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ORIGINALLY APPEARED IN

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FOLLOW THE RULES

New legislation governing the use of emails and SMS text messages for direct marketing will finally come into force on December 11. David Murphy considers the implications for marketers and finds that there are still grey areas to be tested in the months to come.

It's almost here. 18 months after the European Commission adopted the Directive on Privacy and Electronic Communications in July last year, the Privacy and Electronic Communications Regulations will come into force in the UK on December 11. No minor adjustment, this legislation will have wide-ranging implications for the way that companies communicate directly with customers and prospective customers via email and SMS.

Processing legislation

The EC Directive replaces and repeals the 1997 Directive on Privacy and Telecommunications,

which required updating to take account of the now-widespread use of email and SMS. Likewise, the new UK Regulations also repeal and replace the 1999 UK Data Protection and Privacy Regulations.

A draft version of the new regulations was subject to a 12-week consultation process earlier this year, and this elicited more than 420 responses from businesses, trade and consumer representatives, regulatory authorities and individual consumers. Their collective views were taken into consideration in the process of drawing up the final regulations, which were laid before Parliament on 18 September. Because of the number of responses to the consultation, businesses have been given the

maximum 12-week familiarisation period before the Regulations come into force on December 11.

In essence, the new laws as they relate to email and SMS messages are quite simple: the sending of unsolicited emails and SMS text messages for direct marketing purposes will be outlawed from December 11. But there are some exceptions and, predictably, it's in these exemptions that you find the grey areas.

For example, Regulation 22 (3) of the legislation runs as follows: "A person may send or instigate the sending of electronic mail for the purposes of direct marketing where that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient; the direct marketing is in respect of that person's similar products and services only".

Even if a company meets these criteria, it must also give the recipient the opportunity to unsubscribe from receiving further email or SMS messages at the time of each communication. But it's the two phrases: "in the course of the sale or negotiations for the sale of a product or service" and "similar products and services" that are causing some confusion among the email and SMS marketing fraternity.

"What is this concept of 'similar products and services'?" asks Ivan Southall, commercial director of Interactive Prospect Targeting (IPT). "If I register to buy a drill at a DIY site, can they then say it would be OK to send me emails on other building materials, and then take that on and send me another on kitchens?"

And Skip Fidura, director of European field operations at Digital Impact, wonders where the wording of the legislation leaves corporate groups which have lots of disparate companies under their umbrella.

"If I'm British Gas, part of Centrica, does my customer just have a relationship with British Gas, or does the customer also have a relationship with other Centrica companies like the AA and Goldfish?" he asks.

Things should become clearer when the Office of the Information Commissioner issues guidance notes on the legislation, which are due later this month. In the meantime, Robert Dirskovsky, senior interactive media manager at the DMA, advises companies to avoid any problems by being as transparent as possible when the consumer's details are collected.

Real relationship

"If you are clear about the type of goods you provide at the point of data collection, the consumer will accept similar services from your company,"

says Dirskovsky. "If you are intending to share data among other group companies, you need specific consent for that. You can obtain this at the point of data collection, but you must ask for the consumer's consent, and not tick the box for them."

The other main area of confusion lies in the idea of a company obtaining the contact details of the recipient of the electronic mail or SMS, "in the course of the sale or negotiations for the sale of a product or service to that recipient". At what point, precisely, can a consumer be said to be in "negotiations" for the sale of a product or service?

Again, some clarification is expected in the upcoming guidance notes, but many companies will no doubt be pleased that the rather nebulous concept of negotiation has been introduced into the legislation. In doing so, the government has

The screenshot shows an email from Mazda. At the top, it says "mazda" with the Mazda logo. Below that, it says "DRIVE THE REVOLUTION" and "Mazda RX8". There is a photo of a red Mazda RX8. The text in the email includes: "Stay ahead of the pack with the Mazda RX-8", "The revolution that is the Mazda RX-8 is soaring to the UK. What's more, there's still time for you to be among the first to be part of it.", "A coupe that looks great, drives brilliantly and has practicality to boot. And all at a very affordable price.", "WhatCar? Road Test", "In case you need further convincing, we'd like to tell you the latest news from the exclusive world of the Mazda RX-8.", "First, you'll be pleased to know that the Mazda RX-8's RENESIS rotary engine has just earned the coveted accolade of International Engine of the Year 2003.", "We're also really excited about the Mazda RX-8's insurance grouping. The 192 PS model has been placed in group 15L and the 221 PS in group 16B, confirming the Mazda RX-8 as a class leader for insurance as well as design and technology. For full details, including newly published performance figures, check out the Mazda RX-8 website.", "Also, included in the price of every Mazda RX-8 is a free ProdriveLive performance driving course, worth £500.", "Pre-Order your very own Mazda RX-8", and "Read the latest Mazda RX-8 news in full". At the bottom, there is a small disclaimer: "You have received this email because you expressed an interest in the Mazda RX-8. If you would prefer not to receive more information about Mazda vehicles and programmes we would please click on 'No, thanks', and then just send the email."

By offering enthusiasts visiting the dedicated microsite for the new RX8 (www.mazdarx8.co.uk) the chance to opt in to receive email newsletters, Mazda and agency syzygy built a fully opted-in target audience for the two email campaigns sent out in May and June this year. Both email executions clearly stated at the bottom why the recipient had received the email, and how to unsubscribe from the list.



It should create a distinction between legitimate companies and everyone else

Chris Combemale, chairman, DMA Email Marketing Council.

given the green light to businesses to continue a dialogue already established with consumers who have not yet bought anything from them.

As the government pointed out in its response to the consultations, "The draft Regulations took a broad approach to the definition of 'existing customer relationship'. They did not demand that a sale had taken place in order for a customer relationship to be deemed to exist. The wording 'sale or negotiations for the sale of a product or service' therefore included scenarios in which the customer had given their contact details to a business in the lead up to a sale but in which no actual purchase had finally been made."

This one proviso alone means that companies with a legacy database of customers and prospects, including some who have never bought from them, are free to continue communicating with them via email and SMS post-December 11, so long as they follow the rules enshrined in the legislation: similar products and services; free-of-charge unsubscribe/opt-out facility on the occasion of each message; and the identity of the sending company must not be concealed. So if you're, say, the Mayfair Bank but you have a third party company which handles your email-outs, it must be clear that, even though you didn't physically send the email, it came from the Mayfair Bank. In fact, Regulation 23 (1) states that the company name should appear in the "From" field on the email form.

So far, so just about clear. But companies don't just use email to communicate with existing customers. What about the use of rented email lists for acquisition purposes? On the face of it, companies involved in brokering these lists to third party companies will be the ones hardest-hit by the new laws, as they will now have to go back to everyone on the list before December 11 and offer them the oppor-



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Skip Fidura, director of European field operations, Digital Impact.

tunity to unsubscribe. Some undoubtedly will, but most, it seems, are one step ahead of the legislation.

"We are chuffed to bits about the legislation, it has been a long time coming," says Phil Evans, commercial manager of Claritas Interactive which markets a substantial opt-in email file comprising around three million records. "We have been campaigning for this since we formed our interactive division three years ago. Our stance has always been that it should be done on an opt-in basis, so the legislation will have no impact at all on the way we do business."

It's a similar story at IPT, where Ivan Southall

Five ways to comply

Here are the five basic actions you must take to comply with the new regulations governing the use of outbound email and SMS in direct marketing communications.

- 1) Make sure your customers opt in positively. Don't ask them to opt out of receiving email or SMS communications and, if you do ask them to opt in, don't pre-tick the box for them.
- 2) Check your customer and prospect databases to see if they have been compiled on an opt-out or opt-in basis. If it is not opt-in and you have been communicating with these consumers via email or SMS, you can continue to do so without asking them to opt in, but best practice suggests you should now give them the option to opt in and remove from the database any who do not.
- 3) Always provide the means for consumers to unsubscribe from any email or SMS communication as part of each new message you send them. It's currently unclear whether a postal address will suffice but providing an

unsubscribe email contact is the surest way to comply. Premium rate phone number contacts for SMS unsubscribes are specifically banned by the new legislation.

- 4) If you are hiring a list of email addresses to use for acquisition purposes, it is your responsibility to ensure that the list has been compiled on an opt-in basis. Make sure that you research this thoroughly and obtain the appropriate indemnities and warranties in the contract for the purchase and use of the list.
- 5) It is your responsibility to inform consumers about all types of products and services you may wish to email or send them SMS texts about at the point of data collection. The law states that you may only communicate with them about "similar products and services". In the absence of any legal definition of what "similar" means in this respect, it is up to the individual company to specify the products and services in each instance.

DMA members should contact the DMA to obtain a summary of the new regulations.

says: "We have always been strong advocates of the opt-in principle. All the data we have collected since our inception four years ago has been under an open, transparent, opt-in statement. So we anticipated this legislation and have always collected data to the standard required by it."

Neither Evans nor Southall can offer an accurate estimate as to the number of companies renting email lists which have not been collected on an opt-in basis, but Southall concedes that any companies in this position will face problems when it comes to compliance.

"It means that before December 11, they will have to make contact with everyone on the list and get them to opt in to receive further communications," he points out. "Those who do opt in stay on the list, those who don't, they will have to bin."

The problem, says Southall, is that if you don't ask consumers to opt in when the data is originally collected, many see no reason to when you go back to them at a later point and ask them to opt in. So potentially, the size – and value – of any such list is bound to be cut.

What about b2b?

There was some surprise when the lawmakers decided to draw a distinction between individual and corporate "subscribers". While individual members of the public, sole traders and partnerships, and their employees, are covered by the new laws, PLCs and limited companies are not. The Government has conceded that the distinction between "individual" and "corporate" is not always clear-cut, but decided in the end to retain the definitions contained in the draft regulations. It has conceded, however, that the anomalies identified in consultation may lead it to give PLCs and limited companies further rights at some point in the future.



If you are intending to share data among other group companies, you need specific consent

Robert Dirskovsky, senior interactive media manager, DMA.

For the moment, then, companies are free to send unsolicited emails and SMS messages to other companies, so long as the recipients do not include sole traders or partnerships, such as many accountancy, law and estate agency practices. These anomalies, says Digital Impact's Skip Fidura, will mean that in practice, most b2b direct marketers will treat businesses as if they were covered by the regu-

lations in any case.

"The theory is that businesses will have the means to better protect themselves, but the problem with this is that as a practical matter, it makes the marketer's job really complicated," he says. "First you need to be sure you're mailing a business, then you need to be sure it's definitely a limited company or a plc, then you can send the email. If you have more than 10 names on the list, that's a lot of work."



The legislation will have no impact at all on the way we do business

Phil Evans, commercial manager, Claritas Interactive.

As a firm supporter of permission-based marketing, Fidura would no doubt argue that it doesn't make an awful lot of commercial sense to send out unsolicited marketing messages via email or SMS in any event. Nevertheless, he doesn't see the new regulations having much, if any, effect on the amount of junk email – spam – arriving in consumer's in-boxes.

"Spammers don't abide by current laws, so why should we have any expectation that they will abide by a new law?" he asks. "Legislation is a good place

The Distance Marketing Directive

Marketers in the financial services sector have more legislation coming their way next year in the shape of the Distance Marketing of Financial Services Directive. This contains new rules on the consumer's right of withdrawal, unsolicited commercial communications and on essential prior information which must be provided to applicants for financial services products.

The final text of the Directive was published in the Official Journal of the European Communities on October 9th, and the Directive must be transposed into member states' national laws by October 9th, 2004. Both the Treasury and The Financial Services Authority (FSA) have issued consultation papers on the UK implementation of the Directive. The Treasury consultation closed on Friday 17 October, while the FSA Consultation closes on 2 December. The DMA is looking at both papers and the DMA's Financial Services Group recently held an open meeting with the FSA to discuss the consultation paper. The DMA will be submitting a response to both papers in due course.

Some email statistics

Undeliverables

- For an in-house list that is regularly mailed and cleaned you should not get more than 3%. However, if the list is not cleaned then this rises to 10%-20% within 12 months.

Open rate

- Over 50% will delete an email without opening if it is from a company they don't recognise. This figure goes down to 3-10% for companies whom they have given permission to receive information from.
- Open rates range between 15%-55% for an in-house list with 20%-30% being average. A typical clickthrough rate to those opened would be 5%-15% (average 10%) giving an overall response rate of around 3%.
- HTML emails appear to have higher clickthrough rates on average (10%-15% range) i.e. HTML e-mail can be 1.5 to 3 times more effective than plain text e-mails.

Response rates - Plain vs. HTML

- HTML generally generates 20%-40% more response than an equivalent plain text version though this is very dependent on the target market and products/services in question. Now about 90-95% of people can see HTML although 18%-23% say they prefer to receive plain text communications when given the choice. HTML has consistently performed significantly better than plain text although better copy would reduce the difference.
- It has been speculated that HTML design works better because it allows messages to be broken in to a number of smaller, quickly digestible packages (headlines if you like) which can be expanded at a click. This is important in the hurried and cramped environment in which email operates. Conversion rates have also been shown on average to be slightly higher for HTML emails.

Rented list vs. in-house customer list

- Response rates to rented lists are generally between 25% and 50% lower than an in-house list. A response rate of between 1% and 2% for a B2C e-commerce site is realistic, with 1% being average and 2% being good. Average B2B response rates to a rented list are also around 1%. However, both b2b and b2c rates are falling due to email overload and the universal hatred of spam. Own customer lists can generate 3-40% response rates depending on strength of offer, timing and targeting.
- A questionnaire emailing from a trade body achieved a 10% response where the list had been collected by telephone from the receptionist. The same email got 29% when it had been collected by phoning the named recipient.

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to start, but there are a number of other elements, including best practice, consumer education and technology. It has to be a combination of the four, there's no silver bullet for spam."

Mike Teasdale, creative partner at Harvest Digital, goes further, saying he is disappointed that the legislation is being presented as doing something positive about spam. "It worries me that when the amount of spam doesn't decrease, the lawmakers may try to bring in more draconian laws," he says.

These fears seem well-founded when you look at the Department of Trade and Industry's website and see a release announcing the new regulations entitled: "New moves to hammer spammers". But the DMA's Robert Dirskovsky is more upbeat, saying that things have moved on since the laws were drawn up.

"These regulations are not going to stop spam and that is not just the DMA saying that," says

Dirskovsky. "[Communications Minister] Stephen Timms made a similar comment on a radio interview recently and I don't think anyone believes that, in a global context, it will stop spam. Someone who is already flouting the law is not going to honour this new legislation."

Indeed, European Commissioner for Enterprise and the Information Society Erkki Liikanen Liikanen has announced a spam summit for January 2004, which suggests that Dirskovsky is right in his assessment that the lawmakers accept that, on their own, these new regulations will do little to tackle the spam problem. In spite of this, the new regulations have been largely welcomed by industry leaders, who have probably ended up with something less draconian than they originally feared.

"In the lead up to the publication of the regulations, there was an enormous amount of uncertainty among our clients" comments Andy Bacon, managing director of integrated marketing agency DDM. "Now that they have seen the legislation for



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themselves and taken advice from their legal advisers, they are coming to realise that the regulations are not as restrictive as they once feared."

Playing fair

Chris Combemale, head of email technology company EmailVision, and chairman of the DMA's Email Marketing Council, is upbeat about the effect of the new regulations. "We are happy with the legislation," he says. "It creates higher standards than the ones that existed before for companies to use online direct marketing to communicate with their customer base, and it should create a distinction between legitimate companies and everyone else.

"This is important because we know that consumers like to receive emails from companies they respect and do business with. What's needed is a clear distinction between legitimate companies and non-legitimate companies, and with these guidelines, consumers will find it reasonably easy."

We'll soon find out how those consumers will respond to opt-in offers. And, after December 11, no doubt those companies falling foul of the regulations – either through choice or through ignorance – will find out just how firmly they are going to be enforced. ■