

SCHEDULE 5

Regulation 13(b)

Civil sanctions

PART 1

Power to impose civil sanctions

Market surveillance authority

1. The market surveillance authority may impose a requirement upon a person to comply with a compliance notice, a stop notice, an enforcement undertaking or to pay a variable monetary penalty or non-compliance penalty (a “civil sanction”) as set out in this Schedule.

PART 2

Compliance notices and variable monetary penalties

Imposition of a compliance notice

2.—(1) The market surveillance authority may by notice (“a compliance notice”) impose on any person—

- (a) in relation to an offence committed under regulation 14(1) a requirement to take such steps as the market surveillance authority may specify, within such period as it may specify, to secure that the offence does not continue or recur;
- (b) where the market surveillance authority is of the opinion that a person is making available on the market an energy-related product which does not comply with an applicable implementing measure, a requirement to take such steps as the market surveillance authority may specify within such period as it may specify, to secure that the product is withdrawn from the market or that its being made available on the market is prohibited or restricted.

(2) Before imposing a requirement under sub-paragraph (1)(a) the market surveillance authority must be satisfied beyond reasonable doubt that the person has committed the offence.

(3) Before imposing a requirement under sub-paragraph (1)(b) the market surveillance authority must be satisfied beyond reasonable doubt that the energy-related product does not comply with the applicable implementing measure.

(4) A compliance notice may not be imposed on more than one occasion in relation to the same act or omission.

Imposition of a variable monetary penalty

3.—(1) The market surveillance authority may by notice impose on any person in relation to an offence committed under regulation 14(1) a requirement to pay a monetary penalty to the market surveillance authority in such amount as it may determine (“a variable monetary penalty”).

(2) Before doing so the market surveillance authority must be satisfied beyond reasonable doubt that the person has committed the offence.

(3) A variable monetary penalty may not be imposed on more than one occasion in relation to the same act or omission.

(4) There is no limit to the amount of a variable monetary penalty.

(5) Before serving a notice relating to a variable monetary penalty the market surveillance authority may require the person on whom it is to be served to provide such information as is reasonable to establish the amount of any financial benefit arising as a result of the offence.

(6) The market surveillance authority may recover any variable monetary penalty imposed under this Schedule as if payable under order of the court.

Notice of intent

4.—(1) Where the market surveillance authority proposes to serve a compliance notice or a variable monetary penalty under this Part, it must serve on that person a notice of what is proposed (a “notice of intent”).

(2) The notice of intent must include—

- (a) the grounds for the proposed notice or penalty;
- (b) the requirements of the notice and in the case of a penalty the amount to be paid;
- (c) information as to—
 - (i) the right to make representations and objections within 28 days beginning with the day on which the notice of intent was received;
 - (ii) the circumstances in which the market surveillance authority may not impose the notice.

Making representations and objections

5. A person on whom a notice of intent is served may within 28 days beginning with the day on which the notice was received make written representations and objections to the market surveillance authority in relation to the proposed imposition of a compliance notice or variable monetary penalty.

Third party undertakings

6.—(1) A person on whom a notice of intent is served may offer an undertaking as to action to be taken by that person (including the payment of a sum of money) to benefit any third party affected by the offence or non-compliance with an applicable implementing measure (“a third party undertaking”).

(2) The market surveillance authority may accept or reject such a third party undertaking.

(3) The market surveillance authority must take into account any third party undertaking that it accepts in its decision whether or not to serve a final notice and, if it serves a notice imposing a variable monetary penalty, the amount of the penalty.

Final notice

7.—(1) After the end of the period for making representations and objections, the market surveillance authority must decide whether to impose the requirements in the notice of intent, with or without modifications.

(2) Where the market surveillance authority decides to impose a requirement, the notice imposing it (the “final notice”) must comply with paragraph 8 or 9.

(3) The market surveillance authority may not impose a final notice on a person where the market surveillance authority is satisfied that the person would not, by reason of any defence, be liable to be convicted of the offence to which the notice relates.

Contents of final notice – compliance notice

8. A final notice relating to a compliance notice must include information as to—
- (a) the grounds for imposing the notice;
 - (b) what compliance is required and the period within which it must be completed;
 - (c) rights of appeal; and
 - (d) the consequences of failing to comply with the notice.

Contents of final notice - variable monetary penalty

9. A final notice relating to a variable monetary penalty must include information as to—
- (a) the grounds for imposing the penalty;
 - (b) the amount to be paid;
 - (c) how payment may be made;
 - (d) the period within which payment must be made which must be not less than 28 days;
 - (e) rights of appeal; and
 - (f) the consequences of failing to comply with the notice.

Appeals against a final notice

- 10.—(1) The person receiving the final notice may appeal against it.
- (2) The grounds for appeal are—
- (a) that the decision was based on an error of fact;
 - (b) that the decision was wrong in law;
 - (c) in the case of a variable monetary penalty, that the amount of the penalty is unreasonable;
 - (d) in the case of a non-monetary requirement, that the nature of the requirement is unreasonable;
 - (e) that the decision was unreasonable for any other reason;
 - (f) that the decision was wrong for any other reason.

Criminal proceedings

- 11.—(1) If—
- (a) a compliance notice or variable monetary penalty is imposed on any person, or
 - (b) a third party undertaking is accepted from any person,

that person may not at any time be convicted of the offence under regulation 14(1) in respect of the act or omission giving rise to the compliance notice, variable monetary penalty or third party undertaking except in a case referred to in sub-paragraph (2).

(2) The case referred to in sub-paragraph (1) is a case where in relation to an offence under regulation 14(1)—

- (a) a compliance notice is imposed on a person or a third party undertaking is accepted from a person,
- (b) no variable monetary penalty is imposed upon that person, and
- (c) the person fails to comply with the compliance notice or third party undertaking.

(3) Criminal proceedings for offences triable summarily to which a compliance notice or third party undertaking in sub-paragraph (2) relate may be instituted at any time up to six months from the date when the market surveillance authority notifies the person that they have failed to comply with that compliance notice or third party undertaking.

Other offences and penalties

12. Where a person upon whom a compliance notice is served under paragraph 2(1)(b) does not comply with it within the time limit specified in the notice or fails to comply with a third party undertaking, the person is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

PART 3

Stop notices

Stop notices

13.—(1) The market surveillance authority may serve a notice (a “stop notice”) on any person—

- (a) in relation to an offence committed under regulation 14(1), prohibiting a person from carrying on an activity specified in the notice until the person has taken the steps specified in the notice;
- (b) where the market surveillance authority is of the opinion that a person is likely to make available on the market an energy-related product which does not comply with an applicable implementing measure, a requirement to take such steps as the market surveillance authority may specify within such period as it may specify, to secure that its being made available on the market is prohibited or restricted.

(2) A stop notice may only be served where the person is—

- (a) carrying on the activity, and
- (b) the market surveillance authority reasonably believes that—
 - (i) the activity as carried on by that person involves or is likely to involve the commission of an offence under regulation 14(1); or
 - (ii) that person is likely to make available on the market an energy-related product which does not comply with an applicable implementing measure.

(3) The steps referred to in sub-paragraph (1)(a) and (b) must be steps to eliminate the risk of the offence being committed, or of energy-related products which do not comply with an applicable implementing measure being made available on the market.

Contents of a stop notice

14. A stop notice must include information as to—

- (a) the grounds for serving the stop notice and the activity which is prohibited;
- (b) the steps the person must take to comply with the stop notice;
- (c) the consequences of non-compliance;
- (d) the period within which the activity must stop.

Appeals

15.—(1) The person on whom a stop notice is served may appeal against the decision to serve it.

(2) The grounds for appeal are—

- (a) that the decision was based on an error of fact;
- (b) that the decision was wrong in law;
- (c) that the decision was unreasonable;
- (d) that any step specified in the notice is unreasonable;
- (e) that the person has not committed the offence and would not have committed it had the stop notice not been served;
- (f) that the person was not likely to make an energy-related product available on the market and would not have made it available on the market if the stop notice had not been served;
- (g) that the person would not, by reason of any defence, have been liable to be convicted of the offence had the stop notice not been served;
- (h) that the decision was wrong for any other reason.

Completion certificates

16.—(1) The market surveillance authority must issue a certificate (a “completion certificate”) if, after service of a stop notice, the market surveillance authority is satisfied that the person has taken the steps specified in the notice.

(2) A stop notice ceases to have effect on the issue of a completion certificate.

(3) A person on whom a stop notice is served may at any time apply for a completion certificate.

(4) The market surveillance authority must decide whether to issue a completion certificate within 14 days of the application.

(5) A person on whom the stop notice was served may appeal against a decision not to issue a completion certificate on the grounds that—

- (a) the decision was based on an error of fact;
- (b) the decision was wrong in law;
- (c) the decision was unfair or unreasonable;
- (d) the decision was wrong for any other reason.

Compensation

17.—(1) The market surveillance authority must compensate a person for loss suffered as the result of the service of the stop notice or the refusal of a completion certificate if a person has suffered loss as a result of the notice or refusal and—

- (a) a stop notice is subsequently withdrawn or amended by the market surveillance authority because the decision to serve it was unreasonable or any step specified in the notice was unreasonable;
- (b) a person successfully appeals against the stop notice and the First-tier Tribunal finds that the service of the notice was unreasonable; or
- (c) a person successfully appeals against the refusal of a completion certificate and the Tribunal finds that the refusal was unreasonable.

(2) A person may appeal against a decision not to award compensation or the amount of compensation on the grounds that—

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- (a) the market surveillance authority's decision was unreasonable;
- (b) the amount offered was based on incorrect facts;
- (c) the decision was wrong for any other reason.

Offences

18. Where a person on whom a stop notice is served does not comply with it within the time limit specified in the notice, the person is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

PART 4

Enforcement undertakings

Enforcement undertakings

19. The market surveillance authority may accept a written undertaking (an "enforcement undertaking") given by a person to the market surveillance authority to take such action as may be specified in the undertaking within such period as may be specified where the market surveillance authority has reasonable grounds to suspect that the person has committed an offence under regulation 14(1).

Contents of an enforcement undertaking

- 20.—**(1) An enforcement undertaking must specify—
- (a) action to be taken by the person 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; or
 - (c) action (including the payment of a sum of money) to be taken by the person to benefit any person affected by the offence.
- (2) It must specify the period within which the action must be completed.
- (3) It must include—
- (a) a statement that the undertaking is made in accordance with this Schedule;
 - (b) the terms of the undertaking;
 - (c) information as to how and when a person is considered to have discharged the undertaking.
- (4) The enforcement undertaking may be varied, or the period within which the action must be completed may be extended, if both parties agree in writing.

Acceptance of an enforcement undertaking

21. If the market surveillance authority has accepted an enforcement undertaking then, unless the person from whom the undertaking is accepted has failed to comply with the undertaking or any part of it—

- (a) that person may not at any time be convicted of the offence in respect of the act or omission to which the undertaking relates; and
- (b) the market surveillance authority may not impose on that person a compliance notice, stop notice or variable monetary penalty in respect of that act or omission.

Discharge of an enforcement undertaking

22.—(1) If the market surveillance authority is satisfied that an enforcement undertaking has been complied with it must issue a certificate to that effect.

(2) The market surveillance authority may require the person who has given the undertaking to provide sufficient information to determine that the undertaking has been complied with.

(3) The person who gave the undertaking may at any time apply for such a certificate.

(4) The market surveillance authority must decide whether to issue such a certificate, and give written notice of the decision to the applicant, within 14 days of such an application.

(5) The person to whom the notice is given may appeal against a decision not to issue a certificate on the grounds that the decision—

- (a) was based on an error of fact;
- (b) was wrong in law;
- (c) was unfair or unreasonable;
- (d) was wrong for any other reason.

Inaccurate, incomplete or misleading information

23.—(1) A person who has given inaccurate, misleading or incomplete information in relation to an enforcement undertaking is regarded as not having complied with it.

(2) The market surveillance authority may by notice in writing revoke a certificate issued under paragraph 22 if it was issued on the basis of inaccurate, incomplete or misleading information.

Non-compliance with an enforcement undertaking

24.—(1) If a person does not comply with an enforcement undertaking the market surveillance authority may in the case of an offence committed under regulation 14(1)—

- (a) serve a compliance notice, non-compliance penalty, stop notice or variable monetary penalty; or
- (b) bring criminal proceedings.

(2) If a person has complied partly but not fully with an undertaking, that partial compliance must be taken into account in the imposition of any criminal or other sanction on the person.

(3) Criminal proceedings for offences to which an enforcement undertaking relates may be instituted at any time up to six months from the date when the market surveillance authority notifies the person that they have failed to comply with that undertaking.

PART 5

Non-compliance Penalties

Non-compliance penalties

25.—(1) If a person fails to comply with a compliance notice, stop notice, third party undertaking or enforcement undertaking, irrespective of whether a variable monetary penalty was also imposed, the market surveillance authority may serve a notice on that person imposing a monetary penalty (“a non-compliance penalty”).

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(2) The amount of the non-compliance penalty must be determined by the market surveillance authority, and must be a percentage of the costs of fulfilling the remaining requirements of the notice, third party undertaking or enforcement undertaking.

(3) The percentage must be determined by the market surveillance authority having regard to all the circumstances of the case and may, if appropriate, be 100%.

(4) The notice must include information as to—

- (a) the grounds for imposing the non-compliance penalty;
- (b) the amount to be paid;
- (c) how payment must be made;
- (d) the period in which payment must be made, which must not be less than 28 days;
- (e) rights of appeal;
- (f) the consequences of failure to make payment in the specified period;
- (g) any circumstances in which the market surveillance authority may reduce the amount of the penalty.

(5) If the requirements of the compliance notice, stop notice, third party undertaking or enforcement undertaking are fulfilled before the time set for payment of the non-compliance penalty, the penalty is not payable.

(6) The person on whom the notice imposing the non-compliance penalty is served may appeal against it.

(7) The grounds of appeal are—

- (a) that the decision to serve the notice was based on an error of fact;
- (b) that the decision was wrong in law;
- (c) that the decision was unfair or unreasonable for any reason;
- (d) that the amount of the penalty was unreasonable;
- (e) that the decision was wrong for any other reason.

PART 6

Withdrawing or amending a notice

26. The market surveillance authority may at any time in writing—

- (a) withdraw a notice imposing a variable monetary penalty or a notice imposing a non-compliance penalty notice or reduce the amount specified in the notice;
- (b) withdraw a compliance notice or stop notice or amend the steps in order to reduce the amount of work necessary to comply with the notice.

PART 7

Appeals

Appeals

27.—(1) Any appeal under this Schedule must be made to the First-tier Tribunal.

(2) An appeal must be brought within two months of the date on which the notice or decision is received.

(3) In any appeal (except in relation to a stop notice) where the commission of an offence is an issue requiring determination, the market surveillance authority must prove that offence according to the same burden and standard of proof as in a criminal prosecution.

(4) In any other case the tribunal must determine the standard of proof.

(5) All notices (other than stop notices) are suspended pending appeal.

(6) The Tribunal may, in relation to the imposition of a requirement or service of a notice—

(a) withdraw the requirement or notice;

(b) confirm the requirement or notice;

(c) vary the requirement or notice;

(d) take such steps as the market surveillance authority could take in relation to the act or omission giving rise to the requirement or notice;

(e) remit the decision whether to confirm the requirement or notice, or any matter relating to that decision, to the market surveillance authority.

PART 8

Guidance and publicity

Guidance as to use of civil sanctions

28.—(1) The market surveillance authority must publish guidance about its use of civil sanctions.

(2) The market surveillance authority must revise and update the guidance where appropriate.

(3) The market surveillance authority must have regard to the guidance or revised and updated guidance in exercising its functions.

(4) In the case of guidance about compliance notices, stop notices, variable monetary penalties and non-compliance penalties the guidance must contain information as to—

(a) the circumstances in which the civil sanction is likely to be imposed; and

(b) the circumstances in which it is not likely to be imposed.

(5) In the case of guidance about variable monetary penalties and non-compliance penalties, the guidance must contain information about—

(a) the matters likely to be taken into account by the market surveillance authority in determining the amount of the penalty (including voluntary reporting by a person of their own non-compliance); and

(b) rights to make representations and objections and rights of appeal.

(6) In the case of guidance about enforcement undertakings the guidance must contain information as to—

(a) the circumstances in which the market surveillance authority is likely to accept an enforcement undertaking;

(b) the circumstances in which the market surveillance authority is not likely to accept an enforcement undertaking.

Consultation on guidance

29. The market surveillance authority must consult such persons as it considers appropriate before publishing any guidance or revised guidance.

Publication of enforcement action

30.—(1) The market surveillance authority must from time to time publish—

- (a) the cases in which civil sanctions have been imposed;
- (b) where the civil sanction is a compliance notice, stop notice or variable monetary penalty, the cases in which a third party undertaking has been accepted;
- (c) cases in which an enforcement undertaking has been entered into.

(2) In paragraph (1)(a) the reference to cases in which civil sanctions have been imposed does not include cases where the sanction has been imposed but overturned on appeal.

(3) This paragraph does not apply in cases where the market surveillance authority considers that publication would be inappropriate.