

<b>Title:</b> Sharing of Information between Ofcom and the Information Commissioner's Office and the Insolvency Service (Communications Review).  <b>IA No: DCMS075</b>  <b>Lead department or agency:</b> DCMS  <b>Other departments or agencies:</b> Ofcom	<b>Impact Assessment (IA)</b>			
	<b>Date:</b> 27/03/2013			
	<b>Stage:</b> Consultation			
	<b>Source of intervention:</b> Domestic			
	<b>Type of measure:</b> Primary legislation			
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<b>Summary: Intervention and Options</b>	<b>RPC Opinion:</b> RPC Opinion Status
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Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, One-Out?	Measure qualifies as
£1.34m	£0m	£0m	Yes	Zero Net Cost

**What is the problem under consideration? Why is government intervention necessary?**

Nuisance marketing calls and messages and deceptive selling concern consumers. The Information Commissioner's Office (ICO) and the Office of Communications (Ofcom) are responsible for tackling nuisance calls and messages. However, restrictions on the disclosure of information set out in s393 of the Communications Act 2003 (the Act) make it difficult for Ofcom to share certain information with the ICO and the Insolvency Service (IS) unless an internal legal process is followed which can take time, thus restricting effective collaboration. Amending the Act by including the ICO and the IS in s393(3) and relevant measures in s393(5) of the Act would materially enhance information sharing between the bodies in both directions.

**What are the policy objectives and the intended effects?**

The objective is to make it easier for Ofcom to share certain information with the ICO and IS, namely information about businesses undertaking such marketing activities that has been obtained by Ofcom during the exercise of their duties under the Communications Act 2003. This would enable exchange of relevant information between Ofcom, the ICO and IS, free up ICO and Ofcom resources currently spent on information requests, speed up ICO enforcement work that requires, or would benefit from, company-specific information held by Ofcom, and facilitate a more effective actions against companies generating nuisance calls and messages. This should help reduce consumer harm and breaches of Ofcom regulations.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

Option 1) Preferred Option. Amend s393 to facilitate Ofcom's ability to share information with the ICO and IS and support the enforcement work designed to tackle consumer harm in this area.

Option 2) Do nothing. This would mean that the current deficiencies in the information sharing regime would remain, hindering enforcement against companies responsible for nuisance calls and messages. The potential for consumer harm would remain.

**Will the policy be reviewed?** It will not be reviewed. **If applicable, set review date:** N/A

Does implementation go beyond minimum EU requirements?			No.		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes	<b>Large</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b> N/A	<b>Non-traded:</b> N/A	

***I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.***

Signed by the responsible SELECT SIGNATORY: \_\_\_\_\_ Date: \_\_\_\_\_

# Summary: Analysis & Evidence

# Policy Option 1

**Description:** Preferred Option: Permit transfer of information to ISO and IS.

## FULL ECONOMIC ASSESSMENT

Price Base Year 2011	PV Base Year 2015	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: 0.62	High:21.30	Best Estimate:1.34

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	NA	NA	NA

### Description and scale of key monetised costs by 'main affected groups'

None.

### Other key non-monetised costs by 'main affected groups'

Possible loss of trust in Ofcom record-keeping.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	0.07	0.62
High	Optional	2.56	21.30
Best Estimate	NA	0.16	1.34

### Description and scale of key monetised benefits by 'main affected groups'

Reduced losses to consumers due to company 'phoenixing' - the aim is stop individuals who have had regulatory action taken against them for this type of marketing activity from simply closing down their company only to set up a new one providing the same or similar services using the same customer base. Reduced costs of operating ISO and Ofcom.

### Other key non-monetised benefits by 'main affected groups'

(i) Faster enforcement action by ICO where ICO needs, or would benefit from, business-specific information held by Ofcom. (ii) Potential for improved prioritisation of enforcement action facilitated by a fuller, more proactive sharing of intelligence. Together these should help reduce consumer harm. (iii) Reputational benefits to companies in the direct marketing sector, due to action being taken by the ICO against rogue companies that break the rules and thus cleaning up the sector.

Key assumptions/sensitivities/risks

Discount rate (%) 3.5

Numbers of people affected by, and losses resulting from, phoenixing are not known with any certainty. The effectiveness of the phoenixing policy cannot be estimated with any certainty.

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:	In scope of OIOO?	Measure qualifies as
Costs: 0	Yes	Zero net cost
Benefits:0		
Net:0		

## **Problem under consideration and rationale for intervention**

### **Summary**

Nuisance marketing calls and messages and deceptive selling concern consumers. The Information Commissioner's Office (ICO) and the Office of Communications (Ofcom) are responsible for tackling nuisance calls and messages. However, restrictions on the disclosure of information set out in s393 of the Communications Act 2003 (the Act) make it difficult for Ofcom to share certain information with the ICO and the Insolvency Service (IS), thus restricting effective collaboration. Amending the Act by including the ICO in s393(3) and relevant measures in s393(5) of the Act would enable:

- the exchange of relevant information such as between Ofcom, the ICO and IS,
- free up ICO and Ofcom resources currently spent on information requests,
- speed up ICO enforcement work that requires, or would benefit from, company-specific information held by Ofcom, and
- facilitate a fuller, more effective proactive approach to taking action against companies generating nuisance calls and messages.

This should help reduce consumer harm from nuisance calls and messages and breaches of Ofcom regulations.

### **Nuisance Calls**

Nuisance calls and messages cause consumers a significant amount of annoyance and inconvenience and for some, particularly the elderly or vulnerable, they can generate considerable anxiety. The number of complaints received about such calls increased significantly in 2012: the Telephone Preference Service (the official register of consumers that have opted out of receiving unsolicited live marketing calls) received 48,942 complaints about unsolicited live marketing calls in 2011 and 82,447 complaints in 2012; Ofcom received 21,466 complaints about silent and abandoned calls in 2011 and 31,099 complaints in 2012.

Responsibility for tackling nuisance calls and messages primarily falls to the Information Commissioner's Office (ICO) and Ofcom. Neither organisation separately reports the costs of dealing with nuisance calls and messages. The legal basis for this intervention is summarised as follows:

- Under the Privacy and Electronic Communications Regulations (PECR) 2003, the ICO has lead responsibility for enforcing the specific rules that are intended to prevent unsolicited live marketing calls, recorded marketing message calls and texts.
- Ofcom and the ICO share enforcement powers in respect of certain parts of PECR as designated enforcers under Part 8 of the Enterprise Act. These shared powers apply only in relation to infringements causing harm to the collective interests of consumers.
- Ofcom is responsible for dealing with silent and abandoned calls and other forms of persistent misuse using its powers under the Act.

Although as a public body, Ofcom is subject to the Freedom of Information Act and other similar legislation, under which it can be legally obliged to disclose certain information in certain circumstances, it is also subject to other relevant legislation restricting the disclosure of information, including section 393 of the Communications Act 2003 (see [www.legislation.gov.uk/ukpga/2003/21/section/393](http://www.legislation.gov.uk/ukpga/2003/21/section/393)).

Specifically, section 393(1) of the Act provides that any information with respect to a particular business, which has been obtained by Ofcom in the exercise of a power conferred by the Act (or the Broadcasting Act 1996) is not to be disclosed to any other person without the consent of the business concerned. The rest of section 393 sets out certain gateways through which information is legally permitted to be disclosed in certain circumstances and to certain other public bodies for specified purposes. Disclosure of information in contravention of section 393 is a criminal offence as set out in s.393(10). The list of public bodies in section 393(3) to which information may be disclosed does not currently include the ICO, but includes other regulatory bodies such as OFT.

The absence of the ICO and its functions under PECR from this list means that Ofcom cannot readily share relevant information with ICO. The omission of the ICO from Section 393, therefore, hinders effective coordinated action to tackle companies generating nuisance calls and messages. If the ICO needs particular information for its enforcement work, considerable resources need to be spent in

understanding how the different information disclosure regimes in the Act, Enterprise Act and Data Protection Act (DPA) might apply in relation to a specific request. This is a complex area of law with different rules applying depending on which legislative regime is relevant. Ofcom currently needs to assess individual requests on a case-by-case basis, and this can entail a significant resource input. We assume that Ofcom receives three requests for information per week from ICO each of which takes one day to complete. Hence, we estimate that this information transfer currently costs Ofcom and ICO a total of £0.07 million p.a.

Although these constraints have ultimately not prevented Ofcom from sharing information with the ICO in relation to specific enforcement cases, it has tied up resources at Ofcom and ICO. It has also slowed down transfer of relevant information and therefore slowed down the progress of the ICO's enforcement work.

Furthermore, the current situation and in particular, the possibility of criminal sanctions for even an accidental breach of s.393 – inhibits proactive sharing of information that has the potential to shape future enforcement activity. This is because Ofcom is unable to share information about named companies with the ICO, unless they are exercising their enforcement powers under the Data Protection Act (DPA) in relation to those companies.

### **Company Phoenixing**

Ofcom is aware of a number of instances in which companies have been set up to supply communication services but which do not supply the service always promised. This has involved material loss to the customers involved who pay for a service which is not delivered. Ofcom judges that the elderly or vulnerable persons can be disproportionately affected by such operations. Some directors of companies, which are found in breach of their regulatory obligations, avoid legal sanction by dissolving the company concerned and starting up another to pursue the same business strategy, a process known as “company phoenixing”.

Ofcom estimates on average it sees one case of company phoenixing per year. However, it is believed that most companies involved are relatively small scale and aim to target vulnerable sections of the population. The numbers of customers and the average losses that are involved are not known with any certainty because customers are generally unsecured creditors when such companies sue for bankruptcy enter insolvency. For the purposes of this IA, therefore, we assume that each case involves on average 1,000 customers (range: 500 to 5,000) who lose an average of £200 (range: £50 to £1,000) to the companies concerned, then customer losses of approximately £200,000 p.a. (range: £25,000 to £5 million) are involved in each case. Ofcom have been unable to provide us with reliable information about these losses and we seek clarification about the scale of these losses from respondents to the White Paper.

At present, it is not possible for Ofcom to share information with the Insolvency Service (IS) for the purpose of its investigations with a view to disqualifying such persons from holding directorships. For cases under investigation by IS, lack of access to information held by Ofcom would mean that an opportunity is lost to take action against directors who have breached Ofcom's General Conditions and wound up the company to avoid Ofcom sanctions. One result of this delay is that recovery of customer losses is made difficult, another is that more consumers would be scammed.

The ability to share information is also likely to act as a deterrent to directors who might be contemplating “phoenixing” in the future. This should reduce the frequency of such business activities.

Adding the IS to the list of bodies in Act will enable Ofcom to share useful intelligence information with it.

### **Policy objective**

The policy objective is to make it easier for Ofcom to share certain information with the ICO and IS, namely information with respect to a particular business that has been obtained by Ofcom in the exercise of a power conferred by the Communications Act to carry out its role as regulator for communications sector. This information would be provided to enable the ICO to carry out its functions under PECR. This would:

- enable proactive and fuller exchange of relevant information between Ofcom and the ICO,
- free up ICO and Ofcom resources currently spent handling information requests,

- speed up ICO enforcement work that requires or would benefit from business-specific information held by Ofcom,
- facilitate a fuller, more proactive approach to taking action against companies generating nuisance calls and messages.
- Ultimately this should help reduce consumer harm from nuisance calls and messages.

This would also allow IS to better fulfil its regulatory responsibility, by preventing companies that are subject of enforcement action from re-forming.

### **Description of options considered**

Two options have been considered:

Option 1) The Preferred Option. Amend s393 of the Act to add ICO and IS to the list of “relevant persons” in s393(3) and to add PECR, the Insolvency Acts 1986 and 2000, the Companies Directors Disqualification Act 1986 and Companies Acts 1985 and 2006 to the list of “acts and instruments” in s393(5) of the Act. This will permit the ICO and the IS to consider information received from Ofcom in investigation cases.

Option 2) Do nothing. This would mean that the current deficiencies in the information sharing regime would remain, hindering enforcement against companies responsible for nuisance calls and messages.

### **Monetised and non-monetised costs and benefits of each option (including administrative burden)**

**Option 1: Preferred Option. Amend Section 393 of the Communications Act 2003 to include the ICO as relevant persons and PECR, Insolvency Acts, Companies Directors Disqualification Act and Companies Acts as relevant acts and instruments.**

#### **Costs**

There are no significant direct additional costs arising from the proposed change.

It is possible that trust in the security of Ofcom’s record-keeping may be adversely affected resulting in less fulsome disclosure of data in the future, as companies may become aware that information about their activity could be noted and forwarded by Ofcom to the relevant regulatory body for consideration and action. However, the use of information under Section 393 is subject to conditions, which are likely to minimise this effect.

#### **Benefits**

An administrative saving for ICO and Ofcom: resources would be saved as ICO and Ofcom would no longer need to spend significant resources handling information requests, when the ICO needs business-specific information held by Ofcom. We estimate that, currently, three data transfers occur each week between ICO and Ofcom a process which costs each organisation £0.034 million per annum (for details see notes to table below). We assume that this time reduction will eliminate 90% of existing costs of data transfer in both organisations. This saving amounts to approximately £0.06 million p.a.

Potential for faster enforcement action by the ICO, where the enforcement action requires or would benefit from business-specific information held by Ofcom. Easy transfer of that information to the ICO would enable the ICO to complete its investigation more quickly than at present.

Improved prioritisation of enforcement action will be facilitated by a fuller, more proactive sharing of intelligence. If the ICO can access fuller business information than at present, it should be able to plan its interventions so that they have the greatest possible effect.

These should feed through into the wider benefit of reduced nuisance calls and messages and in turn reduced consumer harm. The UK’s telemarketing and mobile marketing sectors should also benefit from better enforcement to tackle companies generating nuisance calls and messages. The behaviour of disreputable companies that are breaking the law is detrimental to the reputation of the sector and undermines its long term interests.

Many of these benefits are indirect and cannot be directly related to transfer of particular sources of information. As a consequence, the direct impact of this policy cannot be readily quantified with any degree of assurance.

Similarly this offers potential benefits for IS in its investigative work by having access to relevant information and also offers consumer benefits by preventing them from falling victim to rogue businesses. Ofcom anticipates that the number of cases to be very low (about 1 per year) and they would only be affected if they breach Ofcom rules. Nevertheless, we expect a halving of the average annual losses to consumers resulting from company phoenixing to £100,000 p.a.

The beneficial effects of a reduction in phoenixing cannot be estimated with great certainty. The above represents a presumed effect on an assumed annual average. At one extreme, there may be no effect at all, the other the measure may be completely successful. We have also argued above that losses could potentially vary between £25,000 and £5 million per annum. Hence, the potential range of benefits of the phoenixing measure is likely to lie between zero and £5 million per annum. In the event we have assumed that half the current losses through phoenixing will be eliminated.

### **Option 2: Do Nothing.**

This is the base case against which the Preferred Option is compared and involves no incremental cost and benefits. Hence, the reductions in losses and administration costs resulting from the proposed measure express the benefits that will result from it.

### **Summary Costs and Benefits**

The comparison between the Preferred Option and Do Nothing is summarised in the following table.

#### **SUMMARY COSTS AND BENEFITS** (£ million in 2011 prices; NPV 2015-24)

	<b>DO NOTHING</b>	<b>PREFERRED OPTION</b>	<b>DIFFERENCE</b>
<b>BENEFITS = COSTS AND LOSSES REDUCED</b>			
Phoenixing to IS	1.66(1)	0.83(3)	0.83
Information Transfer from Ofcom	0.29(2)	0.03(4)	0.26
Information Transfer to ICO	0.29(2)	0.03(4)	0.26
<b>TOTAL*</b>	<b>2.23</b>	<b>0.89</b>	<b>1.34</b>

Columns may not sum to total due to rounding.

Notes:

1. Assumes 1,000 customers affected each year with average losses of £200 per head.
2. Assumes 3 transfers each week which take one eight hour day each to complete. This involves 8 hours' clerical time and 2 hours' management time costed at £15.21 and £23.67 per hour respectively (ONS: Annual Survey of Hours and Earnings 2011).
3. Assumes that the effects of phoenixing will be reduced by 50% as a result of the Preferred Option.
4. Assumes that information transfer costs will be cut by 90% as a result of the Preferred Option.

The Preferred Option yields benefits in the form of cost savings and reductions in customer losses from phoenixing of £1.34 million over 10 years in 2011 prices.

### **Rationale and evidence that justify the level of analysis used in the IA (proportionality approach)**

Due to the absence of costs associated with the proposed option, the level of analysis has been limited to identifying and describing the categories of benefits that are expected to arise. These benefits have not been quantified or monetised because the costs of doing so are likely to be disproportionate to the benefits that be expected to result.

### **Risks and assumptions**

The estimates of the costs of phoenixing are extremely uncertain. The number of victims and the losses they sustain are not known with any certainty. Hence, it is likely that the actual potential losses are different from those estimated above.

The effectiveness of the data sharing in reducing customer losses may be very difficult to accurately measure.

### **Direct costs and benefits to business calculations (following OITO methodology)**

No direct costs to business.

### **Wider impacts**

The wider impact is the more effective reduction of consumer harm caused by nuisance calls and messages. There would also be unquantifiable reputational benefits to the UK's direct marketing sector from better enforcement.

### **Summary and preferred option with description of implementation plan**

The proposed option is a simple change to the information disclosure restrictions placed on Ofcom by s393 of the Act, to facilitate more effective intelligence sharing and collaborative working by Ofcom, IS and ICO. This should result in benefits through more efficient use of resources, more timely flow of information from Ofcom to the ICO and IS for specific ICO and IS investigations and fuller, more proactive sharing of wider information to facilitate more effective prioritisation of actions. In turn this should feed through into reduced consumer harm and improved reputational benefits to the direct marketing sector. Implementation will take place through primary legislation as soon practically possible.