



STATUTORY INSTRUMENTS.

S.I. No. 336 of 2011

EUROPEAN COMMUNITIES (ELECTRONIC COMMUNICATIONS
NETWORKS AND SERVICES) (PRIVACY AND ELECTRONIC
COMMUNICATIONS) REGULATIONS 2011

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EUROPEAN COMMUNITIES (ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES) (PRIVACY AND ELECTRONIC COMMUNICATIONS) REGULATIONS 2011

I, PAT RABBITTE, Minister for Communications, Energy and Natural Resources, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving effect to Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002¹ as amended by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006² and Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009³, hereby make the following regulations:

Citation

1. These Regulations may be cited as the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011.

Interpretation

2. (1) For the purpose of these Regulations the definitions set out in Regulation 2(1) of the Framework Regulations apply.

(2) In these Regulations—

“Act of 1983” means Postal and Telecommunications Services Act 1983 (No. 24 of 1983);

“Act of 1988” means Data Protection Act 1988 (No. 25 of 1988);

“Act of 1993” means Interception of Postal Packets and Telecommunications Messages (Regulation) Act 1993 (No. 10 of 1993);

“Act of 2002” means Communications Regulation Act 2002 (No. 20 of 2002);

“Act of 2003” means Data Protection (Amendment) Act 2003 (No. 6 of 2003);

“Act of 2011” means Communications (Retention of Data) Act 2011 (No. 3 of 2011);

“automated calling machine” means an automatic calling machine or system which, when activated, operates to make calls without human intervention;

¹OJ No. L 201, 31.7.2002, p. 37

²OJ No. L 105, 13.04.2006, p. 54

³OJ No. L 337, 18.12.2009, p. 11

Notice of the making of this Statutory Instrument was published in “Iris Oifigiúil” of 5th July, 2011.

“blocking”, in relation to data, means so marking the data that it is not possible to process it for purposes in relation to which it is marked;

“Commissioner” means Data Protection Commissioner;

“communication” means any information exchanged or conveyed between a finite number of parties by means of a publicly available electronic communications service, but does not include any information conveyed as part of a broadcasting service to the public over the electronic communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information;

“consent” by a user or subscriber means a data subject’s consent in accordance with the Data Protection Acts and these Regulations;

“data” means automated data and manual data;

“data controller” means a person who either alone or with others controls the contents and use of personal data;

“Data Protection Acts” means Data Protection Acts 1988 and 2003;

“Data Protection Directive” means Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995⁴ on the protection of individuals with regard to the processing of personal data and on the free movement of such data;

“Directive on privacy and electronic communications” means Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002¹ as amended by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006² and Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009³;

“directory” means a directory of subscribers in printed or electronic form—

- (a) that is available to members of the public, or
- (b) information from which is available to members of the public by way of a directory enquiry service;

“EEA Agreement” means the Agreement on the European Economic Area signed at Oporto on 2 May 1992 as adjusted by the Protocol signed at Brussels on 17 March 1993;

“electronic mail” means any text, voice, sound or image message including an SMS 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;

⁴OJ No. L 281, 23.11.1995, p. 31

“enactment” means a statute or an instrument made under, or power conferred by, statute;

“enforcement notice” means a notice served under Regulation 17(4);

“European Economic Area” has the meaning assigned to it by the EEA agreement;

“Framework Regulations” means European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011);

“information notice” means a notice served under Regulation 18(1);

“interconnection” means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between the public network operators;

“location data” means any data processed in an electronic communications network or by an electronic communications service, indicating the geographic position of the terminal equipment of a user of a publicly available electronic communications service;

“National Directory Database” means the record of all subscribers of publicly available telephone services in the State, including those with fixed, personal or mobile numbers, who have not refused to be included in that record, kept in accordance with Regulation 19(4) of the Universal Service Regulations and these Regulations;

“operator” means a person designated by the Regulator under Regulation 7(1) of the Universal Service Regulations to provide a universal service (within the meaning of those Regulations) in respect of directory services referred to in Regulation 4 of those Regulations;

“personal data” means data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller;

“personal data breach” means a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed in connection with the provision of a publicly available electronic communications service in the European Union;

“processing”, of or in relation to information or data, means performing any operation or set of operations on the information or data, whether or not by automatic means, including—

- (a) obtaining, recording or keeping the information or data,
- (b) collecting, organising, storing, altering or adapting the information or data,
- (c) retrieving, consulting or using the information or data,
- (d) disclosing the information or data by transmitting, disseminating or otherwise making it available, or,
- (e) aligning, combining, blocking, erasing or destroying the information or data,

and cognate words shall be construed accordingly;

“Regulations of 2003” means European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003 (S.I. No. 535 of 2003);

“traffic data” means any data processed for the purpose of the conveyance of a communication on an electronic communications network or for the billing thereof;

“unsolicited call” means a call that is not requested by the called party;

“unsolicited communication” means a communication that is not requested by the contacted party;

“user” means any natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to this service;

“value added service” means any service which requires the processing of traffic data or location data other than traffic data beyond what is necessary for the transmission of a communication or the billing thereof.

(3) A word or expression that is used in these Regulations and that is also used in the Data Protection Directive, the Directive on privacy and electronic communications or in the Framework Regulations has, unless the context otherwise requires, the same meaning in these Regulations that it has in those Directives or in those Regulations.

(4) In these Regulations a reference to an enactment or Regulations shall be construed as a reference to the enactment or Regulations as amended by any subsequent enactment or Regulations, including these Regulations.

- (5) (a) A reference in any enactment to Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997⁵ is to be construed as a reference to the Directive on privacy and electronic communications.

⁵OJ No. L 24, 30.01.1998, p. 1

- (b) A reference in any enactment to the European Communities (Data Protection and Privacy in Telecommunications) Regulations 2002 (S.I. No. 192 of 2002) or the Regulations of 2003 is to be construed as a reference to these Regulations.

Services to which these Regulations apply

3. (1) These Regulations apply to the processing of personal data in connection with the provision of publicly available electronic communications services in public communications networks in the State and where relevant the European Union, including public communications networks supporting data collection and identification devices.

(2) Section 1(3B) of the Act of 1988 (inserted by section 2 of the Act of 2003) applies in relation to personal data referred to in paragraph (1).

Security of processing

4. (1) With respect to network security and, in particular, the requirements of paragraph (2), an undertaking providing a publicly available electronic communications network or service shall take appropriate technical and organisational measures to safeguard the security of its services, if necessary, in conjunction with undertakings upon whose networks such services are transmitted. These measures shall ensure the level of security appropriate to the risk presented having regard to the state of the art and the cost of their implementation.

(2) Without prejudice to the Data Protection Acts, the measures referred to in paragraph (1) shall at least—

- (a) ensure that personal data can be accessed only by authorised personnel for legally authorised purposes,
- (b) protect personal data stored or transmitted against accidental or unlawful destruction, accidental loss or alteration, and unauthorised or unlawful storage, processing, access or disclosure, and
- (c) ensure the implementation of a security policy with respect to the processing of personal data.

(3) The Commissioner may audit the measures taken by an undertaking providing publicly available electronic communications services and issue recommendations about best practices concerning the level of security which those measures should achieve.

(4) In the case of a particular risk of a breach of the security of the public communications network, the undertaking providing the publicly available electronic communications service shall inform its subscribers concerning such risk without delay and, where the risk lies outside the scope of the measures to be taken by the relevant service provider, any possible remedies including an indication of the likely costs involved.

(5) An undertaking whose public communications network is used by another undertaking for the supply of a publicly available electronic communications service shall comply with any reasonable request made by the undertaking using the public communications network for the purpose of complying with this Regulation.

(6) Where there has been a personal data breach, the undertaking shall, without undue delay—

(a) notify the Commissioner of the said breach, and

(b) where the said breach is likely to adversely affect the personal data or privacy of a subscriber or individual, notify the subscriber or individual of the breach.

(7) A notification under paragraph (6)(b) shall not be required if the undertaking has demonstrated to the satisfaction of the Commissioner that it has implemented appropriate technological protection measures which render the data unintelligible to any person who is not authorised to access it and that those measures were applied to the data affected by the security breach.

(8) Without prejudice to paragraphs (6) and (7), where the undertaking has not notified the subscriber or individual of the personal data breach, the Commissioner may, having considered the likely adverse effects of the breach, require the undertaking to do so by serving an enforcement notice on the undertaking in accordance with Regulation 17(4).

(9) A notification under paragraph (6) shall, at least, contain—

(a) a description of the nature of the personal data breach,

(b) a description of the contact points where more information can be obtained,

(c) a recommendation on measures to mitigate the possible adverse effects of the personal data breach, and

(d) where the notification is under paragraph 6(a), a description of the consequences of, and the measures proposed to be taken by the undertaking to address, the personal data breach.

(10) Subject to any technical implementing measures adopted by the European Commission under Article 4(5) of the Directive on privacy and electronic communications, the Commissioner may adopt guidelines concerning the circumstances in which undertakings are required to notify personal data breaches, the format of such notification and the manner in which such notification is to be made. Where necessary the Commissioner may, for the purpose of this paragraph, issue such instructions as he or she considers necessary.

(11) The Commissioner may conduct an audit to determine compliance with guidelines and instructions issued under paragraph (10).

(12) Undertakings shall maintain an inventory of personal data breaches which shall comprise the following information—

- (a) the facts surrounding the breach,
- (b) the effects of the breach, and
- (c) any remedial action taken,

and shall be sufficient to enable the Commissioner to verify compliance with paragraphs (6) to (10).

(13) An undertaking that—

- (a) fails to comply with the requirements of paragraph (1),
- (b) fails to comply with the requirements of paragraph (4),
- (c) subject to paragraph (7), fails to comply with the requirements of paragraph (6),
- (d) refuses to co-operate with an audit referred to in paragraph (3) or (11), or
- (e) fails to comply with the requirements of paragraph (12),

commits an offence.

(14) (a) An undertaking that commits an offence under this Regulation (other than under paragraph 13(a) or (c)) is liable on summary conviction to a class A fine.

(b) An undertaking that commits an offence under paragraph 13(a) or (c) is liable, on summary conviction, to a class A fine or, on indictment—

(i) in the case of a body corporate, to a fine not exceeding €250,000, or

(ii) in the case of a natural person, to a fine not exceeding €50,000.

Confidentiality of communications

5. (1) Without prejudice to section 98 of the Act of 1983 and section 2 of the Act of 1993 and except where legally authorised under a provision adopted in accordance with Article 15(1) of the Directive on privacy and electronic communications, the listening, tapping, storage or other kinds of interception or surveillance of communications and the related traffic data by persons other than users, without the consent of the users concerned, is prohibited.

(2) Paragraph (1) does not—

- (a) prevent the technical storage of communications and the related traffic data which is necessary for the conveyance of a communication without prejudice to the principle of confidentiality, and
- (b) affect any legally authorised recording of communications and the related traffic data when carried out in the course of lawful business practice for the purpose of providing evidence of a commercial transaction or of any other business communication.

(3) A person shall not use an electronic communications network to store information, or to gain access to information already stored in the terminal equipment of a subscriber or user, unless

- (a) the subscriber or user has given his or her consent to that use, and
- (b) the subscriber or user has been provided with clear and comprehensive information in accordance with the Data Protection Acts which—
 - (i) is both prominently displayed and easily accessible, and
 - (ii) includes, without limitation, the purposes of the processing of the information.

(4) For the purpose of paragraph (3), the methods of providing information and giving consent should be as user-friendly as possible. Where it is technically possible and effective, having regard to the relevant provisions of the Data Protection Acts, the user's consent to the storing of information or to gaining access to information already stored may be given by the use of appropriate browser settings or other technological application by means of which the user can be considered to have given his or her consent.

(5) Paragraph (3) does not prevent any technical storage of, or access to, information for the sole purpose of carrying out the transmission of a communication over an electronic communications network or which is strictly necessary in order to provide an information society service explicitly requested by the subscriber or user.

Traffic data

6. (1) Subject to paragraphs (2), (3), (4) and (5) and the provisions of the Act of 2011, an undertaking shall ensure that traffic data relating to subscribers and users processed and stored for the purpose of the transmission of a communication shall be erased or made anonymous when it is no longer needed for that purpose.

- (2) (a) An undertaking may process traffic data necessary for the purpose of subscriber billing and interconnection payments only up to the end of the period in which the bill may be lawfully challenged and payment pursued or where such proceedings are brought during that period until those proceedings are finally determined. An undertaking shall inform its subscribers of the types of traffic data that are processed and of the duration of such processing.

- (b) Legal proceedings shall be deemed, for the purpose of this paragraph, to be finally determined—
- (i) if no appeal is brought within the ordinary time for an appeal by either party to the proceedings, upon the expiry of that time,
 - (ii) if an appeal is brought within that time or such extended time as the court to which the appeal is brought may allow, upon the date of the determination of the appeal or any further appeal from it or the ordinary time for instituting any further appeal has expired or such other date as may be determined by the court hearing any such appeal, whichever is the latest, or
 - (iii) if an appeal has been brought and is withdrawn, upon the date of the withdrawal of the appeal.
- (3) (a) An undertaking may process traffic data referred to in paragraph (1) for the purpose of marketing electronic communications services or for the provision of value added services to the extent and for the duration necessary for such services or marketing, provided the subscriber or user to whom the data relates has given his or her prior consent in accordance with section 2A(1)(a) of the Act of 1988 (inserted by section 4 of the Act of 2003).
- (b) Prior to obtaining consent, the undertaking shall inform the subscriber or user of the types of traffic data which are processed and of the duration of such processing.
- (c) An undertaking shall ensure that users or subscribers are informed of and given the possibility to withdraw their consent for processing of traffic data for the purpose of this paragraph at any time.
- (4) An undertaking shall ensure that the processing of traffic data in accordance with paragraphs (1), (2) and (3) is restricted to persons acting under its authority in accordance with section 2C(3) of the Act of 1988 (inserted by section 4 of the Act of 2003) handling billing or traffic management, customer enquiries, fraud detection, the marketing of electronic communication services or providing a value added service and such processing is restricted to what is necessary for the purpose of such activities.
- (5) Nothing in these Regulations precludes a court or any other body involved in the settlement of disputes (whether by way of legal proceedings or otherwise) under any enactment from being informed of traffic data for the purpose of settling such disputes, in particular, disputes relating to billing or inter-connection.

Itemised billing

7. (1) An undertaking shall comply with a request of a subscriber to that undertaking to give him or her bills that are not itemised in respect of the electronic communications service supplied by the undertaking to the subscriber.

(2) The Regulator and the Commissioner shall, in the performance of their functions, have regard to the need to reconcile the rights of subscribers to receive itemised bills with the right to privacy of calling users and called subscribers.

Presentation and restriction of calling and connected line identification

8. (1) Where presentation of calling line identification is offered by an undertaking, the undertaking shall—

- (a) offer the calling user the possibility, using a simple means and free of charge, of preventing the presentation of the calling line identification on a per call basis. The undertaking shall offer the calling subscriber this option on a per-line basis,
- (b) offer the called subscriber the possibility, using a simple means and free of charge for reasonable use of this function, of preventing the presentation of the calling line identification of incoming calls, and
- (c) where the calling line identification is presented prior to the call being established, offer the called subscriber the possibility, using simple means, of rejecting incoming calls where the presentation of the calling line identification has been prevented by the calling user or subscriber.

(2) Where presentation of connected line identification is offered, the undertaking shall offer the called subscriber the possibility, using a simple means and free of charge, of preventing the presentation of the connected line identification to the calling user.

(3) Paragraph (1)(a) also applies with regard to calls to third countries originating in the European Union.

(4) Paragraph (2) and paragraph (1)(b) and (c) also apply to incoming calls originating in third countries.

(5) An undertaking that offers the presentation of calling line or connected line identification shall inform the public of it and of the possibilities contained in paragraphs (1) and (2) by publishing a notice regularly, at intervals not more than annually, stating how that information may be obtained.

(6) An undertaking to whom paragraph (1) or (2) applies shall display the information referred to in paragraph (5) on the undertaking's website and, where appropriate, in a directory.

Location data other than traffic data

9. (1) No person shall process location data other than traffic data relating to users or subscribers of undertakings unless—

- (a) such data are made anonymous, or

- (b) they have obtained the consent of the users or subscribers in accordance with section 2A(1)(a) of the Act of 1988 (inserted by section 4 of the Act of 2003) to the extent and for the duration necessary for the provision of a value added service.

(2) An undertaking, that has not already done so, shall inform its users or subscribers, prior to obtaining their consent in accordance with section 2A(1)(a) of the Act of 1988 (inserted by section 4 of the Act of 2003), of—

- (a) the type of location data other than traffic data which will be processed,
- (b) the purposes and duration of the processing, and
- (c) whether the data will be transmitted to a third party for the purpose of providing the value added service.

(3) An undertaking shall give users or subscribers the possibility to withdraw their consent for the processing of location data other than traffic data at any time by making a request that such processing be stopped.

(4) Where the consent of users or subscribers has been obtained for the processing of location data other than traffic data, an undertaking shall give the user or subscriber the possibility, using a simple means and free of charge, of temporarily refusing the processing of such data for each connection to the public communications network or for each transmission of a communication.

(5) An undertaking shall ensure that the processing of location data other than traffic data in accordance with paragraphs (1), (2) and (4) is restricted to persons acting under the authority of the undertaking or of the third party providing the value added service based on data provided by that undertaking and shall be restricted to what is necessary for the purpose of providing the value added service.

Exceptions

10. An undertaking that has not already done so shall ensure that a general description is prepared, and available for any person who requests it, of the circumstances in which the undertaking may override—

- (a) the elimination of the presentation of calling line identification in respect of a line, on a temporary basis, following a complaint by a subscriber and investigation by a member of the Garda Síochána of a suspected offence under section 13 of the Post Office (Amendment) Act 1951 (No. 17 of 1951), requesting the tracing of malicious or nuisance calls. In such a case, the data containing the identification of the calling subscriber will be stored and will be made available in accordance with the Data Protections Acts and section 98(2) of the Act of 1983 by the undertaking to the Garda Síochána, and
- (b) the elimination of the presentation of calling line identification in respect of a line and the temporary denial or absence of consent of a

subscriber or user for the processing of location data on a per-line basis, for calls to the emergency services including law enforcement agencies, ambulance services, fire brigades using the National emergency call number 999 or the single European emergency call number 112 or for the purpose of responding to such calls and bodies dealing with such calls for the purposes of answering them.

Automatic call forwarding

11. (1) (a) An undertaking shall ensure that calls automatically forwarded to a subscriber's terminal as a result of action by a third party shall, without charge upon a request being made to the undertaking by the subscriber to do so, cease to be so forwarded as soon as practicable after receipt of such a request.

(b) An undertaking that has not already done so shall inform its subscribers of the requirements of subparagraph (a).

(2) An undertaking whose network is interconnected with the network to which the line of the subscriber concerned is connected shall, within 48 hours, comply with any reasonable request made by another undertaking for the purpose of complying with paragraph (1).

Directories of subscribers

12. (1) An undertaking referred to in Regulation 19(1) or (2) of the Universal Service Regulations shall ensure that all its subscribers are, without charge—

(a) informed, before they are included in any directory for which the undertaking provides relevant information in accordance with that Regulation and in which their personal data can be included, about the purpose of such a directory and any further usage possibilities based on search functions embedded in electronic versions of that directory,

(b) given the opportunity to determine whether their personal data are included in that directory, and

(c) given the opportunity to determine which of their personal data are included in that directory to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory and to verify, correct or withdraw such data.

(2) Any other person responsible for the collection and making available of a subscriber's data for inclusion in any other directory of subscribers shall ensure that the subscribers are, without charge—

(a) informed, before they are included in any such directory in which their personal data can be included, about the purpose of such a directory and any further usage possibilities based on search functions embedded in electronic versions of the directory,

- (b) given the opportunity to determine whether their personal data are included in that directory, and
 - (c) given the opportunity to determine which of their personal data are included in that directory to the extent that such data are relevant for the purpose of the directory as determined by the provider of the directory and to verify, correct or withdraw such data.
- (3) (a) An undertaking referred to in Regulation 19(1) or (2) of the Universal Service Regulations shall ensure that its subscribers other than natural persons are, without charge, provided with the information referred to in paragraph (1)(a) and the opportunities referred to in paragraph (1)(b) and (c) notwithstanding the fact that the data may not be personal data.
- (b) Any other person responsible for the collection and making available of data for inclusion in any other directory of subscribers shall ensure that subscribers other than natural persons are, without charge, provided with the information referred to in paragraph (2)(a) and the opportunities referred to in paragraph (2)(b) and (c) notwithstanding the fact that the data may not be personal data.
- (4) A subscriber may request the relevant undertaking or person to disregard or reverse the effect of a determination previously made by the subscriber to the undertaking or person under paragraph (2) or (3).
- (5) The relevant undertaking or person shall comply with any notification of a determination made, or deemed to have been made, to that undertaking or that person under paragraph (1), (2) or (4).

Unsolicited communications

13. (1) Subject to paragraph (2), a person shall not use or cause to be used any publicly available electronic communications service to send to a subscriber or user who is a natural person an unsolicited communication for the purpose of direct marketing by means of—

- (a) an automated calling machine,
- (b) a facsimile machine, or
- (c) electronic mail,

unless the person has been notified by that subscriber or user that he or she consents to the receipt of such a communication.

(2) Notwithstanding paragraph (1) and subject to paragraph (4), the use of electronic mail to send an unsolicited communication for the purpose of direct marketing to a natural person does not include an electronic mail to an email address that reasonably appears to the sender to be an email address used mainly by the subscriber or user in the context of their commercial or official

activity and the unsolicited communication relates solely to that commercial or official activity.

(3) A person shall not use or cause to be used any publicly available electronic communications service to send an unsolicited communication for the purpose of direct marketing by means of an automated calling machine or a facsimile machine to a subscriber or user, other than a natural person, where—

- (a) the subscriber or user has notified the person that the subscriber or user does not consent to the receipt of such a communication, or
- (b) subject to paragraph (9), the relevant information referred to in Regulation 14(3) is recorded in respect of the subscriber or user in the National Directory Database.

(4) A person shall not use or cause to be used any publicly available electronic communications service to send an unsolicited communication for the purpose of direct marketing by means of electronic mail, to a subscriber or user other than a natural person, where the subscriber or user has notified the person that the subscriber or user does not consent to the receipt of such a communication.

(5) A person shall not use or cause to be used any publicly available electronic communications service to make an unsolicited telephone call for the purpose of direct marketing to a subscriber or user, where—

- (a) the subscriber or user has notified the person that the subscriber or user does not consent to the receipt of such a call, or
- (b) subject to paragraph (9), the relevant information referred to in Regulation 14(3) is recorded in the National Directory Database.

(6) A person shall not use or cause to be used any publicly available electronic communications service to make an unsolicited communication for the purpose of direct marketing by means of a telephone call or automated calling machine to the mobile telephone of a subscriber or user unless—

- (a) the person has been notified by that subscriber or user that he or she consents to the receipt of such communication on his or her mobile telephone, or
- (b) the subscriber or user has consented to receiving such communication and such consent stands recorded on the date of such communication in the National Directory Database in respect of his or her mobile phone number.

(7) A person shall not use or cause to be used any publicly available electronic communications service to send to a subscriber or user an SMS message for a non-marketing purpose which includes information intended for the purpose of direct marketing unless the person has been notified by that subscriber or user that he or she consents to the receipt of such a communication.

(8) A subscriber or user shall be able to make a notification under paragraph (3)(a), (5)(a) or (6)(a) or make a request to record relevant information in the National Directory Database without charge.

(9) A person will not contravene paragraph (3)(b) or (5)(b) if the unsolicited communication concerned is made during the period of 28 days after a request or notification under Regulation 14 is received and recorded in the National Directory Database by the operator in respect of the subscriber or user concerned.

(10) A person who uses, or causes to be used, any publicly available electronic communications service to make a call or send a communication for the purpose of direct marketing shall—

- (a) in the case of a call, include the name of the person making the call and, if applicable, the name of the person on whose behalf the call is made,
- (b) in the case of a communication by means of an automated calling machine or a facsimile machine include the name, address and telephone number of the person making the communication and, if applicable, the name, address and telephone number of the person on whose behalf the communication is made, or
- (c) in the case of a communication by electronic mail, include a valid address at which that person may be contacted.

(11) A person who, in accordance with the Data Protection Acts, obtains from a customer the customer's contact details for electronic mail, in the context of the sale of a product or service, shall not use those details for direct marketing unless—

- (a) the product or service being marketed is the person's own product or service,
 - (b) the product or service being marketed is of a kind similar to that supplied to the customer in the context of the sale by the person,
 - (c) the customer is clearly and distinctly given the opportunity to object, in an easy manner and without charge, to the use of those details—
 - (i) at the time the details are collected, and
 - (ii) if the customer has not initially refused that use, each time the person sends a message to the customer,
- and
- (d) the sale of the product or service occurred not more than 12 months prior to the sending of the direct marketing communication or, where

applicable, the contact details were used for the sending of electronic mail for the purposes of direct marketing within that 12 month period.

(12) A person shall not send or cause to be sent electronic mail for the purposes of direct marketing, which—

- (a) disguises or conceals the identity of the sender on whose behalf the communication was made,
- (b) encourages recipients to visit websites or otherwise contravenes Regulation 8 of the European Communities (Directive 2000/31/EC) Regulations 2003 (S.I. No. 68 of 2003), or
- (c) does not have a valid address to which the recipient may send a request that such communication shall cease.

(13) (a) A person who—

- (i) contravenes the requirements of paragraph (1), (3), (4), (5), (6), (7), (11) or (12), or
- (ii) fails to comply with the requirements of paragraph (10),
commits an offence.

(b) For the purposes of subparagraph (a) the sending of each unsolicited communication or electronic mail or the making of each unsolicited call constitutes a separate offence.

(14) If, in proceedings for an offence under this Regulation, the question of whether or not a subscriber or user consented to receiving an unsolicited communication or call is in issue, the onus of establishing that the subscriber or user concerned unambiguously consented to receipt of the communication or call lies on the defendant.

(15) A person who commits an offence under this Regulation is liable—

- (a) on summary conviction, to a class A fine, or
- (b) on conviction on indictment—
 - (i) in the case of a body corporate, to a fine not exceeding €250,000,
or
 - (ii) in the case of a natural person, to a fine not exceeding €50,000.

(16) Where a person is convicted of an offence under this Regulation, the court may order any data material or data, which appears to the court to be connected with the offence, to be forfeited or destroyed and any relevant data to be erased.

(17) The court shall not make an order under paragraph (16) in relation to data material or data where it considers that some person other than the person convicted of the offence concerned may be the owner of, or otherwise interested in, the data material or data unless such steps as are reasonably practicable have been taken for notifying that person and giving him or her an opportunity to show cause why the order should not be made.

(18) For the purpose of this Regulation, personal data shall be deemed to include a phone number or an e-mail address of a subscriber or user.

National Directory Database

14. (1) An undertaking referred to in Regulation 19(1) or (2) of the Universal Service Regulations shall, for the purpose of Regulation 13(3)(b) or (5)(b), record or cause to be recorded in the National Directory Database the relevant information specified in paragraph (3) in respect of a line of any one of its subscribers who—

(a) is, upon the making of these Regulations, an ex-directory subscriber in respect of that line who, in the absence of any express instructions to the contrary, shall be taken not to consent to unsolicited calls for the purpose of direct marketing or to such calls by means of an automated calling machine or a facsimile machine, or

(b) had, at any time after the establishment of that Database, made a request to the operator or notified the relevant undertaking that the subscriber does not consent to unsolicited calls for the purpose of direct marketing or to such calls by means of an automated calling machine or a facsimile machine to a line of that subscriber.

(2) An undertaking referred to in Regulation 19(1) or (2) of the Universal Service Regulations that has not already done so shall ensure that its subscribers are provided with information regarding their entitlements under Regulation 13(1), (3)(b) and (5)(b) and the possibilities referred to in paragraph (1).

(3) An undertaking referred to in Regulation 19(1) or (2) of the Universal Service Regulations shall, for the purpose of Regulation 13(3)(b) and (5)(b) and when so notified by any one of its subscribers, make available to the operator the following relevant information in respect of a line of that subscriber to be recorded in the entry in the National Directory Database in relation to that subscriber—

(a) the fact that the subscriber does not consent to unsolicited telephone calls for the purpose of direct marketing or to such calls by means of automated calling machines or facsimile machines, and

(b) if appropriate, the date on which a notification under Regulation 13(3)(b) and (5)(b) was received by the operator.

(4) (a) An undertaking, for the purpose of Regulation 13(3)(b) or (5)(b), shall, as soon as practicable after having been notified under paragraph (3) that a subscriber does not consent to unsolicited telephone

calls for the purpose of direct marketing or to such calls by means of automated calling machines or facsimile machines, transmit particulars of such notification to the operator or other person who publishes a directory to whom the undertaking supplies relevant information relating to its subscribers for inclusion in that directory.

- (b) When the operator or other person who publishes a directory receives particulars of a notification under paragraph (1), the notification shall be deemed, for the purpose of this Regulation, to have been made to the operator or that other person at the time the operator or that other person receives particulars of the notification.

(5) The operator shall record the relevant information referred to in paragraph (3) in respect of a line of a subscriber in the entry in the National Directory Database in relation to that subscriber when it is made available to the operator.

- (6) (a) For the purpose of complying with Regulation 13(3)(b) and (5)(b) a person may, on such terms and conditions as may be approved under Regulation 19(4) of the Universal Service Regulations and on payment to the operator of such fee as may be required by the operator—

(i) be allowed access to the National Directory Database at all reasonable times and take copies of, or of extracts from, entries in that Database, or

(ii) obtain from the operator a copy (certified by the operator or by a member of the operator's staff to be a true copy) of, or of an extract from, any entry in the National Directory Database,

or both, but the operator shall refuse such inspection or copying of, or of extracts from, entries in the National Directory Database if the operator has reasonable grounds to believe that the person will not comply with the Data Protection Acts and these Regulations in respect of the information in that Database.

- (b) A subscriber, or other person with the written consent of the subscriber, may—

(i) be allowed access to the entry in the National Directory Database in relation to that subscriber in respect of a particular line of the subscriber at all reasonable times and, on payment to the operator of such fee as may be required by the operator, take a copy of that entry, or

(ii) on payment to the operator of such fee as may be required by the operator, obtain from the operator a copy (certified by the operator or by a member of the operator's staff to be a true copy) of that entry,

or both.

- (c) In any proceedings—
 - (i) a copy of, or of an extract from, an entry in the National Directory Database certified by the operator or by a member of the operator's staff to be a true copy is evidence of the entry or extract on the date that it is so certified, and
 - (ii) a document purporting to be such a copy, and to be certified as aforesaid, is deemed to be such a copy and to be so certified unless the contrary is proved.
- (d) In any proceedings—
 - (i) a certificate signed by the operator or by a member of the operator's staff of an entry in the National Directory Database in relation to a specified subscriber in respect of a particular line is evidence of the entry on the date that it is so certified, and
 - (ii) a document purporting to be such a certificate, and to be signed as aforesaid, is deemed to be such a certificate and to be so signed unless the contrary is proved.
- (7) (a) Subject to subparagraph (c), the operator may require the payment of fees in respect of the matters referred to in paragraph (6)(a) or (b) and the amount of those fees shall be designed to secure, as nearly as may be and taking one year with another, that the aggregate amount of fees received, or reasonably expected to be received, equals the costs incurred, or reasonably expected to be incurred, by the operator in performing the functions conferred on the operator by this Regulation.
- (b) Different fees may be required in respect of the matters referred to in paragraph (6)(a) and (b).
- (c) The amount of the fees required under subparagraph (a) is subject to the approval of the Regulator.
- (8) For the purpose of his or her functions under Regulation 17, the Commissioner—
 - (a) shall be allowed access to the National Directory Database at all reasonable times and take copies of, or extracts from, entries in that Database, and
 - (b) may obtain from the operator a copy (certified by the operator or a member of the operator's staff to be a true copy) of, or an extract from, any entry in the National Directory Database,

without payment of a fee to the operator.

Technical features and standardisation

15. (1) In implementing these Regulations, the Regulator shall ensure, subject to paragraphs (2) and (3), that no mandatory requirements for specific technical features are imposed on terminal or other electronic communication equipment which could impede the placing of equipment on the market and the free circulation of such equipment in the European Union.

(2) Where these Regulations can be implemented only by requiring specific technical features in electronic communications networks, the Regulator shall inform the Commission in accordance with the procedure provided for by Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998⁶.

(3) The Regulator shall issue such instructions as may be necessary for the purpose of requiring any specific technical features on terminal or other electronic communication equipment necessary under paragraph (1).

Internal procedures where the scope of rights and obligations are restricted and damages for contravention of Regulations

16. (1) (a) Where a legislative measure has been adopted in accordance with Article 15(1) of the Directive on privacy and electronic communications which restricts the scope of the rights and obligations provided for under Regulations 5, 6, 8(1), 8(2) and 9, providers shall establish internal procedures for responding to requests for access to users' personal data having regard to the legislative measures adopted.

(b) The provider shall, when requested to do so by the Commissioner, provide the Commissioner with information about the internal procedures referred to in subparagraph (a), the number of requests received, the legal justification invoked and the provider's response to the requests.

(c) The Commissioner may seek the information referred to in subparagraph (b) in writing and the provider shall supply the information sought in writing within 28 days of receipt of the request.

(d) A person who, without reasonable excuse, fails or refuses to comply with a requirement specified in a request for information under subparagraph (b) or in purported compliance with such a requirement gives information to the Commissioner that the person knows to be false or misleading in a material respect commits an offence.

(2) A person who suffers loss and damage as a result of a contravention of any of the requirements of these Regulations by any other person shall be entitled to damages from that other person for that loss and damage.

(3) In legal proceedings seeking damages against a person under these Regulations, it is a defence for a person to provide that he or she had taken all reasonable care in the circumstances to comply with the requirement concerned.

⁶OJ No. L 204, 21.07.1998, p. 37

Commissioner's powers of enforcement

17. (1) The Commissioner may investigate, or cause to be investigated, whether any prescribed provision of these Regulations has been, is being or is likely to be contravened or not complied with. The power may be exercised either as a result of a complaint made by or on behalf of the person or on the Commissioner's own initiative as a result of forming an opinion that there may be such a contravention.

(2) Unless of the opinion that a complaint referred to in paragraph (1) is frivolous or vexatious, as soon as practicable after the complaint is received the Commissioner shall ensure that the complaint is investigated having regard to the Commissioner's responsibilities under the Data Protection Acts.

(3) If, after a reasonable time, the Commissioner is unable to bring about an amicable resolution of the matter to which a complaint relates (other than a complaint giving rise to the commission of an offence), the Commissioner shall notify the complainant in writing of the Commissioner's decision in relation to the matter. The notice must include a statement to the effect that, if the complainant is dissatisfied with the Commissioner's decision, the complainant has a right to appeal to the Circuit Court under Regulation 21 against the decision within 21 days after the date on which the decision is notified to the complainant under this paragraph.

(4) If the Commissioner is of the opinion that a person has contravened or not complied with, or is contravening or not complying with, a prescribed provision of these Regulations (other than one giving rise to the commission of an offence), the Commissioner may serve on the person an enforcement notice requiring the person to take, within a specified period, such steps as are specified in the enforcement notice.

(5) An enforcement notice—

(a) shall specify the prescribed provision of these Regulations (if any) that, in the opinion of the Commissioner, has been or is being contravened or not complied with and the reasons for having formed that opinion, and

(b) subject to paragraph (7), shall state that the person concerned has a right to appeal to the Circuit Court under Regulation 21 against the requirement specified in the notice within 21 days from the date of service of the enforcement notice on that person.

(6) Subject to paragraph (7), the time specified in an enforcement notice for compliance with a specified requirement may not be expressed to expire until after the period of 21 days from the date of service of the enforcement notice referred to in paragraph (5)(b). If the requirement subsequently becomes the subject of an appeal, the requirement specified in the enforcement notice need not be complied with, and paragraph (10) does not apply in relation to it, pending the determination or withdrawal of the appeal.

(7) Paragraphs (5)(b) and (6) do not apply to an enforcement notice if the Commissioner—

- (a) because of special circumstances, is of the opinion that a requirement specified in the enforcement notice should be complied with without delay, and
- (b) includes a statement to that effect in the enforcement notice.

In that case, however, the enforcement notice shall contain a statement specifying the effect of Regulation 21, paragraphs (3) and (4) excepted, and may not require compliance with the requirement before the expiry of 7 days beginning on the date on which the notice was served.

(8) As soon as practicable after complying with paragraph (4), and in any case not later than 40 days after so complying, a data controller shall notify the blocking, rectification, erasure, destruction or statement concerned—

- (a) to the data subject concerned, and
- (b) if compliance materially modifies the data concerned and notification is not impossible and does not involve disproportionate effort, to any person to whom the data was disclosed during the period beginning 12 months before the date of the service of the relevant enforcement notice and ending immediately before that compliance.

(9) The Commissioner may cancel an enforcement notice and, on doing so, shall by notice in writing notify the cancellation to the person concerned.

(10) A person who, without reasonable excuse, fails or refuses to comply with a requirement specified in an enforcement notice commits an offence.

(11) For the purpose of this Regulation, Regulations 4, 5, 6, 9, 12, 13, 14 and 16(1) are prescribed provisions.

Power to require information

18. (1) The Commissioner may serve an information notice on a person requiring the person to give to the Commissioner in writing such information in relation to matters specified in the information notice as is necessary or expedient for the performance of the Commissioner's functions.

(2) An information notice shall state that the person concerned has a right to appeal to the Circuit Court under Regulation 21 against the requirement specified in the information notice and that, if that right is to be exercised, it must be exercised within 21 days from the date on which the information notice is served on that person.

(3) A person to whom an information notice is served under paragraph (1) shall, to the extent that it is possible to do so, comply with the information notice within the period specified in the information notice. That period may not be less than 21 days from the giving of the information notice.

(4) If an appeal is brought under Regulation 21 against a requirement specified in the information notice then, pending the determination or withdrawal of the appeal—

(a) the requirement need not be complied with, and

(b) paragraph (8) does not apply to a failure to comply with the requirement.

(5) Paragraph (4) does not apply to an information notice if the Commissioner—

(a) because of special circumstances is of the opinion that a requirement specified in the information notice ought to be complied with without delay, and

(b) includes in the information notice a statement to that effect.

In that case, the information notice shall contain a statement specifying the effect of Regulation 21, paragraphs (3) and (4) excepted, and provide that compliance with the requirement may not be required before the expiry of 7 days beginning on the date on which the information notice was served.

(6) No enactment or rule of law prohibiting or restricting the disclosure of information precludes a person from giving to the Commissioner information necessary or expedient for the performance or exercise of the Commissioner's functions.

(7) Paragraph (6) does not apply to information that in the opinion of the Minister for Justice and Equality or the Minister for Defence is, or at any time was, kept for the purpose of safeguarding the security of the State or information that is privileged from disclosure in proceedings in a court.

(8) A person who—

(a) without reasonable excuse, fails or refuses to comply with a requirement specified in an information notice, or

(b) in purported compliance with such a requirement, gives information to the Commissioner that the person knows to be false or misleading in a material respect,

commits an offence.

Powers of authorised officers

19. (1) In this Regulation, “authorised officer” means a person authorised in writing by the Commissioner under the Data Protection Acts to exercise the powers conferred by section 24 of the Act of 1988 or these Regulations, or both.

(2) An authorised officer may, for the purpose of obtaining information that is necessary or expedient for the performance of the Commissioner's functions under these Regulations, do all or any of the following—

- (a) at any reasonable time—
 - (i) subject to paragraph (4), enter a premises that the officer reasonably believes to be occupied by a data controller or a data processor,
 - (ii) inspect the premises and any data located on the premises (other than data consisting of information specified in Regulation 18(7)), and
 - (iii) inspect, examine, operate and test any data equipment located on the premises,
- (b) require any relevant person (data controller or data processor, or an employee of either of them)—
 - (i) to disclose to the officer any such data and produce to the officer any data material (other than data material consisting of information specified in Regulation 18(7)) that is within the power or under the control of that person, and
 - (ii) to give to the officer such information as the officer reasonably requires in relation to the data or material,
- (c) either on the premises or elsewhere, inspect and copy or extract information from those data, or inspect and copy or take extracts from that material, or
- (d) require any relevant person to give to the officer such information as the officer reasonably requires in relation to—
 - (i) the procedures employed for complying with these Regulations and the Data Protection Acts,
 - (ii) the sources from which those data are obtained,
 - (iii) the purposes for which they are kept,
 - (iv) the persons to whom they are disclosed, and
 - (v) the data equipment kept on the premises.
- (3) A person commits an offence if the person—
 - (a) obstructs or impedes an authorised officer in the exercise of a power conferred by this Regulation,
 - (b) without reasonable excuse, does not comply with a requirement imposed by such an officer under this Regulation, or

(c) in purported compliance with such a requirement, gives information to such an officer that the person knows to be false or misleading in a material respect.

(4) An authorised officer shall not, other than with the consent of the occupier, enter a premises that is a private dwelling unless he or she has obtained a warrant from the District Court under paragraph (6) authorising such entry.

(5) An authorised officer appointed under these Regulations, when exercising any powers conferred on an authorised officer by these Regulations, may be accompanied by such other authorised officers or members of the Garda Síochána or both as he or she considers necessary.

(6) Without prejudice to the powers conferred on an authorised officer by or under any provision of this Regulation, if a judge of the District Court is satisfied on the sworn information of an authorised officer that there are reasonable grounds for suspecting that there is information required by an authorised officer under this Regulation held on or at any, or any part of any, premises, the judge may issue a warrant authorising an authorised officer (accompanied by such other authorised officers or members of the Garda Síochána or both as provided for in paragraph (5)) at any time or times within one month from the date of issue of the warrant, on production if so requested of the warrant, to enter the premises, using reasonable force where necessary, and exercise all or any of the powers conferred on an authorised officer under this Regulation.

Service of notices

20. Any notice authorised by these Regulations to be served on a person by the Commissioner may be served—

(a) if the person is a natural person—

(i) by delivering it to the person personally,

(ii) by sending it to the person by post addressed to the person at the person's usual or last-known place of residence or business,

(iii) by leaving it for the person at that place, or

(b) if the person is a body corporate or an unincorporated body of persons by sending it to the body by post to, or addressing it to and leaving it at—

(i) in the case of a company, its registered office, and

(ii) in any other case, the principal place of business of the body.

Appeals to Circuit Court

21. (1) An appeal may be made to and heard and determined by the Circuit Court against—

- (a) a requirement specified in an enforcement notice or an information notice, or
- (b) a decision of the Commissioner in relation to a complaint referred to in Regulation 17.

(2) Such an appeal may be brought only within 21 days from the service on the person concerned of the relevant notice or the receipt by that person of the notification of the relevant decision.

(3) The jurisdiction conferred on the Circuit Court by these Regulations is exercisable by the judge for the time being assigned to the circuit where the appellant ordinarily resides or carries on any profession, business or occupation or, at the option of the appellant, by a judge of that Court for the time being assigned to the Dublin Circuit.

(4) Subject to paragraph (5), a decision of the Circuit Court under this Regulation or Regulation 22 is final.

(5) An appeal may be brought to the High Court on a point of law against a decision of the Circuit Court in which case a reference in these Regulations to the determination of an appeal is to be read as including a reference to the determination of the appeal to the High Court and of any appeal from the decision of the High Court.

Circumstances in which a person need not comply with an enforcement or information notice

22. If—

- (a) a person appeals to the Circuit Court under Regulation 21,
- (b) the appeal is brought within the period specified in the relevant enforcement or information notice, and
- (c) the Commissioner has included in that notice a statement to the effect that, because of special circumstances, the Commissioner is of the opinion that the person should comply with the requirement specified in that notice urgently and that that notice should therefore have immediate effect,

the Circuit Court may, on application made to it for the purpose, make an order determining that non-compliance by the person with the requirement does not constitute an offence pending determination or withdrawal of the appeal or during such other period as may be specified in the order. An order may be made under this Regulation despite any other provision of these Regulations to the contrary.

Evidence in legal proceedings

23. (1) In any legal proceedings—

- (a) a certificate signed by the Minister for Justice and Equality or the Minister for Defence and stating that in the opinion of the Minister concerned personal data are, or at any time were, kept for the purpose of safeguarding the security of the State, or
- (b) a certificate signed by an authorised person and stating that, in the authorised person's opinion, a disclosure of personal data is required for that purpose,

is evidence of that opinion.

(2) A document purporting to be a certificate under paragraph (1)(a) or (b) and to be signed by a person specified in the relevant paragraph is taken to be such a certificate and to be so signed unless the contrary is proved.

(3) Information supplied by a person in compliance with a requirement under Regulation 18 or a direction of a court in proceedings under these Regulations is not admissible in evidence against the person or the person's spouse in proceedings for an offence under these Regulations.

(4) For the purpose of paragraph (1)(b), a person is an authorised person if the person is—

- (a) a member of the Garda Síochána not below the rank of chief superintendent, or
- (b) an officer of the Permanent Defence Forces who holds an army rank not below that of colonel and is designated by the Minister for Defence under section 8(a) of the Act of 1988.

Hearing of proceedings in private

24. The whole or any part of the proceedings under these Regulations may, if the court thinks appropriate, be heard otherwise than in public.

Offences by officers of bodies corporate

25. (1) If an offence under these Regulations—

- (a) has been committed by a body corporate, and
- (b) is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, an officer of the body corporate,

that officer commits a separate offence and is liable to be proceeded against and punished as if that person had committed the first mentioned offence.

(2) If the affairs of a body corporate are managed by its members, paragraph (1) applies to the acts and defaults of a member in connection with the member's functions of management as if the member were a director or manager of the body corporate.

(3) An officer of a body corporate may be proceeded against for an offence under paragraph (1) whether or not the body corporate has been proceeded against or been convicted of the offence committed by the body.

(4) In this Regulation, “officer”, in relation to a body corporate, means a director, manager, secretary or other similar officer of the body, or a person who is purporting to act in any such capacity.

Prosecution of offences

26. (1) The Commissioner may bring and prosecute proceedings for an offence under these Regulations that is to be tried summarily.

(2) Paragraph (1) does not limit any other power conferred by law to prosecute an offence under these Regulations.

(3) If of the opinion that the circumstances relating to a complaint investigated under Regulation 17 involves the commission of an offence under these Regulations, the Commissioner may bring and prosecute proceedings for the offence without attempting to bring about an amicable resolution of the complaint.

Penalties

27. (1) Except as provided by Regulations 4 and 13, a person who commits an offence under these Regulations is liable on summary conviction to a class A fine.

(2) If a person is convicted of an offence under these Regulations, the court may order any data material or data that appears to it to be connected with the commission of the offence to be forfeited or destroyed and any relevant data to be erased.

(3) The court may not make such an order in relation to data material or data if it considers that some person other than the person convicted of the offence concerned might be the owner of, or have a proprietary interest in, the data material or data unless all reasonably practicable steps have been taken—

(a) to notify the person who reasonably appears to be the owner of the data material or data of the proposed forfeiture, destruction or erasure, and

(b) to give that person an opportunity to show cause why the order should not be made.

Power to include requirements under these Regulations in codes of practice under the Act of 1988

28. The Commissioner’s functions under section 13 of the Act of 1988 extend to requirements imposed under these Regulations

Directions

29. The Regulator may, for the purpose of further specifying requirements to be complied with relating to an obligation imposed by or under these Regulations, issue directions to an undertaking to do or refrain from doing anything which the Regulator specifies in the direction.

Enforcement of Regulations by the Regulator

30. (1) Subject to the performance by the Commissioner of the functions under Regulation 17, it shall be a function of the Regulator to monitor compliance with Regulation 7, 8, 9, 10, 11, 12, 13, 14 or 15 and to issue such directions as may be necessary, from time to time, for their effective implementation. The Regulator, in consultation with the Commissioner, may also specify the form and any other requirements regarding the obtaining, recording and rescinding of consent of subscribers for the purpose of these Regulations.

(2) The functions of the Regulator under this Regulation shall be deemed to be included in the functions conferred on the Regulator under the Act of 2002.

(3) The Regulator may give directions to an undertaking to which Regulation 7, 8, 9, 10, 11, 12, 13, 14 or 15 applies requiring the undertaking to take specified measures or to refrain from taking specified measures for the purpose of complying with the provision.

(4) An undertaking to whom Regulation 7, 8, 9, 10, 11, 12, 13, 14 or 15 applies shall furnish the Regulator with such information as the Regulator may reasonably require for the purpose of its functions under these Regulations.

(5) Where the Regulator issues a direction under this Regulation, such direction shall be in writing, state the reasons on which it is based and be addressed to the undertaking concerned and, as soon as practicable, be sent or given in any of the following ways—

- (a) by delivering it to the undertaking,
- (b) by leaving it at the address at which the undertaking ordinarily carries on business,
- (c) by sending it by pre-paid registered post addressed to the undertaking at the address at which the undertaking ordinarily carries on business,
- (d) if an address for the service of directions has been furnished by the undertaking to the Regulator, by leaving it at, or sending it by pre-paid registered post to, that address, or
- (e) in any case where the Regulator considers that the immediate giving of the direction is required, by sending it, by means of a facsimile machine or by electronic mail, to a device or facility for the reception of facsimiles or electronic mail located at the address at which the undertaking ordinarily carries on business or, if an address for the service of notices has been furnished by the undertaking, that address, but only if—

- (i) the sender's facsimile machine generates a message confirming successful delivery of the total number of pages of the direction, or
- (ii) the recipient's facility for the reception of electronic mail generates a message confirming receipt of the electronic mail,

and it is also given in one of the other ways mentioned in subparagraphs (a) to (d).

(6) In paragraph (5) and Regulation 20, a company within the meaning of the Companies Acts is deemed to be ordinarily resident at its registered office and every other body corporate and every unincorporated body of persons shall be deemed to be ordinarily resident at its principal office or place of business.

Application to the High Court

31. (1) Where the Regulator finds that an undertaking has not complied with an obligation or requirement under these Regulations or a direction under Regulation 29, 30(1) or (3), the Regulator shall notify the undertaking of those findings and give the undertaking an opportunity to state its views or, if the non-compliance can be remedied, to remedy the non-compliance within a reasonable time limit as specified by the Regulator.

(2) The Regulator may publish, in such manner as it thinks fit, any notification given by it under this Regulation subject to the protection of the confidentiality of any information which the Regulator considers confidential.

(3) The Regulator may amend or revoke any notification under this Regulation.

(4) Where, at the end of the period specified by the Regulator under paragraph (1), the Regulator is of the opinion that the undertaking concerned has not complied with the obligation, requirement or direction, the Regulator may, whether or not the non-compliance is continuing, apply to the High Court for such order as the Regulator considers appropriate including—

- (a) a declaration of non-compliance,
- (b) an order directing compliance with the obligation, requirement or direction,
- (c) an order directing the remedy of any non-compliance with the obligation, requirement or direction, or
- (d) an order as provided for in paragraph (8).

(5) The High Court may, on the hearing of the application referred to in paragraph (4), make such order as it thinks fit which may include—

- (a) a declaration of non-compliance,

- (b) an order directing compliance with the obligation, requirement or direction,
- (c) an order directing the remedy of any non-compliance with the obligation, requirement or direction, or
- (d) an order as provided for in paragraph (8),

or refuse the application.

An order of the High Court compelling compliance may stipulate that the obligation, requirement or direction must be complied with immediately or may specify a reasonable time limit for compliance and may also stipulate appropriate and proportionate measures aimed at ensuring compliance.

(6) The High Court when dealing with an application under paragraph (4) may make such interim or interlocutory order as it considers appropriate.

(7) The High Court shall not deny any interim or interlocutory relief, referred to in paragraph (6), solely on the basis that the Regulator may not suffer any damage if such relief were not granted pending conclusion of the action.

- (8) (a) An application for an order under paragraph (4) may be for, or include an application for, an order to pay to the Regulator such amount, by way of financial penalty, which may include penalties having effect for periods of non-compliance with the obligation, requirement or direction, as the Regulator may propose as appropriate in the light of the non-compliance or any continuing non-compliance. Such an application for an order in respect of a financial penalty for a period of non-compliance may be made even if there since has been compliance with the obligation, requirement or direction.
- (b) In deciding on such an application, the High Court shall decide the amount, if any, of the financial penalty which should be payable and shall not be bound by the amount proposed by the Regulator.
- (c) Any financial penalty ordered by the High Court to be paid by an undertaking against whom an order may be sought shall be retained by the Regulator as income.
- (d) In deciding what amount, if any, should be payable, the High Court shall consider the circumstances of the non-compliance, including—
 - (i) its duration,
 - (ii) the effect on consumers, users and other operators,
 - (iii) the submissions of the Regulator on the appropriate amount, and
 - (iv) any excuse or explanation for the non-compliance.

Appeals

32. Part 2 of the Framework Regulations also applies to any user or any undertaking that is affected by a decision, designation, determination, specification, requirement, direction, notification and notice or any other act of an equivalent nature of the Regulator under these Regulations.

Co-operation between Commissioner and Regulator

33. The Commissioner and the Regulator shall, in the performance of their functions under these Regulations, cooperate with and provide assistance to each other.

Transitional arrangements

34. (1) A measure that was in force under the Regulations of 2003 immediately before the coming into operation of these Regulations shall continue in force as if it was made under these Regulations.

(2) For the purpose of this Regulation, “measure” means a decision, designation, determination, direction, notice, notification (other than a notification under Regulation 20(1) of the Regulations of 2003), requirement, specification or other act of an equivalent effect made by the Regulator.

(3) Notwithstanding the revocation of the Regulations of 2003, notifications by the Regulator on a person under Regulation 20(1) of those Regulations—

- (a) continue in force, and
- (b) may continue to be issued, revoked or amended,

as if the Regulations of 2003 had not been revoked.

Revocations

35. The following Regulations are revoked:

- (a) the Regulations of 2003; and
- (b) the European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) (Amendment) Regulations 2008 (S.I. No. 526 of 2008).



GIVEN under my Official Seal,
1 July 2011.

PAT RABBITTE,
Minister for Communications, Energy and Natural Resources.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

The purpose of these Regulations is to give effect to Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (ePrivacy Directive), and the amendments to that Directive as introduced by Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009.

As well as transposing the amendments made by Directive 2009/136/EC, these Regulations consolidate the provisions of the existing Statutory Instruments transposing the ePrivacy Directive, namely, the “European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003 (S.I. No. 535 of 2003)” and the “European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) (Amendment) Regulations 2008 (S.I. No. 526 of 2008)”, which have been revoked by these Regulations.

The aim of these Regulations is, inter alia, to provide for data protection and privacy connected with electronic communications networks and services and to enhance the security and reliability of such networks and services.

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