



Department for
Digital, Culture
Media & Sport

Tackling nuisance calls and messages

Consultation on action against rogue directors

May 2018

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Ministerial Foreword

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Minister for Digital and Creative Industries



For many of us, unwanted marketing calls are a source of annoyance and inconvenience. For the most vulnerable in society, however, they can cause extreme anxiety and distress. We have been clear that there is no place for nuisance calls or texts and we have taken active steps to address this problem.

We have introduced measures to force direct marketing companies to display their caller ID, we have increased the fines for wrongdoers, and we have transferred responsibility for the Telephone Preference Service from Ofcom to the Information Commissioner's Office to ensure that they can take quicker enforcement action against those companies found to be breaching the rules. This has led to a reduction in reports of nuisance calls for the second year in a row.

However, over 7,500 concerns were reported to the ICO in March 2018 alone, an increase when compared to February. This figure is uncomfortably high; we are clear that we must continue our work if we are to truly eradicate this modern day blight on society and its pernicious effect on the most vulnerable members of our communities. It is for that reason that we have included in the Financial Guidance and Claims Act 2018 provisions that will further restrict marketing calls relating to claims management services, as well as those from pensions providers. It is also the reason why we are launching this consultation.

Enforcement agencies can already take action against companies and their directors that act outside of the law. Companies responsible for nuisance calls can be fined up to £500,000 if they are found to have breached the Privacy and Electronic Communications Regulations by the ICO. The Insolvency Service can also disqualify senior officials from being a director if they are found to be in breach of these rules.

Since we made it easier for the Commissioner to fine those responsible for breaches of marketing rules, she has issued fines totalling over £5 million for unlawful direct marketing. The ICO also report that there have been eight director disqualifications in relation to eight ICO monetary penalty investigations since 2012.

These measures alone, however, have so far not stopped some unscrupulous directors from forming companies which intentionally and repeatedly flout the rules on nuisance calls. Some directors notoriously operate outside of the law, before dissolving their company when the enforcement agencies come knocking. These same directors then open a new company

and continue their unlawful practices. For that reason, we would be keen to hear your views on whether we should go further by making company bosses personally liable for breaches of the relevant legislation.

Such measures would send a strong message to directors that if their business involves direct marketing activities, they need to be sure their customers have agreed to be contacted and their companies are acting within the law. This measure will mean that direct marketing laws are treated more seriously at boardroom level. It would also make it possible for the ICO to take enforcement action against individual directors, regardless of whether the company concerned continues to trade.

I look forward to considering your responses in due course.

Introduction

Companies that unlawfully make unsolicited marketing communications by electronic means (such as by phone or text message) can be issued with a fine for breaches of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR) by the regulator, the Information Commissioner's Office (ICO). The ICO are able to take a range of corrective measures, including issuing monetary penalty notices of up to £500,000. This type of enforcement can currently only be taken against the company itself rather than any director-level individual within the company.

The ICO reported that almost 130,000 concerns were made to them from people who had received nuisance calls, texts, or other electronic marketing messages in 2017. The ICO issued civil monetary penalties totalling £2.83 million in this period to organisations in breach of marketing regulations.

The Government recognises that tackling this complex problem is a shared responsibility between the Government, regulators, industry and consumer groups. In March 2014, the Department for Culture, Media and Sport (DCMS) launched an Action Plan on nuisance calls. As part of the recommendations in the Action Plan, the consumer protection group Which? were asked to head up a task force on consent and lead generation in the direct marketing industry. The task force brought together representatives from the ICO, other relevant regulators, business, industry and consumer groups, to agree a set of practical recommendations, to help reduce the incidence of unwanted calls and texts received by consumers.

On 8 December 2014, Which? published its task force report which contained 15 recommendations - most of which were aimed at business, industry bodies and regulators; however recommendations 10-15 were aimed at Government. Recommendation 10 of the report, called for company directors to be held liable for breaches of PECR.

Since the publication of the Action Plan and the task force report, the Government has taken forward a range of measures, including strengthening the ICO's ability to take enforcement action against organisations that break the law. Specific actions include:

- Introducing a measure in the Digital Economy Act 2017, making it a requirement for the Information Commissioner to issue a statutory code of practice on direct marketing;
- Amending PECR to require all direct marketing callers to provide Caller Line Identification;

- Lowering the legal threshold at which the ICO may impose a monetary penalty on organisations breaching PECR (a previous requirement to prove that the call caused alarm or distress was removed);
- Making it easier for the ICO to more effectively share information with Ofcom in relation to nuisance calls through an amendment to the Communications Act 2003; and
- The power to issue monetary penalty notices up to £500,000 for serious breaches of PECR.

The Government have also introduced a ban on cold calling in relation to claims management services through the Financial Claims and Guidance Act 2018, except where the receiver has consented to such calls being made to them. The 2018 Act also includes powers to ban cold calls from pension providers.

There are also already a set of actions that regulators can take against company directors if they breach direct marketing regulations. The Insolvency Service has general powers to investigate both insolvent and active companies. If a director has deliberately acted to the detriment of the company and or its creditors, action may be taken against the directors under the Insolvency Act 1986 or the Company Directors Disqualification Act (CDDA) 1986. This consultation paper further outlines the extent of the Insolvency Service's disqualification powers in current law.

The Government is committed to addressing the problem of nuisance calls. During recent passage of the Digital Economy Act 2017, a motion was put forward to enable the ICO to take action against company officers for breaches of PECR. This followed growing concerns in Scotland about the unacceptable level of nuisance calls received in by Scottish residents. A report by Which? had highlighted that 9 in 10 people in Scotland (91%) received a nuisance call on their landline in the month of November 2015¹.

This consultation sets out and seeks views on the functioning of the current legislative options for holding company directors to account, and the option to amend PECR via secondary legislation to give the ICO increased powers to impose fines of up to £500,000 on individual senior officials who breach the Regulations.

Responses received will help the Government assess the need for and impacts of any change.

¹ Figures released in a December 2015 Which? report <https://press.which.co.uk/whichpressreleases/which-launches-nuisance-calls-crackdown-in-scotland/>

How to Respond

The consultation period will run for 12 weeks from June 2018 to August 2018.

Please respond before the closing date. The questions are set out at page 20.

Please send responses to the consultation questions to nuisancecalls@culture.gov.uk.

Responses regarding matters unrelated to the consultation's questions, and responses sent to any other inbox will not be taken in to consideration.

If you do not have access to email, please respond to:

Domestic Data Protection Policy Team,
4th Floor,
Department for Digital, Culture, Media and Sport,
100 Parliament Street,
Westminster,
London,
SW1A 2BQ

This consultation is intended to be an entirely written exercise but we reserve the right to follow up any responses to seek further information.

Please contact the data protection team 020 7211 6217 (or byron.grant@culture.gov.uk) if you require any other format e.g. Braille, Large Font or Audio.

For enquiries about the handling of this consultation please contact the Department for Digital, Culture, Media & Sport Correspondence Team at the above address or email enquiries@culture.gov.uk heading your communication 'Nuisance Calls consultation'.

Copies of responses may be published after the consultation closing date on the Department's website: www.gov.uk/dcms.

Information provided in response to this consultation may be published or disclosed in accordance with access to information regimes (these are primarily the Freedom of Information Act 2000 ('FOIA'), the Data Protection Act 2018 and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is statutory Code of Practice with which public

authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the Data Protection Act 2018 (and the General Data Protection Regulations). The privacy notice can be found at **Annex A** at the end of this document.

This consultation follows the Government's Consultation Principles (published in 2013) which are available at:

<https://www.gov.uk/government/publications/consultation-principles-guidance>

Background

What is direct marketing?

Direct marketing is “the communication (by whatever means) of advertising or marketing material, which is directed to particular individuals” (as defined in [section 122\(5\) of the Data Protection Act 2018](#) (DPA)).

The definition of direct marketing covers not only commercial marketing but any advertising or marketing material, including material promoting the aims of not for-profit organisations, for example, a charity (see the [ICO’s direct marketing guidance](#)).

If an organisation is responsible for direct marketing by electronic means, or employing someone else to do so on its behalf, it must comply with the Privacy and Electronic Communications Regulations 2003 (PECR). This includes telephone calls (both live and automated), faxes, emails, text messages and other forms of electronic message.

Direct marketing is not illegal, so long as organisations adhere to the rules set down in PECR and the DPA.

PECR lays down specific requirements for direct marketing by electronic means, depending on the channel of communication being used. This includes live and automated direct marketing telephone calls, and direct marketing sent by email, or by SMS. In some cases, an organisation will need to have an individual’s prior consent to send them such communications.

When done in accordance with privacy legislation, electronic marketing can be a perfectly legitimate way for organisations to advertise new products and grow their businesses. However where the organisation ignores individuals’ wishes, for example, direct marketing becomes a nuisance and is prohibited by PECR.

Data Protection Act 2018

The DPA received Royal Assent in May 2018, repealing the Data Protection Act 1998 and providing a data protection regime that is fit for the digital age. The new regime includes tougher rules around consent, subjecting it to additional conditions, such as being ‘unambiguous’ and easy to withdraw. Consent must also be ‘explicit’ when processing special categories of personal data (otherwise known as “sensitive personal data”). The new regime also makes the reliance on the use of default opt-out or preselected “tick boxes” unlawful.

The DPA includes stronger financial penalties for non-compliance with the data protection principles. Under the Data Protection Act 1998, a maximum of £500,000 could be levied by the ICO for the most serious breaches. Under the new DPA, this is raised to up to £17 million or 4% of the organisation's annual turnover, whichever is higher. It is important to note that the stronger financial sanctions available under the new regime will not be applicable to breaches of PECR. Such breaches will continue to draw on the enforcement regime under the Data Protection Act 1998 i.e. the maximum fine for a breach of PECR would remain at £500,000 (the DPA saves Part V of the Data Protection Act 1998 for this, and similar, purposes).

The new data protection regime requires organisations to comply with the principles of data processing which include the requirement that personal data be processed lawfully, fairly and in a transparent manner. Organisations using data obtained through unlawful means and subsequently processing these data to make nuisance calls risks breaching these principles. Organisations may be liable to the newer financial penalties and other enforcement action if they are found to be in breach of these principles.

Evidence of the problem

In April 2015, the Government made legislative changes to PECR, lowering the threshold at which the ICO can take action against companies that breach the law. Following this change, the ICO could impose civil penalties of up to £500,000 for breaches of PECR. Since this change in 2015 to the end of 2017, the ICO has issued more than £5.7 million for breaches of nuisance call regulations (not accounting for anything under appeal).

However the ICO report that, of the 27 fines issued, only nine were paid in full, one is the subject of a payment plan, two were paid in part and the remainder were unpaid. This suggests that the individuals behind those companies are not facing the consequences of their actions.

Under PECR, the ICO can only take action against a company rather than individual directors or other senior officers. This means that a rogue director can avoid fines for breaches of PECR, by dissolving their company at the point they are issued with a fine and starting a new company with a new name (known as “phoenixing”) thus continuing their illegal activities. Evidence suggests that the type of companies that flout the rules tend to be small to medium sized limited companies.

Current legislative framework

The DPA already includes a rule carried forward from the Data Protection Act 1998 that allows individual company officers to be held personally liable for criminal

offences within the DPA, though not for regulatory (i.e. non-criminal) breaches. However, there is currently no similar provision in PECR. The introduction of civil monetary penalties issued on directors would be a novel measure in the legislation.

The Insolvency Service has general powers to investigate both insolvent and active companies, including those companies that undertake direct marketing activities. If a director has deliberately acted to the detriment of the company and/or its creditors, action may be taken against the directors under the Insolvency Act 1986 or the Company Directors Disqualification Act (CDDA) 1986.

Director disqualification proceedings can be brought in the public interest on behalf of the Secretary of State for the Department for Business, Energy and Industrial Strategy where the director has failed to meet their duties and legal obligations, including sector specific obligations. Directors may incur personal liability for the company's debts, may face criminal penalties and can be disqualified from acting as a company director for a period of between 2-15 years.

Where an individual is disqualified, they are prohibited from acting as a director or taking part directly or indirectly in the promotion, formation or managing of a company for the period specified unless he or she obtains leave of court to act.

The Insolvency Service can also investigate live companies, for example after a referral from another regulator or complaint from the public. The Home Office is one such body which refers cases to the Insolvency Service where a fine has been issued to a company for hiring illegal workers. The Insolvency Service have taken disqualification proceedings against numerous directors following such referrals². Whilst these companies may subsequently go into liquidation, the Insolvency Service can also investigate beforehand where appropriate. In around 85% of cases directors offer a disqualification undertaking as an alternative to facing court proceedings.

The Courts have a wide discretion to take into account anything else that amounts to unfitness on the part of a director. There is no need for there to have been any prosecution for a legislative breach provided there is supporting evidence and the public interest would be served by bringing proceedings.

Where criminal charges have been brought, the courts may exercise their discretion to make a disqualification order as part of the sentencing process on the request of the prosecuting authority. Each case must be judged on its merits. Where a financial penalty has been paid in full the case would not meet the public interest test to allow disqualification proceedings to be taken against the director.

² <https://www.gov.uk/government/news/no-escape-for-restaurant-directors-who-employed-illegal-workers>

The Insolvency Service can investigate the actions of a director who carries on the same business successively through a series of companies where each becomes insolvent and the insolvent company's business, but not its debts, is transferred to a new, similar 'phoenix' company. The insolvent company then ceases to trade and might enter into formal insolvency proceedings (liquidation, administration or administrative receivership) or be dissolved.

The Insolvency Act 1986 also makes it an offence for a director of a company which has gone into insolvent liquidation to be a director of a company with the same or a similar name, or concerned in its management, without permission of the court within five years after the winding up.

The Insolvency Service have recently made a disqualification order for breaches of direct marketing rules. In December 2017, the Insolvency Service disqualified the director of a marketing company for 12 years after having "flagrantly breached his duties to regulators and company creditors over an extended period". The disqualification undertaking was obtained by the Insolvency Service after the director of the firm refused to pay a £75,000 fine issued by the ICO for non-compliance with PECR. This example demonstrates how the ICO and the Insolvency Service currently work together to bring unscrupulous directors to justice.

Limitations of current legislative framework

Despite the powers available, a minority of company directors continue to breach direct marketing rules with little regard for the consequences. The Information Commissioner has stated that directors are often able to duck away from paying fines by dissolving their company or putting their company into liquidation³. The ICO is increasingly working alongside the Insolvency Service and the Claims Management Regulator to take action against this type of activity. However, even if a disqualification order is placed on the director following a company's dissolution, the debt originally placed on the company would go unrecovered without further enforcement action. This unlawful procedure undermines the ICO's ability to take effective regulatory action.

Options

This consultation paper presents two options:

- a) **Rely on provisions currently available i.e. disqualification**

³ <https://www.gov.uk/government/news/government-clamps-down-on-nuisance-call-crooks>

As aforementioned, action can continue to be taken against directors in the form of disqualification proceedings under existing legislation. Directors may also face fines and even custodial sanctions if they breach the terms of the disqualification. The ICO will continue as at present to fulfil its duty as regulator of PECR and may issue fines to companies in breach of nuisance calls regulations.

b) Introduce financial penalties for directors of companies in breach of nuisance calls rules under PECR

This measure would give the Information Commissioner a power to impose civil monetary penalties of up to £500,000 on those in positions of responsibility in all forms of corporate entities. The overall aims of this proposed measure would be to enhance the ICO's regulatory effectiveness by raising the issue of unsolicited marketing at board level.

The legislative changes would also allow the ICO to hold directors to account where the company fails to pay the fine for a breach of the Regulations, even in cases where the company is put into liquidation. The ICO would also be able to take action against those no longer in senior positions (for example through resignation), as long as they were a director at the relevant time. Doing this would make it harder for the individual who has breached the law to set up a new company and carry out similar activities. This measure would operate alongside the existing disqualification provisions.

How a legislative change to PECR would work

The second option of legislative change would give the Information Commissioner a power to impose civil penalties of up to £500,000 on those in positions of responsibility in all forms of corporate entity. This would be implemented via secondary legislation to PECR, using a negative statutory instrument.

Making company bosses liable for breaches of the Regulations could:

- raise the profile of the handling of personal data and direct marketing activities at boardroom level;
- send a clear message to company directors and other senior officers that they will be held to account even if their company enters into liquidation;

- make it easier for the ICO to take action against a company as well as its directors that breach the Regulations; and
- reduce the amount of nuisance calls made by rogue companies and their directors.

Scope of director liability

The legislative change option would apply to directors, and those in similar positions, in corporate bodies and unincorporated associations. It would also extend to members of partnerships and Scottish partnerships. In relation to an unincorporated body other than a partnership, it would apply to any person who was concerned in the management or control of the body or purports to act in the capacity of a person so concerned.

How could a measure for directors' liability be enforced?

The ICO would enforce this proposed measure independently. In practice this would mean company directors and those in similar positions could, if found to be in breach of the Regulations, be issued with fines of up to £500,000.

The ICO would be able to use its discretion to determine the appropriate enforcement action to take. Such action could include, but may not be limited to, the following:

- More than one director or partner could be issued with a civil penalty;
- The company and or director(s)/partner(s) could be issued with a civil penalty;
- The company directors could potentially face disqualification if they failed to comply with an enforcement notice

Any enforcement action taken by the ICO would be based on the seriousness of the contravention and other aggravated and mitigated factors. Those found in breach of the rules, could make an appeal through the first-tier information tribunal within 28 calendar days of receiving a decision notice from the ICO.

How could a change be achieved?

If the evidence suggests legislative change is the stronger option, the Government could amend PECR through secondary legislation. The government considers that the proposed change would be proportionate because it will have minimal impacts on legitimate marketing organisations, and could increase the ICO's ability to

investigate unsolicited electronic marketing and to take action against organisations that breach the Regulations.

Impact

General public

Anybody with a telephone is likely to have received a nuisance call at some point and there is evidence to suggest that some parts of the UK receive more calls than others. Older people and vulnerable members of society are more likely to feel pressured into signing up to goods and services they do not want, and in the worst cases are deliberately targeted.

Company directors

The vast majority of company directors who play by the rules will have nothing to fear from either option. The principal aim of monetary penalties is to act as a deterrent to breaching the Regulations. In instances where company directors are unable to pay the fine, the ICO has an established process for undertaking the recovery of unpaid monetary penalties. This might include the use of insolvency orders, such as compulsory winding up and, in some circumstances, bankruptcy orders in order to realise any assets. In practice, the ICO have a range of corrective powers they are able to use on companies and directors that have been found to contravene the law, and will not immediately pursue disqualification in the first instance.

Direct marketing companies

The Direct Marketing Association (DMA), the trade organisation which seeks to advance all forms of direct marketing, has over 1,000 members (all of whom are required to abide by the direct marketing rules). However, there are many companies that are not registered with the DMA and there could be as many as 2,000 direct marketing companies in total. Companies which comply with the law have nothing to fear from either option.

Equality duties

Section 149 of the Equality Act 2010 (“the Act”) sets out the Public Sector Equality Duty. This is a legal duty that requires Ministers and the Department, when exercising their functions, to have ‘due regard’ to its three limbs: a) The need to eliminate discrimination, harassment, victimisation on the basis of a “protected characteristic” and other conduct that is unlawful under the Act; b) The need to advance equality of opportunity between those who share a “protected characteristic” and those who do not; and c) The need to foster good relations between those who share a “protected characteristic” and those who do not. The “protected characteristics” are race, sex, disability, age, sexual orientation, religion or belief, pregnancy and maternity, and gender reassignment. The characteristic of marriage and civil partnership is relevant only when considering the

first limb of the duty. Our assessment is that this proposal to introduce director liability for breaches of the Regulations would not be directly or indirectly discriminatory, as it would not treat individuals less favourably because of their protected characteristics.

If the evidence supports further legislative change, however, this may have a positive impact on certain groups with protected characteristics. As indicated above, for example, older people and other vulnerable people (such as those with learning disabilities) are known to suffer the greatest harm as a result of the activities of nuisance callers.

Consultation questions

- Do you think that the current legislative framework regarding the Insolvency Service's powers of disqualification in regards to PECR breaches are sufficient?
- **If no**, do you think that the government should amend PECR to give the Information Commissioner a power to impose fines on company directors and those in similar positions who are responsible for breaches of direct marketing rules?
- What impact would fining directors for breaches of electronic marketing have on you/your organisation?
- Are there any other costs or benefits that may be associated with this proposal that you think the Government should consider before taking a final decision?
- Are there any impacts, including equality impacts, we have not considered?
- Do you have any additional comments?

Annex A

Privacy notice

The following is to explain your rights and give you the information you are be entitled to under the Data Protection Act 2018.

Note that this section only refers to your personal data (your name address and anything that could be used to identify you personally) not the content of your response to the consultation.

1. The identity of the data controller and contact details of our Data Protection Officer

The Department for Digital, Culture, Media and Sport (“the department”) is the data controller. The Data Protection Officer can be contacted at dcmsdataprotection@culture.gov.uk.

2. Why we are collecting your personal data

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes. We may also use it to contact you about related matters.

3. Our legal basis for processing your personal data

The Data Protection Act 2018 states that, as a government department, the department may process personal data as necessary for the effective performance of a task carried out in the public interest. i.e. a consultation.

3. With whom we will be sharing your personal data

We will not share the personal data obtained through this consultation outside of the department. Copies of responses may be published after the consultation closing date on the Department’s website: www.gov.uk/dcms.

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

4. For how long we will keep your personal data, or criteria used to determine the retention period.

Your personal data will be held for three months after the consultation is closed. This is so that the department is able to contact you regarding the result of the consultation following analysis of the responses.

5. Your rights, e.g. access, rectification, erasure

The data we are collecting is your personal data, and you have considerable say over what happens to it. You have the right:

- to see what data we have about you
- to ask us to stop using your data, but keep it on record
- to have all or some of your data deleted or corrected
- to lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at <https://ico.org.uk/>, or telephone 0303 123 1113.

6. Your personal data will not be sent overseas

7. Your personal data will not be used for any automated decision making.

8. Your personal data will be stored in a secure government IT system.