
Legal and Regulatory Update

Extension of the Telephone Preference Service to businesses

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Introduction

This is the first of two papers on the effect of the Privacy and Electronic Communications Regulations 2003, which implement the EU Directive 2002/58/EC on Privacy and Electronic Communications and which revolutionise the way in which marketing by any method other than ordinary postal mail has to be carried out.

This first paper deals with a small point of the extension of the Telephone Preference Service (TPS) to businesses. The second and much more extensive paper will deal with the rules on marketing to businesses and individuals by phone, fax, e-mail, SMS messages, pictures, text and video, and will be published in the next issue.

New draft regulations

The topical point is that the Department of Trade and Industry has just published the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2004 — SI 2004/1039 — as draft regulations which are going to be brought into force on 25 June 2004. These regulations will extend to businesses the right that individuals already have, to register with the TPS — all organisations which wish to make marketing calls to individuals have to clean their calling lists against the TPS list to ensure that people who have registered more than 28 days before do not receive marketing calls.

Safeguards for companies

This right is now being extended to companies, but safeguards have been put in place in the regulations because it would be ridiculous for a mischievous or malicious person pretending to be an employee of, say, ICI plc to be able to make one phone call to the TPS and, 28 days later, to prevent all marketing phone calls to ICI plc as an organisation.

The safeguards are that, unlike registration for individuals which is permanent until revoked by the individual, registration by companies has to be reviewed annually. Close to each anniversary of the company first registering with the TPS, Ofcom will send to each company a list of the extension numbers that have been registered not to receive marketing calls so that these can be checked for accuracy.

In addition all requests by companies to be registered on the TPS have to be in writing.

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Exemption for existing customers

The same exemption applies to companies as it does to individuals, which is that a personal relationship between the marketer and the target company or individual will always override a TPS registration, whether that comes before or after the establishment of the personal relationship, providing that the marketer has complied with the Data Protection Act requirements and told the individual at the company to whom it wishes to market that it is going to do so by telephone, and has given the individual an opt-out which has not been exercised. This notification is usually done in a data protection notice.

To give an example, Betty Smith, the finance director of ICI plc, on behalf of that company enters into a relationship with a supplier of stationery and as part of that supply the stationery company provides her with a data protection notice stating that they will be using her name for marketing purposes and will be contacting her by telephone. Betty Smith reads the data protection notice and does not tick any of the opt-out boxes and carries on doing business with the stationery company. The fact that Betty Smith subsequently registers with the TPS not to receive marketing phone calls on her direct-dial line at ICI plc will not prevent the stationery company from marketing by phone to Betty Smith. The personal relationship that they establish with her overrides her TPS registration even though this came after the establishment of the personal relationship with the stationery company.

Data protection compliance required as well

It is important to remember that not only do marketers have to comply with the privacy and e-communications regulations if they wish to market by any method other than snail mail, but they also have to comply with the Data Protection Act if — even though they are carrying out B2B marketing — they are still e-mailing or phoning an individual at a company.

Best practice

Although the concept of the personal relationship has always applied to TPS registration by individuals, most marketing companies take the view that if an individual feels strongly enough to register with the TPS it is probably safer to exclude them from calling lists. And since it is likely that only a few corporate direct-dial numbers will be registered for each corporate organisation, it is probable that marketers will also consider it safer to exclude these from corporate calling lists.