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STATUTORY INSTRUMENTS

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**2018 No. 389**

**The Gas Appliances (Enforcement) and  
Miscellaneous Amendments Regulations 2018**

**PART 2**

**Market Surveillance and Enforcement**

**Designation of market surveillance authorities**

- 3.**—(1) The market surveillance authority is—
- (a) in the case of appliances or fittings for private use or consumption (other than that referred to in paragraph (2)(b))—
    - (i) in Great Britain, within its area, a weights and measures authority; and
    - (ii) in Northern Ireland, within its area, a district council;
  - (b) in the case of appliances or fittings for use or operation in the circumstances set out in paragraph (2)—
    - (i) subject to paragraph (3), in Great Britain, the Health and Safety Executive; and
    - (ii) in Northern Ireland, the Health and Safety Executive for Northern Ireland.
- (2) The circumstances referred to in paragraphs (1)(b) are where the appliances or fittings are designed—
- (a) for use or operation, whether exclusively or not, by persons at work; or
  - (b) for use, otherwise than at work, in non-domestic premises made available to persons at a place where they may use the appliances or fittings provided for their own use there.
- (3) In so far as these Regulations apply to appliances and fittings intended exclusively or primarily for use on relevant nuclear sites, the market surveillance authority is the Office for Nuclear Regulation.
- (4) In paragraph (3) “relevant nuclear site” means a site which is—
- (a) a GB nuclear site (within the meaning given in section 68 of the Energy Act 2013<sup>(1)</sup>);
  - (b) an authorised defence site (within the meaning given in regulation 2(1) of the Health and Safety (Enforcing Authority) Regulations 1998<sup>(2)</sup>); or
  - (c) a new nuclear build site (within the meaning given in regulation 2A of those Regulations<sup>(3)</sup>).

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<sup>(1)</sup> 2013 c.32.

<sup>(2)</sup> S.I. 1998/494 amended by S.I. 2014/469. There are other amendments not relevant to these Regulations.

<sup>(3)</sup> Regulation 2A was inserted by S.I. 2014/469 and amended by S.I. 2015/51 (regulation 38, Schedule 5).

**Enforcement Authorities**

4.—(1) Subject to paragraph (2), EU Regulation 2016/426, these Regulations and RAMS (in its application to appliances and fittings) must be enforced by the market surveillance authority.

(2) Notwithstanding paragraph (1), the Secretary of State may enforce EU Regulation 2016/426, these Regulations and RAMS (in its application to appliances and fittings).

(3) In Scotland only the Lord Advocate may commence proceedings for an offence under these Regulations.

**Enforcement Powers**

5.—(1) Schedule 1 makes provision for enforcement powers under the 1987 Act where the enforcement authority is—

- (a) a weights and measures authority;
- (b) a district council; or
- (c) the Secretary of State.

(2) Schedule 2 makes provision for enforcement powers under the 1974 Act where the enforcement authority is the Health and Safety Executive or the Office for Nuclear Regulation.

(3) Schedule 3 makes provision for enforcement powers under the 1978 Order where the enforcement authority is the Health and Safety Executive for Northern Ireland.

(4) In addition to the powers available to an enforcement authority by virtue of paragraph (1), (2) or (3), as appropriate, the enforcement authority may use the powers in Schedule 4 (compliance, withdrawal and recall notices).

**Notification to the Secretary of State of enforcement action etc**

6. A market surveillance authority must immediately notify the Secretary of State of any action taken by it, evaluation made or other opinion formed by it, or other matter within its knowledge which is required by Article 37(4) to be communicated to the Commission or the other member States.

**Offences**

7.—(1) It is an offence for an economic operator to contravene the requirements and obligations set out in—

- (a) Article 7 (obligations of manufacturers);
- (b) Article 9 (obligations of importers);
- (c) Article 10 (obligations of distributors);
- (d) Article 12 (identification of economic operators);
- (e) Article 17 (rules and conditions for affixing the CE marking); and
- (f) Article 18 (inscriptions).

(2) It is an offence for an economic operator to fail to—

- (a) cooperate with;
- (b) provide information to; and
- (c) comply with any of the requirements of,  
the market surveillance authority acting under Article 37.

(3) It is an offence for an economic operator to fail to take the action required under—

- (a) Article 39 (compliant appliance or fitting which presents a risk); or

- (b) Article 40 (formal non-compliance).
- (4) It is an offence for a person—
  - (a) to intentionally obstruct an enforcement authority acting in the execution or enforcement of EU Regulation 2016/426;
  - (b) without reasonable cause, to fail to give such an enforcement authority any assistance or information which that authority may reasonably require for those purposes;
  - (c) to knowingly or recklessly furnish to such an enforcement authority any information knowing it to be false or misleading in a material particular; or
  - (d) to fail to produce a document or record for such an enforcement authority when required to do so.
- (5) Proceedings must not be commenced against an economic operator under paragraph (1), (2) or (3) if the economic operator has been given a time period within which to comply or take action, and that time period has not expired.

### **Penalties**

- 8.—**(1) Except for a person who falls within paragraph (3), a person guilty of an offence under these Regulations is liable—
- (a) on summary conviction—
    - (i) in England and Wales, to a fine or imprisonment for a term not exceeding three months, or to both;
    - (ii) in Scotland and Northern Ireland, to a fine not exceeding the statutory maximum or imprisonment for a term not exceeding three months, or to both;
  - (b) on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or to both.
- (2) A person who falls within paragraph (3) is liable on summary conviction—
- (a) in England and Wales, to a fine or imprisonment for a term not exceeding three months, or to both;
  - (b) in Scotland and Northern Ireland, to a fine not exceeding level 5 on the standard scale or imprisonment for a term not exceeding three months or to both.
- (3) A person falls within this paragraph, if that person is guilty of an offence under—
- (a) regulation 7(1)(a) by contravening the requirement in Article 7(3) (failing to keep the technical documentation and the EU declaration of conformity for 10 years); or
  - (b) regulation 7(1)(b) by contravening the requirement in Article 9(8) (failing to keep a copy of the EU declaration of conformity for 10 years and failing to make that document and the technical documentation available to the market surveillance authority on request).

### **Defence of due diligence**

- 9.—**(1) In proceedings for an offence under these Regulations, it is a defence for a person (“P”) to show that P took all reasonable steps and exercised all due diligence to avoid committing the offence.
- (2) P may not rely on a defence under paragraph (1) which involves a third party allegation unless P has—
- (a) served notice in accordance with paragraph (3); or
  - (b) obtained leave of the court.
- (3) The notice must—

- (a) give any information in the possession of P which identifies or assists in identifying the person who—
    - (i) is alleged to have committed the act or default; or
    - (ii) supplied the information on which P relies; and
  - (b) be served on the person bringing the proceedings not less than seven clear days before—
    - (i) the hearing of the proceedings in England, Wales and Northern Ireland;
    - (ii) the trial date in Scotland.
- (4) P may not rely on a defence under paragraph (1) which involves an allegation that the commission of the offence was due to reliance on information supplied by another person unless it was reasonable in all the circumstances to have relied on the information, having regard in particular to—
- (a) the steps that P took, and those which might reasonably have been taken, for the purpose of verifying the information; and
  - (b) whether P had any reason to disbelieve the information.
- (5) In this regulation, “third party allegation” means an allegation that the commission of the offence was due to—
- (a) the act or default of another person; or
  - (b) reliance on information supplied by another person.

#### **Liability of persons other than the principal offender**

**10.**—(1) Where the commission by a person (“P”) of an offence under these Regulations is due to anything which another person (“S”) did or failed to do in the course of business, S is guilty of the offence and may be proceeded against and punished, whether or not proceedings are taken against P.

(2) Where a body corporate commits an offence under these Regulations, a relevant person is also guilty of the offence where the offence was committed by the body corporate—

- (a) with the consent or connivance of a relevant person; or
  - (b) as a result of the negligence of a relevant person.
- (3) In paragraph (2) a “relevant person” means —
- (a) a director, manager, secretary or other similar officer of the body corporate;
  - (b) in relation to a body corporate managed by its members, a member of that body performing managerial functions;
  - (c) a partner in relation to a Scottish partnership; or
  - (d) a person purporting to act as a person described in subparagraphs (a), (b) or (c).

#### **Time limit for prosecution of offences**

**11.**—(1) In England and Wales an information relating to an offence under these Regulations that is triable by a magistrates’ court may be so tried if it is laid within 12 months after the date on which evidence sufficient in the opinion of the prosecutor to justify the proceedings comes to the knowledge of the prosecutor.

- (2) In Scotland—
- (a) summary proceedings for an offence may only be commenced within 12 months after the date on which evidence sufficient in the Lord Advocate’s opinion to justify the proceedings came to the Lord Advocate’s knowledge, and

(b) section 136(3) of the Criminal Procedure (Scotland) Act 1995(4) (time limit for certain offences) applies for the purpose of this paragraph as it applies for the purpose of that section.

(3) In Northern Ireland summary proceedings for an offence may be instituted within 12 months after the date on which evidence sufficient in the opinion of the prosecutor to justify proceedings comes to the knowledge of the prosecutor.

(4) No proceedings are to be brought more than three years after the commission of the offence.

(5) For the purposes of this regulation a certificate of the prosecutor (or in Scotland, the Lord Advocate) as to the date on which such evidence as is referred to above came to their notice is conclusive evidence of that fact.

(6) This regulation has effect subject to paragraph (1)(n) of Schedule 2 (enforcement powers of the Health and Safety Executive and the Office for Nuclear Regulation under the 1974 Act) and to paragraph (1)(n) of Schedule 3 (enforcement powers of the Health and Safety Executive for Northern Ireland under the 1978 Order).

### **Written notice under Article 37 and service of documents**

**12.**—(1) In a case falling within Article 37 (procedure at national level for dealing with appliances or fittings presenting a risk), a market surveillance authority must provide notice when requiring the relevant economic operator to, within a reasonable period—

- (a) take appropriate corrective action;
- (b) withdraw the appliance or fitting from the market; or
- (c) recall the appliance or fitting.

(2) The notice given under paragraph (1) must—

- (a) give reasons for the action required;
- (b) provide a time limit for compliance; and
- (c) be served in accordance with paragraphs (3) to (6).

(3) Any document required or authorised by EU Regulation 2016/426 or these Regulations to be served on a person may be served by—

- (i) delivering it to that person in person;
- (ii) leaving it at the person's proper address; or
- (iii) sending it by post or electronic means to that person's proper address.

(4) In the case of a body corporate, a document may be served on a director of that body.

(5) In the case of a partnership, a document may be served on a partner or person having control or management of the partnership business.

(6) If a person has specified an address in the United Kingdom (other than that person's proper address) at which that person or someone on that person's behalf will accept service, that address must also be treated as that person's proper address.

(7) For the purposes of this regulation "proper address" means—

- (a) in the case of a body corporate or its director—
  - (i) the registered or principal office of that body; or
  - (ii) the email address of the secretary or clerk of that body;

- (b) in the case of a partnership, a partner or person having control or management of the partnership business—
  - (i) the principal office of the partnership; or
  - (ii) the email address of a partner or a person having that control or management;
- (c) in any other case, a person’s last known address, which includes an email address.
- (8) In this regulation, “partnership” includes a Scottish partnership.

### **Appeals against notices**

**13.**—(1) An application for an order to vary or set aside the terms of a notice served under regulation 5 (enforcement powers) or 12 (Article 37 notices) may be made—

- (a) by the economic operator on whom the notice has been served; and
- (b) in the case of a notice other than a recall notice, by a person having an interest in the appliance or fitting in respect of which the notice has been served.

(2) An application must be made before the end of the period of 21 days beginning with the day on which the notice was served.

(3) The appropriate court may only make an order setting aside a notice served under regulation 5 or 12 if satisfied that—

- (a) no contravention of EU Regulation 2016/426 or these Regulations has occurred; or
- (b) the enforcement authority failed to comply with Article 13 (presumption of conformity of appliances and fittings) when serving the notice.

(4) On an application to vary the terms of a notice, the appropriate court may vary the terms of the notice as it considers appropriate.

(5) In this regulation—

- (a) “the appropriate court” is to be determined in accordance with regulation 14; and
- (b) “notice” means—
  - (i) a notice served under regulation 12.
  - (ii) a prohibition notice, a notice to warn or a suspension notice served in accordance with Schedule 1; or
  - (iii) a compliance notice, a withdrawal notice, or a recall notice served in accordance with Schedule 4.

### **Appropriate court for appeals against notices etc and further appeals**

**14.**—(1) In England and Wales or Northern Ireland the appropriate court for the purposes of regulation 13 is—

- (a) the court in which proceedings have been brought for an offence under regulation 7 (offences);
- (b) an employment tribunal seized of appeal proceedings against a notice which relates to appliances or fittings and which has been served under or by virtue of paragraph 1 of Schedule 2;
- (c) an industrial tribunal seized of appeal proceedings against a notice which relates to an appliances or fitting and which has been served under or by virtue of paragraph 1 of Schedule 3 (enforcement powers of the Health and Safety Executive for Northern Ireland under the 1978 Order); or
- (d) in any other case, a magistrates’ court in England and Wales or Northern Ireland.

- (2) In Scotland the appropriate court for the purposes of regulation 13 is—
- (a) the sheriff of a sheriffdom in which the person making the appeal resides or, as the case may be, has a registered or principal office; or
  - (b) an employment tribunal seized of appeal proceedings against a notice which relates to an appliance or fitting an which has been served under or by virtue of paragraph 1 of Schedule 2.
- (3) A person aggrieved by an order made by a magistrates' court in England and Wales or Northern Ireland pursuant to an application under regulation 13, or by a decision of such a court not to make such an order, may appeal against that order or decision—
- (a) in England and Wales, to the Crown Court;
  - (b) in Northern Ireland, to the county court.

### **Compensation**

**15.**—(1) When an enforcement authority other than the Health and Safety Executive, the Health and Safety Executive for Northern Ireland or the Office for Nuclear Regulation, serves a relevant notice in respect of an appliance or fitting, that authority is liable to pay compensation to a person having an interest in the appliance or fitting for any loss or damage caused by reason of the notice if both conditions mentioned in paragraph (2) are met.

- (2) The conditions are that—
- (a) the appliance or fitting in respect of which the relevant notice was served neither—
    - (i) presents a risk; nor
    - (ii) contravenes any requirement of EU Regulation 2016/426; and
  - (b) any neglect or default on the part of the economic operator was not the reason for service of the relevant notice.
- (3) In this regulation, “relevant notice” means a suspension, withdrawal or recall notice as referred to in regulation 13(5)(b).

### **Recovery of expenses of enforcement**

**16.**—(1) This regulation applies where a person commits an offence under regulation 7 (offences).

(2) The court may (in addition to any other order it may make as to costs or expenses) order the person to reimburse the enforcement authority for any expenditure which the authority has reasonably incurred in investigating the offence.

### **Action by enforcement authority**

**17.**—(1) An enforcement authority may itself take any action which an economic operator could have been required to take by a notice served under regulation 5 (enforcement powers) where the conditions for serving such a notice are met and either—

- (a) the enforcement authority has been unable to identify any economic operator on whom to serve such a notice; or
  - (b) the economic operator on whom such a notice has been served has failed to comply with it.
- (2) If the enforcement authority has taken action under paragraph (1) following the failure of an economic operator to comply with a notice, the authority may recover from that person as a civil debt any costs or expenses incurred by the enforcement authority in taking the action.

(3) A civil debt recoverable under paragraph (2) may be recovered summarily—

- (a) in England and Wales, by way of a complaint pursuant to section 58 of the Magistrates' Courts Act 1980<sup>(5)</sup>;
- (b) in Northern Ireland, in proceedings under Article 62 of the Magistrates' Court (Northern Ireland) Order 1981<sup>(6)</sup>.

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<sup>(5)</sup> 1980 c.43. Section 58 was amended by the Crime and Courts Act 2013 (c.22), Schedule 10 paragraph 40.  
<sup>(6)</sup> S.I. 1981/1675 (N.I. 26).