

Draft Order laid before Senedd Cymru under section 61(2) of the Regulatory Enforcement and Sanctions Act 2008, for approval by resolution of Senedd Cymru.

DRAFT WELSH STATUTORY
INSTRUMENTS

2023 No. (W.)

**ENVIRONMENTAL
PROTECTION, WALES**

**The Prohibition on Disposal of
Food Waste to Sewer (Civil
Sanctions) (Wales) Order 2023**

EXPLANATORY NOTE

(This note is not part of this Order)

This Order makes provision in relation to the prohibition on the disposal of food waste to sewer under section 34D of the Environmental Protection Act 1990 (as inserted by section 66 of the Environment (Wales) Act 2016 (c. 3)). Breach of this prohibition is an offence under section 34D of the Environmental Protection Act 1990.

A civil sanctions regime is introduced to enable the regulator to impose fixed monetary penalties, variable monetary penalties and non-compliance penalties (article 5 and paragraphs 1, 11 and 19 of the Schedule). The regulator, for the purposes of this Order, is the local authority for the area in which the premises are situated.

This Order makes provision for the procedure relating to the civil sanctions, including appeals. Appeals under this Order are to the First-tier Tribunal.

The Schedule to this Order (paragraphs 25 to 27) provides that guidance relating to the use of civil sanctions must be published. Guidance must also be published relating to the use of non-compliance penalties and enforcement cost recovery notices (paragraph 26). Before any guidance is published, the regulator is required to consult (paragraph 27). This Order also provides for the publication of information on enforcement action taken by the regulator (paragraph 28 of the Schedule). The regulator is able to recover certain costs of enforcement (paragraph 22

of the Schedule) in the case of variable monetary penalties.

The regulator is able to recover any fixed monetary penalty, variable monetary penalty or non-compliance penalty imposed by the regulator under this Order together with any financial penalty for late payment (paragraph 29 of the Schedule).

Article 6 gives enforcement officers powers of investigation in relation to potential offences, including powers of entry and seizure.

The Welsh Ministers' Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to this Order. As a result, a regulatory impact assessment has been prepared as to the likely costs and benefits of complying with this Order. A copy can be obtained from the Welsh Government at Cathays Park, Cardiff CF10 3NQ and on the Welsh Government website at www.gov.wales.

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2023 No. (W.)

**ENVIRONMENTAL
PROTECTION, WALES**

**The Prohibition on Disposal of
Food Waste to Sewer (Civil
Sanctions) (Wales) Order 2023**

Made

Coming into force

6 April 2024

The Welsh Ministers make this Order in exercise of the powers conferred by sections 36(2), 39, 42, 45, and 52 to 55 of the Regulatory Enforcement and Sanctions Act 2008(1) (“the 2008 Act”).

The Welsh Ministers have consulted in accordance with sections 59(3) and 60 of the 2008 Act(2) and are satisfied (in accordance with section 66 of the 2008 Act) that local authorities (who are the regulator for the purpose of this Order) will act in accordance with the principles referred to in section 5(2) of that Act in exercising a power conferred by this Order.

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- (1) 2008 c. 13. Section 36(2) was amended by section 21(2)(f) of the Enterprise Act 2016 (c. 12); sections 39 and 42 were amended by paragraph 12 of Schedule 5 to S.I. 2015/664. “Prescribed” is defined in section 71 of that Act.
- (2) Section 71(1) of the Regulatory Enforcement and Sanctions Act 2008 Act (c. 13) provides that “relevant authority” means, in relation to provision made under or by virtue of Part 3 by the Welsh Ministers, the Welsh Ministers.

In accordance with section 61(2) of the 2008 Act⁽¹⁾, a draft of this Order has been laid before, and approved by resolution of, Senedd Cymru.

Title, coming into force and application

1.—(1) The title of this Order is the Prohibition on Disposal of Food Waste to Sewer (Civil Sanctions) (Wales) Order 2023.

(2) It comes into force on 6 April 2024.

(3) This Order applies in relation to Wales.

Interpretation

2. In this Order—

“the 1990 Act” (“*Deddf 1990*”) means the Environmental Protection Act 1990⁽²⁾;

“enforcement officer” (“*swyddog gorfodaeth*”) means a person authorised under article 4(1).

Regulator

3. The regulator, for the purposes of the enforcement of an offence under section 34D of the 1990 Act, is the local authority for the area in which the premises are situated.

Enforcement

4.—(1) The regulator may authorise any person to exercise any of the powers specified in article 6 if that person appears to the regulator suitable to exercise them.

(2) An authorisation under paragraph (1) must be in writing.

Civil sanctions

5. The Schedule makes provision about the civil sanctions that may be imposed for the purpose of the enforcement of an offence under section 34D(3) of the 1990 Act.

(1) The reference in section 61(2) of the Regulatory Enforcement and Sanctions Act 2008 (c. 13) to the National Assembly for Wales now has effect as a reference to Senedd Cymru, by virtue of section 150A(2) of the Government of Wales Act 2006 (c. 32).

(2) 1990 c. 43; section 34D was inserted by the Environment (Wales) Act 2016 (anaw 3), section 66. There are further amendments to the Act that are not relevant to this Order.

Enforcement officer powers

6.—(1) An enforcement officer may enter any premises at any reasonable time for the purpose of determining whether an offence under section 34D(3) of the 1990 Act is being, or has been, committed.

(2) An enforcement officer must, if requested to do so, produce evidence of that officer's authority.

(3) A justice of the peace may by signed warrant permit an enforcement officer to enter premises for the purpose of determining whether an offence under section 34D(3) of the 1990 Act is being, or has been, committed, if necessary by reasonable force, if the justice, on sworn information in writing is satisfied that—

(a) there are reasonable grounds to enter those premises, and

(b) any of the conditions in paragraph (4) are met.

(4) The conditions are that-

(a) entry to the premises has been, or is likely to be, refused and notice of the intention to apply for a warrant has been given to the occupier,

(b) asking for entry to the premises, or giving notice of the intention to apply for a warrant, would defeat the object of the entry,

(c) entry is required urgently, or

(d) the premises are unoccupied or the occupier is temporarily absent.

(5) A warrant is valid for one month.

(6) An enforcement officer who enters premises under this article, or a warrant issued under it, may be accompanied by such persons as the enforcement officer considers necessary.

(7) An enforcement officer who enters any unoccupied premises, or premises from which the occupier is temporarily absent, must leave them as effectively secured against unauthorised entry as they were before entry.

(8) An enforcement officer who enters premises under this article, or a warrant issued under it, may-

(a) inspect any records (in whatever form they are held) and take a copy of or seize and detain any records which they have reason to believe may be required as evidence in proceedings under section 34D(3) of the 1990 Act or this Order,

(b) where any such records are stored in electronic form-

(i) have access to, and inspect and check the operation of, any computer and any associated apparatus or material which is or

has been used in connection with the records,

(ii) require any person having charge of, or otherwise concerned with the operation of the computer, apparatus or material to provide such assistance as may reasonably be required, and

(iii) require the records to be produced in a form in which they may be taken away.

(9) An enforcement officer must-

(a) as soon as reasonably practicable after seizure of any records under paragraph (8), provide the occupier with a written receipt identifying those records, and

(b) return the records to the occupier as soon as reasonably practicable once they are no longer required for the purposes of proceedings under section 34D(3) of the 1990 Act or this Order.

(10) An enforcement officer who enters premises under this article, or a warrant issued under it may, for the purposes of investigating offences under section 34D(3) of the 1990 Act or gathering evidence that may be required in proceedings under section 34D(3) of the 1990 Act or this Order-

(a) measure, photograph or take recordings of any part of the premises, any object on the premises or anything that is attached to or otherwise forms part of the premises,

(b) take a sample of any article or substance,

(c) operate any equipment found on the premises,

(d) seize any equipment found on the premises and retain such equipment for so long as is reasonably necessary.

(11) An enforcement officer may destroy or otherwise dispose of any sample taken under this article when the sample is no longer required.

(12) An enforcement officer must-

(a) as soon as reasonably practicable after seizure of any equipment under paragraph (10)(d), provide the occupier with a written receipt identifying the equipment seized, and

(b) return the equipment to the occupier as soon as reasonably practicable once it is no longer required for the purposes of proceedings under section 34D(3) of the 1990 Act or this Order.

(13) This article does not apply to any premises within paragraph (a) or (b) of section 75(5) (domestic property and caravans) of the 1990 Act.

Name

Minister for Climate Change, one of the Welsh Ministers

Date

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.

(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”).

(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 subparagraph (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.

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 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 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.

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 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,
- (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.