

The Directive on Privacy and Electronic Communications (2002/58/EC) DTI Consultation – The Information Commissioner’s Response

This directive (2002/58/EC) is designed to “particularise and complement” the Data Protection Framework Directive (95/46/EC). It is useful to bear this in mind when considering how to give effect to the provisions of this directive.

Should the draft Privacy Regulations redefine the split between corporate and individual subscribers?

We recognise that some difficulties have arisen in respect of the Regulations currently in force implementing directive 97/66/EC and that, superficially at least, there may be a case for following the approach taken in the E-Commerce Directive which distinguishes between when individuals are acting in their private and business capacities. However, we share the DTI’s reservations.

This issue should not be seen in isolation from the question of how far the protections afforded to subscribers in this directive should be extended to corporate subscribers. For example, under the current Regulations where a company provides mobile phones to its employees for use for business purposes there is no right to prevent unsolicited marketing calls because the company, not the employee, is the subscriber. It is not at all clear how far redefining the split between corporate and individual subscribers would help in these circumstances.

What information should operators provide about cookies and similar devices, and how should internet users be given the opportunity to refuse them?

It is difficult to answer such a broad question in other than general terms. Any information provided should be as simple to understand as possible and give individuals a clear appreciation of the potential consequences to them. Exactly how, in practical terms, internet users should be given the opportunity to refuse cookies is less important than that the mechanism is simple and easily understood. It is not clear whether it would be practical to specify in regulations how users should be given this opportunity though we acknowledge that a standard approach would be helpful to users.

Should the Privacy Regulations apply to all cookies and similar devices, or should they only apply to cookies where they involve processing of personal data?

Though article 5(3) is open to differing interpretation is our understanding that it was always intended that the restrictions regarding the collecting of information were not intended only to apply in respect of individual identifiable subscribers, that is to personal data. However, it is far from clear where it was intended to draw the line. We accept that some information collected could be relatively benign. However, we

recognise there may be circumstances in which information about a corporate subscriber, or relating to a number of individuals who might have access to the same computer, could be used in such a way as to give cause for concern. There is a pressing need to ensure that the nature and extent of the requirements of the regulations are readily understood. It is important, therefore, that the exact scope of the provisions implementing Article 5(3) is clear. We recognise that this provides a powerful argument for limiting the application of these provisions to those circumstances in which personal data are collected.

Should the Privacy Regulations specify whether a user should have the right to override a subscriber's consent to a cookie?

The third paragraph of Chapter Three of the consultation document states that the requirements of Article 5(3) do "... not apply to technical storage or access, however, or where strictly necessary in order to provide an information society service requested by the subscriber or user". This touches on two significant difficulties of interpretation. First, what exactly does "technical storage" mean? Second, you could argue that if the subscriber has requested an information society service that involves collecting information regarding usage that it follows that a user does not have a right to refuse the cookies concerned.

We recognise that there is nothing in the directive itself that expressly recognises that there may be circumstances in which it is reasonable for the subscribers' wishes to prevail. We accept also that it might be difficult to define clearly the circumstances in which a user should not be able to disable a cookie. Nevertheless, it seems to us likely that there may be circumstances, for example where an employee is using a computer at work, where the employer's wishes should prevail except to the extent this involves an unwarranted collection of personal data about the employee. If there is any evidence from respondents to the consultation that there is a real practical issue here it would certainly be helpful if the Regulations were drafted in such a way to recognise that, in particular circumstances, the wishes of a subscriber might override those of an individual user, and, if possible, to define the circumstances.

How should service providers gain consent to processing traffic and location data and what information should they provide?

Again, we don't think it makes practical sense to seek to be prescriptive about the way in which service providers gain consent. We recognise that different service providers might, because of the way they operate, obtain such consent in different ways. What is important is that subscribers are given sufficient clear information to enable them to have an informed appreciation of the likely consequences to them if they do consent.

Should service providers be under a stronger requirement to provide a full range of CLI services as proposed?

In our view, subject to any genuine technical impediments there may be, service providers should be under a clear obligation to provide the full range of CLI services that the directive requires.

Should subscribers be allowed to opt for inclusion in a subscriber directory as the default option, as proposed, or should active choice be required?

Having non-inclusion as the default option obviously provides the strongest privacy protection. However, we have no objection to the approach proposed as long as subscribers are fully aware that the default option is entry in the directory and it is simple and straight forward for them to opt-out if they choose.

What entry options should be available to subscribers and should service providers be able to determine the core list, as proposed?

In terms of privacy protection the maximum of degree of choice would be preferable. However, we recognise the practical difficulties that could arise given that there is an established competitive market in telephone directory information services and products. In any event, it appears that article 12(1) of the Directive envisages that directory providers should be able to limit the options for practical reasons. In this context, therefore, we have no objections to the proposal, namely that there should be a core list of the minimum information reasonably necessary to run a telephone and fax number directory service efficiently.

Are the draft Privacy Regulations right to specify that additional consent should be required for inclusion in any directories with a reverse search function?

Reverse search directories which allow the name and address of the subscriber to be obtained by searching on a telephone number have not traditionally been offered in the UK. The term reverse search facility may not necessarily make clear to individual subscribers the consequences of agreeing to have their information made available on such a basis. For this reason we agree that the requirement that an additional separate consent be obtained in this circumstance would provide a necessary and practical safeguard. Asking for specific consent should mean that individuals are more likely to appreciate the consequences of what they are agreeing to. If consent was, as it were, bundled up with consent to a variety of terms and conditions this would surely increase the risk that individuals might agree without a full appreciation of the consequences.

Should corporate subscribers be entitled to some or all of the new rights accorded to individual subscribers?

We have no strong views about whether corporate subscribers should be entitled to, for example, object to unsolicited marketing calls on their fixed lines. In passing, however, we do think that it is probably easy to exaggerate the potential detrimental effect to business of introducing such an entitlement. If some businesses object to receiving unsolicited marketing calls, to the extent that they would register on the Telephone Preference Service (TPS) if possible, it seems unlikely that they would respond positively to such calls anyway. For that reason, we are not certain that there are powerful reasons against allowing corporate subscribers such choices.

Incidentally, we consider that the case for allowing corporate subscribers to opt-out of unsolicited marketing calls is much stronger in respect of mobile phones. Many

companies provide mobile phones to their employees which those employees often carry with them out of work hours, and are allowed to use for personal calls. It is clear that individuals see a marked distinction between the relative intrusiveness of receiving calls on their fixed line office phone in office hours and on their office provided mobile phone. There is a strong argument that it should be possible to register a company provided mobile phone on TPS.

How should “customer relationship” and “similar products” be interpreted for the purpose of unsolicited email and SMS marketing and do you agree with the approach adopted in the draft Privacy Regulations?

We are happy with the purposive approach adopted in the draft Regulations. This is consistent with the general data protection directive (95/46/EC). It seems to us less important whether a subscriber has shown sufficient interest in a marketer’s goods and services to have actually gone ahead with a purchase than that the subscriber should be made fully aware of the intention to send unsolicited marketing material by electronic means and given an easy, and frequent, opportunity to prevent this. Similarly, it appears to us that the reference in the directive to “similar products” must have been designed to seek to ensure that the marketing of types of products and services would be within the reasonable expectation of the individual subscriber, concerned. In this context, therefore, again the key issue is that individual subscribers should have a clear appreciation of the sort of goods and services that is intended to market.

We take the view that the provisions in the directive which apply to unsolicited direct marketing apply not only to the offer for sale of goods or services, but also to the promotion of an organisation’s aims and ideals. This would include a charity or political party making an appeal for funds or support. On a narrow interpretation of the similar products provision charities and political parties would be disadvantaged. As Regulation 21(3) stands those who do not sell products or services would not be able to contact those with whom they have an existing relationship without clear consent. There is no clear justification for treating those who do not collect contact details in the context of an actual or potential purchase less favourably.

Should individual phone subscribers be given opt-in or prior consent rights in relations to phone marketing?

Again a prior consent right would provide stronger privacy protection. However, the Telephone Preference Service (TPS) appears to be well established. It is simple and inexpensive to register on TPS and a large number of individual subscribers have registered. In these circumstances, therefore, there appear to be powerful grounds for maintaining the current position.

Should corporate subscribers be given the right to register on the Telephone Preference Service, as proposed? Should corporate subscribers have stronger rights in relation to fax, email and SMS marketing?

We have touched upon this issue already. We seen no powerful reason against allowing corporate subscribers such rights particularly given the fact that in many circumstances, almost certainly in respect of SMS, and often in respect of fixed line

telephone and email, the electronic communications will be received by specific individuals.

Is the new definition of automated calling system right?

Again, we are happy with the purposive approach adopted. We agree that the presumed mischief was the receipt of wholly automated marketing calls. Even though there is a fairly narrow definition of call in the directive which would reduce the possibility of there being, in effect, double regulation of a particular marketing mechanism (e.g. regulation of the communication itself and the mechanism of transmission, that is, was it automated/wholesale), nevertheless we think it makes sense to adopt a narrow definition. There remains a question whether it is intended to catch systems which deliver an initial pre-recorded message to allow called parties to indicate a particular interest before they are put through to an individual.

We accept that there is a need to address problems that arise in connection with the use of power diallers and other equipment which can result in silent calls, or partial rings, on a subscriber's terminal equipment. We note that Ofcom will have new powers to regulate in this area.

Should network and service providers be required to disclose the source of unsolicited commercial communications?

Real practical difficulties can arise when, in order to enforce rules regarding unsolicited communications, there is a need to identify who the subscriber is in respect of a particular number. Under the current regime, though there is nothing to stop to prevent a network provider or service provider providing us with such information, the fact that they are not required to do so does potentially put them in a difficult position in relation to their customers. A requirement to disclose limited specified information in particular circumstances would remove this problem. Incidentally, our Information Notice powers under s43 of the Data Protection Act 1998 (as amended for the purposes of the TDPP Regulations 1999) are no help here as they allow the Commissioner to issue a notice to a person in order for him to assess whether that person is complying with the Act. However, an amendment to s43 for the purposes of these Regulations which provided that such notices could be served on those other than the party/person whose compliance is in question might be appropriate.

Should new enforcement sanctions be available against breaches of the rules or on unsolicited commercial communications? If so, what should they be?

As the consultation document recognises the enforcement powers available to the Commissioner to enforce the TDPP Regulations 1999 do not lend themselves to taking swift action. This is not surprising because the powers are essentially those which are provided in the Data Protection Act 1998 designed to enforce compliance with the Data Protection Principles. Whether a particular processing activity is fair will often be far from clear cut. It is, therefore, perfectly proper that where a data controller and the Commissioner take a different view of the application of one or more of the principles that the Commissioner's view should not unduly jeopardise a business activity until the issue has been considered by a specialist tribunal. For this

reason the enforcement notice procedure allows appeal to the Information Tribunal and, unless the matter at hand is exceptionally urgent, the effect of an appeal is to suspend the application of the notice until the appeal has been heard by the Tribunal. These enforcement provisions have proved ill-suited for enforcing the relatively straight-forward rules that apply, for example, to the sending of unsolicited marketing faxes.

We therefore support the introduction of enforcement provisions that are closely modelled on the Stop Now Orders provided for in the Stop Now Orders (EC Directive) Regulations 2001. Our understanding is that the experience of the Office of Fair Trading is that Stop Now Orders have been a success.

What we envisage is the Commissioner being able to apply to the court for an order requiring a person considered to be contravening the regulations to stop the non-compliant conduct. We contemplate that, other than in exceptional circumstances, the Commissioner would only be able to apply to the court where attempts to resolve the matter informally have failed. Whilst we accept that persons considered to be contravening the regulations should have the opportunity to resolve the matter informally, there is a need for the Commissioner to be able to get the matter before the court quickly. Further, we believe that the Regulations should provide that a person who acts in contravention of an order be guilty of an offence which the Commissioner could prosecute. We also believe that we should be able to bring proceedings against a Director or similar officer who has consented to, or connived at, the infringement.

Phil Jones
18/06/2003