REGULATION OF INVESTIGATORY POWERS ACT 2000: PROPOSED AMENDMENTS AFFECTING LAWFUL INTERCEPTION – A CONSULTATION

A SUMMARY OF RESPONSES

Background

The original transposition of the E-Privacy Directive was completed in 2003. In April 2009 the European Commission issued a letter of formal notice (Article 226) setting out its view that the UK had not properly transposed Article 5(1) of the E-Privacy Directive and Articles 2(h), 24 and 28 of the Data Protection Directive. On 29 October 2009 the Commission issued a 'Reasoned Opinion', which forms the second stage of the infraction proceedings, detailing the alleged defects in transposition, and in September 2010 referred the UK to the European Court for failing to rectify those defects.

The consultation sought views on how best to remedy, through legislative changes, deficiencies in the original transposition, specifically that:

i) the existing offence of unlawful interception in RIPA only addresses intentional unlawful interception; and
ii) where both parties consent to an interception, making the interception lawful within the meaning of s.3(1) of RIPA, the meaning of "consent" does not reflect that set out in the Data Protection directive.

Five questions were posed in the consultation document:

1. ***Are you content with the way in which we propose to change section 3(1) of RIPA to make clear that interception will be lawful only where both parties to the communication give specific consent to the interception? What impact would this have on Communication Service Providers?***
2. ***Given that the Government accepts that it needs to make legislative changes to address the deficiencies identified by the Commission, do you agree with the recommended option?***
3. ***Are there any other options that the Government should consider or are there any changes that should be made to the recommended options?***
4. ***Do you think the First-tier Tribunal (General Regulatory Chamber) is the appropriate appellate body to determine the appeals? If not, where do you think the appeals should be directed and why?***
5. ***What, if any, additional costs would these proposed changes impose on Communication Service Providers or others?***

Summary of Responses

39 formal responses to the consultation were received.

Broad themes from the submissions received can be briefly summarised as follows.

There was strong support among submissions for an unambiguous 'opt-in' consent. Many argued that including relevant information within general terms and conditions or privacy policies does not allow for a sufficient expression of consent. Respondees

also proposed that consent should not be a pre-condition of service, that it be time limited and revocable without penalty.

The £10,000 penalty fine was considered by many to be inadequate. Suggestions for an alternative approach included using a percentage of a company's annual profit; increasing the penalty with each offence or varying the fine according to the severity of the breach, its impact and the offender's ability to pay.

There was some support for a criminal, rather than civil, sanction. Some considered this important if the CSP was refusing to disclose information or has disclosed false information.

Several submissions suggested that regulatory responsibility would more appropriately sit with the Information Commissioner (ICO) than the Interception of Communications Commissioner (IoCC). Some pointed to the ICO as having more experience around user consent and IP issues. Others pointed out that any incidences of unlawful interception would be likely to also necessitate ICO investigation on data protection issues.

There was broad support that the sanction should not be restricted to CSPs - it should also be applicable to all providers of private telecommunication services and information society services amongst others.

Home Office Response

The Home Office has carefully considered the consultation responses and has made some adjustments to its approach.

RIPA provides the statutory framework which governs the interception of communications. There are a number of circumstances in which lawful interception may take place and these fall into two categories: warranted interception, which can only take place with the authority of the Secretary of State, and interception that may be lawful without a warrant. The changes to 'consent' touch on interception that may be lawful without warrant. Communication service providers may lawfully intercept in accordance with section 3(3) of RIPA, for example to manage their networks, and under section 4(2) of RIPA and the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000. Where businesses choose to carry out interception to provide value added services, which are at the discretion of service providers, section 3(1) of RIPA requires the consent of both the sender and the intended recipient of the intercepted communication.

Under Article 15a of the E-Privacy Directive penalties for breaches in this area should be 'effective, proportionate and dissuasive'. The maximum penalty set out in the legislation that the government is bringing forward is now £50,000. This balances the need for dissuasiveness with the existing criminal penalty under section 1 of the 2000 Act which attracts, on summary conviction, a fine not exceeding the statutory maximum (currently £5,000). The new sanction applies to acts of unlawful interception that fall short of those requiring the requisite intent under section 1 and effectively captures unintentional acts.

The statutory amendments will be supplemented by guidance provided by the Office of the Interception of Communications Commissioner. The guidance will cover, amongst other things, the circumstances in which the Commissioner considers it appropriate to issue a monetary penalty notice, how the Commissioner will determine the amount of the penalty, when it would be appropriate to impose an enforcement obligation, and the mechanisms for the handling of complaints about unlawful interception under these Regulations.

The Interception of Communications Commissioner, whose existing statutory duty is to provide independent oversight of the exercise and performance of the powers and duties conferred or imposed by Part 1, Chapter 1 of the 2000 Act concerning the interception of communications, will bring expertise to the administration of the new penalty. The Commissioner will also be able to request the advice of OFCOM on technical matters relating to electronic communications. The regulations provide for a comprehensive appeals regime for penalty, information and enforcement notices.

The scope of the sanction will not be limited to CSPs. Any person undertaking unintentional unlawful interception will now be within the scope of the offence.

The Order, Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011, has been laid and is subject to affirmative resolution in Parliament.