

**Proposal to lower the legal threshold for enforcement of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (“PECR”), for regulations 19-24, to tackle unsolicited direct marketing calls and SMS text messages.**

Consultation Document

**25 October 2014**

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## **Foreword by Ed Vaizey Minister for Culture, Communications and Creative Industries**

The staggering number of complaints and the stress and anxiety caused by nuisance calls and text messages, especially to the vulnerable and housebound, is of great concern. This is why I have been working closely with regulators, industry, consumer groups and parliamentarians to take concerted action on this issue.

Earlier this year on 30<sup>th</sup> March we launched our first ever Nuisance Calls Action Plan. The Action Plan detailed the work in hand to improve call tracing and joint working by regulators. It also outlined legislative proposals to enable regulators to share information more easily. That work is progressing well and the relevant legislation is now in force.

But, a robust enforcement regime requires a regulator that can take tough action and issue monetary penalties against the worst offenders. The Action Plan noted that the Information Commissioner's Office efforts to issue such penalties were frustrated by the legal requirement to demonstrate that nuisance calls and texts caused substantial damage or substantial distress. We therefore committed to consult on this critical issue to see if this threshold should be lowered, so that those breaking the law cannot evade enforcement action. This consultation seeks your views on how best this can be achieved and I welcome your thoughts on the proposals.

I believe a lower threshold will help boost our efforts to protect consumers more effectively. Whilst direct marketing makes an important contribution to our economy, this must not be at the expense of the consumer's rights. Those who choose not to receive such calls and texts should have their rights respected and those who break the law should be held to account. These proposals seek to strike that balance and reflect our ongoing commitment to ensure that we have a safe and vibrant digital economy.

## **Executive Summary**

### **What this consultation is about**

1. The past decade has seen a rise in the number of complaints made about nuisance calls and text messages, with complaints reaching more than 13,000 per month up to March 2014. The issue is particularly acute for the elderly and housebound, as such calls can cause distress and anxiety. Whilst there have been some penalties issued against organisations for breaking the law, many have not faced enforcement action, in relation to the Civil Monetary Penalty regime and in particular to s.55A (1)(b) DPA. This suggests that there is a need to strengthen the enforcement regime to provide greater protection to consumers.
2. The Privacy and Electronic Communications (EC Directive) Regulations 2003 (“PECR”) govern when a direct marketing call can and cannot be made and the Information Commissioner’s Office (ICO), which is responsible for enforcing PECR, can issue a civil monetary penalty (CMP) of up to £500,000 for those found to be in breach of the regulations. However, the law also states that such Civil Monetary Penalties (CMPs) can only be issued where:
  - there has been a serious contravention of the regulations; and
  - the contravention was of a kind likely to cause ‘substantial damage’ or ‘substantial distress’; and
  - the contravention was deliberate or the person knew or ought to have known that there was a risk that the contravention would occur (and that it would be of a kind likely to cause substantial damage or substantial distress) but failed to take reasonable steps to prevent it.
3. The ICO has issued monetary penalties totalling £675,000 to six organisations since January 2012, but some organisations that have deliberately made a large number of unsolicited direct marketing calls or sent numerous unsolicited SMS text messages and have not been issued with any CMPs. Furthermore, in one instance where an organisation was issued with a CMP, it was overturned on appeal by the Information Rights Tribunal for lack of evidence that such a practice caused substantial damage or substantial distress. Therefore, there remains a real risk that a CMP issued by the regulator could be overturned, due to the need to prove ‘substantial damage or substantial distress’. This has limited the ICO’s ability to regulate effectively.
4. The reports of the All Party Parliamentary Group (APPG) on Nuisance Calls (published on 31<sup>st</sup> October 2013) and of the Culture Media and Sport (CMS) Committee’s (published on 5<sup>th</sup> December 2013) also echoed our concerns about the impact of this high threshold. In our Nuisance Calls Action Plan we committed to consult on this issue to see if and how the threshold could be lowered to enable ICO to regulate more effectively.

5. The focus of this consultation is to change how PECR is enforced by ICO, particularly with reference to Regulation 21 on 'live' unsolicited marketing calls (and SMS text messages), but the proposal will equally apply to contraventions of the following Regulations<sup>1</sup>:

19 (automated recorded calls),  
20 (fax messages),  
21 (direct marketing calls referred to above),  
22 (electronic mail),  
23 (identification of sender when concealed for electronic mail) and  
24 (information for regulations 19, 20 and 21)

## **How to Respond**

6. This 6-week consultation will run for a period from **25 October 2014 until 6 December 2014**. We consider that this consultation will be of particular interest specifically to consumers, business, direct marketing companies, consumer representative organisations and service providers. The proposals will also be of interest to enforcement authorities as well as the general public.
7. Please ensure that your response reaches us by **7 December 2014 at the latest**. If you would like further copies of this consultation document, it can be found at: <https://www.gov.uk/government/consultations/nuisance-calls-consultation>.
8. You are invited to respond to the questions set out on page 20 of this proposal to lower the legal threshold for the Privacy and Electronic Communications (EC Directive) Regulations 2003 consultation document, to the following email address: [Ihtsham.hussain@culture.qsi.gov.uk](mailto:Ihtsham.hussain@culture.qsi.gov.uk)

Written responses should be sent to:

Ihtsham Hussain  
PECR 2003 Consultation  
Telecoms Policy Team  
Department for Culture, Media & Sport  
4th Floor 4E04  
100 Parliament Street  
London  
SW1A 2BQ

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<sup>1</sup> <http://www.legislation.gov.uk/uksi/2003/2426/contents/made>

9. If you require alternative formats (Braille, audio CD, etc) please contact [enquiries@culture.gsi.gov.uk](mailto:enquiries@culture.gsi.gov.uk)
10. When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.
11. A list of those consulted is attached at **Annex B**. If you have any suggestions of others who may wish to be involved in this process please contact us:

Ihtsham Hussain  
4th Floor 4E04  
100 Parliament Street  
London  
SW1A 2BQ

<https://www.gov.uk/government/organisations/department-for-culture-media-sport>

## **Freedom of information**

12. Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the Freedom of Information Act 2000 (FOIA) or the Environmental Information Regulations 2004.
13. If you want information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
14. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.
15. The Department will process your personal data in accordance with the Data Protection Act (DPA) and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

## **The Proposal**

16. One of the most powerful deterrents available to ICO against those found to be breaching the PECR for direct marketing is the ability of the ICO to issue CMPs of up to £500,000. This enables ICO to hold organisations that break the law to account and it also sends a clear signal to others that such breaches will not be tolerated. However, it is evident that the current legal threshold, which must be met before a CMP can be issued, is too high and whilst there is evidence that in many cases the calls cause **'annoyance, inconvenience or anxiety'**, this does not reach the higher legal threshold that is currently required. This is hampering ICOs' ability to regulate effectively on this issue.
17. ICO has sought to overcome this hurdle by taking a flexible interpretation. It now defines 'substantial damage or substantial distress' as a cumulative level of harm being caused. This means that even if individual calls do not cause 'substantial damage or substantial distress', ICO guidance sets out that the cumulative effect of a large number of unsolicited calls does amount to 'substantial distress'. This approach has been applied by ICO to issue recent CMPs.
18. However, this approach was not supported by the First-tier Information Rights Tribunal that in October 2013 overturned a CMP case, as it considered that the high volume of unsolicited text messages did not amount to 'substantial distress'<sup>2</sup>. This decision was subsequently upheld by the Upper Tribunal. This has left ICO in a position where in some situations it feels unable to issue CMPs, even where there has been a clear breach of the regulations and where this has caused annoyance, inconvenience or anxiety.
19. The ICO has advised that if the threshold could be lowered, or preferably removed altogether, then it would be able to protect consumers more effectively. It also noted that with reference to abandoned and silent calls<sup>3</sup>, Ofcom could issue monetary penalties if such calls caused **'annoyance, inconvenience or anxiety'**. It therefore seemed unreasonable to have a lower threshold to tackle one kind of nuisance call (ie abandoned and silent calls) and a much higher threshold for a different kind of nuisance call (ie direct marketing live calls and texts), especially if they both caused similar levels of consumer harm.
20. The ICO has therefore proposed that the legal threshold for direct marketing calls and text messages should be lowered, so that it is better empowered to act in the interest of consumers and can better utilise its substantial CMP powers against organisations that deliberately breach the regulations.

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<sup>2</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i1106/Niebel.%20Christopher%20EA.2012.0260.pdf>.

<sup>3</sup> Abandoned and silent calls are regulated by Ofcom through their persistent misuse powers, which enable Ofcom to issue a monetary penalty of up to £2 million to a person who persistently misuses a network or service if the effect or likely effect of their use is to cause another person to suffer unnecessary annoyance, inconvenience or anxiety.



21. We agree with ICO's view, as effective enforcement is a key plank of the Government's plan to tackle the scourge of nuisance calls. We are keen to make it easier for the regulator to take robust action against any organisation that acts unlawfully and believe that a lower threshold will send a strong signal to those that are currently deliberately breaking rules.
22. This consultation therefore seeks views on proposals to lower the legal threshold, at which ICO can issue a CMP against organisations contravening Regulations 19 - 24 of the PECR, which covers unsolicited direct marketing calls (live and automated) and SMS text messages as well as fax messages and electronic mail.
23. DCMS is leading this consultation as it has ownership of the PECR, whilst the ICO has enforcement responsibility and the Ministry of Justice (MoJ) has policy responsibility for Data Protection.

## **Background**

### **What are nuisance calls?**

24. The term "nuisance calls" can be applied to a range of different types of unsolicited calls<sup>4</sup>. However, for most consumers it primarily relates to calls made by telemarketing organisations, which seek to sell a product or a service. For many consumers such calls can be an annoyance or irritation, but for some, particularly the vulnerable and elderly, they can cause real fear and anxiety.
25. Consumers not wishing to receive unsolicited marketing calls can sign up with the Telephone Preference Service (TPS), which is the UK's national 'do not call' register and once a number is TPS registered, it should not be called without the consumer having notified the caller that they do not object to such calls being made to them by that caller. However, sometimes such notification of no objection can be provided inadvertently when, for example, making on-line purchases or completing questionnaires. Organisations making marketing calls are required to screen their call lists against the TPS register, but there is some evidence that this is not always being done.

### **How are marketing calls and texts regulated?**

26. Under the PECR 2003, consumers are protected from "live" unsolicited direct marketing calls, if their telephone number has been registered with the TPS for at least 28 days, or they have previously notified the caller that they do not

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<sup>4</sup> Nuisance calls can include for example unsolicited marketing live and automated recorded message calls, abandoned and silent calls, calls from a charity or political party, market research calls, abusive and threatening calls, scam calls, compensation calls for personal injury and mis-sold PPI and debt collection calls.

wish to receive any further calls to their number. There are currently more than 20 million numbers registered with the TPS<sup>5</sup>, which is a free service.

27. For “automated” recorded message calls the subscriber must have notified the caller that he/she consents to the call. In relation to SMS text messages the caller must secure prior consent of the consumer (irrespective of whether or not the number is TPS registered), unless it can be proved that there is an existing relationship between the parties.

28. This is set out in further detail in ICO’s guidance for consumers that can be viewed at:

[http://ico.org.uk/for\\_organisations/privacy\\_and\\_electronic\\_communications/~/\\_media/documents/library/Privacy\\_and\\_electronic/Practical\\_application/direct-marketing-guidance.pdf](http://ico.org.uk/for_organisations/privacy_and_electronic_communications/~/_media/documents/library/Privacy_and_electronic/Practical_application/direct-marketing-guidance.pdf)

### **Evidence of the problem:**

29. Where a consumer feels that they have received an unwanted marketing call, they can register their concern with ICO by phone or online<sup>6</sup>. The ICO has a dedicated team that considers complaints, investigates breaches of the PECR and can take formal enforcement action against those organisations or individuals, who breach the PECR. If the Information Commissioner is satisfied that there has been a serious contravention of PECR, that was of a kind likely to have caused substantial damage or substantial distress, and the contravention was deliberate or the person knew that there was a risk that the contravention would occur, but failed to take reasonable steps to prevent it, then it can issue a CMP of up to £500,000.

30. In recent years complaint numbers to the ICO about nuisance calls and text messages have increased substantially, which can be attributed in part to ICO enabling consumers since the end of March 2012, to more easily register complaints online via their website reporting tool:

Financial year 2011-2012:	7,526
Financial year 2012-2013:	160,561
Financial year 2013-2014	161,720

31. Additionally, Ofcom research published on 23 May of this year, indicated that 84% of consumers that participated in their study received at least one nuisance call on their landline telephone number in a four week period. The most prevalent types of nuisance calls were live marketing calls 38%, silent calls 37% and recorded sales calls 12%. The research also found that calls about Payment Protection Insurance (PPI) claims made up 13% of all received nuisance calls, where participants were able to provide a description of the product or service<sup>7</sup>. This issue has also been the subject of a Which?

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<sup>5</sup> Ofcom is currently reviewing the effectiveness of the TPS, the findings of their research is expected be announced this summer and Government will consider their conclusions.

<sup>6</sup> <https://www.snapsurveys.com/swf/surveylogin.asp?k=138312369469>

<sup>7</sup> <http://stakeholders.ofcom.org.uk/market-data-research/other/telecoms-research/nuisance-calls-research>

campaign that has so far received more than 126,295 signatures and the subject of several parliamentary debates. All of these have further re-enforced our belief and highlighted the fact that the current regulatory framework is not working as effectively as it should be.

### **Enforcing the Regulations:**

32. Under the PECR the ICO can take action to change the behaviour of organisations and individuals who breach PECR, which includes non-criminal enforcement and audit and the power to serve a CMP notice. The options are not mutually exclusive and the ICO can also use them in combination, where felt to be required by the circumstances and the main options are:

- Serve information notices requiring organisations to provide the ICO with specified information within a certain time period. Failure to comply with a notice is a criminal offence;
- Serve third party information notices requiring a communications provider to supply the ICO with information specified in the notice about another person's use of electronic communications, where this is necessary to investigate compliance of any person with PECR. Failure to comply with a notice is a criminal offence;
- Issue undertakings, which is a regulatory tool that ICO has developed, rather than being a formal part of their statutory powers, committing an organisation to a particular course of action in order to improve its compliance;
- Serve enforcement notices where there has been a breach, requiring organisations to take (or refrain from taking) specified steps in order to ensure they comply with the law. Failure to comply with a notice is a criminal offence;
- Apply to the court for an Enforcement Order under s. 213 of the Enterprise Act 2002, for an order requiring a person to cease conducting harm to consumers;
- Conduct a compulsory audit of the compliance of a communications service provider in accordance with the personal data breach requirements of PECR;
- Issue CMP notices, requiring organisations to pay up to £500,000 for serious breaches of PECR occurring on or after 26 May 2011. ICO does not retain the CMP, which is collected from the organisation and paid into Her Majesty's Treasury (HMT) consolidated fund;
- Issue fixed CMP notices requiring a communications service provider to pay a fixed monetary penalty of £1,000 for failing to comply with the personal data breach notification requirements of PECR. ICO does not

retain the CMP, which is collected from the organisation and paid into Her Majesty's Treasury (HMT) consolidated fund;

- Apply to the court for a search warrant (entry, inspection and seizure) where there are reasonable grounds for suspecting that PECR has been contravened.

33. The ICO's approach to regulation follows good regulatory principles. It takes a proportionate approach using strong enforcement action coupled with effective education and engagement with organisations breaching the regulations.

34. In using its powers noted above ICO has focused its efforts on the following aspects of compliance and enforcement work:

- **Providing clear guidance and advice:** ICO's website provides guidance and advisory documents for organisations undertaking direct marketing. In December 2013, ICO revised and improved its guidance<sup>8</sup>

Also, a new reporting tool was developed by the ICO in 2012, which has made it easier and quicker for consumers to report their complaints to the ICO online, thereby giving regulators better intelligence for potential action<sup>9</sup>.

- **Joint working with other regulators and other organisations:** In March 2013, the ICO and Ofcom sent a joint letter to around 170 organisations within the call centre industry, which emphasised the importance of complying with the measures in place, including the PECR to protect consumers from harm.

35. The ICO also plays a key central role in co-ordinating a strategic approach to tackle nuisance calls involving other regulators and stakeholders and initiated the multi-agency operation LINDEN. This is part of the operation to develop a strategic threat assessment on lead generation and unwanted marketing communications. This has enabled the ICO to identify key intervention points for regulators and stakeholders and a joint delivery plan has been compiled, to shape and complete this activity.

ICO also works closely with Ofcom and launched a joint action plan on 31 July 2013, which was updated on 3 March of this year that focused on nuisance calls and remains committed to working together to reduce consumer harm. This also refined the priority areas, as being ongoing targeted enforcement action, improving the tracing of calls, including assessing technical measures, working with Government, other regulators, industry and consumer groups to

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<sup>8</sup> Guidance can be viewed at:

[http://ico.org.uk/for\\_organisations/privacy\\_and\\_electronic\\_communications/~/\\_media/documents/library/Privacy\\_and\\_electronic/Practical\\_application/direct-marketing-guidance.pdf](http://ico.org.uk/for_organisations/privacy_and_electronic_communications/~/_media/documents/library/Privacy_and_electronic/Practical_application/direct-marketing-guidance.pdf).

<sup>9</sup> ICO tool for reporting nuisance marketing text messages and telephone calls  
[http://www.ico.org.uk/for\\_the\\_public/topic\\_specific\\_guides/marketing](http://www.ico.org.uk/for_the_public/topic_specific_guides/marketing)

ensure effective co-ordinated action and improving consumer information. Additionally, ICO is a member of the Which? Taskforce that is considering lead generation and consent issues, which will report to Government later this year.

- **Engaging with companies to improve compliance:** The ICO takes informal enforcement action, as a result of which organisations about whom they have had concerns are brought into compliance more quickly, without having to pursue formal action. During 2013-2014, ICO engaged with over 20 organisations that were responsible for making nuisance calls holding them to account through compliance meetings and then monitoring their performance over a period of 3 months. As a result, the ICO recorded substantial reductions in complaints for some organisations. For example, from Quarter 1 to Quarter 4 in 2012-2013, the ICO recorded a reduction in marketing complaints against The Claims Guys Ltd of 77%, We Fight Any Claim Ltd of 52%, British Gas of 59%, Scottish Power of 30% and Talk Talk of 75%.
- **Naming and shaming companies breaking the law:** ICO believes that by letting people know which companies are breaking the law will help consumers take action and will also send a signal that it will take action against companies found to be breaking the law.

36. The ICO's website provides comprehensive details of all the enforcement actions that they have taken to date, including action being taken on current areas of concern<sup>10</sup>.

37. **However, despite the ICO being successful in reducing the volume of complaints relating to some organisations, action of this kind by itself is insufficient to ensure that organisations comply with the PECR. Therefore, the ICO believes that there is a strong and pressing need for it to be able to issue CMPs without needing to demonstrate "substantial damage or substantial distress" in order that it can regulate more effectively.**

### The Role of CMPs

39. CMPs have a beneficial impact for consumers and plays a key role in reducing the volume of non-compliant behaviour. For example, after ICO issued a monetary penalty of £440,000 in November 2012 (in relation to two individuals sending PPI spam text messages – the penalty was later overturned on appeal), the number of unsolicited spam SMS text messages being sent significantly reduced. According to Cloudmark<sup>11</sup>, PPI spam text messages sent as a percentage of all SMS spam in October 2012 was 57%, which reduced to 47% in November 2012, when the ICO issued their CMP.

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<sup>10</sup> <http://ico.org.uk/enforcement/action>.

<sup>11</sup> who run the GSMA's 7726 spam text short code reporting service

40. Additionally, recent research by ICO about CMPs (not specifically those focused on the PECR), which was published on 27 July 2014, provides evidence that CMPs are considered across sectors to have a wider impact in helping to improve compliance amongst organisations.
41. The Department and the ICO are both of the view that issuing CMPs to organisations, who deliberately breach the PECR makes a significant difference, as it acts as a stronger deterrent to potential offenders and sends out a clear warning to those who may be thinking about ignoring the regulations, that their actions will not be tolerated and they will be pursued by the ICO, unless compliance with the PECR is ensured.
42. To date, ICO has issued six CMPs totalling £675,000 to organisations for making unsolicited marketing calls and also sending unsolicited SMS text messages<sup>12</sup>. ICO is also currently investigating 35 companies for breaching the PECR, with a view to taking enforcement action in the near future. A summary of the organisations that have been penalised to date is provided at **Annex C**.
43. However, the overturning of one of its large CMPs has made ICO reluctant to issue further penalties in relation to SPAM texts for fear that they will not be seen as meeting the legal threshold requirements. As a result ICO currently only investigates a small proportion of cases and targets its resources on those that could result in larger penalties, as they would act as a stronger deterrent as well.

## **How a lower threshold would better protect consumers**

44. ICO is of the view that there should be a greater breadth of penalties issued by them, not just focused upon cases that could be regarded as 'large', so that it is clearer that any deliberate and significant breach of PECR could result in a CMP. For example, in a case where there is evidence of "annoyance or nuisance", a lower threshold would provide ICO with the option of imposing a smaller CMP.
45. If the lower threshold had applied during the period 1 April 2012 to 31 November 2012, then according to ICO there would have been approximately 50 more organisations that could be considered for enforcement action, this would include 'repeat offenders' who featured in the top 20 of ICO's list of persistent offenders every month. This would also potentially catch organisations that may be on the whole compliant, but have fallen foul of either failing to conduct sufficient due diligence and have bought bad data, whereby numbers are wrongly assumed to have been checked against TPS register, or where the consent secured for making such calls is questionable, or where there is just a breakdown in relationships with the company's

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<sup>12</sup> <http://ico.org.uk/enforcement/action/calls>

customers<sup>13</sup>. The ICO would continue to have discretion to focus upon individuals and organisations that posed the greatest regulatory risk to consumers, if the legal threshold was lowered.

46. As things stand, ICO is concerned that the Information Rights Tribunal is providing very little latitude in its interpretation of the legal threshold requirements in respect of the PECR, and as a result some cases have been overturned on appeal.
47. We believe that a lower threshold will not only allow ICO to continue to concentrate its efforts on the 'large' cases but also it would enable ICO to issue a wider range of smaller penalties. Such a combined approach is likely to have a more powerful effect on unsolicited communications that are breaking the law.<sup>14</sup>
48. We have been assured by ICO that it is ready and equipped to investigate and progress a significant number of additional cases with a view to taking greater enforcement action including issuing more CMPs. The work involved would be similar as for current CMPs, but it may be quicker to reach a recommendation for enforcement action, as the threshold would be lower. Whilst, each individual case may take less time, there would be more cases for the ICO to deal with.
49. It is important to stress that CMPs would not be imposed in all cases and any CMP imposed would still be based on good regulatory practice in terms of evidence and proportionality in relation to the regulatory outcomes sought.

### Changing the legislation

50. The provisions in PECR implement certain requirements of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (amended by Directives 2006/24/EC and 2009/136/EC). Article 15a of Directive 2002/58/EC (as amended), provides that Member States must ensure that the penalties provided for in relation to infringements of the national provisions adopted pursuant to the Directive must be **effective, proportionate and dissuasive**.
51. Lowering the threshold will require an amendment to be made to the PECR, which will be undertaken through secondary legislation.

### Impact of the proposal

52. This proposal will not impact upon any existing person who complies with the legal requirements of the PECR. It will only impact upon those that breach the regulations and do not comply with the PECR. Consequently, the impact upon business is estimated to be cost neutral or a net benefit to businesses, which

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<sup>13</sup> includes numbers that have not been checked against the TPS register or where customers have not been contacted to gain permission to call them in the future.

<sup>14</sup> See the current ICO Regulatory Action Policy published on the ICO website

[http://www.ico.org.uk/~media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/DATA\\_PROTECTION\\_REGULATORY\\_ACTION\\_POLICY.ashx](http://www.ico.org.uk/~media/documents/library/Data_Protection/Detailed_specialist_guides/DATA_PROTECTION_REGULATORY_ACTION_POLICY.ashx)



achieves compliance. Potential benefits to business that achieve compliance include reduced consumer complaints and improved service, which may help to improve consumer loyalty and result in a more sustainable business model. Also, there could be a potential reduction in operating costs for communications service providers by handling fewer complaints from consumers in customer service.

53. In terms of enforcement potential benefits, this would include a reduction in the number of cases being pursued by the ICO in the longer term due a deterrent effect and thus achieving cost savings.
54. More robust enforcement and CMPs will also mean that organisations acting unlawfully will be unable to gain an unfair advantage over more responsible organisations that refrain from calling TPS registered numbers and conduct proper checks.
55. ICO has discussed this proposal with a wide range of its key stakeholders including Ofcom, the Direct Marketing Association (DMA), Which? and other consumer group representatives, who all have expressed support for the need to lower the legal threshold and for more enforcement action to be taken. In contrast, we are unaware of any strong counter arguments from industry, but to enable potential concerns to be considered a Regulatory Triage Assessment (RTA) has been undertaken. This is provided with this consultation document to ensure that the impact upon industry is fully considered.



## Options for reform

		Option		
		1. Do nothing	2. Lower threshold to 'annoyance inconvenience or anxiety'	3. Remove the existing legal threshold
<b>CMP Criteria</b>	<b>To issue CMP ICO needs to be satisfied that there had been a serious contravention and:</b>	<ul style="list-style-type: none"> <li>the contravention was of a kind likely to cause 'substantial damage' or 'substantial distress'; and</li> <li>the contravention was deliberate or the person knew or ought to have known that there was a risk that the contravention would occur (and that it would be of a kind likely to cause substantial damage or substantial distress) but failed to take reasonable steps to prevent it.</li> </ul>	<ul style="list-style-type: none"> <li>the contravention was of a kind likely to cause annoyance, inconvenience or anxiety; and</li> <li>the contravention was deliberate or the person knew or ought to have known that there was a risk that the contravention would occur (and that it would be of a kind likely to cause annoyance, inconvenience or anxiety) but failed to take reasonable steps to prevent it.</li> </ul>	<ul style="list-style-type: none"> <li>that this had been deliberate, or</li> <li>the person knew that there was a risk that the contravention would occur, but failed to take reasonable steps to prevent the contravention.</li> </ul>

Table 1: Summary of options for reform

### **1. Do nothing**

This will mean that there is no need to make a change to the PECR. The ICO can already take enforcement action under the PECR to tackle nuisance calls. This option would imply that the current system is working effectively and enables the ICO to take sufficient enforcement action, including issuing CMPs, when felt to be appropriate.

ICO will continue to target organisations based on the present legal threshold of needing to prove “substantial damage or substantial distress” and some organisations that are acting unlawfully will avoid being penalised by ICO for misconduct.

**The Government believes that this will not lead to any significant improvement in consumer protection, as organisations will not face necessary robust enforcement action.**

### **2. Lower the legal threshold to “annoyance, inconvenience or anxiety”**

This will mean that ICO could issue a CMP, if unsolicited marketing calls /texts caused ‘annoyance, inconvenience or anxiety’ rather than ‘substantial damage or substantial distress’. The Commissioner would still need to be satisfied that there had been a serious contravention and that this had been deliberate or the person knew that there was a risk that the contravention (of a kind likely to cause annoyance, inconvenience or anxiety) would occur, but failed to take reasonable steps to prevent the contravention.

This will help ensure that the ICO’s actions are more effective against organisations that deliberately breach the PECR<sup>15</sup>.

The benefit will be that it will enable the ICO to impose CMPs of up to £500,000 to more organisations contravening the PECR, especially those who currently escape being punished, due to the need to prove substantial damage or substantial distress.

The drawback of this option could include an expectation that CMPs would be issued by the ICO in many more cases than its resources permit. Consequently, some cases may be dropped with priority given to where the most number of complaints were received.

### **3. Remove the existing legal threshold of “substantial damage and distress” (this is the preferred option of both ICO and DCMS)**

There would be no need to prove “substantial damage and distress”, or any other threshold such as ‘annoyance, inconvenience or anxiety’. The Commissioner would still need to be satisfied that there had been a serious contravention and that this had been deliberate or the person knew that there was a risk that the contravention would occur, but failed to take reasonable steps to prevent the contravention.

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<sup>15</sup> It should be noted that we have excluded “nuisance” from the definition as this would not add significantly or alter to what would be covered by “annoyance, inconvenience or anxiety.”

This would not only simplify the regulations, but also provide the greatest scope for ICO to issue CMPs as part of its enforcement work.

As with Option 2 the benefit of this option would be that it will enable the ICO to impose CMPs of up to £500,000 to organisations contravening the PECR, which includes those that currently escape being punished, where for example there may be insufficient complaint numbers registered with the ICO about their conduct.

Also, as with Option 2 the drawback of this option could include an expectation that CMPs would be issued by the ICO in many more cases than its resources permit.

**The Department's initial preference is for this option, as it would make it easier for the ICO to take enforcement action against organisations who contravene the requirements of the PECR (regulations 19-24).**

**However, we would stress that our final decision will be based upon responses that are received to this consultation.**

## **Summary of Consultation Questions**

**This consultation document seeks views on the following three options and therefore you are invited to consider these when responding to this consultation:**

**1. Do nothing** - There is no need to make a change to the PECR, as the ICO can already take enforcement action under the existing PECR rules.

**2. Lower the legal threshold to “annoyance, inconvenience or anxiety”.** In addition, the Commissioner would still need to be satisfied that there had been a serious contravention and that this had been deliberate or the person knew that there was a risk that the contravention (of a kind likely to cause annoyance, inconvenience or anxiety) would occur, but failed to take reasonable steps to prevent the contravention.

**3. Remove the existing legal threshold of “substantial damage and distress”**  
The Commissioner would still need to be satisfied that there had been a serious contravention and that this had been deliberate or the person knew that there was a risk that the contravention would occur, but failed to take reasonable steps to prevent the contravention.

### **Questions**

- 1. Question: Do you agree that lowering the legal threshold to remove the need to prove ‘substantial damage’ or substantial distress’, will help improve compliance with PECR?**
- 2. Do you agree with the Government’s preferred option (option 3) of removing the need to prove substantial damage or substantial distress and allowing ICO the greatest scope to consider which companies can be issued with a CMP? Please provide your reasoning.**
- 3. Are there any other costs or benefits associated with any of these options that you feel need to be considered before any final decision is taken?**

## What will happen next?

A summary of responses, including the next steps, will be published on the Departments website at: <https://www.gov.uk/government/organisations/department-for-culture-media-sport>. Paper copies will be available if required.

## **Impact of the Proposal**

### *Policy rationale and intended effects*

The rationale for this policy intervention is to lower the legal threshold, which will enable the ICO to more easily issue CMPs to organisations that breach the PECR, including those that currently evade having action taken against them as ICO may not have sufficient evidence to prove that such actions caused substantial damage or substantial distress.

The proposed policy options to lower the legal threshold for the ICO, are likely to lead to desirable policy outcomes such as greater consumer protection, and also ensuring that there is a more level playing field for organisations, with no one being able to gain an unfair commercial advantage.

An initial assessment of impact is set out below. This assessment has been submitted to the Regulatory Policy Committee (RPC) for independent scrutiny through “triage”.

### *Key benefits*

The proposal will only impact on non-compliant businesses that are in breach of the legal requirements of the PECR and would be more likely to be subject to CMPs and less likely to be able to overturn them on appeal, giving them a more effective incentive to become compliant. Compliant businesses will not be subject to CMPs, there will be no additional costs imposed upon them and no need for them to change their current behaviour. Therefore, the impact upon business of this policy proposal is estimated to be zero net cost for compliant businesses.

Potential benefits to consumers may include reduced consumer detriment by reducing the number of unsolicited marketing calls and texts. This would include, for example, a possible reduction in cost to consumers for calling back to query a call and also seeking out or listening to an organisation’s information message. There also may be less incentive to purchase call blocking equipment to avoid receiving calls and the proposal may also benefit vulnerable consumers such as the elderly, who may be distressed as a result of receiving unsolicited calls.

Business that achieve compliance may have potential benefits including, for example, reduced consumer complaints and, which may help to improve consumer loyalty and a more sustainable business model, which is compliant with the PECR. Also, there could be a possible reduction in operating costs for service providers, including for example by handling fewer complaints from consumers in customer service. In terms of enforcement potential benefits, this may include a reduction in the number of cases being pursued by the ICO in the longer term as thus achieving savings.

### *Policy risks and mitigating steps*

There are no associated policy risks for this measure.

## **Conclusion**

The proposed measure of lowering the legal threshold will enable the ICO to take more enforcement action against organisations, which breach the PECR requirements of refraining from making and sending unsolicited communications, including calls and texts. Also, the measure will enable ICO to tackle some of those organisations that have to date managed to avoid action being taken against them. Therefore, the Department is of the view that this measure is warranted, particularly in view of recent complaint numbers and would be welcomed by for example interested MP's, consumer group representatives, industry and regulators.

## **Annex A – Consultation Principles**

This consultation is being conducted in line with the Government's key consultation principles which are listed below. Further information is available on the Better Regulation Executive website at <https://update.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>

If you have any comments about the consultation process please contact:

Consultation Co-ordinator  
Department for Culture, Media and Sport  
100 Parliament Street  
London SW1A  
Email [consultation@dcms.gsi.gov.uk](mailto:consultation@dcms.gsi.gov.uk)

### **Consultation Principles**

- departments will follow a range of timescales rather than defaulting to a 12-week period, particularly where extensive engagement has occurred before;
- departments will need to give more thought to how they engage with and consult with those who are affected;
- consultation should be 'digital by default', but other forms should be used where these are needed to reach the groups affected by a policy; and
- the principles of the Compact between government and the voluntary and community sector will continue to be respected.

## **Annex B – Organisations being consulted**

Information Commissioner's Office

Ofcom

PhonepayPlus

Direct Marketing Association

Which?

Citizen's Advice

British Telecom

Virgin Media

TalkTalk

FSB

CBI

EE

GSMA

Stepchange

Credit Services Association

British Bankers Association

KCOM

UK Competitive Telecommunications Association (UKCTA)

Cable & Wireless

Consumer Futures

action4

Ombudsman Service Communications

CISAS

LACORS

Telecoms Users' Fraud Forum

Fair Telecoms Campaign

Department for Business Innovation & Skills

Ministry of Justice

Vodafone

Three

Hutchison 3G

Telefonica



APPG nuisance calls

CMS Select Committee

Interested parliamentarians

## **Annex C – Civil Monetary Penalties issued by the ICO (since January 2012)**

### **Monetary penalties issued by ICO since January 2012 (not under appeal)**

<b><u>Date</u></b>	<b><u>Company</u></b>	<b><u>Issue</u></b>	<b><u>Penalty</u></b>
16 December 2013	First Financial (UK) Ltd	Sent thousands of unsolicited SMS messages relating to payday loans	£175,000
8 July 2013	Tameside Energy Services Ltd (Manchester)	Energy efficiency improvements company. Failed to carry out adequate checks on TPS registration	£45,000
18 June 2013	Nationwide Energy Services  We Claim You Gain	Both companies part of Save Britain Ltd based in Swansea.  Failed to make adequate checks whether recipients were TPS registered.	£125,000  £100,000
28 Nov 2012	Tetrus Telecom Manchester (McNeish)	Sent millions unsolicited SMS text messages	£140,000
18 Mar 2012	DM Bedroom Designs Ltd Glasgow	Manufactures, fitment and sellers of kitchens, bathrooms and bedrooms. Made unsolicited calls to TPS registered consumers,	£90,000