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SCOTTISH ROAD WORKS COMMISSIONER

Commissioner Advice Paper 3 - Commissioner Penalty Guidelines

Statutory background

Section 119A of the New Roads and Street Works Act 1991 (the Act) and The Scottish Road Works Commissioner (Imposition of Penalties) Regulations 2007 (as amended by The Scottish Road Works Commissioner (Imposition of Penalties) Amendment Regulations 2021) authorises a regime which allows the Scottish Road Works Commissioner to issue penalties to road works authorities and undertakers. Any penalty imposed shall not exceed £100,000.

This document contains the guidelines which the Commissioner proposes to follow in determining the level of penalties imposed under the Act.

This document should be read in conjunction with Chapter 2 of the Code of Practice for Penalties.

General criteria

Penalties can be imposed on road works authorities which fail to comply with their duty to co-ordinate under section 118 of the Act and on undertakers which fail to comply with their duty to co-operate under section 119 of the Act. Annex 1 provides an extract of sections 118 and 119 of the Act. The level of any penalty will be proportionate to the failure for which it is imposed. The Commissioner will take into consideration any representations made by the road works authority or undertaker which has failed to comply with its duties.

Accordingly, the Commissioner, in setting the level of penalty will have regard to all relevant facts and circumstances.

In general, the Commissioner will first consider the following factors in determining the starting figure of any penalty:

- The seriousness of the failure; and
- Comparative justice with previous cases.

Specific criteria which may be relevant depending on the failure

Certain specific criteria may be relevant to adjust the starting figure of any penalty depending on the type of failure. This may include, but would not necessarily be limited to:

- Any gain (financial or otherwise) made by the organisation which failed to comply with its duties (or any third party acting on behalf of the organisation);
- The extent of harm caused, or increased cost incurred by road users or other third parties;
- Size and turnover of the organisation;
- The duration of the failure; and
- Whether a penalty has already been imposed by the Commissioner or another body for the same conduct.

Factors tending to lead to an increase in the level of any penalty

This may include, but would not necessarily be limited to:

- Repeated failures by the same organisation;
- Continuation of the failure after either becoming aware of the failure to comply or being notified of a failure by the Commissioner;
- Failures which are committed recklessly or intentionally rather than negligently; and
- The absence or failure of internal mechanisms or procedures.

Factors tending to decrease the level of any penalty

This may include, but would not necessarily be limited to:

- The extent to which the organisation has taken steps in advance to identify and mitigate factors that might result in a failure; and
- Co-operation with the Commissioner's investigation.

Penalty

Having taken into account any representations that the organisation makes, and having considered the factors listed above (to the extent that they are relevant) and any other circumstances which in the exercise of the Commissioner's discretion are considered relevant to the particular case, the Commissioner will determine a proportionate penalty.

Revision of the Guidelines

The Commissioner may from time to time revise these guidelines. These guidelines will be reviewed in the light of experience in applying them over time.

Definition

In these guidelines, the term 'organisation' means a road works authority or undertaker as defined in the Act.

Annex 1

118. General duty of road works authority to co-ordinate works.

(1) A road works authority shall use their best endeavours to co-ordinate the execution of works of all kinds (including works for road purposes) in the roads for which they are responsible-

- (a) in the interests of safety,
- (b) to minimise the inconvenience to persons using the road (having regard, in particular, to the needs of people with a disability), and
- (c) to protect the structure of the road and the integrity of apparatus in it.

(2) That duty extends to co-ordination with other road works authorities where works in a road for which one authority are responsible affect roads for which other authorities are responsible.

(2A) In discharging their duty under this section, a road works authority shall have regard to all information in the SRWR which relates to the functions of the authority.

(2B) A road works authority shall, so as to maximise the utility of that information for the purposes of subsection (2A)—

- (a) assist the Commissioner in complying with the duty imposed by subsection (1) of section 112A (as read with subsection (2) of that section), and
- (b) keep that information under surveillance.

(3) The Secretary of State shall issue or approve for the purposes of this section codes of practice giving practical guidance as to the matters mentioned above; and in discharging their general duty of co-ordination and the specific duties imposed by subsections (2) to (2B) a road works authority shall have regard to any such code of practice.

(3A) In discharging all the duties referred to in subsection (3), a road works authority shall have regard also to such guidance as is contained in the practice referred to in section 15(3)(b) of the Transport (Scotland) Act 2004 (asp 00).

(4) If it appears to the Commissioner that a road works authority are not properly discharging their general duty of co-ordination, he may direct the authority to supply him with such information as he considers necessary to enable him to decide whether that is the case and if so what action to take.

The direction shall specify the information to be provided and the period within which it is to be provided.

(5) Repealed

(6) A direction under this section may be varied or revoked by a further direction.

119. General duty of undertakers to co-operate.

(1) An undertaker shall as regards the execution of road works use his best endeavours to co-operate with the road works authority and with other undertakers-

- (a) in the interests of safety,
- (b) to minimise the inconvenience to persons using the road (having regard, in particular, to the needs of people with a disability), and
- (c) to protect the structure of the road and the integrity of apparatus in it.

(1A) In discharging the duty under this section, an undertaker shall have regard to all information in the SRWR about matters which might affect, or be affected by, works being or proposed to be carried out by the undertaker.

(1B) An undertaker shall, so as to maximise the utility of that information for the purposes of subsection (1A)—

- (a) assist the Commissioner in complying with the duty imposed by subsection (1) of section 112A (as read with subsection (2) of that section), and

(b) keep that information under surveillance.

(1C) In subsections (1A) and (1B), “undertaker” does not include a person having permission under section 109 to execute road works

(2) The Secretary of State shall issue or approve for the purposes of this section codes of practice giving practical guidance as to the matters mentioned in subsection (1); and-

(a) so far as an undertaker complies with such a code of practice he shall be taken to comply with his duty under that subsection, and

(b) a failure in any respect to comply with any such code is evidence of failure in that respect to comply with that duty.

(2A) In discharging the duties imposed by subsections (1) to (1B), an undertaker shall-

(a) Repealed

(b) have regard to such guidance as is contained in the practice referred to in section 17(4)(b) of the Transport (Scotland) Act 2005 (asp00),

(Closing words repealed)

(2B) If it appears to the Commissioner that an undertaker is not properly complying with his duty under subsection (1), he may direct the undertaker to supply him with such information as he considers necessary to enable him to decide whether that is the case and, if so, what action to take.

The direction shall specify the information to be provided and the period within which it is to be provided.

(3) DELETED

(4) A direction under this section may be varied or revoked by a further direction.

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