

EXPLANATORY MEMORANDUM TO
THE PRIVACY AND ELECTRONIC COMMUNICATIONS (AMENDMENT)
REGULATIONS 2018

2018 No. 1189

1. Introduction

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

2. Purpose of the instrument

- 2.1 This instrument amends the Privacy and Electronic Communications (EC Directive) Regulations 2003 (SI 2003/2426) (“the 2003 Regulations”). They also modify the application of the Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 (SI 2010/31) (“the 2010 Regulations”) and the Data Protection (Monetary Penalties) Order 2010 (SI 2010/910) (“the 2010 Order”).
- 2.2 Under the 2003 Regulations, the Information Commissioner may impose a monetary penalty, under the Data Protection Act 1998 as applied to the 2003 Regulations and saved in relation to the 2003 Regulations by the Data Protection Act 2018, for a serious breach of regulations 19 to 24 of the 2003 Regulations. The purpose of the amendments made by this instrument is to enable the Commissioner to impose such a penalty on an officer of a corporate body in addition to the body itself, where such a breach occurs as a result of action, or inaction, by that officer.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the United Kingdom.
- 4.2 The territorial application of this instrument is the United Kingdom.

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 2003 Regulations were made to implement the provisions of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy

in the electronic communications sector (“the Directive”) in the UK. They were made using the power in section 2(2) of the European Communities Act 1972. The Directive is one of a family of five directives which formed the original European Electronic Communications Framework and were implemented within the UK by the Communications Act 2003, the Wireless Telegraphy Act 2006, and the 2003 Regulations.

- 6.2 The 2003 Regulations have been amended on seven previous occasions. First, in 2004 (S.I. 2004/1039) to permit corporate subscribers to register their telephone number with the Telephone Preference Service. Second, in 2010 (S.I. 2010/22) to replace the relevant tribunals under regulation 28 with the newly-created first-tier tribunal and upper tribunal. Third, in 2011 (S.I. 2011/1208) to implement further European legislative changes, namely Articles 2 and 3 of Directive 2009/136/EC, which in turn amended Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Regulation (EC) No 2006/2004 on co-operation between national authorities responsible for enforcement of consumer protection law, and the Directive. Fourth, in 2015 (S.I. 2015/355) to (1) permit mobile network operators to send alert messages to those who may be affected by a serious emergency when requested to do so by a designated public body, and (2) lower the legal threshold at which the Commissioner can issue a civil monetary penalty for a serious breach of regulations 19 to 24 of the 2003 Regulations. The fifth, in 2016 (S.I. 2016/524) to make it a requirement for direct marketing callers to provide Calling Line Identification (“CLI”). The sixth, in 2016 (S.I. 2016/1177) to permit the transfer from OFCOM to the Information Commissioner of functions relating to registers that are required to be kept under regulations 25 and 26 of the 2003 Regulations. The seventh, in 2018 by sections 35(1), (2) and (3) of the Financial Claims and Guidance Act 2018 to prohibit live unsolicited calls for the purposes of direct marketing in relation to claims management services except where the person called has given prior consent to receiving such calls.
- 6.3 Regulations 19 to 24 of the 2003 Regulations set out the circumstances in which persons may transmit, or instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of fax or make unsolicited calls for those purposes.
- 6.4 The 2010 Regulations make provision in relation to monetary penalty notices and notices of intent served under section 55A and section 55B of the Data Protection Act 1998. They prescribe the maximum amount of a monetary penalty. They also set out the minimum details to be contained in a notice of intent, and in a monetary penalty notice.
- 6.5 The 2010 Order is made in exercise of the power in section 55E of the 1998 Act. It provides, amongst other things, for the withdrawal and variation of monetary penalty notices.
- 6.6 The Data Protection Act 1998 was repealed by section 211 of, and paragraph 44 of Schedule 19 to the Data Protection Act 2018. Section 213 of, and para 58 of Schedule 20 to, the 2018 Act make transitional provision in relation to the 2003 Regulations. This transitional provision has the effect that the 1998 Act continues to operate for the purposes of regulations 2, 31 and 31B of and, Schedule 1 to, the 2003 Regulations. This means that the modifications made by regulation 31 and Schedule 1 which apply Part 5 and sections 55A to 55E of the 1998 Act continue to operate as if that Act had never been repealed.

6.7 Secondary legislation made under the 1998 Act, in its application for the purposes of the 2003 Regulations, is unaffected by the repeal of that provision or by the revocation of that secondary legislation (see section 211 of, and paragraph 44 of Schedule 19, to the 2018 Act).

7. Policy background

What is being done and why?

- 7.1 The Information Commissioner may impose Civil Monetary Penalties of up to £500,000 for breaches of the 2003 Regulations. Since 2015 the Information Commissioner has issued more than £4.8 million in penalties with further penalties in the pipeline.
- 7.2 The Information Commissioner's Office reported that 46 of the 93 fines issued to companies in breach of the 2003 Regulations from April 2015 were paid in full. This leaves a shortfall of £2.5 million of unpaid fines. This shortfall arises because where a company is issued with a fine the company will usually be wound up by its directors in order to avoid the fine. A new company is normally then set up to continue to breach the 2003 Regulations with the cycle continuing if these activities attract a fine (a process known as 'phoenixing').
- 7.3 Where a breach of the 2003 Regulations has occurred with the consent of a company's directors or as a result of their neglect, the Information Commissioner has no powers to make the directors personally liable for the breach. This means that the individuals concerned are not facing the consequences of their actions. Evidence from the Information Commissioner's Office suggests that the type of companies that flout the rules tend to be small to medium sized limited companies.
- 7.4 The modification of the application of the 2010 Regulations and 2010 Order is consequential to the amendments to the 2003 Regulations. This ensures that the information to be included in notices served by the Information Commissioner is appropriate for enforcement of infringements of the 2003 Regulations, and enables enforcement action to continue against a corporate body in a situation where such action has been commenced, but discontinued against an officer of that body.
- 7.5 The overall aim of this instrument would be to enhance the Information Commissioner's regulatory effectiveness by making senior executives at board level accountable for a company's practices if the company fails to comply with the rules on unsolicited communications as set out in the 2003 Regulations.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

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

9. Consolidation

- 9.1 This is a relatively small amendment that does necessitate Government to consolidate the Regulations.

10. Consultation outcome

- 10.1 The Department for Digital, Culture, Media and Sport published its consultation, which was open for 12 weeks from 30 May – 22 August 2018. It received 71 responses from industry, regulators, small businesses and individuals. The majority of respondents wanted the government to introduce legislation to hold directors liable for breaches of PECR. A few respondents had reservations on the grounds that the new measures would be ineffective as they did not think the proposal would affect cold calling, spoofing or phoenixing, or where numbers are untraceable.

11. Guidance

- 11.1 The Information Commissioner's Office is responsible for publishing guidance on information rights. Under the Data Protection Act 2018 the Information Commissioner has been given powers to publish a statutory code of practice on direct marketing, which will focus on rules set out in the 2003 Regulations and the Data Protection Act 2018. We expect the statutory code to reflect these amendments.
- 11.2 The Information Commissioner's Office is in the process of producing the new statutory code of practice on direct marketing, and will consult on its content in due course.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 We have considered the potential impact of this proposal on business, but we are satisfied that it is not a regulatory measure and will have no direct impact on legitimate business activity. It is therefore outside the scope of the Better Regulation process. It is for these reasons that no impact assessment has been produced.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 There could be indirect impacts on sole-traders, micro and small and medium businesses for which the director carries out a key position, but only if the organisation continues to pursue practices which are prohibited by 2003 Regulations.

14. Monitoring & review

- 14.1 The amendments made by this instrument will be subject to review in accordance with the 2003 Regulations. By virtue of section 28(3)(e) of the Small Business, Enterprise and Employment Act 2015, the duty to include a review clause in regulations amending regulatory provisions affecting business does not apply where those provisions are already subject to a statutory review requirement. The 2003 Regulations which these regulations amend already contain that requirement – see regulation 37 of those Regulations. The Department for Digital, Culture, Media and Sport will continue to monitor the level of nuisance calls, working with the Information Commissioner's Office and OFCOM.

15. Contact

- 15.1 Bilal Toure at the Department for Digital, Culture, Media and Sport Telephone: 0207 211 6566 or email: bilal.toure@culture.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Deputy Director for Domestic Data Protection, at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Minister of State for Digital and the Creative Industries at the Department for Digital, Culture, Media and Sport can confirm that this Explanatory Memorandum meets the required standard.