



## **Why unsolicited B2B emailing is likely to require consent**

Many businesses have come to depend upon email broadcast as a key tool in their direct marketing. This makes perfect sense, it's quick, clean, and above all it's cheap. But that may soon have to change.

### **The Legal Background**

The current law governing direct marketing emails is 'The Privacy and Electronic Communications (EC Directive) Regulations 2003' – we call it PECR. Notice the 'EC Directive' part of the name, this is because this is the UK implementation of European Directive 2002/58/EC, the 'Directive on privacy and electronic communications'<sup>1</sup>, also known as the 'ePrivacy Directive'.

PECR adds extra specificity to the Data Protection Act 1998 (DPA), which is the underlying data protection legislation. Also, DPA is the UK implementation of 'Directive 95/46/EC'<sup>2</sup> from the EU,

### **Types of EU law**

There are 2 types of law which come from Europe, a Directive and a Regulation. A Directive is an EU instruction to the member states to implement their own laws to meet the requirements, meaning the member states interpret the law. A Regulation is a law that is implemented by member states exactly as is, without interpretation.

So our current data protection laws are UK interpretations of the laws, and France has its own, and Germany, and so on. This leads to confusion for organisations working in multiple territories, and it leaves the possibility of exploitation of the differences for potentially unscrupulous ends. Consequently the EU is updating data protection laws from Directives to Regulations.

### **EU data protection law update**

The EU has already updated the 'general' underlying law, the equivalent of the DPA. The new law is the 'General Data Protection Regulation'<sup>3</sup> (GDPR). It is already on the UK statute book, introduced on 25<sup>th</sup> May 2016, and comes into force on 25<sup>th</sup> May 2018, when DPA will be repealed.

The EU also intends to update the ePrivacy law, by issuing an 'ePrivacy Regulation' to supersede the 'ePrivacy Directive', implemented as PECR.

It had been the intention to also implement the new 'ePrivacy Regulation' on 25<sup>th</sup> May 2018, to keep it in line with GDPR, however this time-line looks increasingly likely to slip.

But whenever it becomes law, it is this update which might require consent for all direct marketing emails, including B2B.



## Changes from the Directive in the proposed Regulation

The ePrivacy Directive talks about 'users', 'subscribers' and 'data subjects' and it is not always clear what was intended.

The ePrivacy Directive covers unsolicited communications in Article 13. This basically says that consent is required, however, it also talks about protecting the legitimate interests of companies, though it does not state if that is to SEND, or to NOT RECEIVE unsolicited communications. PECR has interpreted this, and has not required consent for sending emails to people in their professional role.

In the proposed 'ePrivacy Regulation'<sup>4</sup>, unsolicited communications are covered in Article 16.

Article 16.1 is much more explicit stating emailing to 'natural persons' must be on the basis of consent.

Article 16.5 is more specific than the Directive, saying legal persons must also be protected, although it is still not clear what is meant.

This imprecision is addressed in comments on the draft.

## Comments on the proposed Regulation

There have been 3 substantial comments from EU departments about the draft, from the Article 29 Working Party<sup>5</sup> (WP29), European Data Protection Supervisor<sup>6</sup> (EDPS) and from the Civil Liberties, Justice and Home Affairs Committee<sup>7</sup> (LIBE).

LIBE has published a full document including the feedback from WP29 and EDPS. It never suggests 'unsolicited direct marketing communications', including email, to companies should be permitted, quite the reverse. It recommends Article 16(1) should be extended to:

*protect legal person against direct marketing communications without consent.*

Further, they report on ambiguity in Article 16(5) and say it should not 'lower the level of protection', it should be clarified to provide:

*the same level of protection, in the context of unsolicited communications, to legal persons and natural persons.*

Every comment approves of this being a Regulation, to avoid the possibility of flexible interpretation.

## Intention of the proposed Regulation

The comments on the proposed law clearly show the intentions of the lawmakers, which is to make unsolicited direct marketing communications like email only legal when there is consent.

To us Brits this seems odd. We, generally, have a fairly laid back approach to direct marketing and it's tempting to think everyone else must be the same. But that simply



isn't true. There are significant cultural differences in Europe. In France, and many other southern European countries, typically people do business with people they know well. They shake hands, hug, kiss cheeks and so forth, as part of regular everyday transactions.

Our 'commodity' based purchasing, choosing the lowest priced similar product, seems as strange to an Italian, as we find the idea of a Frenchman buying petrol for years from his friend, even though it is always much more expensive than the other petrol station in the village.

It's not that there is no place for direct marketing, but the whole commercial process is viewed very differently elsewhere in Europe, and direct marketing is not integral.

## Conclusion

The intention of GDPR and the ePrivacy Regulation are clear, giving data subjects control over how their personal data is processed, including for direct marketing. Clearly there is no proposal to weaken the protections afforded by GDPR.

It seems unlikely the ePrivacy Regulation will be amended to allow for emailing to people at work as PECR has done, at least in part since it doesn't really seem that was the original intention of the Directive either.

Finally, it is becoming increasingly likely the ePrivacy Regulation will not arrive at the same time as GDPR. This would mean PECR continues to be the law in force, and would allow email to people in their work to continue. But this is temporary.

Direct marketers should prepare themselves for unsolicited commercial email to require consent.

## References

1. <https://corpdata.co.uk/doc/ePrivacy-Directive.pdf>
2. <https://corpdata.co.uk/doc/Directive-95-46-EC.pdf>
3. <https://corpdata.co.uk/doc/GDPR-Regulation.pdf>
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