



Privacy & Data Protection

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Marketers shocked by harsh new email rules from EU

A heavy-hitting document from the European Union has blasted a huge hole in marketer’s views of what they can get away with under the E-Privacy Directive.

The influential Article 29 Working Party has unambiguously stated that most marketing emails will need opt-in consent and that the use of third party email lists will usually be unlawful.

Opinion 5/2004, published on 27th February, makes it clear that the Working Party is unhappy at the way many EU Member States have interpreted the law in Directive 2002/58/EC and at the approach that national

regulators are taking to the enforcement of the new regime.

Eduardo Ustaran, data protection legal expert at Field Fisher Waterhouse, states that, “The Working Party is trying to impose a level of harmonisation that that the Directive did not achieve. Whilst this is good in principle, it clearly affects the pragmatic approach adopted by the UK Information Commissioner and a few others.”

The new Euro laws on direct marketing require that opt-in consent must be obtained before marketing emails can be sent to ‘natural persons.’ The only exception to this rule

is where the email address has been obtained in accordance with data protection law from the intended recipient of the email by the company intending to send the email. In order to benefit from the exemption, the marketing email must be for ‘similar products and services’ to that which gave rise to the ‘customer relationship’ in the first place.

This means that it is going to be difficult for companies and firms to send marketing emails lawfully unless opt-in consent has been obtained.

Where emails are sent
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New email rules—charities to suffer

Europe’s new email marketing laws are set to have a dramatic effect on charities. Under the new electronic communications rules, charities will be unable to send emails to donors and potential donors.

By sending emails about the work of the charity, including the good causes it supports and the projects it undertakes, a charitable organisation will be acting unlawfully. This is true even if the charity does not make a

direct request for donations—the reason is that Recital 30 of the European Data Protection Directive (95/46/EC) specifically includes non-commercial communications by charities in euro marketing laws.

Opinion 5/2004 of the Article 29 Working Party (see headline above and page 10) states that direct marketing and fund-raising appeals by charities are included in the new email marketing rules.

Charities are less likely than other organisations to be able to benefit from the exemption from the need to obtain prior opt-in consent for email marketing. The reason is that charities often do not provide a product or service to donors—the provision of a ‘similar product or service’ is essential to the availability of the exemption.

The only way that charities could continue to send marketing emails
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