



**Guidelines on the Privacy and Electronic  
Communications Regulations 2003**

**Amended May 2011**

## **Introduction**

Regulations updating existing legislation on the use of unsolicited emails and texts plus the use of cookies came into force in the UK on December 2003. The regulations implemented the Directive on Privacy and Electronic Communications (2002/58/EC).

In January 2010, this Directive was amended by the European Parliament and Council of Ministers as part of the Telecoms Package. The changes in the Directive were transposed into UK law and became effective from 26 May 2011.

The rules on unsolicited emails and texts remain unchanged. The rules for cookies however have been significantly amended.

## **Unsolicited emails and texts**

*What do the regulations require?*

1. Unsolicited commercial emails (spam) and text messages (SMS) to individual subscribers need individual's prior agreement. Such communications may only be sent to individuals who have 'opted in' or given their 'active consent' to receive unsolicited commercial emails or 'spam', and SMS to mobile phones.
2. There is an exception to this rule in the context of existing customer relationships. Unsolicited communication relating to similar products and/or services can be sent to existing customers until such time as they indicate they no longer want to receive such communications by opting out.

*How does this apply to market, social and opinion research?*

1. Emails and SMS for research purposes are not defined as commercial communications within the legislation. However researchers should be prepared for feedback and/or questions regarding the legislation from respondents who are not aware of this distinction.
2. Client organisations may forward their customer email addresses to market researchers. The only exception to this is in instances where clients have decided to include research in their standard data protection opt out policy. In this case, addresses of customers who have opted out must be removed before the list is forwarded.
3. For non-research or mixed purpose projects that contain a marketing purpose (i.e. those that promote the aims or ideals of an organisation) the Regulations will apply and must be adhered to. See the [MRS Regulations for Using Research Techniques for Non-Research Purposes](#) for further details.

The 2003 legislation also placed the Telephone Preference Service (TPS) on a statutory footing. Screening against the TPS is only required for commercial/direct marketing calls and not for research calls, unless they are for mixed purpose projects.

## **Cookies**

Under the 2003 regulations any websites employing 'cookies' and other tracking devices were required include a clear statement about the use of cookies and had to allow subscribers or users to refuse to accept them if they wished. **This has been changed.**

The new requirement is essentially that cookies can only be placed on machines where the user or subscriber has given their consent. The relevant regulation now states:

- 6 (1) *Subject to paragraph (4), a person shall not store or gain access to information stored, in the terminal equipment of a subscriber or user unless the requirements of paragraph (2) are met.*
- (2) *The requirements are that the subscriber or user of that terminal equipment—*
- (a) *is provided with clear and comprehensive information about the purposes of the storage of, or access to, that information; and*
- (b) *has given his or her consent.***
- (3) *Where an electronic communications network is used by the same person to store or access information in the terminal equipment of a subscriber or user on more than one occasion, it is sufficient for the purposes of this regulation that the requirements of paragraph (2) are met in respect of the initial use.*
- (3A) *For the purposes of paragraph (2), consent may be signified by a subscriber who amends or sets controls on the internet browser which the subscriber uses or by using another application or programme to signify consent.*
- (4) *Paragraph (1) shall not apply to the technical storage of, or access to, information—*
- (a) *for the sole purpose of carrying out the transmission of a communication over an electronic communications network; or*
- (b) *where such storage or access is strictly necessary for the provision of an information society service requested by the subscriber or user.*

In summary, the regulation provides that:

- Clear information is provided to the user;
- Consent is obtained from the user;
- Consent may be indicated by browsers or other application settings (but this is not as helpful as first appears – see below).

The data protection regulator, the Information Commissioner's Office (ICO) has published initial guidance on the new regulations:

[http://www.ico.gov.uk/~media/documents/library/Privacy\\_and\\_electronic/Practical\\_application/advice\\_on\\_the\\_new\\_cookies\\_regulations.pdf](http://www.ico.gov.uk/~media/documents/library/Privacy_and_electronic/Practical_application/advice_on_the_new_cookies_regulations.pdf)

The guidance sets out a three step process for assessing compliance with the regulations:

1. Check what type of cookies you use and how you use them;
2. Assess how intrusive your use of these cookies is;
3. Decide what solution to obtain consent will be best in your circumstances.

It should be noted that the guidance effectively rules out the use of browser settings as a means of obtaining consent for cookies at this time. While this is a possibility under the law, the view of the ICO is that present technology does not allow for browsers to indicate consent of the user in a meaningful way.

The guidance goes on to provide a number of different methods for obtaining consent:

- Pop ups and similar techniques
- Terms and conditions
- Settings-led consent
- Feature-led consent
- Functional uses
- Third party cookies

While the advice here is useful, the guidance does not contain detailed examples of the methods in action, making precise interpretation difficult.

*What does this mean for research?*

Due to the voluntary nature of participation in research, researchers are already required to obtain the informed consent of respondents for the processing of their personal data. In online research, consent for cookies will have to be included in this process.

#### Ad-hoc online interviews

Information about cookies can be included in the introduction or invitation to a research interview, providing a short explanation of their purpose, e.g. to identify participants, to deliver questions in the correct sequence, etc. Consent will be indicated by the respondent's agreement to participate in the interview. This is in line with the ICO's advice on settings led consent:

*Some cookies are deployed when a user makes a choice about how the site works for them. In these cases, consent could be gained as part of the process by which the user confirms what they want to do or how they want the site to work.*

and feature led consent:

*Provided you make it clear to the user that by choosing to take a particular action then certain things will happen you may interpret this as their consent. The more complex or intrusive the activity the more information you will have to provide.*

#### Online Panel Research

For panels an alternative approach is to amend the terms and conditions of the panel to include a clear and comprehensive description of the use of cookies (perhaps including a list of the cookies, although for some complex sites this may run to the hundreds). Panellists may then be asked to consent to the new terms conditions (highlighting the relevant changes) the next occasion on which they log in. According to the ICO:

*To satisfy the new rules on cookies, you have to make users aware of the changes and specifically that the changes refer to your use of cookies. You then need to gain a positive indication that users understand and agree to the changes. This is most commonly obtained by asking the user to tick a box to indicate that they consent to the new terms.*

#### **TPS and Directories**

The 2003 legislation placed the Telephone Preference Service (TPS) on a statutory footing. Screening against the TPS is only required for commercial/direct marketing calls and not for research calls.

The 2003 legislation also created information and consent requirements for entries in publicly available directories, including a requirement that subscribers are informed of all the usage possibilities of publicly available directories - e.g. reverse searching from a telephone number in order to obtain a name and address. Researchers who use or purchase such directories need to be aware of this requirement.