



Department for
Business, Energy
& Industrial Strategy

Trade Union Act 2016: Certification Officer's Levy

Government response



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Introduction

The Trade Union Act 2016 (the 2016 Act) established a fairer framework for industrial relations. This included effective regulation of trade unions through their regulatory body, the Certification Officer, who is responsible for statutory functions relating to trade unions and employers' associations.

The Government recognises the constructive role that trade unions can play in society. The Government wants to work with trade unions to ensure that all unions adhere to the highest standards in their governance, thus providing reassurance to union members and the wider public.

It is fair and right that trade unions that fall short of these standards are held to account. It is therefore important that trade unions are appropriately regulated, ensuring that workers who join a union and members of the public can have confidence that the highest standards of governance are upheld.

The position of the Certification Officer was established in 1975 but has existed in one form or another since the 1871 Trade Union Act. Some of the Certification Officer's duties include:

- maintaining a list of trade unions and employers' associations
- ensuring compliance with statutory requirements for annual returns from trade unions and employers' associations
- determining complaints concerning trade union elections, certain other ballots, and certain breaches of trade union rules

The 2016 Act introduced three key reforms to the Certification Officer's role:

- wider proactive investigatory powers in relation to a number of statutory duties on trade unions
- strengthened enforcement powers to enable the Certification Officer to issue financial penalties of up to £20,000, in addition to issuing an enforcement order
- the power to impose a levy on trade unions and employers' associations on a cost recovery basis

Currently, the costs of the office and functions of the Certification Officer are met by the taxpayer. This is unusual; many other sectors pay a levy to fund their regulator, noting the benefits that appropriate regulation to ensure high standards can bring. The Government believes that trade unions and employers' associations should make a contribution towards the cost of their regulation. This would bring the Certification Officer in line with other regulators such as the Pensions Regulator.

The 2016 Act provides that a levy may be paid by unions and employers' associations to recover the cost of the delivery of regulatory functions. It provides for regulations to set out the

framework for the levy scheme. The specific amounts of the levy will be determined by the Certification Officer in accordance with the framework.

The government consulted on the framework by which the Certification Officer would determine the level and distribution of levy between contributing organisations. Our proposal was centred on four principles. These were that the levy should be:

- **equitable:** user pays for functions consumed based on cost recovery
- **simple:** and easily understood by organisations
- **predictable:** so organisations can plan ahead
- **affordable:** so that organisations can still invest in services for their members.

The consultation opened on 31 August 2017 and closed on 26 October 2017. This report summarises the responses received and sets out how the government intends to proceed.

The next steps for Government will be further engagement with affected stakeholders to finalise the detail of the levy, prior to laying regulations before Parliament to introduce the levy in April 2022.

Summary of responses and government response

The consultation asked six questions.

- 1. Do you agree that the costs for the functions delivered by the Certification Officer as defined above should be recoverable in the levy? Are there any omissions?**
- 2. Do you agree with excluding the costs of external inspectors from the levy? Are there any other significantly variable costs that should be excluded and why?**
- 3. Do you agree that the costs of regulating political funds and superannuation schemes should be subsumed into the levy?**
- 4. Do you agree with the removal of the Certification Officer's existing fees, and for the costs of these activities to be subsumed into the levy? Does this create any unintended consequences?**
- 5. Do you agree with the principle of having exemptions and a limited subsidy regime? Where should we set the affordability cap?**
- 6. Do you agree that this approach meets our objectives? Are there any unintended consequences or potential risks we should consider?**

34 responses were received in total. Of these, 20 were from trade unions (one of which was the Trades Union Congress, a federated trade union), 10 were from employers' associations, and the remaining four were from individuals or other organisations. A list of organisations that responded to the levy is at Annex A.

General comments

A number of responses (21 in total) expressed general opposition to the principle of a levy. They argued that it was appropriate for the state to fund a regulator such as the Certification Officer, and that passing the cost on to trade unions in particular took funds that could otherwise be spent representing members and tackling unfair employment practices. They also expressed concern about the Certification Officer's objectivity and accountability given the Officer's funds would be coming from the organisations it regulates.

Some respondents criticised the lack of certainty over the level of the levy, given the Certification Officer's changing powers. Suggestions to mitigate this included delaying the implementation of the levy, setting it at the level of the Certification Officer's 2017/18 budget for five years, and increasing it in line with inflation.

A number of responses called for further consultation: on the principle of a levy, on a more specific levy system, and on the Certification Officer's governance.

A number of respondents also took the opportunity to express their opposition to the increased investigatory and enforcement powers brought in by the 2016 Act.

Our response

The government notes the principle of a levy was debated during the passage of the 2016 Act through Parliament, and that this consultation set out in some detail the proposed system for calculating the levy. We have considered the system proposed in light of the responses received, and whether to proceed. We continue to believe that it is reasonable for the Certification Officer's costs to be borne by those organisations it regulates, rather than the taxpayer. This is in line with a number of other regulators, such as the Pensions Regulator. We do not believe there is a need for further formal consultation but are providing affected organisations an opportunity to directly feed into the Government plans.

The government also does not agree that the levy should be fixed according to the Certification Officer's 2017/18 budget or a budget in any given year, as this is unlikely to reflect the Office's budgetary needs following the implementation of the new powers. Similarly, we do not agree that the levy should be fixed for a five-year period and thereafter increased with inflation. We recognise that this would make the levy more predictable, but it will mean the Certification Officer will be unable to match the levy to their budgetary needs. A period of implementation is inevitable, but we anticipate the Certification Officer's budget is unlikely to significantly fluctuate year to year. It should be noted that the 2016 Act already contains an important safeguard in that it requires the Certification Officer to aim to ensure the total amount levied over a three-year period does not exceed their actual expenses. We believe that this provides an important and reasonable control over the extent of the levy; and it will be reflected in the levy regulations.

There has been a delay between the 2017 consultation and the proposed introduction date of the levy. In the intervening period, Government has continued to fund the Certification Officer, costs that will in future, for the most part, be covered by the levy.

The final powers from the 2016 Act, including the levy, are now anticipated to commence in April 2022. This will allow the Certification Officer more time to set the levy and will also give unions and employers' associations time to budget for this new cost. Government will use this time to further engage with affected stakeholders to finalise the detail of the levy prior to introduction.

The government has separately consulted on proposals for implementing the financial penalties instituted by the 2016 Act and has published a response to that in parallel. The Certification Officer's widened investigatory powers do not require consultation and will be brought into effect by commencement order in April 2022.

Cost components of the levy

The government committed to an equitable system for the levy that will operate on a cost-recovery basis only. The first section of the consultation therefore examined the Certification Officer's costs and sought views on the specific ones that should be included or excluded from the levy.

Question 1 – costs to be recovered

The government identified the main functions of the Certification Officer following the reforms brought in by the Trade Union Act 2016, as well as the type of organisation (trade union, federated trade union, employers' association, federated employers' association) each related to.

Do you agree that the costs for the functions delivered by the Certification Officer as defined should be recoverable in the levy? Are there any omissions?

Of those who responded to this question, 10 respondents agreed, and 21 respondents disagreed. No omissions were identified. Comments were focused on the wider principle of the proposed levy, and some responses questioned the fact that, even with the division of functions proposed, some organisations would be paying for functions they did not use. A number also suggested that, rather than a levy based on functions used, it should be set at the level of the Certification Officer's 2017/18 budget and fixed for a period of years. A number of union responses and an employers' association questioned whether the proposed division of costs between unions and employers' associations was proportionate.

Our response

The government has previously made the case for a levy in principle and the need for the Certification Officer to set it according to their anticipated budget. Our view is that a system that apportions costs between organisations according to functions used is the most equitable. The proposed system allows the Certification Officer to divide costs between trade unions, federated trade unions, employers' associations, and federated employers' associations on a proportionate basis. **The government, therefore, subject to further engagement, plans to proceed as set out in the 2017 consultation document.**

Question 2 – external inspectors and other variable costs

The Government has been clear that only regular and relatively stable expenditure should be levy-funded. Some of the costs incurred by the Certification Officer are more variable than others. The 2016 Act enables the Certification Officer to appoint one or more members of staff (i.e., 'internal inspectors') or other persons (i.e., 'external inspectors') to investigate financial irregularities and membership register issues. We anticipate the appointment of external inspectors will be the most variable cost for the Certification Officer, as they are contracted on a case-by-case basis to deal with breaches that require specific expertise. We therefore proposed that the costs for external inspectors would be excluded from the levy.

Do you agree with excluding the costs of external inspectors from the levy? Are there any other significantly variable costs that should be excluded and why?

All those who responded to this question agreed that the costs of external inspectors should be excluded from the levy. Respondents pointed to commitments made during passage of the 2016 Act through Parliament. A number of responses suggested the costs of investigations generally would be variable, as the Certification Officer's new investigatory powers could lead to an increase in investigations. Some respondents were also concerned that this would lead to vexatious and unsubstantiated complaints and investigations, and that the Certification Officer should be able to charge complainants for these.

Our response

The government recognises that the costs of hiring external inspectors are a significantly variable cost. **We will therefore exclude such costs from the levy.** However, while we anticipate an increase in the number of cases following the Certification Officer's increased investigatory powers, we do not agree that the cost to meet this increase will vary significantly. When not carried out by an external inspector, the Certification Officer's investigations are carried out from within their Office's headcount and budget. Beyond the initial period of implementation of the new investigatory powers, we do not anticipate this requirement or cost varying substantially. We also believe there are already sufficient safeguards against vexatious or unmerited complaints. The Certification Officer is able to screen complaints and reject those that do not merit further investigation. **However, the government believes that the Certification Officer's external legal costs are also a potentially significantly variable cost, so proposes excluding them from the levy as well.**

Question 3 – costs of regulating political funds and superannuation schemes

Only certain trade unions maintain political funds and funds set up for members' superannuation schemes. The costs for the Certification Officer in supervising these funds are relatively small (coming to about 1% of total current costs each year) and cannot sensibly be calculated on a contribution basis. We therefore proposed that these would be subsumed into the levy.

Do you agree that the costs of regulating political funds and superannuation schemes should be subsumed into the levy?

Of those who responded to this question eight respondents agreed and 24 disagreed. Respondents that did not agree suggested either that government should pay, to avoid penalising organisations for providing such funds, or organisations that had such schemes should pay for regulation via a fee system. One respondent questioned whether the Certification Officer should be regulating superannuation schemes when the Pensions Regulator fulfils this function.

Our response

The government has previously made the case for a levy in principle that covers the work of the Certification Officer. We believe that it is reasonable for the regulator to be able to secure their costs from the organisations being regulated. The costs of regulating political funds and superannuation schemes are a very small proportion of the Certification Officer's total costs (about 1% of current annual costs). It would also be very difficult to separate out the work of supervising these funds for the purposes of a levy, as they are spread out over a 10-year period. The Pensions Regulator is only responsible for workplace pension schemes. **We will therefore proceed with subsuming the costs of regulating such funds into the levy.**

Question 4 – subsuming the Certification Officer's existing fees into the levy

Currently, some of the Certification Officer's activities incur a statutory fee. This is set out in the Trade Unions and Employers' Associations (Amalgamations, etc) Regulations 1975. Fees charged include applications for entry in the list of trade unions and employers' associations which the Certification Officer maintains, applications from a trade union for a certificate of independence, and applications from trade unions and employers' associations for approval of a change of name etc. These fees provide approximately £7,000 of income per annum but have not been updated since 2005 and do not reflect the actual costs of the Certification Officer's work. We proposed to subsume the costs of these activities into the levy.

Do you agree with removal of the Certification Officer's existing fees and for the costs of these activities to be subsumed into the levy? Does this create any unintended consequences?

Of those who responded to this question 10 respondents agreed with the removal of the Certification Officer's existing fees and 22 disagreed. Some respondents were concerned that it would lead to increased applications and therefore costs. A number of unions thought the fee for certificates of independence was a useful disincentive to deter organisations that did not properly fulfil the function of a union from applying for independent status. They also thought a standalone fee for listing as a union or employers' association was a useful contribution for new applicants to make. A number of respondents suggested the current fee regime should be removed but replaced with a small, fixed fee for every organisation regulated by the Certification Officer or a fee regime across all the Certification Officer's functions to ensure costs were distributed more equitably.

Our response

Regardless of whether fees are maintained or not the costs of the related activities will be borne, in part, by the levy. This is because the fees charged do not reflect the actual costs of the activities in question. However, the government recognises the importance of certificates of independence, and the utility fees for this and for listing as a trade union or employers' association provide. **We therefore propose to keep the fees for listing and for certificates of independence, and to subsume other fees into the levy.** The Government also proposes

to consider the level these fees are set at to bring them closer in line to the actual costs of the activities in question.

The question of using a wider fee regime instead of a levy, or implementing a small, fixed fee, is dealt with in our response to the question 5 below.

Setting the levy

The second part of the consultation described four options for calculating the levy:

- (i) a levy contribution that is equal (flat rate) across all organisations irrespective of type of organisation, functions used, membership size, income, or costs incurred
- (ii) a levy contribution based on the size of the organisation
- (iii) a levy contribution based on the principle that costs should be paid by the type of organisation such costs are referable to (adjusted rate)
- (iv) a levy based on a percentage of the declared income an organisation

We concluded that each of these standalone options failed to fully meet the objectives we had set for the levy framework. The consultation therefore proposed a combination of the various options to create a more balanced model.

Question 5 – exemption and limited subsidy regime

The model was based on two working principles, that contributions will be:

- based on the functions that organisations use and the resource the Certification Officer spends on them, by allowing the Certification Officer to apportion costs between different types of organisation
- subject to an affordability cap to exempt and subsidise certain organisations based on a percentage of an organisation's declared annual income – the consultation proposed setting this at 2.5%

Using these principles, the consultation proposed that the Certification Officer would be able to set three income tranches for each category of organisation:

- exempt organisations, for whom the 'standard levy' was more than 2.5% of their annual declared income;
- middle income organisations, for whom the standard levy was affordable as it would not exceed 2.5% on their annual declared income;
- high income organisations, who could pay a higher rate in order to subsidise those unable to pay the levy and still not exceed the 2.5% affordability cap.

Do you agree with the principle of having exemptions and a limited subsidy regime? Where should we set the affordability cap?

Of those who responded to this question, 11 respondents agreed with the principle of an exemptions and subsidy regime, two respondents disagreed. 12 believed government should subsidise the exemptions, and six believed there should be no exemptions but a small, fixed fee to ensure every organisation pays something towards the levy.

15 did not respond to the question on where we should set the affordability cap. Of those that did, three expressed general support for an affordability cap of 2.5%, 14 believed it should be lower than 2.5%, one suggested it should be lower for the larger unions that are subsidising exemptions, and one expressed support for a fee structure.

Comments highlighted a range of suggestions for the proposed regime, including:

- state subsidy for the exempt organisations
- more income bands and lower income caps, partly in response to the concern that the highest income band was too broad
- a small base fee to ensure all organisations contribute something
- a clear definition of income – some suggested this should be limited to net income, income from membership subscriptions, or in respect of only union activity carried out
- alternative banding assessment criteria, including membership numbers and expenditure
- exemption of federated trade unions, to avoid 'double charging' their member unions

Our response

The government has already made the case for a levy in principle, and therefore does not agree that the state should subsidise exempt organisations. We considered a number of the changes suggested by respondents, including extra income bands, a lower income cap, and a base fee. However, the four principles we intend the levy to meet (equitability, simplicity, predictability, affordability) are all finely balanced. Tilting the levy system further towards one of these principles usually detracts from one or more of the others.

Lowering the 2.5% cap increases the number of exempt organisations and would lead to significant increases in the levy payable by the upper tranche (in our model, lowering the cap to 1% increased the upper levy for non-federated trade unions by around £8,500). This detracts from the system's equitability. Adding extra income bands makes the system more complex and less predictable. Adding a smaller, fixed fee for exempt organisations ensures almost all organisations pay something but makes little difference to the total levy non-exempt organisations pay and further complicates the system. The Certification Officer's existing fee system in practice contributes very little money. Its average income is £7,000 per year, and this would not be sufficient to support the running costs and delivery of regulatory functions.

The government considered a model based on membership numbers or membership income but believes this would be less equitable and more complex than the proposed basis of declared income, which is published in the annual returns to the Certification Officer. It is for the Certification Officer to provide guidance on completing these annual returns.

Some employers' associations have few members but a relatively high declared income. We believe to base the levy on membership numbers or income from membership subscriptions alone would be distorted and one that would not meet our equitable principle.

The government understands the concern that federated trade unions' member organisations will essentially be paying the levy twice. However, we believe it is still appropriate to include federated trade unions in the levy. Irrespective of the fact they are made up of other trade unions, they still require regulation by the Certification Officer as organisations in themselves and it is therefore appropriate that they contribute to the levy.

The government therefore proposes to proceed with the model of exemptions and limited subsidy, with a 2.5% affordability cap.

Question 6 – overall approach

We intended to create a levy framework which was:

- **equitable:** all eligible organisations will make a contribution to eligible costs based on usage
- **simple:** the structure of the levy is designed to be easy for organisations to understand
- **predictable:** provided that an organisation's income level does not suffer significant fluctuations, its annual contribution to the levy will be broadly similar year-on-year
- **affordable:** organisations will make a contribution which reflects likely use of functions related to annual income

Do you agree that this approach meets our objectives? Are there any unintended consequences or potential risks we should consider?

Of those who responded to this question three agreed our approach meets our objectives, eight agreed with certain caveats (principally that there should be a small, fixed fee to ensure every organisation contributes something), and 21 disagreed that the proposed approach meets our objectives.

Comments raised a number of risks and potential consequences:

- that the levy is not affordable, particularly for smaller organisations;
- that the levy is too complicated;
- that the levy is not predictable, particularly considering we do not yet know the true level of the Certification Officer's budget following implementation of their enhanced investigatory powers and financial penalties;

- that the Certification Officer would not be accountable to government or organisations paying the levy and could launch spurious investigations.

Some responses called for the Certification Officer to regularly consult on enforcement strategies and the levy, potentially on an annual basis.

Our response

The government accepts that the levy will be an additional budget requirement for trade unions and employers' associations. In proposing a system of exemptions, subsidy, and a 2.5% affordability cap we have sought to balance principles of affordability, equitability, simplicity, and predictability. Making modifications in respect of any of these principles alters the balance to the detriment of the others.

The government also accepts that there will be a period of implementation, and therefore possible unpredictability as the Certification Officer's enhanced investigatory powers and financial penalties are brought into force. This is inevitable, but once set we do not envisage the Certification Officer's budget, and therefore the levy, shifting substantially from year to year.

The Certification Officer is a statutory office holder and independent from the direction of government ministers, as well as the trade unions and employers' associations they regulate. This is important for fulfilling their role but does not mean they are unaccountable. The 2016 Act already mandates the Certification Officer to aim to ensure the levy will not exceed their expenses over any three-year period – this is an important safeguard. With the exclusion of the costs of external inspectors and external legal costs, the levy will cover investigations carried out from the Officer's existing headcount, which we do not expect to vary substantially after the initial period of implementation. The Certification Officer publishes annual reports and finances, so can be publicly held to account for those.

The government therefore proposes to proceed with the model of exemptions and limited subsidy, with a 2.5% affordability cap.

Conclusion and next steps

The government believes that, in line with other sectors in the UK, it is appropriate that the Certification Officer is funded not by the taxpayer but by the trade unions and employers' associations being regulated. We will therefore proceed with implementing a levy.

The government has decided to implement all the Certification Officer reforms under the 2016 Act in one package. The levy, financial penalties and enhanced investigatory powers will therefore commence in April 2022.

The levy should aim to be equitable, predictable, simple, and affordable. We therefore propose to proceed with a levy comprised of two principles:

- (a) based on the functions that organisations use and the resources that the Certification Officer spends on them, by allowing the Certification Officer to apportion different costs to different types of organisation;
- (b) subject to an affordability cap of 2.5% of an organisations declared annual income, and so exempt certain organisations subsidised by higher contributions from others.

Most respondents agreed with the exclusion of external inspectors as a significantly variable cost. The government proposes to also exclude external legal costs from the levy.

Most respondents disagreed with the inclusion of the costs of regulating political funds and superannuation schemes within the levy. However, these costs are small and difficult to separate out. We will therefore propose to proceed with subsuming them into the levy.

Most respondents disagreed with subsuming the Certification Officer's existing fees within the levy. A key argument was the utility of the fees for listing and for certificates of independence. The government therefore proposes to preserve the Certification Officer's existing fee for listing and for certificates of independence and is considering reviewing the levels these fees are set at.

The Government will now engage further with affected organisations to finalise the detail of the levy. After this engagement, draft regulations will be laid before Parliament. The regulations will set out the key principles of the system within which the Certification Officer will determine the specific levy. Subject to further engagement, the government proposes that these key principles will include the 2.5% cap, the ability to apportion costs to different types of organisation according to functions used, and the ability to set three income bands including a band of exempt organisations.

Annex A: list of organisations that responded

- Association of School and College Leaders
- Chartered Institute of Physiotherapy
- Communication Workers Union
- Confederation of Paper Industries
- East Midlands Councils
- East of England Local Government Association
- Federation of Clinical Scientists
- Fire Brigades Union
- GMB
- Improvement and Development Agency for Local Government
- NASUWT
- National Association of Regional Employers
- National Education Union
- National Union of Journalists
- Nautilus
- Pharmacists' Defence Association
- Prospect
- Royal College of Midwives
- Royal College of Nursing
- Society of Radiographers
- South East Employers
- South West Councils
- Thompsons Solicitors
- Transport Salaried Staffs' Association
- Trades Union Congress
- Unison
- Unite the Union
- Universities and College Employers Association
- USDAW

- West Midlands Employers
- Yorkshire and Humber (Local Authorities) Employer Association

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