

## Commissioner for decision (draft)

**Title:** Proposals for updating and communicating our approach to the application of financial penalties for the public sector.

**Date:** 14 March 2022

**Issue:** Developing a pathway for implementation of the agreed position on financial penalties for public bodies following a breach of UKGDPR or DPA 2018.

### Background

1. Last month ET agreed further work to be undertaken on how we impose financial penalties for public bodies.
2. ET noted that it wanted a more compliance focussed response evaluating deterrence better for public bodies, that this should run for the next two years before evaluation, and that it should be set out in the updated regulatory action policy. ET noted that cases completed over the coming months would also need to be considered in this context. There are six public sector cases in penalty setting stages that fall to be completed by end of Q2.
3. Two cases fall for immediate consideration as they are at penalty setting stage:
  - a. An investigation of a special health authority for a new IT software issue that led to corrupted data that resulted in delays to a small number of treatments (proposed at £750,000).
  - b. An investigation of a tertiary hospital trust for release of special category (gender re-assignment treatment) personal data (proposed at £980,000).

### Consideration:

4. ICO seeks to uphold information rights. In the discussion, ET recognised that the public sector represents a diverse set of organisations and services with different structures and motivations and is facing particular challenges

at this time. These provide different drivers for change in response to a financially based penalty and so speak differently to the point of 'dissuasiveness / deterrence' of sanctions. We wish to better reflect these differences when considering the dissuasiveness of financial penalties and take a more compliance focussed approach, but we will still use financial penalties for serious breaches. There is provision for us to do this within the present arrangement by taking a more focussed approach to S153 (k) considerations. We will review how this is working before any further roll out so will adopt the approach for 2 years.

5. S160 of the DPA provides that ICO must produce statutory guidance on exercise of our powers, including our financial penalties and this must be consulted upon including with SofS and be laid in parliament. Any developments to our approach to issuing fines to public sector bodies must therefore be reflected in the updated version, which will be produced later this year after your listening exercise. There is an existing route therefore for any update to be folded into so we are open and transparent.
6. In the meantime, we will need to address the investigations from the public sector that are nearing conclusion. Some of these investigations have identified breaches of the legislation and fall to be dealt with by sanctions including financial penalties as per the existing statutory guidance as set out in the regulatory action policy. However, it could be confusing to the regulated community for us to complete these as before if they are quickly followed by public statements that we are changing our approach in future.

## Recommendation

7. The recommended pathway we are developing is therefore:
  - That Claudia and I brief the investigations and legal regulatory enforcement team using the ET paper on the new requirements (Directors have been advised but we need to provide better explanations for the teams).
  - I will take the final decision maker role for future public sector cases, so we can calibrate the expectation fully. In anticipation of this I have provided advice to the team on the existing two cases with final decisions needed. We will use the completion of these cases to signal the new approach in early May after the pre-election period.

- That we complete the existing regulatory action policy consultation and, as a priority, the regulatory legal team add clarifying text on our proposed new approach to financial penalties for public sector organisations ready for consultation with SofS.
  - In parallel we will pursue the framework for engagement with government on thematic / systemic compliance issues which supports the change in approach. We are awaiting a meeting between you and the COO and for the Civil Service to take this forward.
  - We continue to be open about the considerations we have made when announcing any sanctions, in line with our communicating regulatory and enforcement action policy and to support accountability. This will allow an opportunity for you to communicate the direction of travel; this will tie back into the listening exercise and your recent stakeholder meetings.
  - We will revise the acceptance and prioritisation criteria for investigations to reflect the new approach.
8. This allows an efficient adoption of the new approach, while still meeting our statutory obligations.

## Risks and mitigations

9. Negative public perception that the ICO is not holding government / public sector controllers to account; this will be addressed by clear communications around the dissuasiveness of the other actions we are requiring to remedy any breaches and by communicating that we still retain the option to issue a financial penalty for serious breaches, with relevant examples highlighted.
10. Confusion amongst the regulated community about what rules apply to them; we will use any published notices, consultation responses and the comms activity around the new regulatory action policy to be clear on our expectations and approach to setting any fines; we will set these out on the face of the notices.
11. Successful appeals to ICO decisions under the previous approach; we will mitigate this by reviewing existing appeals and cases nearing conclusion to ensure that decisions are sound and reflect the direction of

travel and there is full detail of considerations made on the face of any notices issued.

12. Successful appeals by commercial entities or not-for-profit organisations who wish to argue that they should also benefit from the new approach; we will mitigate this by clear communication and explanation of the dissuasiveness criteria considerations in any notices issued and published.

### Consultation:

13. General Counsel and Communications have been consulted and their views are reflected in this note.

JDJ 14/3/22

Next steps:

Date: