



The Advertising Association

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ADVERTISING ASSOCIATION SUBMISSION

DEPARTMENT OF TRADE AND INDUSTRY CONSULTATION ON THE IMPLEMENTATION OF THE PRIVACY AND ELECTRONIC COMMUNICATIONS DIRECTIVE (2002/58/EC)

Preamble

The Advertising Association (AA) is a federation of 25 trade associations and professional bodies representing the advertising and promotional marketing industry, including advertisers, agencies, the media and support services in the UK. It is the only body that speaks for all sides of an industry worth over £16.5 billion in 2001. Further information about the AA, its membership and remit is available on our website at:

www.adassoc.org.uk

Introduction & Overview

The AA welcomes the opportunity to respond to the public consultation by the DTI on the implementation of the European Directive on Privacy and Electronic Communications. This measure forms part of the new European framework for electronic communications and services. The AA is keen to ensure confidence in the market place where privacy is respected when using electronic networks and services, and that services providers are given a clear framework in which to operate to the benefit of all users.

The AA agrees that this position paper may be made wholly or partly available on the DTI website once the consultation has closed. The AA confirms that no parts of this position paper should be treated as confidential or unattributable.

Specific Comments on the Draft Privacy Regulations

Cookies

The AA agrees with the DTI's interpretation that it "believe[s] that the key aim in implementing the new provisions of the Privacy Directive should be to enable internet users to make an informed choice about cookies, without placing unnecessary constraints on the technical development of online services. The Privacy Regulations should build on existing good practice and use of the technical controls on cookies available in internet browsers."

The AA would like to highlight for use section 5.23 of the Direct Marketing Association (DMA) Code of Practice for Electronic Commerce, and furthermore the AA is fully supportive of the DTI intention to make use of the Interactive Advertising Bureau (IAB) Cookie Project. The IAB dedicated website is www.allaboutcookies.org

The AA believes that the DTI has taken a prudent position in not including specific provisions in the Regulations relating to how the "clear and comprehensive information about [the use of cookies]" should be set out. For example, companies will be providing links to the IAB website or web designers should be free to use creative ways of providing the information to web surfers, so long as the Regulations are fully complied with.

The AA welcomes the non-inclusion in the Regulations of the specification of how users would be given the opportunity to refuse a cookie. Again, responsible information society service providers will ensure full compliance with the spirit and letter of the Directive and ensuing UK Regulations in the individual manner for surfers to their websites. There should be no single prescribed method laid down in the Regulations.

The AA supports the DTI in its view over the issue of service providers being entitled to refuse cookie-free access to their services where the cookie is intended for the sole purposes of enabling or facilitating the transmission of a communication or where the cookie is strictly necessary for the provision of an on-line service requested by the subscriber or user.

Subscriber Directories

The AA believes that it is acceptable for subscribers to be presented with inclusion in a directory as the default option, provided in accordance with the Regulation that the choice is well explained to subscribers and that they have a clear opportunity to decide otherwise. The AA agrees with the DTI stance that operators are entitled to give subscribers a menu of pre-set entry options. Furthermore the best model would be for operators to formulate their own core list through the appropriate trade bodies in liaison with the appropriate authorities. The AA therefore supports the drafting reflected in the Regulations that does not specify the list of options available.

The AA welcomes the intention to limit the scope of the proposed Regulations to directories that list network subscribers. However, the AA has a concern that the definition of a subscriber directory as one whose 'sole or main' purpose is to list the phone, fax or e-mail contact details of network subscribers could be extended to include any directory with a selection of such information. A clearer definition is needed to limit the definition of a subscriber directory to an essentially alphabetical A-Z listing of subscribers providing basic address and telecommunications contact details.

The AA has a concern over Regulation 17 (5) and the use of 'without charge' in this regulation: where, for example, a subscriber e-mails the directory provider in order to 'verify, correct or withdraw that data', by default the subscriber having chosen this form of communication mechanism will be paying for this himself. The AA assumes that such contact will be allowed and that the directory provider will not be liable to refund any costs involved.

The AA would also point to the related provisions of the industry code as referred to in article 43 on Database Practice contained within the British Code of Advertising, Sales Promotion and Direct Marketing as created and enforced by the Committee of Advertising Practice (CAP). The Code is available at www.cap.org.uk

Reverse search

Reverse search functions allow directory users to identify names/addresses by searching against numbers rather than the other way round. The AA believes that the draft Privacy Regulations are right to specify that additional consent should be required for inclusion in any directory with a reverse search function.

Value added services

Given that the Directive allows the provision of value added services based on traffic or location data by network or service providers on their own or in conjunction with third parties, as long as subscribers give their consent and are informed of the data processing implications, the AA supports the non-specification of the services that may be provided. Such an approach leaves room for manoeuvre for the development of innovative value added services in the future. In an ever changing technological world, companies must not be hindered in their ongoing development of value added services. Provision of any exhaustive list in the current climate may prove damaging in the long run.

Location Data

The AA welcomes the approach taken by the DTI in not specifying how exactly service providers should go about ensuring that subscribers and users are provided with information before consent is obtained. The AA would support the DTI's recognition that self-regulatory mechanisms should be sufficient to establish parameters in this area of offering location data as a value added service.

Unsolicited Commercial Communications

The AA and its members are committed to the self-regulation of commercial communications. The UK industry has a long tradition of self-regulatory codes of conduct and appropriate enforcement mechanisms that are recognised by Government and national regulatory authorities alike. Codes are written and updated to reflect changes in the framework of law and with this in mind the AA urges the DTI's continued recognition of the use and applicability of the Committee of Advertising Practice (CAP) and Direct Marketing Association Codes in relation to the above provisions (for example as mentioned in Chapter Six of the DTI Consultation paper). These Codes are available respectively through the websites www.cap.org.uk and www.dma.org.uk

Use of electronic mail for purposes of direct marketing - Regulation 21.3

The AA concurs with the DTI view that the intention on this subject was not made sufficiently clear through Article 13 of the EU Directive. With this in mind, the AA urges the UK to take a liberal stance on the implementation of "in the context of the sale of a product or a service" and that "the same natural or legal person may use these electronic contact details for direct marketing of its own similar products or services". The AA agrees with the DTI that it does not seem necessary to insist that there must have been an actual purchase for this exemption to apply. The key principle to be borne in mind is that customers are provided with a clear way of opting out from receiving such information, which must be provided under the letter of the Directive.

With regard to the 'similar products or services' rule, the AA believes that companies should not have undue restrictions placed upon them in terms of being able to provide information on new products and services that may be currently available, or made available at a future stage. The AA views the issue of parent company

information and information from subsidiaries to be insufficiently clear in the Directive. It is of course not in a company's best interest to provide information of irrelevance to people, nor is it in their interest to annoy potential customers. However, denying companies that have legitimately been provided with information under the rules of the Directive from using this information to provide information, may hinder the industry from being able to provide details of innovative new products and services of potential interest and benefit to prospective customers. Companies should be provided with the opportunity to share information that may increase competitiveness in the market place and allow easier access to a more widely available product choice.

Existing databases - Regulation 21.6

The effect of 21.6 is unclear, and clarification must be provided upon whether the intention is for existing legitimate databases to be covered by the Regulation. In other words, will such information already collected need to be 'screened through opt-in' again, or will direct marketers be permitted to continue to use their existing information when the regulations come into force.

Telephone marketing

The AA does not believe that individual phone subscribers should be given opt-in or prior consent rights in relation to phone marketing. The individual opt-out rights which subscribers already have in respect of telephone marketing from individual companies, together with the highly accessible option to register on the Telephone Preference Service, provide sufficient safeguards.

Telephone Preference Service (TPS) extension to corporate subscribers

The AA believes that corporate subscribers should not be given the right to register on the Telephone Preference Service. Such provision by legislative means would disproportionately affect small and medium-sized enterprises that use telephone marketing to drive sales and marketing opportunities to other businesses. This would also be seriously anti-competitive. In general, businesses expect to receive and make sales calls, and these companies have the internal processes in place for dealing with and screening sales and marketing contact. The telephone is used as a way to verify data they hold and to ensure its accuracy and that it is up to date as prescribed by the Data Protection Act 1998. This in turn reduces the amount of incorrect online and offline marketing communications. The extension of TPS registration to corporate subscribers would impose an extra burden on direct marketing companies who would have to bear the cost of additional list cleaning against such corporate TPS. The AA argues therefore that there is no need to extend the protection offered by the TPS to corporate subscribers.

Enforcement

The AA believes that new enforcement sanctions could be made available, but only against persistent breaches of the rules on unsolicited commercial communications. The powers of the Information Commissioner's Office could be strengthened in the case of persistent breaches of the law, for example in situations where a company which has been served with an enforcement notice that company can effectively stay any enforcement action by appealing against the enforcement notice. The AA would, however, not support measures that may cause direct marketing companies to be effectively shut down by an enforcement notice for a minor technical breach of the law.

Applicable Law

The AA assumes that any obligations laid down by these UK Regulations are to be imposed on the basis of the 'country of origin control': where persons are legally established in the UK or in relation to subscribers or users. The AA would appreciate clarification by the DTI.

Advertising Association

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