Consumers' cancellation rights

Under the current law, the Distance Selling Regulations and the Doorstop Selling Regulations provide for cancellation periods of 7 working days and 7 calendar days, respectively. However, the Draft Regulations extend and align consumers' cancellation rights by standardizing the cancellation period to 14 days (see Regulation 29). This cancellation period applies if the consumer has been provided with the required information discussed above and is extended to 12 months if that information is not provided (see Regulation 30). This uniform approach provides more certainty and clarity for traders and consumers.

On another note, in what appears to be a fairer position for traders and a change from the current law, traders are not required to provide a refund under a contract for the sale of goods until the goods are returned (see Regulation 33).

Measures to prevent hidden costs

The Draft Regulations introduce provisions that aim to prevent hidden costs in consumer contracts. They include a provision requiring express consent from the consumer for any additional payments to the remuneration agreed for the trader's main obligations (eg an additional payment for an extended guarantee when purchasing an electrical item — see Regulation 38). The Draft Regulations clarify that express consent will not be achieved where the default option is to include the additional payment (eg a pre-ticked box on a website).

BIS has commented that the Draft Regulations seek to stamp out such hidden costs as they 'prevent consumers from understanding fully the cost of what they buy and penalise fair dealing businesses whose offers do not appear competitive next to those involving hidden costs' ('Reform of Consumer Law: Draft Regulations', August 2013, BIS).

Why this matters

The Draft Regulations create more certainty for consumers on their rights when entering into contracts, thereby increasing consumer confidence. They also aim to increase certainty for traders, by standardizing requirements in consumer contracts and thereby creating a level playing field across Europe.

Traders should take note of the changes presented by the Draft Regulations and other legislation implementing the Directive. Care should be taken to ensure that traders' order processes are in compliance with the new requirements on information and cancellation and enable consumers to provide express consent where necessary.

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ICO fuels nuisance call debate

Sue Gold

Journal of Direct, Data and Digital Marketing Practice (2013) **15**, 143–145.
doi:10.1057/ddmp.2013.64

Who: Information Commissioner's Office

When: September 2013

Where: The United Kingdom
Law stated as at: 4 October 2013

What happened

The Information Commissioner's Office is now trying to encourage MPs to change the law if they want to see the number of cold calls cut, and has asked the Culture, Media and Sport Select Committee to enable the ICO to issue more monetary penalties to companies behind the calls. The ICO has asked the government to reduce the level of harm it needs to prove, so that an investigation would have to simply prove annoyance or nuisance before acting.

Background

The ICO's power to issue fines of up to £500,000 for serious breaches of the Privacy and Electronic Communications (EC Directive) Regulations 2003 ('PECR') came into force in May 2011. This followed an increase in penalties of up to £500,000 for serious breaches of the Data Protection Act 1998 (the 'DPA') in April 2010.

In early 2012, the ICO released guidance to clarify the circumstances under which the ICO will issue fines, and it will determine the amount of such fines. The Guidance states that the ICO is 'committed to acting consistently, proportionately and in accordance with public law'. Before issuing any fine, the ICO must determine that:

- (1) there has been a serious breach of the DPA or PECR;
- (2) the breach is of a kind likely to cause substantial damage or distress; and
- (3) the breach was deliberate, or the transgressor knew or should have known that there was a risk that such a breach would occur and they failed to take reasonable steps to prevent it.

The law currently requires the ICO to prove under PECR that calls or texts are causing substantial damage or substantial distress before issuing a penalty.

Enforcement hamstrung

This often means in practice that the ICO can only target companies responsible for large numbers of calls if it can demonstrate that there is substantial damage or distress. In reality, the statistics suggest that the problem of nuisance calls is caused by a large number of companies making hundreds, rather than thousands, of annoying calls.

Complaint figures show that 982 companies prompted complaints to the Telephone Preference Service in June 2013 after making cold calls. Eighty-two per cent of the companies were the subject of fewer than five complaints. Only 21 of the companies were the subject of more than 25 complaints, but even those 'worst offenders' were responsible for just a quarter of the total number of complaints where a company was named.

Cold calls a serious consumer threat

The ICO has issued some significant fines in the last year but these are limited in number. Significant fines include a £440,000 penalty to the owners of Tetras Telecoms for spam texts and £90,000 to DM Design for marketing calls. The ICO set up a survey on its website to make reports on unsolicited marketing. In the ICO report in December 2012 on 'cookie' compliance, it reported that from May to November 2012 it had received 53,000 reports on unwanted marketing compared with just 550 complaints

about ‘cookies’. The ICO therefore considers unsolicited marketing to be a serious consumer threat.

Simon Entwisle from the ICO stated, ‘The simple fact is that the law only allows the ICO to take action against the worst offenders. A change in the law would allow us to target more of the companies making these cold calls and would have a noticeable effect for consumers. This could be a game-changing improvement to how we can stop unwanted calls. There’s a balance to be struck between a direct marketing industry that relies heavily on making calls and consumers who feel they’re being bombarded. It’s for MPs to decide where the balance lies, but I think it’s fair to say that most people probably don’t think the law’s getting it right at the moment’.

Why this matters

On first review, this would appear to be a sensible move if it can lead to a reduction in the number of such cold calls and create a real deterrent. The risk is that this change would not be limited to the current onslaught of cold calls we are seeing and could result in monetary penalties being applied in other cases where there may have merely been ‘annoyance’, for example, delay in responding to an opt-out.

In addition, if this change is agreed it seems likely that the ICO will also seek to change the requirements under the DPA (as well as the PECR) to show substantial damage or distress, particularly following the recent Scottish Borders case where the First Tier Tribunal overturned an ICO fine of £250,000. The Tribunal concluded that although there was a serious breach, it was not of a kind likely to cause substantial damage or distress. This was after a subcontractor left more than 600 employee records in a recycling bin. In addition, these proposals indicate the increased focus by the ICO on enforcement and monetary penalties, particularly in areas of high consumer risk.

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New ICO guidance on direct marketing

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Journal of Direct, Data and Digital Marketing Practice (2013) **15**, 145–147.
doi:10.1057/ddmp.2013.65

Who: Information Commissioner’s Office

Where: Wilmslow, Cheshire, UK

When: September 2013

Law stated as at: 3 October 2013

What happened

The Information Commissioner has published a guidance document focusing on direct marketing (‘Guidance’). Topped off with a 17-point ‘Direct Marketing Checklist’ and an ‘At a glance guide’ to the consent