

Junk Faxes and Unwanted Marketing Calls: The Solution

Have you ever been waiting for an urgent fax confirming a last minute litigation settlement? Only you find that out of the fax machine comes a letter offering you the “once in a lifetime opportunity” to win a free flight to New York or a hundred ways to reduce stress in your life. When the desired fax is finally transmitted, you find that your machine is out of paper due to the many other unsolicited opportunities you have previously received. Have you ever returned from a hard day at the office only to find your phone company ringing you up wanting to offer “even greater” savings on your telephone bills? Have you ever been called by your friendly double glazing company with the chance to be the first to install triple glazing despite the fact that it was they who fitted your double-glazing six months ago? If, like me, you do not have the time nor the fax paper to enable you to entertain junk faxes and "cold calls" then the law has finally come to your rescue.

The Telecommunications (Data Protection and Privacy) (Direct Marketing) Regulations ("the Regulations") came into force on 1st May 1999. The Regulations implement Directive 97/66/EC, the Telecoms Data Protection Directive. For the first time ever the direct marketing industry has been regulated to afford more protection to people from unsolicited faxes and telephone calls. However, the Regulations don't just affect the direct marketing industry. Any business (including voluntary organisations and charities) using the fax or phone for direct marketing is caught by the Regulations.

Under the Regulations OFTEL is charged with making arrangements for a scheme which will allow certain telecom users to “opt out” of receiving such communications. This it has done through two schemes: the Telephone Preference Service (TPS) and the Fax Preference Service (FPS) both run on its behalf by the Direct Marketing Association.

The 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 operations.

The Regulations make distinctions between certain types of users and also the method of communication. It is important to understand these provisions.

Although nothing can replace reading the Regulations themselves (which, incidentally, are written in quite simple language) I attempt here to summarize the main provisions:

Definitions

The terms "individual" and "corporate subscriber" are used throughout the Regulations. Individual means (of course) an individual, unincorporated association, sole trader or partnership all of whom subscribe to a public telecommunications network. Corporate subscriber means the same with regard to, inter alia, a company or other type of incorporated body.

Automated Calling Systems

Regulation 6 makes it unlawful for an automated calling system to be used for direct marketing to call an individual or corporate subscriber unless such recipient has previously indicated that he does not object to such systems being used. An automated calling system is one which automatically makes calls without human intervention and, once the recipient answers the phone, plays an automatic message. Such systems are not often used in this country but are widespread in the United States.

Unsolicited Faxes

These are governed by Regulation 7 and 8. The effect of these is that :

- a** It is unlawful to send a direct marketing fax to an individual unless that individual has previously notified the sender that he does not object.
- b** It is unlawful to send a direct marketing fax to anybody, 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.

Therefore before any solicitors or their clients decide to embark on a direct fax campaign it would be wise to get a list of subscribers to the FPS in their area. They should also check that the intended recipients have not previously notified them of their wish not to receive such faxes. The setting up of in house "do not call" lists would be a good idea. A lot of direct marketing companies use these but solicitors should also take note.

Where an unsolicited fax is sent it is a legal requirement for the sender to ensure that the name of the sender and its address or a freephone number

appear on the fax. This will allow the recipient to make contact with the sender to object.

Unsolicited Telephone Calls

The effect of Regulation 9 is that it is unlawful 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.

Furthermore when a direct marketing call is made, the caller must give his/her name and, if requested, an address or a freephone number so that a complaint or objection can be made.

Compliance

All businesses need to comply with the Regulations as well as solicitors conducting direct marketing themselves. Some people may have already heard of the Telephone Preference Service before. The new TPS is essentially a genetically modified version of the old one but with much more bite. The previous scheme was voluntary and not all organisations subscribed to it. Non-subscribers could still call an objector and it could take subscribers upto six months to receive the information for them to delete an objector's name from their list. The new system is compulsory and carries the full weight of the law. The Regulations require that companies comply with an individual's objection no later than 28 days after the request was registered by the TPS or the FPS.

The Data Protection Registrar will enforce the Regulations. She has the power to issue an Enforcement Notice to require a business to take certain steps to comply with the requirements of the Regulations. Failure to comply is a criminal offence which could lead to fines of upto £5000. The Registrar also has the same powers of entry and inspection as she has to enforce the Data Protection Act 1984.

A person may also commence an action for compensation if he/she has suffered damage by reason of contravention of the Regulations. In such an action it is a defence to show that the caller took such care as was reasonable in the circumstances.

It is important to note that the Regulations apply to all businesses and individuals. A company cannot escape liability by saying it is merely

targeting its customers unless of course such customers have previously indicated that they do not object to such communications.

Compliance Checklist

So what should those engaged in direct marketing do to comply with the Regulations?

1. Train all marketing staff in the effect of the Regulations and the information which they must provide recipients.
2. Keep a “do not call” list of all persons who have indicated that they do not wish to receive direct marketing communications and make it available to all staff.
3. Clean the above list at least once every 28 days with the list kept by the TPS and the FPS to ensure that objectors are not inadvertently called or faxed.

Those individuals (remember that this includes partnerships) who do not wish to receive direct communications they should register themselves with the two organisations. It is important to note the Regulations talk about lines to which communications should not be sent. This means that if you have more than one phone line you should register all the lines with the TPS or the FPS.

Registering with the FPS and the TPS is free for both individuals and corporate bodies. However those wishing to receive data from these organisations (to cross-reference their own marketing lists) will have to pay a fee depending on the nature of the information and the medium upon which it is required.

Telephone Numbers For Opting Out:

Telephone Preference Service : 0845 070 0707

Fax Preference Service : 0845 070 0702

Data Protection and Email

It is important to note that, in addition to risking enforcement action by the Data Protection Registrar for calling/faxing an objector, failure to keep a direct marketing list upto date may lead to a breach of the Data Protection Principles (providing of course that the data relates to individuals and not business).

A further consequence of the rapid advance of communication technology is the widespread use of direct marketing emails ("junk emails"). For those of us who do not want to buy hand carved chairs by Tibetan monks, are the Regulations the answer? Unfortunately the Regulations concerning direct marketing communications apply to "calls". The DTI and the Data Protection Registrar are of the view that an email is not a call, although undoubtedly the same technology is used. However it is only a matter of time before something is done about unwanted emails.

Privacy and Human Rights

On a more philosophical note it is interesting that the Regulations go further towards giving the individual a right of privacy in his own home without actually introducing a Privacy Bill. Perhaps with the new Data Protection Act and the Human Rights Act we do not need such a specific piece of legislation. Time will tell.

In the meantime I have just received an email telling me that someone in the organisation would like a spare computer stand. And I still have to faxback the company which is going to tell me how to reduce stress in my life; for a small fee of course!

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