

EUROPEAN COMMISSION

The New Directive on Privacy and Electronic Communications (2002/58/EC) -Unsolicited Commercial Communications and other issues

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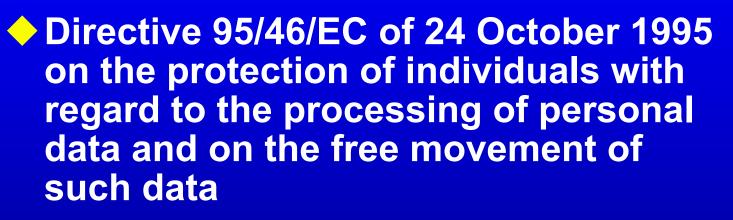
I - Background

A - The New Framework for Electronic Communications



- Directive is part of a new EU regulatory framework for electronic communications
- 5 other legal acts adopted on 7 March 2002, applicable as from July 2003
- Overall objective: adapt existing law to current and expected changes in markets, services and technologies

B - General Data Protection Directive 95/46/EC



 Harmonises Member States' rules on data protection in order to ensure the free flow of personal data in the EU (e.g. purpose limitation, fair processing etc.)

• OJ L 281, 23.11.1995.

C - The 1997 Telecoms Data Protection Directive

Directive 97/66/EC translated the principles set out in Directive 95/46/EC into specific rules for the telecommunications sector e.g.:

- network security
- confidentiality
- traffic data
- calling line identification
- public directories
- unsolicited commercial calls and faxes
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D - Why change?



- To reflect developments in the markets and technologies for electronic communications services, such as the Internet ...
- ...so as to provide an equal level of protection of personal data and privacy, regardless of the technology used.

E - What does Directive 2002/58/EC change?



Main changes :

- Technology neutral coverage
- ➢ Updated definitions
- ➢Opt-in for unsolicited e-mails
- Clarification on use of cookies
- Admissible use of traffic data
- >New rules on location data
- >Opt-in for subscriber directories
- Clarification on data retention



II - Unsolicited Commercial Communications (spam) and Other Issues

A - Scope and Definitions (Arts 1-2)



- Relationship with general Directive 95/46/EC: applicable unless otherwise provided
- Services concerned: on public communications network in the EU
- Widening of coverage to all electronic communications networks and services
- New definitions for communication, traffic data, location data and e-mail (see below)

B - Unsolicited Commercial Communications / Spam (I) -Why EU legislation?



Single market approach needed

- Unsolicited faxes and automated calls already under an opt-in
- Spam is a problem for the development of e-commerce and the information society (e.g. confidence)
- Spam creates costs and nuisance for professionals and consumers
- Filtering systems currently used by ISPs seem open to legal challenge

B - Unsolicited Commercial **Communications / Spam (II) -**Why an opt-in?



- Permission-based marketing seems to be very efficient (spam study 2001)
- Several Member States had an opt-in
- ♦ User empowerment
- Privacy is a right, not an option
- Opt-out lists do not work well in practice (unlimited number, consulting them costs money, abuse)



How distinguish 'good' from 'bad' spam

Easier to implement e.g. at int'l level



Many possibilities (e.g. Web) to obtain consent from e-mail users.



The harvesting of e-mail addresses is contrary to data protection principles

B - UCC/Spam (III) - Basic Principles (Art 13)



 Opt-in for unsolicited e-mail for direct marketing

- Broad technology neutral definition (covering also SMS, MMS etc.)
- Opt-out for use of contact details of existing customers
 - in the context of a sale
 - similar products or services

 Legal persons' legitimate interests to be 'sufficiently protected' (B2B marketing)

B - UCC/Spam (IV) - Definition of Electronic Mail

Any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient." (Art 2)

This means any form of electronic communication for which the simultaneous participation of the sender and the recipient is not required.

B - UCC/Spam (V) - Concept of * Direct Marketing

Covers any form of sales promotion

 Includes direct marketing by charities and political organisations (e.g. fund raising)

 Harmonised approach within EU to be ensured notably through the Article 29 Working Party composed of national data protection authorities

B - UCC/Spam (VI) - Existing customer relationships



 Opt-out allowed for use of contact details obtained from customers in the context of a sale



- May be used by the same company only
- Only for marketing of similar products or services
- Explicit opt-out must be offered at time of collection and with each message

B - UCC/Spam (VII) - Additional Safeguards

Disguise of identity of sender is prohibited

All marketing messages must include a valid return address and allow optout also after earlier opt-in

 Review in 2006 with particular emphasis on UCC/Spam

B - UCC/Spam (VIII) -Application and Enforcement



In short: rules on spam apply to all messages sent over EU networks, regardless of where they originate

 Adequate complaint and penalty mechanisms must be established e.g. individual right or action, claims for damage, sanctions.



For messages from outside the EU especially by the 'bad guys', enforcement will not be easy

- Cooperation with third countries needed
- Practical follow-up underway

C - Spyware and Cookies (Art 5(3))

New provision

- Requirement to inform users of any invisible tracking devices placed on their terminals (e.g. cookies, spyware)
- Inform about purposes of such devices (purposes must be legitimate l.e. in conformity with general data protection directive)
- Obligation to offer the user a possibility to refuse

D - Processing of Traffic Data (Art 6)



Use for service provision and billing Obligation to erase Reminder: Extended coverage to all electronic communications Permission based use for value added services if consent Information obligation

F - Processing of Location Data (Art 9)



- New provision
- Permission based use only
- Reminder: Extended coverage to all electronic communications
- Full information required
- Temporary blockage facility for users
- Override available for emergency services

G - Public Subscriber Directories (Art 12)



Change of default : Opt-in for subscribers

- Not opting-in or opting-out : free of charge
- Full information required e.g. on reverse search
- National choice on separate opt-in for reverse search
- New rules apply to new subscribers only

Timetable



 Adoption and publication in July 2002 (Official Journal No L 201, 31 July 2002)

Transposition in national law by 31 October 2003 at the latest

Review in 2006, with particular emphasis on UCC/Spam





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Directive 2002/58/EC is available at:

http://europa.eu.int/information_society/topics/telecoms/regulatory/ new rf/documents/l 20120020731en00370047.pdf