

SCHEDULE 2

Articles 2(1), 3(2)

Variable monetary penalties etc.

CHAPTER 1

Variable Monetary Penalties

Power to impose variable monetary penalties

1.—(1) SEPA may by notice impose a variable monetary penalty on a person in relation to a relevant offence.

(2) Before doing so SEPA must be satisfied on the balance of probabilities that the person has committed the offence to which the penalty relates.

(3) A “variable monetary penalty” is, subject to sub-paragraph (4), a requirement to pay SEPA a penalty of such an amount as SEPA may in each case determine.

(4) SEPA may not impose a variable monetary penalty that exceeds the following maximum amounts—

- (a) in the case mentioned in sub-paragraph (5), the maximum amount of the fine that may be imposed on summary conviction in such a case; and
- (b) in any other case, £40,000.

(5) The case is one where the offence in respect of which the variable monetary penalty is imposed is—

- (a) triable summarily (whether or not it is also triable on indictment); and
- (b) is punishable on summary conviction by a fine (whether or not it is also punishable by a term of imprisonment).

Relevant offences for variable monetary penalties

2.—(1) For the purposes of this Schedule and section 23 of the Act (variable monetary penalties), “relevant offence” means an offence specified in Schedule 4, if the table in that Schedule indicates that a variable monetary penalty may be imposed.

(2) In relation to a relevant offence (“the principal offence”), the following offences are also relevant offences for those purposes—

- (a) any attempt, conspiracy or incitement to commit the principal offence; and
- (b) an offence under section 293(2) of the Criminal Procedure (Scotland) Act 1995 (statutory offences: art and part and aiding or abetting) as it applies in relation to the principal offence.

(3) For the purposes of sub-paragraph (1), the table in Schedule 4—

- (a) indicates that, in relation to an offence, a variable monetary penalty may be imposed if the third column of the table contains the word “YES” in the row relating to the offence; and
- (b) does not so indicate if that column contains the word “NO” in the row relating to the offence.

Notice of intent

3.—(1) Where SEPA proposes to impose a variable monetary penalty on a person, it must serve on the person a notice of what is proposed (a “notice of intent”).

(2) The notice of intent must include information as to—

- (a) the proposed amount of the penalty;

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- (b) the grounds for the proposal to impose the variable monetary penalty;
- (c) the right to make written representations;
- (d) the period within which representations may be made; and
- (e) the option to offer a VMP undertaking within the period for making written representations.

Right to make written representations

4.—(1) A person on whom a notice of intent is served may, within 28 days beginning with the day on which the notice was served, make written representations to SEPA in relation to the proposed imposition of the variable monetary penalty.

(2) Written representations may in particular include representations that the person would not, by reason of any defence, be liable to be convicted of the offence to which the penalty relates.

(3) The period mentioned in sub-paragraph (1) may be extended by agreement in writing between SEPA and the person on whom the notice was served.

Decision to impose a variable monetary penalty

5.—(1) SEPA must, after the end of the period for making written representations, decide whether to impose a variable monetary penalty and, if so, the amount of the penalty.

(2) In making that decision, SEPA must—

- (a) have regard to any representations made in accordance with paragraph 4; and
- (b) take into account any VMP undertaking accepted by it.

Final notice

6.—(1) Where a decision is taken to impose a variable monetary penalty, SEPA may do so by serving a final notice.

(2) A final notice must include information as to—

- (a) the amount of the penalty;
- (b) the grounds for imposing the penalty;
- (c) how payment may be made;
- (d) the period within which payment must be made;
- (e) late payment interest;
- (f) rights of appeal; and
- (g) the consequences of non-payment.

(3) SEPA may not serve a final notice after a period of six months beginning with the day which is the final day on which written representations may be made in relation to the notice of intent.

(4) The period mentioned in sub-paragraph (3) may be extended by agreement in writing between SEPA and the person on whom the notice was served.

Appeals against variable monetary penalties

7.—(1) A person on whom a variable monetary penalty is imposed may appeal against the decision as to the imposition or amount of the penalty.

(2) An appeal under this paragraph may be made on one or more of the following grounds:—

- (a) the decision was based on an error of fact;

- (b) the decision was wrong in law;
- (c) the amount of the penalty is unreasonable;
- (d) the decision was unreasonable for any other reason; or
- (e) any other reason.

(3) The grounds on which a person may appeal under this paragraph do not include the ground that SEPA failed to comply with guidance issued to it by the Lord Advocate under section 31(1) of the Act.

(4) An appeal under this paragraph must be made within the period of 28 days beginning with the day on which the final notice under paragraph 6(1) is served.

(5) Where an appeal is made under this paragraph, the variable monetary penalty is suspended from the day on which the appeal is made until the day on which the appeal is determined or withdrawn.

Payment requirements for variable monetary penalties

8.—(1) Subject to paragraph (2), the variable monetary penalty must be paid within 56 days beginning with the day the final notice was served or such longer period as SEPA may specify in the final notice.

(2) In the case of an appeal, any penalty which falls to be paid (whether because the penalty was upheld or because the appeal was withdrawn) is payable within—

- (a) the period referred to in sub-paragraph (1);
- (b) the period of 28 days beginning with the day the appeal is determined or withdrawn; or
- (c) such period as the Scottish Land Court may, in determining the appeal, specify,

whichever ends later.

Costs recovery notices

9.—(1) SEPA may serve a notice on a person on whom a variable monetary penalty has been imposed, requiring that person to pay the costs incurred by SEPA in relation to the imposition of the penalty up to the time of its imposition (a “costs recovery notice”).

(2) In this paragraph, “costs” include in particular—

- (a) investigation costs (including the costs of monitoring the environment to determine the harm caused by the relevant offence to which the penalty relates);
- (b) administration costs; and
- (c) costs of obtaining expert advice (including legal advice).

(3) The costs recovery notice must specify—

- (a) the amount required to be paid;
- (b) how payment may be made;
- (c) the period within which payment must be made;
- (d) that SEPA may be required to provide a detailed breakdown of the amount (unless such a breakdown is provided by SEPA with the notice itself);
- (e) the rights of appeal; and
- (f) consequences of non-payment.

(4) The person on whom the notice is served may require SEPA to provide a detailed breakdown of the amount required to be paid (unless such a breakdown has already been provided).

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(5) SEPA must take such steps as are reasonable to ensure that the detailed breakdown is sent to the person requesting it within a period of 21 days from the date of the request.

Appeals against costs recovery notices

- 10.**—(1) The person required to pay costs may appeal against—
- (a) the decision of SEPA to impose the requirement; and
 - (b) the decision of SEPA as to the amount of the costs (including that some or all of the costs were unnecessarily incurred).
- (2) An appeal under this paragraph must be made within the period of 28 days beginning with—
- (a) the day on which the costs recovery notice under paragraph 9(1) is served; or
 - (b) where a person requests a detailed breakdown of the costs recovery notice, the day on which that breakdown is sent by SEPA.
- (3) Where an appeal is made under this paragraph, the costs recovery notice is suspended from the day on which the appeal is made until the day on which the appeal is determined or withdrawn.

Payment requirements for costs recovery notices

- 11.**—(1) Subject to sub-paragraph (2), the amount required to be paid under the costs recovery notice must be paid within 56 days beginning with the day the notice was served or such longer period as SEPA may specify in the notice.
- (2) In the case of an appeal, any costs which fall to be paid (whether because the penalty was upheld or because the appeal was withdrawn) are payable within—
- (a) the period referred to in sub-paragraph (1);
 - (b) the period of 28 days beginning with the day the appeal is determined or withdrawn; or
 - (c) such period as the Scottish Land Court may, in determining the appeal, specify,
- whichever ends later.

CHAPTER 2

VMP Undertakings

VMP undertakings

- 12.**—(1) A person on whom a notice of intent to issue a variable monetary penalty is served may offer a VMP undertaking, which SEPA may accept or reject.
- (2) A “VMP undertaking” is an undertaking by the person on whom the notice of intent is served as to action to be taken by that person, within such period as may be specified in the undertaking, for all or any of the following purposes—
- (a) to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed;
 - (b) to benefit the environment to the extent that the commission of the offence has harmed the environment;
 - (c) to secure that no financial benefit arising from the commission of the offence accrues to the person.
- (3) A person offering a VMP undertaking must do so in writing within the period for making written representations.
- (4) A VMP undertaking must include—

- (a) information as to—
 - (i) the notice of intent to which the undertaking relates;
 - (ii) the act or omission giving rise to the relevant offence to which the notice of intent relates;
 - (iii) the action to be taken under the undertaking;
 - (iv) the period within which that action must be taken; and
 - (v) how and when the person is considered to have fulfilled the undertaking; and
- (b) a statement that the undertaking is made in accordance with this Schedule.

(5) A VMP undertaking accepted by SEPA may be varied (including by extending the period within which the action must be taken) if both parties agree in writing.

Inaccurate, incomplete and misleading information

13.—(1) SEPA may serve a notice on a person from whom SEPA has accepted a VMP undertaking, requiring that person to provide, within such period as SEPA may consider reasonable, sufficient information to determine whether the VMP undertaking has been complied with.

(2) A person who fails to provide such information, or provides inaccurate, misleading or incomplete information in relation to a VMP undertaking may be regarded by SEPA as not having complied with the undertaking.

Non-compliance penalties

14.—(1) SEPA may impose a non-compliance penalty on a person who fails to comply with a VMP undertaking which is accepted from the person.

(2) A “non-compliance penalty” is a requirement to pay SEPA an amount calculated in accordance with sub-paragraph (3).

(3) The amount of the non-compliance penalty is to be determined by SEPA and, subject to sub-paragraph (4), must be—

- (a) an amount equivalent to 140% of the variable monetary penalty which SEPA would have imposed by final notice had the undertaking not been accepted; or
- (b) a lesser amount, where SEPA considers there are exceptional circumstances justifying it.

(4) The maximum amount of the non-compliance penalty that may be imposed in any case is the same as the maximum amount of a variable monetary penalty which would apply in that case in accordance with paragraph 1(4).

(5) Where a decision is taken to impose a non-compliance penalty, SEPA may do so by serving a non-compliance penalty notice.

(6) A non-compliance penalty notice must include information as to—

- (a) the grounds for imposing the non-compliance penalty;
- (b) the amount of the penalty;
- (c) how payment may be made;
- (d) the period within which payment must be made;
- (e) late payment interest;
- (f) rights of appeal; and
- (g) the consequences of non-payment.

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Appeals against non-compliance penalties

- 15.—(1) A person on whom a non-compliance penalty is imposed may appeal against the notice.
- (2) An appeal under this paragraph may be made on one or more of the following grounds:—
- (a) the decision to serve the notice was based on an error of fact;
 - (b) the decision was wrong in law;
 - (c) the decision was unreasonable for any other reason (including that the amount of the penalty was unreasonable); or
 - (d) any other reason.
- (3) An appeal under this paragraph must be made within the period of 28 days beginning with the day on which the non-compliance penalty notice under paragraph 14 is served.
- (4) Where an appeal is made under this paragraph, the non-compliance penalty is suspended from the day on which the appeal is made until the day on which the appeal is determined or withdrawn.

Payment requirements for non-compliance penalties

- 16.—(1) Subject to sub-paragraph (2), the non-compliance penalty must be paid within 56 days beginning with the day the non-compliance penalty notice was served or such longer period as SEPA may specify in the notice.
- (2) In the case of an appeal, any penalty which falls to be paid (whether because the penalty was upheld or because the appeal was withdrawn) is payable within—
- (a) the period referred to in sub-paragraph (1);
 - (b) the period of 28 days beginning with the day the appeal is determined or withdrawn; or
 - (c) such period as the Scottish Land Court may, in determining the appeal, specify,
- whichever ends later.

CHAPTER 3

Effect on criminal proceedings etc. and late payment interest

Variable monetary penalties: effect on criminal proceedings etc.

- 17.—(1) Sub-paragraph (2) applies where—
- (a) a variable monetary penalty is imposed on a person;
 - (b) a VMP undertaking is accepted from a person; or
 - (c) both such a penalty is imposed, and such an undertaking is accepted from, a person.
- (2) No criminal proceedings may be commenced against the person for an offence constituted by an act or omission if the variable monetary penalty or, as the case may be, the VMP undertaking related to that offence constituted by that act or omission.
- (3) Where a notice of intent relating to a variable monetary penalty is served on a person in respect of an offence constituted by an act or omission, the period mentioned in sub-paragraph (4) is not to be counted in calculating any period within which criminal proceedings in respect of that offence constituted by that act or omission must be commenced.
- (4) The period is that beginning with the day on which the notice of intent is served and ending with the day which is the final day on which written representations may be made in relation to the notice.
- (5) The reference in sub-paragraph (2) to criminal proceedings being commenced includes a reference to—

- (a) a warning being given by the procurator fiscal;
- (b) a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995⁽¹⁾) being sent;
- (c) a compensation offer under section 302A⁽²⁾ of that Act being sent;
- (d) a combined offer under section 302B⁽³⁾ of that Act being sent; and
- (e) a work order under section 302ZA⁽⁴⁾ of that Act being made.

Late payment interest

18.—(1) If a person fails to pay in full—

- (a) a variable monetary penalty;
- (b) a non-compliance penalty; or
- (c) a costs recovery notice,

by the payment date, interest is payable on the amount outstanding (“late payment interest”) in accordance with the following sub-paragraphs.

(2) Interest falls to be paid at a rate of 8 per cent per annum calculated on a daily basis for the period beginning with the day after the payment date and ending on the day payment is made or recovered.

(3) The total amount of interest payable is not to exceed the amount of the variable monetary penalty, non-compliance penalty or costs recovery notice to which the interest relates.

(4) In this article, “payment date” means—

- (a) in relation to a variable monetary penalty, the date payment is due in accordance with paragraph 8(1) or, in the case of an appeal, 8(2);
- (b) in relation to a costs recovery notice, the date payment is due in accordance with paragraph 11(1) or, in the case of an appeal, 11(2); and
- (c) in relation to a non-compliance penalty, the date payment is due in accordance with paragraph 16(1) or, in the case of an appeal, 16(2).

(1) 1995 c.46. Section 302 was amended by section 50(1) of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6) (“the 2007 Act”) and section 70(3) of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) (“the 2010 Act”).

(2) Section 302A was added by the 2007 Act, section 50(2) and amended by the 2010 Act, section 70(4).

(3) Section 302B was added by the 2007 Act, section 50(2).

(4) Section 302ZA was added by the 2007 Act, section 51 and amended by the 2007 Act, section 70(5).