

EXPLANATORY MEMORANDUM TO
THE REGULATION OF INVESTIGATORY POWERS
(MONETARY PENALTY NOTICES AND CONSENTS FOR INTERCEPTIONS)
REGULATIONS 2011

2011 No. 1340

1. This explanatory memorandum has been prepared by the Home Department and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 These Regulations bring into force revisions to Part I, Chapter I of the Regulation of Investigatory Powers Act 2000 (“RIPA”).

First, the Interception of Communications Commissioner (“the Commissioner”) is given a new power to impose a penalty for unlawful interception. This penalty may be imposed where the Commissioner considers that a person has unlawfully intercepted a communication in the course of its transmission by means of a public telecommunications system. The penalty may not be imposed where the Commissioner considers that the person is instead guilty of an offence of intentional interception under section 1(1) RIPA, or where the interception could be explained by an attempt to act in accordance with an interception warrant.

Secondly, references to “reasonable belief” in section 3(1) RIPA are deleted. Section 3(1) RIPA authorised interception of a communication where one consenting party had “reasonable grounds for believing” that the other party consented to the interception. Interception will now be lawful for the purposes of section 3(1) if both parties consent to the interception.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 None

4. **Legislative Context**

- 4.1 The E-Privacy Directive (2002/58) was introduced as part of the Regulatory Framework for Electronic Communications to ensure proper protection for individuals and businesses in the arena of electronic communications, networks and services. The main vehicle for transposing the E-Privacy Directive into UK law was the Privacy and Electronic Communications (EC Directive) Regulations 2003, although some of the measures contained within the Directive were already provided for in

existing UK legislation. An example of this is the offence of unlawful interception contained in s1(1) of the Regulation of Investigatory Powers Act 2000 (RIPA).

- 4.2 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.
- 4.3 The Commission identified three areas of defective transposition:
- (1) By limiting the offence in section 1(1) RIPA to intentional interception, the UK had failed to create a sanction for all unlawful interception as required by Article 5(1) of the E-privacy Directive and Article 24 of the Data Protection Directive.
 - (2) The UK had failed to create an independent authority responsible for the supervision of all interception activities as required by Article 28 of the Data Protection Directive.
 - (3) The UK had wrongly made it lawful to intercept a communication where the interceptor has a "reasonable belief" in the other party's consent to the interception. Pursuant to Article 5(1) of the E-privacy Directive and 2(h) of the Data Protection Directive, consent to interception should be freely given, specific and informed.
- 4.4 The Government has conceded the defective transposition identified in points (1) and (3) above. These Regulations address the deficiencies by: (a) introducing into RIPA a sanction for "unintentional" unlawful interception to sit alongside the existing offence of intentional unlawful interception in section 1(1) of RIPA; and (b) amending section 3(1) of RIPA by excising the existing qualification that interception of a communication may be authorised where there are, "reasonable grounds for believing" that a person has consented to the interception. The Government has not conceded the alleged defective transposition identified at point (2) above.
- 4.5 The amendments to RIPA effected by these Regulations are made under section 2(2) of the European Communities Act 1972 ("ECA"). The Secretary of State is designated for the purposes of section 2(2) ECA in respect of matters relating to electronic communications and postal services.
- 4.6 These Regulations are subject to the affirmative resolution procedure. They will come into force on 21 days after the day on which they are made.

A summary of the provisions in the Regulations

- 4.7 Section 1(1) of RIPA makes it a criminal offence for a person intentionally and without lawful authority to intercept, at any place within the United Kingdom, any communication in the course of its transmission by means of a public postal service or telecommunications system. Regulation 2 gives the Commissioner the power to serve a

monetary penalty notice when he considers that a person has intercepted a communication in the course of its transmission by means of a public telecommunication service without lawful authority, but where the Commissioner does not consider that that person has committed an offence of unlawful interception under section 1(1) RIPA. The Commissioner may not serve a monetary penalty notice if he considers that, at the time of the interception, the person was making an attempt to act in accordance with an interception warrant which, in the opinion of the Commissioner, would explain the interception concerned.

4.8 Sections 3 and 4 of RIPA authorise certain kinds of interception which can be conducted without an interception warrant. Section 3(1) of the Act authorises interception of a communication where there are reasonable grounds for believing that both the sender and the recipient of the communication have consented to its interception. Regulation 3 amends section 3(1) RIPA to delete the reference to “reasonable grounds for believing” that consent was given. The effect is that interception will now be authorised under that section only where both parties have consented to the interception.

4.9 Part 1 of Schedule 1 sets out detailed provisions relating to monetary penalty notices.

(a) Paragraph 1 of Part 1 details the information that the penalty notice must contain, the time within which payment may be required and the maximum level of fine that can be imposed (£50,000).

(b) Paragraph 2 sets out the Commissioner’s power to include an enforcement obligation in the monetary penalty notice. This obligation may require a person to stop the conduct concerned on the date specified in the notice.

(c) Paragraph 3 requires the Commissioner to serve a notice of intent before serving a penalty notice, and obliges him to consider representations made in response to that notice (and, in certain cases, to conduct an oral hearing to consider those representations).

(d) Paragraph 4 provides the power for the Interception of Communications Commissioner to vary or cancel a penalty notice and to repay any penalty where appropriate.

(e) Paragraph 5 provides rights of appeal to the First Tier Tribunal, and explains the effect of the appeal on the obligations imposed in the monetary penalty notice.

(f) Paragraph 6 provides a mechanism for the recovery of penalties in the civil courts and a means by which the Commissioner can enforce any enforcement obligation through civil proceedings.

(g) Paragraph 7 requires the Commissioner to issue guidance on how he will exercise his functions in relation to the penalty notice, and sets out what the guidance must deal with.

- 4.10 Part 2 of Schedule 1 sets out the Commissioner’s powers in relation to information notices, and describes the content of such notices. An information notice may request a person to provide information in order to enable the Commissioner to decide whether to serve a penalty notice on that person. Paragraph 10 establishes a right of appeal against an information notice to the First Tier Tribunal. Where a person fails to comply with an information notice, paragraph 11 gives the power to the Commissioner to enforce the notice by imposing a monetary penalty which cannot exceed £10,000. Paragraph 12 imposes a duty on OFCOM to comply with any reasonable request from the Commissioner for advice on technical matters which relate to his new functions in respect to monetary penalty notices and information notices.

5. Territorial Extent and Application

- 5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

- 6.1 Baroness Neville-Jones, Minister of State for the Home Department has made the following statement regarding Human Rights:

“In my view the provisions of the Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011 are compatible with the Convention rights.”

7. Policy background

- 7.1 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.
- 7.2 The changes in these Regulations mean that “reasonable grounds for believing” that the parties to the communication have consented to the interception will no longer be sufficient. The European Commission identified the existing qualification in section 3(1) of RIPA in respect of “reasonable grounds for believing” as a defect in the UK’s transposition of the E-Privacy and Data Protection Directives.
- 7.3 Although there is an existing offence of unlawful interception under section 1(1) of RIPA, the European Commission has reasoned that to properly transpose the E-Privacy Directive there needs to be a sanction to cover all forms of unlawful interception (whether intentional or otherwise). These Regulations create a new

sanction for conduct which may amount to unlawful interception but which would not constitute an offence under section 1(1) RIPA.

- 7.4 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. In circumstances where more detailed technical knowledge is required to determine whether interception has taken place he can call upon the advice of OFCOM. The regulations provide for a comprehensive appeals regime for penalty, information and enforcement notices.
- 7.5 Under Article 15a of the E-Privacy Directive penalties for breaches in this area should be 'effective, proportionate and dissuasive'. The maximum penalty is £50,000, which 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.

8. Consultation outcome

- 8.1 As these Regulations are made under section 2(2) ECA, there is no statutory requirement to consult in respect of them. However, a targeted, informal consultation was held between 8th November and 17th December 2010. The consultation document was published so that any interested person could respond. The two main themes emerging from the responses were the size of the penalty and the scope of sanction. The majority of respondents considered the maximum penalty (£10,000) proposed in the consultation paper was an inadequate deterrent and that the scope of the sanction ought not to be limited to communication service providers. These two themes have been addressed in these Regulations by an increase in the maximum penalty of £50,000 and by not limiting the scope of the application of the sanction.

9. Guidance

- 9.1 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.

10. Impact

- 10.1 The extent to which businesses will be affected by the changes in these Regulations, in respect of 'consent,' depends upon the commercial decisions that such businesses make and how they meet the existing statutory requirement in section 3(1) of RIPA to conduct interception only with the consent of both parties to the communication. The ability of communication service providers to undertake interception in accordance

with section 3(3) of RIPA, for purposes connected with the provision or operation a telecommunications service, is not affected by these Regulations. In response to the consultation some communication service providers indicated that they may be required to do more to obtain consent under the amended section 3(1) if they chose to conduct interception to provide value added services. However, no impact was quantified and businesses are under no obligation to carry out value added services that may be affected by the changes made by these Regulations. The impact on charities and voluntary bodies is assessed as being de minimis. There is minimal impact on the public sector in respect of the administration, which will be undertaken by the Office of the Interception of Communications Commissioner, of the new monetary penalty notice scheme.

- 10.2 An Impact Assessment has not been prepared for this instrument because it amends existing legislation to achieve an original policy intention to transpose EU Directives; and the Regulations introduce a sanction for unlawful activity.

11. Regulating small business

- 11.1 The impact on small businesses is assessed as nil.

12. Monitoring & review

- 12.1 The Government will keep under review the operation of this legislation, including by:

monitoring the number of penalty notices issued by the Interception of Communications Commissioner and the nature of the breaches giving rise to penalty notices, together with the number of appeals and their outcome.

13. Contact

- 13.1 Jill Tan of the Pursue Policy and Strategy Unit at the Home Office, 2 Marsham Street, London SW1P 4DF (telephone 020 7035 1210; e-mail jill.tan@homeoffice.x.gsi.gov.uk) can answer any queries regarding the instrument.