EXPLANATORY MEMORANDUM TO

THE CERTIFICATION OFFICER (AMENDMENT OF FEES) REGULATIONS 2022

2022 No. 246

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 To amend the fees payable to the Certification Officer in respect of her functions in relation to trade unions and employers' associations; to reflect the fact that costs relating to previous fees will now be covered by a levy further to the Trade Union (Levy Payable to the Certification Officer) Regulations 2022 and to update the fees maintained in relation to the applications for certificates of independence and applications for listing.

2.2 This instrument consequently revokes regulation 11 and regulation 12 of the Trade Unions and Employers' Associations (Amalgamations, etc.) Regulations 1975 ("the 1975 Regulations"). It also revokes the Certification Officer (Amendment of Fees) Regulations 2005 ("the 2005 Regulations") in their entirety whilst it revises the fees payable in relation to the applications for certificates of independence and applications for listing.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales, and Scotland.

4.2 The territorial application of this instrument is Great Britain.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 The Certification Officer is responsible for regulating trade unions and employers' associations. The Certification Officer's statutory functions include maintaining a list of trade unions and employers' associations and determining complaints concerning trade union elections, certain other ballots and certain breaches of trade union rules. These functions are currently funded by the taxpayer, with the exception of certain statutory fees. These are currently payable to the Certification Officer by trade unions and employers' associations.

6.2 Section 257A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"), as inserted by section 20 of the Trade Union Act 2016 ("the 2016 Act"), enables the Secretary of State to make regulations to provide for the Certification Officer to recoup their expenses via a levy on trade unions and employers' associations.

6.3 Section 257A(8) of the 1992 Act requires the Secretary of State to consult the Advisory, Conciliation and Arbitration Service (ACAS) and trade unions and employers' associations ("relevant organisations") before making the levy regulations. The Department for Business, Energy and Industrial Strategy carried out a full public consultation on the levy from 31 August to 26 October 2017. The consultation asked whether the existing fees charged by the Certification Officer should be removed and subsumed into the levy.

6.4 The consultation response was published in June 2021. Due to the passage of time since the consultation, a further engagement exercise was undertaken with all relevant organisations between June and July 2021 to gather views of trade unions and employers' associations on the developed levy proposal and the fees to be retained.

6.5 The Trade Union (Levy Payable to the Certification Officer) Regulations 2022 establish the principles and framework by which the Certification Officer will determine the levy. These regulations will come into force on 1 April 2022.

7. Policy background

What is being done and why?

7.1 The Trade Union Act 2016 establishes a fairer framework for industrial relations through, in part, more effective regulation of trade unions through their own regulator, the Certification Officer. The overall aim of the reforms in the 2016 Act is to modernise the regulatory framework of trade unions by giving the Certification Officer powers and funding in line with other regulators.

7.2 The Government intends to revoke a number of the fees the Certification Officer currently charges for certain functions. The cost of the majority of these functions will be subsumed within the levy. The Trade Union (Levy Payable to the Certification Officer) Regulations 2022 exclude from the expenses to be taken into account in calculating the levy those expenses which are intended to be covered by the Certification Officer's revenue from the remaining fees.

Explanations

What did any law do before the changes to be made by this instrument?

7.3 The annual cost of the Certification Officer is funded by the Department for Business, Energy and Industrial Strategy which provides an annual allocation to ACAS. ACAS in turn allocate a budget to the Certification Officer for the financial year.

7.4 Currently, some of the Certification Officer's activities incur a statutory charge, set out in the 1975 Regulations and the 2005 Regulations. Fees charged include applications for entry into the lists of trade unions and employers' associations which the Certification Officer maintains (listing fee) and applications from a trade union for a certificate of independence (certificate of independence fee).

7.5 These fees provide in total approximately £7,000 of income per annum, but they have not been updated since 2005 and so do not currently reflect the actual costs of the

Certification Officer's work. With the exception of these fees, trade unions and employers' associations do not currently pay towards the cost of their regulation by the Certification Officer.

Why is it being changed?

7.6 The Government believes that at a time of ongoing financial restraint it is appropriate that the cost of regulating trade unions and employers' associations should be borne by the organisations themselves rather than the taxpayer. The Trade Union (Levy Payable to the Certification Officer) Regulations 2022 provide for the Certification Officer to do this via a levy which will subsume the majority of the existing fees.

7.7 The 2005 Regulations were made under section 108 and section 293 of the 1992 Act. A negative statutory instrument is required to amend, revoke or replace the 2005 Regulations, including in order to set the level of the retained listing and certificate of independence fees. This follows the precedent set by the 2005 Regulations which revoked the Certification Officer (Amendment of Fees) Regulations 1997.

What will it now do?

7.8 The Certification Officer (Amendment of Fees) Regulations 2022 revoke all fees currently payable to the Certification Officer which will be subsumed into the levy, except for the two fees updated by the Regulations, which are maintained and payable separately to the Certification Officer under the 1992 Act: these are the fees payable on application by trade unions and employers' associations to have their name entered in the respective lists and the fee on application by a trade union for a certificate of independence.

7.9 This instrument revokes and supersedes the Certification Officer (Amendments of Fees) Regulations 2005.

7.10 Regulations 5 and 6 of the 2005 Regulations relate to the respective fees payable on application by an organisation of workers to have its name entered in the list of trade unions and an application by an organisation of employers to have its name entered in the list of employers' associations. The fee for both trade unions and employers' associations applying to be listed is currently set at £150. Between 2009 – 2019, the Certification Officer recorded the cost of processing 17 separate listing applications. The average cost of processing a listing application in that period was £519. The Certification Officer believes that this continues to be broadly representative of the cost of processing an average listing application. This instrument therefore sets the listing fee for trade unions and employers' associations at £519.

7.11 Regulation 7 of the 2005 Regulations relates to the fee payable on application by a trade union for a certificate of independence. The fee is currently set at £4,066. Between 2009 – 2019, the Certification Officer recorded the cost of processing 2 separate applications for a certificate of independence. The average cost of processing an application for a certificate of independence in that period was £997. The Certification Officer believes that this continues to be broadly representative of the cost of processing an average certificate of independence application. This instrument sets the fee for an application for a certificate of independence at £997.

7.12 Regulation 3 of the 2005 Regulations relates to the fees payable on an application for approval of a change of name (currently £96) and the fee payable for every inspection on the same day of documents kept by the Certification Officer (currently £19). These fees will be subsumed into the levy and therefore the relevant regulations be

revoked. Although the fees are set out at regulation 3 of the 2005 Regulations, the original provisions are set out at regulation 11 of the 1975 Regulations. Regulation 11 will therefore be revoked.

7.13 Regulation 4 of the 2005 Regulations relates to the fee for the entry of the name of an amalgamated organisation in the lists maintained by the Certification Officer where the name of each of the amalgamating organisations is already entered. The fee is currently £41. The cost to the Certification Officer of entering a name of an amalgamated organisation in the lists is negligible as adding the name of a new amalgamated organisation to the list is effectively automatic. Therefore, this fee will be subsumed within the levy and will not be chargeable as a separate fee. Although the fee is set out in regulation 4 of the 2005 Regulations, the original provision is set out in the 1975 Regulations at regulation 12. Regulation 12 of the 1975 Regulations will therefore be revoked.

7.14 Regulation 8 of the 2005 Regulations relates to the fee prescribed by section 101B(2) of the 1992 Act in relation to the fee payable on application for the issue of a certificate of independence to an amalgamated union, where the instrument of amalgamation is registered at the time of the application and the Certification Officer is satisfied that the condition of section 101A(3) is met. The fee is currently £41. As with the cost for listing an amalgamated organisation, the Certification Officer incurs negligible costs for administering this as issuing a new certificate of independence to an organisation comprised of two unions which previously held certificates of independence requires negligible additional work. Therefore, this fee will also be subsumed within the levy and will not be chargeable as a separate fee.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union or trigger the statement requirements under the European Union (Withdrawal) Act 2018.

9. Consolidation

9.1 The Department for Business, Energy and Industrial Strategy does not intend to consolidate this legislation.

10. Consultation outcome

10.1 The Department for Business, Energy and Industrial Strategy carried out a full public consultation on the levy system from 31 August to 26 October 2017. The consultation asked whether the existing statutory fees should be removed and subsumed into the levy. 34 responses were received in total. Of these, 20 were from trade unions, 10 were from employers' associations, and the remaining four were from individuals or other organisations.

10.2 Of those who responded to this question, the majority disagreed with the removal of all of the Certification Officer's fees. The Government therefore proposed to keep the fees for listing and for certificates of independence, and to subsume other fees into the levy. The Government's response to the consultation, which has been published on

gov.uk, contains a fuller analysis of responses received and the Government's consideration of the suggestions made[1].

10.3 As the previous consultation was more than three years ago, the government (as well as engaging further with the Advisory, Conciliation and Arbitration Service) wrote to all trade unions and employers' associations in June 2021, to seek their views on the developed proposed structure of the levy as part of a further engagement exercise. 47 responses were received in total. Of these, 33 were from trade unions and 14 were from employers' associations.

10.4 The further engagement exercise asked whether respondents had any comments on the government's intention to keep the existing fees for listing and certificates of independence, as well as whether the level of these fees should be reviewed. Of those who responded to these questions, the majority agreed with the proposal to retain the fees for listing and certificates of independence, and for the Government to review the level of these fees in bring them closer in line to the actual cost of the activities. The final levy policy, including the approach to the Certification Officer's fees, was set out in the government response to the further engagement exercise, which was sent to all trade unions and employers' associations in November 2021.

11. Guidance

11.1 It will be for the Certification Officer to produce guidance on the statutory fees.

12. Impact

12.1 There is very low impact on business, charities or voluntary bodies.

12.2 There is very low impact on the public sector.

12.3 A full Impact Assessment has not been prepared for this instrument because of the very low level of impact on existing trade unions and employers' associations. An Impact Assessment on the Certification Officer's levy has been published on the legislation.gov.uk website[2].

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses, including small employers' associations or small trade unions.

14. Monitoring & review

14.1 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Minister for Small Business, Consumers and Labour Markets has made the following statement:

"It is not appropriate in the circumstances to make provision for review by the Secretary of State in the Certification Officer (Amendment of Fees) Regulations 2022. This is because the costs of monitoring would be considered disproportionate to the relatively limited impact of the regulations."

[1] https://www.gov.uk/government/consultations/trade-union-act-2016-consultation-on-the-certification-officers-levy

[2] https://www.legislation.gov.uk/ukdsi/2022/9780348230185/impacts

15. Contact

15.1 Laurence Evans or Laura Bealin-Kelly at the Department for Business, Energy and Industrial Strategy, Telephone: 0207 215 6086 or 0207 215 8258, Email laurence.evans@beis.gov.uk or laura.bealin-kelly@beis.gov.uk, can be contacted with any queries regarding the instrument.

15.2 James Stevens, Deputy Director for Employment Rights and Enforcement, Labour Markets Directorate at the Department of Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 Paul Scully MP, Minister for Small Business, Consumers and Labour Markets at the Department of Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.