

Title: Certification Officer powers to impose financial penalties IA No: BEIS033(F)-21-LM RPC Reference No: Lead department or agency: BEIS Other departments or agencies:	Impact Assessment (IA)		
	Date: 01/11/2021		
	Stage: Final		
	Source of intervention: Domestic		
	Type of measure: Secondary legislation		
Contact for enquiries:			

Summary: Intervention and Options	RPC Opinion: Not required
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Cost of Preferred (or more likely) Option (in 2019 prices)			
Total Net Present Social Value	Business Net Present Value	Net cost to business per year	Business Impact Target Status
£m 0.0	£m 0.0	£m 0.0	Qualifying provision

What is the problem under consideration? Why is government action or intervention necessary?

The Trade Union Act 2016 (the 2016 Act) modernised and reformed trade union law. To help ensure trade union compliance with the updated regulatory framework, the 2016 Act also enhanced the powers available to the Certification Officer to regulate trade unions. The Certification Officer is responsible for statutory functions relating to trade unions and employers' associations. Part of the Certification Officer's role involves taking appropriate action if a trade union operates in breach of its statutory obligations. However, prior to the 2016 Act, these actions were limited to issuing an enforcement order requiring the union to act in compliance with the regulations.

What are the policy objectives of the action or intervention and the intended effects?

The regulations will implement the powers in the 2016 Act to enable the Certification Officer to impose a financial penalty on trade unions which are in breach of their statutory obligations. They provide a framework that sets appropriate penalty maxima and minima for different types of statutory obligation breached and by different membership size of union. Penalties will create a strong incentive for unions to comply with the full suite of their statutory obligations. The purpose of these obligations is to ensure regularity, fairness and transparency in the way the union is run; giving confidence to the union, their members and stakeholders. On-going compliance with these rules provides a crucial foundation for a well-function industrial relations framework.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

The policy option is implementing part of the 2016 Act, so limited options have been considered:
Option 0 is the no change option.
Option 1: The Certification Officer will be able to issue financial penalties to trade unions where they are in breach of trade union obligations. However, in order to ensure proportionality with the severity of the statutory obligation breached, the proposed regulations set different levels of penalty maxima of £20,000 for breaches related to political funds, union elections and personnel propriety considerations, £10,000 for breaches related to statutory obligations to keep membership registers up-to-date, and £5,000 for breaches of obligations to provide information, comply with CO investigations, and internal union rules.
For unions with less than 100,000 members, the maximas are halved.
In very specific circumstances, primarily related to non-compliance with Certification Officer investigations or related preparatory work, an individual union officer or official could be fined a maximum of £1,000.

Will the policy be reviewed? It will not be reviewed. If applicable, set review date: Month/Year				
Is this measure likely to impact on international trade and investment?		No		
Are any of these organisations in scope?		Micro Yes	Small Yes	Medium Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)		Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister: _____ **Paul Scully** _____ Date: _____ **10/12/2021** _____

Summary: Analysis & Evidence

Policy Option 1

Description: The Certification Officer would have the power to impose financial penalties on unions who breach their statutory obligations

FULL ECONOMIC ASSESSMENT

Price Base Year 2019	PV Base Year 2020	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: £0.0m

COSTS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate		0.036	0.001	0.046

Description and scale of key monetised costs by 'main affected groups'

Familiarisation cost to unions of £0.03 million. Familiarisation and preparation costs for the Exchequer (Certification Office) of £0.006m. Certification Office's ongoing costs of managing the penalties regime £0.001m.

It is difficult to estimate exactly what the annual cost of penalties would be, but it is highly likely to be much lower than £0.1 million a year [the cost of penalties is excluded under the Better Regulation Framework]. Some familiarisation costs and the costs of potential appeals have already been included under the Trade Union Act Enactment Impact Assessment so have not been included here. These are an overall estimate for familiarisation by unions with all the Certification Officer reforms of £0.55 million (part of which would relate to penalties), and the cost of appeals against penalties of £0.007 million (including fees which are no longer charged).

Other key non-monetised costs by 'main affected groups'

N/A

BENEFITS (£m)	Total Transition (Constant Price) Years		Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low		Optional	Optional	Optional
High		Optional	Optional	Optional
Best Estimate		N/A	N/A	

Description and scale of key monetised benefits by 'main affected groups'

The revenue from penalties will go to the Exchequer. While it is difficult to forecast precisely at this stage it is highly likely to be much less than £0.1 million a year on average [penalties are not counted under the Better Regulation Framework].

Other key non-monetised benefits by 'main affected groups'

Union members, employers and the wider public may be more assured that trade unions are effectively regulated and incentivised to be compliant.

Key assumptions/sensitivities/risks

Discount rate

3.5%

There remains uncertainty around the number of penalties that will be issued. However, looking at the annual average of infringements by level and size of union over the past ten years, it is unlikely that the additional investigatory powers combined with the penalty regime would have a large financial impact on unions even if applied at the maximum level.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m: 0.0			Score for Business Impact Target (qualifying provisions only) £m:0.0
Costs: 0.0	Benefits: 0.0	Net: 0.0	

Evidence Base

Problem under consideration

1. The Trade Union Act 2016¹ (“the 2016 Act”) modernised and reformed trade union law. To help ensure trade union compliance with the updated regulatory framework, the 2016 Act also enhanced the powers available to the Certification Officer to regulate trade unions. The Certification Officer is responsible for statutory functions relating to trade unions and employers’ associations.
2. Part of the Certification Officer’s role involves taking appropriate action if a trade union operates in breach of its statutory obligations. However, prior to the 2016 Act, these actions were limited to issuing an enforcement order requiring the union to act in compliance with its statutory obligations.

Rationale for intervention

3. The 2016 Act enhanced the actions that could be taken against non-compliant unions: it enabled the Certification Officer to impose a financial penalty, where appropriate, on such unions. This additional deterrent against unions who breach the law or their rules should further incentivise compliance, providing greater protection and assurance for union members and the public.
4. Section 19 and Schedule 3 of the 2016 Act 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.
5. The regulations may also:
 - a. set different penalty amounts depending on membership size, or for different types of obligation breached; and
 - b. provide for additional grounds of appeal, discounts for early payment, payment of interest or additional financial penalties for late payment, and enforcement of financial penalties.
6. This impact assessment is for the implementing regulations for the financial penalties.

Policy Objective

7. The regulations will implement the powers in the 2016 Act to enable the Certification Officer to impose a financial penalty on trade unions which are in breach of their statutory obligations. They provide a framework that set appropriate maximum penalties for different types of obligation and different sizes of union.
8. The enhancement of the Certification Officer’s enforcement powers, including the power to impose financial penalties where there has been a breach, brings them in line with the powers of other regulatory authorities, such as the Electoral Commission. The objective of the introduction of penalties is to aid the Certification Officer in ensuring rapid

¹ Trade Union Act 2016 <http://www.legislation.gov.uk/ukpga/2016/15/contents/enacted>

compliance with statutory requirements, and to help assure union members and the wider public that compliance with the law in the union sector is being enforced.

9. A consultation took place during April and May in 2017. The government has published its response to the consultation on 8th June 2021². One change the government made following the consultation is that interest charges for late payment will not form part of the penalties regime.

Policy Options

10. Policy option 0 is the no-change option. This would mean that the Certification Officer would not be able to impose financial penalties on trade unions who had breached their statutory obligations. The policy proposal forms part of the reform of the Certification Officer's enforcement powers to bring them into line with other government regulators. Therefore, option 0 would mean that the CO's enforcement powers would be weaker than other regulators. It would also mean that part of the Trade Union Act 2016 would remain unimplemented.
11. Policy option 1 is set out in the implementing regulations for the financial penalty regime.

Policy option 1

12. The 2016 Act sets out that the power to issue a financial penalty will apply where the Certification Officer has the power to issue an enforcement order. It lists nine provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") under which the Certification Officer can issue an enforcement order. These provisions include Section 82 of the 1992 Act which covers failure to comply with rules on political funds. This could in theory apply to employers' associations, but in practice no employers' association has a political fund. The other provisions in the 1992 Act that could result in a penalty do not apply to employers' associations. Therefore, practically, the financial penalties only apply to trade unions.
13. The 2016 Act sets out that the minimum penalty is £200 and the maximum penalty is £20,000 per breach. In Parliament, during the passage of the 2016 Act, the Government committed to penalty maxima below the £20,000 limit for many obligations to provide more scope for a penalty imposed to be commensurate with the type of obligation breached and the size of union. The implementing regulations divide the nine provisions into three groups of obligation type, setting different penalty maxima for each group. These allow the highest maximum penalty for breaches relating to political funding, the proper conduct of union elections and personnel propriety considerations (Level 1). Then, for breaches relating to statutory obligations in relation to keeping the membership register up-to-date the penalty maximum is set at £10,000 (Level 2). Finally, for obligations requiring provision of information, and compliance with investigations and internal union rules, the penalty maximum is £5,000 (Level 3). This is set out in more detail below:

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/991739/certification-officer-enforcement-powers-consultation-govt-response.pdf

Table 1: Maximum penalties for non-compliance by type of obligation

<p>LEVEL 1: £20,000 maximum penalty for breach of:</p> <ul style="list-style-type: none"><input type="checkbox"/> Duty to ensure senior positions are not held by an individual with a criminal record<input type="checkbox"/> requirements about elections for certain positions<input type="checkbox"/> restriction on applying a union's funds in the furtherance of political objects<input type="checkbox"/> rules as to ballots on political resolutions<input type="checkbox"/> political fund rules<input type="checkbox"/> information to members about contributing to political fund
<p>LEVEL 2: £10,000 maximum penalty for breach of:</p> <ul style="list-style-type: none"><input type="checkbox"/> duty to keep membership up to date
<p>LEVEL 3: £5,000 maximum penalty for breach of:</p> <ul style="list-style-type: none"><input type="checkbox"/> duty to comply with a request for access to accounting records<input type="checkbox"/> requirements to provide details of industrial action, or political fund expenditure, in the annual return<input type="checkbox"/> internal union rules on certain matters<input type="checkbox"/> duty to comply with investigatory requirements

14. In addition, to take account of union size, each of these maxima is reduced by 50% for unions with fewer than 100,000 members, to reflect the smaller resources generally available to unions with fewer members.

15. Where individuals are found to be in breach of Schedule A3, paragraph 5(1) of the 1992 Act, essentially relating to complying with Certification Officer investigations or information gathering prior to a potential investigation, there will be a maximum fine of £1,000.

16. Unions will be able to appeal the decision to impose a penalty, or the amount of the penalty through the Employments Appeal Tribunal (EAT). They will be able to appeal on the grounds that (a) it was based on an error of fact, (b) it was wrong in law, or (c) it was unreasonable.

17. The Certification Officer will be enabled to recover the amount of the penalty as a civil debt, following a Court Order.

Background

18. Over the last 10 years to 2020/21 the Certification Officer has dealt with 450 complaints by union members about perceived breaches of trade union legislation or rules, in 150 separate cases³. 78 of these complaints were upheld, with 22 enforcement orders made. An enforcement order is only made when the Certification Officer believes it is appropriate for the union to take some action to remedy the situation. 23 different unions had complaints upheld against them over the ten year period.

³ BEIS analysis of Certification Officer decisions <https://www.gov.uk/government/organisations/certification-officer/about#our-decisions>

Table 2: Certification Officer investigations, complaints and declarations, 2011/12 to 2020/21

	cases	total complaints	complaints upheld (declaration)	orders made
2011/12	16	87	12	0
2012/13	16	35	6	2
2013/14	16	36	8	3
2014/15	20	57	6	3
2015/16	14	43	12	5
2016/17	12	40	6	2
2017/18	11	54	15	4
2018/19	17	43	8	2
2019/20	18	29	4	1
2020/21	10	26	1	0
total	150	450	78	22
annual average	15	45	7.8	2.2

19. The complaints upheld were fairly evenly distributed between unions with 100,000 or more members, and those with less than 100,000 members (36 for the former, 42 for the latter). Over 85% of complaints upheld related to level 3 breaches.

Table 3: Complaints upheld by type of obligation breached and union size, 2011/12 to 2020/21

	Unions with 100,000 or more members			unions with less than 100,000 members			total
	Level 1	Level 2	Level 3	Level 1	Level 2	Level 3	
2011/12			5			7	12
2012/13			1	1		4	6
2013/14			1	3		4	8
2014/15		1	4			1	6
2015/16			8			4	12
2016/17			1	2	1	2	6
2017/18			8			7	15
2018/19			3			5	8
2019/20	2		1	1			4
2020/21			1				1
total	2	1	33	7	1	34	78
annual average	0.2	0.1	3.3	0.7	0.1	3.4	7.8

20. Looking at the annual average of infringements by level and size of union over the past ten years:

- a. If the maximum fine for level and size of union was charged for each infringement, then the total average annual amount of penalties issued would be around £37,500.
- b. The Certification Officer will have stronger powers to investigate potential breaches by unions of the laws it regulates, either proactively or on the basis of third party information. This is in addition to current powers to investigate on the basis of members' complaints. However, the Certification Officer would need to be satisfied that there was a good reason to investigate proactively or on the basis of a third-party complaint. While it is difficult to know how many additional cases would be generated through these extra powers, it is likely to be much lower than the number of cases based on members' complaints. The types of situation that generate most complaints would require specific information that wouldn't be easy to come by outside of the union. Therefore, it might be likely that these additional

organisations would focus on more high serious potential breaches and affect larger unions. Looking at this speculatively, it is unlikely that the additional powers combined with the penalty regime would have a large financial impact, even if applied at the maximum level. Based on an estimate of additional cases at quarter of the rate of annual average cases (as used in the Trade Union Act IA) there might be 4 additional cases a year. The data shows that there are around 3 specific complaints per case on average, and around one breach found every two cases. If the same ratio applied to the additional investigations – and the breaches were considered serious and affected large unions – then this might generate an average of £40,000 a year (2 breaches of level 1 regulations subject to the maximum penalty imposed).

- c. However, the consultation response sets out that previous practice among regulators shows that in all but the most serious cases financial penalties, when considered appropriate, are likely to be less than the maximas set out in the regulations.
- d. Also, the Certification Officer is not obliged to impose a financial penalty on unions for every breach identified but will have discretion as to whether a penalty is required. The Certification Officer will also have to consider the reasonableness of any penalty issued.

21. The regulations will come into force on 1st April 2022. The Certification Officer will operate the penalty regime, with unions able to appeal as a last resort to the Employment Appeal Tribunal.

Monetised and non-monetised costs and benefits

Policy option 0

22. As this is the no change policy option, we have not estimated any costs and benefits for this option.

Policy option 1

23. The 2016 Act covered the granting of powers to the Certification Officer to issue financial penalties to trade unions in breach of their statutory obligations. Section 19 and Schedule 3 of the 2016 Act sets out which sections of the 1992 Act are covered, and aspects of how the penalty regime will work. These included the conditions in which a penalty could be imposed (where a union had breached one of the sections of the 1992 Act listed in Section 19), the ability to set a conditional penalty, the right of appeal to the EAT, and the right to set different maximum penalty amounts in regulations according to type of obligation breached and membership size of unions.

24. The Act IA already accounts for the costs of this element of the penalties legislation:

- a. For the transition cost to unions, it estimated that for the part of the 2016 Act covering the Certification Officer Reforms, there would be a cost of £548,000. This partly reflected familiarisation by union officials, estimated at £232,000, and partly reflected the cost of legal advice obtained, estimated at £316,000. This was based on around 8 hours' time for the union General Secretary and four senior officials, plus 8 hours' legal advice. Only a part of this total cost would relate to the penalties reform, as the Certification Officer reforms also included the widening of enforcement powers and the introduction of a levy.
- b. Cost to unions of appeals to the EAT: The Act IA estimates that there would be around 10 to 12 appeals against financial penalties over a five year period, out of a total of around 18-20 appeals. As costs to non-compliant unions are not scored as a cost under the Better Regulation Framework, we only consider the costs to

unions found to be compliant. Based on the existing track record where appeals relating to Certification Officer are generally unsuccessful, The Act IA estimated that no more than one appeal a year might prove successful. The estimated cost of an appeal was estimated at £7,000, including £1,600 in employment tribunal fees.

25. As noted above, the Better Regulatory Framework assumes compliance, and does not take account of the costs to non-compliant unions, so we do not take account of the costs of penalties imposed, or the costs of unsuccessfully appealing the imposition of penalties.

Costs to trade unions of familiarisation with the proposed regulations

26. We estimate that trade unions will familiarise themselves with the proposed regulations to become aware of the specifics of the penalties framework, including interest charges for late payment, and the method of enforcement. We take a similar approach to that used to estimate the familiarisation costs to unions arising from the different sections in the 2016 Act. However, we assume that unions are already familiar with the provisions in the 2016 Act regarding financial penalties, and note that the regulations are relatively brief, largely setting out some of the detail of the different penalty maxima for different types of breach and for different size of union. We also take into consideration that only 23 unions have experienced having a Certification Officer declaration or order issued against them in the last 10 years (some of which have become former unions – for instance through merger). Of these, 15 only had one case where a complaint was upheld against them during this period. Furthermore, unions already have a requirement to be compliant with the 1992 Act and the 2016 Act, so should not expect to have to take account of the information contained in the proposed regulations. This suggests that there will be some variation in time spent on familiarisation, with perhaps the larger and more politically engaged unions spending more time than the others. We therefore estimate that on average it would take a union general secretary and four senior directors half an hour to familiarise themselves with the regulations.

27. To estimate the labour costs we use median gross hourly wages data from the 2020 Annual Survey of Hours and Earnings (ASHE). For general secretaries and other senior directors of the trade unions we use the wage figure for functional managers and directors not elsewhere classified (SOC 1139, as specified in the SOC10 Index). To estimate total labour costs, we use the estimate of non-wage labour costs as 21.8% of wage costs, based on Eurostat data⁴. These figures are set out below.

Table 4: Estimated median hourly wage costs and labour costs, 2020

<u>Staff</u>	<u>Median hourly wages excluding overtime</u>	<u>Hourly labour costs</u>
Functional managers and directors n.e.c.(representing trade union general secretary and senior directors)	£24.58	£29.94

28. To account for the familiarisation time, the hourly labour costs for the general secretary are multiplied by 0.5, and those for the senior directors are multiplied by 2 (0.5 hours x 4

⁴ Eurostat, Labour costs per hour in EUR, 2019, whole economy excluding agriculture and public administration, [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Labour_costs_per_hour_in_euro,_whole_economy_\(excluding_agriculture_and_public_administration\)_T1](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Labour_costs_per_hour_in_euro,_whole_economy_(excluding_agriculture_and_public_administration)_T1).

directors). This produces the estimated average cost per union of around £ (2.5 x £29.94 = £75).

29. Following the approach set out in the Act IA, we also estimate that unions will get legal advice on the details contained in the regulations. Similarly, we estimate that unions will pay on average for half an hour of external legal advice, at an hourly rate of £278 (this uprates the £250 rate used in the Enactment IA to 2020 prices using the ONS Service Producer Price Index for legal and accounting services). Our estimate for legal costs for each union as part of familiarisation with the regulations is therefore £278 x 0.5 = £139.
30. The latest information from the Certification Officer's website is that there are 141 listed and scheduled trade unions. Multiplying the estimated costs per union by the number of unions gives an estimated familiarisation cost of (£75 + £139) x 141 = £30,000 (to the nearest £1,000).

Other familiarisation costs

31. We do not anticipate that employers' associations would familiarise themselves with these regulations. No employers' association has a political fund, therefore in practice the penalty regime does not apply to them.
32. We do not anticipate that union officials or workplace representatives would familiarise themselves with these regulations. Only a very small proportion of union officials and representatives are involved in an investigation each year, and even fewer are involved in an investigation where a breach is found. Even then, the officials and representatives would only be subject to a potential fine if they did not comply with a Certification Officer investigation. It is unlikely that in the general run of things officials and representatives would consider that such a situation was relevant to them.
33. There will be some costs for the Certification Office to familiarise themselves with the regulations. The Certification Office's estimate is that the Certification Officer and two senior staff have spent a reasonably large number of hours preparing for the introduction of the reforms. Their estimate is around 12 days combined at a daily labour cost for the three of around £500. This gives an estimate of around £6,000.

Ongoing costs

34. The Certification Office estimates that the ongoing costs of administering the penalties regime will be very low at around £1,000 a year.

Ongoing benefits

35. The power to issue financial penalties enhances the ability of the Certification Officer to enforce trade union regulation, and provides additional motivation for union compliance. This should benefit trade union members and the wider public who will have greater confidence that trade unions are operating in compliance with their statutory obligations.
36. The proposed regulations help ensure that the penalty maxima are proportionate to the type of obligation breached and the membership size of the union (membership size correlates quite closely to union income).

Summary of Costs and benefits, and costs to business

37. The summary of costs and benefits is as follows:
 - a. Familiarisation by unions = £0.03 million
 - b. Familiarisation and preparation by Certification Office = £0.006 million
 - c. Ongoing costs to the Certification Office = £0.001 million

- d. Non-monetised benefits are expected to be greater confidence among union members and the wider public that unions are operating in compliance with their statutory obligations.

38. The possible annual costs of financial penalties imposed on unions (not included in the EANDCB)

- a. Cases brought by union members = less than £0.038 million
- b. Additional cases = likely to be less than £0.04 million

39. The NPV, EANDCB and BIT score are all below £0.1 million so are recorded as 0.

Impact on small and micro businesses

40. Levels of turnover would suggest many unions could be small or micro organisations, though numbers of staff employed are not readily available.

41. The main cost of the penalty regime will fall on non-compliant unions through penalties issued, though the amounts are expected to be low – given the low level of breaches each year. The regulations will mitigate the impact on smaller unions slightly by halving penalty maxima for unions with less than 100,000 members.

Equality Impact Assessment

42. The Government published an equality assessment for the Trade Union Bill to understand the impact of individual workers (both union and non-union members)⁵. An Impact Assessment for the Trade Union Act was also published, which set out the Equality Assessment for the Bill as a whole, including the Certification Officer reforms⁶. It assessed that there would be no adverse equality impacts on any protected group because of the Trade Union Act 2016.

Potential trade implications

43. There are no potential trade implications from this legislation.

Monitoring and Evaluation

44. Management information from the Certification Officer on penalties issued, payments and appeals will be monitored by BEIS.

⁵ <https://www.gov.uk/government/publications/trade-union-bill-equality-analysis>

⁶

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/583579/trade_union_act_enactment_IA_BEIS_clean.pdf