



Law Society
of Scotland

Consultation Response

ICO Consultation on draft Data Protection Fining
Guidance.

November 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Privacy Law sub-committee welcomes the opportunity to consider and respond to the Information Commissioner's Office consultation on draft Data Protection Fining Guidance¹.

The sub-committee has the following comments to put forward for consideration.

Consultation Questions

Statutory Background

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

We would like to refer to sentencing guidelines commonly used in court when a company is the duty hold and fined (i.e. health and safety offences). The court will only behind the corporate veil in exceptional circumstances. The organisation is asked to provide three years' worth of accounts to make sure that there is a broader view of the finances available which will then determine the starting level of the fine. Sometimes an independent expert report is produced to assist the court in this analysis.

¹ [ICO consultation on draft Data Protection Fining Guidance | ICO](#)

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

We have no comments.

Question 3. Do you have any other comments on the section on ‘Statutory Background’?

We have no comments.

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

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

It must be remembered that the infringement of the UK GDPR or DPA is not the same as the incident which led to the damage of distress. For example, it can be misleading to look at the number of people affected as that may not relate to the seriousness of the infringement.

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

Article 33 obliges the controller to the notify the Commissioner but there is no obligation on the processor to notify the Commissioner and it is likely that the Processor would breach the terms of its contract with the Controller if it did. We therefore think the following paragraph should be looked at in terms of fining processors:

However, this factor is not relevant if a controller or processor is under a statutory duty to comply with notification obligations in the UK GDPR or Part 3 or Part 4 DPA 2018. 72 The Commissioner will not consider notifications required by law, even if made promptly, as a mitigating factor. The Commissioner expects controllers and processors to comply with their statutory obligations.

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

We have no comments.

Question 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’?

We have no comments.

Calculation of the appropriate amount of the fine

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

We have no comments.

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

Although the fining level is based on the turnover of the organisation, we believe that the ICO should consider other factors such as the financial means of the organisation. We do not think it is enough for the ICO to only consider financial hardship in exceptional circumstances when the proposed fine would irretrievably jeopardise an organisation’s economic viability or bankrupt an individual. We believe that ability to pay should be taken into account in all circumstances.

In the [Corporate Manslaughter Sentencing Guidance](#) the following examples may assist:

The court should examine the financial circumstances of the offender in the round to assess the economic realities of the organisation and the most efficacious way of giving effect to the purposes of sentencing. In finalising the sentence, the court should have regard to the following factors:

- *The profitability of an organisation will be relevant. If an organisation has a small profit margin relative to its turnover, downward adjustment may be needed. If it has a large profit margin, upward adjustment may be needed.*

- *Any quantifiable economic benefit derived from the offence, including through avoided costs or operating savings, should normally be added to the fine arrived at in step two. Where this is not readily available, the court may draw on information available from enforcing authorities and others about the general costs of operating within the law.*
- *Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.*

In considering the ability of the offending organisation to pay any financial penalty, the court can take into account the power to allow time for payment or to order that the amount be paid in instalments, if necessary over a number of years.

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

We have no comments.

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

We have no comments.

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

We have no comments.

Financial hardship

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

Please see our comments above.

Any other comments

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

We have no comments.

For further information, please contact:

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