



Department for
Business, Energy
& Industrial Strategy

TRADE UNION ACT 2016

Consultation on the Certification Officer's
enforcement powers

April 2017

TRADE UNION ACT 2016

Consultation on the Certification Officer's enforcement powers

The consultation is on the BEIS section of GOV.UK here:

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

Trade Union Act – Financial Penalties

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Foreword from the Minister of State for Small Business, Consumers and Corporate Responsibility

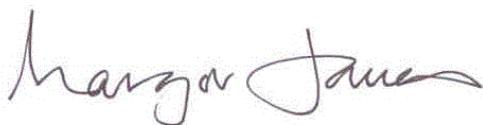
The Trade Union Act 2016 – financial penalties

Positive industrial relations are the backbone of a productive economy where people can go about their business and get on with their lives without unjustified disruption. The Government believes that trade unions can play a constructive role in maintaining such relations. The Government is equally clear that as far as industrial action is concerned, modernising reforms were required to ensure strikes only happen as a result of a clear, positive decision by union members entitled to vote. This is why we brought forward the Trade Union Act 2016.

The Trade Union Act 2016 establishes a fairer framework for all those with an interest in positive industrial relations: workers, employers and trade unions. The framework includes more robust and effective regulation of trade unions through their own regulatory body, the Certification Officer who is responsible for statutory functions relating to trade unions and employers' associations. The aim of this element of the reforms is to modernise the regulatory framework, which has not been reformed for some time and is out of line with regulation of other sectors. For example, in relation to many other sectors, it is taken for granted that regulators can initiate pro-active investigations and issue financial penalties. We are extending this approach to the Certification Officer.

The powers available to the Certification Officer have been significantly enhanced through the Trade Union Act and include greater investigatory powers and the power to introduce a partial levy on trade unions and employer associations. During passage of the Trade Union Act in Parliament, we committed to a penalty maximum below the £20,000 limit on the face of the Act to provide more scope for a penalty imposed to be commensurate with the type of breach. We also committed to a further reduction in penalties according to the size of union. This consultation seeks to engage on this detail as we implement the reforms.

I would welcome views from trade unions, employer associations and other interested organisations and individuals on our proposals for the implementation of the financial penalties regime.



Margot James, MP
Minister of State for Small Business, Consumers and Corporate Responsibility

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General information

Purpose of this consultation

The Government is consulting on the detail of our proposed implementation of the financial penalties regime under the Trade Union Act. We welcome views from unions, employer associations, and other interested organisations and individuals on our proposals.

Issued: 9 April 2017

Respond by: 21 May 2017

Enquiries to:

Sponsorship and Trade Union Reform Team
Department for Business, Energy & Industrial Strategy,
3rd Floor, Abbey 1
1 Victoria Street,
London, SW1H 0ET
Tel: 020 7215 6086
Email: tufinancialpenalties@beis.gov.uk

Consultation reference: Trade Union Act 2016: Consultation on the Certification Officer's enforcement powers.

Territorial extent:

England, Scotland and Wales.

How to respond

Your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome.

You can complete your response online through: [BEIS citizenspace](#)

Alternatively, you can complete the separate consultation response form (Word) available on the [GOV.UK consultation](#) and email or post it to the address above.

Additional copies:

You may make copies of this document without seeking permission. An [electronic version is available on GOV.UK](#).

No hardcopies of this document are available.

Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation (primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004).

If you want information that you provide to be treated as confidential please say so clearly in writing when you send your response to the consultation. It would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded by us as a confidentiality request.

We will summarise all responses and place this summary on the [GOV.UK consultation page](#). This summary will include a list of names or organisations that responded but not people's personal names, addresses or other contact details.

Quality assurance

This consultation has been carried out in accordance with the [Government's Consultation Principles](#).

If you have any complaints about the consultation process (as opposed to comments about the issues which are the subject of the consultation) please address them to:

Email: enquiries@beis.gov.uk

Executive Summary

1. The Trade Union Act (“the Act”) received Royal Assent on 4th May 2016. The Department for Business, Energy and Industrial Strategy is now in the process of implementing the provisions. This consultation seeks your views on the Government’s proposals for the implementation of Section 19 of the Act which gives the Certification Officer the power to impose financial penalties on unions and employer associations for non-compliance with statutory requirements. The power for the Certification Officer to impose financial penalties will apply where the Certification Officer has the power to issue an enforcement order. Enforcement orders (and therefore financial penalties also) may, depending on the circumstances, be issued against trade unions, federated unions, employer associations and federated employer associations.
2. We have set out below our proposals for the implementation of the financial penalties regime. A summary is provided at **Annex A**. A copy of the draft implementing regulations is at **Annex B**. **Annex C** sets out the legislative provisions in the Trade Union Act 2016 in relation to financial penalties.
3. We are consulting on the detail of how the proposed financial penalties regime will operate and we would welcome your views. Specifically, we are seeking views on whether:
 - the proposed approach to set the level of financial penalty by type of obligation breached is appropriate;
 - the maximum levels by type of obligation breached are appropriate; and
 - the proposal to reduce the penalty maxima by 50% for unions and employer associations whose membership size is less than 100,000 is appropriate.
4. A **list of consultation questions** is at page 11.

Proposals for the implementation of financial penalties regime

Scope of regulations

5. The Certification Officer is responsible for statutory functions relating to trade unions and employers' associations. This includes taking appropriate action if a trade union operates in breach of its statutory obligations. The Trade Union Act 2016 provides the Certification Officer with an option of imposing a financial penalty on the specific union.
6. The power to impose financial penalties will apply where the Certification Officer has the power to issue an enforcement order. Enforcement orders (and therefore financial penalties also) may, depending on the circumstances, be issued against trade unions, federated unions, employer associations and federated employer associations.
7. Section 19 and Schedule 3 of the Act¹ give Ministers the power to bring forward implementing regulations to set a maximum and minimum level of financial penalties that may be imposed by the Certification Officer. The level of penalty cannot exceed a maximum of £20,000 or be less than a minimum of £200 as set out in the Act.
8. The regulations may also:
 - set different penalty amounts depending on membership size, or for different types of obligation breached; and
 - provide for additional grounds of appeal², discounts for early payment, payment of interest or financial penalties for late payment, and enforcement of financial penalties.
9. The Certification Officer is not obliged to issue a financial penalty. He may decide that an enforcement order alone is sufficient where a breach is found, or he may choose to issue a conditional financial penalty that will require unions to take certain steps within a certain timescale to avoid a financial penalty being imposed.
10. In practice, in all but the most extreme cases, the financial penalties issued are likely to be less than the maxima set out below because the Certification Officer will have the discretion to impose an appropriate penalty depending on the circumstances of the case. He will take into account both aggravating and mitigating factors. Aggravating factors may include wilful non-compliance with statutory requirements, including fraudulent activity, for example in relation to statutory political fund requirements or the conduct of union elections. Mitigating factors may include a genuine administrative error or oversight, prompt compliance with investigatory requirements or prompt acknowledgement or

¹ The provisions regarding financial penalties, including the power to make regulations, are in Schedule A4 to the Trade Union and Labour Relations (Consolidation Act) 1992, as will be inserted by section 19 and Schedule 3 to the Trade Union Act 2016.

² The Act provides that a person may appeal a decision of the Certification Officer to issue a financial penalty, or the amount of the penalty, to the Employment Appeals Tribunal on the grounds that (a) it was based on an error of fact, (b) it was wrong in law, or (c) it was unreasonable.

rectification of a breach. However, it will be for the Certification Officer to determine what these aggravating and mitigating factors are.

11. In exercising his discretion, the Certification Officer will be independent of Government. Section 16 of the Act confirms that the Certification Officer will '*not be subject to directions of any kind from any Minister of the Crown as to the manner in which he is to exercise his functions.*'
12. The Act provides that a person may appeal a decision of the Certification Officer to issue a financial penalty, or the amount of the penalty, to the Employment Appeals Tribunal. This can be on the grounds that: (a) it was based on an error of fact; (b) it was wrong in law; or (c) it was unreasonable.

Type of obligation breached

13. The Government's view is that the maximum amount of penalty should take account of the severity of the obligation that has been breached. We have reviewed the scope of the obligations and categorised them into three broad groups where the obligations breached are of similar severity. We propose to set different penalty maxima for each of these three groups that may be issued by the Certification Officer when imposing variable penalties. The minimum penalty will be the same for each group.
14. Amongst 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. The Government, which is committed to stamping out electoral fraud, also attaches considerable importance to the proper conduct of union elections.
15. These obligations are considered the most severe if breached. For such breaches a financial penalty of between **£200** and **£20,000** (a "Level 1" maximum) can be imposed. The specific obligations are:
 - duty under Section 45(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") to ensure senior positions are not held by an individual with a criminal record;
 - requirements under Section 46 of the 1992 Act about elections for certain positions;
 - restriction under Section 71 of the 1992 Act on applying a union's funds in the furtherance of political objects;
 - rules as to ballots on political resolutions under Section 74 of the 1992 Act; and
 - duty under Section 82 of the 1992 Act to comply with political fund rules.
16. The Government believes a lower Level 2 penalty is appropriate for breaches of statutory obligations which involve failure of governance. These are important obligations but a breach is arguably not as serious as breaches of political funding, the conduct of union elections and personnel propriety issues. Our proposal is that a financial penalty of between **£200** and **£10,000** (a "Level 2" maximum) is set for breaches of:

- duty under Section 24 of the 1992 Act to keep the membership register up to date.
17. The third category of obligation applies to requirements to provide information, and compliance with investigatory requirements and internal union rules. Our proposal is that breaches of these obligations should incur a financial penalty between of **£200** and **£5,000** (a “Level 3” maximum). The specific obligations are:
- duty to comply with a request under Section 30 of the 1992 Act by a member for access to accounting records;
 - requirements under Sections 32ZA and 32ZB of the 1992 Act to provide details of industrial action, or political fund expenditure, in the annual return;
 - internal union rules on certain matters listed in Section 108A(2) of the 1992 Act; and
 - duty to comply with investigatory requirements (set out in paragraphs 2 and 3 of Schedule 1 of the Trade Union Act 2016).

Membership size of organisation

18. We are also proposing to **reduce the above maxima by 50% for unions and employer associations whose membership is under 100,000**. The assessment of the size of a union or employer association will 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.

Individuals

19. Where an individual is in breach (this relates solely to a breach of paragraph 5(1) of Schedule A3 of the Trade Union and Labour Relations Consolidation Act 1992), our proposal is that the maximum fine will be **£1,000**. The level of individual fine will be set at this figure whatever the size of the union or employer association the individual might belong to.

Appeal provisions

20. The Trade Union Act provides that a person may appeal a decision of the Certification Officer to issue a financial penalty, or the amount of the penalty, to the Employment Appeals Tribunal on the grounds that (a) it was based on an error of fact, (b) it was wrong in law, or (c) it was unreasonable. The Government does not intend to change this or propose further grounds for appeal.

Discounts for early payment, and further penalties for late payment and interest on penalties

21. The Act provides for a power to set in Regulations discounts for early payment. We do not however believe that this is necessary as we have already provided for lower penalty maxima for organisations whose membership is under 100,000. Furthermore, the Certification Officer will have discretion when imposing a penalty and may choose to

issue a conditional penalty to achieve compliance. A conditional penalty may require the trade union to pay a financial penalty if it does not take particular action within a certain timescale.

22. Our proposal is to provide in Regulations that interest will accrue for late payment of financial penalties from the date payment is due as specified in the penalty order or, if there is an appeal, from the date when the appeal is withdrawn or finally determined. The rate of interest will be that specified in Section 17 of the Judgements Act 1838 (i.e. at the rate of 8 per cent per annum). This is in common with other regulatory regimes such as late payment of penalties under the National Minimum Wage Act 1998.
23. The draft Regulations also set out that the total amount of interest for late payment cannot exceed the amount of the penalty imposed by the Certification Officer.

Enforcement

24. The Act provides for a power to set in Regulations enforcement provisions to enable the Certification Officer to recover penalties and any interest for late payment. The draft Regulations therefore enable the Certification Officer to recover penalties and any interest payable on the order of a court in England and Wales and in Scotland, as a civil debt. In the case of an appeal, no amount of penalty is recoverable until the appeal has been withdrawn or finally determined.

List of consultation questions

Consultation Question

1.	Your name
2.	What organisation do you represent (if any)?
3.	E-mail address
4.	If you are representing an organisation, what type of organisation is it? <ul style="list-style-type: none">· Trade union· Federated trade union· Employer association· Federated employer association· Individual· Other organisation (please describe)
5.	If you are a union, a federated trade union, an employer association or federated employer association, is your total membership: <ul style="list-style-type: none">· under 1,000· between 1,000 – 5,000· between 5000 – 10,000· between 10,000 – 25,000· between 25,000 – 50,000· between 50,000 – 100,000· 100,000 or more
6.	Do you agree with the proposed approach to set the level of financial penalty by type of obligation breached? YES / NO If no, please explain why and the alternative you suggest.
7.	Are the maximum levels by type of obligation breached (levels 1, 2 and 3) appropriate? YES / NO If no, please explain why and the alternative that you suggest.
8.	Do you agree with the approach to reduce the penalty maxima by 50% for unions and employer associations whose membership size is less than 100,000? YES / NO If no, please explain why and the alternative that you suggest.

List of consultation questions

- | | |
|-----|---|
| 9. | <p>The Trade Union Act 2016 provides that a person may appeal a decision of the Certification Officer to issue a financial penalty to the Employment Appeal Tribunal on the grounds that (a) it was based on an error of fact, (b) it was wrong in law, or (c) it was unreasonable.</p> <p>Do you agree with the proposed approach not to add to this list of grounds upon which an appeal may be made? YES / NO</p> <p>If no, please explain why and what changes you propose to the grounds for appeal.</p> |
| 10. | <p>Do you agree with the proposed approach that interest will accrue for late payment of financial penalties? YES / NO</p> <p>If no, please explain why and the alternative that you prefer.</p> |
-

Annex A: Summary of proposed implementation of financial penalties regime

We propose the financial penalties regime would impose penalties by type of obligation breached and membership size.

We propose to set the maxima of penalty by type of obligation breached, as follows:

LEVEL 1: £20,000 maximum penalty for breach of:

- Duty to ensure senior positions are not held by an individual with a criminal record
- requirements about elections for certain positions
- restriction on applying a union's funds in the furtherance of political objects
- rules as to ballots on political resolutions
- political fund rules

LEVEL 2: £10,000 maximum penalty for breach of:

- duty to keep membership up to date

LEVEL 3: £5,000 maximum penalty for breach of:

- duty to comply with a request for access to accounting records
- requirements to provide details of industrial action, or political fund expenditure, in the annual return
- internal union rules on certain matters
- duty to comply with investigatory requirements

Where a financial penalty is imposed by the Certification Officer, **a minimum penalty of £200** will apply irrespective of type of obligation breached / membership size of organisation.

Membership size

In addition, we propose to reduce the penalty maxima set out above by 50% where a union (or employers' association) membership size is less than **100,000** members. Where an individual is in default, the maximum fine will be £1,000. This will not be determined by the membership size of the union of employer association the individual belongs to.

Appeals

The Act provides that penalties will be appealable to the Employment Appeal Tribunal (EAT) on three grounds: on points of law, on points of fact, and on the reasonableness of the penalty imposed. We do not intend to add to this list of grounds upon which a challenge may be made.

Further penalties for late payment and interest on penalties

There will be no discount for early payment. However, interest will accrue for late payment of financial penalties from the date payment is due as specified in the penalty order or, if there is an appeal, from the date when the appeal is withdrawn or finally determined. The rate of interest will be specified in Section 17 of the Judgements Act 1838 (i.e. 8 per cent per annum). The total amount of interest for late payment cannot exceed the amount of the penalty imposed by the Certification Officer.

Enforcement

The Certification Officer has the power to recover penalties and any interest payable on the order of a court in England and Wales and in Scotland, as a civil debt. In the case of an appeal, no amount of penalty is recoverable until the appeal has been withdrawn or finally determined.

Annex B: Draft regulations – attached separately

Annex C: Legislative provisions in the Trade Union Act in relation to financial penalties

As the law currently stands, where the Certification Officer determines that there has been a breach of a specified requirement or rule, the Certification Officer has the power to make a declaration and an enforcement order requiring a trade union, or where applicable a federated union, employer association or federated employer association, 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.

Section 19 of, and Schedule 3 to, the Trade Union Act 2016 inserts a new section 256D and Schedule A4 into the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”). These new provisions in the 1992 Act will give the Certification Officer the power to impose financial penalties where he has the power to issue an enforcement order under a number of provisions specified in Schedule A4.

Paragraph 1 of Schedule A4 of the 1992 Act sets out those enforcement order provisions where financial penalty powers will also be available to the Certification Officer.

Where the Certification Officer issues an enforcement order or has the power to do so but chooses not to exercise it, paragraph 2 of the new Schedule A4 allows the Certification Officer to:

- make a penalty order requiring the trade union to pay a financial penalty, or
- make a conditional penalty order requiring the trade union to pay a financial penalty if they do not take particular action within a certain timescale.

Paragraph 3 of the new Schedule A4 sets out how a conditional penalty will be enforced.

If the Certification Officer is satisfied that the union has taken the necessary steps by the time specified, the Certification Officer must notify the union that the penalty is no longer payable.

If the Certification Officer is not satisfied and the penalty has not been paid by the required date, the Certification Officer must issue a further order requiring payment of the original penalty amount or a lesser amount where the union has taken partial steps towards compliance.

The Certification Officer will be able to utilise the investigatory powers conferred by the Trade Union Act in order to establish whether there has been compliance with a conditional penalty order.

Paragraph 4 of Schedule A4 requires that before the Certification Officer makes a penalty order or conditional penalty order, he must inform the trade union (or other person in default) where applicable of the grounds upon which he proposes to make it and give the trade union an opportunity to make representations.

Paragraph 5 provides for a right of appeal to the Employment Appeal Tribunal against a decision to impose a penalty or conditional penalty, and sets out the grounds of appeal on points of law, points of fact or on the reasonableness of the penalty imposed. Power is given to the Secretary of State to add to these grounds of appeal by issuing regulations.

Paragraph 6 provides that the maximum and minimum penalty amounts can be set in regulations but they cannot be less than £200 and cannot exceed £20,000. The Secretary of State is also given a power to issue regulations setting different amounts in relation to different enforcement orders and to reference penalties by whether the person in default is an individual or an organisation and by the number of members that a trade union has.

Paragraph 7 gives the Secretary of State power to make certain provisions by regulations. These are:

- Provisions to deal with discounts for early payment
- Provisions to deal with further penalties for late payment and for interest on penalties, which must not exceed in total the amount of the penalty itself
- Provisions to deal with the collection (enforcement) of the civil penalties that are owed as civil debts

Paragraph 8 of Schedule A4 sets out that regulations issued by the Secretary of State must be made following the affirmative procedure (which involves debate and vote in both Houses of Parliament) and allows those regulations to make supplemental, incidental, transitional or consequential provisions.

