

Consultation questions: Data Protection Fining Guidance

Start date: 2 October 2023

End date: 27 November 2023

About you

Your name:

[REDACTED]

Email address:

[REDACTED]

If you are responding on behalf of an organisation, please tell us the name of the organisation, your role and (if applicable) how the views of the members of the organisation have been obtained:

Federation of Small Businesses (FSB) is a non-profit making, grassroots and non-party political business organisation that represents members in every community across the UK. Set up in 1974, we are the authoritative voice on policy issues affecting the UK's 5.5 million small businesses, micro businesses and the self-employed.

If you are responding as an individual, please tell us if you are responding in a professional or private capacity:

N/A

If you are responding as an individual, please tell us if you consent to us publishing your name alongside your response (we will otherwise publish your response anonymously):

N/A

Our questions

Answers to the following questions will be helpful in finalising the draft Data Protection Fining Guidance. You do not need to answer all the questions.

The headings refer to the relevant sections of the draft Data Protection Fining Guidance.

Statutory Background

- 1.** Do you have any comments on our approach to the concept of an 'undertaking' for the purpose of imposing fines?

No.

- 2.** Do you have any comments on our approach to fines where there is more than one infringement by an organisation?

It does seem sensible that where there is more than one infringement arising from the same or linked conduct to fine based on the most serious infringement, and for where separate conducts do not relate that they each would be subject to relevant statutory amounts. However, we would also ask in this case for consideration to be given to the intent of the business to commit such an offence as well as to rectify any issues, particularly there was an unknowing infringement by an organisation prior to issuing any fines in relation to infringements that are arising from the same conduct or not.

- 3.** Do you have any other comments on the section on 'Statutory Background'?

No.

Circumstances in which the Commissioner would consider it appropriate to issue a penalty notice

- 4.** Do you have any comments on our approach to assessing the seriousness of an infringement?

No.

- 5.** Do you have any comments on our approach to assessing relevant aggravating and mitigating factors?

We are supportive of the relevant aggravating and mitigating factors outlined in particular the Commissioner taking into consideration size and resources of controllers and processors in implementing technical and organisational measures and the degree of cooperation with the Commissioner. Small businesses have much less resources to implement appropriate measures and often do not know what they do not know, and therefore they should be helped to comply in the first instance, with fines left as a last resort. Any penalties issues can have a disproportionate impact on small businesses ability to grow and innovate so careful consideration should be given to their impact particularly if a businesses is willing and able to rectify any issues promptly.

- 6.** Do you have any comments on our approach to assessing whether imposing a fine is effective, proportionate and dissuasive?

We agree with the consideration of effectiveness, proportionality and dissuasiveness when considering whether to issue a fine. The vast majority of small businesses simply wish to be compliant. For these businesses, the mere fact of finding out that they may have inadvertently infringed data protection rules will be enough of a punishment and a deterrent against future infringements. In these circumstances, it will generally be disproportionate to go on to fine the business.

The ICO's detailed criteria on whether a fine is proportionate look sensible. The need for proportionality is particularly important for small businesses who could be significantly more disadvantaged by financial penalties than larger businesses. Imposing financial penalties should only be reserved for severe cases and in particular where a business has acted in bad faith.

- 7.** Do you have any other comments on the section on 'Circumstances in which the Commission would consider it appropriate to issue a penalty notice'?

No.

Calculation of the appropriate amount of the fine

- 8.** Do you have any comments on calculating the starting point for the fine based on the seriousness of the infringement?

No.

- 9.** Do you have any comments on our approach to accounting for turnover when calculating the fine?

It is sensible that adjustments will be made according to turnover in relation to the size of the business and that the thresholds in line with the UK government definition.

- 10.** Do you have any comments on how we apply aggravating and mitigating factors when calculating the fine?

Largely the aggravating and mitigating factors seem sensible, particularly provided that the Commissioner will reach a decision on penalty and its size on a case-by-case basis in relation to fine adjustments. This would help to ensure a more proportionate approach to small businesses and allow the Commissioner to take into account business size and ability to comply.

- 11.** Do you have any comments on how we make any necessary adjustments to ensure the fine is effective, proportionate and dissuasive?

As we have mentioned above it is good to see that the Commissioner will take into account the size and financial position of controllers as well as any other relevant circumstances of the case including ability to comply and rectify infringements. The likelihood of repeat as well as intentional offending should also form part of the consideration.

- 12.** Do you have any other comments on our five-step approach to the calculation of the appropriate amount of a fine?

No.

Financial hardship

- 13.** Do you have any comments on our approach to financial hardship?

It seems sensible to take into consideration the financial hardship and for that to inform a possible reduction where an organisation is unable to pay because of their financial position. However, as it does state that the organisation will have the burden to prove that their situation merits such a reduction, we would like to see appropriate guidance for businesses that would outline the documentation and any other relevant evidence that could be provided.

Any other comments

- 14.** Do you have any other comments on the draft Data Protection Fining Guidance?

No.