A guide to the law on e-mail marketing in Europe

Do you intend to run e-mail marketing campaigns to electronics companies in Europe, but worry about how to comply with the law? Many marketers are concerned that, by e-mail marketing to customers and prospects in Europe, they will break 'privacy' or 'spam' laws, and face fines or other punishment. This e-guide tells you what you need to know, and where to go for comprehensive legal information on the topic.

Fortunately, the law on e-mail marketing in Europe is derived from just one main source: European Commission directive 2002/58/EC. (The European Commission is the closest thing the European Union has to a 'government'.) From here, however, things become more complicated. This is because the EC directive is implemented in law at the nation state level – and there are 27 member states of the EU. So, in the UK for instance, the EC directive finds its expression in the 'Privacy and Electronics Communications (EC Directive) Regulations 2003' – commonly known as PECR.

This e-guide uses the UK as an illustrative example of the law on e-mail marketing in Europe; it does not exhaustively describe the implementation of the EC directive in all 27 member states. This is a useful approach: the law in every European Union (EU) country will be fairly similar, since it is derived from the EC directive.

But it should also be said that every EU country has made up its own mind how to interpret and implement the directive – and some have taken a less relaxed approach to business-to-business e-mail than the UK.

What you can and cannot do under the PECR
Responsibility for enforcement of the UK’s PECR, and for action to punish those who fail to comply with it, rests with a government body, the Information Commissioner’s Office.

The first thing to be clear about is that PECR applies to you if you send any sort of direct marketing communication by electronic means:
'electronic means' include telephone, fax, SMS and video message as well as e-mail. In other words, whatever kind of UK e-marketing campaign you are planning, assume you need to comply with PECR.

The regulations in relation to business-to-business (B2B) e-mail marketing, however, are significantly different from those that apply when marketing to ‘individual subscribers’ (that is, consumers or one-person businesses).

Under PECR, e-mail marketing to consumers is tightly controlled in relation to the permission you need before sending your message. You can e-mail consumers who have specifically asked you to e-mail them (‘solicited’ e-mail). And you can e-mail them if they have previously consented to you sending them messages they have not specifically asked for. There are strict guidelines about what ‘consent’ means, but in essence the consumer should have consciously, knowingly and explicitly agreed to let you e-mail them. The so-called ‘soft opt-in’ also lets you e-mail consumers who have initiated a commercial relationship with you (for instance, by asking you to quote them a price on a product or service).

The consumer has the right at any time to opt out of your communications, and you must abide by this opt-out immediately.

What the PECR says about e-mail marketing to company contacts
In the UK, none of these rules about consent and permission applies to B2B e-mail marketing.

The PECR describes B2B campaigns as marketing to ‘corporate subscribers’ – that is, where the e-mail address belongs to a corporate entity. In any e-mail campaign to employees or officers of a company, you must:

- disclose your company’s identity to the recipient
- give the recipient a valid address through which they can opt out of your marketing messages. This can be an e-mail address, but it is also considered good practice to allow people to opt out of your marketing via your website.

Fail to do these things, and you will be breaking the law.

But under PECR, you are under no obligation to obtain the consent of the recipient of B2B marketing e-mails before you send them - that is, messages where the recipient’s address is a corporate e-mail account (such as sample.person@tko.co.uk). Strangely, even e-mail marketing universally recognised as spam, such as mass broadcast e-mails promoting Viagra, is allowable under PECR, as long as the addressees are corporate e-mail accounts.

A note of caution, however. Before you stop worrying entirely about whether your e-marketing can be seen as ‘spam’, you should remember that data protection laws also apply to B2B marketing. A European Commission directive on data protection gives every individual – and this includes employees of organisations – the fundamental and enforceable right to opt out of receiving marketing material. You also require the consent of any individual to process their data – and this would include, for instance, running a filter that puts their name in a list for an e-mail campaign. As said above, this data protection law only applies when your e-mail campaign involves the use of personal data – in other words, when you know at least the name of the person that the e-mail address belongs to.

So you will be breaking the law if you continue to send B2B marketing messages to the e-mail address of any named individual if that individual has asked you not to use the address for marketing. Also, you must not use an individual’s name or data in a marketing database without consent. But in both cases, the law you will be breaking in the UK is the Data Protection Act rather than the PECR regulations on e-mail marketing.

It is, of course, possible to run e-mail marketing campaigns without holding any personal data – you could, for instance, broadcast to a list of e-mail addresses without knowing the names of the people those e-mail addresses belonged to. In this case, data protection laws would not apply to your campaigns, and you could, from a legal point of view, safely send e-mails in this way.

But from a marketing point of view, this is spam, pure and simple, even if it is legal. Skilled marketers run e-mail marketing campaigns to known customers and prospects. In this case, you will need to comply with the data protection laws of whichever country you are operating in.
Is the law elsewhere in Europe the same as the law in the UK?
Each member of the European Union enacts the EC’s directive separately, and some European countries have interpreted the directive’s rules about e-mailing to ‘corporate subscribers’ differently from the UK. Similarly, each European Union country has its own data protection law. Again, like the UK’s, this will be based on EC directives, but each member state can interpret directives in its own way.

So while the laws on e-mail marketing across Europe are derived from pronouncements in Brussels, in practice the law is not the same everywhere in Europe. To make absolutely sure that you comply with the law, you will need to study the law for each country in which your campaign is to run. The ‘Resources’ section below lists a useful guide to the law published by the Direct Marketing Association in the US.

A more practical approach, however, is simply to follow best practice in e-mail and direct marketing as laid down by professional bodies such as the DMA in the US, the Direct Marketing Association in the UK or the Institute of Direct Marketing. Best practice exceeds the minimum standards for respect of data rights and privacy laid down in the law.

These simple principles are common to the best practices outlined by these direct marketing organisations:
• Gain explicit consent from your intended recipients before sending e-mail marketing messages to them. Do not assume that consent for one type of message gives you blanket permission to send any other type of message. Keep to the spirit as well as the letter of the consent.
• When you gather data from customers and prospects, tell them why you are gathering it, and what you plan to do with their data. Ask their permission to use their data.
• Comply immediately with individuals’ requests for you not to use their data, or to see what data you hold on them.
• Comply immediately with individuals’ requests for you not to send marketing messages to them.
• Treat your customers and prospects as you would wish to be treated yourself.

More Resources
UK government body the Information Commissioner’s Office (www.ico.gov.uk) publishes an excellent document, Guidance for marketers on the Privacy and Electronics Communications Regulations 2003, the law that applies in the UK. It is freely available at the ICO’s website.

A comprehensive guide to the international law on e-mail marketing, the International Email Compliance Resource Guide, is published by the US’s Direct Marketing Association (DMA). You can purchase it online at www.the-dma.org for $240. It gives guidance to the law on e-mail marketing in most of the world’s developed countries, including the UK, Germany, France, Italy and Sweden.

The Direct Marketing Association in the UK publishes useful ‘Best practice’ guides on many topics, including e-mail marketing.