

New European privacy rules hamper e-marketing

Differences in implementation of the EU Privacy and E-communications Directive mean that companies may still have to adapt their marketing campaigns from country to country in order to comply. **Laura Linkomies** explains what marketers need to know about the new rules.

The EU Directive on Privacy and Electronic Communications (2002/58), adopted in July 2002, poses several new restrictions on marketing to individuals across media such as e-mail, fax, telephone and SMS. As one of its main aims is to reduce unsolicited 'spam' e-mail and build confidence in e-commerce, marketers now will have to seek individuals' consent before sending electronic marketing material. This is the main change compared to existing rules which do not make any provision on e-mail marketing. The directive also addresses corporate subscribers, but member states have the scope to decide the extent to which they wish to protect companies (see chart p.19).

that half of the member states had, in mid-October, transposed the directive. Other member states are at different stages in the legislative process.

DIFFERENCES WITHIN THE EU

Under existing legislation, Austria, Finland, Denmark, Italy and Germany require prior consent for e-mail marketing. Article 13 of the new directive attempts to iron out the differences by establishing a universal opt-in requirement for e-marketing to individuals across all member states.

However, marketers can benefit from a so-called 'soft opt-in', which allows companies to contact existing customers on an opt-out basis,

direct marketing industry within the EU. "Companies now have to adapt to using the soft opt-in," explained Axel Tandberg, FEDMA's Director for Government Affairs. "E-mail marketing will be particularly difficult under the new rules, and FEDMA is hoping to see as many EU member states as possible allowing the use of the soft opt-in."

Another problem will be how member states interpret the use of personal data contained in a company e-mail address. In the UK, if an individual's name is part of the e-mail address (john.smith@company.com), the Data Protection Act provides protection, although not the higher opt-in protection that individuals will receive.

INDUSTRY'S COOPERATION IS VITAL

A common set of rules will eventually be available via an annex to FEDMA's code of practice on data protection compliant marketing (see *PL&B Int*, August/September 2003, p.18). The annex will hopefully clarify the position for marketers involved in EU-wide marketing. However, as the directive allows space for interpretation with regard to corporate subscribers, there is likely to be some variation.

"We hope to present the first draft to the EU Data Protection Working Party at the beginning of next year," says Axel Tandberg. "When these amendments have been adopted, companies will benefit from being able to make an assumption that by following the Code of Conduct, they are most likely also to be complying with the Privacy and E-Communications Directive."

"Industry has a key role to play in ensuring that this directive will work," said a spokesman for the European Commission. "The other factor to

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The implementation of the directive by member states is currently under way, but as the new regime will include both opt-in and opt-out rules, the existing situation is not really going to be made much clearer. The way national governments implement the directive will vary from country to country. Some, such as Belgium (which adopted the E-commerce law on March 11th) and Sweden already have new laws in place. In Sweden, the Act on Electronic Communications, which entered into force on July 25th, does not, however, include the directive's provisions on unsolicited marketing. These will be included via a separate Marketing Act.

A spokesman for the European Commission told *PL&B International*

provided that they market similar products and services. It is not yet clear how the concept of similarity will be interpreted in different countries. An existing customer relationship will most likely be defined as a contact who has provided their details in the course of a sale. Importantly, the UK has interpreted this clause flexibly to include contact that has been made during the negotiation for a sale. For example, insurance quotes provide much personal data, and this information could still be used (see p.10).

Direct marketers claim that the new rules mean an end to targeted marketing. The Federation of European Direct Marketing (FEDMA) is worried about the future prospects for the whole

stress is effective enforcement, especially in terms of fighting spam. It is very important the ISPs now have a legal right to filter spam.”

The directive may be aimed at reducing spam, but as most spammers are located outside of Europe, it is doubtful how effective an EU-wide ban will be. The European Commission hopes that international cooperation with the OECD and other stakeholders will help to catch spammers.

UK PLANS FOR A CORPORATE TPS

In the UK, the new e-privacy rules will enter into force on December 11th. The UK Direct Marketing Association (DMA), has been active in influencing the government's policy, and has gained support for its views. For example, the UK has taken the route of not applying the opt-in restrictions to corporate

subscribers. However, the UK government has agreed to introduce a Telephone Preference Service (TPS) for corporate subscribers after spring 2004. This was a compromise between the government view of not posing unnecessary restrictions on business-to-business marketing while still implementing a degree of privacy protection for business subscribers. The TPS was a system favoured by smaller companies that do not wish to waste time answering phones while serving customers.

Tessa Kelly, the DMA's Director of Compliance Operations said that the "DMA welcomes the announcement by the Department of Trade and Industry (DTI) that it is to postpone allowing companies to register on the Telephone Preference Service. This will allow time for practical difficulties, such as which member of staff within a

company will be responsible for registering all its company's telephone numbers, to be resolved.”

Whether the DTI's position means that UK businesses will have a competitive disadvantage against their European rivals, remains to be seen. The directive allows for member states to decide how they wish to regulate telephone marketing for individuals. A mix of opt-in and opt-out rules is a likely outcome.

MARKETING LISTS NEED CLEANING

Another problematic area involves marketing lists. Businesses may need to rescreen existing lists or contact individuals directly to ensure that they have obtained prior consent.

Decisions by the UK's Advertising Standards Authority have reinforced the fact that businesses need to obtain guarantees that the marketing lists they buy have been obtained on an opt-in basis. Companies will also have to check whether they can rely on the exemption of being able to market similar products and services. Companies exchanging marketing lists will need to ensure that the data is clean. All this will add to marketing costs, and companies may well resort to using other marketing campaigns instead of e-mail marketing.

Marketers quickly need to get to grips with the changing environment. "We envisage some difficulties as the European Directives do not seem to achieve harmonisation", said James Milligan, DMA's Legal and Public Affairs Advisor.

However, businesses operating across the EU may be able to apply one set of rules to all their European marketing activities based on the legislation of the country in which they are based. But currently, it is unclear exactly how this will apply in practice.

Summary of the UK E-privacy regulations

Marketing channel	UK Individual subscribers	UK Corporate subscribers
E-mail marketing	New prior consent/opt-in right. Marketers will have to obtain consent for sending unsolicited e-mails. However, it is possible to market similar services or products to existing customers. If the individual's e-mail address has been obtained in the course of a sale or negotiation for a sale of a product or service, marketing e-mails can be sent. Marketers will have to provide a possibility to opt-out at any time.	Case-by-case opt-out rights. If the e-mail address of the recipient contains personal data, it is covered by the Data Protection Act and subscribers must be allowed to opt-out. Additionally, sole traders or non-limited liability partnerships (excluding Scotland) should be treated as individual subscribers.
SMS	New opt-in right. Marketers will have to obtain consent for sending unsolicited e-mails. However, if the mobile phone number has been obtained in the course of a sale or negotiations for a sale of a product or service, SMS messages can be sent on an opt-out basis. Marketers will also have to allow subscribers to opt-out at any time.	The rules on B2B e-mail marketing also apply to SMS and video/picture messaging. However, business subscribers may not be able to opt-out if no personal data has been collected.
Telephone	Individuals can prevent unwanted telemarketing by registering with the existing Telephone Preference Service.	Corporate subscribers will be able to register with the Telephone Preference Service after April 2004.
Fax	Opt-in right. However, individuals can also register with the Fax Preference Service.	Corporate subscribers will retain the right to register with the Fax Preference Service.

For a copy of the UK Information Commissioner's guidance on e-marketing:
www.data.protection.gov.uk/dpr/dpdoc.nsf



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FURTHER INFORMATION: For FEDMA's marketing code see: www.fedma.org.