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Legal and Regulatory Update

ICO reports on its enforcement action

Sue Gold

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Where: UK

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What happened

The Information Commissioner's Office (ICO) has published its latest update on its enforcement action for the last quarter of 2013, and the main focus has been on spam texts, marketing calls and cookies.

ICO action has continued to focus on organizations that breach the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR) and make unsolicited marketing calls or texts to consumers.

Spam texts

Unsurprisingly, spam texts continue to be a concern for consumers. The top three subjects of these text messages were debt management, payday loans and PPI. The ICO has issued a £175,000 monetary penalty notice against First Financial (UK) Limited for the mass sending of unsolicited SMS messages, which led to 4,031 complaints.

There have been some recent cases (such as Tetras) where the ICO's fines have been overturned due to failure by the ICO to demonstrate 'substantial damage or distress' as currently required. The ICO has submitted a business case to the Department for Culture, Media and Sport that sets out the reasons why the threshold for monetary penalties should be lowered in order to create a stronger deterrent. This proposal is supported by Which? and other consumer interest groups.

The ICO also cites a recently agreed Memoranda of Understanding with the global mobile network operators' association GSMA, Vodafone, EE and O2 (Telefónica) to allow the sharing of information to prevent organizations and individuals from sending spam texts.

Marketing calls

In contrast to spam texts, the ICO reports that concerns about marketing calls are down to their lowest level since October 2012. The Commissioner argues that this is due to action by regulators, consumers and industry groups. The ICO states that the fall also relates to the issuing of Civil

Monetary Penalties to Tetras (28 November 2012) and DM Design (20 March 2013). The top three subjects of live sales calls were payment protection insurance, accident claims and energy. The ICO is continuing to monitor 14 companies for compliance with the regulations.

The report also states that the ICO welcomes the All-Party Parliamentary Group on Nuisance Calls report on the unsolicited marketing industry, and that the ICO provided evidence and has responded to the recommendations.

Cookies

The ICO report stated that, between October and December 2013, it received 53 reports of concerns about cookies via its website, compared with 29,529 reports about unwanted marketing communications. The Commissioner states that it is concentrating on sites that do nothing to raise awareness of cookies or to access users' consent. However, the ICO has balanced this with the low consumer threat in this area due to the low levels of concern reported by the public.

Why this matters

This report indicates both the prevalence of spam texting and the fact that the public is increasingly concerned by the practice. There is therefore a corresponding increase in complaints and monetary penalties in this area. Any changes to the thresholds for monetary penalties in this area are likely to be welcomed by consumers but, perhaps, treated more cautiously by marketers.

It will be interesting to see how the various changes proposed by the variety of reports on nuisance calls will impact the ICO's enforcement. The Commissioner appears to be actively engaged in consulting and responding to these reports. In addition, very few complaints have been received about cookies, and therefore it is likely that this will not be a focus for the ICO.

This enforcement update should be interpreted in conjunction with the ICO's updated Guidance on Direct Marketing and indicates the ICO's continued emphasis and focus on this area. In addition, the ICO has recently published a consultation document on its approach to enforcement, and the consultation ended at the end of January 2014. The ICO wants to encourage individuals to raise concerns directly with the organization sending the communications before approaching the ICO. The regulator would retain a record of individual complaints, but in many cases would not investigate itself or take further action. The ICO may offer advice, but will encourage the Data Controller to take ownership of the complaint. In this way, the ICO wants to focus its resources on organizations that are seen as repeat offenders.

Sue Gold, partner, Osborne Clarke, London