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Digital Marketing and Privacy

Introduction

Digital marketing campaigns can be very important for increasing brand awareness and for creating valuable databases. These campaigns must, however, be conducted with care in order to comply with strict legislation.

Legislation, Regulation and Enforcement

The main piece of legislation covering the sending of electronic marketing communications is the Privacy and Electronic Communications (EC Directive) Regulations 2003¹ (“the Regulations”) which came into force on 11 December 2003. The Regulations apply to all companies and other organisations that send out marketing communications by telephone, fax, automated calling system, email, SMS, picture (including video) messages or using any other form of electronic communication.

Also relevant to advertisers sending e-mail and other electronic marketing communications are the provisions of the Data Protection Act 1998² and the Consumer Protection from Unfair Trading Regulations 2008³ (“the CPRs” - which are discussed in detail in a separate ReACTS Ad Guide).

Advertisers must also comply with the Section 10 of the CAP Code⁴ which deals with database and consent based marketing.

The Information Commissioner is primarily responsible for matters involving data protection, privacy and electronic communications. His Office produces guidance on all the areas covered in this note, and more.⁵

What does the CAP Code require?

Under the provisions of section 10 of the CAP Code, when an advertiser is sending any electronic marketing messages by e-mail or SMS etc, whether to a business or an individual, the message should:

- Clearly identify the advertiser as the sender (with the advertiser’s name in the “From” field)
- Make clear it is a promotional message without the need to open the message
- Include a valid e-mail address for the recipient to unsubscribe from any future communications.

What does the Data Protection Act require?

The Data Protection Act 1998 provides that advertisers must process personal data (which includes e-mail addresses) fairly and lawfully and in compliance with certain conditions. It is a requirement when collecting e-mail addresses and other personal data, such as mobile phone numbers, to make clear who is collecting the data and the purposes for which the data is being collected.

What do the E-commerce Regulations provide?

Section 22 of the Regulations provides that advertisers cannot send unsolicited marketing communications by e-mail or SMS to individual subscribers unless the recipient has given his or her prior consent to receiving them – i.e. that they have “opted in” to receiving the marketing.

The Regulations apply to individual subscribers and not to corporate subscribers. Any e-mail sent to a corporate address (e.g.name@company-name.com) is outside the provisions of the

Client Alert 10-129

June 2010

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1. See www.opsi.gov.uk/si/si2003/20032426.htm
 2. See www.opsi.gov.uk/acts/acts1998/ukpga_19980029_en_1
 3. See www.opsi.gov.uk/si/si2008/draft/ukdsi_9780110811574_en_1
 4. See www.cap.org.uk/The-Codes/CAP-Code.aspx
 5. See www.ico.gov.uk

Regulations. Advertisers can therefore send unsolicited commercial messages by e-mail or SMS to company employees at their office e-mail address, until such time as the recipient chooses to opt-out. Advertisers should be aware that the e-mail addresses of employees of partnerships and sole traders are not regarded as business addresses, but as private ones, so in these situations, advertisers should comply with the same requirements as for when they are contacting consumers. These are the subject of the remainder of this Ad Guide.

Opt In v Opt Out

An “opt-in” usually refers just to a tick box. If an individual ticks a box, then they are opting in to being contacted or having their details used for the specified purpose. If the individual fails to tick the box, the company cannot use the individuals’ details for that form of marketing.

This contrasts with an “opt-out”. In this case, if the individual fails to tick the box provided indicating that they do not want to be contacted, the advertiser is permitted to contact them. The benefits of opt-out over opt-in are obvious: where the default position presumes the right to market, the advertiser can reach a much wider audience and has a much higher potential response rate. It is important, however, for advertisers to acknowledge that a failure to tick an opt out box does NOT indicate prior consent: if “prior consent” is required, an opt-out tick box is not appropriate.

What is meant by “Prior Consent”?

The Regulations require “prior consent” for electronic marketing messages. “Prior Consent” requires a positive action by the intended recipient to be made to indicate their agreement to receive communications. It has a wider definition than a simple “opt in”. While an opt-in tick box is certainly one way of demonstrating a user’s consent, it is not the only way.

One legitimate way to obtain consent would be to present an individual with a prominent notice which states that by providing their contact details the user consents to the receipt of unsolicited marketing emails. It is important to ensure that such a statement is drafted correctly in order to ensure that, when submitting their details, the user recognises that they are giving consent to receive marketing messages and also that it is clearly brought to their attention.

An example of such a statement would be a statement prominently situated by a signature request or a “Submit” button which says: *“By submitting this form, you consent to receive e-mail marketing messages from us”*. Any future message must carry an unsubscribe option.

Are there any exceptions to the requirement for prior consent?

There is one exception to the general requirement to obtain prior consent for e-mail and SMS marketing messages. This is known as the “soft opt-in” exception. Under this exemption, a company may send messages by electronic mail without prior consent where:

- the e-mail or SMS address has been obtained by the company in the course of a “sale or negotiations for the sale of a product or service”, and
- the marketing is in respect of a company’s “own similar products or services”, and
- the recipient has been given a simple means of refusing use of his or her details (i.e. an easy way to opt out) at the time the data has been collected, and continues to be provided with such a means at the time of each subsequent communication

What does this mean?

The Regulations do not define what is meant by the phrase ‘in the course of a sale or negotiations for the sale of a product or service’ or what constitutes ‘similar products and services’? However, the Information Commissioner has published guidance on the interpretation of these statements.⁶

“In the course of a sale or negotiations for the sale”

The ICO guidance states that a sale does not need to have been completed for this definition to apply. The guidance goes on to state that where a person has actively expressed an interest in purchasing a company’s products and services, then this will clearly qualify as a “negotiation for the sale of a product or service” provided the individual have not opted out of receiving communications. By way of example, a query about the price of a product would probably count as the negotiation for the sale, but a query about where a store is located would not.

“Similar products and services”

The guidance states that the Information Commissioner will take a “purposive” or pragmatic approach to the interpretation of this phrase. The intention is to ensure that a consumer does not receive promotional material about products and services that they would not reasonably expect to receive. The guidance note gives the example of a consumer who has shopped online

6. See www.ico.gov.uk/upload/documents/library/privacy_and_electronic/introductory/rules_-1.pdf

at a supermarket's website (and has not objected to receiving further e-mail/SMS marketing from that supermarket). In such a scenario, the view is that the consumer would reasonably expect at some point in the future to receive further emails promoting the diverse range of goods available at that supermarket.

Since customers would be entitled to opt out of future messages, the Information Commissioner has indicated in the guidance that they will focus primarily on any failures by advertisers to comply with opt out requests rather than whether the messages are in relation to similar products or services or not.

Unsubscribe options

Advertisers should always include in all electronic marketing messages an easy and free method to enable the user to opt-out (or "unsubscribe") from receiving future marketing messages. The details of individuals who do opt out should be suppressed not deleted, so that advertisers can comply with good data protection housekeeping by checking any new marketing details acquired against this list. If a user does unsubscribe, an advertiser must ensure that they do not send any further marketing communications.

The unsubscribe option should be free and straightforward, so a valid e-mail address in an e-mail marketing message would be acceptable, but a telephone number, whether free or not, would not be, as this may not be convenient for the recipient.

The Information Commissioner has explained that this obligation to include an unsubscribe option cannot be avoided, despite complaints by some text marketers that there is insufficient text character space available to do so. Text marketers should still include the name of the advertiser and an easy way to unsubscribe such as "ABCLtd2STOPMSGSTXT'STOP'TO" (then add a 5 digit short code).

Can advertisers offer "Recommend a Friend" marketing?

There are two types of "recommend a friend" schemes which advertisers like to try to use in order to promote their products or services more widely, often in the mistaken belief that this avoids the requirement for obtaining prior consent. The first of these is to ask individuals who are on the advertiser's mailing list to provide the e-mail addresses of friends so that the advertiser can send marketing e-mails direct to them. The second method is to ask the friend to forward on the advertiser's marketing message themselves. Either or both of these requests could be incentivised. Both these types of requests are basically unacceptable.

- a) In the first case, the advertiser cannot send e-mail marketing messages without knowing for certain that it has the prior consent of the recipient. The advertiser cannot presume that consent has been obtained by the initial individual. Furthermore, the advertiser cannot simply e-mail the individuals on the list provided asking for consent: that e-mail in itself is a marketing message and thus requires prior consent.

However, if advertisers do wish to try to carry out this approach, they must ask their initial contact to confirm that all the potential recipients on the list provided have given their consent to receive the message from the advertiser. This is a very risky thing to do, particularly if there is an incentive offered. Relying on the initial individual's word would not prevent an advertiser being held liable if a complaint were made by a recipient who had not in fact given consent.

- b) In the second case, the advertiser would be breaking the law by encouraging the individual to send marketing communications without prior consent. It is irrelevant for the purposes of the Regulations that the e-mail does not come direct from the advertiser: it is still regarded as an unsolicited marketing communication if the advertiser has encouraged the individual to forward the message, whether by way of an incentive or not. The advertiser, as the instigator of the message, remains liable.

If the recipient individual decides to send on the communication without encouragement, then there is little that the advertiser can do about it, but it is wise to advise customers only to forward emails to those that they are certain are happy to receive them.

Although not strictly the same point, advertisers are also reminded that, when buying database lists from third parties, they should always ensure that the relevant prior consents have been given to receive electronic messages. Furthermore advertisers are advised to obtain a warranty to that effect from the seller.

Bluetooth

There has been some debate in the past as to whether the Regulations apply to Bluetooth communications. Initially the Information Commissioner had suggested that they were, but he later retracted that view and stated that Bluetooth communications were not covered by the Regulations, because Bluetooth does not use a public electronic communications network.

Whilst this may be beneficial for marketers, concern had been expressed that such a ruling might give rise to an increase in 'Bluetooth spam'. However this appears not in fact to have occurred, and indeed the use of Bluetooth technology appears to be less common than originally envisaged.

Marketing across Europe

Each individual country within the European Union has been allowed to implement the EC Directive (2002/58) in its own way, and many have stricter regimes than the UK. Advertisers of pan-Europe campaigns must therefore check how each individual country has implemented the Directive before commencing the campaign.

Final Thoughts

Get them right, and digital marketing campaigns can be a great success: advertisers can have brand conversations with targeted consumers and generate goodwill and sales more positively than other forms of traditional marketing. Get them wrong, though, and brands can be damaged by associating themselves with spamming.

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Client Alert 10-129

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