

Partial Business and Regulatory Impact Assessment

Title of Proposal

The Aquaculture and Fisheries (Scotland) Act 2007 (Fixed Penalty Notices) Order 2015

Purpose and intended effect

- **Background**

Since 2008, under the Aquaculture and Fisheries (Scotland) Act 2007 (“the 2007 Act”) enforcement officers from the Scottish Government’s Marine Scotland Compliance team have been able to offer Fixed Penalty Notices (FPNs) to persons where the officer has reasonable grounds for suspecting that the person has committed an offence in relation to sea fisheries.

As originally enacted, the 2007 Act provided the power for Scottish Ministers to prescribe, by Order, relevant sea fisheries offences in respect of which an FPN could be offered, and to fix a scale of penalties. The Aquaculture and Fisheries (Scotland) Act 2007 (Fixed Penalty Notices) Order 2008 (“the 2008 Order”) was made under this power, and set out the relevant offences and a scale of penalties. The Aquaculture and Fisheries (Scotland) Act 2013 (“the 2013 Act”) amended the FPN regime contained in the 2007 Act, expanding it beyond sea fisheries offences so that its scope also included certain marine licensing, aquatic animal health and marine nature conservation and protection offences. The 2013 Act amendments also set out the relevant offences directly in the provisions of the 2007 Act, rather than leaving these to be set out in an Order. The 2013 Act also amended the upper limit at which an FPN can be offered, from £2,000 to £10,000.

Since introduction (in 2008), approximately 120 FPNs have been offered to individuals and the information available at the time suggests that 85-90% of FPNs have been paid.

- **Objective**

The purpose of the Order is to update and add new levels of penalty to the existing scale of fixed penalties to reflect the new maximum level set out in the 2007 Act, as amended by the 2013 Act. The existing scale of fixed penalties, as set out in the 2008 Order, consists of four levels: £250, £500, £1,000, and £2,000. The new scale will consist of seven levels: £500, £1,000, £2,000, £4,000, £5,000, £8,000 and £10,000.

- **Rationale for Government intervention**

The policy aim is to provide a greater spread of penalty levels leading up to the new upper limit of £10,000. This is intended to provide greater deterrence,

promote compliance and achieve proportionate sanctions for offences.

This contributes to the wealthier and fairer strategic objective. In offering these penalties to those suspected of committing relevant offences, it will allow those fishing legitimately and those lawfully engaged in other marine activities to have a fairer share of the wealth generated through their activity, rather than being undercut by alleged illegal activity.

Consultation

- **Within Government**

Scottish Government officials across sea fisheries, marine licensing; aquatic animal health and marine nature conservation and protection policy and operational areas have been consulted. Criminal Justice officials within the Scottish Government have also been consulted. There has also been consultation with the Crown Office and Procurator Fiscal Service and the Department for Environment, Food and Rural Affairs.

- **Public Consultation**

There has been no formal public consultation specifically on the new penalty levels specified by this Order. This is because it was not considered that there was any substantive policy issue on which to seek views and no meaningful questions that could be asked.

The policy issues in terms of what offences qualify to fall within the FPN regime and the maximum amount of fixed penalty that can be offered have already been considered and agreed in the amendments that were made to the 2007 Act by the 2013 Act. Furthermore, aside from the expansion of the scope of offences covered, there are no changes in terms of how the scheme itself operates.

- **Business**

By its very nature this Order will have an impact on those who are suspected of committing relevant offences; it is meant to have an impact on suspected illegal business and activities.

The question as to how and what extent these proposed levels of penalty would affect business has been asked across both the fisheries and wider marine industries by way of email sent to more than 200 contacts drawn from across the relevant policy areas.

We have received 26 substantive responses. In general the responses indicated that the proposed levels would have no impact or that the organisation was supportive of the proposed levels. There was a response from an organisation indicating that the proposed levels would have an impact but did not specify whether this was positive or negative. There was a small number of organisations who did not support the penalty levels as they

thought small fishermen might be put out of business with a penalty, or they didn't understand why the change was being made at this stage.

Options

Option 1 – Do Nothing

If no order is made then the only levels of penalty that would be available are those currently in use and set out in the 2008 Order.

This would mean that the available level of penalty for an FPN would remain at £250, £500, £1,000 and £2,000.

There would be no way in which the level of gain from the alleged criminal activity could be closely reflected in the penalty offered if the existing penalty levels were not updated and there were no further levels of penalty set.

Option 2 – update existing and set additional levels of fixed penalty within the current statutory limits

Operational enforcement policy would remain along the previous lines but a new scale of fixed penalties would be prescribed, with the aim of providing greater deterrence, promotion of compliance measures and achieving proportionate sanctions for offences.

The new scale will consist of seven levels, rather than just four: £500, £1,000, £2,000, £4,000, £5,000, £8,000 and £10,000. The broader spread of penalty levels (up to £10,000 instead of just £2,000) would mean that penalties would be able to better reflect gain from criminal wrong doing if the gain was in excess of £2000.

We consider that the FPN scheme will continue to provide certainty for fishermen and other persons who have been offered an FPN as it allows them to discharge any liability and removes the uncertainty associated with the costs, timescales, and potential outcomes of court action.

Sectors and groups affected

The FPN is only offered to those suspected of committing relevant offences.

Benefits

Option 1

There are no benefits in continuing with current penalty levels.

Option 2

The benefits of option 2 are that penalty levels will be able to better reflect the alleged illegal gain and so play a part in discouraging fishermen and other persons from taking part in such illegal activity.

Costs

Option 1

It would unnecessarily restrict the sanctions available to the Scottish Ministers under the 2007 Act, as amended by the 2013 Act. It also arguably benefits those who break the law as the lower levels of penalty charge may not be able to adequately reflect the level of illegal gain, or otherwise be proportionate to the nature of the suspected offence.

Option 2

There are no costs other than the costs of increased penalties for those suspected of breaking the law.

Scottish Firms Impact Test

The effect on Scottish businesses will be negligible, as the new scale of penalties will only affect persons suspected of committing relevant offences. As previously mentioned, an email was issued to more than 200 contacts from both the fishery and wider marine industry to ask how and to what extent these proposed levels of penalty would affect them.

We have received 26 substantive responses. In general the responses indicated that the proposed levels would have no impact or that the organisation was supportive of the proposed levels. There was a response from an organisation indicating that the proposed levels would have an impact but did not specify whether this was positive or negative.

Given the engagement already carried out, the majority of responses suggesting no impact and the fact that any impact should only affect those persons or businesses breaking the law we propose no additional face to face engagement with business.

Competition Assessment

In a sea fisheries context the only impact this will have is to enhance the competitive position of fishermen who fish legally, as they will not be undercut as much or as often by those who allegedly break the law and use illegal methods to maximise their catch and hence their profits. The Order is simply a response to the statutory extension of the FPN regime.

In the context of the new offences added by the 2013 Act, offences which would have been automatically referred to the Procurator Fiscal for consideration, an FPN would be available. This would benefit persons and business as it provides a certainty of outcome, with reduced uncertainty around legal costs and timescales.

Using the Competition and Markets Authority Competition Filter questions we have concluded that the proposals will neither directly nor indirectly limit the number or range of suppliers, limit the ability of suppliers to compete or reduce suppliers incentives to compete vigorously.

Test run of business forms

There are no new forms for business. A Record of Decision Making form used by officers who offer a fixed penalty to a person will require amendment to take account of an increased number of levels of penalty.

Legal Aid Impact Test

There will be no impact on the legal aid fund. The Scottish Government’s penalty charges set out in the regulation amount to an agreement between the Marine Scotland Compliance team and the persons themselves who are paying the Fixed Penalty Notices. There is no scope for legal aid to be sought or awarded. There is no court procedure involved. Officers still have the option to refer a case directly to the Procurator Fiscal although the revised FPN scheme does not alter a person’s access to the justice system and continues to allow persons to accept and pay the penalty offered without entering the court system, should they choose to do so.

Enforcement, sanctions and monitoring

The options will be enforced – as they are at the moment – by the Scottish Government’s Marine Scotland Compliance team from existing budgets.

Non-payment of an FPN will – as it does now – result in automatic referral to the Procurator Fiscal for a decision on whether or not to prosecute. The court would then decide the level of sanction. This is the current process.

The Scottish Government will continue to monitor and keep statistics on FPNs offered and FPNs paid.

Implementation and delivery plan

The proposal, which is a development of existing processes and procedures, will be immediately put into effect.

- **Post-implementation review**
There is no set date for review. However we would continue to review the levels of penalty and the level of alleged offending. In light of this experience we could then consider any further measures.

Summary and recommendation

Option 2 is being recommended.

- **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	No benefit.	No economic costs (other than to those who accept the offer of a fixed penalty) over and above current costs of

		enforcement. Current penalty levels are unable to adequately reflect financial gain from suspected offences. Unnecessary restrictions on deterrence measures.
2	This benefits those persons who do not break the law and who will be able to compete more effectively. Greater deterrence from committing offences, more effective promotion of compliance measures and achieving more proportionate sanctions for offences.	No costs (other than to those who accept the offer of a fixed penalty) over and above current costs of enforcement.

Declaration and publication

• Sign-off for Partial Stage BRIAs:

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

Minister's name: RICHARD LOCHHEAD

Minister's title: CABINET SECRETARY FOR RURAL AFFAIRS, FOOD AND THE ENVIRONMENT

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