

EXPLANATORY MEMORANDUM TO
THE TRADE UNION (POWER OF THE CERTIFICATION OFFICER TO IMPOSE
FINANCIAL PENALTIES) REGULATIONS 2022

2022 No. XXXX

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 To implement section 256D of, and Schedule A4 to, the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”), as inserted by section 19 of the Trade Union Act 2016 (“the 2016 Act”), which allows the Certification Officer to impose financial penalties on trade unions and employers’ associations for non-compliance with statutory requirements. The instrument sets the level of financial penalty for obligation breached.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is Great Britain.
4.2 The territorial application of this instrument is Great Britain.

5. European Convention on Human Rights

- 5.1 The Minister for Small Business, Consumers and Labour Markets has made the following statement regarding Human Rights:

“In my view the provisions of the Trade Union (Power of the Certification Officer to Impose Financial Penalties) Regulations 2022 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The Certification Officer is responsible for regulating trade unions and employers’ associations. Functions include maintaining a list of trade unions and employers’ associations and determining complaints concerning trade union elections, certain other ballots and certain breaches of trade union rules.
- 6.2 As the law currently stands, where the Certification Officer determines that there has been a breach of a statutory requirement, they only have the power to make a declaration and an enforcement order requiring an organisation to take certain steps. If an order is not complied with then it can be enforced in the same way as a court order. The Certification Officer currently has no powers to impose any form of financial sanctions.

- 6.3 Section 256D of, and Schedule A4 to, the 1992 Act will give the Certification Officer the power to impose financial penalties where they have the power to issue an enforcement order under a number of provisions specified in Schedule A4. The Trade Union (Power of the Certification Officer to Impose Financial Penalties) Regulations 2022 set out the minimum and maximum financial penalty amounts that may be specified by the Certification Officer in any penalty order, or conditional penalty order, by reference both to the type of obligation breached and, in the case of an organisation, the number of members it has.

7. Policy background

What is being done and why?

- 7.1 The Trade Union Act 2016 establishes a fairer framework for industrial relations through, in part, more effective regulation of trade unions through their own regulator, the Certification Officer. The overall aim of the reforms in the 2016 Act is to modernise the regulatory framework of trade unions by giving the Certification Officer powers and funding in line with other regulators.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.2 Currently, where the Certification Officer determines that there has been a breach of a statutory requirement, they only have the power to make a declaration and an enforcement order requiring an organisation to take certain steps. If an order is not complied with then it can be enforced in the same way as a court order. The Certification Officer currently has no powers to impose any form of financial sanctions.

Why is it being changed?

- 7.3 The enhanced investigatory and enforcement powers under the Trade Union Act 2016 will enable the Certification Officer to act without having to wait for a complaint from a trade union member. Where a breach has occurred, the Certification Officer will have the power to impose financial penalties to secure rapid compliance with statutory requirements. These enhanced powers for the Certification Officer are comparable with those relating to many other regulators. The investigatory powers will be commenced by commencement regulations, at the same time as the financial penalties.

What will it now do?

- 7.4 The Trade Union (Power of the Certification Officer to Impose Financial Penalties) Regulations 2022 set penalty maxima according to the severity of the obligation that has been breached, as well as a minimum penalty of £200.
- 7.5 The most important statutory obligations required of trade unions relate to political funding, the proper conduct of union elections and personnel propriety considerations. For example, it is important that unions ensure that no one who has a criminal record serves in a senior position in that union, and that political funds are managed properly and transparently. For such breaches a financial penalty of between £200 and £20,000 (a “Level 1” maximum) can be imposed.

- 7.6 For breaches of statutory obligations which involve failure of governance, such as failing to keep a membership register up to date, a financial penalty of between £200 and £10,000 (a “Level 2” maximum) is set.
- 7.7 The third category of obligation applies to requirements to provide information, and compliance with investigatory requirements and internal union rules. Breaches of these obligations will incur a financial penalty of between £200 and £5,000 (a “Level 3” maximum).
- 7.8 The regulations also provide for the above maxima to be decreased by 50% for unions and employers’ associations whose membership is under 100,000. The assessment of the size of a union or employers’ association will normally be based on the membership figures provided in the latest annual return to the Certification Officer. This will ensure that small and medium sized unions will pay no more than £10,000, £5,000 or £2,500 respectively, depending on the type of obligation breached.
- 7.9 In recognition of the strong views expressed during the consultation that the charging of interest may adversely affect small unions, the government has decided that no interest is charged for late payment under these Regulations.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

- 9.1 The Department for Business, Energy and Industrial Strategy does not intend to consolidate this legislation.

10. Consultation outcome

- 10.1 The Department for Business, Energy and Industrial Strategy carried out a public consultation on the Certification Officer’s enforcement powers from 9 April to 21 May 2017. 15 responses were received, from the Trades Union Congress (TUC) and larger trade unions. No small unions, businesses or other organisations responded to the consultation.
- 10.2 Unions set out their strong objections to the reforms to the role of the Certification Officer as a whole, and to the proposed financial penalties specifically. However, there was support for a tiered approach setting the level of penalty by type of obligation breached.
- 10.3 The government’s response to the consultation, which has been published on gov.uk, contains a fuller analysis of responses received and the government’s consideration of the suggestions made¹.

11. Guidance

- 11.1 It will be for the Certification Officer to produce guidance on the financial penalties.

¹ <https://www.gov.uk/government/consultations/trade-union-act-2016-consultation-on-the-certification-officers-enforcement-powers>

12. Impact

- 12.1 The impact on business, charities or voluntary bodies of the financial penalties is estimated at £0.04 million over 10 years, primarily due to familiarisation of trade unions and employers' associations with the regulations. Penalties will only be issued to unions and employers' associations that are found to be non-compliant with statutory obligations and union rules.
- 12.2 The impact on the public sector involves some implementation costs and ongoing costs from administering the financial penalties scheme. In the Trade Union Act Implementation Impact Assessment (published in January 2017) it was estimated that the cost to the government of implementing the range of reforms to the Certification Officer contained in the Trade Union Act 2016 was around £110,000 transition costs, with estimated ongoing costs of £50,000. However, recent estimates from the Certification Officer indicate approximately £35,000 transition costs and between £51,000 and £90,000 ongoing costs due to additional resource. The proportion of these costs relating to the implementation of financial penalties is estimated to be £6,000 transitional costs and £1,000 annual ongoing costs.
- 12.3 The estimated annual operating costs of the Certification Office once the 2016 Act is fully implemented is £1,180,000, of which an estimated £1,150,000 is expected to be levied from trade unions and employers' associations. The remainder of the annual budget, including variable external legal costs and appointment of external inspectors, will continue be funded by the government.
- 12.4 An Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses or small trade unions.
- 13.2 To minimise the impact of the requirements on small organisations, the financial penalty maxima will be reduced by 50% for organisations with fewer than 100,000 members.

14. Monitoring & review

- 14.1 During the passage of the 2016 Act and to address concerns in Parliament at the risk of over-zealous regulation of trade unions, the government committed to keep under review the Certification Officer's powers to see how they work in practice.
- 14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Minister for Small Business, Consumers and Labour Markets has made the following statement:

“It is not appropriate in the circumstances to make provision for review by the Secretary of State in the Trade Union (Power of the Certification Officer to Impose Financial Penalties) Regulations 2022. This is because the costs of monitoring would be considered disproportionate to the relatively limited impact of the regulations.”

15. Contact

- 15.1 Laurence Evans or Laura Bealin-Kelly at the Department for Business, Energy and Industrial Strategy, Telephone: 0207 215 6086 or 0207 215 8258, Email laurence.evans@beis.gov.uk or laura.bealin-kelly@beis.gov.uk, can be contacted with any queries regarding the instrument.
- 15.2 James Stevens, Deputy Director for Employment Rights and Enforcement, Labour Markets Directorate at the Department of Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Paul Scully MP, Minister for Small Business, Consumers and Labour Markets at the Department of Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.