

IMPLEMENTATION OF THE DIRECTIVE ON PRIVACY AND ELECTRONIC COMMUNICATIONS

GOVERNMENT'S RESPONSE TO CONSULTATION

18 SEPTEMBER 2003

Background

The Directive on Privacy and Electronic Communications (Directive 2002/58/EC- the 'Privacy Directive') forms part of the new European regulatory framework for electronic communications networks and services.

It updates the current Telecoms Data Protection Directive (Directive 97/66/EC) in the light of new technologies and introduces new provisions on cookies and internet tracking devices, unsolicited commercial e-mail and SMS, value added services based on traffic and location data and subscriber directories.

The draft UK implementing regulations (the Privacy and Electronic Communications (EC Directive) Regulations) were published in March 2003, along with a consultation document seeking the views of industry and individuals on the Government's proposed approach to implementing the Directive in the UK. Further details of the consultation can be accessed at:

http://www.dti.gov.uk/industries/ecomunications/directive_on_privacy_electronic_communications_200258ec.html#consult

The consultation ran from 27 March to 19 June 2003 and elicited more than 420 responses from a wide cross-section of stakeholders, including individuals, businesses, trade and consumer representatives and regulatory authorities. Those who responded [except confidential responses] are listed at:

http://www.dti.gov.uk/industries/ecomunications/directive_on_privacy_electronic_communications_200258ec.html

Summary- Responses to Consultation

Most responses focused on the new provisions the Regulations will introduce on unsolicited commercial e-mail including SMS, cookies and subscriber directories.

On unsolicited commercial e-mail, there was widespread support for the introduction of the general opt-in rule because of the benefits to individuals, but also from businesses which saw a move to permission-based marketing as inevitable given the abuse of e-mail by spammers.

Some businesses highlighted the loss of opportunity for targeted marketing, however, and many responses pointed to the limitations on national legislation and the need to tackle the growing problem of spam on a global basis.

Many responses commented on the interpretation of the Directive's exemption for e-mail marketing in the context of an existing customer relationship, and how the Regulations should apply the rules on addresses obtained in the context of a sale and the limitation on businesses to marketing their own similar products. Most

responses supported a broad interpretation of the exemption given the safeguards included in it, but raised questions about the formulations used in the draft regulations, and many pointed to the need for further guidance on detailed compliance questions.

There were in particular concerns that the proposed requirement to ensure that customers were aware of the nature of products and services was not fully equivalent to the Directive's restriction to marketing similar products and services, creating the risk that the Regulations could be challenged for faulty transposition.

A large number of responses commented on the proposal to extend the right to register on the Telephone Preference Service (TPS) to corporate subscribers, both for and against. Supporters argued that small businesses in particular should have the right to opt out of unsolicited phone marketing because of the potential opportunity cost of wasted time and blocked phone lines. It was also felt that businesses who objected strongly enough to this form of marketing to register on the TPS would not respond positively to telephone marketing messages in any case. Opponents argued that this would unduly restrict legitimate business-to-business calls and put the case for special provisions for corporate registration if the proposal went ahead, in reflection of this. They also raised practical objections including the cost of checking contact lists against the TPS.

Responses generally supported the introduction of new rules and safeguards on cookies and similar internet tracking devices, the provision of value added services based on traffic and location data, and subscriber directories, and the approach taken to implementing them.

A significant number of responses commented on the broader enforcement issues underlying regulation in this area, and the case for alternative enforcement models, as well as powers for the Information Commissioner to require the disclosure of information about the source of unsolicited commercial communications.

Finally, many responses commented that businesses should be given as long as possible to familiarise themselves with the new Regulations before sanctions for their breach came into force.

Summary- Government Decisions and Actions

The Government has carried out a detailed analysis of the responses to consultation and has now reached decisions on all the issues raised.

A full commentary by question raised in consultation is provided below [in 'Detail'] but headline decisions and actions are as follows:

- a) Reformulation of Regulation 21(3) b to provide a restriction to marketing 'similar products and services' in line with the wording of Article 13 (2) of the Directive. Changed in response to concerns that the draft Regulation was not fully equivalent to the provision in the Directive.
- b) Removal of the right for corporate subscribers to register on the Telephone Preference Service from the September Regulations but commitment to extend this right to corporate subscribers in amending Regulations, to come into force after the re-negotiation of the TPS and FPS contracts in April 2004. Changed in response to practical concerns that the timescale for

implementation in autumn 2003 was too short for the necessary technical changes to be made to the TPS system and for safeguards to be put in place.

- c) Commitment to hold further discussions on enforcement with service providers and other key stakeholders. Made in response to calls for stronger and more immediate enforcement powers for the Regulations, as well as clearer powers for the Information Commissioner to require the disclosure of information about the source of unsolicited commercial communications.
- d) Decision to allow the full twelve-week familiarisation period before the Regulations come into force. Made in response to the weight of responses to the consultation, and the concerns raised in consultation that businesses need adequate time to adjust to the new rules. This means that the Regulations will come into force on 11 December.

Detail

Definitions of individual and corporate subscribers

1. The draft Regulations distinguished between individual and corporate subscribers in line with the distinction made in the Directive between the differing levels of protection required for natural and legal persons.
2. However, the consultation paper flagged up the fact that the difference between individual and corporate was not always clear-cut. Some business subscribers, such as sole traders, fell under the individual bracket, as did partnerships outside Scotland [apart from Limited Liability Partnerships, which count as corporate throughout the UK]. The Government therefore consulted on whether the terms individual and corporate subscribers needed re-definition.
3. A number of responses argued that the definitions of individual and corporate subscribers should be linked to the capacity in which they were being contacted. Partnerships in particular were an area of concern, since [outside Scotland] they benefited by default from protection designed for individual subscribers. Against this, however, it was also suggested that Scottish partnerships should be afforded the same rights as those elsewhere in the UK.
4. The majority of responses were in favour of retaining the draft definitions despite the anomalies, since particular care needed to be taken not to remove privacy safeguards from SMEs and sole traders.
5. The Government has considered both views carefully and on balance it is in favour of retaining the draft definitions, particularly given the objections there would be to alternatives and the limited scope for manoeuvre allowed by the Directive and by UK law. However the anomalies identified in consultation may point to further rights for corporate subscribers in the longer term.

Cookies and internet tracking devices: information provided, opportunity to refuse, types of cookies and tracking devices and subscriber/user consent.

6. The draft Regulations specified that users must be alerted to the use of cookies and other internet tracking devices on websites and be provided with clear and comprehensive information about their purpose, as well as an opportunity to refuse them. The Regulations did not prescribe how and where this information should be set out, nor did they seek to define exactly how users should be given the opportunity to refuse a cookie.
7. The draft Regulations interpreted the new transparency provisions in the Directive as applying to all cookies, regardless of the kind of data they processed [personal or otherwise]. They did not seek to define circumstances in which users should have the right to override a subscriber's consent to cookies in situations where terminals are shared [for example on workplace systems or in an internet café].
8. The vast majority of responses accepted that there was no need for the Regulations to be prescriptive about the sort of information and switch-off provided to users. They agreed that a clearly signposted privacy or cookies statement on the online service provider's website would suffice. The Government has therefore retained the proposed wording.
9. A substantial number of responses argued in favour of limiting the new requirements to those cookies used to process personal data only, since this type carried far greater security and privacy implications. These suggested that the wording of the Directive supported such a narrower interpretation.
10. However other responses argued that the application of the new requirements to all cookies regardless of what sort of data they processed would provide greater transparency and would be much simpler for users. Some of those who commented from an operators' perspective considered that such a broader application was required by the Directive and in practice should be easy to comply with through a privacy or cookies statement as proposed. Applying the requirements to all cookies would also avoid problems of interpretation about the definition of 'processing of personal data'. On balance the Government agrees with this approach and has therefore retained the proposed wording.
11. There were fewer responses on whether users should have the right to override a subscriber's consent to cookies. In most cases where terminals were shared it was generally accepted that this would not be problematic, whether because the cookies were of a kind that could be switched on or off without affecting basic service provision, or because the services were of a kind where cookie free access could not in any case be provided, or because in practice users and subscribers were unlikely to disagree. There was therefore no great need to specify whose rights should have precedence.
12. However, a few responses [particularly from corporate programme providers] argued that there could be a problem if an individual user decided to block or disable a cookie or similar device important to the functioning of the programme, thereby undermining the effectiveness or the price basis for the product.
13. The Government has considered this line of argument and concluded that the cases in which problems could occur are currently limited. There are also strong arguments against going beyond the requirements of the Directive and

seeking to define users' as opposed to subscribers' rights, not least the danger of undercutting legitimate user rights under the Directive itself.

14. As it seems impractical to set out prescriptive rules at this stage, the Government has concluded that the Regulations should not seek to define where user or subscriber consent should take precedence. However there could be a case for further guidance or regulation in the future, should working experience show that this is a more difficult issue than anticipated.

Network and Service Providers' requirements: consent to processing of traffic and location data and CLI services

15. The draft Regulations required that network and service providers informed subscribers about the data processing implications of value-added services using traffic and location data before gaining their consent but did not prescribe exactly how this should be done.
16. The Privacy Directive, like its predecessor, requires service providers to offer a range of Calling and Connected Line Information [CLI] services, including the ability to block incoming calls where the CLI has been withheld (anonymous caller rejection). The interpretation of the current UK rules on anonymous caller rejection has been disputed, however, and the draft Regulations put a stronger obligation on providers to make anonymous caller rejection options available.
17. Those responding agreed that there was no need to specify the means by which service providers should gain consent to the processing of traffic and location data. It was widely felt that service providers, along with the relevant regulatory bodies, should develop practical solutions.
18. Responses from some operators felt that the Government's interpretation of the Directive's provisions on ACR was over-zealous and costly. It was held that subscribers could achieve some of the same results by using the options available in the terminal equipment [mobile handsets displayed the caller's identity and users could reject the call by ignoring it or by pressing the 'busy' button.] It was also argued that there were no appropriate technical standards for network based ACR services although was disputed by the industry regulator.
19. However, the many responses in favour of the approach set out in the draft Regulations argued that the use of terminal equipment was an unsatisfactory solution to the problem of receiving unwanted calls, since the user could still be disturbed by the telephone ringing and by messages left on an answer phone.
20. On balance therefore the Government considers that the final Regulations should continue to reflect a stronger requirement for the full range of CLI services

Subscriber directories: default inclusion, entry options, reverse search and corporate subscribers

21. The draft Regulations allowed for individual subscribers to be included in directories as the default position, provided the choice was well explained and

there was a clear opportunity to decide otherwise. They did not prescribe how this information and option should be given, not did they seek to define the list of entry options available to subscribers.

22. The draft Regulations also exercised the option to require additional consent to directories with reverse search functions. They did not propose to extend the full range of rights available to individuals to corporate subscribers, although they did give corporate subscribers a simple opt-out [ex-directory] right.
23. Responses supported the approach of the Regulations on inclusion in subscriber directories as the default situation, provided sufficient information was provided to customers, although some argued that the requirement for consent in the draft regulations did not allow for this interpretation. It was felt that an opt-in system requiring active choice would be unnecessary, and could lead to subscribers failing to register and therefore dropping out of directories by default.
24. Those responding also agreed that regulation on directory entry options was unnecessary; service providers should work with the industry regulators to develop practical solutions.
25. Responses were almost unanimous in supporting the additional consent requirement for reverse search functions, and considered the range of rights available to corporate subscribers under the draft Regulations to be sufficient.
26. The Regulations have been reworded to provide that individual subscribers must be given the opportunity to determine whether, and how fully, to be listed, in line with the Directive. Otherwise, the Government has retained the proposed wording on subscriber directories issues, including the additional consent requirement for reverse search functions.

Unsolicited e-mail and SMS marketing: the 'soft opt-in' exemption [existing customer relationship, similar products and services]

27. The Directive extends an opt-in rule to all commercial e-mails and SMS, except where the conditions set out in Article 13.2 apply. This part of the Article - the 'soft opt-in exemption' - specifies that e-mails may be sent on an opt-out basis in the context of an existing customer relationship, where a) the sender obtains the addressee's contact details in the context of the sale of a product or service b) the sender is marketing its own similar products and services c) the addressee is always able to opt-out of future marketing free of charge.
28. The draft Regulations took a broad approach to the definition of 'existing customer relationship'. They did not demand that a sale had taken place in order for a customer relationship to be deemed to exist. The wording 'sale or negotiations for the sale of a product or service' therefore included scenarios in which the customer had given their contact details to a business in the lead up to a sale but in which no actual purchase had finally been made.
29. The consultation paper also argued in favour of a broad interpretation of the restriction to marketing similar products given the other safeguards built into use of the exemption. The general aim was to ensure that any resulting

marketing fell within customers' reasonable expectations. Given that 'similar' is not defined in the Directive, the draft Regulations proposed that marketers should take 'reasonable steps to ensure that the recipient is aware of the nature of those products and services' at the time of obtaining the addressee's contact details.

30. The vast majority of responses supported the broad interpretation of 'existing customer relationship' although there were differing views of the extent to which the draft Regulations achieved this and requests for further guidance in specific cases.
31. Several requested clarification of the rules for charities and membership organisations, whose promotional activities fell within the definition of direct marketing, but whose relationship with customers did not necessarily involve any form of sale.
32. The Government has concluded that the soft opt-in exemption should apply, as proposed, where e-mail addresses have been obtained in the course of 'a sale or negotiations for a sale of a product or service'. The Government however considers that the wording of the Directive limits the possibility of making special provisions for other forms of transaction.
33. Some responses were also supportive of the notion that 'similar products and services' should be linked to the concept of 'reasonable customer expectations', although there were few direct responses on the proposed requirement to provide information about product ranges at the time of obtaining customers' contact details. Where responses did comment on this issue, further guidance was often requested.
34. Some commentators however expressed concerns that the wording proposed in the draft Regulations deviated too far from the requirements of the Directive in the case of 'similar products and services'. Although the formulation used in the draft Regulations had some acknowledged benefits, it was not clear that it was fully equivalent to the provision in the Directive, creating the risk that the Regulations could be challenged for faulty transposition.
35. The Government has therefore concluded that the formulation of the draft Regulations should be amended to provide a restriction to marketing 'similar products and services' in line with the wording of Article 13.2.

Unsolicited e-mail and SMS marketing: legacy lists

36. The draft Regulations made no specific provisions or transitional arrangements for the use of 'legacy lists' or e-mail and SMS details fairly collected under the existing regime before the new Regulations come into force. Many responses requested further guidance on this issue and sought to clarify whether such lists would remain legitimate.
37. One possible practical solution could be for businesses to ask existing customers for opt-in consent before the new rules apply, although some responses highlighted the cost of this as well as the inevitability of losing names by default.

38. The wording of the Directive provides no transitional exemption for commercial e-mail and SMS, and its addition to the implementing Regulations could therefore cause transposition problems. Additionally, there is a danger that a transitional exemption could be abused by marketers using lists which were not acquired before the new rules come into force, or which were in breach of the rules that applied at the time.
39. The Government has therefore retained the wording proposed in the draft Regulations.

Unsolicited e-mail and SMS marketing: corporate subscribers' rights

40. The Directive requires Member States to safeguard the legitimate interests of corporate subscribers, but the soft opt-in rights on e-mail and SMS need only apply to individual subscribers. The draft Regulations did not propose extending these opt-in rights or giving stronger opt-out rights to corporate subscribers.
41. The majority of responses felt that corporate subscribers should not have the same rights as individuals in relation to e-mail, and many highlighted concerns that a universal opt-in would be harmful for business-to-business selling. Some called for statutory opt-out registers, or statutory backing for existing industry registers like the DMA's e-mps service based in the US for both corporate and individual users [although some industry codes already required use of such registers by members, and it was not clear how much value would be added by statutory backing].
42. Responses on SMS were more mixed— network operators argued that users of corporate mobile phones tended to regard them as their own personal systems, and that stronger regulation would help tackle junk SMS at network level. Against this, other responses argued that SMS was a new medium, and that regulatory constraints should not be imposed unless a need became apparent.
43. The Government has considered the arguments, and considers that on balance, the approach proposed in the draft Regulations should be retained. Neither e-mail nor SMS imposes the real-time disturbance or costs which justify corporate rights against phone and fax marketing [see below]. However, the Government is prepared to review this decision in the light of working experience of the new rules.

Telephone marketing: individual subscribers, corporate subscribers and the Telephone Preference Service

44. Currently the UK applies opt-out rules to direct marketing by telephone to natural persons [individual subscribers], who can decline marketing calls by registering on the Telephone Preference Service. The draft Regulations retained this principle but also extended the right to TPS registration to legal persons [corporate subscribers].
45. It was generally thought that the current arrangements under the TPS offered sufficient protection to individuals. However, some responses argued that the scheme was not well-publicised and that more should be done to make consumers aware of their rights,

46. The issue of corporate subscription on the Telephone Preference Service generated a large amount of debate in consultation and accounted for a significant proportion of the total number of responses received.
47. Responses in favour of the proposal recognised that businesses [and particularly SMEs] were increasingly inconvenienced by direct marketing calls. This was a problematic waste of resources and was often resented more than direct marketing by post or e-mail since telephone calls had to be dealt with on someone else's timescale. The opportunity cost of wasted time and blocked telephone lines was difficult to quantify but substantial.
48. Those responding repeatedly suggested that businesses objecting strongly enough to direct marketing by telephone to register on the TPS would not react positively to telephone marketing messages in any case. Therefore direct marketers could in fact save both time and resources by targeting calls efficiently to those who actually wanted to receive them.
49. It was suggested that corporate TPS registration would clamp down on the problem of businesses targeting individuals with calls while claiming to believe they were corporate subscribers. This was a problem under the current system where individual subscribers were protected by the TPS but corporate subscribers were not.
50. Those against the proposal felt that UK businesses would suffer an additional cost burden in cleaning prospective and existing customer lists against the TPS. This cost was unnecessary since businesses were better placed than individual subscribers to deal with calls. Marketing calls could in fact be an important source of information.
51. However, companies should already be routinely screening lists against the TPS for much business to business marketing, since sole traders and most partnerships are offered protection under the definition of 'natural person'. The potential resource saving made by marketers no longer wastefully calling companies must also be taken into account. It is also relevant that the TPS is an opt-out system. Companies finding marketing calls useful and non-intrusive will still be able to receive them by simply not registering.
52. Responses suggested that the proposal was not compulsory under the Directive and so may be implemented in the UK but not in other Member States. This could put UK businesses at a competitive disadvantage in Europe, since they would no longer be able to carry out telemarketing campaigns without prior costly screening arrangements.
53. This is questionable since many other Member States apply either the same or stricter rules on telephone marketing to both natural and legal persons.
54. It was also argued that the proposal would make it difficult for businesses to comply with Data Protection requirements to keep their customer records up to date since this was usually done by telephone.
55. In fact, the Regulations apply only to commercial communications. A telephone call made to verify details of an order, for research or for other genuinely non-commercial purposes will not be affected by TPS registration.

56. Further responses also raised practical concerns. The TPS administration suggested that the cost of system redevelopment to allow for corporate registration could not be recovered before the April 2004 re-negotiation, and that the implementation deadline in autumn 2003 was too tight for the redevelopment to take place.
57. There were a number of issues surrounding the practical functioning of the new system. Safeguards would need to be in place to ensure that - for example- competing companies could not maliciously register each other on the TPS and that businesses did not 'inherit' TPS registration when they moved into new premises.
58. The Government has carefully considered the arguments both in favour of and against its proposal. On balance it considers that corporate subscribers should have the right to decide whether or not they wish to register on the TPS.
59. However, given the practical concerns and issues raised, this right will only be extended to corporate subscribers after the re-negotiation of the TPS contracts in April 2004. This allows for a transition period, which will allow businesses time to adapt to the new requirements. It will also allow for further discussion of the corporate TPS registration system and for the development of safeguards to ensure its smooth functioning.
60. The final Regulations therefore do not include a provision for corporate registration on the TPS. Instead, amending Regulations will be issued in 2004, to come into effect along with the new TPS and FPS contracts.
61. Since the Directive gives Member States freedom to decide what sort of protection should be given to legal subscribers, the slightly later implementation date will not give rise to transposition problems.

Enforcement and sanctions: new sanctions against breaches and disclosure of the source of unsolicited commercial communications

62. The draft Regulations continued to give the Information Commissioner the right to take action either in response to a complaint or on his own initiative. They also allowed- but did not require- service providers [telephone operators and ISPs] to disclose the source of a call and/or other electronic communication suspected of breaking the rules on unsolicited direct marketing. The Government asked consultees to consider whether changes needed to be made to the enforcement and sanctions regime under the existing Telecoms Data Protection Directive implementing Regulations.
63. Although this was not a unanimous view, many responses argued that current enforcement sanctions and processes were slow and laborious, and were therefore being exploited by some repeat offenders. Some argued that sanctions higher than £5,000 were needed, since this relatively small amount could be built into the business plan of unscrupulous marketers.
64. Some responses argued in favour of powers modelled on 'stop now' injunctions. These would have immediate effect but could only be issued if informal attempts to resolve a complaint failed. Other responses favoured the direct powers to fine available to Ofcom. Against this however, a substantial

number of responses argued the need for caution and a chance for further consultation if the form of sanctions was to be changed.

65. On the issue of disclosure of the source of unsolicited commercial communications, most responses pointed to a real problem with the current regime- operators differed significantly on the extent to which they felt that they could voluntarily disclose the source of unsolicited commercial communications without exposing themselves to liability under the Data Protection Act.
66. Some argued that the lack of a disclosure requirement could leave the enforcing bodies powerless to police opt-in and opt-out rules in cases where operators either felt unable or were not prepared to cooperate on a voluntary basis. While there were relevant provisions in the Data Protection Act which operators could invoke, these may not protect them from all liability, thereby further discouraging voluntary disclosure.
67. Against this, not all commentators accepted the need for change and some, while they agreed in principle, argued that any disclosure requirements needed to be carefully tied in to the existing rules under the Regulation of Investigatory Powers and the Data Protection Acts.
68. The Government has considered the arguments for and against making changes to the enforcement regime. No single enforcement model can hope to cover every scenario and any new powers would have to be carefully considered to ensure that they were fair, proportionate, and compatible with the Information Commissioner's role and powers under other legislation.
69. The Government will hold further discussions on enforcement with service providers and other key stakeholders. This will require a longer timescale than that currently available for the implementation of the Directive. Meanwhile the Government has retained the wording proposed in the draft Regulations.

Laying in Parliament and Coming into Force

70. The draft Regulations were to come into force on 31st October 2003, in line with the transposition deadline in the Directive.
71. Many responses highlighted a general concern that, particularly in areas where the rules had changed, familiarisation periods would be very important to allow businesses to comply with the Regulations before sanctions for their breach applied.
72. The consultation elicited a substantial number of responses and identified several issues which required careful resolution with a variety of stakeholders. This has meant that the final version of the Regulations have not been ready to be laid until September, later than originally projected.
73. Therefore the Government has decided to lay the final Regulations in Parliament during the week commencing 15th September and to allow the full twelve-week familiarisation period before they come into force.