



Animal &  
Plant Health  
Agency

# **Regulatory approach and use of civil sanctions for The Official Controls (Plant Health and Genetically Modified Organisms) (England) Regulations 2019 and (Wales) Regulations 2020**

**Draft Guidance on the use of Civil Sanctions by the Animal and Plant Health Agency (APHA) in England and Wales**

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APHA is an Executive Agency of the Department for Environment, Food and Rural Affairs and also works on behalf of the Scottish Government, Welsh Government and Food Standards Agency to safeguard animal and plant health for the benefit of people, the environment and the economy.

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# 1. Scope of Guidance

This guidance relates to the use of civil sanctions in relation to Schedule 4A to the Official Controls (Plant Health and Genetically Modified Organisms (England) Regulations 2019 and Schedule 4A to the Official Controls (Plant Health and Genetically Modified Organisms (Wales) Regulations 2020, (hereafter referred to as “the legislation”). It applies to England and Wales only. Offences liable for civil sanctions are listed in Part 11 of the legislation. This guidance does not apply to anything regulated by the Forestry Commission or Natural Resources Wales.

An ‘individual or business’ is used throughout this guidance to mean a body of any type, or a natural person, including partners of a partnership. The legislation also provides for enforcement activity in respect of an officer of a body corporate or unincorporated association or a partner of a partnership in respect of a breach or failure by the body that took place with the consent or connivance of the officer.

This guidance applies to anyone who is considered to be a 'professional operator'<sup>1</sup> which means any person involved professionally and legally responsible for one or more of the following activities concerning plants, plant products and other objects:

- Planting
- Breeding
- Production, including growing, multiplying and maintaining,
- Introduction into and movement within and out of England and Wales
- Making available on the market (including online)
- Storage, collection, dispatching and processing.

You can find further guidance to help you answer the question 'am I a professional operator' on the plant health portal here: <https://planthealthportal.defra.gov.uk/plant-passports/am-i-a-professional-operator/>

## 2. Enforcement principles

The Department for Environment, Food and Rural Affairs (Defra), Welsh Government and the Animal and Plant Health Agency (APHA) work together to safeguard biosecurity, plant health and the environment in England and Wales. For

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<sup>1</sup> [Regulation \(EU\) 2016/2031 of the European Parliament of the Council of 26 October 2016 on protective measures against pests of plants, amending Regulations \(EU\) No 228/2013, \(EU\) No 652/2014 and \(EU\) No 1143/2014 of the European Parliament and of the Council and repealing Council Directives 69/464/EEC, 74/647/EEC, 93/85/EEC, 98/57/EC, 2000/29/EC, 2006/91/EC and 2007/33/EC](#)

the purposes of the legislation in England and Wales, APHA is the regulator responsible for plant health protection controls, other than those regulated by the Forestry Commission or Natural Resources Wales.

If a breach has been committed that can easily be rectified, APHA may provide advice on the legal requirements and how to comply as an alternative to civil sanctions or prosecution. For example, if an administrative error was made on a single occasion.

This does not stop civil sanctions being applied in the future for ongoing breaches where they have not been rectified following the advice provided or in cases where later evidence shows the breach was more serious than initially thought.

The examples provided in this guidance are for illustrative purposes only; they describe the way in which APHA may use the civil sanction available, but each case will be dealt with individually.

Civil sanctions will be enforced in line with Defra's Enforcement Policy Statement<sup>2</sup>. The Policy Statement outlines guiding principles on proportionality, consistency, transparency and targeting.

Use of civil sanctions under the legislation is intended to deter illegality and manage incidents of non-compliance to safeguard biosecurity and maintain a 'level playing field'. By taking proportionate and timely action against those responsible for non-compliance with plant health legislation it will protect compliant businesses, trade and the environment.

The civil sanction issued will depend on the seriousness, circumstances, nature (type, intent and scale) and impact of the non-compliance and what can be done to rectify it.

The type of civil sanction will depend on a range of factors, including:

- any biosecurity risks identified
- whether the non-compliance involves an individual or a business
- compliance history and repeated offences
- any intent to deceive or disregard controls
- the need to prevent further non-compliance
- wider impact of non-compliance on the environment

### 3. Civil Sanctions

Civil sanctions are a range of enforcement tools that can be used when people do not comply with regulations, each is a different method of enforcement with a different process and penalty as set out in Schedule 4A of the legislation.

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<sup>2</sup> <https://www.gov.uk/government/publications/defra-enforcement-policy-statement>

Civil sanctions will be proportionate to the offence and are intended to address non-compliance. They will be used to prevent and deter future occurrences.

The standard of proof required for issuing a civil sanction is “on the balance of probability”. This means that APHA, as the regulator, would need to be satisfied on the evidence available that it was more likely than not that the non-compliance occurred. The civil sanctions available under the legislation include:

- Compliance notice
- Restoration notice
- Fixed monetary penalty
- Variable monetary penalty
- Stop notice
- Enforcement undertaking (including third party undertaking)

Any decision to issue a sanction will be proportionate, and give consideration to mitigating or aggravating factors including but not limited to:

- impact of the alleged offence, including any actual effects or potential to cause harm
- intentional circumvention of controls
- any economic gain from the non-compliance
- compliance history
- failure to comply with a statutory notice
- supply of false or fraudulent information/ records
- obstruction of inspectors

### 3.1 Compliance Notice

A compliance notice requires an individual or business to take specified steps, within a defined timescale, to make sure that an offence does not continue and to become compliant with the Regulations.

A compliance notice may be issued for the following reasons, this list is not in order of priority and is not exhaustive:

- Advice and guidance are not followed or opportunities to self-correct are not taken up
- There is a likelihood that the activity will continue, and that advice and guidance alone will not be sufficient to secure compliance

APHA may issue a compliance notice in conjunction with a variable monetary penalty or restoration notice, in relation to the same offence, to influence the offender's behaviour and to restore the environment.

A compliance notice is unlikely to be issued where:

- the offender has already corrected their activity following informal advice

APHA cannot issue a compliance notice where a fixed monetary penalty for the same offence has already been imposed or on more than one occasion in relation to the same offence.

Non-compliance with a compliance notice can result in criminal prosecution.

**Example**

A nursery consistently imports plants without the correct phytosanitary certificates. Despite regulatory action being taken on individual consignments, non-compliance continued. A compliance notice is served, requiring the business to improve processes to reject plants without the correct documentation and improve staff training. Evidence of the new process and training must be supplied to APHA within the stipulated timescale.

### 3.2 Restoration notice

A restoration notice requires an individual or business to rectify, as far as possible, the consequences of the particular offence. The necessary measures and timescale will be set out by APHA in the notice.

A restoration notice will most likely be issued where there has been environmental harm caused, and action is needed to restore this. If there is nothing to restore or restoration is not feasible it is unlikely that a restoration notice will be issued.

APHA may issue a restoration notice in conjunction with a variable monetary penalty or a compliance notice. APHA will not issue a restoration notice where a fixed monetary penalty for the same offence has been issued or on more than one occasion in relation to the same offence.

Non-compliance with a restoration notice can result in criminal prosecution.

**Example**

A landscaping business has used a plant in a display that was incorrectly imported. Consequently, a statutory plant health notice is served mandating the removal and destruction of the plant and followed up by a restoration notice requiring the restoration of the plot to its original condition.

### 3.3 Fixed monetary penalty

A fixed monetary penalty (FMP) is a set financial penalty of £250 for individuals and £2000 for bodies corporate, partnerships, or unincorporated associations.

An FMP may be issued for the following reasons, this list is not in order of priority and is not exhaustive:

- Advice and guidance, or previous enforcement activity have failed to secure compliance
- Other enforcement options such as temporary withdrawal of an authorisation (e.g. for plant passports) are not appropriate or are unsuitable to be used in isolation

Circumstances in which an FMP is unlikely to be imposed include:

- A first offence where efforts have been made to engage with APHA, and the offence has been resolved
- Where the offence is serious or there is significant financial benefit to the offender from the offence

APHA cannot impose an FMP where, in relation to the same offence:

- A compliance notice, restoration notice or stop notice has been served
- A variable monetary penalty has been served
- APHA has accepted a third party or enforcement undertaking

#### **Example**

A business consistently fails to provide pre-notification (where required) of goods arriving in the UK via a border control post. Despite receiving advice and guidance on how to comply on multiple occasions, the individual or business remains non-compliant. An FMP is imposed against the business due to repeated failure to comply.

An individual or business may discharge liability for an FMP by paying 50% of the penalty amount within 28 days of the notice of intent being issued, or within 28 days following the outcome of an unsuccessful appeal.

Failure to make full payment within the prescribed payment period will result in a 50% increase in the penalty amount.

### 3.4 Variable monetary penalty

A variable monetary penalty (VMP) allows APHA to set the level of financial penalty in more complex cases to reflect the severity of the offence and to offset any financial benefit gained by non-compliance. A VMP will not exceed £250,000 and may be issued in conjunction with a compliance, restoration or stop notice.

A VMP may be issued for the following reasons, this list is not in order of priority and is not exhaustive:

- there is evidence of negligence or mismanagement
- there is damage to biosecurity such as the release of a quarantine pest
- to remove an identifiable financial benefit arising from the offence
- where criminal prosecution can be avoided to secure the most appropriate outcome

A VMP is unlikely to be issued for:

- a first offence where the breach has been assessed as minor
- where the offence is so serious that criminal prosecution is considered the most appropriate action

APHA may not impose a VMP on more than one occasion in relation to the same offence.

See Annex 1 for the factors taken into consideration when we calculate a variable monetary penalty.

#### **Example**

A business importing a high volume of plants with significant biosecurity risk has repeatedly bypassed a border control post (BCP) without stopping for inspection. Despite receiving written and verbal advice and guidance on legal requirements, the business continues to intentionally bypass the BCP avoiding inspection. A VMP is issued against the business due to repeated failure to comply with requirements.

### 3.5 Stop notice

A stop notice is a formal notice that requires an activity to stop immediately. It remains in force until the required actions set out in the notice are completed.

A stop notice means the identified activity must immediately cease and the notice will contain the steps which an individual or business must take to comply with the notice and the timeframe to do so. APHA require that sufficient evidence is submitted to demonstrate fulfilment of the conditions of the stop notice in the specified timeframe. APHA will issue a completion certificate once satisfied that the stop notice has been complied with in full.

A stop notice will be considered when non-compliance with legislation is identified, and the offending is continuing.

A stop notice contains:

- grounds for serving the notice
- details of the activity which is prohibited
- steps which the person must take to comply with the notice and the timeframe for completion
- details of the right of appeal
- consequences of failing to comply with the notice.

Not adhering with the conditions of a stop notice may result in criminal prosecution.

A stop notice will not be served where:

- the offender has already stopped or amended the activity following informal advice

An individual or business may be eligible for compensation if they incur a loss due to the issuance of a stop notice or the refusal of a completion certificate if:

- The stop notice was subsequently withdrawn or amended because the decision to serve it was unreasonable, or a step specified in the notice was unreasonable
- APHA were in breach of our statutory obligations
- The person successfully appeals, and the First-tier Tribunal finds the issuance of the notice, or the refusal of a completion certificate was unreasonable

#### **Example**

A garden centre which has not registered with APHA as a professional operator is found to be offering plants for sale. Despite receiving advice and guidance, the garden centre continues to trade, a stop notice is issued to

halt trade until the business is registered and in compliance with plant health requirements.

### 3.6 Enforcement undertakings

An Enforcement Undertaking is a voluntary offer by an individual or business to put right the effects of their offending within a specified period of time. For APHA to accept an offer, there must be reasonable grounds to suspect that the individual or business has committed an offence.

An enforcement undertaking must specify:

- action to be taken by the individual or business to ensure that the offence does not continue or recur
- action to be taken by the individual or business to restore the position, as far as possible, to what it would have been if the offence had not been committed
- action to be taken by the individual or business to benefit any person affected by the offence

If APHA accepts the offer, it becomes a binding agreement between APHA and the individual or business making the offer. Provided the individual or business complies with the terms of the undertaking, then:

- APHA will not prosecute for the original offence in respect of the act or omission to which the undertaking relates
- APHA may not serve a compliance notice, restoration notice, stop notice, or impose a fixed or variable monetary penalty in respect of that act or omission.

Where it is not possible to fully restore the biosecurity of the environment, the offer may require some form of environmental benefit or improvement, such as compensation for damage to natural capital, for example funding for a habitat creation project or plant pest research project.

The individual or business making the offer must state what action they will take to ensure future compliance.

APHA is more likely to accept offers that are proactively submitted at the earliest opportunity.

APHA will consider accepting an enforcement undertaking offer when:

- the practical remediation or restoration work, for delivering the enforcement undertaking can be complied with at the earliest opportunity
- the offer will ensure that the offence does not continue or recur and includes action to restore the position (as far as possible), or action to benefit a third party affected by the offence
- the offer does not contain restrictions on how APHA may publish its acceptance in cases involving the finding or interception of regulated pests and diseases

APHA will not normally accept an offer:

- where the offence was intentional or of the most severe impact
- where the offer contains a clause denying liability
- where the offer contains any clause that sets up defences for possible breach of an enforcement undertaking
- where a decision has already made that a prosecution is appropriate in the public interest
- where legal proceedings have already started

An enforcement undertaking may be varied, or the period within which the action must be completed may be extended, if APHA and the individual or business who offered the undertaking agree in writing. If an individual or business is found to have given inaccurate, incomplete or misleading information this will be considered non-compliance. Should an individual or business fail to comply with the undertaking, APHA may impose an alternative civil sanction or initiate criminal proceedings.

When an individual or business is satisfied that they have fulfilled the terms of the enforcement undertaking, they may apply for a discharge certificate. Applications for a discharge certificate can be made at any time. APHA will review the application and provide written notice of a decision within 14 days.

When a discharge certificate is issued, the enforcement undertaking ceases to have effect. However, APHA may by notice in writing revoke a discharge certificate if it is later found to have been issued on the basis of inaccurate, misleading or incomplete information.

### **3.7 Third Party undertakings**

A third party undertaking is similar to an enforcement undertaking but may only be offered where an individual or business has already received a notice of intent to serve one of the following:

- compliance notice
- restoration notice
- variable monetary penalty

A third party undertaking may only be used to make an offer to compensate someone who has been affected by the offence.

Any third party undertaking will be taken into account when deciding whether or not to serve a final notice, and if a final notice is served for a variable monetary penalty, the amount of the penalty.

### 3.8 Non-compliance penalties

APHA may serve a non-compliance penalty notice if an individual or business fails to comply with:

- a compliance notice, restoration notice or third party undertaking, irrespective of whether a variable monetary penalty was also imposed; or
- an enforcement undertaking

APHA will normally determine the amount of this penalty by assessing:

- what it will cost to fulfil the remaining requirements of the compliance or restoration notice, third party undertaking or enforcement undertaking
- voluntary reporting by an individual or business of their own non-compliance whether there were mitigating factors or aggravating circumstances as set out in Part 3 of this guidance

The penalty will no longer be payable if the requirements of the original compliance notice, restoration notice, third party undertaking or enforcement undertaking are fulfilled before the time set by APHA for payment.

## 4. Representations and appeals

### 4.1 Representations

When APHA decides to impose a compliance notice, restoration notice, fixed monetary penalty or variable monetary penalty APHA will:

- serve a notice of intent detailing the proposed action

- provide an opportunity for an individual or business to make representations and objections in writing within 28 days of the day on which the notice of intent is served
- consider the representation and objections received, and any offer of a third party or enforcement undertaking before making a final decision on whether to serve the final notice or adjust the level of a variable monetary penalty
- notify the individual or business of our final decision and reasoning
- if the representation or objection is successful, APHA will discharge any liability for the offence
- if the representation or objection is unsuccessful, APHA will issue a final notice

If a final notice is issued, APHA will notify the individual or business of their right to appeal.

## 4.2 Appeals

Where a civil sanction is imposed, APHA notices will outline the right to appeal. All appeals relating to civil sanctions must be made to the first tier tribunal.

You can appeal against the following:

- final notice for a compliance notice
- final notice for a restoration notice
- final notice for a fixed monetary penalty
- final notice for a variable monetary penalty
- stop notice
- refusal to issue a completion certificate for a stop notice
- refusal to award compensation for imposition of a stop notice
- amount of compensation offered for imposition of a stop notice
- refusal to issue a discharge certificate for an enforcement undertaking
- non-compliance penalty
- cost recovery notice

Details on the grounds for appeal for each type of sanction can be found in Annex 2.

## 5. Cost recovery

APHA is entitled to reclaim costs related to preparing and serving a compliance notice, restoration notice, variable monetary penalty or stop notice. This may include the costs of any related investigation or expert advice (including legal advice).

We will do this by sending a cost recovery notice which will detail:

- amount to be paid
- period in which payment must be paid (at least 28 days)
- how payment should be made
- consequences of failing to pay
- rights of appeal.

Following expiry of the specified payment period APHA may recover costs as if payable under a court order.

## 6. Publication of civil sanction data

It is a legal requirement for APHA to publish annual data for the cases in which civil sanctions have been imposed and cases where an enforcement undertaking has been accepted. This will not include cases which have been overturned on appeal.

Following best practice and subject to Data Protection laws APHA will publish:

- the cases in which civil sanctions have been imposed;
- where the civil sanction is a compliance notice, a restoration notice or variable monetary penalty, the cases in which a third party undertaking has been accepted;
- the cases in which an enforcement undertaking has been accepted.

APHA reserve the right to withhold publication of a case where it is considered that it would be inappropriate.

## Annex 1: Calculation of Variable Monetary Penalties

This guidance covers the steps and factors involved in the calculation of a variable monetary penalty (VMP).

The objective of VMPs is to deter non-compliance by removing any financial benefit derived from offending. A VMP can also reflect the severity of any impacts.

The maximum penalty that may be imposed is **£250,000**. A VMP may not be imposed more than once for the same act or omission. Before serving a VMP, APHA may request additional information to support the calculation of the VMP.

A notice of intent will be served prior to issuing a VMP. This allows the recipient to provide written representations as to why the VMP should not be issued or the value be adjusted within 28 days from receipt of the notice of intent. Following consideration of any representations, APHA may decide to withdraw the notice of intent or proceed with issuance of the final notice which may include an amended value to take into consideration any representations.

The level of the penalty will be assessed considering the following factors:

- financial benefit: this will consider any advantage in terms of monetary gain or where a loss has been lessened, or costs avoided as a result of the offence.
- biosecurity impact: this will assess whether the impact on biosecurity is actual, potential or an administrative offence. It will also consider the scale, duration or frequency, and severity of plant pest or disease involved
- behaviour and context: this will assess the offender's behaviour and wider factors such as intent, foreseeability, voluntary reporting, actions taken, compliance history, and cooperation with investigations.

Details of how the calculation was made will be set out in both the notice of intent and the final notice.

## Annex 2: Appeals

All appeals relating to civil sanctions will be dealt with in the first instance by the first-tier tribunal.

### **Compliance Notice, Restoration Notice, Fixed Monetary Penalty, Variable Monetary Penalty**

An individual or business may appeal against the final notice on one or more of the following grounds:

1. The decision was based on an error of fact.
2. The decision was wrong in law.
3. In the case of a variable monetary penalty, the amount of the penalty is unreasonable.
4. In the case of a non-monetary penalty requirement, the nature of the requirement is unreasonable.
5. The decision was unreasonable for any other reason.
6. The decision was wrong for any other reason.

### **Stop Notice**

An individual or business may appeal if they have been served a stop notice, on one or more of the following grounds:

1. The decision was based on an error of fact.
2. The decision was wrong in law.
3. The decision was unreasonable.
4. Any step specified in the notice is unreasonable.
5. An individual or business has not committed the offence and would not have committed it had the stop notice not been served.
6. An individual or business would not, by reason of any defence, permit, or licence, have been liable to be convicted of the offence had the stop notice not been served.
7. The decision was wrong for any other reason.

### **Refusal to issue a Completion Certificate for a Stop Notice**

An individual or business may appeal against a refusal to issue a completion certificate on the following grounds:

1. The decision was based on an error of fact.
2. The decision was wrong in law.
3. The decision was unfair or unreasonable.
4. The decision was wrong for any other reason.

### **Compensation for imposition of a Stop Notice**

An individual or business may appeal a decision not to award compensation, or appeal the amount of compensation offered, on the following grounds:

1. The appropriate authority's decision was unreasonable.
2. The amount offered was based on incorrect facts.
3. The decision was wrong for any other reason.

### **Enforcement Undertaking**

An individual or business may appeal the decision not to issue a discharge certificate for an enforcement undertaking on the following grounds:

1. The decision was based on an error of fact.
2. The decision was wrong in law.
3. The decision was unfair or unreasonable.
4. The decision was wrong for any other reason.

### **Non-Compliance Penalties**

An individual or business may appeal if they have been served a non-compliance penalty on the following grounds:

1. The decision to serve the notice was based on an error of fact.
2. The decision was wrong in law.
3. The decision was unfair or unreasonable for any reason.
4. The amount of the penalty is unreasonable.
5. The decision was wrong for another reason.

### **Cost Recovery**

An individual or business may appeal a cost recovery notice on the following grounds:

1. The decision to serve the notice was based on an error of fact.
2. The decision was wrong in law.
3. The decision was unfair or unreasonable for any reason.
4. The amount of the penalty was unreasonable.
5. The decision was wrong for any other reason.