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

Stephen Groom

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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

rules for various marketing channels, the 45-pager is a must-read for all marketers wanting to comply with data protection and electronic communications laws and for their advisers too.

Moreover, since the Guidance goes beyond previous ICO pronouncements in key areas such as consent to direct marketing, urgent attention will need to be paid to data capture mechanisms in case changes are needed to ensure that the data can be used for the intended purposes.

Existing databases may also be rendered unusable for certain purposes at a stroke. More of this below, but first here are some highlights from the numerous passages dealing with consent.

Time limits on consent

The ICO is tightening up its attitude on consent shelf-life in the context of direct marketing. This is particularly relevant for marketing channels such as email and text, where the Privacy and Electronic Communications Regulations 2003 ('PECR') expressly require prior consent.

The ICO advises particular care in the following scenarios:

- when the data subject gives consent to marketing as part of signing up for a service and the service expires, the consent will likely also expire;
- where consent is given to receive messages about a particular product launch, this should not be taken as consent for messages about a different product launch a year later;
- in the context of emails or texts, PECR refers to consent 'for the time being'. The ICO interprets this as making it likely that, if there is any significant change in circumstances, the consent will come to an end; and
- 'Indirect consent' for calls, texts or emails (given to a third party via the 'first party' when the first party captured the contact details) creates special time challenges. As a default position, the ICO advises third-party marketers looking to get in touch for the first time by telephone, text or email not to rely on consent that was given to the first party more than 6 months previously. It accepts that there will be exceptions to this, however, such as consent to receive messages about annually renewable insurance services.

'Indirect' or third-party consent

The ICO takes a stricter view than it did in the past on the validity of third-party consent, particularly in the context of email or text marketing under PECR. Indirect consent is relied on heavily by the UK list rental market, so there will be particular concern in this sector over the ICO's new positioning here.

The regulator states that, where the consent was originally given to 'X' and the marketer intending to send the email or text is 'Y', the ICO will now expect the consent given to X to have either specifically named Y or at least described a specific category of organizations that includes Y.

In contrast, consent to hear from 'selected third parties' is very unlikely to cut the mustard, states the ICO. Moreover, where the consent given to X allows X to share the email address with 'trusted third parties', this is unlikely to extend to third parties selected by Y, no matter how much Y trusts them.

Proof of consent

Not surprisingly, the ICO urges marketers to up their act in terms of ensuring that they have proof of consent. Clear records should be kept of the date of consent, who obtained it and exactly what information was provided to the person consenting. Marketers should not rely, the ICO states, on a bought-in list unless the seller or broker can provide these details. The Guidance goes further by including an 11-point list of aspects that should be checked by any marketer considering using a third-party list.

The ICO makes it clear that consent to direct marketing cannot be valid if it is given as a condition of subscribing to a service or completing a transaction.

Why this matters

The stricter approaches to, for instance, indirect consent for marketing and time limits on consent will cause concern, particularly as the ICO has not been crystal clear about the extent to which the Guidance is retrospective.

The ICO has stated that the Guidance will not be retrospectively applied before its 9 September 2013 publication date, but what about those millions of email addresses and mobile numbers obtained using consent wording for third-party marketing that now fails the more rigorous ICO test? Will these lists be excused from having to follow the new Guidance? Or, if not, will there be a transitional period allowing marketers time to adapt?

The Direct Marketing Association is raising this and other questions with the ICO and requesting further clarification. In the meantime, all businesses capturing personal data that may be used for future direct marketing (which probably means all businesses) should be urgently reviewing their sign-up mechanisms with a view to making necessary changes.

(The ICO Guidance can be found here: http://www.ico.org.uk/~media/documents/library/Privacy_and_electronic/Practical_application/direct-marketing-guidance.pdf.)

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Big changes to Facebook page terms for sweepstakes and contests administration

Nick Johnson

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Where: Menlo Park, California, USA