



HenleyCentreHeadlightVision

Report on administrative penalties simulations

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Contents

I. Preface	2
II. Executive Summary	3
III. Introduction	4
Workshop objectives	4
Workshop process and simulation design	4
Models tested	5
Hypotheses	5
Assumptions	5
The benefits of this process	6
The background to simulation	6
IV. Workshop findings: Implications	11
a. Use of FSA/RAP/Fixed Penalty models	11
b. Businesses and types of problems dealt with	14
c. Key themes and implications	16
1.) Time and money	16
2.) Flexibility	17
3.) Consistency	19
4.) Communication	19
5.) Transparency	20
6.) Ability to pay	22
7.) Intent and commercial gain	23
8.) Justice	24
d. Variations in the 3 regulatory areas	26
V. Analysis of the 6 hypotheses set out by the working group	28
Administrative penalties will make regulation more effective in delivering environmental outcomes	28
Administrative penalties will lead to higher levels of compliance	29
The effectiveness of administrative penalties does not depend on goodwill between business and regulator	31
Administrative penalties will lead to better relations between regulators and all kinds of businesses	33
It is possible to distinguish between cases suitable for administrative penalties and those where criminal prosecution would be appropriate	34
The use of administrative penalties will reduce compliance costs and business overheads	36
VII. Conclusion	38
Appendix A: Workshop agenda	42
Appendix B: Current background to regulatory areas	43
PPC	43
PACKAGING WASTE	43
NOISE	44

I. Preface

In September 2005, the Government began a review of environmental enforcement, led by the Department for Environment, Food and Rural Affairs. The Review is gathering evidence of obstacles to effective environmental enforcement and how they might be overcome.

The Review has been examining several aspects of the 'enforcement system', including the range of sanctions available to regulators. We have set out to be clear about the problem, or obstacles to effective enforcement (stage 1) before considering possible solutions (stage 2).

There has been much discussion in recent years about whether administrative penalties, varied by the regulator, and proportionate to the breach, would improve environmental enforcement. To inform the second stage of the Review we set out to examine the implications for enforcement of using administrative penalties. We selected Henley Centre Headlight Vision to design, facilitate and report on a series of six workshops to try out administrative penalties in realistic scenarios in three regulatory areas – packaging waste, Pollution Prevention and Control and noise nuisance.

There are a number of different types of administrative penalty. In the workshops we have explored the possibilities of 'variable regulator-applied penalties allowing review of the regulator's decision by an independent tribunal'. We have also compared civil administrative penalties, allowing appeal to a special tribunal, with approaches in which the regulator would have recourse to the criminal courts.

We had no fixed view on the implications of using administrative penalties. The workshops simulating their use have allowed us to make a start in exploring how they would work in practice within the timescale of the Review. We invited workshop participants with a wide range of experience and expertise, in management of environmental risk, business, regulation and the criminal justice system. Around 100 participants from business, trade associations, the Magistrates Association, Environment Agency, local authorities and the Health and Safety Executive all contributed not just valuable time but also huge effort and creativity in what were very challenging events.

In this report, Henley give their independent view on what has been learned. It will be used to inform the Review of Enforcement in Environmental Regulation, and to help Defra policy-makers consider the pros and cons of introducing administrative penalties in particular areas of environmental regulation. We hope that it will also assist business and regulators considering their views on this subject.

Finally, we would like to thank everyone who contributed to the project, especially the workshop participants, who generously gave time to the workshops and to results which will help to improve environmental regulation.

II. Executive Summary

In March 2006, Henley Centre Headlight Vision ran 6 workshops for the Department for Environment, Food and Rural Affairs (Defra). The aim was to understand the possible implications of using administrative penalties in environmental regulation and to explore whether new types of sanction might increase the effectiveness of environmental enforcement and reduce costs for businesses and regulators.

Various different penalty models were tested in three different regulatory regimes: Pollution Prevention and Control, Packaging Waste and Noise.

Key findings

The following report concludes that there could be a use for administrative penalties in one form or another in environmental regulation. However, the view of Henley Centre Headlight Vision is that, if policy makers decide to use administrative penalties, there are a number of important factors that need to be borne in mind before doing so:

- Administrative penalties might not be appropriate to resolve highly complex cases.
- A system of administrative penalties should offer the protections provided by the courts as a last resort.
- Any legislation introducing administrative penalties should give regulators the ability to tailor them to the circumstances of the particular case, but also ensure that administrative penalties are applied consistently.
- Any system of administrative penalties needs to be built on clear, transparent and ongoing communication between regulators and businesses, regardless of whether an offence has been committed.
- Policy makers should identify the consequences of administrative penalties for existing legal frameworks. They should also be clear about what administrative penalties would add to the current system of environmental regulation.

III. Introduction

Workshop objectives

Between 14 March and 28 March 2006, Henley Centre Headlight Vision ran 6 workshops for the Department for Environment Food and Rural Affairs (Defra) to test the use of administrative penalties in environmental regulation.

The overall aim of the workshops was to think about how more flexible and better targeted sanctions might increase the effectiveness of environmental enforcement and reduce costs to all, particularly in light of the Hampton Review. 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.

Workshop process and simulation design

As part of the simulations, workshop participants were assigned the roles of fictitious business representatives and regulators in order to elicit their expertise on the strengths and weaknesses of potential future regimes. Feedback also produced information about intended and unintended outcomes of the various models and recommendations on implications which policy development should take into account.

The workshops provided a way for stakeholders to work together in exploring possible policy implications in a stimulating environment in which everyone was free to draw their own conclusions.

Two of the six workshops focused on the regulatory area Pollution Prevention and Control (PPC); two focused on packaging waste regulation; and two on the regulation of Noise nuisance. The first workshop in each regulatory area tested a civil version of administrative penalties, and the second workshop tested a criminal version.

Participants involved in each of the workshops came from business and regulators, and from the Magistrates Association. The Chatham House rule applied throughout, with all comments non-attributable.

The workshops were organised into two parts. Mornings focused on exercises designed to simulate how the models would work in practice. The simulation exercises were based on past cases and combinations of cases; however, key elements such as locations, business size and evidence of an offence having been committed were changed or altered to disguise identities. All business names used in the exercises were checked with Companies House to ensure they were fictitious. Afternoons focused on learning gained from the simulations and the implications that arose.

Models tested

Two different basic models of administrative penalties were tested over the course of the six workshops:

- an entirely civil version where penalty disputes and appeals were considered by a new independent civil tribunal; and
- a criminal version where regulators would bring a criminal prosecution if a business refused to accept the administrative penalty.

In addition, during the Noise workshops, a matrix of fixed penalties was incorporated into both civil and criminal versions.

Within each of the regulatory models, a number of variations were tested – from inflexible to flexible and highly discretionary. Rather than consult on the specific models or their details, the workshops were intended to draw out the implications of administrative penalties across a range of future possibilities.

Hypotheses

As part of the review of implications, strengths and weaknesses, participants also studied and commented on six hypotheses set out by the Review of Enforcement in Environmental Regulation's working group on administrative penalties. These are:

- 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

Assumptions

To enable us to focus on the key issues, and ensure that the process remained manageable, we made a number of assumptions. Some of the most important were that:

- The workshops assumed current legal requirements;

- liability regimes remained as at present (with the opportunity to discuss the implications of changes in plenary);
- decisions to impose or not impose an administrative penalty rested wholly with enforcers;
- the simulations were to be designed around companies which were attempting to comply with regulation, operating generally legal businesses.

The benefits of this process

It is worth briefly reflecting on the benefits of the simulation process that Henley used to assess the strengths and weaknesses of different potential future models of administrative penalty.

Perhaps the most important single benefit was the value gained from tapping into the knowledge of around 100 people with a great deal of relevant experience and expertise, from businesses, regulators and from the Magistrates Association. Being able to bring together these participants enabled us to gather evidence more dynamically than might have been the case with traditional consultation methods.

The use of simulations is a creative way of effectively testing and rehearsing, in as realistic a way as possible (without piloting arrangements), the possible alternatives for the application of administrative penalties. The workshop simulations create a space in which free thinking, new ideas and diverse viewpoints can be surfaced and understood, and allow a shared understanding of the enforcement issues to emerge. The open and constructive nature of discussions was evident throughout the workshop sessions and commented upon by many participants.

Equally the involvement of both the regulators and a cross section of businesses in the simulations allowed an almost 'real-time' rehearsal of the different options to take place. Critical to the benefits gained from the work was the involvement of 'real' business representatives and regulators, to share their experiences and the likely behaviours and attitudes that they would observe in a 'real-life' situation.

It should be noted that the conclusions drawn by this report should not be attributed to any single attendee at the workshops. We have gathered together all the evidence presented and the views expressed to inform our conclusions, but would not wish participants to feel bound by our work.

The background to simulation

Defining a simulation

A simulation has been defined by Ken Jones, one of the leading writers on the subject, as 'a non-taught event in which the participants have sufficient information to enable them to behave with professional intent according to

their roles' (Jones, 1989)¹. They differ from training events in that there are not necessarily right answers; participants have the power to make decisions on their own, within the overall framework proposed by the simulation.

The simulation model used in the DEFRA work was also a 'soft' model. Unlike a computer-based simulation, in which there may be particular routes or paths which are closed off to participants, 'soft simulation' provides participants with background information about the circumstances, and some information about the environment (including the social or regulatory rules which govern the environment).

As Jones notes, 'Simulations, unlike discussions, must involve decision making about doing something, or not doing something. Actions must be under consideration as the outcome of the decision-making'.²

The DEFRA simulations are outlined below. For present purposes, however, it is worth noting that they brought together professionals and practitioners; that the simulations included information both on companies and alleged environmental infringements, each fictitious but drawn from life; and laid out a set of processes and penalties which the regulator had at their disposal. The simulations then evolved over a number of rounds in which businesses and regulators responded to the decisions of the other.

The outcome of this approach is to create a safe space in which participants can make decisions, and subsequently explore the consequences and the implications of those decisions. In an article on a simulation of television election coverage which he designed for the Manchester Broadcasting Symposium, Andrew Curry observed, 'One of the benefits of simulation is that it can be a way of testing ideas about change, and of the consequences of change, without going through the pain which real change involves. It offers us 'soft' ideas about possible futures.'³

There are two significant strands to this. The first is that simulation is about improving the quality of learning about the behaviour of an organisation or of a system of which it is a part. The second strand, discussed below, is that simulations take as a starting point that organisations are complex and unpredictable.

Turning to the first strand, some of the thinking that was embodied in the development of simulation techniques in the 1970s and 1980s derived in turn from the experiential learning movement.⁴ An important part of the process is about surfacing knowledge held in the heads of participants ('tacit

1 Jones, K, *A Source Book of Management Simulations*, London, Kogan Page, 1989.

2 Jones, K, *ibid.*

3 Curry, A, 'It's Live! It's Happening! It's Now', in Nod Miller and Rod Allen (eds), *It's Live But Is It Real?*, London, John Libbey, 1993.

4 Art Kleiner, *The Age of Heretics*. London, Nicholas Brealey Publishing, 1996.

knowledge'), both about the technical subject under scrutiny, and also about the way in which organisations are likely to behave in the environment which is being modelled by the simulation. Nonaka has written that effective organisational learning requires that participants are able to share tacit knowledge, which is then tested against their 'explicit' (written or published) knowledge.⁵ The simulation design was aligned with this process.

There is a further issue. As Peter Senge has observed in his influential book *The Fifth Discipline*, many conventional strategic tools are poor (or unable) to let practitioners see the consequences of their actions over time. 'When our actions have consequences beyond our learning horizon, it becomes impossible to learn from direct experience:

'Herein lies the core learning dilemma that confronts organisations: we learn best from experience but we never directly experience the consequences of many of our most important decisions' [italics in original].⁶

Simulation can help deal with this problematic issue; the use of the simulation approach effectively compresses time to enable people to test for consequences.

Models of organisational behaviour

One implication is that simulations presuppose a particular set of models of how organisations function. There is a significant body of literature on this, which we do not propose to review here. In summary, however, the organisational and social model implicit in simulation is of organisations as systems of complex behaviour, which interact with other complex organisations, rather than as more predictable machine-type models.

Such models have become increasingly prevalent since the 1960s. Trist and Emery's influential article on 'socio-technical systems' was published in 1960.⁷ Geoffrey Vickers influential body of work on organisational behaviour (in which he argued that organisations principally sought to establish, maintain and modify social relationships over time) was published in the 1960s and 1970s.⁸ More recently Jake Chapman has applied the substantial body of systems thinking to the work of the British public sector in his Demos monograph *System Failure*.

As Chapman writes, 'In many domains of public policy, the world in which the policy maker aims to intervene is beyond complete comprehension. The

5 Ikujiro Nonaka and Hirotaka Takeuchi, *The Knowledge Creating Company*. Oxford, Oxford University Press, 1995.

6 Peter Senge, *The Fifth Discipline*. London, Century House/Random House, 1990.

7 F. Emery and E. Trist, 'Socio-technical systems' [1960], republished in Emery (ed), *Systems Thinking*, Harmondsworth, Penguin, 1969.

8 Peter Checkland, *Systems Thinking, Systems Practice*. Chichester, John Wiley, 1981.

complexity involved precludes the possibility of being able to predict the consequences of an intervention. Under these conditions the linear rational model of policy-making fails to guide the policy maker.⁹ It is in the nature of complex systems that they behave in unexpected ways.

The view that organisations are complex systems is now widely prevalent, but has not yet made substantial inroads into government. Many of the prevailing metaphors within Whitehall remain those of the machine age. One of the dangers of this is that there is too little consideration given to the likelihood of unintended consequences of policy intervention. Another is that 'hard' models (based on analytical assessment derived from the left brain) are likely to be given greater credibility than 'soft' models (based on how people and systems interact, derived from the right brain). The prevalence of economic and econometric models within government is both further evidence of this, while at the same time amplifying this prevailing worldview.¹⁰

The simulation process is introduced briefly below, but one example from it might serve to illustrate the point. In one simulation, a (fictitious) company was alleged to have caused two instances of pollution. One was large scale and well-evidenced. The other was far smaller, but disputed. The first was going to cost the fictitious company hundreds of thousands of pounds in costs and charges, while the second was likely to cost them only a few thousand pounds. When the simulation tested these two cases, the company accepted the first penalty, but fought the second one ferociously, even though the cost of so doing might be greater than the cost of the penalty. The reason was a perceived lack of fairness in the process, together with reputational damage.

Conventional economic models would suggest instead that the company would fight the larger penalty and accept the smaller one. The values of the simulated company, however, were not just economic values. This is in line with research by Thibaut and Walker into "procedural justice" in the 1970s. They found that people care as much about the justice of the process through which an outcome is produced as about the actual outcome.¹¹

As the biologist Brian Goodwin has argued, 'We have reached the limits of a science of quantities, prediction, and control. ... What has been revealed is why the complex systems on which the quality of our lives depends, such as the weather, ecological systems, communities, economies and health, are out of our control except in very limited ways.'¹² In terms of public policy, perhaps this argument was put more succinctly by the distinguished economist Andrew Graham when he observed that 'if we could measure quality, it would be

⁹ Jake Chapman, *System Failure (2nd edition)*. London, Demos, 20xx. www.demos.so.uk, accessed 20th May 2006.

¹⁰ Geoff Mulgan, 'Global comparisons in policy-making: the view from the centre', 12th June 2003, Open Democracy. www.opendemocracy.net, accessed 20th May 2006.

¹¹ Thibault and Walker, *Procedural Justice*, Erlbaum, 1975

¹² Brian Goodwin, 'From Control to Participation', *Resurgence*, issue 201. www.resurgence.org/resurgence/issues/goodwin201.htm, accessed 20th May 2006.

quantity'.¹³ The notion that evidence must be quantifiable if it is to constitute evidence is the product of a particular moment of British politics: social researchers have long known that it takes both quantitative and qualitative assessment to understand the dynamics of a given social issue.

The DEFRA simulation

With these points in mind, it is worth turning briefly to the design of the DEFRA simulations. Six workshops were held over a period of a few weeks, two each in the area of pollution control, waste packaging, and noise. As stated above, a range of broadly comparable regulatory models were devised for each area; at one of the two workshops, civil models were tested, at the other civil and criminal models were tested.

In terms of public learning and data gathering, it is worth noting here a few points. The first is that for the duration of the morning, participants were allowed to immerse themselves in their simulation, playing in turn the roles of business people and regulators, and then repeating this process. At the end of each simulation cycle, they were required to record decisions in writing. The afternoon, therefore, was devoted to eliciting the data generated by participants' exposure to the simulation material, and this was done by two slightly contrasting processes.

The first process was to review in turn each of the interactions between 'business' and 'regulator' during the course of the morning, identifying issues and sticking points, as well as places where processes had run smoothly and created broad agreement. This was initially done in role. This was designed in particular to capture experiential aspects of the simulation.

The second process moved participants out of role (and also moved them physically in the workshop space, to emphasis this shift), and reviewed with the whole group, in turn, each of the four regulatory models which had been tested during the morning. Specifically, we asked the group to bring to the discussion both their professional and personal experience, and also insight gained from the simulation process. By its nature, this review required a more dispassionate assessment from the earlier experientially-led review, but was also informed by participants' experience of the simulations. This enabled us to test for unexpected effects, and also for outcomes which may have been generated by specific group dynamics within the workshop.

¹³ Quoted by William Davies, 'Evidence-based policy and democracy', 23rd November 2005. *Open Democracy*. www.opendemocracy.net, accessed 21st May 2006.

IV. Workshop findings: Implications

a. Use of FSA/RAP/Fixed Penalty models

Regulatory area	Civil Model	Criminal Model
PPC	Workshop 1: 14 March Based on procedures employed by the Financial Services Authority (FSA) Tested versions A, B, C, D	Workshop 2: 17 March Based on ideas developed by Environment Agency for Regulator Applied Penalties (RAP) Tested versions A, B, C, D
Packaging Waste	Workshop 3: 21 March Based on procedures employed by the Financial Services Authority (FSA) Tested versions A, B, C, D	Workshop 4: 23 March Based on RAP model Tested versions A, B, C, D
Noise	Workshop 5: 27 March Based on FSA procedures and including a 'matrix of fixed penalties' Tested versions A, B, C, D	Workshop 6: 28 March Based on RAP model and including a 'matrix of fixed penalties' Tested versions A, B, C, D

The regulatory models tested during the administrative penalties simulations drew on three sources for their inspiration: the Financial Services Authority model, which guided design of the simulated **civil-based** systems; Environment Agency ideas for a Regulator Applied Penalty model, or RAP, which shaped design of the **criminal-based** system; and the idea of a model incorporating a range of fixed penalties, which was offered for discussion at Defra's November 2004 *Conference on access to justice in environmental matters* - this guided simulations during both noise regulation workshops (civil and criminal).

The following section presents the details of the four versions of these models, which were tested in workshop. For example, looking at the above table, PPC Workshop 1 tested four different versions of the civil model (versions A, B, C and D).

Civil regulatory models of possible approaches to administrative penalties, based on procedures employed by the Financial Services Authority

For all: new guidelines on use to be set, non-payment triggers civil debt recovery

Version A

- Penalties assessed by formula: the gain made through the company's non-compliance, plus its costs incurred in making this assessment
- Maximum fine identified
- No recourse to ordinary courts
- If company disagrees with regulator's assessment, could appeal to independent, specialist panel

Version B (all of the above plus the following)

- Regulator able to increase assessed figure on basis of level of intent to comply

Version C (all of the above plus the following)

- In making assessments, regulator to take account of: the extent of the environmental impact; the level of economic, market, or competitive benefit gained by breach; the size of the organisation on whom the penalty is imposed, and in some circumstances, also their ability to pay; intent or otherwise, together with history of compliance; the duration and frequency of the behaviour; the scale and effort involved in any remediation since breach was notified or, prior to breach, identified by management
- Regulator has recourse to other sanctions, including but not limited to appropriate publicity (paid for by the company) and mandatory remediation

Version D (all of the above plus the following)

- If the Company disagrees with regulator's assessment it may make an appeal to Alternative Dispute Resolution. If the Company and regulator continue to disagree, they have recourse to the independent, specialist panel

Criminal regulatory models of possible approaches to administrative penalties - Regulator Applied Penalties

For all: as current policy, to replace prosecution in some cases

Version A

- Penalties assessed by formula: the gain made through the company's non-compliance, plus the regulator's costs incurred in making this assessment
- Maximum fine identified
- If the Company disagrees with regulator's assessment it may make an appeal to the regulator's internal reviewer
- In the event of breakdown of process, the regulator may prosecute

Version B (all of the above plus the following)

- Regulator able to increase assessed figure on basis of level of intent to comply

Version C (all of the above plus the following)

- In making assessments, regulator to take account of: the extent of the environmental impact; the level of economic, market, or competitive benefit gained by breach; the size of the organisation on whom the penalty is imposed, and in some circumstances, also their ability to pay; intent or otherwise, together with history of compliance; the duration and frequency of the behaviour; the scale and effort involved in any remediation since breach was notified or, prior to breach, identified by management
- Regulator has recourse to other sanctions, including but not limited to appropriate publicity (paid for by the company) and mandatory remediation

Version D (all of the above plus the following)

- If the Company disagrees with the regulator's assessment, they can go to Alternative Dispute Resolution. If they continue to disagree, the regulator may prosecute

Civil and criminal models tested during noise regulation workshops, including a 'matrix of fixed penalties'

In addition to drawing on the FSA model for the workshop on a civil version of administrative penalties, and the RAP model for the workshop on a criminal version of administrative penalties, the simulated Noise cases incorporated a fixed penalty model in each of the four versions. Thus instructions given to the 'regulators' in both workshops included instructions on use of a range of fixed penalties. Offences were graded according to seriousness, and there was a tariff according to whether first, second or third offence.

b. Businesses and types of problems dealt with

Here we summarise the businesses, types and offences committed which were simulated during the six workshops.

PPC workshops

Name of company	Type of company	Offence 1	Offence 2
Professional Kitchens	Manufacturer of wood-based panels and kitchenware products	Accidental spillage of polish. The leaking container was held over an on site drain which led to the surface water system	Storing of harmful material on land without a license to do so
Stork Steel	Steel manufacturer	Release of coke oven gas into atmosphere	Lack of relevant license for equipment (hot rolling mill)
Refuse Solutions	Recycling and waste management	Release of excessive levels of mercury into the Thames estuary, followed by falsification of records to conceal the offence	Emissions of landfill gas in contravention to permit conditions

EnergyMass	Generator of chicken-litter - fuelled electricity	Inappropriate use of equipment (bio-filter), in contravention of PCC permit	Operating outside permitted hours, creating noise and vibration which caused disturbance to local residents
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Packaging Waste workshops

Name of company	Type of company	Offence
SUPER Market Ltd.	Discount supermarket chain	Unregistered
Pet's Delight	Manufacturer of dry dog and cat food	Unregistered
Leisure Treasure Ltd.	Owens and operates 312 leisure centres across the UK	Never complied with producer responsibilities
Green Future Consultants	Small environmental consultancy operating a compliance scheme	Significantly undercharged members in 2005
Nice Dream Ice Cream	Multinational manufacturer and retailer of luxury ice cream	Currently unregistered
Electro IMPS	Importer and distributor of domestic electrical appliances	Unable to fulfill contracts it had for the supply of 2005 PRNs
OneStop Compliance	Medium sized packaging waste compliance scheme	Unable to produce sufficient evidence for glass recycling
Baggins & Saks	Producer of paper-based printed bags and sacks	Unregistered

Noise workshops

Name of company	Type of company	Offence 1	Offence 2
Chilly Cuisine	Restaurant specialising in Caribbean cuisine	Nuisance of noise from cooling fans located behind the restaurant	Nuisance of noise from air conditioning unit
Grab it! Grocers	Medium-sized grocery store	Nuisance of noise caused by late-night deliveries	Nuisance of noise caused by chopping block in shop's butchery section
Strictly Rootz Music	Small, specialist record shop	Nuisance of noise caused by loud music played in shop all day long	Nuisance of amplified music in rehearsal space
Block Contractors Ltd.	Privately owned building contracting firm	Noise outside of site boundary caused by late running concrete pour	Violation of s60 notice by refurbishment of flat out of hours

c. Key themes and implications

A number of key themes emerged from the analysis of the six workshops. For clarity, these have been grouped into the eight headings listed below. Under each is an exploration of the opportunities and challenges afforded by administrative penalties as well as additional commentary expressed around these themes.

1.) Time and money

Opportunities

The argument that administrative penalties would reduce costs and speed up the process of enforcement in environmental regulation was expressed by a small number of workshop participants.

It was also argued that for less contentious cases as well as minor offences, such as a 'paper offence' under PPC or failing to acquire sufficient Packaging Waste Recovery Notes (PRNs), administrative penalties could speed up the

process. This was seen to work well in one of the PPC simulations where a steel manufacturer was in breach of its permit regulations but had caused no actual environmental harm; both regulator and business considered the administrative penalty system an appropriate tool for such a case. The view was that with a small, simple case where there are few disputed facts, an agreement between the regulator and business could be reached without the intervention of the courts and with a low level of bureaucracy and therefore time and money required.

An additional point was made about the lower burden of proof required for administrative penalties working under a civil model; to gather evidence to reach a conclusion on the basis of the 'balance of probabilities' would take less time and money than doing so 'beyond reasonable doubt'.

Challenges

However, the majority view was that, with a high number of ambiguous cases, the regulator would still spend a significant amount of time (and money) gathering a comprehensive body of evidence in order that the business does not reject the penalty from the outset. The conclusion was therefore that administrative penalties may not necessarily decrease the time it would take to conclude an individual case.

Another barrier to speeding up the enforcement process was identified in the scenario where there was little variation between the administrative penalty fine levied under the criminal model and the anticipated fine levied by the courts, or if the criminal fine risked being lower. In this instance, a business would be likely to take a case to court as there would be the perception of 'little to lose' in testing the case in a criminal court setting. In such a scenario, use of the administrative penalty would not save time.

A range of participants at the noise workshops considered that administrative penalties could be an unnecessary extra layer of bureaucracy; the feeling was that they unnecessarily lengthened the current process.

Additional point raised

Clear communication from regulators (letters, policies, expectations etc.) would increase transparency and reduce complexity and the challenge of interpreting bureaucratic demands, thus saving time.

A lower cost system, should it be achieved, might increase the incentives for a company to keep appealing for as long as possible.

2.) Flexibility

Opportunities

Overall, the more flexible regulatory models such as C and D were welcomed as they reflected the reality of environmental offences whereby it is very difficult

to categorise offenders and use just one rigid formula. In the noise workshops, for example, all the regulatory models included a simple grid relating to the number of offences previously committed by the business and the severity of offence. This was used to assess the appropriate level of fine for the offending business. However, under such an inflexible model, regulators found it very difficult to determine what constituted a high or low severity offence.

The insistence that 'one size does not fit all' was echoed by both regulators and regulated across all regulatory areas.

A number of business participants warmed to a more flexible approach as it was seen to allow more room for negotiation with the regulator (but see also references to the regulator as 'judge and jury'). This made dialogue between business and regulator more likely.

Moreover, regulators found benefit in the ability to use their discretion over factors such as intent and ability to pay into account. The advantage was clear from a comparison with the more inflexible regulatory models. The use of regulatory model B during a packaging regulation simulation involving a small pet food manufacturer led to the frustrating conclusion of the only option being a high fine based on a set formula, resulting in the company being put out of business. This was felt to be an unsatisfactory conclusion for both business and regulator and additionally raised the question 'is this in the public good?'

Challenges

However, the crucial disadvantage identified in a flexible system was the difficulty in maintaining consistency across different cases. Across all the workshops it was felt that a fine based too heavily on the subjective judgement of an individual regulator would almost inevitably lead to regional variation and inconsistency.

This was seen to be in the case in the PPC simulation involving a large manufacturer of kitchen units where the company's staff had poured a harmful substance into the surface water system in response to an accidental spillage in their yard. In this case the regulator had to take into account a number of mitigating factors raised by the business in order to decide whether the offence should be treated as intentional or not. It was considered unlikely that full consistency would be reached across the country in such complex cases.

Moreover, inflexibility (or simplicity) in a regulatory model for administrative penalties was seen to have its attractions. It was not only seen to be easier for the regulator to follow but it was also seen to offer clarity for the business, making the system easy to understand, potentially leading to less dispute over the fine levied. However, such crude uniformity is not the same as consistency in application of enforcement principles and criteria while still reflecting the circumstances of particular cases.

The ideal but difficult to achieve compromise articulated in the workshops was a system allowing for the regulator's discretion but working within a framework of control.

Additional point raised

More than one of the regulator participants felt that if they have the discretion to increase the fines initially prescribed by a formulaic approach, there should also be the option of decreasing the fine levied.

3.) Consistency

Opportunities

The tension between flexibility and consistency has already been noted; the more rigid formula used in regulatory models A and B leads to greater uniformity of fine but removes the means to tailor penalties to the circumstances of particular cases. More flexible approaches – variations C and D – provide opportunities to tailor penalties to cases leading to greater consistency, but may also increase subjectivity and thus inconsistency.

Challenges

As mentioned under flexibility, the downside to the more rigid regulatory models is that there is no room to take the specific details of an individual case into account.

An additional obstacle to consistency was the difficulty in establishing the key facts of any one case; for example, it was thought that a lot of information was required to prove intent and commercial gain from non-compliance. However, with regulatory models C and D, these dimensions to the case were key criteria through which the regulator would assess the appropriate level of fine to levy. Participants reflected that it would be difficult to achieve a greater level of consistency when the criteria for assessing a fine depended on such complex and often readily disputed facts.

It is not just the facts of a case that are difficult to ascertain but also the value that should be placed on the impact of an offence. For example, in the noise simulations, the question was asked 'How much does a disturbed night cost?'. It was felt that allowing too much discretion over such subjective issues, would lead to an inconsistent approach.

4.) Communication

There was a general consensus in the workshops that communication between business and regulator (including letters, meetings and on-going telephone communications) was mutually beneficial; in the noise simulations, one business participant remarked: 'Clear dialogue from day one gets you a result'.

Opportunities

The use of Alternative Dispute Resolution that appeared in the criminal regulatory model D was identified as a tool for facilitating a more neutral

dialogue and therefore helping communication between the business and regulator. There was additionally the suggestion from one participant that Alternative Dispute Resolution should be used from the outset of the process rather than as a response to difficulties in a case. However, as the more flexible regulatory models (including model D) were seen to lead to more informal communication between business and regulator, it was considered that ADR would not always be necessary.

Challenges

There was a concern that fear of receiving an administrative penalty from the regulator would result in less communication between the regulator and business, leading to less mutual understanding and, consequently, less compliance.

Reduced dialogue was a particular concern under the criminal versions of administrative penalties. With the backdrop of a potential court case, regulators and business representatives both explained that business might be less willing to share information and engage in discussion with a regulator with increased powers.

Additional points raised

A broad range of participants expressed the need for a number of aspects of an administrative penalty system to be communicated very clearly from the outset. These included the purpose of the penalties, what sort of offences they would be applied to and the nature of the relationship between regulator and business under the system.

A more specific area requiring clear communication was what would constitute a repeat offence. The first question posed was: would the nature of the offence have to be the same? For example, if a business receives an administrative penalty for playing music loudly, would a loud hammering noise from that same business be considered a repeat offence? The second question that emerged was: would the offence have to take place in the same location? For example, if a company commits an offence at one site, would the same offence at a different site be a repeat offence?

5.) Transparency

Challenges

As has been mentioned under the theme of consistency, the simulations highlighted the importance of having evidence to prove that an offence has been committed. As a result, a large portion of the arguments that took place tended to focus around the proof and facts surrounding a case rather than the appropriate level of sanction that should be levied. For example, during a simulated PPC case involving a producer of biomass electricity, the business demanded that the regulator provide details of how samples of the pollutant emitted by the company involved were collected and stored (as a means of

verifying that the charge was credible). This illustrated that there would be a significant demand for transparency under the administrative penalty system.

Overall, both business and regulator participants concluded that an administrative penalties system should not be a substitute for a proper investigation and a high level of transparency. A business participant voiced the view that administrative penalties would work better on the basis of proof 'beyond reasonable doubt' rather than on the 'balance of probabilities' as that would ensure a higher degree of transparency.

However, one of the difficulties identified with achieving this level of transparency in the system was cost. For example, in a case where the fine is £5, 000 but the investigation costs to substantiate the case were £50, 000, there would clearly be questions around the efficiency of the system.

When discussing the issue of transparency, a discussion around the matrix of fixed penalties concluded that they would allow for very little transparency. A fixed penalty level was applied in one of the noise simulations; a restaurant that was generating nuisance noise from its air conditioning unit received a fixed penalty, resulting in a more entrenched and aggressive stance by the business. Furthermore, one business participant commented: 'They may be okay for parking fines and speeding fines but you can't use them for anything like this'.

Additional points raised

A significant question raised during the course of the workshops was: 'what transparency is there for the public?' This discussion focused on where the money collected from administrative penalties should be directed. The following options were consequently considered:

a) Environment Agency: This was immediately discounted due to the perverse incentive such a system would create; a larger number of offences would lead to greater revenue for the regulating body.

b) Treasury: This was considered a good destination for the fines because it was neutral. However, some participants expressed dismay that the money would 'get lost in central government' where it was not necessarily used for improving the environment or compensating those affected by an offence.

c) Redistributed to businesses with a good history of compliance: This appealed to many participants as it was seen to lead to higher levels of compliance and has a greater sense of justice; those that make efforts to protect the environment are rewarded. However, some cautioned that this system would have no credibility if the size of the rebates was too small.

d) Environmental improvement schemes (similar to the situation with the Landfill Tax Fund or WRAP - Waste and Resources Action Plan): This was welcomed especially by the PPC and packaging participants as it was seen to directly focus on the ultimate aim of this area of regulation: to improve the environment. Moreover, it allowed for a greater community-focused use of

money so that members of the community who had been affected by an offence (particularly true of PPC and noise offences) were seen to be in some way compensated.

One participant felt that, given the more obviously positive uses of fine money, this option might encourage more whistle-blowing within businesses.

e) Regulation training courses for SMEs: This was suggested in the workshops simulating noise regulation. It was considered a fitting use of money as it provided support for SMEs who have historically borne the greater regulatory burden. In addition it was seen to lead to greater compliance as there would be greater awareness of noise regulation and understanding of what constituted an offence. In such a case, one participant suggested that this option could bring about a notable change of role and general focus of an administrative penalty regulator; he or she would be viewed as a facilitator of improvement rather than a punitive force.

There were, however, queries as to how the training courses could be administered.

6.) Ability to pay

Opportunities

Regulatory models C and D in both the civil and criminal model were applauded for allowing the regulator to determine the level of fine, taking the size of a company and their ability to pay into account. Under this system it was possible to levy a larger fine for bigger companies as well as companies working on bigger contracts.

One business participant expressed the view that taking the size of a company and their ability to pay into account would be more acceptable for the business; it seemed a fair, quantifiable variable.

Challenges

However, the point was made that there could still be injustice with taking the size of a company into account when assessing a fine. This was the case in regulatory models C and D; there were worries that one system for SMEs and another for large companies and multinationals would emerge.

One participant with a legal background illustrated the potential complexity of taking ability to pay into account in an administrative penalty system by analogy to Fixed Penalty Notice speeding fine:

Mr. X has a reasonably high income. He receives a £80 speeding fine but believes there is sufficient mitigation to contest the fine. He therefore takes the case to court but his defence is rejected. He is consequently asked to pay a higher fine of £500.

Mr Y, on the other hand, does not have a steady income. He receives a £80 speeding fine and has little defence. However, he takes the case to the courts because, unlike Mr. X, he has nothing to lose. In court he states that he is on benefits and therefore unable to pay. The case is therefore reviewed and he is given a £40 fine.

Additional point raised

One participant suggested that the maximum fine ought not to be a set figure (as set out in all regulatory models used in the process) but a proportion of a company's profit.

7.) Intent and commercial gain

Opportunities

Regulatory models C and D were praised for taking commercial gain from an offence into account: *'in making assessments we [the regulatory body] will take account of...the level of economic, market, or competitive benefit gained by breach.* Whilst this was particularly relevant for the packaging simulations, participants in all three regulatory areas believed that, to bring about real justice, no company should be able to save money through non-compliance.

In addition, the business practice of budgeting for non-compliance was seen to be a clear indication of intent as it allowed for the embedding of regulatory breaches in day-to-day operations. Therefore, in identifying intent as one of the criteria on which a fine is assessed, this practice was seen to be duly penalised.

Challenges

Whilst taking commercial gain into account was applauded as a concept, one regulator participant felt that, especially in the case of PPC and noise, such gains would be very difficult to calculate.

Similar difficulties were encountered over another factor considered in variations C and D, the issue of intent. It was generally agreed across all six workshops that intent would be a likely point of contention in a lot of cases as it was seen as very difficult to prove. This was reflected in one of the PPC simulations in which a provider of recycling and waste management services was alleged to have polluted a nearby river and subsequently falsified the records to conceal this fact. In both PPC workshops where this case was tested, the issue of intent (proof of falsification) was debated at length, leading business and regulator to an impasse.

Use of a multiplier in the case of an intentional offence could therefore be a major cause in the breakdown of the regulator-business relationship. Furthermore, dispute over a business' intent may constitute grounds for appeal to the tribunal in a civil model, or to the regulator prosecuting in a criminal model.

An additional challenge identified was how to prevent a business budgeting for non-compliance, whereby regulatory breaches are embedded in day-to-day operations (clearly an indication of intent). However, it was felt that administrative penalties provided no clear disincentive for this sort of practice.

8.) Justice

Opportunities

A range of participants viewed the criminal courts as an important backdrop for the administrative penalty system to work in. Elaborating on this point, a business participant emphasised that the criminal system is more greatly feared by businesses because of the time and hassle involved as well as the adverse publicity (a criminal court case was seen to be a greater disgrace). The customer-facing companies such as the large international ice cream manufacturer and retailer used in the packaging simulations were seen to be particularly sensitive. It was therefore felt that the criminal model, with the potential of recourse to the courts, had the advantage of making future compliance more likely.

However, others saw greater benefits in the civil model where the element of criminality was removed. The argument was that the threat of prosecution with the associated activities such as interviews under caution and the involvement of lawyers mean that the business is more defensive and therefore less willing to provide information.

Challenges

One of the key concerns that emerged from a range of participants was that the regulator would act as both judge and jury; as one business participant from a packaging workshop put it: 'Who regulates the regulator?' As a means of solving this difficulty, one participant suggested a system whereby the details and judgment of the case would be carried out by the regulator but the sum of the fine would be negotiated and decided by a separate, independent body.

Another concern surrounding the criminal model was that some businesses may accept a fine when they have not committed an offence in order to avoid the risk of a higher fine in court. In other words, a business' decision to accept a fine would not be based on the truth of the case but on playing the odds of the system.

This scenario arose in the packaging waste simulation involving a discount supermarket chain that accepted an administrative penalty because it was cheaper than gambling on a hearing in the criminal courts. The concern in such a scenario is that innocent companies accept administrative fines as the 'easy option' but are then liable in a future case for a much higher fine because of their apparent history of non-compliance. This was seen to be an unjust outcome.

Additional point raised

One of the regulator participants underlined the danger of companies liquidating in response to an administrative penalty – an outcome which achieves none of the objectives for this area of regulation. The participant therefore expressed the view that directors should carry greater liability in certain companies.

d. Variations in the 3 regulatory areas

Regulatory Area	Issues raised specific to regulatory areas
<p style="text-align: center;">PPC</p>	<ul style="list-style-type: none"> • Complicated area of regulation which leads to difficulties in gathering evidence and proving an offence. • A criminal level of proof of 'beyond reasonable doubt' would be required in order to function without an unmanageable level of challenges from the business alleged to have committed an offence.
<p style="text-align: center;">PACKAGING WASTE</p>	<ul style="list-style-type: none"> • 'Free riders', or non-registered, non-compliant companies were of particular concern to participants at packaging waste workshops. • Similarly, participants of these 2 workshops felt that any system of administrative penalties should seek to incentivise registration. • Any system of administrative penalties would need to be able to handle future PRN scarcity.
<p style="text-align: center;">NOISE</p>	<ul style="list-style-type: none"> • Domestic nuisance cases are many times more frequent than business nuisance cases - the workshops and review address business cases exclusively. • If legislation is amended and administrative penalties are introduced, what would happen to rights to bring about private prosecution of a business? • Need ability of seizure of noise-making equipment. • Need to take into consideration that residents are important players in alleged noise nuisance cases. • Use of administrative penalties in business cases

	would be in marked contrast to continuing criminal prosecution of private individuals.
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V. Analysis of the 6 hypotheses set out by the working group

At the start of the workshop process, the working group set out six hypotheses to be tested. These were developed to focus discussion at the events, and in this report, on key claims that are often made about administrative penalties. We were particularly interested in what the likely effects of new sanctions would be on compliance rates, costs and relationships between regulators and the regulated. This section analyses how workshop participants responded to the hypotheses following the simulated application of administrative penalties.

Administrative penalties will make regulation more effective in delivering environmental outcomes

<p>Agreed</p>	<ul style="list-style-type: none"> • A range of participants agreed conditionally: <ul style="list-style-type: none"> - If administrative penalties are perceived as fair: for example, if companies accept that they have committed an offence, and if free-riders are targeted more efficiently. - If the penalties could be served within the context of a criminal court-based system. Administrative penalties would be another regulatory 'stick' to be used to achieve compliance and perhaps avoid criminal prosecution. • Many workshop participants noted that the leverage of administrative penalties would focus business attention on consequences of breaching regulation, thus resulting in desired environmental outcomes. • Some workshop participants felt environmental benefits would be more obvious in relation to lower-level offending. • Others identified the potential benefit of longer-term, behavioural change. This would be a consequence of the 'fear factor' instilled by possibly substantial regulator-applied penalties. <ul style="list-style-type: none"> - These benefits, several noted, would not be obvious or easily measured.
<p>Disagreed</p>	<ul style="list-style-type: none"> • A range of participants felt that the system would result in no changes in environmental outcomes: <ul style="list-style-type: none"> - One regulator participant said that compliance can already be achieved under the existing system.

Additional point raised	<ul style="list-style-type: none"> • The question of who determines environmental impact, and how, was usefully raised, but not answered, during this discussion.
Conclusion	<p>Participants at PPC workshops were split on this issue. It was felt that small improvements of environmental outcomes could be achieved through greater compliance from less serious offenders in response to administrative penalties but the overall effect was thought to be minimal.</p> <p>Participants at Packaging Waste workshops agreed with this hypothesis, providing the structure of sanctions creates incentives to comply.</p> <p>Participants at Noise workshops disagreed with this hypothesis because the new enforcement powers were perceived as an additional level of bureaucracy.</p>

Administrative penalties will lead to higher levels of compliance

Agreed	<ul style="list-style-type: none"> • A number of participants agreed conditionally: <ul style="list-style-type: none"> - If regulation is applied consistently - If fines are linked to a business's history of non-compliance - If regulators take any intent to offend into consideration - If fines are linked to a company's financial status and ability to pay - If penalties are sufficiently punitive. • A number of regulator and business participants (most notably from the PPC workshops) believed higher levels of compliance would be achieved from smaller companies and for less serious offences. <ul style="list-style-type: none"> - It was felt that an administrative penalty system would be most useful as a tool against lower-level offending. • The backdrop of a possible criminal prosecution was felt to be necessary for greater levels of compliance when dealing with larger companies which have been accused of having committed major offences.
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<p>Disagreed</p>	<ul style="list-style-type: none"> • There were strong views on this issue. • Leaving enforcement fully in the hands of the regulator was felt by some to open up the possibility of reduced self-monitoring and self-regulation within the business community. • Some workshop participants pointed out that regulators are not responsible for managing businesses, and that many elements of business operations are simply out of the regulator's hands: <ul style="list-style-type: none"> - The regulator can only try to encourage businesses to move in certain directions and the administrative penalty system does not change this situation.
<p>Additional point raised</p>	<ul style="list-style-type: none"> • Some workshop participants – most notably those from both workshops on noise nuisance – felt that whilst the system might not make things worse, there were no clear benefits to compliance that administrative penalties might bring to the current regulatory system. <ul style="list-style-type: none"> - One workshop participant commented, 'they don't add anything'. Another said simply, 'if it ain't broke, don't fix it'. - Others added that administrative penalties would still be part of a penalty process – if used by the regulator it would be because regulations had already been breached. • It was felt that any regime should incentivise compliant behaviour, as well as penalise non-compliant behaviour.
<p>Conclusion</p>	<p>Participants at PPC workshops were split on this issue. They pointed out that administrative penalties could influence the behaviour of low-level offenders for the better but they were unlikely to make a large-scale difference.</p> <p>Participants at Packaging Waste workshops agreed with this hypothesis, providing the structure of sanctions creates incentives to comply.</p> <p>Participants at Noise workshops disagreed with this hypothesis because the new enforcement powers were perceived as an additional level of bureaucracy.</p>

The effectiveness of administrative penalties does not depend on goodwill between business and regulator

<p>Agreed</p>	<ul style="list-style-type: none"> • Some workshop participants explained that, whilst both the regulator and business would prefer to have a good relationship, once a letter is served to a business any previously existing goodwill often goes 'down the toilet'. Hence, some argued, as under the current system, goodwill would be irrelevant to effectiveness if regulations have not been observed. • A number of participants felt the following conditions were required for this hypothesis to be true: <ul style="list-style-type: none"> - The system, process and rules of engagement should be made clear up front - There must be trust in the regulator's consistency and fairness - The regulator's approach and the outcome of each case should be transparent
<p>Disagreed</p>	<ul style="list-style-type: none"> • Some workshop participants argued that you need goodwill to make regulatory systems work in the first instance and this would certainly be the case under a newly introduced penalty regime. • It is also important to consider the human elements of ongoing business-regulator relationships, which are multi-faceted and not limited to single issues or cases. <ul style="list-style-type: none"> - Goodwill is necessary throughout the life of business-regulator relationships and not simply at the point at which powers of administrative penalties might be called upon by the regulator. • Participants attending the PPC and noise workshops pointed out that goodwill would depend on the maturity of the industrial sector, suggesting that more goodwill exists in more established regulatory areas.
<p>Additional point raised</p>	<ul style="list-style-type: none"> • The relationship between a business and regulator is inherently antagonistic. A regime that does not depend on goodwill between the two is therefore essential for an effective system. • Without goodwill, the appeals process would be overloaded due to lack of confidence in regulators' decision-making. • During a workshop on noise nuisance regulation, participants agreed that any setting of targets for administrative penalties would hurt goodwill. This was a point made in passing during plenary discussions; it was not pursued further.

Conclusion	<p>Participants at PPC workshops disagreed with this hypothesis, noting that good will is an important element of the working relationship between regulator and business.</p> <p>Participants at Packaging Waste workshops agreed with this hypothesis, although they would prefer that good will exist.</p> <p>Participants at Noise workshops both agreed and disagreed with this hypothesis, pointing out that businesses want good will to exist between themselves and the local enforcer, however, good will does not have to exist for rules to be applied.</p>
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Administrative penalties will lead to better relations between regulators and all kinds of businesses

<p>Agreed</p>	<ul style="list-style-type: none"> • A number of participants agreed conditionally: <ul style="list-style-type: none"> - If the focus of their relations is on the environmental outcome rather than financial income for the regulator - If both sides have faith in the system - If administrative penalties are perceived to be fair - If incentives for compliance and good behaviour are built into the system, rather than the system focusing on penalising non-compliant businesses. - If administrative penalties are accompanied by better communication. - If there is enough flexibility to reflect the circumstances of the case.
<p>Disagreed</p>	<ul style="list-style-type: none"> • Some business and regulator participants responded to this hypothesis with an unequivocal 'no'. • The difficulty of maintaining a consistent approach to implementation of regulation across all local authorities and all individual inspectors was considered a major delivery challenge given the need for individual communication on most issues. • Not endowing regulators with too much authority was perceived by some as a way of improving relations between regulators and all kinds of businesses. <ul style="list-style-type: none"> - The criminal courts were seen to serve a purpose in this regard: by depersonalising the process, the business and regulator are able to have fairer relations. - If, in the other hand, regulators visit and inspect a business, but also have the authority to then fine/penalise, there is potential for relations to be worse (one workshop participant drew a comparison to traffic wardens). • If administrative penalties operate within a civil system, the shift from evidence gathered 'beyond reasonable doubt' to a 'balance of probabilities' has the potential of placing great strain on relations between regulator and business because the regulator would be given full powers of determining whether an offence was committed or not. Some workshop participants preferred to grant this final authority to the courts and not an individual with whom business works on a regular basis.

<p>Additional point raised</p>	<ul style="list-style-type: none"> • Some participants questioned the appropriateness of seeking to improve relations between regulator and regulated: <ul style="list-style-type: none"> - In the end, regulators need to enforce the rules and should not be concerned with the quality of relations. - Many workshop participants explained that better relations should not be under consideration unless the relations were related to improving compliance and subsequently environmental outcomes. • During one of the workshops simulating noise regulation, a workshop participant emphasised that good relations between regulator, all kinds of businesses, <i>and neighbours and residents</i> should be taken into account: <ul style="list-style-type: none"> - Residents are often the first to file complaints in noise nuisance cases - Their responses to improved or worsened noise circumstances often determine how long the cases will last. • It was noted during one noise regulation workshop that relations between business and regulator are relatively good under the current regulatory system: <ul style="list-style-type: none"> - There was the feeling that they have enough tools at their disposal to work constructively with businesses and to reach desired outcomes.
<p>Conclusion</p>	<p>Participants at PPC workshops agreed with this hypothesis when working under the more flexible regulatory models (i.e. C, D)</p> <p>Participants at Packaging Waste workshops agreed with this hypothesis, especially in relation to compliant companies.</p> <p>Participants at Noise workshops disagreed with this hypothesis, suggesting that the simulated regime was likely to create barriers to relations between regulator and business.</p>

It is possible to distinguish between cases suitable for administrative penalties and those where criminal prosecution would be appropriate

<p>Agreed</p>	<ul style="list-style-type: none"> • A number of participants felt that it would be possible to distinguish between less serious offences, which they felt appropriate for the administrative penalty system and more serious cases involving material damage, major pollution, death (PPC) or fraud (packaging waste) which should be prosecuted criminally. • Other participants agreed conditionally <ul style="list-style-type: none"> - If it is clear that an offence has been committed
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	<ul style="list-style-type: none"> - If any intent to commit the offence has been identified • Some consequently argued that administrative penalties should only apply to non-complex, incontestable cases, such as technical or administrative breaches. • Most agreed that the use of an administrative penalty or criminal prosecution would depend on the nature of the offence and the impact of the offence.
Disagreed	<ul style="list-style-type: none"> • The reality on the ground reflected by a number of regulator participants is that it is often unclear that an offence has been committed. <ul style="list-style-type: none"> - It would therefore not be easy to know which path to choose under an administrative penalty system. • More than one of the regulator participants argued that they needed the discretion to increase or decrease the fine; they felt that overly rigid criteria and categorisations would cause more harm than good. • The additional point was made that it is not easy to distinguish between suitability for administrative penalties and criminal prosecution because the two approaches are part of the same enforcement continuum.
Additional point raised	<ul style="list-style-type: none"> • Given the limits of a three-hour simulation it is not surprising that some workshop participants were uncertain about this hypothesis. • More information about the investigative tools provided by an administrative penalty system would be required to make a decision. <ul style="list-style-type: none"> - For example, the ability to establish that a breach was intentional, elements of Alternative Dispute Resolution if part of the administrative penalties process, and penalties and tariffs available to the regulator. • For this hypothesis to be realised, criteria and guidance to distinguish between the criminal and non-criminal must be clear to both regulator and business
Conclusion	<p>Participants at PPC workshops agreed with this hypothesis in relation to non-complex, lower-level offending.</p> <p>Participants at Packaging Waste workshops strongly agreed with this hypothesis.</p> <p>Participants at Noise workshops disagreed with this hypothesis, pointing out that there are 'grey areas' in the area of noise regulation that administrative penalties would not help to clarify.</p>

The use of administrative penalties will reduce compliance costs and business overheads

<p>Agreed</p>	<ul style="list-style-type: none"> • Additional compliance costs and business overhead would not be introduced as a consequence of the administrative penalty system; there would potentially be a reduction in costs. • Incentives to comply would be an important element of this system: for example, <ul style="list-style-type: none"> - in the packaging waste regulatory area, high maximum fines were thought to be an incentive to register and comply and, ultimately, would reduce costs and overheads. • Participants felt reduced costs might not necessarily be evident to individual businesses, but would bring overall benefits to the different sectors. • Clear communication from regulators (letters, policies, expectations etc) would reduce complexity and the challenge of interpreting bureaucratic demands, thus saving time and money. If policies are 'more up front', this hypothesis will be realised.
<p>Disagreed</p>	<ul style="list-style-type: none"> • Other workshop participants felt that there would be no change in compliance costs and business overhead under a system of administrative penalties for those businesses which are already compliant. • The burden of administrative costs: <ul style="list-style-type: none"> - Regulators and businesses will still have to investigate alleged breaches under this system - The potential extra internal administrative costs involved in chasing non-compliers (for the regulator) might raise compliance costs for the entire business community. • A further tier of sanctions would not add anything to noise abatement orders, and ultimately prosecution, currently available.
<p>Additional points raised</p>	<ul style="list-style-type: none"> • Business representatives attending the packaging waste workshop which tested a civil version of administrative penalties were adamant that keeping cases out of the criminal courts would reduce costs: <ul style="list-style-type: none"> - They anticipated fewer legal fees involved for both business and regulator. • This was echoed by other participants in regulatory areas who considered that <ul style="list-style-type: none"> - The civil system would work more quickly than it does

	<p>currently.</p> <ul style="list-style-type: none"> - Even if a penalty is served, the financial demands of a criminal court case would be avoided. • The burden of legal costs: <ul style="list-style-type: none"> - If a regulator chooses to fine a business using the same burden of proof found in the current criminal court system, instead of serving a notice or warning, related legal costs might rise instead of fall. - If an administrative penalty is contested, the protracted negotiation might not produce any savings for either the business or for the regulator because of the need to refer to Finance or Legal Departments before or after the issuing of a penalty. - If – as tested in the civil regulatory model – new independent tribunals are created, a number of local authority officers felt that costs would increase. • Business representatives noted that if, as simulated, a matrix of fixed penalties are incorporated into the administrative penalty model it might result in the notices exceeding the costs of preventing any further nuisance, such as repairing noise making machinery, thus resulting in a double burden of cost. • Incentive to comply would be an important element of this system: <ul style="list-style-type: none"> - For example, if there were high maximum fines in the packaging waste regulatory area, they would act as an incentive to register and comply and, ultimately, reduce costs and overheads.
<p>Conclusion</p>	<p>Participants at PPC workshops disagreed with this hypothesis, noting that costs could potentially be increased.</p> <p>Participants at Packaging Waste workshops agreed with this hypothesis, largely because avoiding criminal court procedures were seen to benefit the entire sector and, ultimately, reduce compliance costs.</p> <p>Participants at Noise workshops disagreed with this hypothesis, noting that costs of compliance would not change under the simulated system.</p>

VII. Conclusion

Based on the evidence to emerge from the six simulation workshops, it appears that there could be a use for administrative penalties in one form or another in environmental regulation. However, the view of Henley Centre Headlight Vision is that, if policy makers decide to use administrative penalties, there are a number of important factors that need to be borne in mind before doing so. Here we refer to five key issues which, on the basis of our work, we believe need to be taken into account, and carefully considered, if administrative penalties are to be introduced:

- ***Administrative penalties might not be appropriate to resolve highly complex cases.***

When considering whether or not to introduce a system of administrative penalties, policy makers must distinguish between less serious or less complex offences for which administrative penalties would, in many cases, speed up the resolution of cases and reduce costs for all parties involved; and, in contrast, highly complex types of cases where administrative penalties would not meet these objectives. Policy makers should consider that administrative penalties might not be appropriate as regards more complicated cases which involve many competing factors, or those where evidence is more difficult to gather or open to dispute. The potential benefits of administrative penalties are negated if it is difficult to establish that an offence has or has not been committed in the first instance.

However, the application of administrative penalties might be advantageous in other instances. For example, output of the workshops on packaging waste suggests that administrative penalties could work well in many circumstances. This is probably the case because it was relatively straightforward to quantify factors such as costs avoided and gain from non-compliance. In contrast, under PPC regulation, lengthy procedures are often undergone to determine evidence of wrongdoing. This suggests that the administrative penalty route would be inappropriate for some alleged breaches. Similarly, when evidence gathered is based upon subjective assessments (as is sometimes the case when regulating noise nuisance), administrative penalties might not be useful.

- ***Any legislation introducing administrative penalties should give regulators the ability to tailor them to the circumstances of the particular case, but also ensure that administrative penalties are applied consistently.***

The workshops tested a range of models of administrative penalties, from highly formulaic, to flexible and adaptable. It was clear that, whilst the formulaic/inflexible versions of administrative penalties were easy to apply and efficient, the flexible versions were received more positively by representatives of business and enforcement bodies because of their ability to account for the

particular circumstances of offences committed. When determining a fine/penalty, the flexible models gave 'regulators' the ability to weigh the extent of environmental damage, the financial gain from non-compliance, the company's history of compliance, any need for restitution to communities affected, and the ability of a company to pay. Flexible versions of administrative penalties would provide regulators with effective tools for punishing offending companies in balanced and fair ways.

It is important, however, that policy makers anticipate one key pitfall involved in adopting flexible models of regulator-applied penalties: inconsistent regulation and enforcement across the UK and regulatory areas. If a flexible version of an administrative penalty regime is adopted, penalty criteria must be clear, transparent and, when drawn upon, well-documented.

- ***Any system of administrative penalties cannot replace the need for clear, transparent and ongoing communication between regulators and businesses, regardless of whether an offence has been committed.***

It is essential that communication between regulators and businesses is maintained during all stages of their relationship regardless of whether administrative penalties are introduced or not. A system of regulator-applied penalties should be understandable and plainly spelled out if introduced. If a breach is alleged, businesses should be fully aware of the 'rules of engagement' from the first point of contact, how the penalty regime operates, and their rights. Indeed, communication is an area for improvement regardless of enforcement system in place (i.e. whether administrative penalties are introduced or not).

- ***Policy makers should identify the consequences of administrative penalties for existing legal frameworks. They should also be clear about what administrative penalties would add to the current system of environmental regulation.***

It is possible that administrative penalties would complement current regulations by giving regulators more effective tools for working with both offending and complying businesses. It is important, however, that policy makers consider how the introduction of administrative penalties might affect or be affected by existing legal frameworks. There are potentially unexpected and unintended consequences of endowing regulators with new penalty powers. These consequences must be thoroughly anticipated.

For example, during workshops on Noise regulations, questions were raised as to what effect administrative penalties might have on existing powers of individuals to raise private prosecutions (EPA 1990, s82). Would these private powers be left in place, or would they be swept aside by new legislation? How could a system of administrative penalties preserve these rights?

In addition, in the Noise workshops, it became obvious that the use of administrative penalties could lead to confusion because domestic noise nuisances would (it was assumed for purposes of the workshops) continue to be regulated as they are currently, with ultimate use of criminal prosecution against non-compliance. Because domestic noise nuisances constitute the vast majority of noise nuisance cases, it is possible that the introduction of administrative penalties solely for business noise nuisance would complicate the work of Local Authority Environmental Health Practitioners (EHP).

In addition, policy makers should consider whether the powers regulators currently have at their disposal offer benefits similar to administrative penalties. For example, participants of PPC workshops noted that beneficial elements of the administrative penalties tested in the workshops are already operating (e.g. PPC regulators already engage in informal negotiation with business; business and regulator attempt to come to mutually beneficial conclusions; and both parties already engage in conversations about how best to approach breaches without going to court). Similarly, Local Authority EHPs have powers under the Clean Neighbourhoods and Environment Act 2005 to apply fixed penalties for businesses (and domestic premises) where those with intruder alarms in a designated area fail to register key-holder details with the local authority; soon, they will have powers of fixed penalties for night-time noise from licensed premises. Policy makers should consider how these processes work/do not work at present, what administrative penalties might add if anything to better use of existing frameworks (i.e. are administrative penalties necessary given existing tools?), and how productive elements of existing business-regulator relations might be built into a new regime.

- ***A system of administrative penalties should offer the protections provided by the courts as a last resort.***

There are three factors which must be taken into account if an administrative penalty regime were to leave courts in place. First, one side effect of endowing regulators with the authority to penalise businesses might be a breakdown in communication between the two parties if business representatives were interviewed under caution or regulators used the court as a knee-jerk reaction to difficult cases. In that case, the business representatives could 'clam up' in the face of a regulator and withdraw from the administrative penalty procedure. As noted above, policy makers must emphasise the importance of open communication between regulator and business. Moreover, if administrative penalties are applied primarily to low-level 'paper offences', the benefits of working with the regulator and avoiding the costs of court will be evident to business communities.

Second, it is possible that some companies might happily agree to pay/serve an administrative penalty when criminal prosecution could have been possible. Policy makers should work to remove perverse incentives from the system. Companies should not be allowed to avoid court and accept a lesser civil penalty than they might otherwise deserve.

Inversely, some companies might insist on prosecution because they believe they will receive a smaller fine in court than they would have from a regulator. Any system of administrative penalties should ensure that civil and court penalties are coordinated to remove the possibility of businesses admitting or denying guilt based on a calculation of whether a lower fine would be awarded by the court than they would be liable for as an administrative fine. In addition, policy makers should ensure that benefits of a system of administrative penalties are clear to regulated businesses: i.e. speedier resolution of cases and reduced costs for all parties involved.

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, as above, 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.

To underline the importance that policy-makers should attach to these five key considerations, we note that the simulations produced markedly different results in different regulatory areas. In this exercise, the packaging waste workshops indicated that new variable administrative penalties could be beneficial, while participants in the noise simulations were sceptical about their application. A new sanctions regime might have substantially varying consequences in different regulatory areas.

In conclusion, Henley Centre Headlight Vision believe that there is use for administrative penalties in environmental regulation, and that the potential regime could offer benefits to all parties involved. In order to receive the most benefit, however, policy makers should bear the above points in mind and proceed with caution.

Appendix A: Workshop agenda

09.30 am - 10.00am	Refreshments and registration
10.00 am - 10.10am	Welcome to workshop from DEFRA
10.10 am – 10.40 am	Presentation by HCHLV: Introduction to workshop, house rules, participant introduction
10.40 am – 11.30 am	Business Round 1: Groups A, B, C, D
11.30 am – 12:10 pm	Regulator Round 1: Groups A, B, C, D
12:10 pm – 12:15 pm	Business Round 2: Groups A, B, C, D
12:15 pm – 12:25 pm	Round Room 1: Status Check (in role)
12:25 pm – 12:45 pm	Business Round 2: Groups A, B, C, D (continued)
12:45 pm – 1 pm	Regulator Round 2: Groups A, B, C, D
1 pm – 1:40 pm	LUNCH
1:40 pm – 2:25 pm	In role as regulator: round-room establishing where cases finished and what loose ends there still are.
2:25 pm – 3:05 pm	Out of role: reflect on each of the 4 regulatory models
3:05 pm – 3:15 pm	Short break
3:15 pm – 3:30 pm	<p>Analysis of hypotheses</p> <p>Participants work in pairs and discuss:</p> <ol style="list-style-type: none"> 1. Which of the hypotheses seems most likely to be true 2. Which seems likely to go either way, and why 3. Which seems likely to be untrue, and why
3:30 pm – 4:30 pm	Review output from discussions about hypotheses
4:30 pm	Close and thanks

Appendix B: Current background to regulatory areas

PPC

The IPPC system, set out in the Pollution Prevention and Control (England and Wales) Regulations 2000 (the PPC Regulations), applies an integrated environmental approach to the regulation of certain industrial activities and implements the European Community Directive on Integrated Pollution Prevention and Control (96/61/EC). The primary aim of the IPPC Directive is to ensure a high level of environmental protection, and to prevent, and – where that is not practicable – to reduce emissions to acceptable levels.

Regulators must set permit conditions which are based on the use of the 'Best Available Techniques' (BAT), which balances the cost to the operator against benefits to the environment. Regulators are required to set permit conditions covering potential pollution of air, land and water. The PPC Regulations also include provisions relating to energy efficiency, site restoration, waste minimization and accident prevention.

The PPC Regulations apply to a range of activities, including the chemicals industry, power generation, some components of the waste treatment industry (including incineration and landfill), food and drink manufacturers and large-scale intensive livestock production (pigs and poultry). Since 31st October 2000, any new installations need a PPC permit. Operators of existing installations are required to apply for a PPC permit sector by sector on a timetable extending to early 2007.

Some 4,500 installations in England and Wales are covered by IPPC. For all but about 500 of these, the regulator is the Environment Agency, but the remainder are regulated by local authorities, largely in order to preserve continuity with previous regulatory arrangements. The regulators have extensive powers available to them to enforce permit conditions and other requirements of the PPC Regulations, including powers to issue improvement and 'stop' notices, powers to require remediation of pollution and powers to initiate criminal proceedings in respect of any offence specified in the PPC Regulations. The exercise of these improvement, 'stop' or remediation powers can often have serious financial consequences for recipients.

PACKAGING WASTE

The Packaging Regulations transpose the European Parliament and Council Directive 94/62/EC on Packaging and Packaging Waste (as amended by Directive 2004/12/EC) ('the Directive'). The aim of the Directive is to harmonise the management of packaging waste in the EC and tackle the impact that packaging and packaging waste have on the environment. Although the primary objective is to increase the recovery and recycling of packaging waste in a consistent way in all Member States of the EC (so as to avoid barriers to trade), priority is also given to reducing the amount of packaging used and the

reuse of packaging. The Directive sets Member States mandatory recovery and recycling targets for packaging waste, the first of which were to be met in 2001 and the next targets need to be met by 31 December 2008.

The Packaging Regulations require certain businesses (e.g. businesses that handle more than 50 tonnes of packaging per annum and have a turnover in excess of £2 million) to register with the appropriate regulator (either the Environment Agency (England and Wales) or the Scottish Environment Protection Agency (Scotland)). The Packaging Regulations do not target specific sectors but may apply to any business that handles packaging. Following registration the key requirement for these businesses is that they recover and recycle specified tonnages of packaging waste each year. They then must certify that this recovery and recycling has been achieved. Businesses may either register and comply with their requirements independently or through a packaging compliance scheme.

Failure to comply with many of the requirements in the Packaging Regulations is a criminal offence. In particular a business that falls under the Packaging Regulations commits an offence if it fails to register with the appropriate regulator or fails to provide the appropriate evidence that it has met its recovery and recycling obligations. There are no defences for failing to meet these requirements.

NOISE

Noise is often an accepted part of commercial activity, but when such noise becomes a nuisance to those living in the area there are steps that can be taken by the local authority against those responsible for the noise. Local authorities have a duty under section 79 of the Environmental Protection Act 1990 to inspect their area from time to time for occurrences of noise nuisance, and to take reasonably practicable steps to investigate complaints of noise emitted from premises so as to be prejudicial to health or a nuisance. If satisfied that a noise amounts to, or is likely to be, a statutory nuisance (in general terms, a nuisance to the average reasonable person living in the area), the local authority shall serve an abatement notice under section 80 requiring the abatement of the nuisance or the restriction of its occurrence or recurrence. The abatement notice can also require the execution of works or other steps necessary. Those against whom an abatement notice has been served have twenty-one days in which to appeal against the notice. If an appeal is not made, or if it is unsuccessful, the abatement notice will remain in force.

It is a criminal offence not to comply with an abatement notice. There is a fine upon summary conviction of up to £20,000 for industrial, trade and business premises. Section 82 of the Environmental Protection Act 1990 enables individuals to take private nuisance action through the magistrates' court.

Commercial premises regulated under Pollution Prevention and Control regulations are not regulated under sections 79 and 80 of the Environmental

Protection Act 1990. Most other premises are regulated under section 79 and 80, including licensed premises, retail premises and some industrial premises.

Most noise from construction sites is regulated under sections 60 and 61 of the Control of Pollution Act 1974. A local authority can serve a notice under section 60 specifying what plant or machinery may be used, the hours in which works can be carried out and the levels of noise that are acceptable. Section 61 enables those intending to carry out works to apply for consent from the local authority, stating the nature of the works and the steps taken to minimise noise. It is a criminal offence to contravene a section 60 or 61 notice without reasonable excuse, with a penalty upon summary conviction of up to £5,000 together with a fine not exceeding £50 for each day on which the offence continues.