

UK Privacy and Electronic Communications Regulations: E-Mail, Faxes, Phone Calls, and Cookies.

The UK Communications Minister has introduced into Parliament the Privacy and Electronic Communications (EC Directive) Regulations 2003, which are necessary for the implementation of the Directive on Privacy and Electronic Communications (2002/58/EC). The Regulations update existing UK legislation covering unsolicited email, phone calls, faxes and the Internet. The Directive is, in part, the European Commission's "anti-spam" program. These particular regulations, which only apply in the UK, come into force on December 11, 2003. They will be enforced by the Office of the Information Commissioner, formerly known as the Data Protection Commissioner. If you market into the UK, you need to know what follows.

Cookies.

When the Directive was being drafted, the European Commission's brilliant, experienced, and well-informed bureaucrats and parliamentarians had proposed to paralyze the Internet by requiring positive opt-in consent for each deployment of a cookie by a Website. If you don't think this is silly, in Explorer go to Tools| Internet Options| Privacy and set the toggle bar to Block All Cookies, and see what happens. In Netscape, go to Edit| Preferences| Advanced, and click either "Warn me" or "Reject all cookies". Give it a try. You'll go nuts.

Fortunately, on this topic, FEDMA and others did break through the resistance to learning from business about the real world, and now all that is required is that a user be "provided with clear and comprehensive information about the purposes of the storage of, or access to, ...personal information on a subscriber's computer", ie, a cookie. The Regulations pretty much track the Directive. In short, information somewhere (for example, in your privacy policy) describing how you use cookies and what you do with the information they generate, and describing how to block them (see first paragraph above) may be sufficient. However, the Regulations are not detailed enough to answer this question. One suspects that the next layer of UK-style governance of things like this, called "Guidelines" will cover that subject. These Guidelines may well be issued in the next 2 months.

While we can't be sure, one hopes that if all you use cookies for is to maintain the session, or in order to deliver something an individual has requested, like access to her stock trading account or shopping cart, you will not even have to go through the charade of telling people about cookies. While all of this seems unremarkable, it pays to remember that Europeans are convinced that cookies contain personal information, and what one can and can not do in Europe with personal information is all regulated.

For one example of a disclosure that I think satisfies the Directive (except for advice on blocking) visit The DMA's privacy policy at <http://www.the-dma.org/privacy.shtml>. For a complete education on cookies, visit www.cookiecentral.com.

E-Mail/SMS/txt

As for e-mail, SMS, and text messages, the European Commission and the Parliament jumped quickly onto the politically correct side of the empty opt-in\opt-out debate and chose "correctly". And so, of course, must these Regulations. Henceforth, in the UK you may send e-mail and SMS or text messages to an individual for the purposes of "direct marketing" (more on this later) only if one of two cases apply.¹

1. Consent Cures All

The first case where the sending of e-mail, SMS, or text messages is permissible is when a person has "notified the sender" that he consents to such communication being sent by the sender or "at the instigation of the sender".

This would seem to suggest that you can't e-mail to rented lists, and you can't rent out your e-mail list. The language says that the consent must be "notified to the sender", which is from the individual to you. This suggests that the following does not work: "Yes, please rent my name to other reputable companies whose offers you think will interest me." Is the e-mail list rental business in the UK now dead?

Well, two arguments are suggested that it isn't. First, the language of section 22 applies to "**unsolicited** communications". And the prohibition is against sending "unsolicited communications" unless the recipient has notified the sender that he consents to such communications. Thus, it is argued, there must be a category of "solicited communications" which is different from "unsolicited communications", and a check-box would work to create a class of "solicited communications".

Our own view is that this was just sloppy drafting and the section was clearly intended to apply to any solicitation, and if it wasn't directly solicited, it could not be sent. But perhaps the Guidelines will tell us.

One other argument is also put forward why transfers to third parties to send e-mails builds on the fact that the consent is to the communication being sent by the sender or "at the instigation of the sender. Could this save lists? Not if the requirement that the recipient "notify the sender" is read to mean "directly or indirectly." Or unless the Ministry or Parliament wakes up and says, "Hold on. Why can't a citizen of the UK, in the exercise of his or her right to receive whatever information they want, tell the marketing world they will receive messages from whomever? Where do we get off telling them they can't?"

¹ The following discussion refers to all three kinds of messages, despite the use of the term "e-mail". In the words of the Regulations, these are all "electronic mail", which includes any "text, voice, sound or image message sent over a public electronic communications network..."

For what it is worth, we think "at the instigation of the sender" probably means it's ok to use a service bureau to send your promotions. But I would love to hear someone argue about the consumers' rights to tell the world "Send me stuff." As these Regulations are written, they can't.

2. In the Case of the Sale or Negotiations -- "Soft Opt-in"

The second permissible case is when there is an existing business relationship, but a very restrictively-defined business relationship. (This is basically an opt-out, but the political taste of using that phrase was much too bitter, so it has been named "soft opt-in". Names matter in these debates.)

In terms of the definition of "soft opt-in:"

First, you must have obtained the e-mail address in the course of the "sale or negotiations for the sale of a product or service" to that person. You can't use "e-mail append" from secondary sources to find your customers' or prospects' e-mail addresses; you have to get them from the source at the time of the purchase or enquiry. Yes, enquirers and browsers of the human sort qualify as within the "business relationship." However, this also means that e-mail addresses gathered and input before December 11 other than in the context of a sale or negotiation, or with full consent, can not be used. That is, legacy addresses, cannot be mailed unless they qualify as just described.

Second, the direct marketing must be in respect of "that person's similar products and services only..." No third party ride-alongs. No e-mailing for third parties. No "other customers like you who bought X also bought A,B, and C," unless A, B, and C are "similar."

What qualifies as "similar products and services"? There is no guidance on this either, but legal counsel to the direct marketing industry in Denmark, where privacy-consciousness is very high, is of the view that in the Danish law, it means "within the same product group". Thus, you could promote other clothing products to a clothing buyer, but not a suitcase.² Would authorities in the UK agree? This certainly seems eminently sensible. As of right now, the Regulations are silent, but one suspects that the expected "Guidelines" will cover that subject.

Third, the individual has to have been given a clear and free (aside from the cost of the "unsubscribe" transmission) chance to opt-out at the time of "address-gathering" and again in the commercial message.

(Interesting subsidiary question: How long does the business relationship last? One year? Forever? Given the degradation speed of e-mail addresses and cellphone numbers, does it matter? We don't know. Again, perhaps the Guidelines will help.)

² Opinion letter of Kromann Reumert Law Firm, 2 July 2003 with regard to Amendment of the Danish Marketing Practices Act - Direct Marketing

Finally, in both permissible cases, all DM electronic messages must not "disguise or conceal" the identity of the sender and must include a valid address of the sender for opt-out purposes. Whether this must be an on-line or off-line address is not specified.

E-Mail/SMS/txt to Companies

The good news is that e-mail marketing to companies and individuals within companies is still permissible. We don't know how effective unsolicited e-mail marketing to info@somecompany.com can be, but, you can do it. Moreover, since the restriction on these messages only applies to messages to "individual subscribers", ie, the individual who has the electronic network account (read Internet access or wireless phone account) you can also send messages to named.person@somecompany.com since in that case the "subscriber" is a "corporate subscriber," not an "individual subscriber".³

However, complicating this further is the fact that the industry's mandatory self-regulatory Committee of Advertising Practice ("CAP") Code of Advertising, Sales Promotion and Direct Marketing Practices does not currently permit unsolicited e-mailing to non-customers at company addresses, ie, business-to-business prospecting. And a violation of the Code incurs the attentions of the redoubtable Advertising Standards Authority (ASA). But, perhaps industry will get the law and the self-regulation in sync.⁴

Having said all that, however, the Government has already stated that it will monitor its complaint level with respect to unsolicited "electronic messages" to companies, and nothing in the Electronic Communications Directive would *prima facie* prevent it from requiring a "soft opt-in" or worse for business-to-business marketing.⁵

Telephone and Telefax

The Regulations refine the rules on telephone and telefax marketing. Telephone marketing to individuals is already permissible subject to mandatory consultation with the opt-out register (do-not-call [DNC] list) or unless the individual or company has told the calling party not to call (in-house suppress). In short, a company must exercise its opt-out right caller-by-caller, while individuals can list themselves on the DNC list.

³ Interesting note: partnerships and individuals "doing business as" are not "corporate subscribers", except that partnerships in Scotland ARE "corporate subscribers". Thus, e-mails to employees of partnerships are subject to opt-in/soft opt-in. Since many law firms are partnerships, and since lawyers can be ...difficult, those who market to lawyers would be wise to remember that they "enjoy" the protections of individuals as to e-mail solicitations.

⁴ This interesting twist is pointed out by Stephen Groom of the UK law firm Osborne Clarke in his September *Hot Topic Report* on www.marketinglaw.co.uk. For further information contact Stephen at stephen.groom@osborneclarke.com.

⁵ In fact, paragraph 45 in the Directive explicitly states, "This Directive is without prejudice to the arrangements which Member States make to protect the legitimate interests of legal persons with regard to unsolicited communications for direct marketing purposes."

This may not last. The obviously misnamed Department of Trade and Industry has publicly announced that it has decided to cripple trade and industry by opening the DNC register to companies, probably sometime in 2004. That the vast majority of companies find this ludicrous, anti-business, potentially devastating, and the end of civilization as we know it has not so far swayed the Minister from his chosen path.

The issue would appear to be the vast number of small businesses, many operated from homes, who appear to be inundated with business calls, a problem being faced in the United States as well.

Finally, as to faxes:

1. For individuals, opt-in only;
2. For companies, individual company opt-out (in-house suppress) and DNC suppress for faxes from any commercial source. Yes, a national opt-out list for faxes to companies.

Penalties?

Leaving aside the possibility of being publicly thrashed by the ASA for having sent unsolicited e-mails to prospects within companies, the Regulations are enforced by the Information Commissioner with the powers given him under the 1998 Data Protection Act, including the ability to issue "enforcement orders," usually to stop a practice. Failure to comply is a criminal offence punishable by fines of up to GBP5,000. If one elects a jury trial and loses, the penalty can be an unlimited fine.

Finally, the Regulations establish a private right to sue for "any person who suffers damage by reason of any contravention of... [the] Regulations..." It is a defense that one has "...taken such care as in all the circumstances was reasonably required to comply with the relevant requirement." But how sympathetic will judges and juries be to the occasional database mess-up? Certainly they won't be sympathetic to someone e-mailing to prospects in clear violation of the prohibitions. On the other hand, what is the "damage" that one could suffer? A speculation for another time, but at this point in time remember that in the UK, while damages are generally set by the judge, as normally a jury does not hear these cases, nevertheless, the loser pays the winner's lawyer, and contingency fees (no win, no fee) and class actions are now permitted.