

## **Empower and support companies that want to do the right thing and tackle persistently offending companies or individuals**

### **Background**

The Scottish Government held a Nuisance Calls Summit in June 2016 which identified a series of issues to be addressed to reduce the number and impact of nuisance calls. The Nuisance Calls Commission will consider each of these issues in more detail in a series of three themed meetings covering empowering and protecting consumers; supporting businesses and tackling persistent offenders; and improving the regulatory environment. These meetings will inform development of a progress report setting out the co-ordinated actions of the Scottish Government and stakeholders to find solutions to nuisance calls, and what further work will be done.

This paper focuses on the second of these three themes: empowering and supporting companies that want to do the right thing and tackling persistently offending companies or individuals. It is closely related to the other themes – if consumers know that legitimate companies will demonstrate good practice, it should be easier for them to identify and protect themselves from unscrupulous companies that give themselves away by failing to adhere to accepted standards. Regulators should also be better able to focus on the worst offending companies that pose the biggest risk to consumers. These ideas are echoed in the wider movement to develop a system of ethical regulation, which seeks to achieve long term organisational change by emphasising shared values and increased collaboration, and reserves sanctions for only the worst offending organisations. There will be a discussion on the potential for ethical regulation concepts to inform the nuisance calls work at the Commission meeting, and more information is available in Annex A.

At the Nuisance Calls Summit, a number of key points were raised, including:

- the need to make it easier for companies to understand the rules surrounding making calls to existing or potential customers;
- the need for both companies and consumers to be clear on what giving consent to use data means; and
- the ability of technology to prevent nuisance calls.

What emerged most clearly, however, is the need to tailor solutions to distinguish between companies that want to adhere to the rules and those that persistently or knowingly break them. The session will therefore be divided into two parts.

### **Part one: Supporting companies to do the right thing**

#### **Key areas for discussion**

##### **(1) How can we support businesses that want to do the right thing?**

It is accepted – and will be covered in the final meeting of the Commission– that the regulatory environment is complicated. It is also accepted that the vast majority of businesses want to do the right thing, and recognise that bad practice may harm, not only their specific business, but consumer trust in business generally. To minimise breaches, it is therefore important to ensure that companies can easily discover their obligations, and put in place measures to ensure they comply.

Live and recorded marketing calls are covered by the Privacy and Electronic Communications Regulations<sup>1</sup> (PECR), which originate from the EU and set out rules around what consent parties need to have given before organisations can call them to market their services. It should be noted that where a company contracts with another organisation to carry out marketing on its behalf, the contracting company will usually be held liable for any breaches of the law even if carried out by a third party.

There are different rules for live calls, automated calls, faxes, and electronic mail (this includes emails or texts). For example, automated calls and texts are prohibited unless the recipient has expressly agreed to communication, while live calls can be made as long as the recipient has not opted out of receiving them via the Telephone Preference Service (TPS). The Data Protection Act<sup>2</sup> also covers how companies must store and use data. While these regulations overlap and complement one another, there are also differences that must be observed.

The point was raised at the Nuisance Calls Summit that many small companies may not know they are breaching these rules, due both to their complexity, and the plethora of unrelated regulations they must comply with.

Questions for discussion:

- What can be done to simplify the messages and guidance to make it easier for businesses to understand?
- How can business awareness of the rules be increased?

*(2) How can businesses help to make sure they are obtaining consent for the purposes they intend to use data, and how can they make it clearer to customers what they are consenting to?*

Live marketing calls must not be made to anyone who has opted out of receiving them. This can be done either by notifying individual companies on a case-by-case basis, or by registering with the Telephone Preference Service (TPS) or Corporate Telephone Preference Service (CTPS). Those who register on TPS or CTPS can still offer consent to be contacted by specific companies. In contrast, automated calls must not be made to anyone who has not first consented to be contacted.

Under the PECR, consent must be knowingly and freely given; clear and specific; cover the organisation and the type of communication to be used; and involve a positive action, such as ticking a box. This is broadly in line with the requirements of the General Data Protection Regulations<sup>3</sup>, which also originate from the EU and are scheduled to come into force in May 2018.

A variety of additional measures have been proposed to improve the transparency of consent giving and data use. These include a limited time for which data can be held

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<sup>1</sup> <https://ico.org.uk/about-the-ico/what-we-do/privacy-and-electronic-communications-regulations/>

<sup>2</sup> <https://www.gov.uk/data-protection/the-data-protection-act>

<sup>3</sup> [http://ec.europa.eu/justice/data-protection/document/review2012/com\\_2012\\_11\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf)

or acted upon – for example, the Direct Marketing Association is developing timescales that members must adhere to – and a default position that customers must opt-in to be contacted, rather than opting out. Simplified terms and conditions may also make it easier for customers to understand exactly what they are agreeing to. The ICO has a code of practice setting out what privacy notices should contain, and highlighting good practice<sup>4</sup>.

Points for discussion:

- Is a finite period for data retention a viable solution? What challenges and opportunities would it present?
- Could requiring users to opt in to receive calls rather than opting out of receiving them be adopted as good practice?
- What impact, if any, will Brexit have on existing data protection and privacy laws?
- Could companies do more to increase the transparency and accessibility of their terms and conditions for data use? If so, how can better practice be embedded?

### **(3) How can businesses be supported to move from good practice to best practice?**

At the Summit, it was noted that the existing rules are vital for protecting consumers, but that there are examples where companies go a step further, to safeguard both their customers and comply with their own internal values. A few examples can illustrate the point:

- At the Summit, SSE highlighted their practice of using their data to identify vulnerable customers, and ensuring that they do not receive any marketing calls
- In fundraising calls, some charities, such as the Red Cross, have signed up to a commitment to go beyond the legal requirements to protect customers.

It is important that businesses are not burdened with onerous requirements, but these practices demonstrate that, for those customers who may need extra support, companies can take a variety of steps to protect them. Such steps also improve organisational reputation, and ensure that when they do contact vulnerable customers for non-marketing purposes, calls are more likely to be well received.

Additional steps might include not calling after certain times; offering an option to opt out of further contact on each call made; and providing written confirmation of any agreements made by phone, which must be signed before the contract is complete.

Questions for discussion:

- Would a best practice guide to supplement good practice be useful? What should it cover?

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<sup>4</sup> <https://ico.org.uk/for-organisations/guide-to-data-protection/privacy-notices-transparency-and-control/>

- Is there merit in a commitment for commercial companies, just as there is for fundraisers? What might it look like? What incentives might there be for companies to sign up?
- How should best practice be shared as it evolves or new ideas are developed, so that companies can learn from one another and adopt different approaches that suit their needs?
- How can best practice be recognised and rewarded?

## **Part two: Tackling persistent offenders**

While supporting companies to protect customers is vital, we know that some of the most dangerous calls for customers are made by companies who wilfully and persistently break the rules. We welcome the recent decision by the UK Government to impose director level accountability for breaches of the laws on nuisance calls, which should go some way to preventing ‘phoenix’ companies (that is, those that break the law and simply reform as another company). Similarly, we welcome the upcoming consultation by UK Government on how to prevent pensions-related calls. However, we also know that this will not solve the problem entirely, especially for companies who operate overseas.

### **Key areas for discussion**

#### **(1) What role can technology play in reducing the impact of nuisance calls?**

As discussed at the first Commission meeting, individuals can protect themselves by installing call blocking technology. However, this will, in most instances, require victims of nuisance calls to pay to protect themselves, and they may do so only after they have already suffered call-related detriment. Individual action may also limit the intelligence available to regulators and enforcement agencies used to identify persistently offending companies.

However, on a larger scale, telecoms companies can block at least some nuisance calls at source, or provide facilities such as call blocking to their customers (customers may be charged for this service). There is good practice in this area; both Vodafone and BT will highlight their work to protect customers at the meeting.

Points for discussion:

- Can technology be deployed more effectively to prevent nuisance calls?
- Which methods should be focused on?
- What is the best way to finance new technological roll-outs?
- How can we ensure that technology allows intelligence to be gathered and shared and still protects user privacy?

#### **(2) Non-technical solutions**

While technology has a vital role to play, it can only ever be one part of the solution. Determined companies will always attempt to circumvent technical fixes – for example, while all companies must now display a number as a result of UK regulatory changes, many have the capability to spoof them.

Protecting those who are most vulnerable requires early detection of rogue companies, and effective measures to tackle them. This can only be achieved by close collaboration between regulators, enforcement agencies, consumer groups, and third sector organisations.

Points for discussion:

- What examples of good partnership working already exist?
- How can these be mapped to other areas or sectors?
- What barriers prevent wider collaboration to detect rogue companies, and how can barriers to collaboration be broken down?

## Annex A – Ethical regulation

Ethical based regulation (EBR) is a collaborative approach to regulation between businesses, government, regulators and other stakeholders, centred around a shared ethical vision. EBR is based on the rationale that most businesses want to do the right thing and that regulation's primary purpose should facilitate this. It aims to:

- Create value-based cultures within organisations, and the conditions to empower people to challenge practices contrary to those values;
- Develop a just and open environment, where learning is shared, and where, when adverse events occur, the focus is on what went wrong and how it can be fixed, rather than automatically assigning blame;
- Develop a regulatory system where regulators are empowered to tailor their approaches to suit the performance of individual businesses; and
- Ensure constant improvement and sharing of best practice by increasing the range of stakeholders – both within and outwith the organisation – with the interest in and ability to maintain and enhance performance.

This thinking is not new. Indeed it is underpinned by significant academic and empirical research, including that of Prof Chris Hodges<sup>5</sup>, with whom SG have been working closely. However, the increased dissatisfaction with the compliance-driven approach of traditional regulatory models, particularly those in the economically regulated sectors, has given EBR a renewed focus.

SG has been an early supporter and adopter of the EBR approach, as outlined in the SG response to the Independent Working Group on Consumer and Competition Policy<sup>6</sup> and reiterated in the recently published “*Delivering better outcomes for consumers and businesses*”<sup>7</sup>, helping to shape the ethical regulation debate relating to competition and consumers in Scotland. Prof Hodges has also cited Scotland as a place where our existing drive for collaboration and coproduction make us ideally suited to realise the benefits.

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<sup>5</sup> For a useful summary, see [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/497539/16-113-ethical-business-regulation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/497539/16-113-ethical-business-regulation.pdf)

<sup>6</sup> <http://www.gov.scot/Publications/2016/03/8525/0>

<sup>7</sup> <http://www.gov.scot/Publications/2016/12/5688>