

DOC 5

REVIEW OF FIXED PENALTY NOTICES

Background

1. At its last meeting, the Cabinet Sub-Committee on Justice asked officials to conduct a review of the fixed penalties regime within the coronavirus regulations, and to consider whether changes should be made to existing Covid-related fixed penalties, and how to set any new fixed penalties.
2. Since that meeting, the regulations have changed significantly both on entry to and departure from the firebreak, complicating the task of reviewing the regime and evaluating its impact. However, given the desire to maintain a more stable set of rules, it is now opportune to complete work on the review. Any regulatory changes agreed by ministers can be delivered through the review of the main Covid regulations that is due by 19 November and the next subsequent review of the international travel regulations.

Scope and methodology

3. The scope of the review was limited, to ensure that it remained self-contained. We have not reviewed systematically the scope of what is an offence, who the enforcing authority is or how they are enforced, although questions of this nature inevitably arose and we do now intend to consider some of these questions. The review also did not consider powers of enforcing authorities, but this was taken forward in parallel and reflected in the most recent set of regulations.
4. The review has been conducted through examination of available statistical evidence, some collection of stakeholder views and discussion between officials. However, changes to the scope of offences and limitations or inconsistencies in how the issuing of FPNs is recorded means that the evidential picture is inevitably limited and inconclusive. In particular, there is little basis on which to disentangle the impact on behaviour of the fact an offence exists from the impact of the level of the penalty for that offence.
5. The fixed penalties considered in this review do not only include those within the main coronavirus regulations, but also include those in the international travel regulations and the regulations relating to information which must be given to international travellers. This is all of the FPNs that have been made for purposes of protection against coronavirus.

Current position

6. Fixed penalty notices (FPNs) operate by enforcement officers (which in most circumstances will be a police officer or a local authority representative) offering them to individuals or businesses who they believe to be in breach of the regulations. Where individuals or businesses are offered a Fixed Penalty Notice, they have the option of accepting it or not. If they do not accept it, criminal proceedings will be issued. While this process offers the individual a chance to make the case that the Notice should not have been issued, ultimately before a prosecutor, it is unlikely that individuals will receive legally aided representation

before a court and the potential financial penalty before a court is unlimited. Individuals who are unsuccessful in court will also receive a criminal record. The deterrents to challenging a Fixed Penalty Notice are therefore very high.

7. Enforcement officers are not obligated to issue Fixed Penalty Notices, and where they consider it is not the most appropriate tool (for example because the offending is particularly serious and requires a greater penalty) they should issue criminal proceedings directly. However, if they do decide to issue Fixed Penalty Notices, there is no discretion for police as to the value of the Notice. All of this reflects the category of case for which FPNs have historically been used (motoring offences, fare evasion, littering, graffiti and similar).
8. In normal circumstances, FPNs would not be used for at least some of the type of offences that exist under Covid rules. Fundamentally, FPNs for things that are not directly observable like speeding or littering go against the basic idea of the justice system that those accused of wrongdoing are entitled to representation and a free and impartial tribunal at which to state their case. Although that option is available, the accused has to make a risk-based judgement within 28 days on whether to take their chances in court or simply paying a penalty, even if the person feels that they would not be found guilty beyond reasonable doubt.
9. However, these are not normal circumstances, and all four UK nations rely heavily on fixed penalty notices for the enforcement of their Covid regulations. Over time, Scotland has become the most reluctant to impose large penalties, with only one penalty set above the baseline value of £60, and that penalty (for breach of quarantine requirements for international travellers) set at £480, less than half the sum for England or Wales. A number of offences punishable by FPN in England and Wales are punishable only through the courts in Scotland.
10. For comparison, outside the Covid context, the highest value FPN we have identified which appears to be aimed primarily at private individuals is £300 for driving without insurance, and the large majority are valued at £100 or less. The highest value FPN we have identified for businesses is £500, for licensed premises exceeding permitted noise levels, with no others identified of above £300. All sums provided are for first offences, and some rise with repeated offending.
11. Ministers are aware that the large majority of interactions with enforcement officers do not result in enforcement action being taken. Police operate a “4Es approach” where they seek to engage, explain and encourage compliance before if necessary moving to enforcement action. For the purposes of this review it is assumed that this would continue. Similarly, local authority enforcement officers will attempt informal engagement and warnings before moving to issue improvement or closure notices to premises or FPNs.

Key findings

12. A number of concerns have been expressed about the operation of the current regime, including:
 - a. grounds for questioning whether some of the fixed penalties have been applied correctly within the law. Two separate CPS reviews across England and Wales found that 6% of cases under the regulations had been incorrectly

charged even where they had led to convictions in court – so that is in circumstances where a prosecutor had agreed to criminal proceedings being issued, and there had been some judicial involvement. It is highly likely that without those safeguards the proportion of FPNs issued in error is considerably higher. The main difficulty appears to have been the need for enforcement officers to make judgements about whether individuals have “reasonable excuses” in particular circumstances, which is not a judgement that has to be made in most other instances where FPNs are routinely used.

- b. grounds for concern about the extent of there being disparities in the distribution of FPNs based on protected characteristics - for example:
 - i. 10% of FPNs in Wales up to 22 September were issued to people identifying as Asian or Chinese, as opposed to the groups representing around 2% of the population;
 - ii. up to 22 September, those aged below 35 received 61% of all FPNs in Wales;
 - iii. up to 22 September, 76% of FPN's issued in Wales were to males
 - iv. while we do not have a comparable breakdown for Wales, in Scotland, figures revealed at the latest board meeting of the Scottish Police Authority showed people living in the most deprived areas were up to 12 times more likely to be given fines for breaking Covid restrictions.

It is not clear what has driven these disparities or whether there are additional disparities we do not know about, given the limited data. They may reflect over-policing or over-enforcement of certain groups or settings. Or they may reflect particular patterns of behaviour in certain groups. Even if the latter is the case, it does not necessarily mean that other groups are more compliant in comparison. Other groups may, for example, have been non-compliant in areas where enforcement is less likely to be taken.

- c. for many offences it is very hard to determine levels of compliance, let alone whether the level of fixed penalties has a deterrent effect; and
 - d. there are some areas where there is little obvious link between the seriousness of the potential impact of behaviour and the level of penalty for that behaviour or the likelihood of being penalised. The majority of all FPNs issued in Wales up to 22 September were for breaches of travel restrictions, whereas the greatest cause of the spread of Covid in that time appears to have been indoor gatherings. This gives rise to questions as to whether enforcement may have focused where it is easier to take action.
13. However, there were also good reasons why the fixed penalty regime was developed as it was, including:
- a. to allow rapid responses to inappropriate behaviours in situations where needed – alternate approaches do not allow “on the spot” consequences;
 - b. alignment with other UK nations, which allows for more effective communication and can prevent undesired behaviours from moving into Wales from other parts of the UK (such as was the case with unlicensed music events);

- c. Where there is evidence to suggest the level of penalty will have an impact on preventing offending, this should be considered (for example because disparity across the border could lead to displacement of activity from England into Wales)
- d. Where it is possible to do so in conjunction with the above, there should be the greatest possible consistency between levels of penalties across different offences.

Recommendations

Areas for proposed regulatory action

(a) Offence of organising or facilitating an unlicensed music event

18. When the new criminal offence for people organising or facilitating an unlicensed music event was designed in August, police forces in Wales asked the Government to take the proactive step of considering the stance taken by UK Government and providing parity for the four police forces in Wales with their English counterparts for those facilitating or organising unlicensed music events. They requested the new offence came into force for the August Bank Holiday, as this is a notoriously busy time for such events, and that it provide for a fixed penalty notice of £10,000 to be issued in respect of the new offence. This was consistent with the position for a similar offence in England.
19. Ministers agreed that the urgent need to act, and the high risk of displacing activity which imposes a significant risk of transmission from England into Wales in the absence of complete parity of penalties, left no alternative but to adopt the approach requested. Police report that the deterrent has been useful, although usage of the FPN itself is rare in both England and Wales. As of 28 October, 66 such FPNs had been issued in England (where the relevant offence is much broader) and 2 in Wales.
20. While organising music events of this kind remains high risk and to be strongly discouraged, £10,000 remains an exceptionally high sum for any individual or business to be asked to pay without having gone through a court process. During the last week, the issuing of FPNs for this sum was briefly suspended by police owing to courts finding that in England the penalty had been unreasonably high in many of the instances where it was used, although as set out above the relevant offence is broader in England and the suspension has now been lifted. There are no FPNs available for this offence in Scotland and all cases have to be pursued through criminal proceedings.
21. Police report that “the Policing in Wales view remains that until the current public health crisis has abated, the scope to utilise the £10,000 fine for Unlicensed Music Events/ Raves should remain both as a deterrent and as one means of dealing with these offences whilst not resorting to other criminal justice routes”. It is worth noting in this context that the 2 people issued FPNs in Wales have both opted to contest their cases in court, which goes against the suggestion that the existence of the FPN is reducing pressure on the courts.

22. **On balance, we recommend the removal of the ability to award a Fixed Penalty Notice for this offence**, and communicating to the police that we consider these offences are so serious that in some circumstances they do warrant prosecution, notwithstanding the operational imperative to minimise those circumstances. If handled correctly, the prospect of prosecution and an unlimited fine should be at least as effective a deterrent as a fixed penalty.

(b) Offences around failure to self-isolate

23. The second area in which penalties are significantly higher is in relation to failing to self-isolate when entering Wales from a non-exempt country outside the UK (referred to hereafter as “quarantine requirements”). The fixed penalty for this is £1000. In this instance, alongside the questions about whether it is legitimate for any individual to be under pressure to pay such a large sum without the protections of the legal system, there are two further questions of fairness:

- i. Whether an enforcement officer will really be in a place to judge on the spot whether an individual had a reasonable excuse to leave the home (see discussion at para 12a above);
- ii. Whether it is fair to ask individuals who statistically are unlikely to have coronavirus to pay £1000, when those who have been told to isolate by NHS TTP are far more likely to have coronavirus and would only have to pay £60 if they failed to self-isolate

24. Options for addressing this include:

- a. Removing the disparity. This in turn could be done by
 - i. Increasing the penalty for confirmed/suspected Covid cases to £1000;
 - ii. Reducing the penalty for international travellers to £60; or
 - iii. Setting penalties for both at some intermediate point
- b. Tolerating the disparity as it stands.
- c. Reducing the disparity (recommended)
- d. Creating a further offence for “reckless” breaches of the self-isolation requirements, with a higher value FPN that equates more closely

25. Options a(i) or (iii) are not recommended primarily because of the specific considerations around the penalty for those who fail to self-isolate after testing positive for coronavirus. Ministers have previously concluded that the paramount consideration in setting a penalty for this offence is to ensure the penalty does not inadvertently discourage symptomatic people from getting tested. Assurances were also given to certain groups such as travellers as to how the information they provided to contact tracers would be used. Given that this offence has only recently been created, there is as yet no evidence as to whether its creation is affecting people’s willingness to be tested, so it is not proposed to change the penalty for confirmed or suspected Covid cases who fail to isolate. Instead we would propose to keep the level of this penalty under review.