

EXPLANATORY MEMORANDUM TO
THE COMMUNICATIONS ACT 2003 (DISCLOSURE OF INFORMATION) ORDER
2014

2014 No. [XXXX]

1. This explanatory memorandum has been prepared by the Department for Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument specifies the Information Commissioner, the Financial Conduct Authority (FCA) and the Payment Systems Regulator (PSR) as persons to whom the Office of Communications (Ofcom) can disclose information with respect to a particular business without the consent of that business. It will enable Ofcom to disclose information to them about the conduct of companies which it may obtain during its regulatory activity. This will assist the Information Commissioner with his enforcement work, including taking action against companies which make unsolicited direct marketing calls to consumers in breach of the Privacy and Electronic Communications (EC Directive) Regulations (PECR) 2003¹. The Order will also assist the FCA and the PSR in exercising their functions in relation to new payment systems which use mobile telephony. In addition, the instrument will allow Ofcom to disclose information to the Insolvency Service relating to misconduct during bankruptcy by company directors.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 Section 393 of the Communications Act 2003 (“the Act”) prohibits the disclosure of information obtained with respect to a particular business by Ofcom in the carrying out of any of its functions under the Act and the Broadcasting Acts 1990 and 1996 without the consent of that business. Unauthorised disclosure of information is a criminal offence as set out in section 393(10) of the Act. However, section 393(2)(b) provides that this prohibition does not apply to disclosure made for the purpose of facilitating the carrying out by any relevant person of any relevant function. Section 393(3) and (4) permits the Secretary of State to make an order specifying a person as a relevant person and their functions as relevant functions.

4.2 This instrument enables Ofcom to disclose information to the Information Commissioner, FCA and PSR by specifying each of those persons as relevant persons and certain of their functions as relevant functions. It also enables Ofcom to disclose

¹ S.I. 2003/2426.

information to the Insolvency Service by specifying certain of their functions as relevant functions. It is not necessary to specify the Insolvency Service as a relevant person as it is an agency of the Department for Business, Innovation and Skills and therefore is already a relevant person under section 393(3)(a) (Minister of the Crown).

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Parliamentary Under Secretary of State for Culture, Communications and Creative Industries, Ed Vaizey MP, has made the following statement regarding Human Rights:

In my view the provisions of the Communications Act 2003 (Disclosure of Information) Order 2014 are compatible with the Convention rights.

7. Policy background

7.1 Information Commissioner: Ofcom has its own enforcement functions as regards the persistent misuse of electronic communications networks or systems (e.g. misuse of automated calling systems) and information gathered in carrying out those functions may also be of use to the Information Commissioner in regulating the misuse of personal data or taking enforcement action under PECR. For instance, a company may be making a large number of abandoned and silent calls. That is a matter for Ofcom to investigate using its powers to tackle persistent misuse and levy a monetary penalty if appropriate. However, in making those calls, that same company may also be in breach of the PECR, in that they may be calling (deliberately or inadvertently) people who are registered with the Telephone Preference Service, or who have otherwise notified the company concerned that they do not wish to be contacted. That is a regulatory matter for the Information Commissioner, and permitting Ofcom to disclose information about its investigation may assist the Information Commissioner in the conduct of his own investigation.

7.2 Ofcom and the Information Commissioner have closely-related and, in some cases, overlapping regulatory and enforcement functions in relation to misuse of communication networks. The two regulators have entered into a memorandum of understanding which sets out, amongst other matters, which of them should take the lead where their powers overlap. Ofcom and the Information Commissioner cooperate and coordinate with each other in relation to their respective investigation and enforcement activities. However, Ofcom's ability to disclose potentially relevant information obtained in connection with Ofcom's functions under the Act to the Information Commissioner is hampered by the general restriction on the disclosure of information in section 393(1) of the Act unless one of the exceptions in section 393(2) applies (e.g. the disclosure is made for the purpose of facilitating the carrying out by Ofcom of their functions). Also, the possibility of criminal sanctions for even an accidental breach of section 393 of the Act

inhibits proactive disclosure of information, which has the potential to shape future enforcement activity. Expressly permitting Ofcom to disclose information to the Information Commissioner will reduce the time and resources spent considering whether disclosure of certain information can be permitted and will also permit a wider category of relevant information to be shared between the two regulators, which will enable them to better coordinate their response to changing behaviours in the market.

7.3 FCA & PSR: in December 2013 the Financial Services (Banking Reform) Act gained Royal Assent. That Act provides for the establishment of a new payment systems regulator by the FCA. The role of the PSR will be to regulate payments systems to ensure they are operating in the interests of consumers. Some of these systems may be provided by or with the involvement of electronic communications networks and service providers i.e. businesses regulated by Ofcom. For example, payments via mobile phones and “in-app” payments.

7.4 The increasing intersection between electronic communications service providers and financial payments means that Ofcom expects the information that it collects from or relating to the businesses it regulates to have increasing relevance to the duties of the FCA and the PSR. For example, as mobile network operators move into the provision of mobile wallets and contactless payments data which Ofcom collects on mobile connections and revenues may be useful for the PSR to identify and address policy challenges presented by these new forms of electronic payments.

7.5 This instrument ensures that Ofcom is able to disclose relevant information to both the FCA and PSR for the purpose the facilitating the carrying out of these bodies functions relating to payment systems under the Financial Services & Markets Act 2000, the Financial Services (Banking Reform) Act 2013 and the Payment Services Regulations 2009. HM Treasury will bring forward a separate instrument to allow the FCA and PSR to disclose information to Ofcom obtained by those bodies under the 2000 and 2013 Acts.

7.6 Insolvency Service: this instrument allows Ofcom to disclose information to the Insolvency Service in relation to the phenomenon of “phoenix” companies. These are companies that are set up to supply communication services (for example, phone or broadband), but which do not supply the service promised and involve financial loss to consumers, who pay for a service which is not delivered. When Ofcom begins enforcement action, that company enters insolvency, only to reappear with a slightly different name, to conduct the same unlawful operations again. Ofcom is unable to take enforcement action against the new company, since it has not yet breached the law. However, some of the directors will be the same people, and the new company is merely the old, dissolved company, reconstituted. Ofcom considers that the elderly and vulnerable can be disproportionately affected by such operations.

7.7 This instrument ensures that Ofcom is able to disclose information to the Insolvency Service for the purpose of its investigations with a view to disqualifying directors operating ‘phoenix companies’ under the Company Directors Disqualification Act 1986. Previously, the Insolvency Service’s lack of access to information held by

Ofcom meant that opportunities were lost to take action against directors who have breached Ofcom's General Conditions and wound up the company to avoid Ofcom sanctions. The result of this was that recovery of consumer losses was made difficult and more consumers were scammed. The knowledge that Ofcom may disclose information to the Insolvency Service is also likely to act as a deterrent to directors who might be contemplating "phoenixing" in the future.

8. Consultation outcome

8.1 Although this instrument has not been subject to consultation, on 30 July 2013 proposals were set out in the Department for Culture, Media and Sport's strategy paper *Connectivity, Content and Consumers: Britain's digital platform for growth*. This outlined plans to tackle nuisance calls by enabling Ofcom to disclose information more easily with the Information Commissioner (and the Insolvency Service), for companies that made unsolicited marketing calls, so that the Information Commissioner could take more effective action.

<https://www.gov.uk/government/publications/connectivity-content-and-consumers-britains-digital-platform-for-growth>. This measure has been discussed in detail with Ofcom and the Information Commissioner's Office.

9. Guidance

9.1 Guidance will not be issued for this measure as it only affects Ofcom.

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

11. Regulating small business

11.1 This instrument is considered to have no impact on small business.

12. Monitoring & review

11.1 The relevant bodies (Ofcom, Information Commissioner, FCA, PSR and Insolvency Service) will monitor and review the effectiveness and operation of these provisions from time to time.

13. Contact

13.1 Ihtsham Hussain, Department for Culture, Media and Sport (DCMS), tel: 0207 211 6140, Ihtsham.Hussain@culture.gsi.gov.uk, can answer queries regarding the instrument.