

## ANNEX C – ADMINISTRATIVE PENALTIES

1 The purposes of enforcement could be met through administrative sanctions as well as through the criminal justice system. The Review set out to examine the implications of doing that.

### Fixed penalty notices

2 Fixed penalty notices are becoming more and more widely available to regulators and are frequently used in some areas. For example, the number of fixed penalty fines issued by local authorities for litter offences rose from 7,565 in 2003/04 to 25,216 in 2004/05<sup>1</sup>.

3 Fixed penalty notices would seem likely to be effective where motivation to commit offences is not high and the advantage gained from doing so, or the cost of compliance, is small. Minor fly-tipping by householders or small businesses may be in this category, assuming perpetrators are likely to be detected.

4 There is no evaluation evidence as yet on fixed penalty notices used for fly-tipping under the Clean Neighbourhoods and Environment Act. Nor is evidence available on use of fixed penalties for littering.

5 There would seem to be built in limits to use of fixed penalty notices. Above a certain level of fine, their use arguably becomes unacceptable because of increasing procedural unfairness, with growing pressure to accept a possibly disproportionate fine to avoid criminal or civil tribunal process.

6 Wright et al<sup>2</sup> cite evidence, mainly from the USA, which seems to indicate that the nature and intensity of inspection, including the issue of fixed penalty notices has a direct effect on health and safety at work performance. They suggest that fixed penalty notices have a shock value unrelated to the size of penalty, but it may wear off with repeated or predictable use.

### Variable administrative penalties

7 The Review has focused particularly on the possible use of variable, and potentially substantial, administrative penalties. The Review has considered in what circumstances the use of variable administrative penalties could increase the effectiveness and efficiency of enforcement.

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<sup>1</sup> Source: Defra statistics on fixed penalty notices available at [www.defra.gov.uk/environment/localenv/legislation/fpn/index.htm#returns](http://www.defra.gov.uk/environment/localenv/legislation/fpn/index.htm#returns). Figures from 2001-02 and 2002-03 were 11,615 and 12,820 respectively.

<sup>2</sup> Wright, M., Antonelli, A., Doyle, J.N., Bendig, M., and Genna, R. "An evidence based evaluation of how best to secure compliance with health and safety law" (2005) HSE research report 334

8 To explore the implications of using variable administrative penalties, the Review set out to bring regulators, businesses, magistrates and others together in a series of six practical simulation workshops. Legal, logistical and timing considerations meant that it was not possible to institute formal pilots to explore new penalty regimes, but informed simulations proved an effective alternative.

9 The Review engaged independent consultants Henley Centre Headlight Vision to design and facilitate the events. Three different regulatory regimes were tested – Pollution Prevention and Control, Packaging Waste and Noise.

10 The objective of the simulations was to consider how more flexible and better targeted sanctions might increase the effectiveness of environmental enforcement and reduce costs for all. Administrative penalties were defined as variable, regulator-applied penalties, civil or criminal in basis, allowing review of the regulator's decision by an independent and impartial court or tribunal.

11 To focus discussions, the workshops set out to test a number of hypotheses:

- administrative penalties will make regulation more effective in delivering environmental outcomes
- administrative penalties will lead to higher levels of compliance
- the effectiveness of administrative penalties does not depend on goodwill between business and regulator
- administrative penalties will lead to better relations between regulators and all kinds of businesses
- it is possible to distinguish between cases suitable for administrative penalties and those where criminal prosecution would be appropriate
- the use of administrative penalties will reduce compliance costs and business overheads

These statements were not assumed by the simulations, but were used to draw out participant views and evidence.

12 The full findings of the workshops are available in Henley Centre Headlight Vision's report<sup>3</sup>. Overall the workshops established in broad terms that variable administrative penalties have the potential to be used in environmental regulation. However, policy-makers considering introducing them will need to bear in mind a number of inter-related factors:

- use of administrative penalties needs to be underpinned by good continuing communications between regulator and operators;
- administrative penalties would work best where offences are clear cut and gains from non-compliance or other factors easier to assess;

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<sup>3</sup> at [www.defra.gov.uk/environment/enforcement](http://www.defra.gov.uk/environment/enforcement)

- regulators would need flexibility to tailor penalties to particular circumstances of case, but with assurances of consistency for business;
- procedures would have to be scrupulously transparent and fair, underpinned by rigorous and independent scrutiny to comply with the Human Rights Act (ECHR Article 6), and to build trust;
- policy makers should identify the consequences of administrative penalties for existing legal frameworks;
- it should be clear what administrative penalties would add to the current system of environmental regulation.

13 A crucial question in designing a scheme of variable administrative penalties is whether the system should be wholly civil or allow the regulator to prosecute if negotiations breakdown or the administrative penalty is rejected. The Henley report concludes:

*“In three workshops, participants worked through civil models with ultimate recourse to an independent specialist tribunal, and in three others participants worked through a system in which the regulator could bring a criminal prosecution if negotiations broke down.*

*“Specific views on the way the criminal and civil systems might compare in practice were various ... , but **overall** participants strongly supported the kind of procedural and independent safeguards in the criminal justice system. The use of beyond reasonable doubt was favoured as promoting transparency, although efficiency benefits were thought possible if the test was changed to balance of probabilities. It was not possible for the workshops to consider more than briefly the respective merits of oversight by the criminal courts on the one hand or an independent specialist tribunal on the other. But the workshops show that any administrative penalties system, civil or criminal in flavour, would need to be transparent, fair and subject to rigorous independent scrutiny if called for.”*

14 The workshops also raised questions about the effect of a system in which either party could revert to the criminal justice process. Would this lead to perverse effects, such as an operator accepting what it saw as an unreasonable fine for a quiet life; or the use of criminal justice mechanisms such as cautioning under the Police And Criminal Evidence Act discouraging openness and hindering speedy resolution of issues?

15 The Review suggests that provided there are sufficient procedural safeguards, the key design question is whether a civil or a criminal regime would better serve regulatory and enforcement purposes, and which would be most efficient.

16 A further and detailed question is whether under a civil administrative penalty scheme, the regulator should still be required to put forward evidence sufficient to prove the offence has been committed “beyond reasonable doubt”. In the workshops, business tended to see “beyond reasonable doubt” as a crucial element in securing transparency and fairness.

17 Under a civil system, “balance of probabilities” would be the normal level of proof. It has been argued before<sup>4</sup> that “balance of probabilities” would in itself support use of a civil system because it would speed up the process and maximise efficiency gains. However, Environment Agency does not consider that investigation on the basis of balance of probabilities would be less costly for them: in practice they would need to be able to anticipate and strongly rebut defences, so they would still seek evidence to prove their case beyond reasonable doubt<sup>5</sup>.

18 The question arises whether “beyond reasonable doubt” is a uniquely criminal concept, but initial legal advice suggests it is an attempt at an objective test which could be adopted in a civil decision-making process. It appears that the standard of proof, the rules of evidence, and style of the tribunal proceedings can be selected so they best serve a tribunal's purpose.

19 Overall, on the basis of the Henley report, we suggest that the decision whether or not to introduce variable admin penalties would have the single greatest potential for shaking up the enforcement system. It would have important implications for the relationship between operators and regulators; the role of the criminal justice system in environmental regulation; and the way in which enforcement purposes could be achieved. Consequently, there would be a high opportunity cost if administrative penalties were not introduced where evidence suggests they would improve effectiveness and efficiency. Whether or not to introduce variable administrative penalties should therefore be one of the first issues considered in reappraising the enforcement system in a particular regulatory area.

### **Need for change?**

- Workshops show variable administrative penalties have the potential to be used in environmental regulation;
- Policy-makers would need to consider a range of factors and potentially complicated effects before deciding whether to introduce them;
- Certain findings from the workshops suggest that introducing variable administrative penalties would need to be accompanied by attention to establishing an appropriate regulatory culture, and perhaps advice and training for both regulator and regulated;
- In reforming the enforcement system in a particular regulatory area, variable administrative penalties should not be seen as just another enforcement measure – they have the biggest potential of any measure to change the system and what it is designed to achieve.

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<sup>4</sup> Woods, M. and Macrory, R. “Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach” (2003)

<sup>5</sup> personal communication