

## SCHEDULE

Article 5

### Civil sanctions

## PART 1

### Fixed monetary penalties

#### **Imposition of a fixed monetary penalty**

1.—(1) The regulator may by notice impose a fixed monetary penalty on a person (“fixed monetary penalty”) in relation to an offence under section 34D(3) of the 1990 Act.

(2) Before doing so, the regulator must be satisfied beyond reasonable doubt that the person has committed the offence.

(3) The amount of penalty to be paid to the regulator as a fixed monetary penalty is £300.

#### **Notice of intent**

2.—(1) Where the regulator proposes to impose a fixed monetary penalty on a person, the regulator must serve on that person a notice of what is proposed (“notice of intent”).

(2) The notice of intent must include—

- (a) the grounds for the proposal to impose the penalty;
- (b) the amount of the penalty;
- (c) a statement that liability for the penalty can be discharged by paying 50% of the penalty within 28 days beginning with the day on which the notice was received;
- (d) information as to—
  - (i) the effect of that discharge payment;
  - (ii) the right to make representations and objections within 28 days beginning with the day on which the notice of intent was received;
  - (iii) the circumstances in which the regulator must not impose the penalty (including any defences relating to the offence in relation to which the notice is served).

#### **Discharge of liability**

3. The penalty is discharged if a person who receives a notice of intent pays 50% of the amount of the penalty within 28 days beginning with the day on which the notice was received.

#### **Making representations and objections**

4. 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 regulator in relation to the proposed imposition of the fixed monetary penalty.

#### **Service of final notice**

5.—(1) If the person who has received a notice of intent does not discharge liability within 28 days the regulator may serve a final notice (“final notice”) imposing a fixed monetary penalty.

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(2) The regulator must not serve a final notice on a person where the regulator 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.

(3) The regulator who serves a final notice relating to a fixed monetary penalty must not serve any other notice under this Order in relation to the offence.

#### **Contents of final notice**

6. A final notice must include information as to—
- (a) the grounds for imposing the penalty,
  - (b) the amount of the penalty,
  - (c) how payment may be made,
  - (d) the period of 56 days within which payment must be made,
  - (e) details of the early payment discounts and late payment penalties,
  - (f) rights of appeal, and
  - (g) the consequences of non-payment.

#### **Discount for early payment**

7. If a person who was served with a notice of intent made representations or objections concerning that notice within the time limit, that person may discharge a final notice by paying 50% of the penalty within 28 days beginning with the day on which the final notice was received.

#### **Appeals against final notice**

- 8.—(1) The person receiving a 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) that the decision was unreasonable;
  - (d) any other similar reason.

#### **Non-payment after 56 days (late payment penalty)**

- 9.—(1) The penalty must be paid within 56 days of receipt of a final notice.
- (2) If the penalty is not paid within 56 days the amount payable is increased by 50%.
- (3) In the case of an appeal the penalty is payable within 28 days of the determination of the appeal (if the appeal is unsuccessful), and if it is not paid within 28 days the amount of the penalty is increased by 50%.

#### **Criminal proceedings**

- 10.—(1) If a notice of intent for a fixed monetary penalty is served on any person—
- (a) no criminal proceedings for the offence may be instituted against that person in respect of the act or omission to which the notice relates before 28 days from the date the notice of intent is received, and
  - (b) if that person so discharges liability, that person must not at any time be convicted of the offence in relation to that act or omission.

(2) If a fixed monetary penalty is imposed on any person, that person must not at any time be convicted of the offence in respect of the act or omission giving rise to the penalty.

## PART 2

### Variable monetary penalties

#### Imposition of a variable monetary penalty

**11.**—(1) The regulator may by notice impose a monetary penalty on a person requiring that person to pay such amount to the regulator as the regulator may determine (“variable monetary penalty”) in relation to an offence under section 34D(3) of the 1990 Act.

(2) Before doing so, the regulator must be satisfied beyond reasonable doubt that the person has committed the offence.

(3) Where a variable monetary penalty is imposed in relation to an offence that is—

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

the amount of the variable monetary penalty must not exceed the maximum amount (if any) of that fine.

(4) Before serving a notice relating to a variable monetary penalty on a person, the regulator may require the person to provide such information as is reasonable for the purpose of establishing the amount of any financial benefit arising as a result of the offence.

#### Notice of intent

**12.**—(1) Where the regulator proposes to impose a variable monetary penalty on a person, the regulator must serve on that person a notice of what is proposed (“notice of intent”).

(2) The notice of intent must include—

- (a) the grounds for the proposal to impose the penalty;
- (b) the amount of the penalty;
- (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 regulator must not impose the penalty (including any defences to the offence in relation to which the notice is served).

#### Making representations and objections

**13.** 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 regulator in relation to the proposed imposition of the variable monetary penalty.

#### Third party undertakings

**14.**—(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 person affected by the offence (“third party undertaking”).

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- (2) The regulator must accept or reject a third party undertaking.

### **Service of final notice**

**15.**—(1) At the end of the period for making representations and objections, the regulator must decide whether to impose the variable monetary penalty in the notice of intent, with or without modifications.

- (2) The regulator must take into account any third party undertaking that it accepts in deciding—
  - (a) whether or not to serve a final notice, and
  - (b) the amount of any variable monetary penalty it imposes.

(3) Where the regulator decides to impose a variable monetary penalty, the regulator must serve a notice imposing it (“final notice”) that complies with paragraph 16.

(4) The regulator must not serve a final notice on a person where the regulator 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**

**16.** A final notice must include information as to—

- (a) the grounds for imposing the penalty,
- (b) the amount of the penalty,
- (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 non-payment.

### **Appeals against a final notice**

**17.**—(1) The person receiving a 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) that the amount of the penalty is unreasonable;
  - (d) that the decision was unreasonable for any other reason;
  - (e) any other similar reason.

### **Criminal proceedings**

**18.**—(1) If—

- (a) a variable monetary penalty is imposed on any person, or
- (b) a third party undertaking is accepted from any person,

that person must not at any time be convicted of the offence in respect of the act or omission giving rise to the 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—
  - (a) a third party undertaking is accepted from a person,

- (b) no variable monetary penalty is imposed on that person, and
- (c) that person fails to comply with the third party undertaking.

(3) Criminal proceedings for offences triable summarily to which a third party undertaking in sub-paragraph (2) relates may be instituted at any time up to six months from the date when the regulator notifies the person that the person has failed to comply with that undertaking.

## PART 3

### Non-compliance penalties

#### **Non-compliance penalties**

**19.**—(1) If a person fails to comply with a third party undertaking, the regulator may serve a notice on that person imposing a monetary penalty (“non-compliance penalty”) in respect of the same offence, irrespective of whether a variable monetary penalty was also imposed in respect of that offence.

(2) The amount of the penalty must be determined by the regulator, and must be a percentage of the costs of fulfilling the remaining requirements of the third party undertaking.

(3) The percentage must be determined by the regulator 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 penalty,
- (b) the amount of the penalty,
- (c) how payment may be made,
- (d) the period within which payment must be made, which must not be less than 28 days,
- (e) rights of appeal,
- (f) the consequences of non-payment, and
- (g) any circumstances in which the regulator may reduce the amount of the penalty.

(5) If a third party undertaking is fulfilled before the time set for payment of the non-compliance penalty, the penalty is not payable.

#### **Appeals against non-compliance penalties**

**20.**—(1) A person receiving a non-compliance penalty 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) that the decision was unfair or unreasonable for any reason;
- (d) that the amount of the penalty is unreasonable;
- (e) any other similar reason.

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## PART 4

### Combination of sanctions

#### Combination of sanctions

**21.**—(1) The regulator must not serve a notice of intent relating to a fixed monetary penalty if a variable monetary penalty has been imposed on that person relating to the same act or omission.

(2) The regulator must not serve a notice of intent relating to a variable monetary penalty on a person if, in relation to the same act or omission—

- (a) a fixed monetary penalty has been imposed on that person, or
- (b) that person has discharged liability to a fixed monetary penalty following service of a notice of intent to impose that penalty.

## PART 5

### Enforcement cost recovery notice

#### Enforcement cost recovery notices

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

(2) Costs include in particular—

- (a) investigation costs;
- (b) administration costs;
- (c) costs of obtaining expert advice (including legal advice).

(3) The enforcement cost recovery notice must specify—

- (a) the grounds for imposing the notice,
- (b) the amount required to be paid,
- (c) how payment may be made,
- (d) the period within which payment must be made, which must not be less than 28 days,
- (e) rights of appeal, and
- (f) the consequences of non-payment.

(4) The person on whom the notice is served may require the regulator to provide a detailed breakdown of the amount.

(5) The person required to pay costs is not liable to pay any costs shown by that person to have been unnecessarily incurred.

#### Appeals against enforcement cost recovery notices

**23.**—(1) The person required to pay costs under paragraph 22(1) may appeal—

- (a) against the decision of the regulator to impose the requirement to pay costs,
- (b) against the decision of the regulator as to the amount of those costs, or
- (c) for any other similar reason.

- (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 amount of the costs is unreasonable;
  - (d) that the decision was unreasonable for any other reason;
  - (e) any other similar reason.

## PART 6

### Administration and appeals

#### **Withdrawing or amending a notice**

24. The regulator may at any time in writing—
- (a) withdraw a fixed monetary penalty;
  - (b) withdraw a variable monetary penalty, a non-compliance penalty or an enforcement cost recovery notice or reduce the amount specified in the penalty or notice.

#### **Guidance as to use of civil sanctions**

- 25.—(1) Where this Order confers power on the regulator to impose a civil sanction—
- (a) the regulator must publish guidance about its use of the sanction;
  - (b) in the case of guidance relating to a fixed monetary penalty or variable monetary penalty, the guidance must contain the relevant information;
  - (c) the regulator must revise the guidance where appropriate;
  - (d) the regulator must have regard to the guidance or revised guidance in exercising its functions.
- (2) In the case of guidance relating to a fixed monetary penalty, the relevant information referred to in sub-paragraph (1)(b) is information as to—
- (a) the circumstances in which the penalty is likely to be imposed,
  - (b) the circumstances in which the penalty must 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 objections and rights of appeal.
- (3) In the case of guidance relating to a variable monetary penalty, the relevant information referred to in sub-paragraph (1)(b) is information as to—
- (a) the circumstances in which the penalty is likely to be imposed,
  - (b) the circumstances in which the penalty must not be imposed,
  - (c) the matters likely to be taken into account by the regulator in determining the amount of the penalty (including voluntary reporting by any person of their own non-compliance), and
  - (d) rights to make representations and objections and rights of appeal.

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### **Additional guidance**

**26.** The regulator must publish guidance relating to the use of non-compliance penalties and enforcement cost recovery notices specifying—

- (a) the circumstances in which they are likely to be imposed,
- (b) the circumstances in which they must not be imposed,
- (c) matters to be taken into account in establishing the amount involved, and
- (d) rights of appeal.

### **Consultation on guidance**

**27.** The regulator must consult such persons as it considers appropriate before publishing any guidance or revised guidance under this Order.

### **Publication of enforcement action**

**28.**—(1) Where a power is conferred on the regulator to impose a civil sanction under this Order, the regulator must from time to time publish reports specifying—

- (a) the cases in which the civil sanction has been imposed,
- (b) where the civil sanction is a fixed monetary penalty, the cases in which liability to the penalty has been discharged by payment of the penalty following the notice of intent and without further action being taken, and
- (c) where the civil sanction is a variable monetary penalty, the cases in which a third party undertaking has been accepted.

(2) In sub-paragraph (1)(a) the reference to cases in which the civil sanction has 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 Welsh Ministers consider that publication would be inappropriate.

### **Recovery of payments**

**29.** The regulator may recover any fixed monetary penalty, variable monetary penalty or non-compliance penalty imposed under this Order and any financial penalty for late payment, on the order of a court, as if payable under a court order.

### **Appeals**

**30.**—(1) An appeal under this Order is to the First-tier Tribunal (“the Tribunal”).

(2) In any appeal where the commission of an offence is an issue requiring determination, the regulator must prove that offence according to the same burden and standard of proof as in a criminal prosecution.

(3) In any other case the Tribunal must determine the standard of proof.

(4) All notices are suspended pending the determination or withdrawal of the appeal.

(5) The Tribunal may, in relation to the imposition of a penalty or service of a notice under this Order—

- (a) withdraw the penalty or notice,
- (b) confirm the penalty or notice,
- (c) vary the penalty or notice,

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- (d) take such steps as the regulator could take in relation to the act or omission giving rise to the penalty or notice, or
- (e) remit the decision whether to confirm the penalty or notice, or any matter relating to that decision, to the regulator.