EU delivers blow to marketing industry

By Alan Pedersen

IN A DRAMATIC TURNAROUND the European Parliament has stunned industry observers by making a last minute compromise with the Council of Ministers over key e-marketing issues. It means that the draft directive on the protection of privacy in e-communications will signal major changes to the European marketing industry.

Despite fierce lobbying from pro-industry groups, the European Parliament and Council has failed to serve up a more palatable approach on new media marketing. Following the Parliament's vote on May 30th, the decision taken on cookies and spam may be a meal that businesses will find difficult to digest.

UNSOLICITED MARKETING

Only weeks before the vote it looked as if the decision on unsolicited e-mail marketing would be left up to member states. This so-called "national choice" (Article 13.3) amendment to the European Commission's original proposal meant an e-mail opt-out was still on the cards. Harmonised prior consent would apply only to fax, SMS (texting) and location-based marketing. But, in what must come as a bitter blow to e-mail marketers, the Parliament reversed its decision, bringing it into line with the Council's Common Position published in January.

It is believed that MEPs struck a deal behind closed doors, whereby some member states (including the UK) would drop their opposition to the opt-in requirement in return for a more favourable compromise on the data retention issue. Since the September 11th attacks, some governments have been trying to force the issue on data retention which would give police authorities greater powers to gain access to Internet data traffic.

The decision by Parliament is a "small disaster for industry" says Axel Tandberg, Director of Government Affairs at the Federation of Direct Marketing (FEDMA). He questions where it will end, suggesting that legislators could eventually turn their attention to other marketing practices by introducing prior consent for postal mail.

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> David Coleman – UNICE

SMEs will be hit the hardest says Tandberg. Whilst larger organisations have sophisticated websites to capture marketing data and brand strength and awareness to pull potential customers in, smaller companies do not have that luxury. So-called "push" advertising has traditionally been a more viable alternative, but Tandberg now believes that SMEs will be faced with increased advertising and marketing costs. Whilst sending e-mail is a relatively cheap process, smaller companies often have to buy in marketing lists. The move away from opt-out means that there will be fewer lists available, but with the demand still there, Tandberg says the prices will go up. He suggests that some companies may be forced into finding alternative ways to market their products.

The Parliament's decision means that legitimate marketers will end up "paying the price of irresponsible marketers who have been misusing e-mail," says Tandberg, who calls into question the effect it will have on suspect marketers who "don't give a damn about the law anyway."

His views are reiterated by David Coleman, an advisor on information society issues at UNICE (Union of Industrial and Employers' Confederations of Europe). "Spam will not diminish because of this pan-European ban on unsolicited communications," he says. He believes the EU has made a critical mistake in directly associating spam with unsolicited marketing. "We do not want to infringe on privacy," says Coleman, "but we do not want the wrong rules, providing the wrong solutions, which would penalise legitimate business."

George Mills, of the anti-spam lobby EuroCAUSE, is "ecstatic" over the result. He suggests that the impact on legitimate businesses will be

minimal as "real marketers don't spam...It will punish the miscreants," he says, "and leave the honest folks alone." Mills feels that some pro-industry lobbies are making a fuss over nothing, suggesting that most big companies already have procedures in place to deal with opt-in marketing. "The lobbying organisations," he says, "were rather behind what their actual members were doing."

The one ray of light for marketers is the inclusion of a Council amendment that will let companies send unsolicited communications to existing customers. This so-called "soft opt-in" contained in Recital 41 states that "within the context of an existing customer relationship, it is reasonable to allow the use of electronic contact details for the offering of products or services, but only by the same company that has obtained the contact details directly from the customer."

THE GREAT COOKIE DEBATE

There is at least some relief for the Internet advertising industry and e-commerce in general, after a favourable decision was reached on the cookie front. Both the Council and Parliament have now recognised that cookies can be "a legitimate and useful tool" (Recital 25). It means that website operators will be permitted to use cookies, provided that they give "clear and precise information" about the purposes of their use and the methods or tools that consumers can use to disable them. The decision has been described by the European branch of the Interactive Advertising Bureau (IAB) as a "victory for common sense."

The road to agreement on this hotly contested subject has been a long and troublesome process. The original proposal from the European Commission had no reference to tracking technologies. It was Parliament, in fact, which drafted in an amendment (Article 5.3) stating that their use would be permitted only if "explicit" consent were obtained from users. The Council's Common Position in January, took a supposedly softer stance. It added two new Recitals (24 & 25) that differentiated cookies from other "spyware" technologies and permitted their use on condition that "clear and precise prior notice" was given and that users were provided with the "opportunity to refuse to have a cookie or similar device stored on their terminal equipment" (Recital 25).

But whilst the phrase "prior notice" may appear perfectly innocuous, the devil, unfortunately, is in the detail. From a technical standpoint, prior notice would have been "practically impossible," says Amanda Chandler, European Privacy Director at DoubleClick. There were suggestions that website operators could provide advance notice through pop-up boxes on web pages. However, because cookies are downloaded as soon as a web page is accessed, Chandler suggests it is arguable whether this would strictly be prior notice. She suggests that most companies would have had to redirect their customers to a "cookie-free landing page" containing the relevant information and a right to opt-out.

From a consumer angle, there are doubts as to whether this approach would be in their best interests. Pro-industry campaigners have long argued that cookie blocking technologies such as P3P (Platform for Privacy Preferences) are a far more pragmatic and user-friendly solution than so-called "opt-out" cookies that could be supplied by website operators. It lends some justification to claims that those involved in the legislative process have not been technically minded enough to deal adequately with e-marketing issues.

The decision on cookies is seen as a vindication for pro-marketing groups who have always maintained their willingness to be up front about their use. "We've worked really hard to win people over and get them to understand the nature of cookies, how they work and why they're important," says Angela Mills-Wade, Public Affairs Director of IAB Europe.

THE NEXT STEPS

As part of the next stage in the legislative process, the draft directive will be passed back to the Council of Ministers for approval. They are due to discuss the matter on June 18th. Should they reject the text, the draft will go into a conciliatory process that could take up a further three months. However, industry groups have more or less conceded defeat and expect the draft, albeit with one or two minor changes, to be adopted in its current form. There is also unlikely to be little scope for further lobbying on a national level. "I don't think there is much leeway left," says FEDMA's Tandberg.

What action businesses will need to take, is not yet entirely clear. But, marketers will need to start thinking about how they are going to deal with the issues. They should have around 15 months to gear themselves up for changes before the directive is transposed into national legislation, possibly around October next year. The clock is ticking.

The European Parliament is yet to publish the final amendments to the draft directive.

For further information and copies of documentation from the European Parliament, Council of Ministers, and European Commission, contact the News Editor on: Tel: +44 (0)208 423 1300, E-mail: alan@privacylaws.com

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