Sweden opts-in to EU spam rules

Jim Runsten looks at Sweden's new e-marketing regulations, their implications for B2B advertising, how they will apply to marketers located outside Sweden, and how the rules will be enforced.

Article 13 of the 2002 EU Directive on Privacy & Electronic Communications (which regulates e-marketing), was implemented in Sweden on March 3rd 2004 when the Parliament passed a bill on amendments to the Swedish Marketing Practices Act (1995:450) concerning unsolicited marketing via e-mail. The amendments entered into force on April 1st 2004.

INDIVIDUAL SUBSCRIBERS

The new regulations introduce an opt-in regime for individual subscribers. Direct marketing material may not be sent by e-mail to individual subscribers unless recipients have previously notified their consent.

There is an exception to the opt-in regime, which allows the continued use of an opt-out (which can be referred to as a "soft opt-in") provided that the direct marketing is:

- only applied to marketing contacts with whom there has already been a sale
- carried out by the same legal entity that obtained the individual's details
- limited to similar products and services
- to an individual who has not objected to the use of their e-mail address for direct marketing, and who was offered an opt-out when their details were first obtained and for each occasion the details are used for direct marketing.

(Consequently, all the fore mentioned criteria must be met for the soft opt-in alternative to be applicable.)

Registers and lists that have been purchased from third parties do not qualify to fall under the soft opt-in exemption.

Direct marketers should note that the opt-in rule is not limited to "consumers". It applies to all non-corporates - ie. partnerships and sole traders have the same rights as private individuals. Accordingly, the new regulations do to some extent apply to B2B marketing.

The opt-in rule applies to "unsolicited" direct marketing via systems without personal contact. The Swedish Legislator has chosen to keep the opt-out rule for other methods of remote communication (eg. telemarketing) in the new regulations.

> If the soft opt-in exemption cannot be relied on, then strictly speaking the marketer would need to re-approach legacy contacts to obtain opt-in consent with the risk of getting very few positive returns.

CORPORATE SUBSCRIBERS

The opt-in rule does not apply to corporate subscribers. These include companies and other organisations that are legal entities.

However, the new regulations prescribe that all direct marketing must contain a valid address to which recipients, whether a physical or legal entity, can send a request to the marketer to stop sending them marketing material. Where the sending of marketing material to an employee of a company includes the processing of personal data (as it would where the direct marketer knows the name of the person they are contacting - eg. fred@acorporate.com, not dataprotection@acorporate.com), then that individual also has a right under the Swedish Personal Data Act to request that the marketer cease sending him marketing material.

E-MAIL OPT–OUT REGISTERS

Article 7 of the Electronic Commerce Directive (2000/31/EC) allowed for a possible "opt-out" register for unsolicited commercial e-mails. Although, in the regulations that transposed the Electronic Commerce Directive into law, the Swedish Legislator included a rule stating that marketers must check e-mail addresses against existing "opt-out" registers, no such register was ever created. Since all individuals have to opt-in according to the new regulations and it is considered that industry opt-out schemes are sufficient, the new regulations do not prescribe an opt-out register. In any event, most spam originates outside the European Economic Area (EEA) and EEA e-mail registers are peripheral to that traffic (and possibly even counter-productive since unscrupulous spammers may harvest the registers for active e-mail addresses).

NO CONCEALED IDENTITIES

According to the new regulations, marketers must not conceal their identity when they send or instigate the sending of marketing e-mails – whether to corporates or individuals. Marketers must also always provide a valid address to which the recipient can send an opt-out message.

HISTORIC DATA

The new regulations apply equally to new data collected after April 1st 2004 and to historical or "legacy" e-mail data that was collected before that date. Such legacy data for direct marketing to individual subscribers may continue to be used only if it falls within the provisions of the soft-

opt-in exemption. If the soft opt-in exemption cannot be relied on, then strictly speaking the marketer would need to re-approach the legacy contacts to obtain opt-in consent with the risk of getting very few positive returns.

TERRITORIAL APPLICATION

The Swedish Consumer Agency is the supervisory authority for the Swedish Marketing Practices Act of which the new regulations will form a part. The Consumer Agency and its Director General, the Consumer Ombudsman, will apply the new regulations to all marketing activities directed to the Swedish market in accordance with a position statement regarding e-commerce and marketing on the Internet made in October 2002 (see notes).

Although the Swedish Consumer Agency is responsible for enforcing the new regulations, it should also be noted that any data processed in Sweden or transferred from Sweden, that falls under the Swedish Personal Data Act is monitored by the Swedish Data Inspection Board.

ENFORCEMENT

Both individuals and legal entities may seek remedy from the marketer for breach of the regulations. There are three types of remedies:

- an injunction against continuing the marketing activities under penalty of a conditional fine
- compensation for damages; and
- a fine for disruptive marketing practices.

The Consumer Ombudsman may take enforcement action on his own initiative, or as a result of a complaint by an affected person. The Consumer Ombudsman may demand an order for the marketer to provide information or an injunction against continuing marketing activities under penalty of a conditional fine in the Swedish Market Court. The Consumer Ombudsman can also demand, in the District Court of Stockholm, that the marketer is ordered to pay a fine for disruptive marketing practices if the marketer, or any person acting on its behalf, intentionally or negligently breaches the rules - for example by not providing a valid address in marketing e-mails.

Orders and injunctions combined with a conditional fine may be issued by the Consumer Ombudsman himself in less serious cases. However, what constitutes cases of minor importance is not defined in the Marketing Practices Act. All orders and injunctions issued by the Consumer Ombudsman can be appealed to the District Court of Stockholm, except orders to submit information.

AUTHOR: Jim Runsten is a senior associate in law firm Bird & Bird's Stockholm office. He can be contacted at: jim.runsten@twobirds.com.

FURTHER INFORMATION: The Consumer Ombudsman's position statement on e-marketing can be found at: www.konsumentverket.se/Documents/in_english/nordic_statement_ecommerce_2002.pdf.

EU report addresses harmonised e-marketing

In March this year, the EU Article 29 Data Protection Working Party (a group representing EU data protection authorities) published a report on the implementation of the Privacy and Electronic Communications Directive. The directive, which was due to be implemented by all 15 EU member states by November last year, restricts marketers' ability to contact potential customers by requiring them to gain prior (opt-in) consent before sending them advertising via new media channels such as e-mail, SMS and fax.

Despite the intention of creating a harmonised approach to e-marketing within the EU, discrepancies in the way some countries have implemented the directive into national law (as well as failure by others to actually implement the directive on time) has created an uneven approach to compliance. As a result, the Article 29 Working Party has issued its position regarding the steps needed to establish a "uniform application" of the directive.

One of the issues discussed is the methods organisations can use to obtain 'prior consent' from consumers. The Working Party has called for industry associations to develop and promote specific measures for collecting consent.

The Working Party has also stated that marketing via third party lists that were compiled prior to the new opt-in requirement "may in principle not be used". This, however, conflicts with guidance from the UK Information Commissioner which states that legacy data bought from list brokers can be used, provided that the UK Data Protection Act has been complied with.

Another complex issue raised by the Working Party is the distinction made between marketing to individual and business ("legal person") subscribers. Under the E-Privacy Directive, member states were given the scope to develop their own approach to the issue. However, the Working Party notes that this has been problematic, pointing out that while some countries (for example, Germany and Italy) have extended the 'opt-in' rule to business subscribers, others such as the UK and Ireland have adopted a two-tier approach. The Working Party recommends that in countries where marketing to business contacts is permitted on an opt-out basis, "practical rules" should be developed to ensure that organisations are aware of the nature of the people they are marketing to, and that individuals' opt-in rights are respected.

For a full copy of the report, see: http://europa.eu.int/comm/internal_market/privacy/workingroup/wp2004/wpdocs04_en.htm

Report by Alan Pedersen