

Framework used to guide ICO staff in determining the appropriate amount of a monetary penalty

Once it has been decided that a monetary penalty should be imposed, the ICO must then consider what would be the appropriate amount, given the circumstances of the case.

In determining the appropriate amount of a monetary penalty the ICO will have regard to the underlying objective to promote compliance with the Act, and to the general approach set out in paragraphs 3.1 to 3.3 of the Information Commissioner's statutory guidance about the issue of monetary penalties.

A number of issues are likely to be relevant to the decision as to what would be an appropriate monetary penalty in a particular case, and these issues are incorporated in a five-step framework, which can be summarised as follows:

Step 1 – seriousness of the contravention

A penalty setting meeting panel comprising either the Head of Enforcement or the Enforcement Group Manager, and the Team Manager responsible for overseeing the investigation of the case, will determine a starting figure that reflects the seriousness of the contravention of section 4(4) DPA by the data controller or breach of PECR by a 'person'.

This will involve looking at the nature of the contravention or breach 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, given the statutory maximum of £500,000, which will be considered against a 'seriousness' rating as follows:

- Serious = £40,000 to £100,000;
- Very serious = more than £100,000 but less than £250,000;
- Most serious = £250,000 up to the maximum of £500,000.

Once the level of seriousness has been determined, the starting figure will be set by moving upwards or downwards from the mid-point of the band dependent on the specific circumstances of the case. In doing so the panel will take into account, for example, the number of data subjects affected, the period over which the contravention extended, and the type of data that was breached; or, for PECR breaches, the number of unlawful communications which were the subject of complaints, types of complaints and the period over which the contraventions of PECR extended. It should be borne in mind that penalties are set on a continuous scale. Therefore a particular breach should reach the same starting point whether it is rated as serious and adjusted upwards on the circumstances of the case, or rated as very serious and adjusted downwards.

Step 2 – aggravating and mitigating factors

The panel 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. The factors that may have the effect of aggravating or mitigating the contravention are not those that relate directly to the breach, eg the nature of the data or number of data subjects. They are factors such as the behaviour of the data controller following the breach, whether the data controller had previously declined to submit to an audit, the general record of the data controller and any other factors taken into account that were not considered at Step 1. However, the likely financial impact of a monetary penalty on the data controller will not be considered at Step 2.

Step 3 – financial impact on the data controller

The panel 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 panel will take into account any proof of genuine financial hardship which has been supplied. Any such evidence will also be taken into account when the data controller or 'person' makes representations to the Information Commissioner in response to a notice of intent, referred to in Section 5 of the Information Commissioner's guidance about the issue of monetary penalties.

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 panel 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 panel considers that the figure arrived at after Step 3 is insufficient to promote compliance with the Act or Regulations having regard to the underlying objective in imposing a monetary penalty, then the panel may increase the monetary penalty.

Step 5 – final determination

The Information Commissioner or the Deputy Commissioner (Data Protection) will then 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.

The notice of intent referred to in Section 5 of the Information Commissioner's guidance about the issue of monetary penalties will set out the proposed amount of the monetary penalty.

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