



Law Society
of Scotland

Consultation Response

Tackling nuisance calls and messages: consultation
on action against rogue directors

August 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Consumer Law, Banking Company & Insolvency Law and Privacy Law committees welcome the opportunity to consider and respond to the Department for Digital, Culture, Media & Sport's consultation: *Tackling nuisance calls and messages*.¹ The committees have the following comments to put forward for consideration.

General remarks

We welcome, in principle, the move to introduce measures targeted at holding directors to account. As referred to in the consultation paper and reinforced in a more recent survey by Which?,² nuisance calls are a significant problem and it is hoped that greater personal responsibility will ensure that directors address the issue. However, further detail is needed - for example as to how such fines would be apportioned - to provide a comprehensive analysis of these specific proposals.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/712415/Nuisance_calls_and_texts_consultation.pdf

² https://www.insider.co.uk/news/nuisance-telephone-calls-accidents-which-13111921?utm_source=business_insider_newsletter&utm_medium=email&utm_content=EM_DailyRecord_Nletter_Business_News_smallteaser_Text_Story15&utm_campaign=daily_newsletter

Response to questions

Q1. Do you think that the current legislative framework regarding the Insolvency Service's powers of disqualification in regards to PECR breaches are sufficient?

The current regulatory structure was revised in 2015, and following the Neibel case³, reducing the threshold for enforcement action. The consultation paper notes the level of fine enforcement - between 2015 and the end of 2017, 27 fines have been issued, of which 9 were paid in full, two were paid in part, one is subject to a payment plan and the remainder have seen no payment made – suggesting that the “the individuals behind those companies are not facing the consequences of their actions.” It therefore seems sensible to consider further measures aimed at reducing abusive behaviour in the form of nuisance calls and texts.

The ‘phoenixing’ of companies may contribute to this low level of enforcement, and it would be helpful to understand how many of these unpaid fines are avoided in this way. We believe that fine enforcement, in common with tribunal and court judgment enforcement, involves wider challenges that could helpfully be addressed. For instance, research by BEIS highlighted that around 35% of all employment tribunal claims remained unpaid by employers.⁴ Of that proportion, 37% of these were because the company was no longer trading or insolvent – and in half of these situations, claimants believed that a ‘phoenix’ company had resumed trade. It may be helpful to consider wider work around the challenges of such companies than the current suggested changes to PECR.

Q2. 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?

A key issue in this context is that of enforcement. Amending the PECR to give the Information Commissioner new powers to impose fines on company directors could prove

³ *Information Commissioner v. Niebel* [2014] UKUT 255 (AAC)

⁴ Department for Business, Enterprise, Innovation and Skills, *Payment of Tribunal Awards: 2013 Study* (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf)

helpful in ensuring greater compliance with the direct marketing rules. However, further detail is needed as to how these would be implemented as for the reasons set out here.

The consultation paper notes that more than one director or partner could be issued with a civil penalty; and that the company and/or directors and partners could be issued with a civil penalty. Such decisions will be taken “at the end of a detailed investigation process” but the process itself is not set out. It would have been helpful to include more practical details of this in the consultation. Furthermore, there is the prospect that the organisation may not cooperate or provide sufficient information to assist with this exercise of discretion. As the proposal envisages fining one or more directors, there may be issues around attribution.

As the proposal envisages fining the company and/or the directors, there may be further challenges around responsibility of payment between the company and its directors. Might directors be held jointly and severally liable for fines? Could companies be precluded from paying fines issues to directors? While it may be assumed that the company would take responsibility on behalf of its directors, this may not always be the case. For instance, a company director that resigned following a reckless breach of PECR might not have a fine paid on his or her behalf by the company.

Rules could be considered targeting ‘phoenix’ companies, under which the liability for the fine would remain with the company, unless it became insolvent, in which case liability would fall on the directors personally.

Finally, we note that personal rather than corporate liability may more acutely engage human rights legislation, for instance, around the right to property in Protocol 1 of Article 1 of the European Convention on Human Rights. It is important to bear this in mind when drafting the final rules.

Q3. What impact would fining directors for breaches of electronic marketing have on you/your organisation?

We have no comment on this question.

Q4. 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?

We have no comment on this question.



Q5. Are there any impacts, including equality impacts, we have not considered?

We have no comment on this question.

Q6. Do you have any additional comments?

We have no comment on this question.

For further information, please contact:

Carolyn Thurston Smith

Policy Team

Law Society of Scotland

DD: 0131 476 8205

carolynthurstonsmith@lawscot.org.uk