

Explanatory Memorandum to the Sea Fishing (Penalty Notices) (Wales) 2019

This Explanatory Memorandum has been prepared by the Marine and Fisheries Division and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Sea Fishing (Penalty Notices) (Wales) 2019. I am satisfied that the benefits justify the likely costs.

Lesley Griffiths

Minister for Environment, Energy and Rural Affairs

26 February 2019

PART 1

Description

1. When the existing Order, Sea Fishing (Enforcement of Community Measures) (Penalty Notices) Order 2008 (SI 2008/984), was introduced it created a scheme whereby Financial Administrative Penalties (FAPs) could only be offered for EU offences against the Common Fisheries Policy (CFP).
2. This Order revokes and replaces the Sea Fishing (Enforcement of Community Measures) (Penalty Notices) Order 2008 SI 2008/984. It introduces a revised scheme to allow FAPs to be offered in respect of offences under domestic legislation as well as those arising as a result of an enforceable community restriction or other obligations.

Matters of special interest to the Constitutional and Legislative Affairs Committee

3. None.

Legislative background

4. This Order is made in exercise of powers conferred by Section 30 of the Fisheries Act 1981 and Sections 294 and 316(1)(b) of the Marine and Coastal Access Act 2009.
5. The Order follows the negative resolution procedure, pursuant to Section 316(8) of the Marine and Coastal Access Act 2009.

Purpose and intended effect of the legislation

6. The FAP scheme for CFP offences has been in operation in England and Wales since 2008 pursuant to the Sea Fishing (Enforcement of Community Measures) (Penalty Notices) Order 2008 (SI 2008/984). Since that time other UK Fisheries Administrations have conducted reviews of their own schemes and updated them where necessary to include domestic offences.
7. Section 294 of the Marine and Coastal Access Act 2009 now gives Welsh Ministers the powers to extend the use of FAPs for breaches of domestic sea fisheries legislation.
8. The introduction of FAPs for domestic offences will bring the system into line with the treatment of CFP offences, leading to a consistent and transparent system of sanctions for all fisheries offences in Wales.

9. It will allow Welsh Government Marine Enforcement Officers (MEOs) to offer FAPs in respect of some fisheries offences quickly and effectively without recourse to prosecution.

Consultation

10. A consultation ran from 5 December 2018 to 28 January 2019 on the proposals to extend the existing arrangements for issuing FAPs in respect of CFP offences to domestic fisheries offences.

11. The consultation was posted on the Welsh Government's website at:
<https://beta.gov.wales/consultations>.

PART 2 – REGULATORY IMPACT ASSESSMENT

12. This Regulatory Impact Assessment relates to the new Sea Fishing (Penalty Notices (Wales) Order 2019. The new 2019 Order will repeal the existing Sea Fishing (Enforcement of Community Measures) (Penalty Notices) Order 2008 (S.I. 2008/984) which provides for a Financial Administration Penalty (FAP) scheme for EU Common Fishery Policy (CFP) offences only. The new 2019 Order would extend the FAP scheme to include breaches of domestic fisheries offences through application of powers available in section 294 and 316(1)(b) of the Marine and Coastal Access Act 2009.
13. Currently, the range of sanctions available for domestic fisheries offences are not as extensive as those available for offences under the CFP. Adding FAPs to the range of available sanctions would provide another mechanism for addressing domestic fisheries offences that warrant a sanction greater than a verbal or written warning but are not serious enough to justify, in terms of the public interest, a prosecution. The change would be in line with the Macrory recommendation to use administrative sanctions as an enforcement tool in regulatory regimes¹.
14. The introduction of the Welsh Government's extended FAP scheme would enable all fisheries offences in Wales to be addressed in a flexible, proportionate and consistent manner, providing an effective deterrent to those who consider breaching either domestic and/or CFP fisheries regulations. The introduction of the extended FAP scheme would also bring the regulation of domestic fisheries offences in Wales into line with other UK Fisheries Administrations.

Option 1 – Do Nothing

15. Currently, when an offence is detected, Marine Enforcement Officers (MEOs) have three options available to them, which are dependent on the severity of the offence:
- (i) **Issue a verbal warning** - A verbal warning is issued for a minor first offence.
 - (ii) **Issue a written warning** – A written warning is the second stage in the process for a repeat minor offender or for someone committing a slightly more serious offence.
 - (iii) **Proceed to prosecution** – The option of prosecution is for the most serious offences or considered for those who are repeat offenders. A case file is produced and a decision made to take the offender to court. This process can take up to one year before the case is brought before a Magistrate's Court. This is a costly and time consuming process.

¹ <https://webarchive.nationalarchives.gov.uk/20121205164501/http://www.bis.gov.uk/files/file44593.pdf>

16. Doing nothing is the baseline option and as such there are no **additional** costs and benefits associated with this option. Those fishermen taken to court incur costs in terms of legal fees, and loss of earnings due to interruption of fishing activities caused by having to attend court. The extent of preparation required for court cases is dependent upon the nature of the offence.
17. The current system offers no incentive for sustainability. During the time it currently takes for a case to proceed through the courts, there is a chance of transgressors continuing to reoffend.
18. In addition, some illegal fishing activities adversely and directly affect the livelihoods of fishing communities by undermining the stocks on which they depend. This can result in reduced economic security in communities heavily dependent on fishing as a source of employment.
19. Table 1 shows the number of infringements detected by Welsh Government since 2008 that have resulted in either a written warning or prosecution.

Table 1: Number of written warnings issued and prosecutions in Wales, 2008-2017

| Number of prosecutions and written warnings to fishermen by Welsh Government | | |
|---|----------------------------------|---------------------|
| Year | Official Written Warnings | Prosecutions |
| 2018 | 6 | 27* |
| 2017 | 1 | 11 |
| 2016 | 7 | 0 |
| 2015 | 3 | 3 |
| 2014 | 5 | 6 |
| 2013 | 5 | 3 |
| 2012 | 1 | 6 |
| 2011 | 5 | 7 |
| 2010 | 2 | 11 |
| 2009 | 6 | 0 |
| 2008 | 2 | 3 |

*The number of prosecutions in 2018 was in excess of what would normally be seen as the award of a new contract led to a build-up of case files.

20. This option would provide no benefit in terms of improving enforcement and control measures in the conservation of fish stocks and the environment. It will have no effect on increasing compliance with fisheries regulations or reducing re-offending.

Option 2 – Introduce a system of FAPS for domestic fisheries offences

21. This option involves the introduction of a system of FAPs for domestic fisheries offences, using powers available under Section 294 of the Marine and Coastal Access Act 2009. This would mirror and complement the existing FAP scheme for CFP offences leading to a consistent and transparent system of sanctions for all fisheries offences and would bring enforcement of Welsh fisheries offences into line with other UK Fisheries Administrations.
22. This option would allow both the Welsh Government's Chief Officer Fisheries Operations (CO) and the Welsh Fisheries Monitoring Centre to issue FAPs to address some fisheries offences quickly and effectively without resorting to criminal prosecution. However, it would not remove the option of a court hearing either at the fisherman's or fisheries department's request, or the issue of an Official Written Warning where appropriate. Similarly, MEOs would still have the option to issue verbal and written advice for minor offences.
23. Discussions have taken place with Central Finance who have approved recycling of penalty receipts within the Marine and Fisheries BEL 2870, however discussions on the transactional element of the penalty process are ongoing. Ambit Income budget will be discussed during the first supplementary budget process.

Cost to businesses

24. All fishermen who commit relevant fisheries offences will be affected by these proposals. There will be no impact on those businesses/fishermen who continue to abide by the law.
25. Those fishermen who breach the applicable regulatory controls may experience an increase, decrease or no change in costs depending upon the circumstances and severity of their case. At this stage, it is difficult to predict how many FAPs will be issued or the number of court cases heard each year, however, based on the current number of written warnings and prosecutions (Table 1), the numbers are not expected to be large.
26. There may be an increase in costs for fishermen guilty of minor domestic infringements who would previously have expected to receive an Official Written Warning for offences not deemed serious enough to warrant a criminal prosecution. Under the new regime they may be eligible for a FAP ranging from £250 to £10,000, depending upon the offence and circumstances. If accepted the offender would be given 28 days in which to pay the FAP in full. If not paid during this period, the case will automatically be referred for prosecution.

27. There are potential cost-savings for those fishermen who commit an offence and are currently prosecuted through the courts but who may, in the future, be issued with a FAP instead. Court costs are varied and depend on the type of offence which has occurred. However, in most cases, the offender would experience a loss of earnings as a result of having to attend court and would also incur legal fees. If found guilty, the offender could receive a fine, incur costs and have to pay a victim surcharge. The offender would also have a criminal record. An offender may also lose their permit to fish in a particular area or for a particular species, which again will affect their ability to earn a living.
28. In more serious cases, offenders will continue to be prosecuted. In this scenario, there is not expected to be any change in the costs incurred by the business or enforcement body.

Cost to Government

29. The Marine & Fisheries Division of the Welsh Government will administer the schemes and will continue to carry out their enforcement activities as it currently does. MEOs will investigate and gather evidence on suspected offences, and present that evidence to the CFO with a recommendation to issue a penalty notice where appropriate and if they have evidence that a person has committed a relevant fisheries offence.
30. MEOs are not expected to require any additional training because they are already able to issue FAPs for EU CFP offences.
31. An additional cost will be incurred with the production of Guidance Notes for both officers and the public. This cost is expected to be minimal as existing guidance notes for a similar system in England will be used as a template for the equivalent Welsh documents. Printing of the Guidance would also be undertaken in-house, therefore reducing the actual cost of production.

Benefit to fishing industry

32. Compared to prosecution, FAPs would speed up procedures for dealing with domestic infringements and reduce the administrative burdens and costs of legal representation for some non-compliant fishermen.

This includes:

- Reduction in time lost during court appearance
- Reduction in solicitor fees through avoiding court appearance
- Reduction in costs of fines payable to the courts if found guilty
- Faster conclusion of cases that would have previously been sent to the courts

33. The system would provide greater consistency in penalties for similar fisheries offences, thereby removing the uncertainty caused by wide variations of penalties imposed by different Magistrates' Courts.
34. Table 2 below shows examples of prosecution costs currently incurred by fishermen for breaches of domestic fisheries regulations. It has not been possible at this stage to include accurate estimates of savings to fishermen due to this policy option.

Table 2: Examples of prosecution costs

| Year of Hearing | Prosecution Fines (£) | Costs of Prosecution (£) |
|------------------------|------------------------------|---------------------------------|
| 2018 | 163,644 | 40,742 |
| 2017 | 12,621 | 9,269 |
| 2016 | 101,907 | 23,105 |
| 2015 | 4,000 | 2,000 |
| 2014 | 76,355 | 17,411 |
| 2013 | 4,250 | 2,495 |
| 2012 | 97,750 | 23,700 |
| 2011 | 63,000 | 5,414 |
| 2010 | 48,000 | 5,887 |
| 2009 | 2,440 | 1,100 |
| 2008 | 26,000 | 2,473 |

35. In addition to potential savings, there is a potential non-monetary benefit in that offenders can avoid the stigma of a criminal record by accepting a FAP as an alternative to court proceedings.
36. The introduction of FAPs for domestic offences is expected to act as a deterrent against illegal fishing activity, helping to maintain a level playing field for compliant businesses/fishermen.

Benefits to Government

37. The ability to control fishing practices effectively has a significant impact on the marine environment. The FAP system is expected to increase compliance with fisheries regulations.
38. It will become apparent to potential offenders that in place of warnings (verbal and written) and criminal prosecutions, many fisheries infringements will be dealt with by the swift imposition of penalties for infringements. This should increase compliance with all fisheries and conservation regulations, and therefore protect fishery stocks, particularly those which may be subject to stock recovery measures.
39. FAPs are also expected to offer MEOs a more cost-effective means of addressing certain infringements. With the introduction of FAPs, MEOs

would still be required to complete a full case file, therefore there would be no direct saving in officer time (see Table 3). However, if a FAP was offered and accepted, this would reduce the need for further MEO time to be expended on court proceedings.

40. If a case proceeds to court, Welsh Government have to pay the fees of external prosecuting solicitors. If a defendant is convicted, Magistrates often award prosecution costs. However this is not guaranteed. An award of full costs may be dependent on the nature and severity of the offence. If a FAP were accepted by an offender, it would avoid this cost to Welsh Government.

Table 3: Estimated cost of current enforcement:

| Infringement Type | Hours | Estimated total cost |
|-------------------|-------|----------------------|
| Low level | 2-5 | +£200 |
| Medium level | 10-20 | + £3,000 |
| High level | 30 + | + £8,000 |

41. Finally, the introduction of FAPS would bring the enforcement of fisheries offences into line with other UK Fisheries Administrations.

Summary of the preferred option

42. The preferred option is to introduce a system of FAPs for domestic fisheries offences, including inshore fisheries byelaw offences, using powers available under Sections 294 and 316(1)(b) of the Marine and Coastal Access Act 2009. This will provide MEOs with an additional tool to address fisheries offences in a timely and proportionate way.

Consultation

43. The consultation was drawn to the attention of key stakeholders including members of the Wales Marine Fisheries Advisory Group (WMFAG) and those on the Stakeholder Register.
44. The consultation ran from 5 December 2018 to 28 January 2019.
45. A total of 13 responses were received. Twelve of these were partial, incomplete responses; one was completed without comment. No objections were put forward.
46. There are no changes to the legislation as a result of the consultation.

Competition Assessment

| The competition filter test | |
|---|---------------------|
| Question | Answer yes or no |
| Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share? | No |
| Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share? | No |
| Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share? | No |
| Q4: Would the costs of the regulation affect some firms substantially more than others? | No |
| Q5: Is the regulation likely to affect the market structure, changing the number or size of businesses/organisation? | No |
| Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet? | No |
| Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet? | No |
| Q8: Is the sector characterised by rapid technological change? | No |
| Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products? | No |

The Regulations are not expected to have an impact on competition in Wales or the competitiveness of Welsh businesses.