

Direct Marketing: The New Law

The Privacy and Electronic Communications (EC Directive) Regulations 2003 came into force on 11th December 2003 and implement EC Directive 2002/58/EC of the same name. They update the current law in the light of new technologies and in particular ensure that the privacy rules currently applicable to phone and fax services also apply to e-mail and to the use of the Internet.

The new regulations will affect a wide range of organisations and individuals including 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.

The new regulations carry over those elements of the Telecommunications (Data Protection and Privacy) Regulations 1999 which apply to phone and fax marketing. Therefore it is still unlawful:

- To use an automated calling system to transmit marketing material without the prior consent of the subscriber. This covers systems that automatically make telephone calls in order to play a recorded marketing message to recipients.
- To make a direct marketing telephone call to an individual where the individual has either told the caller's organisation that he does not wish to receive such calls or he has registered with the Telephone Preference Service.
- To send a direct marketing fax to an individual unless that individual has previously notified the sender that he does not object
- To send a direct marketing fax to anyone, whether individual or corporate body, who has notified the sender previously that he does not wish to receive such faxes or has registered with the Fax Preference Service.

There are also provisions for those instigating direct marketing calls or faxes to give certain information to the recipients.

The main new provision of the regulations concerns the use of unsolicited email and text messaging (SMS) for the purposes of direct marketing. Regulation 22 states that generally these may only be sent where an individual has given his/her explicit prior consent to receiving them. However if a customer's details are obtained in the course of a sale of a

product or service, the business may then use those details to market its own same or similar products or services to that customer. The Information Commissioner has stated that this latter expression is linked to those products and services about which the customer would reasonably expect to receive information.

Those sending direct marketing e mail or SMS must clearly and distinctly give the customer the opportunity to opt-out easily and free of charge when the details are collected and on any subsequent marketing e-mail.

One fundamental flaw in the new regulations is that e-mails sent to a corporate subscriber fall outside the ambit of the regulations except in so far as there is a requirement to identify the sender and to provide contact details. This means that any marketing e mails sent to an individuals e mail address at work will not be caught only those sent to his/her private home e mail. This will cause some concern to many individuals and employers as a vast amount of junk email is received at work thus clogging up the servers and wasting staff time.

There are a further four new provisions in the regulations:

Anyone who uses cookies and similar tracking devices on their websites must give users certain information and a chance to refuse 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 allow for the provision of value added services based on traffic or location data. 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 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.

The Information Commissioner will be able to investigate and issue enforcement notices to individuals or companies who breach the regulations. Failure to comply with an enforcement notice is a criminal offence and is liable to an unlimited fine. Furthermore, an individual who suffers damage as a result

of a breach may also pursue a claim for compensation under regulation 30 and/or section 13 of the Data Protection Act 1998. The Commissioner's office has published guidance on how it intends to regulate the operation of the regulations. This is available at www.informationcommissioner.gov.uk.

The new regulations will have implications for solicitors, both as senders and recipients of direct marketing. They will also affect solicitors' business clients who will require advice on the implications for their marketing operations.

Summary

The new Privacy and Electronic Communications (EC Directive) Regulations 2003 :

- enables the provision of value added services based on location and traffic data, subject to the consent of subscribers (for example, location based advertising to mobile phone users);
- removes the possibility for a subscriber to be charged for exercising the right not to appear in public directories;
- introduces new information and consent requirements on entries in publicly available directories, including a requirement that subscribers are informed of all the usage possibilities of publicly available directories - e.g. reverse searching from a telephone number in order to obtain a name and address;
- extends controls on unsolicited direct marketing to all forms of electronic communications including unsolicited commercial e-mail (UCE or Spam) and SMS to mobile telephones; UCE and SMS will be subject to a prior consent requirement, so the receiver is required to agree to it in advance, except in the context of an existing customer relationship, where companies may continue to email or SMS to market their own similar products on an 'opt-out' basis;
- introduces controls on the use of cookies on websites. Cookies and similar tracking devices will be subject to a new transparency requirement - anyone that employs these kinds of devices must provide information on them and allow subscribers or users to refuse to accept them if they wish.

Ibrahim Hasan is a writer and trainer on information law with www.actnowtraining.co.uk

Email ibrahim@actnow.org.uk

He will be speaking on a course on the Data Protection Act 1998 in Manchester on 3rd February 2004.