
Legal and Regulatory Update

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A new regulatory regime for direct marketing using fax, telephone and e-mail

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Introduction

This year direct marketers face a marked increase in the regulation of their activities. On 1 March the Telecommunications (Data Protection and Privacy) Regulations 1999 came into force. This will be followed by the implementation of the Distance Selling Directive in June. The way businesses use fax, telephone and e-mail for direct marketing will need to be reassessed to ensure compliance with the regulations.

The current legal and regulatory position

The Telecommunications (Data Protection and Privacy) (Direct Marketing) Regulations 1998

An overhaul of the data protection rules began with the introduction of the Telecommunications (Data Protection and Privacy) (Direct Marketing) Regulations 1998¹ ('the 1998 Regulations') which came into force on 1 May 1999. The Regulations afford consumers more protection from unsolicited faxes and telephone calls from direct marketers, and will affect all businesses including voluntary organisations and charities.

Direct marketing is defined in the 1998 Regulations to be 'a reference to the communication of any advertising or marketing material on a particular line'. It is the Data Protection Registrar's view that the term 'direct marketing' covers a wide range of activities,² applying not only to the offer for sale of goods or services, but also the promotion of an organisation's aims and ideals. This would include a charity or a political party making an appeal for funds or support.

Use of automated calling systems

The use of an automated calling system³ is prohibited unless the subscriber concerned has previously notified the caller that he consents to such calls. This applies to communications to individuals and corporate subscribers. An individual is defined to include private individuals and sole traders throughout the UK, and partnerships in England, Wales and Northern Ireland.

Unsolicited direct marketing faxes and telephone calls

It is unlawful to send direct marketing faxes to an individual without his consent.⁴ In addition, the sending of unsolicited direct marketing faxes is

Increased regulation of the direct marketing industry

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Restrictions on the use of unsolicited faxes and telephone calls

prohibited on any line where the individual/corporate subscriber has previously notified the caller that such communications should not be sent on that line or has registered with the Fax Preference Service.⁵ Similarly, it is unlawful to make a direct marketing telephone call to an individual (or sole trader)⁶ who has told the caller that he does not wish to receive such calls or has registered with the Telephone Preference Service.⁷ Corporate subscribers do however continue to have remedies available to them for dealing with unwanted direct marketing calls under the Telecommunications Act Class Licences.⁸

The 1998 Regulations do, though, provide some leniency for direct marketers. Regulation 11(4) provides that if a call is made to a number listed in the central list held by the Telephone Preference Service or Fax Preference Service which was not listed at any time within the 28 days preceding the making of the call, the caller will not have contravened the terms of the Regulations. This provides a period of grace to those who have checked that the numbers that they wish to use are not listed but do not make the calls or send the faxes until some days later.

Obligation to provide information

The 1998 Regulations also provide that certain information is communicated to the individual or corporate subscriber.⁹ Those using automated calling systems or faxes are required to provide the name of the caller and either the address of the caller or a freephone telephone number on which he can be reached. Those making telephone marketing calls are required to give the name of the caller and, if the recipient so requests, the address of the caller or a freephone telephone number on which he can be reached. Where the call is made on behalf of a company, the name given should be that of the company.

Telephone Preference Service and Fax Preference Service

The Telephone Preference Service and the Fax Preference Service (TPS/FPS) were set up by the Direct Marketing Association (UK) in 1995 and 1997 as voluntary self-regulatory schemes to enable consumers to opt out of receiving unsolicited sales and marketing calls. Following the implementation of the 1998 Regulations, the DMA was awarded the contract to run the new statutorily based schemes which came into operation in May 1999. Individuals and, in the case of faxes, corporate subscribers can register their objection to receiving sales and marketing calls or faxes. Businesses, including charities, can obtain the list of numbers that have been registered by subscribing to the TPS/FPS. Since these schemes have been given statutory force, the number of subscribers has risen significantly. Up to 13 January 2000, the number of individuals registered with the TPS and FPS was 947,020 and 110,396 respectively as opposed to 283,000 and approximately 15,000 respectively when the scheme was still voluntary.¹⁰

Ability to cleanse customer lists

Enforcement and compliance requirements for business

The 1998 Regulations are enforced by the Data Protection Registrar using the enforcement powers provided in the Data Protection Act

1998.¹¹ The Registrar can take action against any person who is in breach regardless of whether or not they are or should be a registered data controller, by issuing an enforcement notice. Failure to comply with a notice is a criminal offence which carries a fine of up to £5,000.

Also, a person who suffers damage by reason of a breach of the 1998 Regulations is entitled to compensation unless the caller can show that he has taken such care as is reasonable in the circumstances to comply with the 1998 Regulations.¹²

The new regulations

The Telecommunications (Data Protection and Privacy) Regulations 1999

The introduction of the Telecommunications (Data Protection and Privacy) Regulations 1999 ('the 1999 Regulations') completes the implementation of the Telecoms Data Protection Directive.¹³ These Regulations came into effect on 1 March 2000 to coincide with the coming into force of the Data Protection Act 1998. They revoke and repeat in full the 1998 Regulations and also add a number of provisions which affect direct marketing.

Use of data by telecommunications providers for marketing purposes

The additional provisions focus mainly on limiting the use of certain data by telecommunications companies for marketing purposes.¹⁴ Data¹⁵ may be processed by the telecommunications provider in order to market its own telecommunications services only where the subscriber has given consent. There is no specific definition of what 'consent' means but it is the DTI's view that consent must be informed.¹⁶

The processing of traffic and billing data by a telecommunications provider for the marketing of its own services is only allowed to the extent that it is necessary for such purposes and no more. Individual subscribers can also indicate that their personal data are not to be used for direct marketing purposes.¹⁷

Such obligations have been imposed in an attempt to avoid any practices which would impact on the privacy of subscribers; for example, the analysis of customers' bills to identify those using particular services in order to offer them similar or competing services.

A telecommunications provider should ensure that when subscribers enter into a contractual arrangement by signing an agreement, they are made aware of the choices they have regarding the processing of their personal data.

Application of the 1999 Regulations to e-mail

The extent to which e-mail is covered by the 1999 Regulations has been an area of controversy. The 1999 Regulations impose obligations in respect of 'calls' and 'unsolicited calls'. It is the DTI's view that e-mail is not a call. However, other provisions of the 1999 Regulations do apply to e-mail.¹⁸

**Additional
restrictions on the
use by
telecommunications
providers of
customer data**

It would appear that the exclusion of e-mail from the definition of a 'call' is a significant limitation of the 1999 Regulations. However, the Distance Selling Directive,¹⁹ which is due to be implemented by all EU member states by 4 June 2000, contains similar provisions to those of the 1999 Regulations and expressly covers all forms of commercial communications, including e-mail, whether solicited or not. Some countries already ban unsolicited e-mails.²⁰ The proposed EU E-Commerce Directive²¹ does not include such a ban and it seems it has left the Distance Selling Directive and Data Protection Act 1998 to regulate in this area.

Distance Selling Directive

The Distance Selling Directive aims to increase the protection of consumers when purchasing goods and services through electronic media such as the Internet and e-mail. More traditional forms of distance selling will also need to comply with the new rules. Non-compliance may give rise to civil and/or criminal penalties.

The Directive requires the express prior consent of consumers before sending faxes or using automated calling machines as a means of communication.²² All other forms of marketing communications, including e-mail, mailshots and cold calling, whether unsolicited or not, will only be possible where there is no clear objection from the consumer (the so-called opt-out system).

The Directive also repeats certain requirements contained in the 1999 Regulations relating to the supply of information by the caller. For example, it will be mandatory for the caller to state his identity and the purpose of the call will have to be made explicitly clear at the beginning of any conversation to allow the consumer to decide whether or not he wants to continue with the call.²³ It is important to note that the Directive will only provide protection to consumers for the purposes of distance selling to consumers. Business-to-business e-mails, for example, are not covered.

At present there is no indication from the DTI as to a precise date for implementation of the Directive. A further consultation document was published by the DTI on 24 November 1999 with a deadline for responses by 11 February 2000.²⁴ In this further consultation paper, the DTI is still seeking consultation on a number of issues, in particular whether an opt-in or opt-out system should be applied. It may seem logical for the UK to adopt the opt-out system to make it in line with the opt-out system already operating under the 1999 Regulations in respect of telephone calls.

Non-statutory E-Mail Preference Service

On 10 January 2000 the DMA in America launched the E-MPS, which is a global service available to all marketers. The DMA (UK) has set up a gateway for its UK consumers to register with the E-MPS service. Essentially, all those marketing organisations which subscribe to the E-MPS system can clean their existing e-mail lists of individuals against those individuals who have registered their e-mail address with E-MPS.

Restrictions on all forms of commercial communications

Any marketer who uses the service will send their list electronically to the E-MPS; all those e-mail addresses registered will be removed from the marketer's list and the cleansed list is returned electronically. Unlike the TPS and FPS, the E-MPS is not yet a statutory scheme. However, as the mechanisms for the implementation of an opt-out system are now already in place in the UK, it seems likely that such a system will be adopted under the terms of the Distance Selling Directive.

Ensuring compliance

Since a breach of the regulations may lead to criminal sanctions being imposed, the decision to comply with them is no longer an option. As the 1998 Regulations have been in force since May of last year, many companies may already be compliant. But in any event, the following practical steps should be taken by all companies with direct marketing staff.

Practical steps to be adopted by companies involved in direct marketing

- Keep an in-house 'do not call' list.
- Customer lists already in existence should be cleansed against the lists kept by the TPS/FPS. It is important to note, however, that if a customer on an in-house list has given consent but has also registered with the TPS or FPS, this separate consent will override the TPS/FPS registration. This means that an individual can opt in for the purpose of an individual relationship he or she wishes to establish or continue with a specific supplier. Where an individual has opted in, the cleaning of the individual's line with the TPS or FPS is unnecessary.
- Subscribe to the TPS/FPS/E-MPS and decide what type of subscription is appropriate for the business.
- Undertake an internal audit to identify areas of non-compliance and implement the necessary procedural changes.
- Educate all direct marketing staff about the regulatory regime. Front-line staff in particular need to be aware of the information they are legally obliged to communicate.
- Ensure uniform compliance across all forms of communication. Although many direct marketing companies and businesses may already have procedures in place to comply with the restrictions relating to unsolicited faxes and telephone calls, it is vital to ensure that such compliance extends to e-mail to make compliance certain before the Distance Selling Directive is implemented in the UK.
- Appoint a 'compliance officer' responsible for monitoring and ensuring compliance on all aspects of direct marketing undertaken.

References

- 1 Implementing 97/66/EC of the European Parliament and Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector — OJ No. L24, 30 January 1998.
- 2 Data Protection — Interim Guidance — the Telecommunications (Data Protection and Privacy) (Direct Marketing) Regulations 1998 dated June 1999.
- 3 Defined in Regulation 6(1) as 'a system which, when activated, operates to make calls without human intervention'. This definition is not identical to that used in the Telecommunications Act Class Licences.

- 4 Regulation 7.
- 5 Operated by the Direct Marketing Association (UK).
- 6 It is, of course, impossible for the marketer to know which businesses are in fact sole traders, which makes this provision a trifle onerous.
- 7 As ref. 5 above.
- 8 Condition 7 of the Telecommunications Services Licence; Condition 6 of the Self Provisions Licence.
- 9 Regulation 11(1).
- 10 Figures supplied by the Direct Marketing Association (UK).
- 11 Regulation 13 of the 1998 Regulations and Part 5 of the Data Protection Act 1998.
- 12 Regulation 12(1).
- 13 Except Article 5 of the Telecoms Data Protection Directive on confidentiality of communications, which is not required to be implemented until October 2000.
- 14 These provisions bolster those under the Data Protection Act 1998 which give individuals the specific right to object to data being used for direct marketing purposes.
- 15 For example, a subscriber's address, the type, starting time and duration of calls, and matters concerning payments including advance payments, payments by instalments, reminders and disconnections. A full list of data is given in Schedule 3 of the 1999 Regulations and is wider in scope than the definition of data under the Data Protection Act 1998.
- 16 Explanatory Note on the UK implementation of Directive 97/66/EC on the processing of personal data and the protection of privacy in the telecommunications sector.
- 17 Implementing Article 12.2 of the Telecommunications Data Protection Directive.
- 18 For example, provisions relating to security under Regulation 25.
- 19 Directive 97/7/EC of the European Parliament and Council of 20 May 1997 on the Protection of Consumers in respect of distance contracts — OJ No. L144/19, 4 June 1997.
- 20 For example, Austria, Annex A — Further Consultation Document — Implementation of EU Distance Selling Directive.
- 21 'Proposal for a EU Directive on certain legal aspects of electronic commerce in the internal market', COM (1998) 586.
- 22 Article 10 of Directive 97/7/EC.
- 23 Article 4(3) of the Directive 97/7/EC.
- 24 Distance Selling Consultation, November 1999, published by the DTI.