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Legal and Regulatory Update

Implementation of the directive on privacy and electronic communications, or making a meal out of cookies and spam

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Abstract

On 27 March 2003 the Department of Trade and Industry published a consultation document on the implementation of the directive on privacy and electronic communications. This consultation is aimed at ‘anyone who direct markets by phone, fax, SMS [short message service] or e-mail’, and is open until 19 June 2003. The consultation provides marketers with the opportunity to express their opinions about the proposed changes in legislation.

Introduction

E-commerce Minister Stephen Timms launched the consultation by saying that the new legislation would ‘aim to give control back to the customer’. He explained: ‘When used properly, direct marketing is a powerful business tool. But badly targeted messages, whether by e-mail, phone, fax or text are a global concern. Not only are they a great nuisance, they are eroding trust in legitimate and valuable business services.’¹

This should alert marketers to some of the changes that will affect them, most notably in relation to the use of unsolicited e-mails and SMS. This paper seeks to outline the elements of the proposed legislation that are most relevant to marketers, and to provide them with the tools needed to take an informed role in the consultation process. The Direct Marketing Association is drafting a response to the consultation which takes account of direct marketing issues, and members should consider forwarding any queries or concerns to Robert Dirskovski at the DMA.²

The consultation document is available online.³

Security and confidentiality, cookies and other tracking devices

What are cookies?

A cookie is described in the consultation document as ‘software sent to and stored in’ a user’s PC that then ‘acts as a marker or identifier that can be recognised automatically by the service provider’.⁴ Cookies have a range of uses, such as to monitor how often and in what order people visit pages on a website, or to record visitors’ purchasing/interest preferences

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so the website can be adapted to provide appropriate, targeted advertising. They are an important tool for marketing on the internet.

In a previous paper in *Interactive Marketing*, Danny Meadows-Klue (European president of the Interactive Advertising Bureau (IAB)) argued that restricting the use of cookies would have 'startling' costs.⁵ Although the provisions in relation to cookies that made it into the final version of the directive are less stringent than those in earlier drafts, they still impose significant new requirements on service providers.

The IAB provides an online resource to help online service providers to comply with the provisions relating to cookies.⁶

How are cookies affected by the directive?

The directive refers pejoratively to 'spyware, web bugs, hidden identifiers and other similar devices',⁷ and warns that such software (which may include cookies) may 'seriously intrude upon the privacy of . . . users'.

The directive seeks to protect this privacy by restricting the use of cookies. The consultation document states that the 'key aim . . . should be to enable internet users to make an informed choice about cookies'.⁸ It is still not clear exactly what will be the extent of the restriction on the use of cookies. Mr Meadows-Klue referred to 'as yet unspecified conditions for the use of cookies' in the EC directive, and the ambiguities that he noted have survived in the draft UK regulations.

Informed choice

Clear and comprehensive information

The regulations state that users should be 'provided with *clear and comprehensive information* about the purposes' for which information is stored on a user's PC, or the information then accessed (emphasis added).⁹ The draft regulations do not clear up the question of when the notification should take place (ie whether a user should be notified before a cookie is placed on his PC), nor how notification should take place. The consultation document concedes that the draft regulations 'do not specify where and how this information should be set out . . . but we would envisage it being included in a clearly signposted privacy or cookie statements [*sic*] on the online service provider's website'.¹⁰ Clearly, given the remaining ambiguity over the positioning of the information, it is a point on which consultation may well determine the form of the regulation when it finally comes into force.

Ambiguity over positioning

The IAB's approach is to supply a website which provides 'an accessible and impartial source of information about cookies for website users', to which service providers can provide a link on their websites.

Opportunity to refuse cookies

In addition to being provided with information as described above, users must be given 'the *opportunity to refuse* the storage of or access to'¹¹ information such as that held by cookies, subject to the exception described below.

There is no clarification of the question of how a user should be able to refuse a cookie — the draft regulations leave this deliberately unclear. The consultation paper suggests two possibilities: 'service providers

could make their own switch-off facilities available, or they could explain to users how to use the switch-off and alert facilities provided independently in browser programmes'.¹² The latter sounds like the most straightforward solution, since most browser software has a facility for switching off cookies. But service providers who use cookies (ie most service providers) will want some clarification of this issue to avoid the risk of being penalised for falling short of the requirement to notify users.

Initial use

First use only

An important concession which should relieve the burden on service providers allows the information to be provided to the user on only the first use. The draft regulations state that 'it is sufficient . . . that the requirements . . . are met in respect of the *initial use*',¹³ which presumably means *only* the initial use.

Service providers' entitlement to refuse cookie-free access

The directive and draft regulations allow for two exceptions to the requirements described above. Service providers can use cookies without providing information or the opportunity to refuse where the cookie is intended:

- 'for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network'; or
- 'where such storage or access is strictly necessary for the provision of an information society service'.¹⁴

The service provider could therefore refuse to allow a user to access its website where it has disabled cookies on its internet browser, but only in these specific circumstances.

It remains to be seen what 'necessary' and 'facilitating the transmission of a communication' mean in this context. If service providers are at all unsure of whether the use of cookies comes within one of these allowable exceptions they should provide the 'clear and comprehensive' information required anyway.

Unsolicited commercial communications — Automated calling systems, fax, phone, e-mail and SMS

'Spam must not be allowed to get in the way,' said Stephen Timms, E-commerce Minister.¹⁵

Global spam problem

Unwanted commercial e-mails (also called 'spam') have been estimated to account for 40 per cent of global e-mail traffic. The directive seeks to outlaw such e-mails. Given that a large proportion of the spam received in the UK comes from outside the EC, it remains to be seen how much of an effect this will have on the global proportion of spam. But the directive and draft regulations will have a striking effect on marketers in the EC direct marketing to 'natural' individuals.

**Consent to
unsolicited
marketing e-mails**

E-mail and SMS opt-in for individual subscribers

Marketers will no longer be permitted to send unsolicited marketing e-mails (which include SMS messages under the definitions in the draft regulations) without the prior consent of the subscriber. In other words, new customers must agree to receive marketing by e-mail. Where existing customers have not given their consent, they must be asked to agree before they are sent marketing e-mails (subject to the exception below). Additionally, it will be necessary for individuals to consent before they are sent unsolicited marketing by fax or from automated calling systems.

The regulations are drafted with reference to individual subscribers rather than users. This leaves open the possibility that marketers could send unsolicited marketing to users who are *not* subscribers. This might be the case for employees, where it is the employer who is 'party to a contract with a provider of public electronic communications services',¹⁶ although there is protection for individuals under the Data Protection Act if their e-mail address contains personal data (eg the employee's name). In other words, it is not known what the law is when marketing to an employee of ICI in a business setting. Does a marketer have to get the consent of ICI (the subscriber), or the individual (the user)?

The sender of unsolicited marketing e-mails must also identify itself, and give the recipient an address for requesting that the sender send no further e-mails. The requirement to provide this information is in addition to requirements under the E-commerce Regulations.¹⁷ They require that marketing by e-mail and text message should:

- be accompanied by a message stating that the e-mail or text is a commercial communication
- state that the communication is by way of a promotional offer (if appropriate)
- make any conditions clear, unambiguous and easily accessible.

Corporate subscribers

Corporate subscribers can opt out of receiving marketing by fax, and can opt out of receiving marketing e-mails where their business address incorporates personal data. The opt-in consent with regard to e-mails and SMS will not otherwise apply to corporate subscribers.

CAP Code

Although the regulations are still in draft form, the Committee of Advertising Practice launched the new British Code of Advertising, Sales Promotion and Direct Marketing on 4 March 2003, which took effect immediately. This 'CAP Code' requires marketers to comply with some of the provisions in the directive even before the regulations have reached an agreed form and been brought into force. The code states that: 'the explicit consent of consumers is required before . . . marketing by e-mail or SMS text transmission'.¹⁸

**Before regulations
are in force**

Existing customer relationship exception

Under the directive and draft regulations, there is an exception to the rule requiring recipients to opt in for e-mails sent in the context of an existing customer relationship, providing that:

- the sender has obtained the recipient's contact details 'in the course of the sale or negotiations for the sale of a product or service',¹⁹
- the marketing is only in respect of the sender's products or services
- the sender has taken 'reasonable steps to ensure that the recipient is aware of the nature of those products and services'.²⁰

The sender must also identify itself, and give the recipient an address for requesting that the sender sends no further e-mails.

The CAP Code does not list all of these requirements, other than the opportunity to object. It states that 'marketers may market their similar products to their existing customers without explicit consent so long as an opportunity to object to further marketing is given on each occasion'.²¹ It is not clear why CAP published the code so far in advance of the regulations reaching an agreed form, nor whether CAP will publish an updated code when the regulations come into force. Marketers who simply ensure that they comply with the code risk breaching the regulations.

Changes to the regulation of direct marketing by telephone

Opt-in rights?

The consultation asks interested groups to suggest whether any changes should be made to the existing law in relation to direct marketing by telephone. Under the current system, individuals can opt out through the TPS or on a case-by-case basis; the consultation document asks whether this should be changed to a system that is consistent with the new requirements relating to marketing by e-mail (by requiring marketers to obtain consent before direct marketing by telephone).

The consultation also asks whether the law should be changed for marketing by telephone to corporate subscribers. The consultation states that 'there are three broad options . . . leave things as they are, give corporate subscribers further opt-in rights, or go the whole way and give corporate subscribers exactly the same rights as individuals'.²² The draft regulations give corporate subscribers the right to register on the TPS and opt out on a case-by-case basis. Marketers who fear that these changes might be unduly prohibitive should consider making their feelings clear in the consultation process.

Definitions of corporate and individual subscribers

The directive distinguishes between legal and natural persons, and affords greater protection to natural than to legal persons. This poses a problem in UK law, where sole traders and partnerships are classed as natural rather than legal persons. They therefore stand to benefit from the level of protection designed for natural individuals, no matter how large the business they run.

In the draft regulations, the line is drawn between the meaning of

Restriction on marketing without consent

‘legal’ and ‘natural’ persons in the same place as in the directive.

Marketers whose businesses include direct marketing to partnerships and sole traders should be aware that they will be severely restricted in marketing to non-corporate customers under the draft regulations unless they obtain their consent. These marketers should consider expressing their concerns during the consultation process. The consultation document suggests that two alternative ways of distinguishing between types of individual would be:

- to apply the rules to individuals only where they are not acting ‘in their business capacity’,²³
- to extend the meaning of ‘legal persons’ to include partnerships.

Other provisions

Subscriber directories

The new provisions allow consumers to decide whether to be listed in subscriber directories, and require this right to be exercisable free of charge.

Processing of traffic and location data

The directive allows mobile operators and service providers to use the data regarding the location of their customers to offer them extra services based on this location. These services might include traffic and weather reports, but would also allow for location-based advertising. The directive and draft regulations both make clear that users must give consent to the use of these location data. The communications provider must give information regarding the type of data to be processed, the purposes for which it is processed and whether it will be transmitted to a third party.²⁴ This replaces the current regime which does not allow the use of location data; the consultation states: ‘this will open the door to a range of new services such as location-based advertising to mobile phones’.²⁵

Conclusion

The draft regulations leave a number of issues unresolved, notably the method by which users should be notified of the use of cookies. They also leave room for change in relation to the distinction between individual and corporate subscribers and the treatment of direct marketing by telephone. They are designed to protect the privacy of individuals, but do so at the expense of marketing opportunities for marketers.

Reduced marketing opportunities

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