

**EXPLANATORY MEMORANDUM TO**  
**THE TRADE UNION (LEVY PAYABLE TO THE CERTIFICATION OFFICER)**  
**REGULATIONS 2022**

**2022 No. XXXX**

**1. Introduction**

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

**2. Purpose of the instrument**

- 2.1 To implement section 257A of the Trade Union and Labour Relations (Consolidation) Act 1992 (“the 1992 Act”), as inserted by section 20 of the Trade Union Act 2016 (“the 2016 Act”), which allows the Certification Officer to recoup costs through a levy on trade unions and employers’ associations. The instrument sets the principles by which the levy should be calculated by the Certification Officer.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 None.

**4. Extent and Territorial Application**

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

**5. European Convention on Human Rights**

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

“In my view the provisions of the Trade Union (Levy Payable to the Certification Officer) Regulations 2022 are compatible with the Convention rights.”

**6. Legislative Context**

- 6.1 The Certification Officer is responsible for regulating trade unions and employers’ associations. Functions include maintaining a list of trade unions and employers’ associations and determining complaints concerning trade union elections, certain other ballots and certain breaches of trade union rules. These functions are currently funded by the taxpayer. Section 257A of the 1992 Act enables the Secretary of State to make regulations to provide for the Certification Officer to recoup their costs via a levy on trade unions and employers’ associations.
- 6.2 The Trade Union (Levy Payable to the Certification Officer) Regulations 2022 make such a provision and establish the principles and framework by which the Certification Officer will determine the levy. This is the first time the power has been exercised.

- 6.3 Section 257A of the 1992 Act requires the Secretary of State to consult ACAS and trade unions and employers' associations ("relevant organisations") before making the levy regulations. The Department for Business, Energy and Industrial Strategy carried out a full public consultation from 31 August to 26 October 2017. In doing so, we fulfilled the commitment given during the passage of the 2016 Act to consult on whether the costs of any external inspectors the Certification Officer uses should be excluded from the levy.
- 6.4 Following the 2017 consultation, the government also agreed to exclude the variable costs of the Certification Officer's external legal advice from the levy. The consultation response was published in June 2021 and, due to the passage of time since the consultation, a further engagement exercise was undertaken with all relevant organisations between June and July 2021 to gather views of trade unions and employers' associations on the developed levy proposal.

## **7. Policy background**

### *What is being done and why?*

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

### *Explanations*

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

- 7.2 The annual cost of the Certification Officer is funded by the Department for Business, Energy and Industrial Strategy which provides an annual allocation to the Advisory, Conciliation and Arbitration Service (ACAS). ACAS in turn allocate a budget to the Certification Officer for the financial year. Currently, some of the Certification Officer's activities incur a statutory charge, set out in the Trade Unions and Employers' Associations (Amalgamations, etc.) Regulations 1975 (as amended) and in the Certification Officer (Amendment of Fees) Regulations 2005. Fees charged include applications for entry into the list of trade unions and employers' associations which the Certification Officer maintains (listing fee) and applications from a trade union for a certificate of independence. These fees provide in total approximately £7,000 of income per annum, but they have not been updated since 2005 and so do not currently reflect the actual costs of the Certification Officer's work. With the exception of these fees, trade unions and employers' associations do not pay towards their regulation by the Certification Officer.

#### Why is it being changed?

- 7.3 The government believes that at a time of ongoing financial restraint it is appropriate that the cost of regulating trade unions and employers' associations should be borne by the organisations themselves rather than the taxpayer. The Trade Union (Levy Payable to the Certification Officer) Regulations 2022 provide for the Certification Officer to do this via a levy.

What will it now do?

- 7.4 The Trade Union (Levy Payable to the Certification Officer) Regulations 2022 lay out the principles by which the Certification Officer is to calculate the levy each year. In setting out these principles, the government intends to achieve a levy system that is equitable, predictable, simple, and affordable.
- 7.5 The levy will be calculated each year and based on the Certification Officer's expenses. We anticipate that the levy will be charged in the final quarter in the financial year that it relates to (although the regulations allow it to be charged between 1<sup>st</sup> April in the financial year to which the levy relates and 30<sup>th</sup> June in the following financial year) and will be broadly based on the actual relevant expenses, incurred or to be incurred. Organisations must have existed for a full financial year before the year to which the levy relates before they can be charged.
- 7.6 In order to ensure accountability for the levy, the Certification Officer must aim to ensure that the total amount levied over a three-year period does not exceed their total relevant expenses over that time. When notifying each organisation of the levy they must pay, the Officer must also explain how the levy has been determined.
- 7.7 The costs of external inspectors and external legal services will be excluded from the levy, as these are not expected to be predictable costs as the Certification Officer's investigatory and enforcement powers are extended under sections 17, 18 and 19 of the 2016 Act.
- 7.8 The levy methodology requires the Certification Officer to first determine the "total levy" for a financial year before apportioning it between the four categories of relevant organisations, which are federated trade unions, non-federated trade unions, federated employers' associations and non-federated employers' associations. That apportionment is to be based on the expenses which are broadly referable to functions exercised in relation to each of those categories.
- 7.9 Many of the expenses incurred by the Certification Officer cannot easily be attributed to any one of those four categories, and so the regulations allow the Certification Officer to determine a "basic amount", which is the proportion of the total levy which covers expenses incurred by the Officer from functions and services broadly applicable to all organisations; this should initially be attributed to all relevant organisations equally as the "basic levy". All relevant organisations should pay the basic levy, except where the basic levy exceeds 2.5% of their annual income when they will be considered exempt for that financial year. Annual income refers to the income in the most recent annual return sent by each organisation to the Certification Officer under section 32 of the 1992 Act.
- 7.10 The "additional amount" is the remainder of the total levy minus the basic amount. A "categorised additional amount" is a proportion of the additional amount which covers expenses incurred by the Certification Officer from functions and services broadly applicable to a particular category of relevant organisation; this should be attributed to those categorised organisations only as a "categorised additional levy". (Based on her current functions and services and the costs currently incurred in relation to them, the Certification Officer considers it likely that only non-federated trade unions will be required to pay a categorised additional levy.) The Certification Officer must initially divide each categorised additional amount equally between all relevant organisations in that category to find the categorised additional levy. Where the aggregate of the

basic levy and a categorised additional levy exceeds 2.5% of a relevant organisation's annual income, they will only be charged the basic levy for that financial year.

- 7.11 The consultation proposed that higher income organisations would subsidise lower income organisations by paying an enhanced levy. The “total levy shortfall” is the remainder of the total levy once the basic and additional amounts have been apportioned to relevant organisations who are not exempt; this is attributed to relevant organisations as the “enhanced levy”. The Certification Officer must divide and allocate the total levy shortfall equally between all relevant organisations, other than those that have already been exempted, and ensure that the aggregate of any other levy payments and the enhanced levy would not exceed 2.5% of their annual income for any relevant organisation. In practice this may require that the equal division of the total levy shortfall is repeated until that threshold is not exceeded for any relevant organisation required to pay the enhanced levy.
- 7.12 The government also intends to revoke most of the fees the Certification Officer currently charges for a number of functions. This is because the cost of these functions will be subsumed within the levy. Following the 2017 consultation and the 2021 further engagement exercise, two fees will be preserved: the fee for listing as a trade union or employers' association and the fee for a certificate of independence. This is because they help ensure an organisation that applies for listing or for a certificate of independence genuinely meets the criteria for doing so. The Trade Union (Levy Payable to the Certification Officer) Regulations 2022 provide that the costs of dealing with applications for listing and certificates of independence are not relevant expenses for the purposes of determination of the levy. The revocation of the Certification Officer's fees requires a separate statutory instrument under the negative procedure, which the government intends to lay once Parliament has given approval to this instrument.

## **8. European Union Withdrawal and Future Relationship**

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

## **9. Consolidation**

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

## **10. Consultation outcome**

- 10.1 The Department for Business, Energy and Industrial Strategy carried out a full public consultation on the levy system from 31 August to 26 October 2017. 34 responses were received in total. Of these, 20 were from trade unions, 10 were from employers' associations, and the remaining four were from individuals or other organisations.
- 10.2 A number of responses, largely from trade unions, expressed general opposition to the principle of a levy. The majority of the rest agreed the levy met the government's objectives, with some modifications proposed. The government's response to the consultation, which has been published on gov.uk, contains a fuller analysis of responses received and the government's consideration of the suggestions made<sup>1</sup>.

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

- 10.3 As the previous consultation was more than three years ago, the government (as well as engaging further with ACAS) wrote to all trade unions and employers' associations in June 2021, to seek their views on the developed proposed structure of the levy as part of a further engagement exercise. 47 responses were received in total. Of these, 33 were from trade unions and 14 were from employers' associations.
- 10.4 A number of responses, particularly those from trade unions, expressed general opposition to the principle of a levy. Following the further engagement exercise, the government made an amendment from the levy proposal set out in the 2017 consultation, by increasing the number of levy bands for those relevant organisations which pay a categorised additional levy from three to four to ensure the same treatment for other relevant organisations that have a similar income. This is because, where the basic levy and the categorised additional levy exceed 2.5% of a relevant organisation's annual income, that relevant organisation may still be required to pay the basic levy rather than being altogether exempt for the financial year. The final levy policy was set out in the government response to the further engagement exercise, which was sent to all trade unions and employers' associations in October 2021.

## **11. Guidance**

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

## **12. Impact**

- 12.1 The impact on business, charities or voluntary bodies of the introduction of the levy is estimated slightly over £1,150,000, primarily due to the annual cost of the levy.
- 12.2 The estimated annual operating costs of the Certification Office once the 2016 Act is fully implemented is around £1,180,000, of which an estimated £1,150,000 is expected to be levied from trade unions and employers' associations. The remainder of the annual budget, including variable external legal costs and appointment of external inspectors, will continue to be funded by the government.
- 12.3 Familiarisation costs to trade unions and employers' associations for familiarisation with the regulations are estimated at close to £40,000.
- 12.4 The impact on the public sector involves some implementation costs and ongoing costs from administering the levy. Recent estimates from the Certification Officer indicate approximately £18,000 transition costs and between £11,000 and £31,000 annual ongoing costs due to additional resource relating to the implementation of the levy.
- 12.5 An Impact Assessment is submitted with this memorandum and is published alongside the Explanatory Memorandum on the [legislation.gov.uk](http://legislation.gov.uk) website.

## **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses, including small employers' associations or small trade unions.
- 13.2 The levy system is designed to ensure that the levy is equitable and affordable such that organisations can still invest in services for their members. Relevant organisations will be exempt from the levy altogether where the levy payment amounts to over 2.5% of their annual income. No relevant organisation will pay over 2.5% of their annual income in annual levy payments.

## **14. Monitoring & review**

- 14.1 During the passage of the 2016 Act and to address concerns in Parliament at the risk of over-zealous regulation of trade unions, the government committed to keep under review the Certification Officer's powers to see how they work in practice.
- 14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Minister for Small Business, Consumers and Labour Markets has made the following statement:
- “It is not appropriate in the circumstances to make provision for review by the Secretary of State in the Trade Union (Levy Payable to the Certification Officer) Regulations 2022. This is because the costs of monitoring would be considered disproportionate to the relatively limited impact of the regulations.”

## **15. Contact**

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