

## REGULATORY IMPACT ASSESSMENT

### PRIVACY AND ELECTRONIC COMMUNICATIONS (EC DIRECTIVE) REGULATIONS 2003

#### 1. TITLE OF PROPOSAL

This Regulatory Impact Assessment has been prepared on the Privacy and Electronic Communications (EC Directive) Regulations 2003, which implement provisions arising from an EC Directive on data protection in the communications sector (Directive 2002/58/EC)

#### 2. PURPOSE AND INTENDED EFFECT OF THE MEASURE

##### Purpose

There are four key new provisions:

- **Regulation 6 - cookies and similar internet tracking devices**  
Requires that anyone who uses **cookies** (whether they process personal data or not) and similar tracking devices must provide information and a chance to refuse to subscribers or users who are not content to accept them. This rule does not apply where the cookie or similar device is used only to enable the transmission of website or other online content or where it is an integral part of an online service which cannot be provided without it
- **Regulations 7 and 14- value added services based on traffic and location data**  
Allow for the provision of **value added services** based on traffic or location data, either by network operators on their own or in conjunction with third parties. There is no restriction on the type of services that may be provided as long as subscribers give their consent and are informed of the data processing implications.
- **Regulation 18 - subscriber directories**  
Gives subscribers a right to decide whether or not they want to be listed in **subscriber directories**. Subscribers must be given clear information about the directories in question, including any reverse search-type functions, for which additional specific consent is required.
- **Regulation 22 - unsolicited commercial e-mail and SMS**  
Requires that **unsolicited commercial e-mail (UCE) and SMS** to individual subscribers is subject to a prior consent requirement, so that it may only be sent if the recipient has agreed in advance. There is an exception to this rule in the context of an existing customer relationship, where companies may continue to market their own similar products and services on an "opt-out" basis

## **Background**

The Regulations are necessary for the implementation of the EC Directive on Privacy and Electronic Communications (2002/58/EC), which forms part of the new European regulatory framework for electronic communications networks and services. The Directive is implemented through the form of a Statutory Instrument to be made under the European Communities Act 1972.

The Directive updates the current Telecoms Data Protection Directive (Directive 97/66/EC) in the light of new technologies and in particular ensures that the privacy rules currently applicable to phone and fax services also apply to e-mail and to the use of the internet.

Directive 97/66/EC was implemented in the UK via the Telecommunications (Data Protection and Privacy) Regulations 1999, the Regulation of Investigatory Powers Act 2000, and the Telecommunications (Lawful Business Practice and Interception of Communications) Regulations 2000.

The new Regulations carry over those elements of the Telecommunications (Data Protection and Privacy) Regulations 1999 which still apply under the new regime.

The transposition of the Directive into UK law will affect a wide range of organisations and individuals. As well as requiring changes of those operating in the electronic communications sector, it will also impact on direct marketers, website and online content businesses, providers of subscriber directories, internet users and anyone who sends or receives commercial communications by e-mail or SMS.

## **Risk Assessment**

The United Kingdom is required by Community Law to implement the Directive into UK law. A failure to do so could lead to proceedings being brought by the European Commission in the European Court. A failure to implement could also lead to HMG being liable in the UK courts for losses suffered by those denied their rights under the Directive as a result.

### **3. OPTIONS**

On the basis of this risk assessment, there are two options to consider:

#### **Option 1 - Do nothing.**

The UK is already largely in compliance with most of the broad principles of the Directive through the implementing legislation for the Telecoms Data Protection Directive (including the Regulation of Investigatory Powers Act and the Lawful Business Practice Regulations), the Data Protection Act 1998 and other relevant legislation. Current business practice, including industry codes of practice on e-mail marketing may also support this argument.

**Option 2 - Legislate** through regulations made under Section 2(2) of the European Communities Act 1972.

#### 4. BENEFITS AND INTENDED EFFECTS

**Option 1** – there is no benefit associated with Option 1.

Although, as indicated above, the United Kingdom is already largely in compliance with the Directive, the extent to which it is not is sufficient for there to be a very substantial risk of action in the ECJ, and of damages being awarded against the Government in the UK courts. In particular, the new requirements on unsolicited commercial e-mail and on cookies and similar internet tracking devices go further than current statutory requirements. While the shortfall could be met to an extent by industry self-regulation through codes of conduct, enforcement of the rules would be difficult outside trade or industry association membership without some form of statutory backing – current industry codes in this area are designed to supplement rather than replace statutory requirements. This would be unsatisfactory from the complainant's viewpoint and could put those businesses that did comply at a competitive disadvantage.

**Option 2** - the expected wider benefit is the avoidance of action in the ECJ, and the parallel avoidance of damages awarded against the Government in the UK courts for non-implementation of the Directive by users and operators granted rights under it.

The expected further benefits and intended effects of **Option 2** are as follows:

Clarification of the regulation of electronic communications networks in the light of new technologies, so that subscribers can be more confident that their privacy will be respected when they use electronic networks and services, and that network and service providers are given more certainty about the rules under which they must operate.

Reassurance that the regulations will also apply to new technologies developing in the future, due to their 'technology neutral' nature.

**Regulation 6** - Increased transparency for subscribers and users regarding cookies and similar tracking devices. Increased awareness of the nature and uses of cookies.

**Regulations 7 and 14** - A clearer legal framework for network operators wishing to provide value added services based on traffic or location data. An accompanying benefit to subscribers who will only receive these services if they have given their consent to them and are informed of the data processing implications.

**Regulation 18** - Enhanced protection of subscribers' privacy regarding informed listing in subscriber directories.

**Regulation 22** - Protection of subscribers' privacy regarding unsolicited commercial e-mail and SMS. Reduction in the volume of unsolicited commercial e-mail, which currently accounts for close to a third of all traffic on the Internet, and is still rising (source: Brightmail).

Subsequent saving in terms of time and aggravation for individual recipients of unsolicited commercial e-mail. Maintenance of consumer trust in electronic commerce, which is threatened by misuse of commercial e-mail.

Volume handling benefits to internet service providers and mobile operators due to reduction in the amount of unwanted UCE sent to inboxes and handsets.  
Maintenance of trust in direct marketers, which can be eroded by misuse of commercial e-mail.

While specific quantitative benefits are difficult to predict, publicly available research suggests that the costs of UCE to Internet Service Providers are 10% of the overhead cost of providing internet access, which is included in the monthly charges to consumers (source: "How to Can Spam" by Randolph Court and Robert Atkinson November 1 1999)

### **Issues of Equality or Fairness**

The regulations will apply equally to all organisations and firms, in all sectors regardless of size, nature or origin. The United Kingdom is required by Community Law to implement the Directive. A failure to do so could lead to proceedings being brought by the European Commission in the European Court of Justice.

## **5. COSTS**

### **Sectors affected**

As outlined above, the transposition of the Directive into UK law will affect a wide range of organisations and individuals.

As well as requiring changes of those operating in the electronic communications sector, it will also impact on direct marketers, website and online content businesses, providers of subscriber directories, telephone and internet users and anyone who sends or receives commercial communications by telephone, fax, e-mail or SMS. For direct marketing purposes this will also include charities and membership organisations. It will also impact on the third party collection and sale of contact details.

### **Compliance costs**

**Option 1** - imposes no compliance costs on business.

**Option 2** - imposes compliance costs on business mainly in the four areas of change to the existing regime:

#### **Cookies and similar internet tracking devices:**

The cost to businesses wishing to use cookies or similar tracking devices will be that of providing information and a chance to refuse to subscribers or users who are not content to accept them.

While we do not propose to legislate prescriptively on how this should be done, a clearly flagged link to a privacy or cookies statement should suffice. The cost of such a link and privacy policy can be estimated in the following way:

Drafting and uploading of simple privacy policy based on template– 2 hours web design time at £35 per hour = £70.

Drafting and uploading of more complex privacy policy including legal advice –

2 hours web design time at £35 per hour plus 1 hour legal advice at £100 per hour = £170.

While these costings are approximate, it is unlikely that compliance with this measure will be burdensome.

Several bodies will provide template cookie statements to facilitate the change although in practice most reputable web designers have been building cookie and privacy policy statements into websites for several years.

There may also be a cost associated with the provision of cookie-free versions of websites for subscribers or users who are not content to accept them, should businesses deem this necessary. This is unlikely to apply in a large number of cases and specific costs will vary widely from website to website.

**Value added services based on traffic and location data:**

The costs to businesses wishing to provide value added services based on traffic or location data will be those of gaining consent from subscribers and informing them of the data processing implications of this consent.

Again we do not propose to legislate prescriptively on how this information must be given and consent sought. Therefore the onus will be on industry - together with the relevant regulatory bodies - to find and implement creative and cost-effective solutions. Given the relative infancy of these sorts of services, the cost is difficult to quantify but again it is unlikely to be burdensome. The measure was not flagged up as a significant cost issue in consultation.

**Subscriber directories:**

The cost to business wishing to list subscribers in directories will be that of giving clear information about the directories in question, including any reverse search-type functions. Again, since we do not propose to be prescriptive about the way in which directory providers should provide this information, exact costs are difficult to predict but compliance is unlikely to be burdensome and was not flagged as an issue in consultation.

**Unsolicited commercial e-mail (UCE) and SMS:**

The costs to business wishing to send UCE and SMS will be that of gaining prior recipient consent [except in the context of a verifiable existing customer relationship, where companies may continue to direct market their own similar products and services on an “opt-out” basis].

This is difficult to quantify and is unlikely to be burdensome in monetary terms, although the issue of having to rescreen existing lists or ‘legacy data’ was often raised in consultation.

## **Other Costs**

There may be some loss of revenue to network operators, service providers and direct marketers if fewer direct marketing text messages and emails are sent.

There may be replacement costs for business, associated with implementing new means of marketing communication in the absence of those direct marketing text messages and e-mails. There will also be an impact on the value of lists of contact addresses compiled by third parties under current opt-out rules.

Finally, there will also be a wider cost to Government, of preparing the implementing legislation and enforcing and publicising the regulations.

## **Costs for a typical business**

It is difficult to define what constitutes a 'typical business' in terms of these regulations, since they will affect a wide range of organisations and individuals.

As outlined previously, as well as requiring changes of those operating in the electronic communications sector, the regulations will impact on direct marketers, website and online content businesses, providers of subscriber directories and anyone who sends commercial communications by telephone, fax, e-mail or SMS.

However it is possible to provide the following sample costs for a business which:

1. Has a website, uses cookies and therefore needs to provide a cookies statement.
2. Carries out e-mail marketing to both existing and potential customers

**Cookies-** cost is the provision of information and a chance to refuse to subscribers or users who are not content to accept cookies.

Drafting and uploading of simple privacy policy based on template– 2 hours web design time at £35 per hour = £70.

Drafting and uploading of more complex privacy policy including legal advice – 2 hours web design time at £35 per hour plus 1 hour legal advice at £100 per hour = £170.

There may also be a cost associated with the provision of cookie-free versions of websites for subscribers or users who are not content to accept them, should the company deem this necessary.

**E-mail marketing-** cost is gaining prior recipient consent [except in the context of a verifiable existing customer relationship, where the company may continue to direct market its own similar products and services on an "opt-out" basis].

This is difficult to quantify and is unlikely to be burdensome in monetary terms, although there may be some opportunity cost associated with the loss of existing 'legacy data' lists or replacing e-mail marketing with other alternative campaigns.

## **6. CONSULTATION WITH SMALL BUSINESS: SMALL FIRMS IMPACT TEST**

The Directors of seven UK SMEs were interviewed in detail by telephone about the likely impact of Option 2 on their firms. [Full responses are provided at Annex C]

### **Costs**

As outlined above, the areas in which costs are anticipated are those of obtaining customer consent where changes have been made to the existing regime. This is unlikely to have a significantly differing impact on different sizes of firms and the differential cost burden on small business [compared with larger firms] is expected to be small.

This was verified by the small business impact test as follows:

**Regulation 6** – Cookies and similar tracking devices - It was felt that the cost of providing cookie/privacy statements would be low, at just 1-3 hours of a web designer's time. This was not considered burdensome, especially given that most websites built within the last few years already included such statements by default.

**Regulation 22**– Unsolicited Commercial Communications – It was not felt that the cost of obtaining opt-in consent would be burdensome for SMEs, although this was difficult to quantify exactly.

### **Benefits**

It should be noted that small firms do stand to benefit in the areas where they may also incur costs. These benefits could be differentially greater than those enjoyed by large firms.

Small firms arguably benefit more than larger corporates from business to business e-mail marketing. Typically SME managers may not have time to peruse catalogues for new products but many do buy equipment and software etc. as the direct result of a marketing e-mail. The retention of an opt-out system for business-to-business e-mail will therefore benefit SMEs who fall within the corporate subscriber category.

Small firms may have more difficulty with implementation than larger corporates with comprehensive legal/public affairs departments. Those with websites will benefit from the introduction of 'template' cookie statements or pro-formas and advice, as to be provided by the IAB.

Small firms may be in a position to be more innovative and faster moving in terms of new technological developments. Therefore the technology neutrality of the new regulations may stand to benefit SMEs.

## **7. COMPETITION ASSESSMENT**

The transposition of the Directive into UK law will affect a wide range of organisations and individuals. As well as requiring changes of those operating in the electronic communications sector, it will also impact on direct marketers, website and online

content businesses, providers of subscriber directories, telephone and internet users and anyone who sends or receives commercial communications by e-mail or SMS.

It is anticipated that the Regulations are likely to have little or no effect on competition. The factors taken into account in making this assessment are:

The wide variety of types of organisations and markets, and market shares covered by the Regulations, which make competition concerns unlikely;

The areas in which costs are anticipated are unlikely to have a significantly differing impact on different sizes of firms;

The Regulations are unlikely to make a change to market structure as they do not impose costs on only certain firms within a market, nor do they favour/penalise new firms entering the market – they apply across the board;

It is not anticipated that the regulations will restrict innovation, however they may place restrictions on businesses providing some products or services that they may otherwise have provided if they are not able to gain the necessary customer consent.

## **8. ENFORCEMENT AND SANCTIONS**

The regulations will be enforced by the Information Commissioner. The Information Commissioner's office has powers to investigate and issue enforcement notices to individuals or companies which breach the Regulations. Breach of an enforcement notice is a criminal offence liable to a fine of up to £5,000 if handled in a magistrate's court, or an unlimited fine if the trial is before a jury. In addition, anyone who has suffered damages because the Regulations have been breached has the right to sue the person responsible for compensation.

## **9. MONITORING AND REVIEW**

Member States' implementation of the Directive will be reviewed by the European Commission during 2006.

## **10. CONSULTATION**

### **Within Government**

Government departments and regulatory authorities consulted by the DTI over the course of negotiations on the Directive and preparation of the Regulations include:

Cabinet Office

Department for Culture Media and Sport

HM Customs and Excise

Independent Television Commission

Information Commissioner's Office

Foreign and Commonwealth Office

Home Office

Department for Constitutional Affairs  
National Assembly for Wales  
Northern Ireland Executive  
Office of the E-Envoy  
Office of Fair Trading  
Office of Telecommunications (OfTel)  
Radio Authority  
Radiocommunications Agency  
Scottish Executive

### **Public Consultation**

The Directive on Privacy and Electronic Communications is one of the six Directives forming the new regulatory framework for electronic communications networks and services, known as the 1999 Communications Review. The Department and OfTel (the Office of Telecommunications) liaised closely with industry and consumer representatives and other interested stakeholders throughout the Review. In particular, the Department held two public workshops on the Review, in conjunction with OfTel, to which organisations including representatives of small businesses were invited

In addition, the Department began a consultation specifically on the Directive in April 2001, during the detailed negotiations on the draft of the Directive. The views of the Department's contact list on the Directive were sought – the list numbered approximately 900 interested parties at that time, and included UK electronic communications operators and service providers, trade associations, small firms organisations, consumer bodies, bodies in the charity and voluntary sector, direct marketing organisations, directory publishers, individual subscribers and a number of small businesses. Other interested parties were also invited to comment through the Department's website.

We received more than seventy representations from interested parties during the negotiations on the draft Directive.

We then launched a public consultation on the draft implementing regulations, which ran from 27<sup>th</sup> March to 19<sup>th</sup> June 2003. We received over 426 responses from industry, membership organisations, charities, Government departments, regulators, consumer representatives and individuals. All arguments and issues raised during the consultation have been incorporated into this impact assessment.

## **11. SUMMARY AND RECOMMENDATION**

On the basis of the analysis identified in this document, option 2 is the recommended option. The following table summarises the argument:

	<b>Option 2 Expected costs</b>	<b>Option 2 Expected benefits</b>
Business	<p>Compliance costs associated with new provisions on: cookies, traffic and location data, subscriber directories, UCE/SMS.</p> <p>Replacement costs where alternative means of marketing communication sought.</p>	<p>Clarification of the legal framework in light of new technologies [in particular regarding unsolicited SMS, and provision of value added services]</p> <p>Volume handling benefits to internet service providers and mobile operators due to reduction in UCE and commercial SMS.</p>
Citizens	None	<p>Protection of subscribers' privacy, and avoidance of unwanted direct marketing e-mails and SMS. Substantial savings in terms of time and aggravation from UCE.</p> <p>Continued avoidance of unwanted direct marketing telephone calls and faxes.</p>
Government	<p>Cost of preparing implementing regulations and guidance</p> <p>Cost of enforcing the regulations</p>	<p>Avoidance of ECJ action</p> <p>Avoidance of damages awarded against the Government in the UK courts for non-implementation</p>

## 12. DECLARATION

I have read the Regulatory Impact Assessment and I am satisfied that the balance between cost and benefit is the right one in the circumstances.

Signed by the Minister.....

[Stephen Timms, Minister of State for Energy, e-Commerce and Postal Services]

Date.....

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**Annex A– Consultation with Small Business: The Small Firms Impact Test  
Table of Responses**

<b>Small Firm</b>	<b>Company Overview</b>	<b>Cookie use/ opinion on new cookie regulations</b>	<b>E-mail marketing/ opinion on opt-in regulations</b>	<b>General/ Publicity</b>
1	<p>Ltd co.</p> <p>Supplies whistles and related products to distributors (B2B) and individuals (B2C).</p> <p>Has run a consumer web shop for last 7/8 years.</p> <p>B2C sales doubling YOY.</p>	<p>Uses cookies to monitor click- throughs on site: what did people initially look at and where did they then go?</p> <p>Does not currently display a privacy or cookies statement and was unaware of requirement to do so under DPA.</p> <p>Would be useful to have a pro forma of privacy statements approved by DTI</p> <p>Cost would be web designer's time.</p>	<p>Company uses both e-mail and SMS marketing</p> <p>In favour of opt-in and application to individuals only-does occasionally make useful B2B purchases from UCE.</p> <p>However UCE is a nuisance for business - Received 30 unsolicited e-mails in last 2 weeks mainly from the US/India/Pakistan. Mailing companies seem to pick up contact details from various trade fairs around the world.</p> <p>Why can't UCE be labelled differently from other e-mail (or appear in red or similar provision)?</p>	<p>Don't introduce prescriptive legislation - the sector is still developing and we have to provide for this.</p> <p>Regulations aren't generally well known among SMEs.</p> <p>Need to utilise small business networks to get message across:</p> <p>Chambers of Commerce/Business Groups/Business Link/SBS/articles in law magazines and trade press.</p>

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2	<p>Ltd co</p> <p>Small consultancy providing services to large corporates.</p>	<p>Does have a web site but this doesn't use cookies.</p>	<p>Carries out limited e-mail marketing but as this tends to be B2B, would be unaffected by the new regulations.</p>	<p>Was aware of new regulations but not in detail.</p> <p>Would be useful to have a simple website, with step-by-step instructions for SMEs.</p>
			<p>Receives around 150 UCEs per day.</p>	
			<p>Fully supports opt-in rules for individuals.</p> <p>Unsubscribing from mailing lists does not seem to be an effective deterrent.</p>	
3	<p>Ltd co</p> <p>Internet and web consultancy</p>	<p>Longitude website does not use cookies but the business regularly provides cookies statements for others.</p>	<p>Does not use e-mail marketing but this would tend to be B2B and therefore unaffected by the new rules.</p>	<p>A short web bulletin, written in clear English would help SMEs to understand the new rules.</p>
		<p>Cost of providing cookie statement</p>	<p>Supports opt-in regime for individuals.</p>	

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includes:

- Cost of writing
- Cost of uploading
- Cost of legal advice

Estimates about £35-£50 for a standard statement but £150 for more complex version.

Cookies are not always harmless and can be used to impersonate others.

Could legislate to change the factory setting of machines, so that they do not automatically accept cookies from the outset.

4	Ltd co IT consultancy	Does not use cookies presently but will be using them for e-commerce purposes in the near future.  Cookies statement	Does not carry out e-mail marketing currently but will do in future. This will be B2B so unaffected.  Would receive more than 1,000 UCE per day if no	Knew about the regulations but in the industry.  Would be good to use the FSB and Chambers of Commerce to publicise.
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		would simply cost the time of the web designer, plus any legal advice.	filtering software.	Professional Contractors Group
		Supports pointing people in direction of their browser settings.	Fully in favour of individual opt-in.	Mailout from the Inland Revenue with its regular communications with business.
5	Ltd co IT consultancy Web solutions, design and hosting E commerce solutions Training provider	Uses cookies as part of an off-the-shelf e-commerce package.  Cookies keep track of contents of shopping cart, store delivery addresses and facilitate a 'remember me' option for personal details.	Runs a newsletter by e-mail, on an opt-in basis to communicate with existing clients.  Would not use unsolicited e-mail marketing, as this is an annoyance.  Fully supports opt-in rules for individuals.	Was vaguely aware of the new rules but was unclear as to how they applies in the UK.  An article in the FSB national magazine would be useful publicity.
		Has a privacy statement which includes cookies.  Privacy statement should not cost more than £50 for an SME	Receives approx 100 UCEs per day - spam filters go a long way towards helping but sometimes delete the wrong messages.	
6	Ltd co for last 3 years, previously partnership for 22 years.	Has website but currently not using cookies. E-commerce facility to be opened in future. This will be	E-mails to existing customers on opt-in basis – takes details as part of routine phone conversations and obtains	Had attended Chamber of Commerce e-mail marketing seminar.  Further articles in trade press

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	Specialist wholesaler of picture framing supplies.	log-in so will use cookies.  Cost of privacy statement would be web designer's time, charged at £400-£450 per day although Business Link grants are available to cover some of this.	opt-in consent.  Receives lots of spam and supports opt-in for individuals.	would be useful.  Mailed information pack and helpline would also be useful.
7	Ltd co  IT consultancy	Cookies used only in embedded links to other sites- do not capture personal data at present.  Does not currently display cookies statement but this would only cost 1-2 hours of a web designer's time.	Does not carry out e-mail marketing.  Receives a huge amount of UCE- mainly from the US- simply deletes.  In favour of opt-in rules for individuals.	Was not aware of the new rules.  Could be promoted through article in FSB magazine.  Trade press in general.  Mailout from Inland Revenue with tax information.

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