

CONSULTATION BY THE DEPARTMENT OF TRADE & INDUSTRY ON A DRAFT ORDER RAISING THE MAXIMUM PENALTY FOR PERSISTENT MISUSE OF ELECTRONIC COMMUNICATIONS NETWORKS OR ELECTRONIC COMMUNICATIONS SERVICES TO TACKLE SILENT CALLS

GOVERNMENT RESPONSE

Background

1. Ofcom requested the DTI to consider raising the maximum penalty from £5,000 to £50,000, which could be levied by them on those that persistently misuse electronic communications networks and services, in view of mounting public and parliamentary concern about silent calls. It was felt that the current maximum penalty was not sufficient for the level of consumer harm and worry that silent calls caused and that it was not a real sanction or deterrent. Ofcom proposed that the maximum penalty should be increased to £50,000. The maximum penalty is set out in the Communications Act 2003 ("the Act"), which contains an Order making power, which would enable DTI to implement this proposal. The Act provides powers to Ofcom to take action against persons who persistently misuse networks or services in a way that causes unnecessary annoyance, inconvenience or anxiety to others, but which falls short of a criminal offence, and section 130(4) of the Act provides for a maximum penalty of £5,000.
2. The DTI launched a consultation document on 31 October 2005 with a press release, which was e-mailed to 22 organisations and made available on the Department's website. On the same day in a separate independent initiative Ofcom announced the results of its investigation into seven companies, whom they suspected were making silent calls and confirmed that it was taking enforcement action against 4 of the companies to ensure they desisted from making excessive silent calls. In addition, Ofcom announced that it was amending its policy on persistent misuse and their revised policy, amongst other things, set out a number of requirements for companies using automatic calling systems including providing a recorded message and ensuring that Call Line Identification (CLI) be provided. The Ofcom consultation on this closed on 9 January 2006 and Ofcom will announce the results of its consultation shortly.

Analysis of Responses – Raising the Maximum Penalty

3. The DTI consultation on this proposal closed on 24 January 2006 and the Department received 6 responses from telecom service providers,

a consumer body, a trade association and individual consumers. There was overwhelming support for raising the maximum penalty.

4. Respondents generally welcomed our proposal, but some felt it would have no impact unless Ofcom takes enforcement action against companies, which are persistently making nuisance silent calls. We believe that it will have an impact, as we understand that Ofcom will be taking appropriate enforcement action and that Ofcom will monitor and evaluate on a regular basis how the increased penalty is working and will assess whether consumers are benefiting. We expect that Ofcom will consider all cases on a case-by-case basis. The forthcoming response to their consultation, which closed on 9 January 2006, will provide further details as to how they will proceed, but we expect them to take a firm, but flexible approach to their enhanced penalty powers.
5. One respondent welcomed our proposal but felt that the maximum penalty should be increased to £100,000 and penalties issued according to the seriousness of the offence. The respondent felt that the proposed increase to £50,000 was much lower than the existing ICSTIS maximum penalty of £250,000 for those that breach the ICSTIS Code on premium rate services and considered that an increase should be made that gives more parity with the fines that ICSTIS can make - in its view, a maximum penalty of £100,000 would reflect this. The maximum penalty of £50,000 was proposed because under the Act the scale of penalties is most severe where there is a major abuse of the market or incitement to criminal action, followed by those actions, which defraud or grossly mislead the public. At the lower end are penalties against actions which are harmful and offensive to the public but which do not involve direct financial harm. Under the broadcasting provisions of the Act, typical fines for serious harm and offence, which are compounded by willful and reckless disregard of regulation are of the order of £50,000. In addition, Ofcom's substantive initiatives that were also proposed on 31 October 2005 will strengthen further the regulatory regime against nuisance silent calls, the results of that consultation will be announced shortly.
6. A number of respondents agreed with our proposal, but one respondent felt that so far the marketing industry had been reluctant to seriously address this issue and existing penalties were too low to constitute an appropriate deterrent. The respondent believed that it will be necessary to monitor the effectiveness of the increased maximum penalty and it may be necessary to increase the penalty again in the future. Ofcom will monitor and evaluate how the increased maximum penalty is working in practice and if it is felt necessary we may consider increasing it further.

7. Another respondent felt that the maximum penalty should not be increased until Ofcom had declared and demonstrated an intention to use its existing powers, which it had not done so to date. Ofcom feels that the current maximum penalty of £5,000 is not sufficient for the level of consumer harm and anxiety that silent calls caused and that it is not a real sanction or deterrent. We accept and support that view. Once the increased penalty is in place Ofcom will consider all cases on a case-by-case basis taking a firm, but flexible approach.

Conclusion

The overall support for this proposal has led us to conclude that we should now proceed with the Order to implement the increase in the maximum penalty to £50,000.

Guidance for consumers and business

Maximum Penalty:

The increase in the maximum penalty from £5,000 to £50,000 will not have any impact on consumers or business, which do not persistently misuse electronic communications networks and services. Only those that engage in persistent misuse or contravene a requirement of an enforcement notification given in respect of the notified misuse will be affected by the penalty increase.

On 1 March 2006, Ofcom, the independent communications regulator, announced new rules for the use of automatic calling systems, which are designed to deliver additional protection from silent calls for consumers.

Further detailed information can be obtained from:

<http://www.ofcom.org.uk/media/news/2006>