

**SECOND SUPPLEMENT TO THE GIBRALTAR  
GAZETTE**  
No. 3851 of 26 May, 2011

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LEGAL NOTICE NO. 71 OF 2011.

**COMMUNICATIONS ACT 2006**

**COMMUNICATIONS (PERSONAL DATA AND PRIVACY)  
(AMENDMENT) REGULATIONS 2011**

In exercise of the powers conferred on me by section 9 of the Communications Act 2006, and all other enabling powers, and in order to transpose into the law of Gibraltar Article 2 of Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending 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, I have made the following Regulations—

**Title and commencement.**

1. These Regulations may be cited as the Communications (Personal Data and Privacy) (Amendment) Regulations 2011 and come into operation on the day of publication.

**Amendments to the Communications (Personal Data and Privacy) Regulations 2006.**

2. The Communications (Personal Data and Privacy) Regulations 2006 (the Principal Regulations) are amended in accordance with regulations 3 to 16.

**Amendments to regulation 2.**

3. Regulation 2 of the Principal Regulations is amended—

- (a) by deleting the definition of “call”;
- (b) by deleting the definition of “competent authority”;
- (c) by substituting the following definition for the definition of “the Directive”—

““the Directive” means 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 (the Privacy Directive), as the same may be amended from time to time;”

- (d) by substituting the following definition for the definition of “location data”–

““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;” and

- (e) by inserting the following definition after the definition of “location data”–

““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;”.

**Amendment to regulation 4.**

4. Regulation 4 of the Principal Regulations is amended–

- (a) by substituting the following heading for the heading–

**“Security of Processing”; and**

- (a) by inserting the following sub-regulations after sub-regulation (1)–

“(1A) Without prejudice to the Data Protection Act 2004, the measures referred to in sub-regulation (1) shall–

- (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, 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.
- (1B) The Data Protection Commissioner may audit the measures taken by service providers and issue recommendations about best practices concerning the level of security which such measures should achieve.”.

**Insertion of regulation 4A.**

5. The Principal Regulations are amended by inserting the following regulation after regulation 4—

**“Personal data breach.**

- 4A.(1) A service provider shall, as soon as reasonably practicable and with undue delay, notify the Data Protection Commissioner of any personal data breach.
- (2) When the personal data breach is likely to adversely affect the personal data or privacy of a subscriber or individual, the service provider shall also notify the subscriber or individual of the breach as soon as reasonably practicable and without undue delay.
  - (3) Notification of a personal data breach to a subscriber or individual concerned shall not be required if the provider has demonstrated to the satisfaction of the Data Protection Commissioner that it has implemented appropriate technological protection measures, and that those measures were applied to the data concerned by the security breach.

- (4) The technological protection measures referred to in sub-regulation (3) shall be such as to render the data unintelligible to any person who is not authorised to access it.
- (5) Without prejudice to the provider's obligation to notify subscribers and individuals concerned pursuant to sub-regulation (2), if the provider has not already notified the subscriber or individual of the personal data breach, the Data Protection Commissioner, having considered the likely adverse effects of the breach, may require it to do so.
- (6) The notification to the subscriber or individual shall, as a minimum, contain the following information—
  - (a) a description of the nature of the personal data breach;
  - (b) the contact points where more information can be obtained; and
  - (c) a recommendation of the measures that can be taken to mitigate the possible adverse effects of the personal data breach.
- (7) The notification to the Data Protection Commissioner shall, in addition to the information set out in sub-regulation (6), also contain a description of the consequences of, and the measures proposed or taken by the provider to address, the personal data breach.
- (8) Subject to any technical implementing measures adopted by the European Commission pursuant to Article 4 (5) of the Privacy Directive, the Data Protection Commissioner may adopt guidelines and, where necessary, issue instructions concerning the circumstances in which providers are required to notify personal data breaches, the format of such notifications and the manner in which the notification is to be made.
- (9) The Data Protection Commissioner may audit whether providers have complied with their notification obligations under this regulation.

- (10) A service provider who fails to comply with the requirements of this regulation commits an offence.
- (11) Service providers shall maintain an inventory of personal data breaches comprising–
  - (a) the facts surrounding the breach;
  - (b) the effects of the breach; and
  - (c) the remedial action taken,

which shall be sufficient to enable the Data Protection Commissioner to verify compliance with the provisions of this regulation.

- (12) The inventory referred to in sub-regulation (11) shall only include the information necessary for the purposes of that sub-regulation.”.

**Substitution of regulation 5.**

6. The Principal Regulations are amended by substituting the following regulation for regulation 5–

**“Confidentiality of communications.**

- 5.(1) Subject to sub-regulation (4), a person shall not store information, or gain access to information stored, in the terminal equipment of a subscriber or user unless the requirement of sub-regulation (2) is met.
- (2) The requirement is that the subscriber or user of that terminal equipment has given his consent, having been provided with clear and comprehensive information, in accordance with the provisions of the Data Protection Act 2004, about the purposes of the storage of, or access to, that information.
- (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 requirement of sub-regulation (2) is met in respect of the initial use.

- (4) Sub-regulation (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 to provide the service.”.

**Amendment to regulation 6.**

7. Regulation 6 of the Principal Regulations is amended by substituting the following sub-regulation for sub-regulation (3)—

- “(3) Traffic data relating to a subscriber or user may be processed and stored by a service provider if—
- (a) such processing and storage are for the purpose of marketing electronic communications services, or for the provision of value added services to that subscriber or user; and
  - (b) the subscriber or user to whom the traffic data relate has given his prior consent to such processing or storage; and
  - (c) such processing and storage are undertaken only for the duration necessary for the purposes specified in paragraph (a).”.

**Amendment to regulation 8.**

8. Regulation 8 of the Principal Regulations is amended by substituting the following sub-regulation for sub-regulation (1)—

“(1) Subject to the following provisions of this regulation, a person who intentionally intercepts a communication or the related data in the course of its transmission by means of a publicly available electronic communications service shall be guilty of an offence.”.

**Substitution of regulations 11, 12, 13 and 14.**

9. The Principal Regulations are amended by substituting the following regulations for regulation 11, 12, 13 and 14—

**“Prevention of calling line identification - outgoing calls.**

11.(1) This regulation applies, subject to regulations 16 and 17, to outgoing calls where a facility enabling the presentation of calling line identification is available.

- (2) The service provider shall provide users originating a call by means of that service with a simple means to prevent presentation of the identity of the calling line on the connected line as respects that call.
- (3) The service provider shall provide subscribers to the service, as respects their line and all calls originating from that line, with a simple means of preventing presentation of the identity of that subscriber's line on any connected line.
- (4) The measures to be provided under sub-regulations (2) and (3) shall be provided free of charge.

**Prevention of calling or connected line identification - incoming calls.**

12.(1) This regulation applies to incoming calls.

(2) Where a facility enabling the presentation of calling line identification is available, the service provider shall provide the called subscriber with a simple means to prevent, free of charge for reasonable use of the facility, presentation of the identity of the calling line on the connected line.

(3) Where a facility enabling the presentation of calling line identification prior to the call being established is available, the service provider shall provide the called subscriber with a simple means of rejecting incoming calls

where the presentation of the calling line identification has been prevented by the calling user or subscriber.

(4) Where a facility enabling the presentation of connected line identification is available, the service provider shall provide the called subscriber with a simple means to prevent, without charge, presentation of the identity of the connected line on any calling line.

(5) In this regulation “called subscriber” means the subscriber receiving a call by means of the service in question whose line is the called line (whether or not it is also the connected line).

**Publication of information for the purposes of regulations 11 and 12.**

13. Where a service provider provides facilities for calling or connected line identification, he shall provide information to the public regarding the availability of such facilities, including information regarding the options to be made available for the purposes of regulations 11 and 12.

**Co-operation of communications providers for the purposes of regulations 11 and 12.**

14. For the purposes of regulations 11 and 12, a communications provider shall comply with any reasonable requests made by the service provider by means of which facilities for calling or connected line identification are provided.”.

**Substitution of regulations 20, 21, 22, 23 and 24.**

10. The Principal Regulations are amended by substituting the following regulations for regulation 20, 21, 22, 23 and 24—

**“Use of automated calling and communication systems.**

20.(1) A person shall neither transmit, nor instigate the transmission of, communications comprising recorded matter for direct marketing purposes by means of an automated calling and communication system except in the circumstances referred to in sub-regulation (2).

(2) Those circumstances are where the called line is that of a subscriber or user who has previously notified the caller that

for the time being he consents to such communications being sent by, or at the instigation of, the caller on that line.

- (3) A subscriber or user shall not permit his line to be used in contravention of sub-regulation (1).
- (4) For the purposes of this regulation, an automated calling and communication system is a system which is capable of—
  - (a) automatically initiating a sequence of calls to more than one destination in accordance with instructions stored in that system; and
  - (b) transmitting sounds which are not live speech for reception by persons at some or all of the destinations so called.

**Use of facsimile machines for direct marketing purposes.**

21.(1) A person shall neither transmit, nor instigate the transmission of, unsolicited communications for direct marketing purposes by means of a facsimile machine where the called line is that of—

- (a) an individual subscriber or user, except in the circumstances referred to in sub-regulation (2);
- (b) a corporate subscriber or user who has previously notified the caller that such communications should not be sent on that line; or
- (c) a subscriber or user and the number allocated to that line is listed in the register kept under regulation 26.

(2) The circumstances referred to in sub-regulation (1)(a) are that the individual subscriber or user has previously notified the caller that he consents for the time being to such communications being sent by, or at the instigation of, the caller.

(3) A subscriber or user shall not permit his line to be used in contravention of sub-regulation (1).

(4) A person shall not be held to have contravened sub-regulation (1)(c) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the communication is made.

(5) Where a subscriber or user who has caused a number allocated to a line of his to be listed in the register kept under regulation 26 has notified a caller that he does not, for the time being, object to such communications being sent on that line by that caller, such communications may be sent by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.

(6) Where a subscriber or user has given a caller notification pursuant to sub-regulation (5) in relation to a line of his—

- (a) the subscriber or user shall be free to withdraw that notification at any time; and
- (b) where such notification is withdrawn, the caller shall not send such communications on that line.

(7) The provisions of this regulation are without prejudice to the provisions of regulation 20.

**Unsolicited calls for direct marketing purposes.**

22.(1) A person shall neither use, nor instigate the use of, a publicly available electronic communications service for the purposes of making unsolicited calls for direct marketing purposes where—

- (a) the called line is that of a subscriber or user who has previously notified the caller that such calls should not for the time being be made on that line; or
- (b) the number allocated to a subscriber or user in respect of the called line is one listed in the register kept under regulation 27.

(2) A subscriber or user shall not permit his line to be used in contravention of sub-regulation (1).

(3) A person shall not be held to have contravened sub-regulation (1)(b) where the number allocated to the called line has been listed on the register for less than 28 days preceding that on which the call is made.

(4) Where a subscriber or user who has caused a number allocated to a line of his to be listed in the register kept under regulation 27 has notified a caller that he does not, for the time being, object to such calls being made on that line by that caller, such calls may be made by that caller on that line, notwithstanding that the number allocated to that line is listed in the said register.

(5) Where a subscriber or user has given a caller notification pursuant to sub-regulation (4) in relation to a line of his—

- (a) the subscriber or user shall be free to withdraw that notification at any time and free of charge; and
- (b) where such notification is withdrawn, the caller shall not make such calls on that line.

**Use of electronic mail for direct marketing purposes.**

23.(1) This regulation applies to the transmission of unsolicited communications by means of electronic mail to individual subscribers or users.

(2) Except in the circumstances referred to in sub-regulation (3), a person shall neither transmit, nor instigate the transmission of, unsolicited communications for the purposes of direct marketing by means of electronic mail unless the recipient of the electronic mail has previously notified the sender that he consents for the time being to such communications being sent by, or at the instigation of, the sender.

(3) A person may send or instigate the sending of electronic mail for the purposes of direct marketing where—

- (a) that person has obtained the contact details of the recipient of that electronic mail in the course of the sale or negotiations for the sale of a product or service to that recipient;
- (b) the direct marketing is in respect of that person's similar products and services only; and
- (c) the recipient has been given a simple means of refusing (free of charge except for the costs of the transmission of the refusal)

the use of his contact details for the purposes of such direct marketing, at the time that the details were initially collected, and, where he did not initially refuse the use of the details, at the time of each subsequent communication.

(4) A subscriber or user shall not permit his line to be used in contravention of sub-regulation (2).

**Use of electronic mail for direct marketing purposes where the identity or address of the sender is concealed.**

24.A person shall neither transmit, nor instigate the transmission of, a communication for the purposes of direct marketing by means of electronic mail—

- (a) where the identity of the person on whose behalf the communication has been sent has been disguised or concealed, in contravention of the Electronic Commerce Act 2001;
- (b) where a valid address to which the recipient of the communication may send a request that such communications cease has not been provided; or
- (c) where a recipient is encouraged to visit a website that contravenes the Electronic Commerce Act 2001.”.

**Insertion of regulation 25A.**

11. The Principal Regulations are amended by inserting the following regulation after regulation 25—

**“Redress for infringements.**

- 25A.(1) Any person adversely affected by infringements of the provisions of regulations 20 to 25, and having a legitimate interest in the cessation or prohibition of such infringements, may bring legal proceedings before the Supreme Court in respect of such infringements.
- (2) A service provider may bring legal proceedings in respect of such infringements in order to protect its legitimate business interests.

- (3) A service provider who by its negligence contributes to infringements of the provisions of regulations 20 to 25 commits an offence.”.

**Amendments to regulation 26.**

12. Regulation 26 of the Principal Regulations is amended by substituting the following sub-regulations for sub-regulations (1), (2) and (3)–

- “(1) For the purposes of regulation 21, the competent authority shall maintain and keep up-to-date, in printed or electronic form, a register of the numbers allocated to subscribers or users, in respect of particular lines, who have notified it (notwithstanding, in the case of individual subscribers or users, that they enjoy the benefit of regulation 21(1)(a) and (2)) that they do not for the time being wish to receive unsolicited communications for direct marketing purposes by means of facsimile machine on the lines in question.
- (2) The competent authority shall remove a number from the register maintained under sub-regulation (1) where it has reason to believe that the number has ceased to be allocated to the subscriber or user by whom it was notified pursuant to sub-regulation (1).
- (3) On the request of–
- (a) a person wishing to send, or instigate the sending of, such communications as are mentioned in sub-regulation (1); or
- (b) a subscriber or user wishing to permit the use of his line for the sending of such communications,

for information derived from the register kept under sub-regulation (1), the competent authority shall, unless it is not reasonably practicable so to do, on the payment to it of such fee as is, subject to sub-regulation (4), required by it, make the information requested available to that person, subscriber or user.”.

**Amendment to regulation 28.**

13. Regulation 28 of the Principal Regulations is amended by substituting the words “service provider” for the words “ provider of a publicly available electronic communications services”.

**Insertion of regulation 29A.**

14. The Principal Regulations are amended by inserting the following regulation after regulation 29–

**“Responding to requests for access to personal data**

29A. Communications providers shall establish procedures for responding to requests for access to users’ personal data in accordance with the provisions of the Data Protection Act 2004 and shall provide the Data Protection Commissioner, on request, with information of such procedures, the number of requests received, the legal justification invoked and his response.”.

**Insertion of regulation 31A.**

15. The Principal Regulations are amended by inserting the following regulation after regulation 30–

**“Penalties.**

31A.(1) A person guilty of an offence under these Regulations is liable–

- (a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding level 5 on the standard scale, or to both, or
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years, or to a fine, or to both.

(2) A person shall also be guilty of an offence under these Regulations, and subject to the penalties set out in sub-

regulation (1), where the conduct leading to the offence has subsequently been rectified.”.

**Substitution of regulation 32.**

16. The Principal Regulations are amended by substituting the following regulation for regulation 32–

**“Request that the Data Protection Commissioner exercises his enforcement functions.**

32. Where it is alleged that there has been a contravention of any of the requirements of these Regulations, a person aggrieved by the alleged contravention may request the Data Protection Commissioner to exercise his enforcement functions in respect of that contravention, but those functions shall be exercisable by the Commissioner whether or not it has been so requested.”.

Dated 26th May, 2011.

F J VINET,  
Minister with responsibility for communications.

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**EXPLANATORY MEMORANDUM**

These Regulations transpose into the law of Gibraltar Article 2 of Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending 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.

