

Proposal to lower the legal threshold for the Privacy and Electronic Communications (EC Directive) Regulations 2003 (“PECR”) for regulations 19-24, to tackle unsolicited direct marketing calls and SMS text messages

Consultation Response Report

25 February 2015

**Chapter 1:
Introduction**

1.1 This Report summarises responses to the Department for Culture Media and Sport consultation on proposed amendments to the Privacy and Electronic Communications (EC Directive) Regulations 2003 (“PECR”) to lower the legal threshold for enforcement of regulations 19 to 24 with the aim of tackling non-compliant unsolicited direct marketing by electronic means.

1.2 The PECR requires that calls cannot be made to a number that is registered with the Telephone Preference Service (TPS), or if previously the caller has been advised not to make further calls. Recorded message calls require prior consent, as do messages sent by electronic mail (such as SMS text messages) in some circumstances. The Information Commissioner’s Office (ICO) regulates, among other things, unsolicited marketing calls, automated recorded messages and SMS text messages under the PECR. The consultation proposal was to lower the legal threshold at which the ICO may issue a civil monetary penalty (CMP) for contravention of regulations 19 to 24 by amending or removing the requirement that the contravention caused ‘substantial damage or substantial distress’. A CMP of up to £500,000 can be issued by the ICO for breaching the PECR.

1.3 The ICO plays a key and leading role in taking enforcement action against organisations that breach the regulations. Since January 2012, it has issued nine CMPs totalling £815,000 to organisations found to be making unsolicited direct marketing calls and sending unsolicited SMS text messages. In October 2013, the First-tier (Information Rights) Tribunal overturned one of the largest CMPs the ICO had issued. This was because the Tribunal determined that ‘substantial damage or substantial distress’ had not been caused by the company concerned. That decision was subsequently upheld by the Upper Tribunal. Consequently, the ICO has been very reluctant to issue further penalties in relation to unsolicited marketing calls and text messages in particular for a well-founded fear that they would not be seen as meeting the legal threshold for action. As a result, the ICO currently only investigates a very small proportion of cases and targets its resources upon those that could potentially result in larger CMPs, as they would act as a stronger deterrent. The ICO have confirmed, from their investigations, that should the threshold be lowered, enforcement would be possible against an increased number of organisations.

1.4 In July 2013, the ICO presented a business case to the Department for Culture, Media and Sport requesting that the legal threshold be lowered. The Government agreed with this view and in the Nuisance Calls Action Plan, issued in March 2014, the Government committed to bringing forward this consultation with a view to enabling the ICO to issue CMPs more easily and therefore, take more effective enforcement action against organisations that deliberately or negligently breach the requirements of the PECR. The issue of nuisance calls continues to be a concern for many consumers and is in the media spotlight. Therefore, in addition to this measure, the Government will continue with its efforts to explore further additional potential solutions where possible to help address the problem of nuisance calls.

1.5 The consultation was launched on 25 October, and closed on 6 December 2014. Respondents were asked to submit views on three questions, which included providing an opinion on the three options for action proposed, and were invited to do so via e-mail or written response. A total of 298 responses were received. A summary of returns is set out below, along with our analysis of the returns. In section 3, we explain the next steps that we plan to take and how this has been informed by the responses submitted.

Chapter 2: Consultation Responses

2.1 The consultation presented three options for reform, summarised in the table below.

<p>Option 1. Do nothing</p> <p>This will mean that there is no need to make a change to the PECR. The ICO can already take enforcement action under the PECR to tackle nuisance calls. This option would imply that the current system is working effectively and enables the ICO to take sufficient enforcement action, including issuing CMPs, when felt to be appropriate.</p> <p>The ICO will continue to target organisations based on the present legal threshold of needing to prove “substantial damage or substantial distress” and some organisations that are acting unlawfully will avoid being penalised by the ICO for misconduct.</p>
<p>Option 2. Lower the legal threshold to “annoyance, inconvenience or anxiety”</p> <p>This will mean that the ICO could issue a CMP, if unsolicited marketing calls /texts, among other things caused ‘annoyance, inconvenience or anxiety’ rather than ‘substantial damage or substantial distress’. The Commissioner would still need to be satisfied that there had been a serious contravention and that this had been deliberate or the person knew that there was a risk that the contravention (of a kind likely to cause annoyance, inconvenience or anxiety) would occur, but failed to take reasonable steps to prevent the contravention.</p> <p>This will help ensure that the ICO’s actions are more effective against organisations that deliberately breach the regulations.</p>
<p>Option 3. Remove the existing legal threshold of “substantial damage and distress”</p> <p>There would be no need to prove “substantial damage and distress”, or any other threshold such as ‘annoyance, inconvenience or anxiety’. The Commissioner would still need to be satisfied that there had been a serious contravention and that this had been deliberate or the person knew or ought to have known that there was a risk that the contravention would occur, but failed to take reasonable steps to prevent the contravention.</p>

Table 1: summary of consultation options

2.2 A selection of quotes in the table below, highlights some of the typical points raised in the responses received.

“Government should be able to discourage these calls by whatever means possible before we all go stark raving mad!”

“It is important that the changes to the law work otherwise Members of Parliament will continue to receive complaints from constituents.”

“Only when the economics collapse that cold calling and spamming will stop.”

“The distress caused to vulnerable people by these calls is incalculable.”

“The only evidence should be that a call has been made or an email has been sent.”

“Installed a call blocking device, which has been very effective”

“Numbers that are registered with TPS should not be called”.

“If I don’t recognise the number or if it is withheld I don’t answer. However this causes problems as sometimes the calls are genuine.”

“When a UK number is withheld it should be easy to obtain a call log in order to sue the originator.”

“Consumers may potentially lose out on important information, products or services from which they might legitimately benefit.”

“Where text messages have been sent legally, they are still capable of annoying customers.”

“A lower threshold will encourage greater compliance, as business will know that ICO is empowered to pursue them for breach of the rules.”

“Removal would enable ICO to take more effective enforcement action against businesses that breach the requirements in PECR to refrain from making unsolicited calls and sending emails.”

“Cold callers using a company’s brand to harass innocent individuals. Such calls are damaging for a company’s brand and reputation.”

“Support any amendment to PECR that will enable ICO to more easily take action against firms that make unlawful direct marketing calls and texts to consumers.

‘Companies that hide their identity pay no regard to the rules and deliberately and repeatedly cause anxiety or harm to consumers by making unsolicited calls, need to be traced and penalised.’

Table 2: Selected quotes from consultation responses received

2.3 The Government received 298 responses to the consultation. These came from a wide range of respondents including members of the public, private

sector companies, not-for-profit organisations, consumer groups, industry and regulators.

2.4 It should be stressed that 129 respondents did not express a preference for any of the three options which were presented, or offer a view on the costs or benefits they believed would be derived from the implementation of the presented options. Instead, they took the opportunity to highlight the difficulties and problems they had endured due to the relentless practice of unscrupulous companies making nuisance calls. Many were hopeful that a change in the enforcement regime would result in a significant reduction in the number of calls received and felt that a change in legislation would help towards reducing the stress and anxiety caused by nuisance calls and text messages.

2.5 Of the respondents that did express a preferred option, none of the respondents agreed with Option 1 - do nothing.

2.6 13 respondents favoured option 2 - lower the legal threshold to "annoyance, inconvenience or anxiety".

2.7 The reasons that were provided by respondents who favoured this option varied. Some for example felt that the change to the law would help reduce the number of complaints that MPs received from their constituents that in turn could help indicate how well the problem was being addressed. Others explained in detail that although they supported the lowering of the threshold, they felt that a clear definition of what is considered as an inconvenience, annoyance and anxiety needed to be provided, to ensure clarity and certainty for companies carrying out legitimate marketing activity. Several respondents also expressed a high level of disappointment that despite their number being registered with the Telephone Preferential Service (TPS) they continued to receive nuisance calls.

2.8 The mobile industry expressed a preference for this option. A majority of the complaints that the mobile operators received were from customers complaining about the receipt of unwanted text messages. Consequently, they wanted to see action being taken to tackle the problem and their response provided details of the service that the mobile operators had established for the handling of unwanted texts¹.

2.9 Of the 298 respondents, the vast majority (144) favoured option 3 - remove the existing legal threshold of "substantial damage and distress". It should also be noted that 13 respondents expressed a preference for option 2, whilst 12 respondents expressed a preference for both options 2 & 3.

2.10 Several views were presented on why option 3 would be a suitable solution. One respondent felt that removal would enable the ICO to take more

¹ On receipt of an unwanted text, the recipient should forward it to 7726 aka SPAM. The MNO will investigate the source and content of a message and if the message has been sent without appropriate consent, the MNOs can disconnect the relevant SIM from the network.

effective enforcement action against businesses that breached the requirements in PECR and would hopefully act as a deterrent to the making and sending of unsolicited calls and messages. It would also enable the ICO to tackle the non-compliant behaviour of some organisations that, to date, have managed to avoid action being taken against them.

2.11 Many of the respondents supported their responses with explanations and details of the problems and issues they had encountered. Some also included information about measures they had taken to protect themselves from unwanted and unsolicited marketing calls, for example by installing a call blocking device. One respondent explained that they purchased a call blocking device “to get some peace in their own home”. Others also made reference to being registered with the Telephone Preference Service (TPS), which they felt did lead to a noticeable reduction in the number of calls they received.

2.12 Many of the respondents recognised that if option 3 was implemented then there would be an increase in the workload for the ICO and therefore highlighted the need that consideration should be given to the issues concerning the future funding of the ICO. Also, one respondent was of the view that a new regulator should be created to deal with nuisance calls, as the ICO was unable to cope with problems of this nature.

2.13 Many also shared their views on the perceived benefits of this option including, for example, consumers no longer being interrupted by unwanted calls when working from home, enjoying an evening meal etc. With the majority of nuisance calls being to landlines, numerous respondents commented that they were considering removing it from their home. However, if proper measures were introduced to stop, or at least reduce the number of calls, then they would reconsider. The knock on effect of this decision would be the benefit of continued business for communication providers.

2.14 A significant number of respondents also provided suggestions on the additional measures that they felt Government should take alongside the implementation of the preferred option 3. Some respondents highlighted the need to ensure that the ICO had the necessary finance and resource support to ensure it would be effective in delivering its enhanced responsibilities. Some respondents also offered to take a more active role in assisting the Government with the implementation of the proposed change, so that the problem could be better addressed.

2.15 One respondent shared details of Canada’s anti-spam legislation, which came into force in July 2014. This law allows individuals and organisations, who are affected by an act or omission that is in contravention of the law, to bring a private right of action through a court against individuals and organisations against whom they allege have violated the law. The private right of action would allow an applicant to seek actual and statutory damages. It was suggested that if the UK adopted this approach, then it would protect consumers from the rogue practice of spamming that is prevalent within in the UK.

2.16 Similarly, it was also suggested that individuals should be able to initiate proceedings against companies that made nuisance calls to their particular number. An example was provided - the claimant would make a claim “for damages for a value of £50 or less and would not be required to justify the value of the damages of the claim.” This would allow civil claims for £50 or less without the hurdle that currently existed for such claims, that of justifying and quantifying, the value of damages that were caused by one junk e-mail or call. There was a view that this would not cause a burden upon the courts, as the defendants would be aware that they were in the wrong and that they would lose, so would prefer to settle claims out of court.

2.17 Several respondents felt that UK companies who were being investigated for a breach of the regulations should be required to pay for the costs incurred by the ICO for undertaking its investigation on a “fee for fault” basis. This would see the introduction of a mechanism not dissimilar to the Financial Ombudsman Service, where costs for the investigation of formal complaints are recouped against the business perpetrating the breach.

Chapter 3 Government Response

3.1 Option 1 - The Government welcomes the fact that respondents did not favour this particular option. Although it was presented for consideration, this option would have incorrectly implied that the current system was working effectively and enabled the ICO to take sufficient enforcement action, including issuing CMPs, where appropriate. The Government believes that this would not have led to any significant improvement in protection for consumers, as organisations would not have had to face any necessary robust enforcement action by the ICO.

3.2 Option 2 - The Government acknowledges that this option would have ensured that the ICO's actions would be more effective against organisations that deliberately breached the PECR. The ICO would be able to impose CMPs of up to £500,000 to more organisations contravening the PECR, especially to those who currently escape being punished, due to the need to prove substantial damage or substantial distress. However the drawback of this particular option would have been that by including a substituted test for the harm caused there would need to be clarity, as to what this new test required and there would continue to be a risk of some organisations evading enforcement.

3.3 Option 3 - This option would give the ICO the greatest scope to consider which companies should be issued with a CMP. The Government acknowledges the need to ensure that the ICO has the necessary funding and resource, so that it can effectively handle the indisputable increase in their enforcement work from removal of the legal threshold. The ICO has provided reassurance that they will be able to cope with the expected increased case load. Several respondents suggested that a percentage of the funds from the CMPs levied by the ICO for breaches should be used to fund the ICO. However receipts are required to be returned to the central Consolidated Fund.²

3.4 After carefully considering the responses, the Government has decided to proceed with the preferred option 3 of removing the legal threshold for the ICO, due to most respondents who expressed a preference favouring this option. We have also taken into account that nuisance calls have become an important concern for many consumers and it is appropriate to empower the ICO in being able to take effective action against callers that breach the regulations. This will ensure that the ICO is no longer required to prove substantial damage or substantial distress, or any other test of harm caused by the contravention, before considering, which organisations who breach the PECR, should be issued with CMPs.

² In line with the principles for dealing with resources in the public sector, set out in HM Treasury's Managing Public Money , last updated July 2013

Conclusion

3.5 Therefore, having taken the responses received into careful consideration and in view of the need to continue with its measures to tackle the problem of nuisance calls, the Government has decided to proceed to remove the legal threshold 'of substantial damage or substantial distress' for the ICO. The Commissioner would still need to be satisfied that there had been a serious contravention and that this had been deliberate or the person know or ought to have known that there was a risk that the contravention would occur, but failed to take reasonable steps to prevent the contravention. We are confident that this measure will be warmly welcomed by key stakeholders including consumers, regulators and parliamentarians and consumer groups. DCMS thanks respondents for their participation and intends to implement this measure by 6 April 2015.