Legal update

Telephone marketing out in the cold?

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Abstract In December 2003, new UK law came into effect following a European directive which was aimed principally at trying to control spam — a global problem affecting almost all users of e-mail, text messaging and other forms of electronic communication. In the flurry of e-mail and spam-related press coverage that accompanied the introduction of the new law, it would have been easy to overlook the fact that it also extends to other means of marketing such as telephone marketing. Restrictions on so-called ‘cold calling’ were introduced and these have recently been extended to cover potentially all business-to-business (B2B) marketing calls. This article explains the restrictions and gives some suggestions for compliance.

BACKGROUND

As described in a previous paper,¹ the UK has already brought in The Privacy and Electronic Communications (EC Directive) Regulations 2003. Regulations adopting the European Directive on Privacy and Electronic Communications (2002/58/EC). The Regulations came into effect in the UK on 11 December, 2003, supplementing the UK’s existing data protection legislation. They are enforced by the Information Commissioner, who has released Guidance notes on their interpretation.²

The Regulations seek to be ‘technology neutral’ and cover a wide variety of marketing activities, including direct marketing by telephone, fax and electronic communications; automated calling systems; subscriber directories;

internet cookies; and value added services which rely on traffic or location data. The extent to which telephone marketing activities are covered has recently been widened; as a result of a recent amendment to the Regulations, they now clearly cover B2B marketing by telephone as well as marketing to individual consumers.

APPLICATION OF THE REGULATIONS TO MARKETING BY TELEPHONE

Telephone activities covered by the Regulations

As with electronic mail, the key regulations applying to telephone marketing, Regulations 21 and 24, cover

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telephone communications made for the purpose of 'direct marketing'. This term is defined as 'the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals'.³ This means that telephone calls concerning a wide range of subject matter are covered including, for example, appeals made by charities and political parties for funds or support.⁴

It should be noted that it is not necessary for the marketer to actually speak to an individual. The Guidance makes clear that voicemail and answerphone messages left by marketers making calls that would otherwise be 'live' are covered by the Regulations.⁵ Such messages are considered to be 'electronic mail' under the Regulations, and the rules on other electronic mail — such as emails and mobile phone text messages as discussed previously⁶ — apply to them. Similarly, faxes are also covered by the Regulations, but they are also subject to different rules (Regulations 20 and 24) to telephone calls, and are not discussed further here.

The restrictions imposed on telephone marketing when the Regulations came into force

Broadly speaking, the Regulations resulted in two types of restriction on telephone calls made for direct marketing purposes when they came into force on 11 December, 2003:

- 1 Marketers were prohibited from making such calls to individuals or companies that had notified the caller that such calls should not be made, ie had opted out of receiving marketing calls (including where such opting out took place before 11 December); and
- 2 Individuals (but not companies) were also able to register their telephone number(s) with a register maintained

by the Telephone Preference Service (TPS), prohibiting all marketers from making unsolicited marketing calls to those numbers.

There are two important points to note on these restrictions. First, the reference to 'individuals' above, is to persons covered by the term 'individual subscriber' in the Regulations. As explained previously,⁷ this term confusingly covers sole traders and partnerships (such as the vast majority of solicitors', accountants' and architects' firms) based in England, Northern Ireland and Wales, as well as individual consumers. Furthermore, the 'companies' referred to above are, strictly speaking, the entities covered by the term 'corporate subscriber' used in the Regulations, and that term extends to limited liability UK partnerships and Scottish partnerships, to governmental organisations (including hospitals and other public bodies) as well as UK companies.

This put telephone marketers who only market to businesses in a difficult position because, although they might not make marketing calls to individual consumers, it would be hard for them to be sure that all of the businesses they might have wished to call had not registered their numbers with the TPS. Some businesses — for example, the businesses of sole traders such as consultants who carry on their business in their own name rather than under the umbrella of a company, or of English (non-limited liability) partnerships — could have registered (as they qualified as 'individual subscribers'). So, calling businesses without checking the TPS register could have led B2B marketers to fall foul of the prohibition.

Secondly, the prohibition on calling TPS-registered individuals did not apply where the individual had previously informed the marketer that he or she did not object to receiving such calls from them. In such circumstances, unsolicited calls from that marketer were permitted

until the individual withdrew consent to receive the calls or it was otherwise clear that they were no longer welcome.⁸

Extension from individuals to B2B telephone marketing

The difficult distinction between individual and corporate subscribers has now, at least in the context of telephone marketing, in effect been removed. This is because as of 25 June, 2004, amendments to the Regulations, introduced by SI 2004/1039 The Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2004, permit corporate subscribers (as well as individual subscribers) to register numbers with the TPS. The numbers of company businesses are therefore to be found in the TPS register, and B2B telephone marketers will inevitably have to ensure that their marketing lists do not include the registered numbers. Save for this change, the restrictions referred to above operate largely as they did when the Regulations first came into effect. The remainder of this paper outlines how, at the time of writing, the restrictions work in practice for businesses who want to move unsolicited telephone marketing calls to other businesses and gives some practical suggestions for compliance.

THE REGULATIONS IN PRACTICE AND THE TPS

When is it ok to cold call other businesses?

As a result of the amendments to the Regulations, businesses that want to make *unsolicited* calls to other businesses (irrespective of whether they are sole traders, partnerships, governmental organisations or limited companies) will have to check before cold calling *any*

number that:

- 1 Is not on their list of numbers of businesses which have requested not to be called (ie on the marketer's 'do-not-call' list); and
- 2 Is not listed on the TPS Register.

If the number in question is not on either list, marketers can make an unsolicited call to that number. Even if the number is on one or both of these lists calls can be made to this number, provided it is something the company has asked to be informed about — ie provided it is not a cold call.

Number not name

The TPS Register is a list of numbers only, it does not contain names. This means that marketers can't search by name for companies who don't want to be cold called. As a result, checking that it is okay to call the numbers marketers want to cold call must be done by checking the numbers against those on the TPS Register. One advantage of having only numbers on the TPS Register is that, where a company has only registered some of its numbers, marketers are not prohibited from calling other numbers they know to belong to this company (provided the company has not specifically requested not to receive cold calls). For example, if a company has registered only its switchboard number on the TPS Register, one can still cold call direct numbers belonging to that company, provided it has not asked not to receive such calls.

What happens if companies don't comply?

Businesses who have been cold called despite asking not to receive such calls, or despite registering the number called on the TPS Register, can make a

complaint direct to the Information Commissioner. The Information Commissioner has the power to issue an enforcement notice to marketers who have breached the Regulations. In the worst situations, the penalties for failure to comply with an enforcement notice could be a potentially unlimited fine and, in some circumstances, personal liability for certain officers of the company.

It's YOUR call

Even if a sub-contractor is paid to make unsolicited calls, compliance with the Regulations is the marketer's responsibility. For example, if a company outsources telephone marketing to a call centre, then, if there is a breach of the Regulations, any enforcement action will be taken against the first company as the instigator of the call. Proper handling of data is also important to consumers, so even if sub-contractors can be persuaded to indemnify the company for any fines that must be paid, it may not be so easy to make good the damage to the company's reputation.

How to get access to data on the TPS Register

Marketers who want to make unsolicited calls to other businesses either need to check the numbers they want to call against the TPS Register or pay a company to do this for them.

To access data held by the TPS one must take out a licence to use the data file. There are two data files. The TPS Register contains details of sole traders and partnerships in England, Wales and Northern Ireland who do not want to receive unsolicited calls. The Corporate TPS contains details of limited companies in the UK, public limited companies, limited liability partnerships in England, Wales and Northern Ireland and any

partnership in Scotland as well as schools, government departments and agencies, hospitals, and other public bodies. It is important to remember that even B2B-only marketers, will still need access to both files to ensure that individual subscribers such as sole traders (listed in the TPS) or corporate subscribers such as limited companies (listed in the Corporate TPS) are not called. A separate licence is needed for each file and these can be applied for via the TPS website. There are three categories of licence, each with different levels of access and different fees. Further information is available at <http://corporate.mpsonline.org.uk>.

Details of companies who offer to cleanse lists against TPS data files can also be found on the TPS website.

Practical suggestions for compliance

- DO put in place a procedure for documenting all the numbers of companies who have said they do not wish to receive unsolicited marketing calls. Make sure that there is one central list which captures all the requests taken by various divisions of the company.
- DO make sure that numbers due to be called are checked against the central do-not-call list each time a marketing campaign is planned to ensure that none of the businesses which have opted out are cold called.
- DO NOT delete the numbers for which an opt-out request has been received; otherwise there will be no record that that number should not be called. Instead, it should be added to the central list.
- DO put in place a procedure for updating the central list regularly. Ensure that the people who are responsible for making unsolicited

calls regularly check the list of numbers to which unsolicited calls are not wanted. This is necessary because consent to receive marketing calls is only ever given 'for the time being'.

A company which has previously consented to receiving marketing calls can change its mind at any time.

- DO make sure that both the TPS as well as the Corporate TPS are checked.
- DO make sure that the TPS Register is checked often enough to catch new registrations. Registrations take 28 days to come into force and during this time it is okay to call the number in question, provided the business is not already on the 'do not call list'. For instance, a TPS registration made on 25 June, 2004 would not have applied until 23 July, 2004. During that time, the business could legitimately be called unless it had specifically asked not to receive cold calls. Once a number has been registered for 28 days though, it should not be called, and the register must be checked frequently enough to prevent such numbers being called.
- DO give sub-contractors an up-to-date copy of the central list recording numbers they should not call. Additionally, sub-contractors should be obliged to check the TPS Register prior to making unsolicited calls.
- DO check any lists bought from third parties or which have been generated for the company against both the TPS Register and the company's central 'do-not call-list'.
- DO identify the company name and provide a valid e-mail or postal address or freephone number for opt-out requests when making an unsolicited call. Where a sub-contractor makes calls on the company's behalf, they should also give this information about

the business on whose behalf they are making the call.

CONCLUSIONS

The UK Regulations put in place new rules relating to privacy and telephone communications which have consequences for the way legitimate businesses carry out telephone marketing. Previously, those engaging in B2B telephone marketing but not marketing to consumers might have fallen foul of the restrictions because some businesses but not others could register with the TPS. Now at least the situation is clear for B2B marketers. From at least 25 June, 2004, B2B marketers, like those marketing to individual consumers, should, as well as not calling businesses which have opted out of receiving marketing calls, have also started checking the numbers they call against the TPS Register. Although this means B2B-only telephone marketers now know where they stand, they might well have preferred to live with the uncertainties that existed before this change and had more businesses to call.

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References and notes

- 1 Nettleton, E. 'Electronic marketing and the new anti-spam regulations', *Journal of Database Marketing & Customer Strategy Management*, Vol. 11, No. 3, pp. 235–240.
- 2 Guidance to the Privacy and Electronic Communications (EC Directive) Regulations 2003 which is available on the Information Commissioner's website (<http://www.informationcommissioner.gov.uk>). This has now been supplemented with Guidance on Corporate Registration on the TPS, which is available on the same site.
- 3 Section 11 of the Data Protection Act 1998.
- 4 See page 3, part 1 of the Guidance (version 3).
- 5 See page 24, part 1 of the Guidance (version 3).
- 6 Nettleton (2004) *op cit*.
- 7 *Ibid*.
- 8 Consent is treated as being given 'for the time being', a term discussed in the context of marketing by electronic mail in Nettleton (2004) *op cit*.