



International Chamber of Commerce

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Department of Policy and Business Practices

Commission on E-Business, IT and Telecoms

Task Force on Protection of Personal Data

ICC comments for the second Parliament reading of the proposal for a European Union Directive on processing personal data and the protection of privacy in the electronic communications sector

Summary

This short Memorandum expresses the concerns of the International Chamber of Commerce (ICC) with the Common Position adopted by the Council of the European Union Telecom Ministers (issued 21 January 2002) on the proposal for a European Union Directive on processing personal data and the protection of privacy in the electronic communications sector.

The protection of personal privacy is an important issue for industry, consumers, and governments. While the ICC fully supports the aim to stop unwarranted invasions of personal privacy via electronic communications, the ICC does not support the approach in the Council's Common Position insofar as it concerns unsolicited e-mail communications, cookies, directories, and data storage.

Unsolicited Commercial E-Mail Versus 'Spam':

Much of the concern, from the ICC's perspective, is caused by the fact that the draft Directive does not contain a definition of what is meant by "unsolicited commercial communications". A distinction must be made between unsolicited commercial e-mail and 'spam' email messages, which the ICC would regard as untargeted sending of commercial e-mails from sources that disguise or conceal their identity in order to deceive an Internet user, or that may use false titles to e-mails to mislead the recipients to open them. If this Directive were aimed at 'spam', then the international business community would have far fewer concerns in relation to Article 13.

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However, the lack of definition means that the phrase could be given a very wide construction, which goes far beyond what is necessary to outlaw 'spam' and, in so doing, will have a negative effect on existing commercial practices which are both legitimate and perfectly legal within some Member States.

Article 13 of the proposed Directive seeks to curb all unsolicited e-mail in an effort to combat the problems associated with 'spam' by imposing a blanket prohibition in all cases where the recipient has not affirmatively expressed a prior consent to receive these types of messages (i.e. recipient has not 'opted-in'). However, it should be recognized that an 'opt-in' approach would have no impact on 'spam', as spammers operate outside the law, respecting neither 'opt-in' nor 'opt-out' rules. On the other hand, it would have a chilling effect on the ability of legitimate businesses, particularly small and medium, to both maintain and expand their customer bases through the responsible, targeted use of innovative marketing techniques made possible by the Internet. Where employed appropriately, commercial e-mail can play a legitimate and significant role in the emergence and growth of electronic commerce. The measures proposed could hinder the growth of the Internet and e-commerce in Europe, and discriminate against e-mail vis-à-vis other means of communication.

ICC also appreciates concerns regarding the cost implications for users who have to pay for the time they are connected to the Internet and as such to receive and download unsolicited commercial e-mails. However, this is a rather short-term concern since increasingly the cost for Internet access is formulated based on fixed rates rather than metered ones. Broad band access also provides for rapid Internet connection and overcomes the concern of time spent while downloading e-mails. On the other hand, the vast majority of ICC members believe that consumers stand to benefit from the convenience and efficiency of receiving information about new offers from merchants via e-mail.

Therefore, ICC urges the Commission, European Parliament and Council of Telecom Ministers to (1) contemplate, instead of a blanket approach to the use of e-mail for direct marketing, an analysis of those aspects of 'spam' that are clearly objectionable to consumers and to seek to outlaw or criminalize such activity, (2) urge Member States to pursue violators of existing Community legislation by which objectionable 'spam' can be tackled¹, and (3) permit Member States choice between an 'opt-in' and 'opt-out' approach to unsolicited commercial e-mail.

¹ The Article 29 Data Protection Working Party has found that spammers act in contravention of relevant Community legislation. If an e-mail address were collected in a public space on the Internet, its use for electronic mailing would be contrary to relevant Community legislation for three reasons. Firstly, it could be seen as "unfair" processing of personal data in terms of article 6(1)(a) of the general directive. Secondly, it would be contrary to the principle of purpose, article 6(1)(b) of that directive, in that the data subject made his e-mail address public for quite a different reason, for example participation in a newsgroup. Thirdly, given the cost imbalance and the disruption to the recipient, such mailing could not be regarded as satisfying the balance of interest test of article 7(f), Opinion 1/2000 of the Article 29 Data Protection Working Party on certain data protection aspects of electronic commerce.
http://europa.eu.int/comm/internal_market/en/media/dataprot/wpdocs/wp28en.htm

ICC welcomes the Council of Minister's recognition to allow unsolicited commercial e-mails within the context of an existing customer relationship. However, it would not be appropriate to limit this relationship only within the context of a *purchase* of a similar product or service. There are cases where a user has manifested interest in a product or service, but has not actually purchased the product or service. Some products and services could be free of charge, such as information provided on-line. Such examples would include ordering an online catalogue, making inquiries on a particular product or service, and attempting to purchase a product that is not in stock. In these cases it would be of benefit to both the consumer and business, if information on other products and services could be sent to the potential customer. Therefore, ICC urges a modification of Article 13 (2) and Recital 41, which would permit sending unsolicited commercial e-mails to potential customers that have manifested interest in the company's products or services. Furthermore, there are outstanding questions regarding the restriction of unsolicited e-mails to *similar products and services*, namely because it is unlikely that a clear and unambiguous definition of similar products and services will be established. Therefore, we urge that the wording "similar" be dropped from the text.

At the very least, the word should be 'related' – so, a purchaser of a lawn mower could be approached with an extended warranty for that machinery or the manufacturer's recommended insurance or spare parts service.

Cookies:

ICC welcomes the Council of Minister's recognition that some devices that enter the user's terminal, namely cookies, can be a 'legitimate and useful web site tool' (recital 25) in order to distinguish them from other privacy intrusive devices such as spy-ware, certain types of web bugs and hidden identifiers.

Devices such as cookies are used for many simple, yet essential, functions for web sites. In this context, it is important to note that, cookies themselves do not collect personal information of visitors to a web site (or their machines). Cookies are able to match data to a living individual only when the user to which the cookie relates has provided the web site operator with personal information through a separate process, e.g. for registration purposes. The common use of "persistent" cookies, which are stored on a user's terminal equipment, is to provide the user with a personalized visit where the cookie eliminates the need for re-entering certain information such as language preference and log-in number – which is a considerable added value for the consumer. Other cookies, known as session cookies, do not permanently store or access data on the terminal equipment, but merely monitor which pages are visited and are deleted when the user logs off. Session cookies enable website owners to improve the design of the site by eliminating or changing unused pages and to assess the marketing value of the site but prove no threat to the privacy of web site visitors. This type of anonymous monitoring is also necessary to support the continuation of e-services as many free-to-user services are available only because they are funded from advertising revenue generated on sites.

ICC supports the principle of informing the consumer of the possibilities of personal data being processed and the principle of allowing users to refuse this processing, as stipulated in Recital 25 and Article 5 (3). However, ICC has concerns regarding the text adopted by the Council, which requires that these obligations must be complied with *before* the web site operator sends the cookie to the Internet user.

Such a requirement would lead to a more cumbersome and more complex web experience, as it would seem to require acceptance of cookies in the form of pop up windows. Users would be bombarded with such pop-up windows on every visit to every web site, which would make their Internet experience slow, limited and frustrating.

Web sites would have to be redesigned in order to accommodate the pop-up windows, which by itself would be an additional economic burden on web site operators. In addition, EU based web sites would be at a disadvantage compared with web sites located in third countries, as users would have a better and more efficient experience browsing non-EU-based web sites, which are not subject to the Directive.

Therefore, ICC finds the “in advance” requirement in Article 5 (3) and Recital 25 is unnecessary and disproportionate and urges its replacement with ‘timely’ or ‘prompt’. Such a formulation would avoid the above-mentioned negative consequences while providing the user with an adequate level of protection.

Directories:

An ‘opt-in’ requirement for use of subscriber data by third parties, as proposed by Article 12, is likely to prevent competitive directory publishers from obtaining listings published in telephone directories and making them available online. Competitive publishers often provide directories tailored to the unique needs of a specific geographic region or group of consumers, and the draft Directive would impede the ability to offer these products. Not only would this hinder the growth of legitimate businesses, but also it would unduly discriminate against Internet-based directories. A far more desirable approach would be to offer people the ability to “opt-out” of such a directory. We are encouraged by the lead Committee’s decision to adopt an opt-out regime for directories and urge the Commission, Parliament and Council of Telecom Ministers to include this amendment in the final text.

Data Storage:

ICC members fully support appropriate cooperation with law enforcement agencies to enhance security, being mindful of business realities. However, we believe that service providers should be required to preserve data in their possession only upon receipt of a subpoena (or written functional equivalent thereof) issued by a competent judicial or

administrative authority that follows appropriate due process, is narrowly tailored to meet the needs of a specific investigation or prosecution, is limited in duration, is conducted in an expedited way, and costs to service providers are reimbursed.

If it is considered necessary to amend the draft Directive in this respect, ICC suggests that the European Parliament confirms its previously adopted amendments to Article 15 (1) from the first reading of the Directive, thus ensuring that data preservation shall be entirely exceptional, shall be based on a specific law and shall be authorized by judicial or competent authorities for individual cases.

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