

## Communications Consumer Panel and ACOD response to DCMS' proposal to lower the legal threshold for enforcement of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR"), for regulations 19-24, to tackle unsolicited direct marketing calls and SMS text messages

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### Introduction

The Communications Consumer Panel and the Advisory Committee on Older and Disabled People welcome this opportunity to comment on DCMS' proposal to lower the legal threshold for enforcement of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR"), for regulations 19-24, to tackle unsolicited direct marketing calls and SMS text messages

The Panel works to protect and promote people's interests in the communications sector. We are an independent body, established by the Communications Act 2003. The Panel carries out research, provides advice and encourages Ofcom, Government, the EU, industry and others to look at issues through the eyes of consumers, citizens and micro businesses. The Panel pays particular attention to the needs of older people and people with disabilities, the needs of people in rural areas and people on low incomes, and the needs of micro businesses, which face many of the same problems as individual consumers. There are four members of the Panel who represent the interests of consumers in England, Northern Ireland, Scotland and Wales respectively. They liaise with the key stakeholders in the Nations to understand the perspectives of consumers in all parts of the UK and input these perspectives to the Panel's consideration of issues.

There is also cross-membership with Ofcom's Advisory Committee on Older and Disabled People (ACOD). This means that Members, in their ACOD capacity, also provide advice to Ofcom on issues relating to older and disabled people including television, radio and other content on services regulated by Ofcom as well as about issues concerning the postal sector.

## Response

### Context

The second wave of Ofcom's quantitative research into nuisance calls, published in May 2014<sup>1</sup>, found that 84% of participating UK adults with a landline phone reported experiencing a nuisance call in the four week fieldwork period. Sixty seven percent reported receiving a live marketing/sales call, 61% reported experiencing a silent call, 37% reported experiencing a recorded sales call and 14% reported receiving an abandoned call. Those who reported receiving any nuisance calls reported an average of nearly nine calls (8.7) in the four week period, which equates to approximately two calls per week. Twenty nine percent reported more than 10 nuisance calls and 8% reported more than 20 nuisance calls over the four week period.

The majority of nuisance calls (81%) were thought to be 'annoying'; this feeling dominated across all ages, socio-economic groups and working status. A higher proportion of silent calls (88%) were considered annoying compared to any other type of call; while a higher proportion of recorded sales and 'other' calls (81%) were considered annoying compared to abandoned calls (71%). Recorded sales calls were also considered more annoying than live marketing/sales calls (76%).

In comparison, relatively few calls were reported as being 'not a problem' (12%) or 'distressing' (6%), and very few were considered 'useful' (1%). Although overall a relatively small proportion of calls made people feel distressed, those aged 16-24 (23%), as well as students (16%), unemployed (15%) and C1 socio-economic group (9%) were more likely than older people, working or retired people and other socio-economic groups to be distressed by nuisance calls. Silent calls were considered more distressing than recorded or live marketing/sales calls (9% vs 5% each), and were also indicatively more distressing than abandoned and 'other' calls (6% each).

The most common reasons given (unprompted) by participants for calls being reported as annoying or distressing were that they had received a lot of calls already, or else that there was no reply when they picked up the phone. Annoyance was also due to the unnecessary interruption and waste of time, while calls that were perceived to be 'scams' were more likely to be considered distressing.

### Background

The Privacy and Electronic Communications (EC Directive) Regulations 2003 ("PECR") govern when a direct marketing call can and cannot be made and the Information Commissioner's Office (ICO), which is responsible for enforcing PECR, can issue a Civil Monetary Penalty (CMP) of up to £500,000 for those found to be in breach of the regulations.

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<sup>1</sup> [http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/nuisance-calls-research/Nuisance\\_calls\\_W2\\_report.pdf](http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/nuisance-calls-research/Nuisance_calls_W2_report.pdf)

However, the law also states that such CMPs can only be issued where:

- there has been a serious contravention of the regulations; and
- the contravention was of a kind likely to cause ‘substantial damage’ or ‘substantial distress’; and
- the contravention was deliberate or the person knew or ought to have known that there was a risk that the contravention would occur (and that it would be of a kind likely to cause substantial damage or substantial distress) but failed to take reasonable steps to prevent it.

The consultation notes that the ICO has issued monetary penalties totalling £675,000 to six organisations since January 2012.

However some organisations that have deliberately made a large number of unsolicited direct marketing calls or sent numerous unsolicited SMS text messages have not been issued with any CMPs. Additionally, in one instance where an organisation was issued with a CMP, it was overturned on appeal by the Information Rights Tribunal for lack of evidence that such a practice caused ‘substantial damage or substantial distress’.

The consultation therefore states that it is evident that the current legal threshold, which must be met before a CMP can be issued, is too high and whilst there is evidence that in many cases the calls cause ‘annoyance, inconvenience or anxiety’, this does not reach the higher legal threshold that is currently required. The need to prove ‘substantial damage or substantial distress’ therefore limits the ICO’s ability to regulate effectively.

The consultation therefore offers three options:

- 1) to do nothing:
- 2) to lower the threshold to ‘annoyance, inconvenience or anxiety’:
- 3) to remove the existing legal threshold.

The ICO’s view is that they should have available a greater breadth of penalties, not just focused upon cases that could be regarded as ‘large’, so that it is clearer that any deliberate and significant breach of PECR could result in a CMP. We agree. For example, if the lower threshold had applied during the period 1 April 2012 to 31 November 2012, then according to the ICO there would have been approximately 50 more organisations that could be considered for enforcement action. This would include ‘repeat offenders’ who featured in the top 20 of the ICO’s list of persistent offenders every month.

## Comments

Nuisance calls - including live marketing calls, silent calls, abandoned calls, and recorded marketing message calls - and texts from businesses can cause consumers irritation, anxiety and distress. The issue can be particularly acute for the elderly and housebound. There is also a risk that these calls and texts adversely affect people’s likelihood of engaging with commercial services by phone, which in turn could mean lost business for

some firms. A reduction in people's trust in their communications service is bad both for consumers and businesses.

As the consultation notes, the past decade has seen a rise in the number of complaints made about nuisance calls and text messages, with complaints reaching more than 13,000 per month up to March 2014.

In our response to the inquiry into the unsolicited marketing industry by the All Party Parliamentary Group (APPG) on Nuisance Calls<sup>2</sup>, we welcomed the Government's expressed intention to legislate to enable Ofcom more easily to share information with the ICO and the Insolvency Service about companies undertaking such activities and to explore other options with regulators to remove barriers to enforcement - such as the ability of nuisance callers to conceal the telephone number which they are calling from, and the scope to lower the legal threshold that needs to be met before ICO can take action.

We note that the focus of this consultation is to change how PECR is enforced by the ICO, particularly with reference to Regulation 21 on 'live' unsolicited marketing calls (and SMS text messages), but the proposal will equally apply to contraventions of the following Regulations:

- 19 (automated recorded calls),
- 20 (fax messages),
- 21 (direct marketing calls referred to above),
- 22 (electronic mail),
- 23 (identification of sender when concealed for electronic mail), and
- 24 (information for regulations 19, 20 and 21)

We support option 3 - to remove the existing legal requirement to prove that the contravention was of a kind likely to cause 'substantial damage' or 'substantial distress'. The remaining requirements - that the contravention was serious and deliberate or negligent, are sufficiently robust in our view to capture those incidents that require enforcement whilst avoiding subjecting the regulator to tests that are almost impossible to quantify accurately and only serve to delay administering justice.

We agree that CMPs are one of the most powerful deterrents available to the ICO and enable it to hold organisations that break the law to account. They also send a clear deterrent signal to others that such breaches will not be tolerated. CMPs are therefore considered to have a beneficial impact for consumers and play a key role in reducing the volume of non-compliant behaviour. We note that, after the ICO issued a monetary penalty of £440,000 in November 2012 (in relation to two individuals sending Payment Protection Insurance (PPI) spam text messages - the penalty was later overturned on appeal), the number of unsolicited spam SMS text messages being sent significantly reduced.

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<sup>2</sup> <http://www.communicationsconsumerpanel.org.uk/downloads/appg-nuisance-calls---130913.pdf>

We are aware that the ICO has advised that if the threshold could be lowered, or preferably removed altogether, then it considers it would be able to protect consumers more effectively. The ICO also noted that, with reference to abandoned and silent calls, Ofcom could issue monetary penalties if such calls caused ‘annoyance, inconvenience or anxiety’. We agree that it seems unreasonable to have a lower threshold to tackle one kind of nuisance call (i.e. abandoned and silent calls) and a much higher threshold for a different kind of nuisance call (i.e. direct marketing live calls and texts), especially if they both cause similar levels of consumer harm.

We note that DCMS has been assured by the ICO that it is ready and equipped to investigate and progress a significant number of additional cases with a view to taking greater enforcement action including issuing more CMPs. The work involved would be similar as for current CMPs, but it may be quicker to reach a recommendation for enforcement action, as the threshold would be lower. However, we would echo the caution that, while each individual case may take less time, there would be more cases for the ICO to deal with.

In relation to Option 3, we would be interested to know why the test is if the serious contravention was deliberate or that the person knew that there was a risk that the contravention would occur, rather than, as currently and also as in Option 2, “the contravention was deliberate or the person knew *or ought to have known* that there was a risk that the contravention would occur...”. We would suggest that negligence or a lack of due diligence is no defence and believe that this must be captured within the regulations so that appropriate action can be taken to protect consumers.

We agree that potential benefits to consumers may include reduced consumer detriment by reducing the number of unsolicited marketing calls and texts. The consultation rightly notes benefits such as:

- a possible reduction in cost to consumers for calling back to query a call or seeking out or listening to an organisation’s information message
- there may be less incentive to purchase call blocking equipment to avoid receiving calls
- the proposal may also benefit vulnerable consumers such as the elderly, who may be distressed as a result of receiving unsolicited calls.

However there is also a further potential benefit - albeit difficult to quantify - of a smaller number of calls taking less of people’s time and causing significantly less aggravation and annoyance to a significant number of households across the UK.

## **Conclusion**

In conclusion, we support the proposal to remove the current legal threshold to prove that a contravention was likely to cause ‘substantial damage’ or ‘substantial distress’. We would add, however, that the coordinated effort between regulatory bodies to tackle nuisance calls must continue as a matter of urgency.

We are encouraged by the recent greater priority given to enforcement and hope that that this proposal will mean faster processing and swifter, more effective, action where appropriate. Should the proposal be accepted, some early visible outcomes as a result will be very helpful for all stakeholders.

Finally, we welcome the Government's statement this week that it intends to seek a derogation from the e-privacy directive to impose a requirement to provide CLI on any person making unsolicited calls for direct marketing purposes and its commitment to bring forward secondary legislation to amend the Privacy and Electronic Communications Regulations in the coming months, following an appropriate consultation.

However we would again urge further consideration of requiring caller line identification display services to be free of charge. Although some providers offer this service free of charge or bundled (if one commits to a 12 month contract), others do not. We believe it unlikely that, given the low level of switching in the market, consumers are likely to change provider so that they can take advantage of the provision of CLI for free. We note that the Government expects other communications providers to offer free CLI in view of the legislation it plans on caller line identification. However we are unsure why this would be a commercially attractive proposition if customers are already paying for such a service and unlikely to switch.