



# Regulatory Reform (Scotland) Act 2014

## 2014 asp 3

### PART 3

#### ENVIRONMENTAL REGULATION

#### CHAPTER 2

#### SEPA'S POWERS OF ENFORCEMENT

##### *Fixed monetary penalties*

#### **20 Fixed monetary penalties**

- (1) The Scottish Ministers may by order make provision for or about the imposition by SEPA of a fixed monetary penalty on a person in relation to a relevant offence.
- (2) Provision under subsection (1) must provide that a fixed monetary penalty—
  - (a) may be imposed on a person only where SEPA is satisfied on the balance of probabilities that the person has committed the offence to which the penalty relates,
  - (b) is to be imposed by notice, and
  - (c) may not be imposed on a person in relation to an offence constituted by an act or omission if a fixed monetary penalty has already been imposed on that person in respect of the same offence constituted by the same act or omission.
- (3) For the purposes of this Chapter, a “fixed monetary penalty” is a requirement to pay to SEPA a penalty of an amount specified in an order made under subsection (1).
- (4) The maximum amount of such penalty that may be so specified in relation to a particular offence is an amount equivalent to level 4 on the standard scale.
- (5) In this section, “the standard scale” has the meaning given by section 225(1) of the Criminal Procedure (Scotland) Act 1995.

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## **21 Fixed monetary penalties: procedure**

- (1) Provision under section 20—
  - (a) must secure the results in subsection (2) (“the mandatory results”),
  - (b) may secure the result in subsection (3) (“the optional result”).
- (2) The mandatory results are that—
  - (a) where SEPA proposes to impose a fixed monetary penalty on a person, it must serve on the person a notice of what is proposed (a “notice of intent”) which complies with subsection (4),
  - (b) except where the person has discharged liability by virtue of provision made under subsection (3), the person may make written representations to SEPA in relation to the proposed imposition of the fixed monetary penalty (including that the person would not, by reason of any defence, be liable to be convicted of the offence to which the penalty relates),
  - (c) SEPA must, after the end of the period for making representations, decide whether to impose the fixed monetary penalty,
  - (d) SEPA must, in so deciding, have regard to any representations,
  - (e) where SEPA decides to impose the fixed monetary penalty, the notice imposing it (“the final notice”) complies with subsection (5), and
  - (f) the person on whom a fixed monetary penalty is imposed may appeal against the decision to impose it.
- (3) The optional result is that the notice of intent also offers the person the opportunity to discharge the person’s liability for the fixed monetary penalty by payment of a sum specified in the notice of intent (which sum must be less than or equal to the amount of the penalty).
- (4) To comply with this subsection the notice of intent must include information as to—
  - (a) the grounds for the proposal to impose the fixed monetary penalty,
  - (b) the right to make written representations,
  - (c) the period within which representations may be made,
  - (d) where provision is made under subsection (3)—
    - (i) how payment to discharge the liability for the fixed monetary payment may be made,
    - (ii) the period within which liability for the fixed monetary penalty may be discharged, and
    - (iii) the effect of payment of the sum referred to in subsection (3).
- (5) To comply with this subsection the final notice must include information as to—
  - (a) the grounds for imposing the penalty,
  - (b) how payment may be made,
  - (c) the period within which payment must be made,
  - (d) any early payment discounts or late payment penalties,
  - (e) rights of appeal, and
  - (f) the consequences of non-payment.
- (6) Provision to secure the result in subsection (2)(f) must secure that the grounds on which a person may appeal against a decision of SEPA—
  - (a) include the grounds that—
    - (i) the decision was based on an error of fact,

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- (ii) the decision was wrong in law, and
  - (iii) the decision was unreasonable, but
- (b) do not include the ground that SEPA failed to comply with guidance issued to it by the Lord Advocate under section 31(1).

## **22 Fixed monetary penalties: effect on criminal proceedings etc.**

- (1) Provision under section 20 must secure that in a case where a notice of intent referred to in section 21(2)(a) in respect of an offence constituted by an act or omission is served on a person—
- (a) no criminal proceedings may be commenced against the person in respect of that offence constituted by that act or omission—
    - (i) before the end of any period in which the person may discharge liability for the fixed monetary penalty pursuant to section 21(3), or
    - (ii) if the person so discharges liability, and
  - (b) the period as mentioned in subsection (2) 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.
- (2) 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.
- (3) Provision under section 20 must also secure that, in a case where a fixed monetary penalty is imposed on a person in respect of an offence constituted by an act or omission, no criminal proceedings may be commenced against the person in respect of that offence constituted by that act or omission.
- (4) The references in subsections (1)(a) and (3) to criminal proceedings being commenced are to be read as if they included references 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) being sent,
  - (c) a compensation offer under section 302A of that Act being sent,
  - (d) a combined offer under section 302B of that Act being sent, and
  - (e) a work order under section 302ZA of that Act being made.

### *Variable monetary penalties*

## **23 Variable monetary penalties**

- (1) The Scottish Ministers may by order make provision for or about the imposition by SEPA of a variable monetary penalty on a person in relation to a relevant offence.
- (2) Provision under subsection (1) must provide that a variable monetary penalty—
- (a) may be imposed on a person only where SEPA is satisfied on the balance of probabilities that the person has committed the offence to which the penalty relates,
  - (b) is to be imposed by notice, and

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- (c) may not be imposed on a person in relation to an offence constituted by an act or omission if a variable monetary penalty has already been imposed on that person in respect of the same offence constituted by the same act or omission.
- (3) For the purposes of this Chapter, a “variable monetary penalty” is, subject to subsection (4), a requirement to pay SEPA a penalty of such amount as SEPA may in each case determine.
- (4) SEPA may not in any case impose a variable monetary penalty that exceeds the maximum amount specified in an order made under subsection (1) in relation to that case.
- (5) The maximum amount that may be so specified is—
  - (a) in the case mentioned in subsection (6), the maximum amount of the fine that may be imposed on summary conviction in such a case,
  - (b) in any other case, £40,000.
- (6) The case is one where the offence in respect of which the variable monetary penalty is imposed—
  - (a) is 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).
- (7) The Scottish Ministers may by order substitute another sum for the one for the time being mentioned in subsection (5)(b).

## **24 Variable monetary penalties: procedure**

- (1) Provision under section 23 must secure the results in subsection (2).
- (2) The results are that—
  - (a) where SEPA proposes to impose a variable monetary penalty on a person, it must serve on the person a notice (a “notice of intent”) which complies with subsection (3),
  - (b) the person may make written representations to SEPA in relation to the proposed imposition of the variable monetary penalty (including that the person would not, by reason of any defence, be liable to be convicted of the offence to which the penalty relates),
  - (c) SEPA must, after the end of the period for making such representations, decide whether to impose a variable monetary penalty and, if so, the amount of the penalty,
  - (d) SEPA must, in so deciding, have regard to any representations,
  - (e) where SEPA decides to impose a variable monetary penalty, the notice imposing it (the “final notice”) complies with subsection (4), and
  - (f) the person on whom a variable monetary penalty is imposed may appeal against the decision as to the imposition or amount of the penalty.
- (3) To comply with this subsection the notice of intent must include information as to—
  - (a) the grounds for the proposal to impose the variable monetary penalty,
  - (b) the right to make written representations, and
  - (c) the period within which representations may be made.
- (4) To comply with this subsection the final notice must include information as to—

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- (a) the grounds for imposing the penalty,
  - (b) how payment may be made,
  - (c) the period within which the payment must be made,
  - (d) any early payment discounts or late payment penalties,
  - (e) rights of appeal, and
  - (f) the consequences of non-payment.
- (5) Provision to secure the result in subsection (2)(c) must include provision for—
- (a) the person on whom the notice of intent is served to be able to offer an undertaking 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—
    - (i) to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed,
    - (ii) to benefit the environment to the extent that the commission of the offence has harmed the environment,
    - (iii) to secure that no financial benefit arising from the commission of the offence accrues to the person,
  - (b) SEPA to be able to accept or reject such an undertaking, and
  - (c) SEPA to take any undertaking so accepted into account in its decision.
- (6) Provision to secure the result in subsection (2)(f) must secure that the grounds on which a person may appeal against a decision of SEPA—
- (a) include the grounds that—
    - (i) the decision was based on an error of fact,
    - (ii) the decision was wrong in law,
    - (iii) the amount of the penalty is unreasonable, and
    - (iv) the decision was unreasonable for any other reason, but
  - (b) do not include the ground that SEPA failed to comply with guidance issued to it by the Lord Advocate under section 31(1).

## **25 Variable monetary penalties: effect on criminal proceedings etc.**

- (1) Provision under section 23 must secure the result in subsection (2) in a case where—
- (a) either—
    - (i) a variable monetary penalty is imposed on a person, or
    - (ii) an undertaking referred to in section 24(5) is accepted from a person,  
or
  - (b) both such a penalty is imposed on, and such an undertaking is accepted from, a person.
- (2) The result is that 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 undertaking related to that offence constituted by that act or omission.
- (3) Provision under section 23 must provide that the period mentioned in subsection (4) is not to be counted in calculating any period within which criminal proceedings in respect of an act or omission in relation to which a notice of intent under section 24(2) (a) is served must be commenced.

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- (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 subsection (2) to criminal proceedings being commenced is to be read as if it included 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) being sent,
  - (c) a compensation offer under section 302A of that Act being sent,
  - (d) a combined offer under section 302B of that Act being sent, and
  - (e) a work order under section 302ZA of that Act being made.

#### *Non-compliance penalties*

### **26 Undertakings under section 24: non-compliance penalties**

- (1) Provision under section 23 may include provision for a person to pay a monetary penalty (in this Part, a “non-compliance penalty”) to SEPA if the person fails to comply with an undertaking referred to in section 24(5) which is accepted from the person.
- (2) Where such provision is included, it may also—
  - (a) specify the amount of the non-compliance penalty,
  - (b) provide for the amount to be calculated by reference to criteria specified by order by the Scottish Ministers,
  - (c) provide for the amount to be determined by SEPA (subject to any maximum amount set out in the provision),
  - (d) provide for the amount to be determined in any other way.
- (3) Where provision is included as mentioned in subsection (1), it must provide that the maximum amount of the non-compliance penalty that may be imposed in any case is not to exceed the maximum amount of the variable monetary penalty to which the non-compliance penalty relates in such a case.
- (4) Where provision is included as mentioned in subsection (1), it must secure that—
  - (a) the non-compliance penalty is imposed by notice served by SEPA, and
  - (b) the person on whom it is imposed may appeal against the notice.
- (5) Provision pursuant to subsection (4)(b) must secure that the grounds on which a person may appeal against a notice referred to in that subsection include that—
  - (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 reason (including, in a case where the amount of the non-compliance penalty was determined by SEPA, that the amount is unreasonable).

### *Enforcement undertakings*

## **27 Enforcement undertakings**

- (1) The Scottish Ministers may by order make provision—
  - (a) for or about enabling SEPA to accept an enforcement undertaking from a person in a case where SEPA has reasonable grounds to suspect that the person has committed a relevant offence, and
  - (b) for the acceptance of the undertaking to have the consequences in subsection (4).
- (2) For the purposes of this Chapter, an “enforcement undertaking” is an undertaking to take action of a type mentioned in subsection (3) and specified in the undertaking within such period as may be so specified.
- (3) The types of action are—
  - (a) action to secure that the offence does not continue or recur,
  - (b) action to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed,
  - (c) action of a description specified by order by the Scottish Ministers.
- (4) The consequences are that, unless SEPA has certified under provision made in pursuance of subsection (5)(g) that the person from whom the enforcement undertaking is accepted has not complied with the undertaking or any part of it—
  - (a) no criminal proceedings may be commenced against the person from whom the enforcement undertaking is accepted in respect of an offence constituted by an act or omission if the undertaking relates to that offence constituted by that act or omission,
  - (b) SEPA may not impose on the person a fixed monetary penalty which it would otherwise have power to impose by virtue of section 20 in respect of the act or omission, and
  - (c) SEPA may not impose on the person a variable monetary penalty which it would otherwise have power to impose by virtue of section 23 in respect of the act or omission.
- (5) An order under this section may in particular include provision—
  - (a) as to the procedure for entering into an enforcement undertaking,
  - (b) as to the terms of an enforcement undertaking,
  - (c) as to publication of an enforcement undertaking by SEPA,
  - (d) as to variation of an enforcement undertaking,
  - (e) as to circumstances in which a person may be regarded as having complied with an enforcement undertaking,
  - (f) as to monitoring by SEPA of compliance with an enforcement undertaking,
  - (g) as to certification by SEPA that an enforcement undertaking or any part of it has not been complied with,
  - (h) for appeals against such certification,
  - (i) in a case where a person has given inaccurate, misleading or incomplete information in relation to an enforcement undertaking, for that person to be regarded as not having complied with it,

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- (j) in a case where a person has complied partly but not fully with an enforcement undertaking, for that partial compliance to be taken into account in the imposition of any criminal or other sanction on the person,
  - (k) for the purpose of enabling criminal proceedings in respect of an act or omission in relation to which SEPA has accepted an enforcement undertaking to be commenced against a person who has not complied with the undertaking or any part of it, for the period mentioned in subsection (6) not to be counted in calculating any period within which such proceedings must be commenced.
- (6) The period is that beginning with the day on which the enforcement undertaking is accepted and ending with—
- (a) the day on which SEPA certifies, under provision made in pursuance of subsection (5)(g), that the undertaking or any part of it has not been complied with, or
  - (b) where an appeal against such a certification is taken, the day on which the appeal is finally determined.
- (7) The reference in subsection (4)(a) to criminal proceedings being commenced is to be read as if it included 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) being sent,
  - (c) a compensation offer under section 302A of that Act being sent,
  - (d) a combined offer under section 302B of that Act being sent, and
  - (e) a work order under section 302ZA of that Act being made.
- (8) References in this section to taking action specified in an enforcement undertaking include references to refraining from taking such action.

*Operation of penalties and cost recovery*

**28      Combination of sanctions**

- (1) Provision may not be made by order under section 20 and section 23 conferring powers on SEPA in relation to the same offence unless it secures that—
- (a) SEPA may not serve a notice of intent referred to in section 21(2)(a) on a person in relation to an act or omission where a variable monetary penalty has been imposed on that person in relation to the act or omission, and
  - (b) SEPA may not serve a notice of intent referred to in section 24(2)(a) on a person in relation to any act or omission where—
    - (i) a fixed monetary penalty has been imposed on the person in relation to the act or omission, or
    - (ii) the person has discharged liability for a fixed monetary penalty in relation to that act or omission pursuant to section 21(3).
- (2) Provision under section 20 must secure that in a case where a notice of intent referred to in section 21(2)(a) is served on a person—
- (a) SEPA may not, before the end of any period in which the person may discharge liability to the fixed monetary penalty pursuant to section 21(3), impose a variable monetary penalty on the person in respect of the act or omission to which the notice relates, and



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- (b) SEPA may not, if the person so discharges liability, impose a variable monetary penalty on the person in respect of that act or omission.
- (3) Provision under section 20 must also secure that in a case where a fixed monetary penalty is imposed on a person, SEPA may not impose a variable monetary penalty on the person in respect of the act or omission giving rise to the penalty.
- (4) Provision under section 20 must also secure the result that a fixed monetary penalty in respect of an offence constituted by an act or omission may not be imposed on a person if, in respect of that offence as constituted by that act or omission—
- (a) criminal proceedings have been commenced against the person,
  - (b) the person has been given a warning by the procurator fiscal,
  - (c) the person has been sent a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995 (fixed penalty: conditional offer by procurator fiscal)),
  - (d) the person has accepted, or is deemed to have accepted, a compensation offer issued under section 302A of that Act (compensation offer by procurator fiscal),
  - (e) the person has accepted, or is deemed to have accepted, a combined offer issued under section 302B of that Act, or
  - (f) a work order has been made against the person under section 303ZA of that Act (work orders).
- (5) Provision under section 23 must also secure the result that a variable monetary penalty in respect of an offence constituted by an act or omission may not be imposed on a person if, in respect of that offence as constituted by that act or omission—
- (a) criminal proceedings have been commenced against the person,
  - (b) the person has been given a warning by a procurator fiscal,
  - (c) the person has been sent a conditional offer (within the meaning of section 302 of the Criminal Procedure (Scotland) Act 1995 (fixed penalty: conditional offer by procurator fiscal)),
  - (d) the person has accepted, or is deemed to have accepted, a compensation offer issued under section 302A of that Act (compensation offer by procurator fiscal),
  - (e) the person has accepted, or is deemed to have accepted, a combined offer issued under section 302B of that Act, or
  - (f) a work order has been made against the person under section 303ZA of that Act (work orders).

## **29 Monetary penalties**

- (1) An order under this Chapter which confers power on SEPA to require a person to pay a fixed monetary penalty, a variable monetary penalty or a non-compliance penalty may include provision for—
- (a) early payment discounts,
  - (b) the payment of interest or other financial penalties for late payment of the penalty (such interest or other financial penalties not in total to exceed the amount of the penalty),
  - (c) enforcement of the penalty.
- (2) Where such provision is included, it may also provide for—

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- (a) SEPA to recover the penalty, and any interest or other financial penalty for late payment, as a civil debt,
- (b) the penalty, and any interest or other financial penalty for late payment, to be recoverable as if it were payable under an extract registered decree arbitral bearing a warrant for execution issued by a sheriff of any sheriffdom.

### **30 Costs recovery**

- (1) Provision under section 23 may include provision for SEPA to require a person on whom a variable monetary penalty is imposed to pay the costs incurred by SEPA in relation to the imposition of the penalty up to the time of its imposition.
- (2) Where such provision is included, it must secure that—
  - (a) a requirement to pay the costs is imposed by notice,
  - (b) the notice specifies the amount required to be paid,
  - (c) SEPA may be required to provide a detailed breakdown of the amount,
  - (d) the person required to pay costs may appeal against—
    - (i) the decision of SEPA to impose the requirement,
    - (ii) the decision of SEPA as to the amount of the costs (including that some or all of the costs were unnecessarily incurred),
  - (e) SEPA is required to publish guidance about how it will exercise the power conferred by the provision.
- (3) In subsection (1), the references to costs include in particular—
  - (a) investigation costs,
  - (b) administration costs,
  - (c) costs of obtaining expert advice (including legal advice).
- (4) Subsections (1)(b) and (c) and (2) of section 29 apply to costs required to be paid by virtue of subsection (1) of this section as they apply to a fixed monetary penalty, a variable monetary penalty or a non-compliance penalty.

#### *Guidance*

### **31 Guidance as to use of enforcement measures**

- (1) The Lord Advocate may issue, and from time to time revise, guidance to SEPA on the exercise of its functions relating to enforcement measures.
- (2) SEPA must comply with such guidance or revised guidance in exercising those functions.
- (3) In this section, an “enforcement measure” means a fixed monetary penalty, variable monetary penalty or enforcement undertaking (and any references in this Chapter to the imposition of an enforcement measure include acceptance of an enforcement undertaking).
- (4) Where power is conferred on SEPA by virtue of this Chapter to impose an enforcement measure in relation to an offence, the provision conferring the power must secure the results in subsection (5).
- (5) The results are that—

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- (a) SEPA must publish guidance about—
    - (i) how the offence is enforced,
    - (ii) the sanctions (including criminal sanctions) to which a person who commits the offence may be liable,
    - (iii) the action which SEPA may take to enforce the offence, whether by virtue of this Chapter or otherwise,
    - (iv) the circumstances in which SEPA is likely to take any such action,
    - (v) SEPA's use of the enforcement measure,
  - (b) in the case of guidance relating to a fixed monetary penalty or variable monetary penalty, the guidance must contain the relevant information, and
  - (c) SEPA must have regard to the guidance in exercising its functions.
- (6) In the case of guidance relating to a fixed monetary penalty, the relevant information referred to in subsection (5)(b) is information as to—
- (a) the circumstances in which the penalty is likely to be imposed,
  - (b) the circumstances in which it may not be imposed,
  - (c) the amount of the penalty,
  - (d) how liability for the penalty may be discharged and the effect of discharge, and
  - (e) rights to make representations and rights of appeal.
- (7) In the case of guidance relating to a variable monetary penalty, the relevant information referred to in subsection (5)(b) is information as to—
- (a) the circumstances in which the penalty is likely to be imposed,
  - (b) the circumstances in which it may not be imposed,
  - (c) the matters likely to be taken into account by SEPA in determining the amount of the penalty (including, where relevant, any discounts for voluntary reporting of non-compliance), and
  - (d) rights to make representations and rights of appeal.
- (8) SEPA may from time to time revise guidance published by it by virtue of subsection (5).
- (9) The references in subsections (5) to (7) to guidance include references to any revised guidance under subsection (8).
- (10) Before publishing any guidance or revised guidance by virtue of this section, SEPA must consult—
- (a) the Lord Advocate, and
  - (b) such other persons as it considers appropriate.

#### *Publication of enforcement action*

### **32 Publication of enforcement action**

- (1) Subsection (2) applies where the Scottish Ministers make provision by order under—
- (a) section 20 as to the imposition by SEPA of a fixed monetary penalty,
  - (b) section 23 as to the imposition by SEPA of a variable monetary penalty, or
  - (c) section 27 as to the acceptance by SEPA of an enforcement undertaking.

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- (2) The order may require SEPA to publish such information as may be specified in the order as regards cases in which it has done what the order permits it to do.

*Interpretation of Chapter 2*

**33 Interpretation of Chapter 2**

In this Chapter—

“early payment discounts” means early payment discounts included in an order under this Chapter by virtue of section 29(1);

“enforcement undertaking” has the meaning given in section 27;

“fixed monetary penalty” has the meaning given in section 20;

“late payment penalties” means a requirement to pay interest or other financial penalties for late payment of a fixed monetary penalty, a variable monetary penalty or a non-compliance penalty included in an order under this Chapter by virtue of section 29(1);

“non-compliance penalty” has the meaning given in section 26(1);

“variable monetary penalty” has the meaning given in section 23.