



Department for
Business, Energy
& Industrial Strategy

Consultation on the Certification Officer's Enforcement Powers

Government response

June 2021



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Introduction

The Trade Union Act 2016 establishes a fairer framework for positive industrial relations. This includes 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. There are 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; and
- the power to impose a levy on trade unions and employer associations on a cost recovery basis.

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.

Currently, for most statutory obligations, the Certification Officer can only act on receipt of a complaint from a union member that a union may have failed to comply with a duty. Where a breach is found, the Certification Officer can issue a declaration and enforcement order¹, but currently has no power to issue financial penalties. 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 in other sectors.

Section 19 of the Trade Union Act 2016 gives the Certification Officer the power to impose financial penalties on unions and employers' associations for non-compliance with statutory requirements. The power to impose financial penalties will apply where the Certification Officer has the power to issue an enforcement order. It provides an additional enforcement option.

During the passage of the Trade Union Act 2016 in Parliament, we committed to a penalty maximum below the £20,000 limit in legislation in certain cases, with bands below that to provide more scope for a penalty imposed to be commensurate with the type of breach. We also committed that penalties would be reduced according to the size of union. We agreed to

¹ Enforcement orders (and therefore financial penalties also) may, depending on the circumstances, be issued against trade unions, federated unions, employers' associations, and federated employers' associations.

consult on this detail and on 9 April 2017, we published a consultation document '*Trade Union Act 2016: Consultation on the Certification Officer's enforcement powers*'².

The consultation provided detail on how the proposed financial penalties regime will operate and sought views on three particular areas:

- setting the level of financial penalty by type of obligation breached;
- the maximum levels by type of obligation breached; and
- the proposal to reduce the penalty maxima by 50% for unions and employers' associations whose membership size is less than 100,000.

The consultation closed on 21 May 2017. This report summarises the responses received and sets out how the Government intends to proceed.

²https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/607243/Consultation_on_the_Certification_Officer_s_enforcement_powers_-_FINAL_-_5.4.2017.pdf

Summary of responses

We received 15 responses to the consultation from the Trades Union Congress, large and medium sized unions. No small unions, businesses, employers' associations, other organisations, or individuals responded to the consultation. A list of the respondents is set out below:

- Aslef
- British Medical Association
- Communication Workers Union
- General, Municipal and Boiler Makers Union
- Fire Brigades Union
- First Division Association
- National Union of Teachers (now the National Education Union)
- Nautilus
- Prospect
- Royal College of Midwives
- Trades Union Congress
- Union of Shop, Distributive and Allied Workers
- Unison
- Unite
- Voice

General comments

Respondents submitted views that extended beyond the Government's proposals on the financial penalties' regime to the reforms of the role of the Certification Officer more widely. In particular, the unions stated that:

- They are strongly opposed to the reforms to the role of the Certification Officer as a whole as these represent a serious intrusion into the internal affairs of trade unions by the state.
- The reforms, and in particular the extension of the Certification Officer's investigatory powers, do not comply with international obligations as the Certification Officer will be too powerful and able to act as the complainant, investigator, prosecutor, and judge in

contravention of international obligations, including Article 6 of the European Convention on Human Rights (ECHR)³;

- There is no regulatory failure in this area and therefore no requirement for these reforms - unions have a good record of compliance with statutory obligations;
- The Certification Officer will have access to confidential information (e.g., membership records) which is a breach of privacy.
- If the Government proceeds with the implementation of these reforms, the Certification Officer should prepare detailed guidance on how the new powers will be applied in practice.
- This guidance should set out that financial penalties will be used in exceptional circumstances only and unions should be consulted on the guidance before final regulations are laid in Parliament.
- The six-week consultation period on financial penalties was insufficient.
- There was no impact assessment provided in the consultation; and
- The proposed level of penalties is disproportionate. The Government should reduce the minimum and maximum penalties which can be applied by the Certification Officer.

Government response to general comments

Rationale for the reforms

The Government observes that many of the comments stating opposition to the wider reforms to the role of the Certification Officer were addressed during extensive debates in both Houses of Parliament during the passage of the Trade Union Act 2016.

Currently, for many suspected breaches of statutory requirements, the Certification Officer can only investigate on receipt of a complaint from a trade union member. For example, where members are aware of the statutory requirements on unions to conduct their elections properly, they have made complaints and the Certification Officer has, in a number of instances, found against a union and has issued enforcement orders requiring that a union election be re-run.

Complaints in relation to other areas, e.g., the maintenance of political funds, where there are statutory requirements on unions have been made less often. That does not mean however that there is no problem. Trade union members will not always know what regulatory requirements their union must observe.

The Government believes that the reforms to the role of the Certification Officer are necessary. The enhanced investigatory and enforcement powers under the Trade Union Act 2016 will enable the Certification Officer to act where there is reason to do so, without having to wait for a complaint from a trade union member, including on matters the Certification Officer might discover in the course of their duties. The Certification Officer will also be able to respond to

³ Article 6 protects the right to a public hearing before an independent and impartial tribunal within reasonable time.

matters brought to their attention by third parties. Where a breach has occurred, the Certification Officer will have the power to impose financial penalties, including conditional 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. For example, the Electoral Commission can carry out proactive investigations where statutory breaches are suspected and require the production of documents. The Commission also has the power to impose financial penalties that may be up to £20,000 for more serious breaches. Similarly, many regulators in the UK are funded by a levy on organisations that they regulate.

State intrusion and compliance with international obligations

The Government recognises that trade unions can play a constructive role in maintaining positive industrial relations. This is about striking the right balance, and it is perfectly reasonable for the Government to legislate to ensure that they act democratically, transparently and within the rule of law. The UK's courts have consistently recognised this position.

Through these reforms, the Government is ensuring that unions are accountable to their members and the wider public. The regulatory matters the Certification Officer can consider are generally related to a union's governance. The Certification Officer will continue to have no locus in relation to trade union members taking part in strike action.

The Government believes that the enhanced investigatory and enforcement powers for the Certification Officer under the Trade Union Act 2016 are compliant with the independence and impartiality requirements of Article 6 of the ECHR and international conventions, including those of the International Labour Organisation (ILO).

The Certification Officer has always carried out their functions independently of Government. Section 16 of the Trade Union Act explicitly provides for this. Should the Certification Officer act unlawfully in making an enforcement decision, unions have the right of appeal to the Employment Appeal Tribunal. Under the Trade Union Act 2016, the Government has provided greater judicial oversight of the Certification Officer's decisions by allowing appeals on points of fact as well as law. It is well-established that where there is a right of appeal against decisions of administrative bodies such as the Certification Officer, there is not a violation of the right to a fair hearing.

It is established practice for regulators to have the power to investigate and then make a decision to take enforcement action. The Certification Officer will be no different when exercising their new regulatory powers. Furthermore, the procedures for investigations and decisions will be for the independent Certification Officer to determine. The Certification Officer will have the power to delegate any of their functions, where considered appropriate, to one or more Assistant Certification Officers. This could include the new investigation process. Staff or other persons can also be appointed to carry out an investigation and produce a report for the Certification Officer to consider.

The reforms are a breach of privacy

The Government believes that the enhanced powers under the Trade Union Act 2016 are a proportionate measure to assist the Certification Officer in performing their functions. There are safeguards to protect members' privacy.

The Data Protection Act will apply to the Certification Officer and their inspectors. They will be required to use personal data, including data on union members, consistent with the protections in the Data Protection Act.

The new investigatory powers contain provisions to impose a duty of confidentiality on inspectors that the Certification Officer appoints to prevent unauthorised disclosure of personal information about union members.

Furthermore, the Certification Officer will be under a statutory duty to act consistently with Article 8 of the ECHR⁴ in the performance of their functions.

Enforcement guidance

The Government agrees that enforcement guidance would be helpful and appropriate. Many other regulators already do this. However, the Certification Officer is independent of Government and it will be for them to decide whether to issue enforcement guidance. The Government does not agree that the final regulations in relation to the financial penalties' regime should be delayed pending publication of this guidance.

Consultation period and impact assessment

The Government does not accept that six weeks was insufficient in relation to this consultation, as it was aimed primarily at specific stakeholders (e.g., trade unions and employers' associations). The 2017 general election took place during the consultation period. The Department for Business, Energy and Industrial Strategy followed election guidance which advised that on-going consultations should continue as normal. The consultation was conducted in line with Cabinet Office consultation principles.

The Trade Union Act Impact Assessment (the Act IA) estimated that for all the Certification Officer reforms, there would be a transitional cost to unions of £548,000 (familiarisation and legal advice). The transitional cost for employers' associations is £2,400.

The Act IA also set out that there would be annual ongoing cost of around £36,000 to trade unions from dealing with additional investigations, and the annual cost of £7,000 to compliant unions of taking a case appealing a judgement by the CO to the Employment Appeal Tribunal.

The Government considers that there has been every opportunity for unions to make themselves aware of the additional costs arising from the Certification Officer reforms as set out in the Act IA.

⁴ Article 6 protects the right to respect for private and family life, home, and correspondence.

An Equalities Impact Assessment was undertaken and published during the passage of the Trade Union Bill in September 2015⁵. In light of its conclusions, and the scope of the proposed regulations, no further formal Equalities Impact Assessment was considered necessary.

The costs to trade unions associated with familiarisation with the financial penalties' regime are anticipated to be low, at substantially below £500,000.

In the unlikely event that all breaches being subject to the maximum penalty allowed for the type of breach and the membership size of union we estimate that around £45,000 would be imposed as penalties on unions on average on an annual basis. This is based on the Certification Officer's declarations of non-compliance over the past five years. This could rise with the introduction of the Certification Officer's proactive investigatory powers. However, even if these are concentrated on larger unions and most serious potential breaches, and penalty maxima are applied for each breach, we estimate that on average penalties imposed would not be greater than £105,000 a year.

Proposed level of penalties

The Government has set out that the proposed levels of penalties, as proposed in the consultation document, are proportionate. The Government is of the view that the penalty maxima and minima should be put in place as proposed. Those levels of are in line with those that can be imposed by other regulators. For example, the Electoral Commission can impose financial penalties of up to £20,000, which is the same as the maximum level of penalty proposed for the Certification Officer.

In setting out the maximum penalty, the Government has categorised obligations into three broad groups taking account of the severity of the obligation that has been breached. Previous practice suggests that in all but the most extreme cases, the financial penalties issued are likely to be less than the maxima set out in the regulations. This is because the Certification Officer will have the discretion to impose an appropriate penalty – within the maximum and minimum range set by the regulations – depending on the circumstances of the case. The Certification Officer will also be able to take into account both aggravating and mitigating factors when imposing a penalty and is not obliged to award a penalty for every breach.

The proposed maxima will apply to each complaint of a breach. Therefore, if there are multiple complaints, the financial penalty may be higher. This is still subject to the Certification Officer's discretion in applying an appropriate penalty.

The Government proposes to proceed with the implementation of the level of penalties as set out in the consultation document, with some amendments which have arisen as a result of this consultation.

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/460114/BIS-15-534-trade-union-bill-equality-analysis.pdf

Timing and next Steps

The Government regrets the delay in publishing this response, given that the consultation took place in 2017. Challenges of Parliamentary time and wider events have delayed this response, and implementation of the measures it covers.

However, as the penalties will only affect non-compliant organisations, the proposals have not changed substantially and there is no particular reason to think that views on them will have changed significantly since 2017, the Government does not consider that there is a need to re-consult prior to introduction of the power to impose penalties.

The next step will be for the Government to lay draft regulations before Parliament to enable the implementation of the penalties regime for the Certification Officer. Subject to Parliamentary approval, the intention is for the regulations and the implementation of the regime to come into force in April 2022.

Alongside those regulations, the Government will introduce by commencement regulations the enhanced investigatory powers for the Certification Officer contained and referred to in section 17 of the Trade Union Act 2016, together with the other remaining reforms relating to the Certification Officer contained in that Act. These investigatory powers and other reforms, alongside the power to impose a levy, will also commence in April 2022.

Responses to consultation questions

The consultation document asked ten questions, the first five asked for details of the respondent organisation or individual. Questions 6 to 10 set out the key questions for respondents to consider.

Question 6: Do you agree with the proposed approach to set the level of financial penalty by type of obligation breached?

Unions strongly disagreed with the Government's proposed implementation of a financial penalties' regime. Unions do not think that the introduction of financial penalties is necessary as the Certification Officer's current enforcement orders are sufficient. There was support for the proposed approach of setting the level of penalty by type of obligation breached.

Government response

The Government has set out previously why it believes that the reforms to the role of the Certification Officer are necessary, including the implementation of a financial penalties' regime. The Government welcomes support for the proposed approach of setting out the level of financial penalty by type of obligation breached. **The Government will carry forward this approach in the final regulations.**

Question 7: Are the maximum levels by type of obligations breached appropriate?

Unions argued that the proposed penalty maxima were too high and should be reduced. They felt that penalties of up to £20,000 were not appropriate where minor technical mistakes or administrative errors are made. The Certification Officer should issue enforcement guidance to clarify that penalties would only be issued in exceptional circumstances where fraudulent activity or wilful non-compliance was involved. The penalty minima of £200 should also be reduced.

Government response

The Government has set out previously why it believes that the proposed penalty maxima are appropriate. The Government's view is that unions have important statutory obligations to observe, and where there is evidence of wilful non-compliance or fraudulent activity, the Certification Officer should be able to impose a penalty up to the proposed maxima set out in the financial penalties' regulations. **The Government does not intend to change the proposed maxima in the final regulations.**

The Government observes that in practice most penalties issued are likely to be less than the maxima because the Certification Officer will have discretion and be able to take account of mitigating factors.

Mitigating factors may include a genuine administrative error or oversight, prompt compliance with investigatory requirements or prompt acknowledgement or rectification of a breach.

However, it will be for the Certification Officer to determine what these factors are. Similarly, it will be up to the independent Certification Officer to decide whether to issue enforcement guidance and determine what this guidance should contain.

In relation to the £200 minima, the Trade Union Act 2016 requires that where the Certification Officer decides to impose a financial penalty, the minimum penalty must be £200. It is important to note that the Certification Officer is not obliged to issue a financial penalty. The Certification Officer may decide that an enforcement order is sufficient or 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.

Question 8: Do you agree with the approach to reduce the penalty maxima by 50% for unions and employers' associations whose membership size is less than 100,000?

Whilst opposed to the proposed financial penalties regime as a whole, a majority of unions were supportive of the Government's approach that penalty maxima should be reduced by 50% for smaller unions. A small number of unions were opposed, suggesting instead that the 100,000-membership level was arbitrary and that a more gradual scale of penalty maxima reductions should be used.

Unions made some technical comments in relation to the definition of a small union, asking that the final regulations should allow the Certification Officer to use the membership figures in their latest annual return when calculating whether a union is below the 100,000-membership threshold.

Government response

The Government has considered the differing views from unions on this question and **has decided to continue with the approach set out in the consultation, as this benefits from simplicity and would be readily understood by all parties**. The final regulations will therefore provide for a reduction of penalty maxima by 50% for unions and employers' associations whose membership size is less than 100,000.

In relation to the definition of a small union, **the Government agrees with the unions' views** and has amended the final regulations so that the Certification Officer may rely on the membership figure provided in the latest annual return.

Question 9: Do you agree with the proposed approach not to add to the list of grounds, set out in the Trade Union Act 2016, upon which an appeal may be made?

Unions wanted to have a full right of appeal on the grounds that a penalty imposed by the Certification Officer is unreasonable or unmerited due to the facts of the case. Unions also argued that the final regulations should require the Certification Officer to provide written reasons why they have decided to impose a financial penalty.

Government response

Under the Trade Union Act 2016, the Government set out powers that provided for appeal rights on points of fact and law, as well as the reasonableness of the penalty imposed. This provided greater judicial oversight of the Certification Officer's decisions by strengthening appeal rights to the Employment Appeal Tribunal. **The Government believes that it has already addressed trade union concerns in this area.**

In relation to written reasons, the Certification Officer is under a statutory duty to inform the person subject to a financial penalty order of the grounds on which the Certification Officer proposes to make that penalty⁶. Furthermore, the Certification Officer must give reasons for their decision because they are already under a public law duty to do so. **Therefore, the Government does not believe that it is necessary to include in the regulations an express provision requiring the Certification Officer to give written reasons why they have decided to impose a financial penalty.**

Question 10: Do you agree with the proposed approach that interest will accrue for late payment of financial penalties?

The TUC and many unions strongly opposed the proposal that interest should be charged for late payment of penalties, particularly as the Government had not taken up the power in the Trade Union Act 2016 to provide discounts for early payment. Some unions asserted that small unions might need time to collect sufficient funds to pay a penalty and that the charging of interest would be particularly unfair to them. A number of unions suggested that a discount scheme for early payment would be in line with other penalty regimes.

Government response

The Government recognises that the charging of interest may adversely affect small unions. **The Government will amend the final regulations so that no interest is charged for late payment.** The Government does not agree that there is a sufficient case for providing discounts for early payment.

⁶ Paragraph 4(a) of Schedule A4 to the Trade Union and Labour Relations (Consolidation) Act 1992, as inserted by the Trade Union Act 2016

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