

INTERNAL PROCEDURE FOR ISSUING MONETARY PENALTY NOTICES

Introduction

Under section 55A to E of the Data Protection Act 1998 ('Act') the Information Commissioner ('Commissioner') may, in certain circumstances, serve a Monetary Penalty Notice on a data controller.

In addition, the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 inserted section 55A to E of the Act into the Privacy and Electronic Communications (EC Directive) Regulations 2003 ('PECR'), enabling the Commissioner to serve a Monetary Penalty Notice on a person who breaches PECR.

A Monetary Penalty Notice is a notice requiring a data controller or person to pay a monetary penalty of an amount determined by the Commissioner and specified in the notice. The amount of the monetary penalty determined by the Commissioner must not exceed £500,000.

The Commissioner is required to prepare and issue Guidance about how he proposes to exercise his power to serve Monetary Penalty Notices which is available on the ICO website -

<https://ico.org.uk/media/for-organisations/documents/1043720/ico-guidance-on-monetary-penalties.pdf>

It should be read in conjunction with the Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 and the Data Protection (Monetary Penalties) Order 2010.

Procedure

In terms of how work is handled within the ICO the following procedures should be followed:

1. For cases under section 5A PECR, please refer to the agreed process for decision making which is available from the Team manager of the Anti-Spam Investigation Team.
2. In all other cases, in order to take a matter forward the Group manager will convene a Case Working Group ('Group') comprising the Group manager, the Team manager, the case officer and a lawyer. The Group will consider the case officer's report ('Report')

and whether the criteria for the imposition of a monetary penalty have been met and whether, given the particular circumstances of this case and the underlying objective in imposing a monetary penalty, the imposition of such a penalty is justified.

3. Once it has been decided that a monetary penalty should be imposed, the Group (apart from the case officer) will then consider what would be the appropriate and proportionate level of monetary penalty within the prescribed limit of £500,000 in accordance with a 5-step framework for determining the amount of a monetary penalty.

Step 1 – nature and seriousness of the contravention or collection of breaches

The Group will determine a starting figure that reflects the nature and seriousness of the contravention of the Act by the data controller or collection of breaches of PECR by a person.

This will involve looking at the nature of the contravention or collection of breaches together with the scope of the potential harm caused, and a consideration of what is reasonable and proportionate, given the circumstances of the case.

The initial view is based on the sanction available based on the statutory maximum of £500,000, which will be considered against a 'nature and seriousness' rating as follows:

- Level A = £1 to £10,000
- Level B = £10,001 to £40,000
- Level C = £40,001 to £100,000
- Level D = £100,001 to £250,000
- Level E = £250,001 to £500,000

Once the level of nature and seriousness has been determined, the starting figure will be set by moving upwards or downwards in the band dependent on the specific circumstances of the case.

For contraventions under the Act, the Group will take into account the number of data subjects affected, the period over which the contravention extended, and the type of data that was involved in the breach. Because contraventions under the Act must involve the likelihood of substantial damage and/or substantial distress they are

likely to fall into Level C or above.

For PECR breaches, the Group will take into account the number of unlawful communications which were the subject of complaints, the types of complaints and the period over which the collection of PECR breaches extended.

It should be borne in mind that penalties are set on a continuous scale. Therefore a particular contravention or collection of breaches should reach the same starting point whether it is rated as, for example, Level B and adjusted upwards on the circumstances of the case or rated as Level C and adjusted downwards.

Step 2 – aggravating and mitigating factors

The Group may increase or decrease the amount of the monetary penalty arrived at after Step 1 to take into account factors which aggravate or mitigate the contravention or collection of breaches. The factors that may have the effect of aggravating or mitigating the contravention are not those that relate directly to the breach, for example, the nature of the data or number of data subjects. They are factors such as the behaviour of the data controller or person following the breach, whether the data controller had previously declined to submit to an audit, the general record of the data controller or person and any other factors taken into account that were not considered at Step 1.

Step 3 – financial impact on the data controller

The Group may increase or decrease the amount of the monetary penalty arrived at after Step 2 to take into account the likely financial impact of a monetary penalty on the data controller or person. In particular, the Group will take into account any proof of genuine financial hardship which has been supplied by a data controller or person.

Step 4 – underlying objective

It is important that there is consistency in the monetary penalties set by the ICO. The above steps are only a guide but should help achieve consistency in the penalties set. However, the Group should review the proposed penalty against others set in comparable cases and satisfy themselves that consistency has been achieved, or adjust the figure arrived at upwards or downwards. Also, if the Group considers that the figure arrived at after Step 3 is insufficient to promote compliance with the Act or PECR having regard to the underlying objective in imposing a monetary penalty,

then the Group may increase the monetary penalty.

Step 5 – final determination

The Report and any Decision Record will be signed by the Head of the Enforcement department and placed before a Commissioner or Deputy Commissioner ('Commissioner'). He will consider whether or not to proceed and/or determine a final figure bearing in mind what is reasonable and proportionate given the particular facts of the case, the need for consistency, and the underlying objective in imposing the monetary penalty.

4. If so advised, the lawyer will draft a Notice of Intent containing the prescribed information which will be referred to the Commissioner for his approval and signature. The legal team will then send the Notice of Intent to the data controller or person by Special Delivery who will be given 28 calendar days from the date the notice was sent to make representations to the Commissioner which must be considered.
5. Having taken full account of any representations the data controller or person has made and the deliberations of those within his office who have recommended this course of action, the Commissioner will make a final decision on whether or not to impose a monetary penalty and, if so, determine an appropriate and proportionate monetary penalty.
6. If so advised the lawyer will draft a Monetary Penalty Notice containing the prescribed information which will be referred to the Commissioner for his approval and signature. The legal team will then send the Monetary Penalty Notice to the data controller or person by Special Delivery.
7. The Monetary Penalty Notice will be published on the ICO website with any confidential or commercially sensitive information redacted if requested and in accordance with the 'Communicating our enforcement and regulatory activities policy' on the ICO website -

https://ico.org.uk/media/about-the-ico/policies-and-procedures/1890/ico_enforcement_communications_policy.pdf
8. If a data controller or person either fails to pay the monetary penalty to the Commissioner or lodge an appeal at the Tribunal within 28 calendar days of the Monetary Penalty Notice being sent, the matter should be referred to the lawyer for enforcement.