

## Penalty 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, a penalty notice.

It does not constitute legal guidance.

## **INTRODUCTION**

The data protection legislation provides the Information Commissioner ('Commissioner') with the power to issue an administrative fine by way of a *'penalty notice'*.

An administrative fine can be issued in addition to, or instead of, other enforcement powers to provide an effective, proportionate and dissuasive sanction for an infringement.

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, a penalty 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 a penalty notice are set out in Annex 1.

### **GDPR and LED Implementing Regulations 2018**

The power for the Commissioner to give a penalty notice is provided for by Regulation 112 of the Regulations. How a notice must be given is set out in Regulation 100.

Regulation 113 restricts when a penalty notice may be given.

Regulation 114 sets the maximum amount of penalty that may be imposed at £1,000,000. (One million pounds).

Schedule 5 of the Regulations makes further provisions about penalty notices, including provisions requiring the Commissioner to give a notice of intent to impose a penalty and provisions about payment, variation, cancellation and enforcement.

The above mentioned Regulations are set out in Annex 2.

## **NOTICE OF INTENT**

Before giving a penalty notice, the Commissioner must, by written notice, inform the person that the Commissioner intends to give a penalty notice.

Paragraph 3 of Schedule 5 sets out what a notice of intent must contain. In general terms, a notice of intent must contain:-

- the reasons why a penalty notice is proposed including:-
  - the circumstances of the failure, and
  - the nature of personal data involved in that failure,
- an indication of the amount of the penalty, and
- the proposed date the penalty notice will be given.

In the notice of intent, the Commissioner must provide at least 21 days for the person to make written representations and may, if he considers it appropriate to do so, also give the person the opportunity to make oral representations.

## **CONTENT OF A PENALTY NOTICE**

A penalty notice may not be given before the end of the period specified in the notice of intent. The Commissioner must consider any written or oral representations that have been made in accordance with the notice of intent when giving a penalty notice.

Paragraph 5 of Schedule 5 sets out the content of a penalty notice which includes inter alia:-

- the reasons why a penalty notice is being imposed including:-
  - the circumstances of the failure, and
  - the nature of personal data involved in that failure,
- whether the Commissioner received representations,
- the amount of the penalty including:-
  - the reasons for the amount of the penalty and
  - any aggravating or mitigating factors
- details of how the penalty is to be paid,
- the date ( not less than 28 days from date of notice) by which the penalty must be paid, and
- the right of appeal.

## **VARIATION OR CANCELLATION OF A PENALTY NOTICE**

The Commissioner may vary or cancel a penalty notice. Where a penalty notice is varied the Commissioner must do so by giving a '*penalty variation notice*'.

## **RIGHT OF APPEAL**

Regulation 120 provides a right of appeal against a penalty notice.

An appeal can be made against the notice, or, the amount of the penalty specified in the notice.

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

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

## **ENFORCEMENT OF A PENALTY NOTICE**

### **High Court**

Regulation 117, set out in Annex 4, provides that where a person fails to comply with a penalty notice, the Commissioner can certify that failure to the High Court.

The High Court must inquire into the matter and may deal with the person as a contempt of court.

As set out in paragraph 9 of Schedule 5, if the Court so orders, the penalty is recoverable as if it were payable under an order of the court.

## 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: ...*

*(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;..."*

Article 83 of the Applied GDPR sets out the "General conditions for imposing administrative fines", including:-

*Art 83: 1. Each supervisory authority shall ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be effective, proportionate and dissuasive.*

*2. Administrative fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in points (a) to (h) and (j) of Article 58(2). When deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in each individual case due regard shall be given to the following:*

*(a) the nature, gravity and duration of the infringement taking into account the nature scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them;*

*(b) the intentional or negligent character of the infringement;*

*(c) any action taken by the controller or processor to mitigate the damage suffered by data subjects;*

*(d) the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them pursuant to Articles 25 and 32;*

*(e) any relevant previous infringements by the controller or processor;*

*(f) the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;*

*(g) the categories of personal data affected by the infringement;*

*(h) the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;*

*(i) where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned with regard to the same subject matter, compliance with those measures;*

*(j) adherence to approved codes of conduct pursuant to Article 40 or approved certification mechanisms pursuant to Article 42; and*

*(k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.*

While Article 57 of Applied LED provides for Penalties:-

*Art 57            "Member States shall lay down the rules on penalties applicable to infringements of the provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive."*

## ANNEX 2

### GDPR AND LED IMPLEMENTING REGULATIONS 2018

#### REGULATIONS 100,112 to 114

##### **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 —*
  - i. *the address of a registered company is that of its registered office; and*
  - ii. *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.*

## 112: Penalty notices

- (1) *If the Information Commissioner is satisfied that a person —*
  - (a) *has failed or is failing as described in regulation 106(2), (3), (4) or (5);*
  - (b) *has failed to comply with an information notice;*
  - (c) *has failed to comply with an assessment notice given, pursuant to regulation 77, in exercise of the Information Commissioner's powers under Article 58(1) of the applied GDPR; or*
  - (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.*
- (2) *In the case of a failure described in regulation 106(2), (3) or (4), when deciding whether to give a penalty notice to a person and determining the amount of the penalty, the Information Commissioner must have regard to the following, so far as relevant, —*
  - (a) *to the extent that the notice concerns a matter to which the applied GDPR applies, the matters listed in Article 83(1) and (2) of the applied GDPR;*
  - (b) *to the extent that the notice concerns a failure to comply with these Regulations, the matters listed in paragraph (3).*
- (3) *Those matters are, —*
  - (a) *the nature, gravity and duration of the failure;*
  - (b) *the intentional or negligent character of the failure;*
  - (c) *any action taken by the controller or processor to mitigate the damage suffered by data subjects;*
  - (d) *the degree of responsibility of the controller or processor, taking into account technical and organisational measures implemented by the controller or processor;*
  - (e) *any relevant previous failures by the controller or processor;*
  - (f) *the degree of co-operation with the Information Commissioner, in order to remedy the failure and mitigate the possible adverse effects of the failure;*
  - (g) *the categories of personal data affected by the failure;*

- (h) the manner in which the infringement became known to the Information Commissioner, including whether, and if so to what extent, the controller or processor notified the Information Commissioner of the failure;*
- (i) the extent to which the controller or processor has complied with previous enforcement notices or penalty notices;*
- (j) adherence to approved codes of conduct or certification mechanisms;*
- (k) any other aggravating or mitigating factor applicable to the case, including financial benefits gained, or losses avoided, as a result of the failure (whether directly or indirectly); and*
- (l) whether the penalty would be effective, proportionate and dissuasive.*
- (4) Schedule 5 makes further provision about penalty notices, including provision requiring the Information Commissioner to give a notice of intent to impose a penalty and provision about payment, variation, cancellation and enforcement.*
- (5) The Council of Ministers may by regulations, —*
  - (a) confer power on the Information Commissioner to give a penalty notice in respect of other failures; and*
  - (b) make provision about the amount of the penalty that may be imposed.*

*Tynwald procedure – approval required.*
- (6) Before making regulations under paragraph (5), the Council of Ministers must consult such persons as the Council of Ministers considers appropriate.*
- (7) Regulations made under paragraph (5) may —*
  - (a) make provision about the giving of penalty notices in respect of the failure; and*
  - (b) amend this regulation and regulations 113 to 116.*

### **113: Penalty notices: restrictions**

- (1) The Information Commissioner may not give a controller or processor a penalty 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) a 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.*

#### **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. ...*

### **SCHEDULE 5**

#### **PENALTIES**

##### **1: Meaning of “penalty”**

*In this Schedule, “penalty” means a penalty imposed by a penalty notice.*

##### **2: Notice of intent to impose penalty**

- (1) *Before giving a person a penalty notice, the Information Commissioner must, by written notice (a “notice of intent”) inform the person that the Information Commissioner intends to give a penalty notice.*
- (2) *The Information Commissioner may not give a penalty notice in reliance on a notice of intent after the end of the period of 6 months beginning with the day after the notice of intent is given.*

##### **3: Contents of notice of intent**

- (1) *A notice of intent must contain the following information—*
- (a) the name and address of the person to whom the Information Commissioner proposes to give a penalty notice;*
- (b) the reasons why the Information Commissioner proposes to give a penalty notice (see subparagraph (2));*

*(c) an indication of the amount of the penalty the Information Commissioner proposes to impose, including any aggravating or mitigating factors that the Information Commissioner proposes to take into account;*

*(d) the date on which the Information Commissioner proposes to give the penalty notice.*

*(2) The information required under subparagraph (1)(b) includes—*

*(a) a description of the circumstances of the failure, and*

*(b) where the notice is given in respect of a failure described in regulation 106(2), the nature of the personal data involved in the failure.*

*(3) A notice of intent must also—*

*(a) state that the person may make written representations about the Information Commissioner's intention to give a penalty notice, and*

*(b) specify the period within which such representations may be made.*

*(4) The period specified for making written representations must be a period of not less than 21 days beginning with the day on which the notice of intent is given.*

*(5) If the Information Commissioner considers that it is appropriate for the person to have an opportunity to make oral representations about the Information Commissioner's intention to give a penalty notice, the notice of intent must also—*

*(a) state that the person may make such representations, and*

*(b) specify the arrangements for making such representations and the time at which, or the period within which, they may be made.*

#### **4: Giving a penalty notice**

*(1) The Information Commissioner may not give a penalty notice before a time, or before the end of a period, specified in the notice of intent for making oral or written representations.*

*(2) When deciding whether to give a penalty notice to a person and determining the amount of the penalty, the Information Commissioner must consider any oral or written representations made by the person in accordance with the notice of intent.*

#### **5: Contents of penalty notice**

*(1) A penalty notice must contain the following information—*

- (a) the name and address of the person to whom it is addressed;*
  - (b) details of the notice of intent given to the person;*
  - (c) whether the Information Commissioner received oral or written representations in accordance with the notice of intent;*
  - (d) the reasons why the Information Commissioner proposes to impose the penalty (see subparagraph (2));*
  - (e) the reasons for the amount of the penalty, including any aggravating or mitigating factors that the Information Commissioner has taken into account;*
  - (f) details of how the penalty is to be paid;*
  - (g) details of the rights of appeal under regulation 120; and*
  - (h) details of the Information Commissioner's enforcement powers under this Schedule.*
- (2) The information required under subparagraph (1)(d) includes—*
- (a) a description of the circumstances of the failure, and*
  - (b) where the notice is given in respect of a failure described in regulation 106(2), the nature of the personal data involved in the failure.*

## **6: Period for payment of penalty**

- (1) A penalty must be paid to the Information Commissioner within the period specified in the penalty notice.*
- (2) The period specified must be a period of not less than 28 days beginning with the day after the day on which the penalty notice is given.*

## **7: Variation of penalty**

- (1) The Information Commissioner may vary a penalty notice by giving written notice (a "penalty variation notice") to the person to whom it was given.*
- (2) A penalty variation notice must specify—*
  - (a) the penalty notice concerned, and*
  - (b) how it is varied.*
- (3) A penalty variation notice may not—*
  - (a) reduce the period for payment of the penalty;*

- (b) increase the amount of the penalty;*
- (c) otherwise vary the penalty notice to the detriment of the person to whom it was given.*

*(4) If—*

- (a) a penalty variation notice reduces the amount of the penalty, and*
- (b) when that notice is given, an amount has already been paid that exceeds the amount of the reduced penalty, the Information Commissioner must repay the excess.*

### **8: Cancellation of penalty**

- (1) The Information Commissioner may cancel a penalty notice by giving written notice to the person to whom it was given.*
- (2) If a penalty notice is cancelled, the Information Commissioner—*
  - (a) may not take any further action under regulation 112 or this Schedule in relation to the failure to which that notice relates; and*
  - (b) must repay any amount that has been paid in accordance with that notice.*

### **9: Enforcement of payment**

- (1) The Information Commissioner must not take action to recover a penalty unless—*
  - (a) the period specified in accordance with paragraph 6 has ended,*
  - (b) any appeals against the penalty notice have been decided or otherwise ended,*
  - (c) if the penalty notice has been varied, any appeals against the penalty variation notice have been decided or otherwise ended, and*
  - (d) the period for the controller or processor to appeal against the penalty, and any variation of it, has ended.*
- (2) A penalty is recoverable if the court so orders in accordance with proceedings taken under regulation 117, as if it were payable under an order of that court*

## 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—*  
...  
*(e) a penalty notice; or*  
*(f) a penalty variation notice.;*  
...  
(4) *A person who is given a penalty notice or a penalty variation notice may appeal against the amount of the penalty specified in the notice, whether or not the person appeals against the notice.*  
...  
(7) *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

#### 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.*