fair telecoms campaign **briefing**

Clarification of points raised in media coverage of the change to statutory regulations covering nuisance calls

This briefing is to follow our participation in media coverage of the announcement that the statutory regulations covering the imposition of penalties for making "nuisance calls and texts" will be changed. We have made our point for now - this briefing is simply to clarify the issues.

We have noted widespread misrepresentation of the current threshold which the Office of the Information Commissioner has to cross before being able to impose a financial penalty in respect of a breach of the terms of the Privacy and Electronic Communications Regulations (EU Directive) 2003, by making "nuisance calls" or sending unsolicited marketing emails or text messages.

Statutory provisions and how they have been represented

- PECR §§19-24 see legislation.gov.uk/uksi/2003/2426/regulation/19/made, 20, 21, 22, 23, 24
- PECR §31 see legislation.gov.uk/uksi/2003/2426/regulation/31/made
- Data Protection Act 2008 §55A (1) (b) and §55A (3) (a) (ii) see legislation.gov.uk/ukpga/1998/29/section/55A

The first two respectively establish the regulations being enforced and confirm the relevance of the latter, which currently requires that:
"the contravention was of a kind likely to cause substantial damage or substantial distress".

This is interpreted by the DCMS, in its press release of 25 February to be:
"a company caused 'substantial damage or substantial distress' ".

This has led to reporting, such as the following:
"Companies have bombarded people with unwanted marketing calls and texts, but have escaped punishment because they did not cause enough harm." - see this Daily Mail article

What does this mean

The clauses that are now to be removed only meant that the ICO has to show that the activity being penalised is "***of a kind likely to cause***" a particular effect, which most of us would think reasonably applied to all nuisance calls. That is indeed the basis on which the ICO has been proceeding for over 10 years. It is the nature of the activity and its "likely" effect that is relevant in the statute, not the degree of harm caused in any particular case.

The degree of harm caused in a particular case is relevant to the level of penalty, as determined by the ICO under the terms of its own policy (see below), not the statutory requirement, which is the responsibility of the government and parliament.

We think the one particular case (in 2013), where the ICO lawyers failed to convince a tribunal that the sending of hundreds of thousands of spam texts was ***"of a kind likely to cause substantial damage or substantial distress"***, to have been something of a glitch. It is nonetheless reasonable for swift and simple action to be taken to prevent any further cases tripping over this problem.

It is however totally incorrect to suggest that this effect has to be shown to have actually occurred in every case - up until the time when the statute is changed to remove this condition.

There are strong odours of both buck-passing and Party Politics surrounding this issue.

David Hickson


Thursday, 26 February 2015

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Remaining constraints on action by the ICO

It is important to recognise the other constraints which remain on the powers of the ICO to impose penalties.

- The other sub-clauses of Section 55A of the DPA: §55A (3) (a) (i) and §55A (5) see legislation.gov.uk/ukpga/1998/29/section/55A
- The terms of the ICO's own policy on the imposition of Monetary Penalties - published here.
- The limitations reported to the Culture Media and Sport Committee of parliament, by Simon Entwisle, Director of Operations, Information Commissioner's Office - see Minutes of Evidence

The latter includes the following exchange, starting at Q164:

Jim Sheridan: '***So persistent offenders know there is no danger of them going out of business if they persistently offend.***'

Simon Entwisle: '***That is right.***'

…

'***if the Government want to push this further, they could give us powers so that we don't have to take that into consideration - so that the ICO could put people out of business.***'

It may be noted that the government has not even hinted of considering extending the powers of the ICO in this way. This is one of a number of reasons why the fair telecoms campaign is pressing for the regulators that already hold this power to get involved.

Media coverage of the issue

We understand that the ICO would not wish offenders to believe that its powers were unduly constrained; a little bluff may help to persuade fewer companies to make nuisance calls. We would not wish to undermine this bluff, insofar as it has a positive effect.

We cannot however allow the government to take undue credit for a claimed radical change to the regulatory regime, when no such change has occurred. We believe that truly radical measures are now required to make a significant difference to the problem of nuisance calls.

The **fair telecoms campaign** does not want to leave nuisance callers feeling that they can carry on their unacceptable activity with impunity. It is however wrong for the public to be misled about the degree of protection which is being provided to them and the probable effect of action by their government. This is especially relevant when there are more effective steps that could and should be taken.

Further action

We will continue to press for other regulators, notably the Claims Management Regulator, OfGEM and the Financial Conduct Authority, to accept their responsibility for the way in which regulated businesses under their control operate - notwithstanding wider general laws and regulations. In particular, they have the power to impose appropriate and specific regulation on how the telephone is used in their sector; we believe that they thereby carry a responsibility for its misuse.