

EXPLANATORY MEMORANDUM TO

THE COMMUNICATIONS ACT 2003 (MAXIMUM PENALTY FOR CONTRAVENTION OF INFORMATION REQUIREMENTS) ORDER 2011

2011 No. 1773

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 Order amends section 139(5) of the Communications Act 2003 to raise the maximum level of financial penalty that Ofcom is able to levy for breaches of its information gathering powers under sections 135, 136 and 191 of the Communications Act 2003. The instrument will raise the level of penalty that Ofcom can levy from a maximum of £50,000 to a maximum of £2 million. This amendment to the Communications Act 2003 implements aspects of the Better Regulation Directive¹.

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

3.1 The maximum level of the increased penalty is £2 million. This is a substantial amount, but it is a maximum level of penalty. The maximum possible penalty needs to be high to act as a sufficient deterrent for the larger communications companies that are subject to this regulatory regime. In addition, any penalty imposed by Ofcom must be appropriate and proportionate to the contravention in question.

4. Legislative Context

4.1 The European Framework is made up of 5 Directives:

- i. The Framework Directive;
- ii. The Authorisation Directive;
- iii. The Access Directive;
- iv. The Universal Service Directive; and
- v. The “E-Privacy” Directive.

4.2 The original European Framework was implemented in the UK by means of the Communications Act 2003, the Wireless Telegraphy Act 2006 and the Privacy and Electronic Communications Regulations 2003.

4.3 In 2009 two Directives were made amending the European Framework. This Order implements changes made by the Better Regulation Directive to the Authorisation Directive and the Framework Directive. These changes require Ofcom to have the ability to impose appropriate, effective and dissuasive penalties. This Order is made in exercise of the power conferred by section 139(9) of the Communications Act 2003 and it is subject to the affirmative resolution procedure.

¹ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services.

- 4.4 There are 3 further statutory instruments in the package of instruments which will fully implement the changes to the European Framework.
- i. The Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011;
 - ii. The Electronic Communications (Universal Service)(Amendment) Order 2011; and
 - iii. The Electronic Communications and Wireless Telegraphy Regulations 2011.
- 4.5 Scrutiny History: The Department for Business Innovation and Skills submitted an Explanatory Memorandum on the report by the Commission on the review which it conducted of the European Framework ending in 2007². This report contained proposals for the legislation amending the European Framework. The 6th Report of the House of Commons European Scrutiny Committee recommended the proposals for debate in the European Standing Committee³. The House of Lords European Committee also considered the proposals in its 5th Report of 2007-08⁴. On 13th May 2008, the House of Lords cleared the proposal from scrutiny⁵.
- 4.6 A Transposition Note has been drafted and this is attached to this Memorandum.

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 Minister for Culture, Communications and the Creative Industries, Ed Vaizey, has made the following statement regarding Human Rights:
- 6.2 In my view the provisions of the Communications Act 2003 (maximum penalty for contravention of information requirements) Order are compatible with the Convention rights.

7. Policy background

- 7.1 Amendments to Article 10(3) of the Authorisation Directive as well as to Article 21a of the revised Framework Directive require that the national regulatory authority (Ofcom in the UK) is able to levy dissuasive financial sanctions for breach of certain regulatory obligations.
- 7.2 Ofcom already has powers to impose financial penalties for breaches of the information gathering power in sections 135, 136 and 191 of the Communications Act 2003. These provisions of the Communications Act 2003 are Ofcom's main information gathering powers in relation to electronic communications networks and services.

² http://europeanmemorandum.cabinetoffice.gov.uk/memo_details.aspx?memoID=867

³ 6th Report of session 2007-8, page 13, paragraph 1.21.

⁴ <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/36/3602.htm>

⁵ <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/10/1012.htm> (10th Report of 2007-08)

- 7.3 The current limit for those penalties is £50,000. This is set out in section 139(5) of the Communications Act 2003. Having reviewed the maximum level of the penalty in the context of implementation of the changes to the Framework and Authorisation Directives, we no longer believe that this level of penalty is sufficiently dissuasive to prevent non-compliance with information gathering requests.
- 7.4 Non-compliance with information requests under sections 135, 136 and 191 of the Communications 2003 hinders Ofcom in fulfilling its duty as communications regulator. The failure to supply proper and timely information can prevent Ofcom from making informed decisions relating to market remedy and consumer protection. This in turn can have significant detrimental impacts on both communication markets and consumer protections. We see the ability to levy an increased level of penalty for failure to comply with an information request as key to ensuring that Ofcom has the necessary information available to it to make effective and correct regulatory decisions.
- 7.5 Recent changes to the Ofcom enforcement regime in relation to sanctions for silent calls raised the maximum level of penalty that Ofcom can levy for such breach to £2 million. We propose to mirror that change and increase the maximum level of the penalty for non-compliance with information gathering notifications.
- 7.6 Information is vital to enable Ofcom to carry out its functions and in addition, as other financial penalties contained in the Communications Act increase above the current penalty for breach of an information request, there could be a financial advantage to companies refusing to answer an information request and taking a £50,000 penalty rather than answer the request and potentially highlight other regulatory breaches which carry a much higher penalty.
- 7.7 The £2 million penalty is a maximum amount. The use of this power by Ofcom must be appropriate and proportionate to the breach of the information gathering powers under sections 135, 136 and 191 of the Communications Act 2003.

8. Consultation outcome

- 8.1 The Government published its preferred approach for the implementation of the amendments to the European Framework for Electronic communications in September 2010. This included detailed explanation of the changes we proposed to make to Ofcom's powers to levy financial penalties for breach of its information gathering requests. In that document, stakeholders were asked to give their views on the proposed level of sanction. The consultation ran for the 13 weeks recommended by BRE best practice guidelines and closed on 3rd December. It was backed by a number of stakeholder events as well as with meetings with individual stakeholders.
- 8.2 Respondents representing both aspects of the telecommunications sector and consumer groups were broadly supportive of the proposal to increase the level of sanction. They agreed that it is of utmost importance for the effective conduct of Ofcom's regulatory functions under the Framework in relation to electronic communications for Ofcom to be able to gather all necessary information through the effective and proportionate use of its information gathering powers. Respondents were also agreed that it was important that Ofcom is able to levy dissuasive penalties for the breach of such powers, particularly to those operating short-term scams where the potential gains can exceed the amount of the fine.

- 8.3 The majority of stakeholders, however, also struck a cautionary note, arguing that given the high level of potential fine, its levy should be proportionate to the type of breach of an information sharing obligation, noting that many companies can receive several formal requests for information each week.
- 8.4 A number of respondents did not agree with the proposed increase in the level of sanction. They suggested that the current level of penalty for failure to comply is already dissuasive, and claimed that there is little evidence that companies are not complying with information requests. A smaller number of respondents suggested that the Government should focus more on minimising the burden on stakeholders and positive incentives rather than necessarily imposing financial sanctions in order to ensure compliance with information gathering requests.
- 8.5 A small number of respondents noted that the current level of sanction is a considerable sum. Anything above this, and in particular, the proposed sum of £2 million, would be equivalent to a substantial commercial penalty. They noted that Ofcom’s current powers to sanction for a breach of an information request are already higher than some of those available to the regulators of other sectors.
- 8.6 The Government has considered carefully all the responses it received but does not think that the information presented to it by respondents in relation to the proposal give cause to rethink the level of proposed maximum level of sanction.

9. Guidance

9.1 Ofcom will be producing a statement setting out the guidelines they propose to follow in determining the amount of penalties imposed by them. Where Ofcom revise this statement, they must consult on the revisions.

10. Impact

- 10.1 There will be no impact on charities or voluntary bodies. There will be no impact on compliant business and the Order will only have an impact on businesses that do not comply with an information request from Ofcom.
- 10.2 The impact on the public sector is negligible as the increased fine will only apply to communications companies in breach of their regulatory obligations under sections 135,136 or 191 of the Communications Act 2003.
- 10.3 In terms of the impact on the private sector, Impact Assessments have been completed to cover our implementation of the revisions to the European Framework on Electronic Communications. These will be published alongside the Explanatory Memorandum on the www.legislation.co.uk website. The relevant Impact Assessments relating to this Order are DCMS 015 (“Implementing the revised EU Electronic Communications Framework”), and paragraphs 40 to 62 of the evidence base of DCMS 022 (“Implementing the revised EU Electronic Communications Framework – Authorisation Directive”).

11. Regulating small business

- 11.1 The legislation does apply to small business but only those that are in breach of their regulatory obligations under sections 135, 136 and 191 of the Communication Act 2003. Any penalty imposed by Ofcom will need to be appropriate and proportionate to the contravention in respect of which it is imposed. There are no measures specifically targeted at small businesses and our Impact Assessments make clear that there is no disproportionate impact on small businesses as a consequence of the amendments to the level of the penalty.

12. Monitoring & review

- 12.1 Ofcom will monitor and review on a regular basis how the increased maximum penalty is working as a deterrent. In addition, the Department will review the amended penalty provision in five years time (2016) as part of the statutory review of the implementation of the revisions to the Authorisation and Framework Directives.

13. Contact

- 13.1 Simon Miller at the Department for Culture, Media and Sport. Tel: 020 7125 5675 or email: simon.miller@culture.gov.gsi.gov.uk can answer any queries regarding the instrument.

Transposition Note: Directive 2009/140/EC of the European Parliament and Council

Transposition Note setting out how the Communications Act 2003 (Maximum Penalty for Contravention of Information Requirements) Order 2011 (the “Order”) implements aspects of Directive 2009/140/EC.

The Directive

Directive 2009/140/EC of 25th November 2009 (the “ Better Regulation Directive”) amends three further Directives:

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (“Framework Directive”);
- Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (“Access Directive”); and
- Directive 2002/20/EC on the authorisation of electronic communications networks and services (“Authorisation Directive”)

These Directives are concerned with the regulatory regime for electronic communications networks and services.

The Better Regulation Directive must be transposed into national law by 25th May 2011, with the implementing measures coming into force from the 26th May 2011.

These Regulations do not go beyond what is necessary to implement the Better Regulation Directive.

Article	Objective	Implementation	Responsibility
Article 1(24)	This provision inserts a new Article 21a into the Framework Directive which makes provision for penalties.	Article 2 of the Order amends the maximum penalty in section 139(5) of the Communications Act 2003 to ensure that the amount of the penalty is appropriate, effective, proportionate and dissuasive.	Ofcom
Article 1	This provision replaces paragraph 1, 3 of Article 10, which makes provision for dissuasive financial penalties.	Article 2 of the Order amends the maximum penalty in section 139(5) of the Communications Act 2003 to ensure that the amount of the penalty is appropriate, effective, proportionate and dissuasive.	Ofcom