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The Future of PECR and its implications for B2b Email Prospecting?

Worried about whether it's legal to broadcast your business-to-business (b2b) email prospecting campaigns?

If you are, we've written the following guide to help you navigate your way through the current legislation but for those of you who would like an immediate response, the answer is **YES YOU CAN**.

The Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR) sets out rules about sending direct marketing and advertising messages by electronic means, such as by telephone, fax, email, text and picture or video message, or by using an automated calling system. PECR also includes other rules relating to cookies, telephone directories, traffic data, location data and security breaches.

The law as it currently stands, states that opt-in consent is **not** required for UK business to business (b2b) based prospecting campaigns subject to the restrictions highlighted below. Whereas, opt-in consent is required for the majority of b2b based campaigns into EU member states (excluding France and Rep. of Ireland). The confusion concerning b2b arises not only as a result of the legal position of the majority of the EU but also as a result of business to consumer (b2c) lead generation campaigns requiring opt-in consent.

Unsolicited, b2b email prospecting campaigns in the UK are however, subject to the following current restrictions:

- 1) All emails must incorporate a simple to use unsubscribe option i.e. opt-out.
- 2) Suppression files must be actively maintained and processed prior to conducting any email campaign.
- 3) The offer must be of a b2b nature i.e. consumer based offers are not permitted.
- 4) Targeting must be based on corporate subscribers only. Corporate subscribers are defined as companies with a legal status of either; Ltd, Plc, Llp, Scottish Partnership or government body. Please be aware that corporate subscribers does not include sole traders or partnerships (unless in Scotland) as they are deemed to fall under the b2c definition.
- 5) The offer should be relevant based on the nature of the business being targeted and the role the individual performs within that business.
- 6) In order to follow best practise guidelines, companies should not disguise or conceal their identity and all unsolicited communications should be inclusive of your mailing address and telephone number details in case the recipient would prefer to make contact with you other than via email

In January 2017 the European Commission published a draft of the new updated version of the PECR entitled E-Privacy Regulation (ePR), which was somewhat ambitiously intended to be introduced at the same time as GDPR (May 25th, 2018).

The original draft stated that opt-in consent was **not** required for b2b email marketing to corporate subscribers and so the status quo enforced under PECR (see restrictions above) would be maintained.

However, in October 2017 the European Parliament voted in favour of a revised text which accounted for far stricter controls over electronic communications. This is potentially really bad news for b2b companies as the text contains no reference to other legal bases for processing data under ePR and relies solely on consent. Additionally, b2b corporate marketing will be required to have an opt-in consent (as there is no distinction between b2b and b2c) and this will severely hamper businesses' abilities, especially SME's, to enter the market and be competitive.

In terms of the way forward, in order for the ePR to come into effect, the three parties of European Parliament, European Commission and the European Council need to agree on the final text. This would be achieved through up to two separate readings. If agreement still can't be achieved, conciliation will then be sought. Once finalised, the ePR is unlikely to come into effect until after a grace period had expired (as occurred with the GDPR) after which the legislation will finally appear within the 'Official Journal of the European Union'.

Whilst the ePR is a somewhat less detailed piece of legislation in comparison to GDPR, it is worth noting that it still took over 4 years to get GDPR agreed. Given the complexities highlighted above, commentators have confirmed that ePR won't be finalised until the first half of 2019 (at the earliest), although the second half of 2019 is more likely. B2b marketers should therefore seek to stay abreast of the developing legislation and be prepared to respond swiftly if needs be.

As of September 13th, 2018, the Direct Marketing Association (DMA UK) and the Federation of European Direct Marketing Association (FEDMA) together with over 70 organisations from across Europe are calling for EU policy makers and member States to review the implications of the draft ePR. The group has written to representations from all the Member States working on the ePR outlining a total of six concerns with regard to the current text and asking for more time to discuss those fully so as to reach a balanced framework. One to the six concerns relates to the need to clarify the rules for b2b marketing communications. The letter seeks to allow member states to have the flexibility to decide upon whether the consent is required for b2b marketing sent to end users who are legal persons and individuals in their professional capacities.

At the time of writing, we are not aware of any further updates.

This article was written on October 1st^h, 2018.

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Northwood House, Northwood, Shrewsbury, Shropshire SY4 5NN UK
Tel/Fax: +44 (0)1948 710236

E-mail: paulevans@paulevansassociates.com Web: www.paulevansassociates.com
Paul Evans Associates UK Limited Registered in England and Wales No: 11657510 VAT Registration Number 308 4995 71