



Department for
Digital, Culture
Media & Sport

Tackling nuisance calls and messages

Consultation on action against directors

Government response

December 2018

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Executive summary

Between 30 May and 21 August 2018, the Department for Digital, Culture, Media and Sport (DCMS) consulted on taking action against company directors whose organisations were responsible for breaches of nuisance calls and messaging laws.

There were 71 responses to the consultation. A **clear majority favoured introducing financial penalties for directors of companies in breach of nuisance calls rules under the Privacy and Electronic Communications Regulations 2003**. The majority of respondents felt that this proposal would deter those heading up companies, members of other bodies corporate and, in Scotland, Scottish partnerships from allowing or failing to prevent the making and sending of nuisance calls and messages. In this document, “company” is used as shorthand for these organisations, as is “director” for other senior company officers, members of bodies corporate which are not companies and partners of Scottish partnerships. Respondents favouring the proposal also highlighted the benefit this would have on consumers; tougher consequences for rogue traders would result in fewer of them operating, leading to increased trust and confidence in the telemarketing industry.

A minority of respondents felt that the current legislative enforcement regime was sufficient. Some respondents commented that fining directors for this activity would not prevent such communications being made. Others stated that the option proposed did not go far enough and that the introduction of custodial sentences should have been considered.

The Government has carefully considered the consultation responses and decided to take forward the proposal to amend the Privacy and Electronic Communications Regulations 2003 (PECR) to permit the imposition of fines on individual directors who consent to or connive in or neglect to prevent serious contraventions of PECR by their organisation. The measure would give the Information Commissioner’s Office (ICO) a power to impose fines of up to £500,000 on directors in addition to imposing fines subject to the same maximum on organisations. The measure would apply to anyone who ceases to be a director as long as they had been in post at the relevant time.

The Government laid the Explanatory Memorandum and Statutory Instrument before Parliament on 16 November 2018, with the measure coming into force on 17 December 2018.

Introduction

This document is the Government's response to the outcome of the consultation on 'Tackling nuisance calls and messages'. The consultation was open for 12 weeks between 30 May and 21 August 2018.

The Government strongly believes that there is no place for nuisance calls or texts, and continues to take steps towards reducing this problem. On 8 September 2018, we banned unsolicited calls for the purposes of direct marketing in relation to claims management services, except where the receiver of the call has consented to be contacted. The Government have also recently concluded a consultation regarding the banning of cold calls relating to pensions, and will publish its analysis and response shortly.

The Government acknowledges the importance of the telemarketing industry to the UK. In a report published by Contact Babel, it was identified that in 2016 over 700,000 people were working as agents in contact centres around the UK, which equated to 4% of the UK's workforce. This figure rises for the North East, North West, and Scotland where over 6% of the working population are employed in a contact centre¹.

Whilst the majority of these telemarketing companies operate lawfully, a minority persistently operate outside of the rules. The consultation sought views on the functioning of the current legislative options for holding company directors to account. It included an 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 nuisance calls and messages regulations.

Section 122 of the Data Protection Act 2018 (DPA) defines "direct marketing" as:

"the communication (by whatever means) of advertising or marketing material which is directed to particular individuals".

This definition also applies for PECR, as regulation 2(2) of PECR provides that those expressions not defined in the Regulations have the meaning given in the DPA. PECR only applies to marketing done via electronic communication; electronic communication covers phone, fax, email, text or any other type of 'electronic mail' used for marketing purposes. This is covered comprehensively in the ICO's guidance on PECR published on their website²

The ICO is currently able to issue companies that breach PECR with a civil monetary penalty (CMP) of up to £500,000. The ICO was given these powers in August 2012 and, in the period since its introduction up to August 2018, 89 CMPs have been issued totalling £9.3 million.

¹ <http://www.contactbabel.com/pdfs/dec2015/UK-SOITP-2016-Marketing-v2.pdf>

² <https://ico.org.uk/for-organisations/guide-to-pecr/electronic-and-telephone-marketing/>

38 CMPs, totalling approximately £5.4 million, have been unable to be recovered either in full or in part due to the company becoming insolvent after the CMP's issuing. Of this balance, an amount of £81,752 has been recovered either by way of an ICO payment plan prior to the insolvency event, or by way of a dividend from the liquidation. The Government are therefore keen to ensure that effective actions are able to be taken to minimise the scale of this issue.

The Information Commissioner has previously said that fining directors of companies would put an end to companies becoming insolvent to evade monetary penalties and act as a strong deterrent for rogue directors operating unlawfully. The Information Commissioner commented that:

“Making directors responsible will stop them ducking away from fines by putting their company into liquidation. It will stop them leaving by the back door as the regulator comes through the front door.”

This consultation was therefore published to explore this option, as well as gauging views on the current legislative landscape. This document includes a summary of the consultation responses, the Government's response to the comments received, and next steps following the conclusion of the consultation.

Consultation responses

A total of 71 responses to the consultation were received from a mixture of individuals, organisations, charities and regulatory bodies (listed in Annex A). 36 responses were received via the online responding tool provided. 33 responses were received via the consultation email address. A further two responses were received by letter.

The Government is grateful for the responses to the specific consultation questions, as well as other comments provided. A summary of the responses can be found below.

Question 1

Do you think that the current legislative framework regarding the Insolvency Service's powers of disqualification in regards to PECR breaches are sufficient?

Of the 71 responses received, 39 specifically addressed this question. Of those 39 responses, 36 (92.3%) thought that the current legislative framework regarding the Insolvency Service's powers of disqualification in regards to PECR breaches **were not** sufficient.

The main reason given for this response was that the current directors' disqualification provisions were not a sufficient deterrent to prevent rogue directors from engaging in prohibited unsolicited marketing behaviour. Responses also stated that current provisions did not go far enough in stopping the act of 'phoenixing' - directors dissolving their companies and re-establishing them under a different name to avoid enforcement action.

Several organisations agreed that the Government should amend PECR to give the commissioner powers to impose fines of up to £500,000 as it will send a clear message to rogue firms.

Three responses (7.7%) felt that the Insolvency Service's powers of disqualification in regards to PECR were sufficient. These responses were registered through the online tool and did not provide further comment.

Question 2

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?

Of the 71 responses received, 45 specifically addressed this question. Of those 45 responses, 39 (86.6%) thought that the Government should amend PECR to give the Information Commissioner power to impose fines on company directors and those in similar positions who are responsible for breaches of direct marketing rules.

The main reasons given for supporting this proposal were that it would provide a greater deterrent effect and would result in a reduction in the overall volume of nuisance calls in the UK. Some responses commented that the introduction of director level accountability for breaches of the Regulations was a key step in addressing the issue of nuisance calls for consumers, whilst others believed that this measure would likely result in fewer unscrupulous companies being able to operate. Respondents also felt that, by being able to take action against those sitting at boardroom level, it would be easier for the ICO to take action to reduce the number of nuisance calls made by companies.

Four responses (8.8%) did not agree with this proposal. These respondents said that it would be unhelpful to increase the ICO's enforcement powers in isolation and that, if this change was brought forward, it would have no meaningful effect in reducing the number of nuisance calls made.

Question 3

What impact would fining directors for breaches of electronic marketing have on you/your organisation?

The majority of responses to this question stated that this proposal would reduce the number of nuisance calls received, with one individual stating that it would reduce the "dreadful incidence of intrusive, worrying, invariably untruthful and unsolicited calls from strangers".

Several respondents felt that the proposal would send a strong message to those who intentionally avoid PECR obligations and bring an end to phonexing, whilst others felt that the proposal would allow their organisation to focus on legitimate enquiries rather than fraudulent enquiries resulting from nuisance calls.

A minority of respondents said that this proposal would have no significant impact. One individual queried whether a breach of PECR would have to satisfy particular conditions, such as causing extreme damage or distress, before the ICO were able to issue fines on the director/s. This is covered in the response section below.

Question 4

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?

The majority of responses to this question focused on the benefits that reduced nuisance calls through fining company directors would have on elderly and vulnerable people. Some wrote that the proposal would allow vulnerable members of society to feel safe when answering their phones.

Some respondents highlighted that a benefit of fining directors would be a reduction in time wasted by consumers. Some commented that nuisance calls interrupted their work and wasted valuable time and therefore reducing nuisance calls would increase productivity in general.

Some organisations felt that the proposal would increase public trust and confidence in telemarketing, and consumers would therefore receive more reliable and ethical advice from claims management companies. Some wrote that the measure would be welcomed by the legitimate marketing industry, which is often brought into disrepute by the actions of rogue companies.

Question 5

Are there any impacts, including equality impacts, we have not considered?

The majority of responses to this question said it was important to consider the impact of nuisance calls on vulnerable people and those that rely on their phone either for work or as their main form of communication with other services such as a GP.

A minority of comments called for Government to explain clearly the circumstances in which the ICO would fine a director as opposed to issuing the fine to the company, and to consider how this measure would tie in with the Companies Act 2006.

Question 6

Do you have any additional comments?

There were a number of general comments provided in response to this question.

Some respondents used this opportunity to welcome the provision but to also urge that additional amendments be brought forward to completely ban unsolicited direct marketing calls. A small number of respondents called for custodial sentences to be introduced for frequent offenders of the Regulations, whilst others called for a reliable system of outsourcing direct marketing activities to third party firms without incurring penalties should that company breach the rules.

Others called for clarification around the meaning of consent in relation to direct marketing, along with more consistent use of terminology when referring to nuisance calls and messages.

In addition to these, some comments called on telecommunications providers to take more responsibility in tackling this issue, and for greater action to be taken to enforce against those companies that cultivate consumers' data to then pass on to the companies that make and send nuisance calls and messages.

Government response

The Government is committed to tackling the issue of nuisance calls and messages, and reducing the pernicious effects they can have on society. Whilst we continue to build on the package of legislative measures, we reiterate that there is no simple solution to this problem; the issue of nuisance calls is a shared responsibility between Government, regulators, industry and consumer groups and requires a multifaceted response.

Current legislation allows disqualification proceedings to be brought upon a company director for breaches of PECR. As explained in the consultation paper, 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.

However even with this framework in place, the number of nuisance calls and messages received by UK consumers remains unacceptably high. The ICO reported that over 11,000 concerns were lodged with them in July 2018 alone³, giving an indication as to the continuing seriousness of this problem. As aforementioned, approximately £5.4 million have been unable to be recovered either in full or in part due to the company becoming insolvent after the ICO have issued the company with a fine. The consultation was therefore published in order to seek views on whether the Government should legislate to hold company directors financially liable for breaches of PECR, or to persist with the current legislative framework.

The majority of respondents to this consultation believed that a change in legislation to introduce director liability for breaches of nuisance calls and messaging rules should be introduced.

The majority of respondents felt that this proposal would serve as a greater deterrent to discourage company directors and senior managers from conducting unsolicited electronic direct marketing. Respondents favouring this option also stated the benefit this would have on consumers; tougher consequences for rogue traders would result in fewer of them operating, leading to increased trust and confidence in the telemarketing industry.

There were a minority of respondents who felt that the current legislative enforcement regime is sufficient. Some respondents commented that fining directors for this activity would not prevent such communications being made, with others stating that the option proposed does not go far enough and introducing custodial sentences should have been considered.

³ <https://ico.org.uk/action-weve-taken/nuisance-calls-and-messages/>

The Government has decided to take forward the proposal and now intends to amend the PECR to implement it as we do not believe that the current legislative mechanisms to tackle this issue have proved effective to date. We are keen to ensure that where directors are complicit to the unlawful activities of their company, they are effectively held to account. We expect this measure to increase compliance in this sector and increase consumer confidence in the telemarketing industry.

The measure would give the ICO a power to impose civil monetary penalties (CMP) of up to £500,000 on those in positions of responsibility in all forms of corporate entities. 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. This provision will work in a similar way to section 198 (Liability of directors etc) of the DPA.

The ICO would only issue a CMP on a director where a serious contravention of PECR had been identified. The ICO's approach to the exercise of its enforcement and other powers is set out in their Regulatory Action Policy⁴. The ICO will also produce a direct marketing code of practice under section 122 of the DPA.

More widely, the ICO continue to investigate the data industry, including data brokers and Credit Reference Agencies. Details of their investigation in to this area can be found in their 'Investigation into the use of data analytics in political campaigns'⁵.

The Explanatory Memorandum and Statutory Instrument for this measure was laid before Parliament on 16 November 2018, with the measure coming into force 17 December 2018.

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

⁵ <https://ico.org.uk/media/action-weve-taken/2259371/investigation-into-data-analytics-for-political-purposes-update.pdf>

Annex A

Association of British Travel Agents
Association of Personal Injury Lawyers
Direct Marketing Association
Fair Telecoms
Information Commissioner's Office
Institute of Chartered Accountants in England and Wales (ICAEW)
Katmal Limited
Law Society of Scotland
National Accident Helpline
National Trading Standards Scams Team
Which?
60 people who responded independently