

Marketing opt-out extended to corporates

By David Bowden, Consultant, Lobby and Law Ltd

From 25th June 2004 even Limited Companies and PLCs can register their office telephone numbers to prevent unwanted sales and marketing calls. Originally the Telephone Preference Service ("TPS") was set up for consumers who wanted to stop unwanted telesales calls at home. This has now been extended to corporate subscribers too. Although the Regulations to bring this about are short and Guidance has been issued by the Information Commissioner's Office ("the ICO") to accompany them, there are still a few areas which require clarification.

The "Spam & Cookies" Directive (2002/58/EC) ("the Directive") only covers "natural persons" meaning that corporate bodies are not covered. This exclusion was originally faithfully kept to by the UK Government when it implemented this Directive at the end of 2003 with the Privacy & Electronic Communication (EC) Directive Regulations 2003 (SI 2003 No 2426) ("the 2003 Regulations") which came into force on 11th December 2003.

Following UK implementation, there remained concern that UK-based businesses were still exposed especially to "spam" which, provided it is sent to corporate bodies, is not covered by either the Directive or the 2003 Regulations. It is not clear where the clarion calls originated that UK businesses were being bombarded with unwanted telemarketing calls.

On 31st March 2004, the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2004 ("the 2004 Regulations") were laid and these came into force on 25th June 2004. These amend the 2003 Regulations so that limited companies and other bodies corporate are now brought squarely within the ambit of the 2003 Regulations.

To police the 2004 Regulations, the task (like that with TPS itself) has been handed by the DTI to the Direct Marketing Association (DMA) to administer.

A new database – Corporate TPS – has been set up. Since May 2004, businesses have been able to register their telephone number(s) with Corporate TPS. The DMA have confirmed that the Corporate TPS database is up and running and already has subscribers registered but it was unable at the date this article was written to confirm the exact numbers on the database.

To accompany the 2004 Regulations the ICO has issued a 5-page Guidance Note on 27th May 2004 which can be downloaded from the ICO's website. Whilst this attempts to flesh out the 2004 Regulations and offer practical advice to businesses affected by the 2004 Regulations, it still leaves a few questions unanswered.

The 2004 Regulations will apply to:

- finance & Leasing companies operating in the B2B sector who routinely make outbound sales & marketing calls;
- consumer finance companies who telemarket SMEs which are limited companies
- all companies who use Outbound Telemarketing ("OBTM") to generate sales & leads.

Those companies operating mainly or exclusively in the consumer finance field will be well placed to help other companies in their group adjust to the transition as they are already well-versed in the operation of the consumer TPS file and the importance of keeping suppression files up to date and for prospects list to be screened and cleaned before any OBTM takes place.

The basic requirement will be to obtain the Corporate TPS file and run this against the list of any telephone numbers on a prospect file before any OBTM takes place. An updated copy of the Corporate TPS file will need to be obtained every 28 days. There will be difficulties for large companies where *ad hoc* telemarketing takes place to ensure there is compliance.

For companies that feel their staff are bothered by unwanted sales and marketing calls, they can register for free their telephone numbers with Corporate TPS. This can be a double-edged sword as it could choke-off legitimate calls that a company's procurement function will expect and want to receive. The ICO's Guidance suggests that care be taken on the choice of which telephone numbers to register.

Although it is still early days yet, the following 10 things will need to be considered by companies who are thinking of using Corporate TPS.

1. Prior CTPS registration and subsequent contractual consent to telemarket What is the position where a customer is already registered with TPS and then signs an agreement which gives consent to OBTM? The ICO's Guidance does not expressly address the issue of contrary customers. In theory registration with TPS is done to choke off all marketing calls. For a credit and car finance company to be certain that it can rely on subsequent contractual consent, this would have to be clear and unambiguous in the Terms & Conditions. If this is not clear, then standard contracts need to be looked at now with a view to appropriate changes being made.

2. Existing contractual consent to telemarket and subsequent Corporate TPS Registration. A finance company cannot merely rely on the existing contractual consents it may hold. This means that the Prospect file(s)

will need to be screened against the Corporate TPS file and this will need to be done every 28 days where telemarketing activity is continuous. This will need to have started when Corporate TPS went live on 25th June 2004. The ICO's Guidance does say that businesses can put in place a "blanket" Corporate TPS Registration and advise selected businesses that this will not apply to them! In practice few will bother with this as it is far too cumbersome.

3. Contractual terms and conditions with corporate customer say contractual consent over-rides prior Corporate TPS Registration.

This may be a possible solution as long as it is made clear in the contract. If it is regarded as unduly onerous it must not be hidden away. For SMEs, they may be regarded as "consumers" for the purposes of unfair contract terms legislation (see paragraph 5 below).

4. Contractual terms and conditions with corporate customer say contractual consent over-rides subsequent Corporate TPS Registration

It is unlikely that such a clause can be made to work even if it is exceptionally clear, drafted in plain English and expressly brought to a customer's attention before a contract is entered into. Again SMEs may be regarded as "consumers" - see Paragraph 5 below.

5. Are SMEs "consumers" for purposes of unfair contract terms legislation?

Even if a contractual clause is used saying contractual consent over-rides subsequent or prior Corporate TPS registration that may not be the end of the matter. Certain SMEs even if they are bodies corporate are regarded as "consumers" where a transaction is only incidental to their main business and there has not been a regularity of dealings. (R & B Custom Brokers v UDT [1988] 1 All ER 847 CA). So even if a contractual clause purports to oust Corporate TPS registration, it is liable to be rendered void under either the Unfair Contract Terms Act 1977 and/or the Unfair Terms in Consumer Contracts Regulations 1999.

6. What is "marketing"? The ICO's Guidance acknowledges that not all outbound telephone calls will constitute a "telemarketing call".

Regulation 21 of the 2003 Regulations governs "Unsolicited calls for direct marketing purposes". Regulation 21(1) provides that a "person shall neither use, nor instigate the use of, a public electronic communication service for the purpose of making unsolicited calls for direct marketing where (a) the called line is that of a subscriber who has previously notified....or (b) the number allocated to a subscriber in respect of the called line is one listed in the register kept under

LEGAL ANALYSIS

regulation 26". There is no further definition of "direct marketing" in the 2003 Regulations.

Section 11 (3) of the Data Protection Act 1998 ("the 1998 Act") says that in that section of the DPA "direct marketing" means "the communication (by whatever means) of any advertising or marketing material which is directed to particular individuals."

As the ICO's Guidance acknowledges there is a difference between marketing and information-where the line is drawn is not always so clear! The Guidance says such calls must not be used as a pretext to start a marketing call. However if a dialed customer asks, for example, whether they are getting the best deal that the bank is currently offering, then this would then take the call out of the unsolicited régime and the call could then be passed over to a sales team.

7. How often do internal prospect files need to be screened against Corporate TPS? TPS and Corporate TPS advise customers that it can take up to 28 days for the free registration to be effective. This means that for telemarketers who are continually telemarketing, the Corporate TPS file needs to be obtained on 25th June 2004 and run against the internal prospect file and any matches need to be weeded out. This activity will then need to be repeated at least every 28 days.

8. How does this affect other communication channels? Corporate TPS only seeks to block OBTM calls. In the B2C context, the ICO has previously sought to promote a "triple opt-out" to reflect the 3 principal communication channels – namely mail, telephone and "other electronic means". For new customers (either B2B or B2C), if they are not given a triple opt-out and they request to be opted out of marketing – that means they are opted out of marketing by **all** means. Customers who say "don't call me again" are requesting only that they receive no more outbound telephone calls not that they don't want to receive emails or direct mail.

Providing internal suppression files are sophisticated enough, this channel of preference can be so recorded leaving the other 2 channels open. Registration with Corporate TPS will only block one channel off. Providing a valid consent is held then this will not prevent marketing by email or direct mail providing the rules under the 1998 Act and/or the 2003 Regulations are followed.

9. Enforcement Powers. Companies that telemarket corporate subscribers who are registered with Corporate TPS are at risk of complaints going to the ICO. For isolated breaches nothing more may transpire. However, if the ICO suspects that there is a systemic

breach, an Enforcement Notice may be served. Unless this is complied with, no personal data can be processed after the date in the notice.

10. Unfair Commercial Practices Directive This is now close to agreement in Brussels. When it comes to be implemented into UK law two or so years hence, OBTM practices will need re-visiting. This Directive defines a commercial practice as unfair if it "is contrary to the requirements of professional diligence" and Article 9 bans "Aggressive practices" whilst Article 10 bans the "Use of harassment, coercion and undue influence". As to how these terms will eventually be defined and interpreted by the courts and the implications for telemarketers, will have to be seen.

Conclusion

The 2002 directive makes for entertaining reading. Recital 40 says "The single market requires a harmonised approach to ensure simple, Community-wide rules for businesses and users." Of course what we have got now is precisely the opposite! We appear to have 25 different sets of rules across the EU and an approach to corporate data which is now inconsistent as well.

© 30th June 2004
David Bowden
Lobby and Law Limited.