

# Dutch spam law enters into force

As anti-spam regulations start to bite in the Netherlands, Joe Figueiredo examines the new rules and highlights some of the commercial and legal implications.

**M**ore than just an irritant, spam threatens to grind the motor of business to a halt. No surprise then that the European Commission included a EU-wide ban on spam in its Directive on Privacy and Electronic Communications (e-Privacy Directive) in July 2002.

The e-Privacy Directive - which offers a certain amount of flexibility, resulting in different national implementations - was expected to be ratified by EU member states and incorporated into national law by October 31st 2003. Unfortunately, several EU legislatures, including the Dutch, were slow to respond. The good news, however, is that the Telecommunication Act (containing the anti-spam regulations) became law in the Netherlands on May 19th. The threat of legal proceedings by the European Commission may have motivated Dutch lawmakers to move somewhat expeditiously.

## Protecting the individual

The new law defines spam as an electronically delivered unsolicited message that could be an e-mail, mobile message (SMS or MMS) or fax. Although there is an increase in mobile spam in the Netherlands, commercial e-mail is still by far the biggest threat, and therefore earns the larger share of attention.

Even though sending spam to organisations remains legal, sending it to private individuals without their explicit consent is now unlawful. However, there are important exceptions.

Companies, for example, can send unsolicited material to a customer's electronic address without their explicit permission - provided the address was obtained as part of the sales process. This means that the message sent should be connected in some way to a product or service that is being sold. Furthermore, it should contain the identity of the e-mail-address holder; and provide the recipient with a simple way - like an e-mail, web or postal

address - to 'opt-out' of receiving a similar message in the future.

In addition, organisations can legally use distribution lists containing electronic addresses compiled prior to the law coming into force, provided there is an existing (client) relationship with the respective address holders, or opt-in approval has been obtained from them.

Although the anti-spam regulations mostly apply to those who send illegal spam from the Netherlands, anyone in the Netherlands who can be shown to be an 'essential' distributor of foreign spam - ie. held ultimately responsible for (instructing others to distribute) illegal spam from abroad - can also be held accountable.

Notably, Internet service providers (ISPs) are not legally bound to restrict spam: Dutch law views ISPs as information carriers - like the postal service - and consequently not responsible for the content they transport.

## Largely reactive

OPTA, the Dutch post and telecom watchdog, is responsible for enforcing the anti-spam regulations. Offenders are dealt with under Dutch administrative law, *Wet Algemeen Bestuursrecht*, the legal code that defines and governs the relationships and interactions between the Dutch government (and authorities), and the public.

OPTA's enforcement strategy is to target the bigger offenders, "who are first sent an official complaint and, if need be, an invitation to a hearing," said Edwin van de Haar, OPTA's public relations officer. "In addition to a warning - which comes with a compliance deadline and a fine of up to €450,000 for non-compliance - we can also prosecute serious offenders."

To aid enforcement, OPTA has set-up a website ([www.spamklacht.nl](http://www.spamklacht.nl)) that offers comprehensive information about the law, and advises consumers on how to deal with and reduce spam. More importantly, the website allows victims

## E-marketing rules

- E-mail/SMS marketing must be sent with the consent of the recipient, unless they are existing customers and the advertising concerns similar products or services.
- Business e-mail addresses are not covered by the new rules.
- Businesses must disclose their identities in the marketing message.
- Consumers must be provided with a means to opt-out from further commercial contact.
- There are no transitional allowances, meaning legacy marketing databases will need to comply with the new rules.

to lodge complaints onto a central registry. "All complainants receive a standard confirmation, but no subsequent progress report," explained Van de Haar. "Furthermore, all these complaints are placed in a database, which allows OPTA to select out the more serious offenders to be addressed. We have taken this pragmatic approach of focusing only on the big fish because we don't think it is practical or feasible for us to investigate and process every complaint."

There is no central opt-in registry, however. Consumers consenting to receiving spam have to do so on a per-organisation basis. In most cases, this is done by logging onto an organisation's opt-in website and checking (or clearing, to withdraw consent) an opt-in box.

## Blessing in disguise

Contrary to expectations, the Dutch direct marketing sector is not too disturbed by the new law.

One reason is because "our industry has a long tradition of self-regulation, including e-mail and telemarketing codes of conduct. Besides, many of our members use names of existing clients and are not really affected by the new

law. If at all, the ones most affected by the new regulations are list brokers and list owners," reported Dirk van der Steenhoven, managing director of DDMA, a trade association representing the Dutch direct marketing and sales promotion sector.

Another reason is because DDMA is against 'spray and prey' marketing tactics like spamming, and the waste of resources for limited gain, according to Van der Steenhoven. "That is why we prefer targeting our marketing. The new opt-in

clogs networks and stifles business - and calls for companies to install extra mail servers - at additional expense."

"Finally, consumers can expect higher prices - as marketing costs needed to get them to opt-in - trickle down to them; and increased irritation - in the form of telephone calls and pop-up ads on the web - as companies try to enlist their support. It is a pity that the EU did not use its powers more effectively in fighting e-mail spam."

the administrative legal code - under which EU regulators operate - or civil law. A good example is the recent case of a spammer being sent to jail in America, under new legislation over there."

Finally, there is the question of resources. Van Dam is concerned that OPTA does not have adequate resources to handle these additional responsibilities. He has proposed closer cooperation with Spamvrij.nl, a Dutch anti-spam lobby which, according to its spokesperson, Rejo Zenger, "could assist OPTA in tracing spam mail-headers and providing guidance."

Reacting to these suggestions, Van de Haar said, "It is still too early to tell. We have around five full time workers dedicated to spam oversight and enforcement, and need more time to evaluate the situation. Besides, we do have frequent contacts with anti-spam lobby groups, such as Spamvrij.nl, and we will continue to work closely with them, using their expertise and knowledge, and exchanging views and information."

### Starting to bite

So, in the two months since the law came into force, are there any visible results?

"OPTA has received over 2,200 consumer complaints, of which 1,900 were about e-mail spam and the rest mostly about unsolicited SMS messages. A behaviour pattern of the bigger spammers is beginning to emerge and is being analysed," reported Van de Haar, who expects OPTA to deal with its first offenders this fall.

And the courts have started to apply the law as well. In July, for the very first time, a Dutch court used anti-spam regulations to score a conviction. This was a case where an employment broker used stolen information from a job-ad website to (unwittingly) send unsolicited e-mail to an advertiser - who had inadvertently given his private e-mail address (see [www.dmeurope.com/shownews.asp?ArticleID=2384](http://www.dmeurope.com/shownews.asp?ArticleID=2384)).

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requirement, in fact, will help us improve our hit rate by only targeting those who have consented to receive our promotional material electronically. Our members have a lot to lose if they don't get their Internet strategy right, and risk damaging their brand image and company reputation. That's why we've introduced the DDMA certification that distinguishes compliant companies from those who don't follow the self-regulating code."

### Outside the law

Others are somewhat apprehensive about the new regulations. One of them is Christiaan Alberdingk Thijm, a Dutch lawyer specialising in IT security and privacy. "As a lawyer, I believe the law should be applied proportionally and have the desired effect. Bearing that in mind, I have mixed feeling about the anti-spam regulations and their desired effect.

"Firstly, the regulations only apply to the European Union. However, most of our spam comes from outside the EU, and can be traced to around ten known - their pictures are on the web - mass-spammers, at whom the law should be directed. All of this means that the major bulk of spam will not be affected by the law."

"Secondly, the Netherlands chose to only protect private individuals, and not businesses. This means that companies will continue to be plagued by unwanted e-mail. The law should be even-handed and also protect business. Research indicates that 50 to 70 per cent of all e-mail distributed is spam - which

### Hands across the water

But what can be done to fight spam more effectively?

Firstly, spam from outside the EU - mostly from the US, South Korea and China, according to Alberdingk Thijm - needs to be addressed. Martijn van Dam, a Dutch Labour parliamentarian, is pressing for the US authorities to extend their anti-spam law (nicknamed the CAN-SPAM Act, passed in late-2003) to include European e-mail address-holders. One proposal is to request them to block all unsolicited commercial e-mail at a top-domain level. This would also mean that Europeans wishing to receive such e-mail would then be required to 'opt in'.

OPTA is also discussing the foreign-spam issue with its European counterparts in the Independent Regulators Group and European Regulators Group, and the American Federal Communications Commission. "We would like to ensure a smooth and systematic exchange - instead of the current ad hoc manner - of spam and spammer information," said Van de Haar.

Next, tougher enforcement is called for. "Only fierce enforcement will deter spammers," said Alberdingk Thijm. "I have seen how another regulator, CBP, the Dutch data protection agency, operates and I predict OPTA is going to take the same cautious, low-profile approach, and have very little effect. I would also like to see spammers dealt with more severely under criminal law, instead of