

EXPLANATORY MEMORANDUM TO
THE PRIVACY AND ELECTRONIC COMMUNICATIONS (EC DIRECTIVE)
(AMENDMENT) (No. 2) REGULATIONS 2016

2016 No. 1177

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument amends the Privacy and Electronic Communications (EC Directive) Regulations 2003 (“the 2003 Regulations”) which regulate privacy and data protection in the electronic communications sector in the UK. The amendments provide for the transfer from OFCOM to the Information Commissioner (“the Commissioner”) of functions relating to registers that are required to be kept under regulations 25 and 26 of the 2003 Regulations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The 2003 Regulations were made to implement the provisions of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (“the Directive”) in the UK. They were made using the power in section 2(2) of the European Communities Act 1972 (“the Act”). The Directive is one of a family of five Directives which formed the original European Electronic Communications Framework and were implemented within the UK by the Communications Act 2003, the Wireless Telegraphy Act 2006, and the 2003 Regulations.
- 4.2 The 2003 Regulations have been amended on five previous occasions. First, in 2004 (S.I. 2004/1039) to permit corporate subscribers to register their telephone number with the Telephone Preference Service. Second, in 2010 (S.I. 2010/22) to replace the relevant tribunals under regulation 28 with the newly-created first-tier tribunal and upper tribunal. Third, in 2011 (S.I. 2011/1208) to implement further European legislative changes, namely Articles 2 and 3 of Directive 2009/136/EC, which in turn amended Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Regulation (EC) No 2006/2004 on co-operation between national authorities responsible for enforcement of consumer protection law, and the Directive. Fourth, in 2015 (S.I. 2015/355) to (1) permit

mobile network operators to send alert messages to those who may be affected by a serious emergency when requested to do so by a designated public body, and (2) lower the legal threshold at which the Commissioner can issue a civil monetary penalty for a serious breach of regulations 19 to 24 of the 2003 Regulations. The fifth, in 2016 (S.I. 2016/524) to make it a requirement for direct marketing callers to provide Calling Line Identification (“CLI”). This followed a commitment by the Government to impose such a requirement, during the passage of the Consumer Rights Act 2015, and forms part of the Government’s strategy to tackle the problem of nuisance calls and to protect the vulnerable and elderly in society who are most impacted by this issue.

- 4.3 Regulations 20 and 21 of the 2003 Regulations set out the circumstances in which persons may transmit, or instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of fax or make unsolicited calls for those purposes.
- 4.4 Regulations 25(1) and 26(1) of the 2003 Regulations require OFCOM to maintain and keep up-to-date registers of the fax and telephone numbers of subscribers who have notified them under regulations 20 and 21 that they wish to opt out of receiving unsolicited communications for direct marketing purposes.
- 4.5 Regulations 25(2) and 26(2) require OFCOM to remove a number from a register where they have reason to believe that number has ceased to be allocated to a subscriber who has opted out.
- 4.6 Regulations 25(3) and 26(3) require OFCOM to provide information derived from the register on payment of a fee if requested to do so by a person wishing to send direct marketing or a by a subscriber.
- 4.7 Regulations 25(4) and 26(4) allow OFCOM to require different fees depending on the form the information from the register takes or whether that information is taken from the whole or different parts of the register.
- 4.8 Regulations 25(5) and 26(5) enable OFCOM to contract out to some other person each of the above functions with the exception of the functions of determining the fees payable in relation to a request under regulations 25(3) or 26(3).
- 4.9 This instrument amends the 2003 Regulations so as to transfer responsibility for the functions under regulations 25 and 26 from OFCOM to the Commissioner.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is the United Kingdom.
- 5.2 The territorial application of this instrument is the United Kingdom.

6. European Convention on Human Rights

- 6.1 As this instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.
- 6.2 The 2003 Regulations implement Directive 2002/58/EC which is aimed at protecting the fundamental rights of natural persons and particularly their right to privacy, as well as the legitimate interests of private persons.

- 6.3 The amendments made by this instrument to the 2003 Regulations do not directly engage article 8 as they are simply effecting a transfer of a small number of functions from one public body to another.

7. Policy background

What is being done and why

- 7.1 The increasing level of consumer frustration and, in some cases, anxiety being caused by nuisance phone calls is a serious concern to the Government. OFCOM estimates that each year UK consumers receive around 4.8 billion nuisance calls: 1.7 billion live sales calls, 1.5 billion silent calls, 940 million recorded sales messages, and 200 million abandoned calls.
- 7.2 OFCOM has contracted with the Telephone Preference Service Limited (“TPSL”) to carry out its functions relating to the keeping of a register of subscribers who have opted out of receiving unsolicited direct marketing calls or faxes. TPSL offers free services that allow subscribers to register their landline and/or mobile telephone number or their fax number respectively if they no longer wish to receive unsolicited direct marketing communications. The registers which the TPSL provides are the Telephone Preference Service (“TPS”), Corporate Telephone Preference Service (“CTPS”) and Fax Preference Service (“FPS”).
- 7.3 The 2003 Regulations enable OFCOM to determine a range of fees which can be charged when information is requested from a register. TPSL can provide the register in whole or in parts to enable greater flexibility. The fees are approved by the Secretary of State and are set at a level that will equal the costs incurred, or that are reasonably expected to be incurred in meeting a request.
- 7.4 Organisations which call or send a fax to a subscriber for direct marketing purposes where that subscriber has opted out will be in breach of regulation 20 or 21 of the 2003 Regulations as applicable.
- 7.5 The Commissioner is responsible for enforcing breaches of the 2003 Regulations. . Where breaches are found, the Commissioner can issue civil monetary penalties of up to £500,000 (regulation 31 of, and Schedule 1 to, the 2003 Regulations, which apply the enforcement provision made in Part V and sections 55A to 55E of the Data Protection Act 1998 with modifications). However, the Commissioner has no responsibility for functions relating to the registers. Those functions rest with OFCOM. This seems inconsistent with the Commissioner’s role as enforcer.
- 7.6 As a result of this instrument, functions relating to the registers will transfer from OFCOM to the Commissioner. This should assist the Commissioner in her enforcement function by giving the Commissioner direct control over how the registers in question are maintained and direct access to the information contained in them (rather than continuing to rely on a data sharing agreement with OFCOM). It is hoped that this will enable complaints arising from nuisance calls and faxes to be dealt with more quickly.

Consolidation

- 7.7 In light of the EU Commission’s review of the Electronic Communications Framework¹, the Department has no plans to consolidate the 2003 Regulations at this

¹ <https://ec.europa.eu/digital-single-market/news/public-consultation-evaluation-and-review-regulatory-framework-electronic-communications> (accessed on 03 October 2016)

stage. However, if the review leads to substantial changes to Directive 2002/58/EC the Government will consider whether consolidation is appropriate.

8. Consultation outcome

- 8.1 This measure is an administrative change, therefore no formal consultation on this measure has taken place. The two main stakeholders affected by this change, the ICO and OFCOM, have been engaged in discussions with each other and the DCMS throughout this process. Both stakeholders are content for the change to happen and for the additional functions to be included into the contract.

9. Guidance

- 9.1 The Information Commissioner's Office publishes guidance on the 2003 Regulations for organisations wishing to send electronic marketing messages. This will be updated to reflect these amendments.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies.
- 10.2 There is no impact on the public sector.
- 10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 The amendments made by this instrument will be subject to review in accordance with regulation 37 of the 2003 Regulations. By virtue of section 28(3)(e) of the Small Business, Enterprise and Employment Act 2015, the duty to include a review clause in regulations amending regulatory provisions affecting business does not apply where those provisions are already subject to a statutory review requirement. The 2003 Regulations which these regulations amend already contain such a requirement – *see* regulation 37 of the 2003 Regulations. The Department for Culture, Media and Sport will continue to monitor the level of nuisance calls, working with the ICO and OFCOM.

13. Contact

- 13.1 Bilal Touré at the Department for Culture, Media and Sport Telephone: 0207 211 6566 or email: bilal.toure@culture.gov.uk can answer any queries regarding the instrument.