Sorting through the telemarketing chaos left by *ACA Int'l v. FCC*

The Federal Communications Commission ('FCC') announced, on 14 May 2018, that it is seeking comments on its interpretation of key definitions, such as an automatic telephone dialling system ('ATDS'), under the Telephone Consumer Protection Act of 1991 ('TCPA'), in light of the U.S. Court of Appeals for the District of Columbia Circuit ('the Court') decision in *ACA International, et al. v. FCC and United States of America* ('*ACA Int'l*'). Brian I. Hays, Ryan M. Holz, Douglas R. Sargent, Partners at Locke Lord LLP, explain how these, and other recent developments, may have a significant impact on the scope of the TCPA going forward.

Introduction

When the Court earlier this year rejected the FCC's broad definition of an ATDS in *ACA Int'l*, corporate defendants and telemarketers cheered the ruling. But those cheers have become significantly more muted since, as courts have reached different conclusions about how the decision impacts prior FCC rulings. In particular, in response to *ACA Int'l*, the FCC has initiated the process for developing a new definition of an ATDS. Adding to the uncertainty regarding what constitutes an ATDS, both the U.S. House of Representatives and the U.S. Senate have now introduced legislation that would expand the statutory definition of an ATDS nearly as far as the FCC's prior definition. While the proposed legislation does provide some protection for entities that rely on high volume telephone contacts, it could squash any hope that *ACA Int'l* will represent a substantial turning point in TCPA litigation.

Background

In 1991, the U.S. Congress ('Congress') passed the TCPA, which prohibited calls made to cell phones using an ATDS without consent from the consumer. The TCPA defined an ATDS as equipment that had the capacity to store, produce, and call numbers using a random or sequential number generator. The old random and sequential diallers that the TCPA was designed to combat virtually ceased to exist. In their place, companies began using new software which used lists of numbers, rather than randomly or sequentially generated numbers, to maximise consumer contacts.

In 2015, the FCC responded to this change in technology by declaring, over the objection of now FCC Chairman Ajit Pai, that an ATDS was 'any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists.' This put new dialling software, including predictive diallers, squarely within the definition of an ATDS.

Earlier this year, the Court issued its long-awaited decision in *ACA Int'l* , in which it concluded that the FCC overstepped its authority when expanding the definition of an ATDS. The Court did not, however, provide much guidance as to how an ATDS should be defined.

Recent developments

Since *ACA Int'l*, courts throughout the country have been grappling with how to proceed. A District Court in Arizona found that *ACA Int'l* abolished all prior FCC interpretations of an ATDS, leaving the statutory language as the sole interpretative authority. But District Courts in Florida and Alabama disagreed, finding the Court simply nullified the FCC's 2015 interpretation of an ATDS, but not the FCC's earlier interpretations.

In response to these recent developments, the FCC issued, on 17 May 2018, a notice seeking comments as to the appropriate definition of an ATDS. In particular, the FCC is considering whether it should adopt a narrow definition of an ATDS that would leave the vast majority of dialling systems in use today outside the protections of the TCPA or keep a broad definition of an ATDS but limit TCPA violations to only those calls that actually use the automatic dialling feature. This would allow companies to use a one dialler system to autodial consumers for whom the company has consent and then flip a switch to use the manual, click-to-dial feature for consumers who have not consented to receive autodialled calls.

Adding to the uncertainty of what type of equipment is covered by the TCPA, Democrats in Congress have introduced the Stopping Bad Robocalls Act (S. 3078) ('the Bill'). The Bill would expand the definition of an ATDS to

Since *ACA Int'l*, courts throughout the country have been grappling with how to proceed.

Image: Anton Eine / EyeEm / EyeEm / Getty Images

Brian I. Hays Partner
bhays@lockelord.com

Ryan M. Holz Partner
rholz@lockelord.com

Douglas R. Sargent Partner
dsargent@lockelord.com

Locke Lord LLP, Chicago

specifically include equipment that makes a series of calls to stored telephone numbers, including telephone numbers stored on a list. The Bill would also declare that a system is an ATDS if 'no additional human intervention is required' to launch the phone calls.

The Bill is a mixed bag for companies and telemarketers. On the one hand, by deeming a system that makes calls from numbers on a list to be an ATDS, such as a predictive dialling system that is widely utilised today, Congress would be expanding the statutory definition of an ATDS nearly as far as the FCC had in 2015. On the other hand, by exempting calls that require human intervention, such as 'click-to-dial' or 'preview mode,' Congress would be recognising and correcting a key flaw in the FCC's 2015 interpretation, that a system with the capacity to be an autodialler is always used as an autodialler. At the very least, such a definition would remove the uncertainty that has plagued TCPA litigation both before and after *ACA Int'l*.

It is not yet clear how much support the Bill has in Congress. But given that the Bill could have a significant impact on the scope of the TCPA going forward, its progress in Congress is likely to be tracked closely by interested parties.

EU and Japan adequacy agreement "signals a new era"

The European Commissioner for Justice, Consumers and Gender Equality, Věra Jourová, and the Commissioner of the Personal Information Protection Commission of Japan, Haruhi Kumazawa, issued, on 17 July 2018, a joint statement on the conclusion of talks on an agreement to establish an adequacy decision for personal data transfers between the EU and Japan ('the Agreement'), along with a Q&A on the same ('the Q&A').

Eduardo Ustaran, Partner at Hogan Lovells International LLP highlighted, "This will be the EU's first adequacy decision since the coming into effect of the General Data Protection Regulation (Regulation (EU) 2016/679) ('GDPR'). For this reason, the European Commission ('the Commission') needs to follow the criteria set out in Article 45, so it is very helpful that this is happening so soon after the GDPR is in place, as other jurisdictions will be able to gauge what is expected. [...] The fact that this will also be a mutual recognition of frameworks signals a new era for global privacy. Japanese law is by no means identical to EU law, but this shows that legal diversity is not in conflict with the protection of data across borders and cultures. Let's hope that other countries take note and that the EU is keen to pursue this spirit of collaboration on a global scale."

According to the Q&A, Japan, like the EU, has recently modernised its data protection legislation, however, Japan is still expected to harmonise certain existing differences such as the expansion of the definition of sensitive data and the establishment of a system which would be supervised by the Personal Information Protection Commission ('PPC') and would be responsible for handling and resolving complaints from Europeans.

Yumi Watanabe, Counsel at Baker & McKenzie Tokyo, Gaikokuho Joint Enterprise, told DataGuidance, "Whilst restrictions on cross-border transfers of personal data existed before the implementation of the GDPR, the Agreement will make cross-border transfers of personal data run more smoothly. I believe that a number of Japanese companies anticipated the Agreement, [however,] many companies are still struggling to comply with the GDPR in their personal data management [...] To bridge the gap between the GDPR and the Act on the Protection of Personal Information, the PPC intends to implement new enforceable rules, providing individuals in the EU with additional safeguards [...] which, would be binding on Japanese companies importing data from the EU."

The adequacy decision is expected to be adopted by the Commission in autumn 2018, after obtaining an opinion from the European Data Protection Board and a vote from a committee composed of representatives of the EU Member States.

Ustaran concluded, "This is also good news for the UK as it provides welcome certainty about the standards of data protection that are needed from an adequacy perspective. A mutual recognition of frameworks would also be the obvious way forward for the UK and the EU following Brexit, so this is a hopeful precedent. Much work remains to be done on this front and the UK should consider carefully how Japan has played this all along. The ultimate message is clear, when everyone is open minded and receptive, good things happen for everyone's benefit."