

# Email Marketing and the Law

[www.emailtools.co.uk](http://www.emailtools.co.uk)

## 1. Introduction

New rules regulating and restricting the sending of direct marketing e-mails and SMS messages were supposed to come into force on **31 October 2003**. In fact, the *Privacy and Electronic Communications (EC Directive) Regulations 2003* were only laid before Parliament on **18 September 2003** and will not come into force until **11 December 2003**. Therefore, it is important that those involved in email marketing are aware of the likely changes to the law.

However, before we establish what changes are going to occur, we need to remind ourselves of how the law stands now.

## 2. Overview of Data Protection Law

### (a) Data Protection Act 1998:

New definition of “Personal Data”  
New concept of “Sensitive Data”  
New concepts of “Data Subject” and “Data Controller”  
New definition of “Data Processing”

### (b) Remember: "personal data" means data which relate to a living individual who can be identified-

- (i) from those data, or
- (ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

### (c) Notification requirement (see [www.dpr.gov.uk](http://www.dpr.gov.uk))

### (b) Data Protection Principles (see [www.dataprotection.gov.uk](http://www.dataprotection.gov.uk)) - anyone processing personal data must comply with the eight enforceable principles of good practice. They say that data must be:

- fairly and lawfully processed;
- processed for limited purposes;
- adequate, relevant and not excessive;
- accurate;
- not kept longer than necessary;
- processed in accordance with the data subject's rights;

- secure;
- not transferred to countries without adequate protection (*safe harbour*).

(c) Remember: **CONSENT IS KING.**

### 3. Direct Marketing – Existing Regime

- (a) Legislation:
- Telecommunications (Data Protection and Privacy) Regulations 1999; and
  - Telecoms Data Protection Directive 1997.
- (b) Telephone Preference Service (opt-out for individuals):
- See [www.tpsonline.org.uk](http://www.tpsonline.org.uk)
  - Requirement for caller information to be provided.
- (c) Fax Preference Service:
- Opt-in for individuals
  - Opt-out for corporates
  - See [www.fpsonline.org.uk](http://www.fpsonline.org.uk);
  - Requirement for sender information to be provided.
- (d) Opt-outs can be private (as between an individual/corporate and a particular marketer) or public (via the TPS or FPS) so remember to ‘List Clean’.
- (e) Email marketing not specifically addressed.

### 4. Direct Marketing – New Regime

- (a) Legislation:
- Directive on Privacy and Electronic Communications 2002 – adopted by EU Parliament on 12 July 2002, supposed to be transposed into UK law by **31 October 2003**.
  - **Spring 2003** – A consultation process followed the publication of draft UK Regulations with deadline of mid June for comments.
  - **18 September 2003** – Regulations laid before Parliament.
  - **11 December 2003** – Regulations come into force in the UK.
- (b) Changes:
- Replaces Telecommunications (Data Protection and Privacy) Regulations 1999 (but keeps the same rules for telephone and fax marketing EXCEPT that now corporate subscribers can opt-out of receiving unsolicited telephone calls);
  - Extends controls on unsolicited direct marketing to unsolicited commercial email (“UCE”) and SMS messages; and
  - UCE to *individual subscribers* requires *prior consent* (opt-in), notified to the *sender* except in the context of some *existing*

*customer relationships* and provided always that the identity of the sender is clear and the recipient is given an address that he/she can contact to withdraw their consent.

(c) *Individual Subscribers:*

- If an email recipient is not an individual subscriber the harsh ‘opt-in’ principle does not apply.
- “individual” means a living individual and includes an unincorporated body of such individuals; and
- “subscriber” means a person who is a party to a contract with a provider of public electronic communications services for the supply of such services.
- According to the DTI “The rationale for this is that business/corporate subscribers do not always need the same level of protection as individuals, and safeguards justified for business-to-individual transactions could be unnecessarily burdensome to business-to-business dealings.”
- Examples:
  - Individual subscriber email address: [j.smith@hotmail.com](mailto:j.smith@hotmail.com); and [j.smith@bowyogaclub.com](mailto:j.smith@bowyogaclub.com)
  - Corporate subscriber email address: [j.smith@acmeindustries.com](mailto:j.smith@acmeindustries.com)
  - What about: [j.smith@fancifulname.com](mailto:j.smith@fancifulname.com)?
- Remember: Data Protection Principles still apply to most email addresses.

(d) *Prior Consent:*

- the recipient of the electronic mail has previously notified *the sender* that he consents for the time being to such communications being sent by, or *at the instigation of*, the sender for direct marketing purposes.
- Regulations are not clear about whether or not indirect notification to a definite sender (via a third party) amounts to a sufficient notification.
- Regulations are not clear about whether or not notification to unspecified senders amounts to a sufficient notification.
- Regulations are not clear about what “*at the instigation of*” means. A narrow interpretation would be that a sender can use a third party ISP to send the sender’s emails. A wide interpretation would be that a sender can permit third parties to send emails (although this wider interpretation defeats the purpose of the Regulations).

(e) *Existing customer relationships:*

- If an individual subscriber has not previously notified the sender that he consents to direct marketing emails being sent, you may still send them provided that you have a qualifying *existing customer relationship*.
- There will be a qualifying *existing customer relationship* if:

- (i) you have obtained an email address of an individual in the course of the sale *or negotiations for the sale* of a product or service to that individual;
  - (ii) the direct marketing is in respect of your products or services and those products/services marketed are 'similar' to those previously provided (the DTI have indicated that this means they are the kind of products/services that the individual would have expected the marketer to provide);
  - (iii) at the time that the individual provided his/her details to you they had an opportunity to refuse to allow you to use them for direct marketing purposes but did not so refuse;
  - (iv) the identity of the sender is clear; and
  - (v) the individual is given an address that he/she can contact to withdraw their consent.
- (f) Cookies:
- Cookies or other electronic information accessing techniques are permissible provided users are:
    - (i) provided with clear and comprehensive information about the purposes of the storage of, or access to, such information; and
    - (ii) given the opportunity to refuse the storage of or access to such information.
  - Where a user comes back to a website it is not necessary to repeat the information/opportunity mentioned above, provided that it was provided to them the first time that they visited the site.

## 5. Advertising Standards Authority

- (a) The old code (The British Codes of Advertising and Sale Promotion Edition 10) did not attempt to regulate email direct marketing to any significant extent.
- (b) The new code (The British Code of Advertising, Sales Promotion and Direct Marketing Edition 11) expressly covers email direct marketing.
  - The new code was published on 4 March 2003 and took effect on 4 June 2003.
  - The new code was developed in conjunction with The Direct Marketing Association (see [www.dma.org.uk](http://www.dma.org.uk)).
  - The new code essentially requires direct marketers to comply with data protection law, distance selling law and the Privacy and Electronic Communications (EC Directive) Regulations (mentioned above).
  - See [www.asa.org.uk](http://www.asa.org.uk)
- (c) The ASA is essentially the advertising industry's self-regulating authority. Their Codes and decisions do not have any legal effect and their primary method of penalising breaches of the Code is public censure.

6. Trading in Email Data (list owners position)

- (a) Legislation: Copyright, Designs and Patents Act 1988; and The Copyright and Rights in Databases Regulations 1997.
- (b) Copyright will not normally subsist in a database of contact information unless the selection or arrangement of the data “constitutes the author’s own *intellectual* creation” (as opposed to just author’s hard work).
- (c) Database right will subsist in a database of contact information if you can show that there has been “a substantial investment in obtaining, verifying or presenting the contents of the database”. Therefore, care should be taken to keep a careful record of exactly how much time and money goes into the creation, updating and presentation of a database (as opposed to its exploitation).
- (d) Database right is infringed if a person extracts all or a substantial part of a database *or* systematically extracts insubstantial parts of a database without the consent of the owner of the database.
- (e) Remember to ensure that if anyone uses your database they do so under the terms of a licence.
- (f) The position outside of the EU varies and in many territories (including the US) the protection afforded to databases is minimal.

***Disclaimer: This guide is intended to serve as general guidance only and should not be regarded as legal advice. Readers should take independent legal advice on specific issues concerning the new and the old legislation before placing any reliance on this guide.***

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<http://www.emailtools.co.uk/resources.htm>

**FARRER & Co**

66 Lincoln's Inn Fields  
London, WC2A 3LH

Tel: (00 44) (0) 207 242 2022  
Fax: (00 44) (0) 20 7917 7293  
Web: [www.farrer.co.uk](http://www.farrer.co.uk)

## Email Marketing & The Law

Are you sending an email to a corporate subscriber?	√	Regulations do not apply so email marketing to the recipient is permitted (but Data Protection Principles will probably still be relevant)						
	X	Has the recipient given <i>you</i> his/her prior consent to the sending of marketing emails?	X	Have you obtained the email address of the recipient in the course of the sale or negotiations for the sale of a product or service to that recipient?	X			
			√	Provided that the identity of the sender is clear and the recipient is given an address that he/she can contact to withdraw their consent, email marketing to the recipient is permitted	√	At the time that the recipient provided his/her details to you, were they given the opportunity to refuse to allow you to use them for direct marketing purposes and did not so refuse?	X	
							√	Is your marketing email in respect of the same or similar goods/services to those that you have provided to the recipient previously (or told them that you provide)?
							X	Provided that the identity of the sender is clear and the recipient is given an address that he/she can contact to withdraw their consent, email marketing to the recipient is permitted

Email marketing to that recipient is not permitted

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