

UNSOLICITED EMAIL

DOES EUROPE ALLOW SPAM? THE STATE OF THE ART OF THE EUROPEAN LEGISLATION WITH REGARD TO UNSOLICITED COMMERCIAL COMMUNICATIONS

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Unsolicited commercial emails, also referred to as junk-mail or spam, is considered a rude and irritating form of marketing. The sending of unsolicited commercial emails has appeared on the European political agenda more than once. The discussion on this issue evolves around the question whether an 'opt-in' or an 'opt-out' approach should be installed. Opt-in means that no commercial messages may be sent without the prior consent of the receivers. Opt-out means that individuals can register in so called opt-out registers, or indicate to companies which have sent them emails that they no longer wish to receive such messages. There are several legislative acts in Europe that affect the sending of unsolicited emails. At present, two future directives are being prepared affecting the subject. This has led to a reopening of the discussion in the European Parliament. This article contains an overview of the current legal rules, as well as a discussion of the proposed legislative acts.

1. INTRODUCTION

'Junk email costs Internet users 10 billion Euro a year world wide.'

This is an estimate made in a Commission study on unsolicited commercial communications and data protection.² This study investigates email marketing and the legislative approach of the European Union with regard to it. 10 billion Euro is a very rough estimate. It is virtually impossible to make an exact calculation of the costs caused by junk email. Even so, this estimate indicates that there is a problem at hand. The European legislature discussed the issue on several occasions. So far this has not led to a prohibition of these practices. There are several Directives that affect spamming, but there is as yet no clear statement on a European level, as to how this should be regulated. At the moment, two Directives are being prepared that hold provisions with regard to email marketing. This has given rise to a revival of the debate that has already taken place during the procedure leading to the e-commerce Directive. This article begins with a short explanation of spam. Then, an outline of the current law affecting unsolicited email is given, followed by a discussion of the pending proposals. The article finishes with a general discussion and concluding remarks.

2. UNSOLICITED COMMERCIAL EMAILS

2.1 What is the problem?

The sending of unsolicited emails is an inexpensive form of direct marketing. It can reach a broad public and the costs are mostly borne by the receiving end, paying for the Internet

connection. It is cheaper than the traditional form of direct paper mailings since there are no printing costs and hardly any delivery costs. Specific software packages make it possible to collect large numbers of email addresses through the Internet. Such so called harvesting tools systematically gather email addresses from discussion groups and websites. It is also possible to buy lists of email addresses from professional 'collectors' or service providers. Possibly, databases of bankrupt dotcom-companies are sold for such purposes. The email address lists can then be used to send all kinds of advertisement messages and special offers. A simple mailing program is enough to reach hundreds and thousands of people. There are sophisticated software applications available that facilitate the sending of huge numbers of emails. Such mailing tools can even get around filters installed to prevent these messages. Usually, the receivers of the messages have had no previous contact with the sender and their addresses were collected from public sites. Large amounts of such unsolicited messages can become very irritating. The messages have to be deleted one by one and they can fill up inboxes so fast that other mail does not get through. These practices are known as spam or junk-email. Spam is an extremely rude form of email marketing. It can be defined as:

The practice of sending unsolicited emails, most frequently of a commercial nature, in large numbers and repeatedly to individuals with whom the sender has no previous contact, and whose email address was found in a public space on the Internet, such as news group, mailing lists, directory or website.³

In blatant forms of spam, the sender hides their identity, knowing that they use an unpopular marketing tool. Such spam activities do not sponsor the Internet in any way, especially

when sent in extremely large numbers. The repeated sending of huge amounts of mail can clog inboxes, paralyse mail-servers, use up bandwidth causing virtual traffic-jams and can be annoying and discouraging to Internet users. A great resentment has grown against spamming activities, as is evidenced by the negative-sounding term⁴ chosen for it.

While governments are working on laws,⁵ practice has taken its measures. Fanatic anti-spam organizations publish black lists of known spammers, often in combination with software to ward off their messages.⁶ Internet service providers are active in protecting their subscribers from spam-activities and keeping their servers clean by installing anti-spam filters. Fewer companies revert to this form of aggressive marketing since it generates negative associations. Spam has its origins in the United States. American inboxes were flooded with unsolicited messages between 1995 and 1998. This flood has never reached Europe and is now gradually diminishing. Nevertheless, spam still exists, which is shown by various statistics that keep count of the spam rates.⁷ Apparently, this marketing instrument leads to results, because it is still used. A well-targeted email campaign can be very annoying, but when the offered product or service is bought, the campaign is successful. A ban on spam has been opposed as being against the freedom of expression, and seen as an obstacle to commercial freedom. True, email marketing is a unique way to inform consumers about products and services. Small companies with limited budgets have the chance to market their products at low cost to a wide public, which stimulates competition. The sending of unsolicited commercial communication by email is often compared with other forms of 'intrusive' marketing that are not forbidden. Who asked for those screaming ugly billboards everywhere, or for the tv-commercials interrupting your favourite programme, or the personally addressed envelope with the message that you might have won a new car? All these marketing methods are not forbidden. On the other hand, there are strict regulations concerning automatic calling machines and the sending of facsimile messages. Unsolicited email can equally be compared to these techniques. The heart of the problem seems to be the contradiction between the interests of the business world and the users of email: the freedom to use email marketing to its full potential versus the right to keep your inbox clear from commercial messages.

2.2 From spam to 'permission marketing'

Generally, all unsolicited emails tend to be characterized as spam. A distinction, however, can be made between the rude and aggressive form of email marketing that is spam and the more moderately sent unsolicited emails.⁸ It can be argued that email marketing has the potential to become, in due time, a widely accepted marketing tool, if used according to proper standards. For now, there is no clear distinction between the unsolicited emails that are called spam and those that might be considered a legitimate marketing strategy. Still, even a legitimately sent unsolicited email can be annoying and damage the reputation of the company on whose behalf it was sent. For this reason, companies revert to different uses of email, such as free newsletters. Most commercial websites now offer the possibility to their visitors to subscribe to such newsletters, or offer the customers the

opportunity to indicate whether or not they wish to receive further information or special offers. This marketing strategy is called opt-in email marketing, or permission marketing. The problem with permission marketing is how to draw the customers' attention to the email services in the first place.

2.3 Opt-out or opt-in?

The European legislature has not taken a clear stand yet with regard to the question to what extent unsolicited email marketing should be allowed. The discussion evolves around the question of whether an opt-in or an opt-out approach should be used. The *opt-in approach* means that the targeted person has to give his or her prior consent to receiving the commercial electronic mail. This means the sender of commercial emails must take action to seek the consent of individuals (permission marketing). When someone has given their consent to receiving commercial emails, the received messages are in essence no longer unsolicited. In other words, an opt-in approach can be seen as a prohibition for the sending of unsolicited emails. The *opt-out approach* means that individuals should indicate that they do not, or no longer, wish to receive unsolicited commercial emails. This can be done through registering in so called opt-out lists, or by contacting the sender and asking to be removed from the email list. The opt-out approach requires the receiving person to take action, whereas the opt-in approach puts the initiative on the sender. There is no single law on a European level addressing the issue. There are several Directives containing provisions that directly or indirectly affect the sending of unsolicited commercial communications. These Directives will be discussed, in chronological order, in the next paragraph.

3. THE EUROPEAN LEGAL FRAMEWORK

3.1 The Privacy Directive

One of the first legislative acts that affects the sending of unsolicited emails is Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data,⁹ shortly referred to as the privacy Directive. This Directive is applicable when personal data is processed. Personal data means any information relating to an identified or identifiable person. When such information is processed, for example collected and organized, the rules of the Directive have to be taken into account. Most email addresses are clearly personal data in the sense of this Directive. Email addresses often contain the user's name, as well as information on the country of residence, the service provider or the place of employment. Even if the address itself does not include this information, it is usually possible to link the email address to a person, making it personal data. However, it is not always possible — or it is quite troublesome — to connect an email address to an individual person, in which case it is not personal data. Moreover, an email address can be made anonymous by using privacy-enhancing technologies. It is also possible to get an email address without submitting your personal data at hotmail.com.¹⁰ Most people are unfamiliar with privacy-enhancing software and do not take measures to 'anonymize' their email address. The majority of email addresses can therefore be considered personal data in

the sense of the privacy Directive. The Directive offers the individual a fairly high level of protection with regard to their email address as far as this constitutes personal data.

According to Article 6 of the privacy Directive, personal data must be collected fairly, for specified, explicit and legitimate purposes, and processed in a fair and lawful manner in line with those stated purposes. This means that before email addresses are collected, a legitimate purpose must be formulated. It is left to the member states to determine more precisely the conditions under which the processing of personal data is lawful and what is to be a 'legitimate purpose'. When the collected information is used, Article 7 prescribes that this may only take place on legitimate grounds. A limited set of grounds is enumerated. Two of these grounds are relevant for the use of email addresses. Unsolicited emails can be legitimate on ground 7(a), when the individual has unambiguously given their consent, or on ground 7(f), when the sending is necessary for the purposes of legitimate interests, except where such interests are overridden by fundamental rights and freedoms of the individual. It is again left to the member states to answer the question whether direct marketing is a legitimate business interest, and if this is more important than the fundamental rights and freedoms of the individual. Article 10 states that when personal data is collected, the individual must be informed about the intended processing. Furthermore, as follows from article 14(b), the individual must be given the opportunity to object to the processing of their personal data for direct marketing purposes. Finally, the same article states that the person in question must be informed if their data is being disclosed to, or used on behalf of third parties for the purpose of direct marketing. This can be relevant when, for example, an Internet Service Provider sells an email list of its subscribers. The individual must be offered the right to object, free of charge, to such disclosure or uses.

The working party, as installed according to Article 29 of the privacy Directive, has pointed out that the recipient bears most of the costs and is disrupted by the receiving of the mail. The working party feels that the interests of the receiver outweigh the legitimate business interest (if any) of sending unsolicited commercial emails.¹¹ It also finds that collecting email addresses from public domains, such as discussion groups, can not be considered fair in terms of article 6. The sending of unsolicited emails means that the email addresses are used for a different purpose than for which they were made public. When interpreted in this manner, the privacy Directive does not allow the sending of unsolicited emails. However, the final word in this is up to the member states. They are to determine more precisely when the processing of personal data is lawful and if direct marketing is a legitimate business interest, justifying direct email marketing. Put shortly, the privacy Directive does not necessarily forbid the sending of unsolicited emails, but requires openness about the collecting and using of personal information such as email addresses. This can be very informative to many people who are not aware of where data concerning them is stored and what it is used for.

3.2 The Distance Selling Directive

Directive 97/7/EC on the protection of consumers in respect of distance contracts¹² contains an opt-in approach with regard to certain means of distance communication. Article 10

of this distance selling Directive requires the prior consent of the consumer when automatic calling machines or fax machines are used to approach the (potential) customer. Email is not mentioned, nor in the second paragraph, that states that other means of distance communication which allow for individual communication may be used only where there is no clear objection from the consumer. It is noteworthy that email, which did exist at the time of the adoption of this Directive, is not explicitly mentioned. Did the legislature wish to evade the question? Or is this done to keep the provision technology neutral? The wordings '*no clear objection from the consumer*' in the second paragraph entail a less stringent rule than '*the prior consent of the consumer*' required in the first paragraph. The wordings in the second paragraph are generally interpreted as referring to an opt-out regime with regard to unsolicited commercial communications. The consumer can object after receiving a message or can register himself in an opt-out register. The registration in an opt-out register can be considered to communicate a clear objection. This means the consumer can be contacted through email unless they have objected to this, or registered that they oppose this. The provision can only be effective if companies regularly consult such registers, however the Directive does not include an obligation to do this. The Directive is aimed at protecting consumers. Companies and other organizations cannot rely on the protection offered by Article 10.

3.3 The Telecommunications Directive

Directive 97/66/EC¹³ concerning the processing of personal data and the protection of privacy in the telecommunications sector contains a provision similar to Article 10 of the distance selling Directive. According to Article 12 (1) of this telecommunications Directive, the use of automatic calling machines or fax machines for the purposes of direct marketing is not allowed, unless there is a prior consent of the customer. The second paragraph of Article 12 covers 'calls made by other means of communication'. It is not quite clear what these 'other means of communication' should be, since the article refers to 'calls', this can hardly be anything else than a telephone. Probably direct marketing calls from human telephonists fall within this category. With regard to this category, the Member States have two options. Such calls are not allowed either: (1) without the subscribers' consent; or (2) in respect of subscribers who do not wish to receive these calls. The first option means the opt-in approach and, reading closely, the second option can be understood as referring to the opt-out approach. As with the Directive on distance selling, the telecommunications Directive makes no reference to email. However, during the implementation of the Directive in their national law several member states included email marketing in the opt-in approach.¹⁴ Seeing the resemblance of the marketing techniques, this seems a logical step. Other member states interpreted the term 'calling' narrowly, excluding electronic mail from the protection offered by article 12. The term 'call' is quite technology specific and the telecommunications Directive does not clearly state that it is applicable to new services and technologies. The working party as installed by Article 29 of the privacy Directive is of the opinion that the telecommunications legal framework should apply to

Internet services in the same way as it applies to other forms of communications.¹⁵ The European Commission also recognized the need to update this provision so that other forms of unsolicited direct marketing are equally protected. A proposal with the intention to renew the telecommunications Directive is now in consideration.¹⁶ This proposal extends the applicability of the telecommunications Directive to electronic communications. The term 'call' will probably be replaced by the term 'communication'. The proposal is discussed later in this article.

3.4 The e-commerce Directive

The latest regulative act affecting the issue is Directive 2000/31/EC¹⁷ on certain legal aspects of information society services, in particular electronic commerce, in the internal market (shortly referred to as the e-commerce Directive). For the first time, unsolicited commercial communications by electronic mail are actually mentioned in the text. The possible unwanted consequences of unsolicited commercial communications are explicitly recognised by the Directive. Recital 30 states that:

The sending of unsolicited commercial communications by electronic mail may be undesirable for consumers and information society service providers and may disrupt the smooth functioning of interactive networks.

Nonetheless, the e-commerce Directive does not forbid the sending of unsolicited commercial communications. In fact, it explicitly does not seek to address the question of whether an opt-out or an opt-in procedure should be used to approach these practices.¹⁸ Article 7 of the e-commerce Directive prescribes two requirements without going into the legality of unsolicited email, nor affecting the applicability of other legislation. First, if permitted by national law, the nature of the unsolicited message is to be identifiable clearly and unambiguously as soon as it is received. Second, those sending the messages are to regularly consult and respect the opt-out register. This of course implies the instalment of such registers. The consultation of these registers does not need to be prior to the sending of email, nor very often, just 'regularly'. The effectiveness of such a register is largely dependent on the organization of it. Should there be one general opt-out register, or several more specific registers? Each company having its own opt-out list seems far from practical. The most important condition for a workable system is that the (well organized and regularly consulted) registers are indeed *respected*. Member states remain free to adopt the opt-in approach within their national territory. The opt-in regime will then only be applicable to companies established within their borders. This means ample relief considering the cross-border nature of Internet and email. Although the Directive leaves the option open to the member states, the formulation of the requirements implicitly supports the opt-out approach. Still, by requiring that the nature of the message should be identifiable clearly and unambiguously, some relief is offered in avoiding unsolicited messages. The already widely installed spam filters can then easily filter them out. It is not unusual for spammers to use deceptive subject headers to evade the ISP's spam-filters and to make the receiver open the message before deleting it. It is more likely that an

unsolicited message has a header containing the words 'a very important message for you' or 'save money now', then 'this is an unsolicited commercial email'. The requirements in the e-commerce Directive can remedy this and obliges member states to ensure that the opt-out registers are actually consulted. Such a provision was lacking in the distance selling Directive. Different from the above-discussed Directives, the provisions in the e-commerce Directive are applicable to both individuals and organizations. By explicitly not addressing the question on the permissibility of unsolicited commercial communications, the discussion on this issue seems to be suspended to 2003, when the Directive is to be revised as required by article 21. Were it not that the proposals discussed in the next paragraph have led to a reopening of the debate.

4. FUTURE LEGISLATION

4.1 Future Directive on the distant selling of financial services

Financial services are exempted from the application of the distant selling Directive. A specific Directive concerning the distant marketing of consumer financial services will cover these services. The proposal for this Directive¹⁹ contains an article on unsolicited communications, however there does not seem to be a substantial change in the position of the European legislature. Article 10 of the proposal contains an opt-in rule for automatic calling machines and fax machines, similar to the regulation in the distant selling Directive. The second paragraph comprises two options. It reads as follows:

Member states are to ensure that means of distance communication other than those referred to in paragraph 1, when they allow individual communications shall not be authorized unless the consent of the consumer concerned has been obtained or may only be used if the consumer has not expressed his manifest objection.

As email is not mentioned in the opt-in rule of prior consent of paragraph 1, it is subject to one of the options of paragraph 2 as cited above. The option under (a) represents the opt-in approach and option (b) the opt-out approach. The choice, again, is left to the member states. The *European Economic and Social Committee* proposed to include email in the opt-in regime. This was rejected because the article should be aligned with the same provision in the distant selling Directive.²⁰ The Council reached a political agreement on this issue on 27 September 2001. The above-cited article was accepted by the Council, leaving the heart of the matter up to the national choice of the member states. The European Parliament has to finish a second reading before the Directive can be adopted.

4.2 Future Directive concerning the electronic communications sector

The rapid developments in the electronic communications sector gave cause to the European legislature to work on a new legislative framework for electronic communications networks and services.²¹ One of the six proposals, which together are to create this framework, is the proposal for a

Directive on the processing of personal data and the protection of privacy in the electronic communications sector.²² The proposal is shortly referred to as the Data Protection Directive and intends to replace Directive 97/66/EC (the Telecommunications Directive). The general aim of the proposal is to adapt and update the existing provisions to the developments in electronic communication services and technologies. The explanatory memorandum states that the aim is to create rules that are technology neutral and to ensure that the same services are regulated in an equivalent manner, irrespective of the means by which they are delivered. Controversially, at the outset of the Directive, different communication methods are defined. The proposal as amended by Parliament²³ includes a definition for the term 'communication':

Any exchange or conveyance of information between a finite number of parties by means of a publicly available electronic communications service. This does not include any information conveyed as part of a broadcasting service to the public over an electronic communications network except to the extent that the information can be related to the identifiable subscriber or user receiving the information

For the term 'call':

A connection established by means of publicly available telephone service allowing two-way communication in real time

For 'electronic mail':

Any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient.

These slightly forced and awkward-sounding definitions indicate that the communication method is indeed relevant. Why else would they need defining? If the European legislature chooses to define these terms, the question comes up how many more communications methods will need to be defined as technology progresses.

Unsolicited communications are covered by article 13 of the proposal. The proposal as amended by Parliament entails two regimes for unsolicited communications for the purpose of direct marketing. Paragraph 1 prescribes the opt-in regime for automatic calling machines, facsimile machines and SMS. For other means of communication, paragraph 2 leaves the choice to the Member states to adopt either the opt-in or the opt-out regime. In the original proposal of the Commission email was included in the opt-in regime of paragraph 1. With regard to this, the *European Economic and Social Committee* noted that an opt-in regime for email raises some serious questions. Although it supports the opt-in approach, the committee states:²⁴

...An opt-in approach has one serious drawback in that it could well hinder the development of e-commerce and in such a way as to discriminate against companies in the EU. Commercial communications are a prerequisite for many of the services on the Internet.

This statement illustrates that the committee recognizes the balance of interests that is at stake: commercial opportunities opposite the customer's interest in being spared unsolicited commercial communications. The committee is of the opinion that the latter must take precedence. Several parliamentary committees think otherwise. *The Parliamentary Committee on Citizens' freedoms and rights, Justice and*

Home affairs argued that the opt-in approach will harm e-commerce in Europe vis-à-vis other parts of the world. As unsolicited commercial emails are allowed elsewhere, forbidding this in Europe would put European companies at a disadvantage. The committee stated that sending direct marketing via email should be considered a legitimate business interest that is completely different from spamming. As to how the distinction between spam and legitimate email marketing should be made does not become clear. The only comment made in this respect is that in cases of spamming the receiver 'cannot identify the origin of his data'.²⁵ The committee further pointed out that:

'The opt-out system will promote e-commerce in Europe, one of the major objectives of the eEurope initiative. The opt-in system will be a barrier to the same and will help encourage direct marketing companies to set up their business outside the European Union, where the legislative framework allows the opt-out for direct marketing purposes.'

The Committee on Legal Affairs and the Internal Market presented a similar opinion. This committee stated that unsolicited commercial communications may be the only affordable means by which small- and medium-sized enterprises could effectively promote their products and services across borders.²⁶ This committee suggested that the sender should indicate where the email address was obtained. During the procedure a new communication method made its entrance: SMS or short messages service. This technique, which allows the sending of short text messages to mobile phones, seems to be in the middle between an unsolicited call and an unsolicited email. SMS is included in the opt-in approach. Apparently, the opt-in approach remains limited to a few chosen technologies, i.e. automatic calling machines, fax and now SMS. With regard to email, the European Parliament introduced several amendments to the commission proposal that help distinguishing between unacceptable spam and acceptable email marketing. It is to be prohibited for the sender to conceal their identity and the message should include a valid return address where the individual can object to the further receiving of messages. These rules are applicable to natural persons. The member states are to ensure that legitimate interests of those who are not natural persons are sufficiently protected. This means that companies or other organizations are not equally protected. They are to be protected 'sufficiently'. After the Council has reached an agreement the proposal goes back to the Parliament for a second reading.

5. DISCUSSION

It appears that the European legislature is somewhat reluctant to take a decision with regard to unsolicited commercial email. Member states are offered the choice between an opt-in or an opt-out regime. This is a compromise that does not reflect the supranational approach that is needed with regard to this international communication method. Countries installing an opt-in regime will have problems preventing unsolicited email from outside their borders. Since the Internet is a global medium, it would be preferable to have global standards, or at least international. This is often easier said than done. All the same, the European law contains some minimum standards for email marketing. Scattered over the different Directives, one finds the following:

- The message should be labelled as being a commercial message (e-commerce Directive).
- Opt-out registers should be regularly consulted and respected (e-commerce Directive).
- The individual should be informed when and why their email address is used (privacy Directive).
- The sender should indicate how the receiver can opt-out (privacy Directive).
- The opting-out should be easy and free of charge (privacy Directive).
- It is forbidden for the sender to conceal their identity (future data protection Directive).
- The message should include a valid return address, where individuals can indicate that they wish to opt-out (future data protection Directive).

In addition to this guidance, commercial messages should conform to the general rules for advertising such as those found in the Directive for misleading and comparative advertising (the advertising Directive).²⁷ Assuming that no substantial changes will be made to the data protection Directive, unsolicited messages not in conformity with these rules can be considered illegal spam. If the European legislature feels a moderate form of unsolicited commercial communications should be allowed as a powerful and cheap marketing tool, it is useful to formulate clear conditions to be able to distinguish between unwanted spam and legitimate email marketing.

A further point of interest is that, except for the e-commerce Directive, all discussed Directives are applicable to individuals, (or natural persons as opposed to legal persons). It is unclear why companies or non-profit organizations do not deserve the same level of protection in this matter. One of the objections against unsolicited email is that it consumes the receivers' time and money, as well as taking up a share of the available bandwidth slowing Internet traffic in general. This is equally true for organizations. In the end, someone has to work through the organizations' mailbox reading and deleting the messages. In other words, the unsolicited messages addressed to an organization are just as annoying, time- and money-consuming as those addressed to an individual. Another question left open is how the discussed rules affect the sending of non-commercial emails, for example messages from political organizations or charity institutes.

Finally, I would like to mention the aim of the European Union to create technology-neutral rules. According to the last proposal for a data protection Directive, spam received

on a mobile phone is different from spam in an email inbox. Is an SMS really so much different from email? New technologies are being developed. The path chosen by the European Union indicates that it is needed to decide for each new technique whether it has the honour, so to speak, to be included in the opt-in approach. A better option might be the wordings as suggested by the *Committee on the Environment, Public health and Consumer policy*. This committee suggested including 'other personally addressed electronic communications' in the opt-in regime.²⁸ Although this, in turn, is not helpful against spam addressed to organizations. The present system is confusing and disordered, the relevant rules are dispersed and the final choice in the matter is left to the Member States. A general rule stating conditions for direct marketing in the advertising Directive (applicable to both natural and legal persons) might be a better solution to this problem.

6. CONCLUDING REMARKS

Although it is generally agreed that spamming is an unwanted practice, it is debatable if the same is true for all unsolicited commercial communications. The discussed Directives do not forbid the sending of unsolicited messages. The discussion on the legislative approach with regard to unsolicited commercial communication evolves around the question of whether an opt-in or opt-out approach should be installed. The European legislature appears to have a restrictive approach with regard to the application of the opt-in regime. Opt-in is only obligatory in connection with a limited number of communication methods, so far not including electronic mail. However, Member States are free to implement an opt-in regime within their territory. The lack of a clear choice on a European level for either the opt-in or the opt-out approach indicates that there is no political agreement on the question as to whether commercial freedom is more important than the consumers' interest to be spared of unsolicited commercial messages in their inbox. In the meantime, new techniques are being developed. Software designers and marketing agents are being increasingly creative in finding ways to invade peoples' personal space with commercial messages. It will be difficult, if not impossible to construct a general rule taking all the peculiarities of each specific technique into account.

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FOOTNOTES

¹ The author is a Ph.D. candidate working on a project concerning the legal aspects of e-commerce at the University of Twente (The Netherlands) and wishes to thank Prof. A. Brack, head of the department of Business Law at the University of Twente, for his helpful comments.

² Commission Report on Unsolicited Commercial Communications and Data Protection, January 2001, which can be found on the Internal market web-site of the European Commission: <http://europa.eu.int/comm/internal_market/>, following the link 'data protection'.

³ Definition by the 'Commission Nationale de l'Informatique et des Libertés' (CNIL), an independent French commission that presented

a report on Electronic Mailing and Data Protection, adopted on 14 October 1999. For more information see: <www.cnil.fr>.

⁴ 'Spam' is a trademarked name for a canned meat product, used in a Monty Python sketch, according to the CNIL report (supra nt. 3), p. 1.

⁵ An overview anti-spam legislation can be found on: <www.spam-laws.com>.

⁶ For example: <www.spamhaus.com>, <<http://mail-abuse.org/rbl/>>, <www.sengir.demon.co.uk/spam_sites.html>.

⁷ For example see the statistics on: <<http://spamcop.net>>.

⁸ Supra nt. 2, p. 98.

⁹ OJ L 281, 23/11/1995, p. 31.

¹⁰ When registering for a Hotmail address the registration form requires the submission of personal data, but one can easily submit

false information and still get the email address. An 'anonymous' address can also be obtained at freemail.nl, Yahoo.com, altavista.net.

¹¹ Opinion 1/2000 on certain data protection aspects of electronic commerce, adopted on 3 February 2000, document 5007/00/EN/final, WP 28, p.4.

¹² OJ L 144, 04/06/1997, p. 19.

¹³ OJ L 024, 30/01/1998, p. 1.

¹⁴ Austria, Denmark, Finland and Italy.

¹⁵ Opinion 2/2000 concerning the general review of the telecommunications legal framework, adopted on 3 February 2000, document 5009/00/EN/final, p. 3. Documents of the working party can be found on <http://europa.eu.int/comm/internal_market/en/dataprot/wpdocs/index.htm>.

¹⁶ Proposal for a Directive of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communication sector, COM(2000) 385 final.

¹⁷ OJ L 178, 17/07/2000 p. 1.

¹⁸ See recital 30 of the e-commerce Directive.

¹⁹ COM(1999) 385 final of 23-07-1999.

²⁰ Explanatory Memorandum of the amended proposal, COM(1999) 385 final.

²¹ COM(2000) 393 final, as presented by the Commission on 12-7-2000.

²² *Id.*

²³ See second report of the European Parliament on the proposal, document nr. A5-0374/2001 of 24 October 2001 approved on 13 November 2001. Reports of the European Parliament can be found on its website <<http://www.europarl.eu.int>>, clicking the link 'plenary sessions' is an easy way to find them.

²⁴ In its opinion of 24 January 2001, Documents of the European Economic and Social Committee can be found on its web-site <<http://www.esc.eu.int>>.

²⁵ European Parliament, Report nr. A5-0270/2001 of 13 July 2001, p. 31.

²⁶ Opinion included in Report A5-0270/2001 of 13 July 2001, p. 49.

²⁷ Directive 84/450/EEC, OJ L 250, 19/9/1984, p. 17 as amended by Directive 97/55/EC, OJ L 290, 23/10/1997, p. 18, corrected by Corrigendum OJ L 194, 10/7/1998, p.54.

²⁸ Opinion included in Report A5-0270/2001, p.71.

BOOK REVIEW

Company law

The Company Director's Guide — Your Duties, Responsibilities & Liabilities, Institute of Directors, 2001, Hard-cover, Institute of Directors, 443pp., £35.00, ISBN 0 7494 3325 6.

As the preface indicates: 'This book represents a collective view of law and good practice drawn from a broad cross-section of company directors, shaped considerably by surveys of IoD members, focus groups and experienced directors, as well as input from academics.' It deals with limited companies incorporated in the UK and is primarily addressed to directors of such companies. The aim of the book is to highlight the role of a director and their legal responsibilities. There are four parts with part one examining what companies are and the constitution of companies. The second part deals with the board of directors and contains four chapters dealing with the purpose of a board, board members and their roles, how the board operates and board appraisal. In part three, the role of the individual director is examined, dealing with the selection, appointment and removal of directors, a director's legal status, duties and responsibilities, and a range of other matters. The final part looks at related matters dealing with family companies and a broad issue of corporate governance in general. The overall aim of the book is to offer a concise readable and accurate guide to law and good practice for use by company directors.

Available from Institute of Directors, 116 Pall Mall, London SW1Y 5ED, <www.iod.com> or Kogan Page Publishers, 120 Pentonville Road, London N1 9JN, <www.kogan-page.co.uk>.