiations with the responsible person, as the actions they wish to offer are a matter for them. The responsible person may wish to seek their own independent legal advice.
71. The undertaking form should be completed, in clear and concise language, specifying:
- The actions the responsible person will take in relation to the act or omission that breaches the Act, to remedy the matter, prevent continuation or recurrence, or benefit any affected person;
 - The timeframe for completion of actions.

Review and Approval

72. We will normally aim to acknowledge our receipt of your offer within 7 working days after it is received. Once we are in receipt of an offer which meets the basic requirements of an Enforcement Undertaking, we will then aim to make a formal assessment of your offer within 60 calendar days, however this may take longer depending on the basis of the offer.
73. We will formally approve or reject the undertaking in writing. When an undertaking has been accepted, the undertaking is binding. We, therefore, recommend that the undertaking is signed by the responsible person before submission. In the case of a rejection, we will confirm this in writing and we may provide feedback when appropriate, to assist the responsible person to update the offer and resubmit. Any revised offer should be submitted as quickly as possible.

Applying for a compliance certificate

74. Once the responsible person is of the opinion that they have complied with the terms of the enforcement undertaking, they may apply to the Secretary of State for a compliance certificate by submitting a written request to the Downstream Oil Resilience team (downstreamoilteam@energysecurity.gov.uk).

The responsible person should include the following information with their request:

- Contact information
- Details of the enforcement undertaking, including any reference number
- A description of the actions the responsible person has taken to comply.

The application should be accompanied by any documentation or information to demonstrate they have fulfilled all their obligations stipulated in the undertaking, if applicable. This may include completed forms, photographs, receipts.

75. The Secretary of State will consider the request for a compliance certificate to determine if the responsible person has met the conditions of the undertaking. If approved, they will receive a compliance certificate confirming adherence to the undertaking within 14 days after the date the application is received.
76. In the event that the Secretary of State is not satisfied that the conditions of the undertaking have been met, this will be communicated in writing within 14 days after the date the application is received. The responsible person may submit a further application following the response provided.