

EXPLANATORY MEMORANDUM TO
THE PRIVACY AND ELECTRONIC COMMUNICATIONS (EC DIRECTIVE)
(AMENDMENT) REGULATIONS 2016

2016 No. 524

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 require that persons making or instigating calls for direct marketing purposes do not prevent presentation of calling line identity (“CLI”) on the called line.

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 making of this instrument is subject to the negative resolution procedure.
- 4.2 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 means of the Communications Act 2003, the Wireless Telegraphy Act 2006, and the 2003 Regulations.
- 4.3 The 2003 Regulations have been amended on four 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 Information Commissioner's Office ("ICO") can issue a civil monetary penalty for a serious breach of regulations 19 to 24 of the 2003 Regulations.

Calling Line Identification

- 4.4. Regulations 19 to 24 of the 2003 Regulations provide rules that organisations must comply with when sending marketing and advertising by electronic means (e.g. phone calls, texts, fax messages and email).
- 4.5. This instrument amends regulations 19 (in relation to automated calling systems) and 21 (in relation to calls for direct marketing purposes) so as to require that persons making or instigating calls for direct marketing purposes do not prevent presentation of CLI on the called line.
- 4.6. In so doing, the UK seeks to ensure more effective enforcement of the rules prohibiting unsolicited communications for direct marketing purposes to recipients who have opted out of such communications. In particular, the requirement for calls for direct marketing purposes not to withhold CLI will facilitate investigation of and, where appropriate, enforcement against, unsolicited calls reported to the ICO and to Ofcom.
- 4.7. The amendments therefore safeguard and strengthen the regulators' ability to investigate and enforce against unauthorised use of electronic communications systems, as permitted pursuant to Article 15(1) of the Directive.

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 the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

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.¹ As recognised in the Government's Nuisance Calls Action Plan (published in March 2014), this is a complex problem requiring cooperation between Government, regulators, consumer groups, communications providers and industry.

¹ http://stakeholders.ofcom.org.uk/binaries/consultations/silentcalls/JAP_Update_Dec2015.pdf (accessed on 19 April 2016).

- 7.2 The ICO and Ofcom continue to work together to address the problem as a priority and have set out the progress being made under their joint action plan, most recently in December 2015.² Recent action taken by the Government includes lowering the legal threshold at which the Information Commissioner may impose a civil monetary penalty on organisations for a serious breach of the 2003 Regulations. Since this change came into effect in April 2015, the ICO has issued a number of substantial fines amounting to £895,000.
- 7.3 Despite an increase in enforcement action, however, organisations continue to breach the law; and in a significant proportion of cases the failure to provide CLI makes it more difficult for the ICO and Ofcom to pursue enforcement action. In this regard, reports of the All Party Parliamentary Group on nuisance calls (published on 31 October 2013)³ and of the Culture, Media and Sport Committee (published on 5 December 2013)⁴ have both recommended that direct marketing calls should be required to carry CLI. The Government committed to imposing such a requirement, subject to consultation, during passage of the Consumer Rights Act 2015.⁵

Consolidation

- 7.4 In light of the European Commission's ongoing review of the Electronic Communications Framework⁶, the Department does not intend to consolidate the 2003 Regulations at this stage. However, the Government will consider consolidation if the review leads to substantial changes to the Directive.

8. Consultation outcome

- 8.1 The Government consulted on its proposals to make these amendments. A six week consultation was launched in January 2016, outlining the Government's preferred approach. A total of 170 responses were received.
- 8.2 The consultation asked two questions: whether respondents agreed that the Government should amend the 2003 Regulations to make it a requirement for direct marketing callers to provide CLI; and whether there were any other costs or benefits associated with the proposal that the Government should consider before taking a final decision. Those in favour agreed that the measure would make an important contribution to the Government's overall strategy for tackling nuisance calls; and many responses reflected the personal impact of such calls. The small minority not in favour of the proposal generally felt that it did not go far enough or would not make a significant impact on the problem.
- 8.3 The Government response to the consultation is available online at: <https://www.gov.uk/government/consultations/requiring-direct-marketing-callers-to-provide-calling-line-identification>.

² Ibid. See also Ofcom's Annual Plan 2016/17: <http://www.ofcom.org.uk/content/about/annual-reports-plans/ann-plans/1560620/Annual-Plan-2016-17.pdf> (accessed on 19 April 2016).

³ <http://www.which.co.uk/documents/pdf/all-party-parliamentary-group-on-nuisance-calls-inquiry-339341.pdf> (accessed on 19 April 2016).

⁴ <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmcmds/636/63602.htm> (accessed on 19 April 2016).

⁵ HL Deb 26 November 2014 vol 757 cc914-5.

⁶ <https://ec.europa.eu/digital-single-market/news/public-consultation-evaluation-and-review-regulatory-framework-electronic-communications> (accessed on 19 April 2016)

9. Guidance

- 9.1 The ICO publishes guidance on the 2003 Regulations for organisations wishing to send electronic marketing messages.⁷ This will be updated to reflect these amendments.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is minimal. It is estimated that the instrument is relevant to approximately 2,000 organisations which make calls for direct marketing purposes, of whom around half currently provide CLI and are therefore unaffected. Ensuring compliance with the requirement is considered to be straightforward and therefore the impact on the remainder of the relevant organisations is minimal. Insofar as these amendments promote more effective enforcement against businesses which breach regulations 19 and 21 of the 2003 Regulations, this will benefit those that are compliant as they will no longer have to compete with those gaining an advantage by acting illegally. There may also be some benefits for companies who are incentivised to become compliant, in terms of lower levels of complaints and therefore lower costs in dealing with those complaints. There may be a small reduction in revenue for direct marketing organisations as consumers may be less likely to answer calls when it is possible to identify the source. This effect is difficult to quantify, but we estimate it to be relatively small as the Direct Marketing Association has said that few legitimate organisations or individuals would lose revenue as a consequence of having to provide CLI for outbound marketing calls.
- 10.2 The impact on the public sector is minimal. An increase in complaints could give rise to potential costs to the ICO, but the ICO have provided assurance that those costs can be covered within their current budget arrangements.
- 10.3 An impact assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 No specific action is proposed to minimise regulatory burdens on small businesses, in view of the fact that the overall impact of the measure on business is minimal.

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. 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 Amanda Williams at the Department for Culture, Media and Sport (tel: 07710760697 or email: Amanda.williams@culture.gov.uk) can answer any queries regarding the instrument.

⁷ <https://ico.org.uk/for-organisations/guide-to-pecr/> (accessed on 19 April 2016).