

Enforcement Notices

The purpose of this guidance is to explain the various statutory provisions that relate to, the content of, the right of appeal against and the potential consequences of failing to comply with, an enforcement notice.

It does not constitute legal guidance.

INTRODUCTION

The data protection legislation provides the Information Commissioner ('Commissioner') with a range of corrective powers.

The Commissioner may deal with an infringement, or likely infringement, by issuing a reprimand or warning. However, where the Commissioner determines that the use of other corrective powers are appropriate then, as set out in Regulation 77(8) of the GDPR and LED Implementing Regulations 2018 ('the Regulations'), these powers can only be exercised by giving an '*enforcement notice*'.

The purpose of an enforcement notice is either to require action to be taken, or halt action, to achieve compliance with data protection legislation and/or remedy a personal data breach.

An enforcement notice can be given to order a controller or processor to:-

- comply with a data subject's rights;
- bring processing operations into compliance;
- inform a data subject of a personal data breach (*controller only*);
- stop specified processing;
- rectify, erase or restrict processing of personal data;
- suspend data flows to a recipient in a third country or to an international organisation.

This guidance explains the various statutory provisions that relate to, the content of, the right of appeal against, and the potential consequences of failing to comply with, an enforcement notice.

STATUTORY PROVISIONS

Applied GDPR and Applied LED

The relevant powers of the Commissioner under the Applied GDPR and the Applied LED that may lead to the Commissioner giving an enforcement notice are set out in Annex 1.

GDPR and LED Implementing Regulations 2018

The power for the Commissioner to give an enforcement notice is provided for by Regulation 106 of the Regulations. How a notice must be given is set out in Regulation 100.

Supplementary provisions and provisions relating to rectification and erasure are set out in Regulations 107 and 108.

Regulation 109 provides restrictions as to when an enforcement notice may not be given and Regulation 110 provides for the cancellation or variation of an enforcement notice.

The above mentioned Regulations are set out in Annex 2.

CONTENT OF AN ENFORCEMENT NOTICE

In deciding to give an enforcement notice, the Commissioner will have considered whether the failure has caused or is likely to cause any person any damage or distress and the enforcement notice will indicate that such consideration has occurred.

The enforcement notice will be addressed to the proper officer, for example, the secretary or directors of the body, at its principal office. However, where a controller or processor has advised the Commissioner of a designated Data Protection Officer (DPO), a copy of the enforcement notice will also be sent to the DPO.

An enforcement notice will set out what the person has failed or is failing to do and give the Commissioner's reasons for reaching that opinion.

In general, an enforcement notice will also state:-

- who is required to comply with the notice;
- what action is to be taken or refrained from;
- the timescale for doing so; and,
- how to confirm that action has been taken.

The enforcement notice will also explain the right of appeal.

The timescale for compliance will reflect the significance and/or urgency of the issue. In deciding whether or not to issue an 'urgent' enforcement notice, and in deciding the period for compliance with such a notice, the Commissioner will consider whether urgent action is appropriate and proportionate in the circumstances.

RIGHT OF APPEAL

Regulation 120 provides a right of appeal against an enforcement notice.

An appeal can be made against the enforcement notice, or, if the enforcement notice contains an urgency statement, an appeal can be made against that statement or the effects of that statement on any other part of the enforcement notice.

In general terms an appeal must be made within 28 days of the date of issue of the enforcement notice.

If an appeal is brought against an enforcement notice, a requirement in the enforcement notice does not have to be complied with pending determination or withdrawal of the appeal.

The provisions relating to the right of appeal, including how to make an appeal, are set out in Annex 3.

FAILURE TO COMPLY WITH AN ENFORCEMENT NOTICE

High Court

Regulation 117 (see Annex 4) provides that where a person fails to comply with an enforcement notice, the Commissioner can certify that failure to the High Court. The High Court must inquire into the matter and may deal with the controller or processor as if it had committed a contempt of court.

Penalty Notice

Under Regulation 112(1)(d) (see Annex 4), where a person has failed to comply with an enforcement notice, the Commissioner may, by written notice ('penalty notice'), require a person to pay an administrative fine up to the maximum amount of £1 million. (See Regulation 114 in Annex 4)

ANNEX 1

APPLIED GDPR AND APPLIED LED ORDERS

Commissioner's Tasks

Article 57 of the Applied GDPR sets out the Commissioner's tasks including:-

Art 57(1)(a): "monitor and enforce the application of this Regulation"

Art 57(1)(f): "handle complaints ..., and investigate, to the extent appropriate, the subject matter of the complaint..." and

Art 57(1)(h): "conduct investigations on the application of this Regulation..."

While Article 46 of the Applied LED sets out the Commissioner's tasks including:-

Art 46(1)(a): "monitor and enforce the application of the provisions adopted pursuant to this Directive and its implementing measures;"

Art 46(1)(f): "deal with complaints lodged ... and investigate, to the extent appropriate, the subject-matter of the complaint..."

Art46(1)(i) "conduct investigations on the application of this Directive..."

Commissioner's Powers

Article 58 of the Applied GDPR sets out the Commissioner's powers including:-

Art 58(2): "Each supervisory authority shall have all of the following corrective powers:

(a)to issue warnings to a controller or processor that intended processing operations are likely to infringe provisions of this Regulation;

(b)to issue reprimands to a controller or a processor where processing operations have infringed provisions of this Regulation;

(c)to order the controller or the processor to comply with the data subject's requests to exercise his or her rights pursuant to this Regulation;

(d)to order the controller or processor to bring processing operations into compliance with the provisions of this Regulation, where appropriate, in a specified manner and within a specified period;

(e)to order the controller to communicate a personal data breach to the data subject;

(f)to impose a temporary or definitive limitation including a ban on processing;

(g)to order the rectification or erasure of personal data or restriction of processing pursuant to Articles 16, 17 and 18 and the notification of such actions to recipients to whom the personal data have been disclosed pursuant to Article 17(2) and Article 19;

(h)to withdraw a certification or to order the certification body to withdraw a certification issued pursuant to Articles 42 and 43, or to order the certification body not to issue certification if the requirements for the certification are not or are no longer met; ANNEX Data Protection (Application of GDPR) Order 2018 Page 134 SD No. 2018/0143 c

(i)to impose an administrative fine pursuant to Article 83, in addition to, or instead of measures referred to in this paragraph, depending on the circumstances of each individual case;

(j)to order the suspension of data flows to a recipient in a third country or to an international organisation;...”

While Article 47 of Applied LED sets out the Commissioner’s powers including:-

Art 47(1) “Each Member State shall provide by law for each supervisory authority to have effective corrective powers such as, for example:

(a)to issue warnings to a controller or processor that intended processing operations are likely to infringe the provisions adopted pursuant to this Directive;

(b)to order the controller or processor to bring processing operations into compliance with the provisions adopted pursuant to this Directive, where appropriate, in a specified manner and within a specified period, in particular by ordering the rectification or erasure of personal data or restriction of processing pursuant to Article 16; (c)to impose a temporary or definitive limitation, including a ban, on processing.”

ANNEX 2

GDPR AND LED IMPLEMENTING REGULATIONS 2018

REGULATIONS 100, 106 to 110

100: Notice from the Information Commissioner

- (1) *This regulation applies in relation to a notice authorised or required by these Regulations to be given to a person by the Information Commissioner.*
- (2) *The notice may be given to a natural person —*
 - (a) *by delivering it to the natural person;*
 - (b) *by sending it to the natural person by post addressed to the natural person at his or her usual or last-known place of residence or business; or*
 - (c) *by leaving it for the natural person at that place.*
- (3) *The notice may be given to a body corporate or unincorporate—*
 - i. *by sending it by post to the proper officer of the body at its principal office; or*
 - ii. *by addressing it to the proper officer of the body and leaving it at that office.*
- (4) *The notice may be given to the person by other means, including by electronic means, with the person's consent.*
- (5) *In this regulation—*

"principal office", in relation to a registered company, means its registered office;

"proper officer", in relation to any body, means the secretary or other executive officer, including but not limited to the registered agent, board of directors, or equivalent governing body, as may be charged with the conduct of its general;

"registered company" means a company registered under the enactments relating to companies for the time being in force in the Island.
- (6) *For the purposes of this regulation, so far as it relates to the addresses of controllers —*
 - iii. *the address of a registered company is that of its registered office; and*
 - iv. *the address of a person (other than a registered company) carrying on a business is that of the person's principal place of business on the Island.*
- (7) *This regulation is without prejudice to any other lawful method of giving a notice.*

106: Enforcement notices

- (1) *Where the Information Commissioner is satisfied that a person has failed, or is failing, as described in paragraph (2), (3), (4) or (5), the Information Commissioner may give the person a written notice (an "enforcement notice") which requires the person —*
 - (a) *to take steps specified in the notice; or*
 - (b) *to refrain from taking steps specified in the notice, or both (and see also regulations 107 and 108).*
- (2) *The first type of failure is where a controller or processor has failed, or is failing, to comply with any of the following —*
 - (a) *a provision of Chapter II of the applied GDPR or Chapter 2 of Part 3 of these Regulations (principles of processing);*
 - (b) *a provision of Articles 12 to 22 of the applied GDPR, or Chapter 4 of Part 3 of these Regulations, conferring rights on a data subject;*
 - (c) *a provision of Articles 24 to 39 of the applied GDPR (obligations of controllers and processors), including a requirement to communicate a personal data breach to the Information Commissioner or a data subject;*
 - (d) *a provision of Article 30 or Article 31 of the applied LED namely the requirement to communicate a personal data breach to the Information Commissioner or a data subject;*
 - (e) *the principles for transfers of personal data to third countries, non-Convention countries and international organisations in Articles 44 to 49 of the applied GDPR; or*
 - (f) *the requirement, imposed by this subparagraph, to implement data protection policies that are compliant with guidance provided by the Information Commissioner under these Regulations.*
- (3) *The second type of failure is where a monitoring body has failed, or is failing, to comply with an obligation under Article 41 of the applied GDPR (monitoring or approved codes of conduct).*
- (4) *The third type of failure is where a person who is a certification provider —*
 - (a) *does not meet the requirements for accreditation;*
 - (b) *has failed, or is failing, to comply with an obligation under Article 42 or 43 of the applied GDPR (certification of controllers and processors); or*
 - (c) *has failed, or is failing, to comply with any other provision of the applied GDPR (whether in the person's capacity as a certification provider or otherwise).*

- (5) *The fourth type of failure is where a controller has failed, or is failing, to comply with regulations under regulation 96.*
- (6) *An enforcement notice given in reliance on paragraphs (2), (3) or (5) may only impose requirements which the Information Commissioner considers appropriate for the purpose of remedying the failure.*
- (7) *An enforcement notice given in reliance on paragraph (4) may only impose requirements which the Information Commissioner considers appropriate having regard to the failure (whether or not for the purpose of remedying the failure).*
- (8) *The Council of Ministers may by regulations confer power on the Information Commissioner to give an enforcement notice in respect of other failures.*
- (9) *Before making regulations under this regulation, Council of Ministers must consult such persons as the Council of Ministers considers appropriate.*
- (10) *Regulations made under this regulation —*
 - (a) *may make provision about the giving of enforcement notices in respect of the failure; and*
 - (b) *may amend this regulation and regulations 107 to 110.*

107: Enforcement notices: supplementary

- (1) *An enforcement notice must —*
 - (a) *state what the person has failed or is failing to do; and*
 - (b) *give the Information Commissioner's reasons for reaching that opinion.*
- (2) *In deciding whether to give an enforcement notice in reliance on regulation 106(2), the Information Commissioner must consider whether the failure has caused or is likely to cause any person damage or distress.*
- (3) *In relation to an enforcement notice given in reliance on regulation 106(2), the Information Commissioner's power under regulation 106(1)(b) to require a person to refrain from taking specified steps includes power —*
 - (a) *to impose a ban relating to all processing of personal data; or*
 - (b) *to impose a ban relating only to a specified description of processing of personal data, including by specifying one or more of the following —*
 - (i) *a description of personal data;*
 - (ii) *the purpose or manner of the processing;*
 - (iii) *the time when the processing takes place.*

- (4) *An enforcement notice may specify the time or times at which, or period or periods within which, a requirement imposed by the notice must be complied with (but see the restrictions in paragraphs (6) to (8)).*
- (5) *An enforcement notice must provide information about the rights of appeal under regulation 120.*
- (6) *An enforcement notice must not specify a time for compliance with a requirement in the notice which falls before the end of the period within which an appeal can be brought against the notice.*
- (7) *If an appeal is brought against an enforcement notice, a requirement in the notice need not be complied with pending determination or withdrawal of the appeal.*
- (8) *If an enforcement notice —*
 - (a) *states that, in the Information Commissioner’s opinion, it is necessary for a requirement to be complied with urgently; and*
 - (b) *gives the Information Commissioner’s reasons for reaching that opinion, paragraphs (6) and (7) do not apply but the notice must not require the requirement to be complied with before the end of the period of 7 days beginning with the day on which the notice is given.*
- (9) *In this regulation, “specified” means specified in an enforcement notice.*

108: Enforcement notices: rectification and erasure of personal data etc.

- (1) *Paragraphs (2) and (3) apply where an enforcement notice is given in respect of a failure by a controller or processor —*
 - (a) *to comply with a data protection principle relating to accuracy; or*
 - (b) *to comply with a data subject’s request to exercise rights under Article 16, 17 or 18 of the applied GDPR (right to rectification, erasure or restriction on processing).*
- (2) *If an enforcement notice requires the controller or processor to rectify or erase inaccurate personal data, it may also require the controller or processor to rectify or erase any other data which —*
 - (a) *are held by the controller or processor; and*
 - (b) *contain an expression of opinion which appears to the Information Commissioner to be based on the inaccurate personal data.*
- (3) *Where a controller or processor has accurately recorded personal data provided by the data subject or a third party but the data are inaccurate, the enforcement notice may require the controller or processor —*

- (a) *to take steps specified in the notice to ensure the accuracy of the data;*
 - (b) *if relevant, to secure that the data indicate the data subject's view that the data are inaccurate; and*
 - (c) *to supplement the data with a statement of the true facts relating to the matters dealt with by the data that is approved by the Information Commissioner, (as well as imposing requirements under paragraph (2)).*
- (4) *When deciding what steps it is reasonable to specify under paragraph (3)(a), the Information Commissioner must have regard to the purpose for which the data were obtained and further processed.*
- (5) *Paragraphs (6) and (7) apply where —*
- (a) *an enforcement notice requires a controller or processor to rectify or erase personal data; or*
 - (b) *the Information Commissioner is satisfied that the processing of personal data which has been rectified or erased by the controller or processor involved a failure in paragraph (1).*
- (6) *An enforcement notice may, if reasonably practicable, require the controller or processor to notify third parties to whom the data have been disclosed of the rectification or erasure.*
- (7) *In determining whether it is reasonably practicable to require such notification, the Information Commissioner must have regard, in particular, to the number of people who would have to be notified.*
- (8) *In this regulation, "data protection principle relating to accuracy" means the principle in Article 5(1)(d) of the applied GDPR.*

109 Enforcement notices: restrictions

- (1) *The Information Commissioner may not give a controller or processor an enforcement notice in reliance on regulation 106 (2) with respect to the processing of personal data for the special purposes unless —*
- (a) *a determination under regulation 130 with respect to the data or the processing has taken effect; and*
 - (b) *the court has granted leave for the notice to be given.*
- (2) *A court must not grant leave for the purposes of paragraph (1)(b) unless it is satisfied that —*
- (a) *the Information Commissioner has reason to suspect a failure described in regulation 106(2) which is of substantial public importance; and*
 - (b) *the controller or processor has been given notice of the application for leave in accordance with rules of court or the case is urgent.*

110: Enforcement notices: cancellation and variation

- (1) *The Information Commissioner may cancel or vary an enforcement notice by giving written notice to the person to whom it was given.*
- (2) *A person to whom an enforcement notice is given may apply in writing to the Information Commissioner for cancellation or variation of the notice.*
- (3) *An application under paragraph (2) may be made only —*
 - (a) *after the end of the period within which an appeal can be brought against the notice; and*
 - (b) *on the ground that, by reason of a change of circumstances, one or more of the provisions of that notice need not be complied with in order to remedy the failure identified in the notice.*

ANNEX 3

RIGHT OF APPEAL, TRIBUNAL PROCEDURES AND RULES

APPEAL

120: Right of appeal

(1) *A person who is given any of the following notices may appeal to the Tribunal—*

...

(d) *an enforcement notice;*

...

(2) *Where a notice listed in paragraph (1) contains a statement under regulation 101(7)(a), 104(8)(a) or 107(8)(a) (urgency), the person given the notice may appeal against—*

(a) *the Information Commissioner's decision to include the statement in the notice;*
or

(b) *the effect of its inclusion as respects any part of the notice,*
whether or not the person appeals against the notice.

...

(3) *Schedule 8 contains additional provisions relevant to appeals.*

121: Determination of appeals

(1) *Paragraphs (2) to (4) apply where a person appeals to the Tribunal under regulation 120(1) or (4).*

(2) *The Tribunal may review any determination of fact on which the notice or decision against which the appeal is brought was based.*

(3) *If the Tribunal considers—*

(a) *that the notice or decision against which the appeal is brought is not in accordance with the law; or*

(b) *to the extent that the notice or decision involved an exercise of discretion by the Information Commissioner, that the Information Commissioner ought to have exercised the discretion differently,*

the Tribunal must allow the appeal or substitute another notice or decision which the Information Commissioner could have given or made.

(4) *Otherwise, the Tribunal must dismiss the appeal.*

- (5) *On an appeal under regulation 120(2), the Tribunal may direct—*
- (a) *that the notice against which the appeal is brought is to have effect as if it did not contain the statement under regulation 101(7)(a), 104(8)(a) or 107(8)(a) (urgency); or*
 - (b) *that the inclusion of that statement is not to have effect in relation to any part of the notice,*
- and may make such modifications to the notice as are required to give effect to the direction.*
- (6) *On an appeal under regulation 120(3), if the Tribunal considers that the enforcement notice ought to be cancelled or varied by reason of a change in circumstances, the Tribunal must cancel or vary the notice.*
- (7) *On an appeal under regulation 120(5), the Tribunal may cancel the Information Commissioner's determination.*

PROCEDURE

146 Tribunal Procedure Rules

(1) Tribunal Procedure Rules may make provision for regulating, —

(a) the exercise of the rights of appeal conferred by regulation 120; ...

(b) ...

including their exercise by a representative body.

(2) In relation to proceedings involving the exercise of those rights, Tribunal Procedure Rules may make provision about, —

*(a) securing the production of material used for the processing of personal data;
and*

(b) the inspection, examination, operation and testing of equipment or material used in connection with the processing of personal data.

(3) Paragraph 5 of Schedule 8 makes additional provisions in respect of Tribunal Procedure Rules.

147 Disclosure of information to Tribunal

No enactment or rule of law prohibiting or restricting the disclosure of information precludes a person from providing the Tribunal with information necessary for the discharge of the Tribunal's functions under data protection legislation.

ISLE OF MAN DATA PROTECTION TRIBUNAL RULES 2003

Tribunal Rule 52 – Time limit for appealing

Rule 52 sets out the time limit for appeal. In general, the time limit is **28 days** from the Issue Date of the enforcement notice.

Tribunal Rule 51(1) - Method of appeal

You may bring an appeal by serving notice of appeal in writing to:

The Clerk to the Appeals Tribunal
General Registry
Isle of Man Courts of Justice
Deemsters' Walk
Douglas, Isle of Man
IM1 3AR

Tribunal Rule 51(2) – Completing a notice of appeal

"The notice of appeal shall -

(a) identify the disputed decision and the date on which the notice relating to such decision was served on or given to the appellant; and

(b) state -

(i) the name and address of the appellant;

(ii) the grounds of the appeal;

(iii) whether the appellant considers that he is likely to wish a hearing to be held or not;

(iv) where applicable, the special circumstances which the appellant considers justify the Tribunal's accepting jurisdiction under rule 52(2); and

(v) an address in the Island or the United Kingdom for service of notices and other documents on the appellant."

Tribunal Rule 51(4) – request for early hearing

"A notice of appeal may include a request for an early hearing of the appeal and the reasons for that request."

A copy of the Isle of Man Data Protection Tribunal Rules 2003 can be found at:-

<http://www.tynwald.org.im/links/tls/SD/2003/2003-SD-0027.pdf>

ANNEX 4
GDPR AND LED IMPLEMENTING REGULATIONS 2018
PENALTIES AND HIGH COURT

PENALTIES

112: Penalty notices

- (1) *If the Information Commissioner is satisfied that a person—*
...
(d) has failed to comply with an enforcement notice,
- the Information Commissioner may, by written notice (a “penalty notice”), require the person to pay to the Information Commissioner an amount specified in the notice.*

114: Maximum amount of penalty

- (1) *In relation to an infringement of a provision of the applied GDPR, the maximum amount of the penalty that may be imposed by a penalty notice is £1,000,000.*

HIGH COURT

117 Failure to comply with notices

- (1) *The Information Commissioner may certify in writing to the High Court that a controller or processor has, or both have (as the case may be), failed to comply with —*
- (a) an information notice;*
(b) an assessment notice;
(c) an enforcement notice; or
(d) a penalty notice.
- (2) *The Information Commissioner must not exercise the power under paragraph (1) before the expiry of the period of time specified in the relevant notice.*
- (3) *The High Court must inquire into the matter and, after hearing —*
- (a) any witness who may be produced against or on behalf of the controller or processor, as the case may be; and*

- (b) *any statement that may be offered in defence, may deal with the controller or processor, as the case may be, as if it had committed a contempt of court.*
- (4) *This regulation does not confer any right of action in civil proceedings in respect of a failure to comply with a duty imposed by or under these Regulations.*
- (5) *The High Court may for the purposes of securing compliance with data protection legislation make an order requiring the controller (or a processor acting on behalf of that controller), in respect of the processing, —*
 - (a) *to take steps specified in the order; or*
 - (b) *to refrain from taking steps specified in the Order.*