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« Spamming » 24 questions & answers

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« Spamming » 24 questions & answers

The sending of unsolicited electronic mail, otherwise known as *spamming*, has reached worrying proportions. This document, which is conceived in the form of questions and answers, sets out the phenomenon as well as the regulations (of Belgian law) applicable to that issue.

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1. What is spamming ?

The term “spamming” is more often used than defined. There is a large variety of “spam”, to which different legislations apply (act on electronic commerce, privacy act, computer criminality act, acts on consumer protection, act on publicity for medicines, ...).

In the broad sense of the word it means sending unsolicited electronic messages. Although it is not systematically the case, the characteristics of spamming can generally be described as follows:

- the unsolicited messages are, sometimes repeatedly, sent in bulk;
- the communication often has a commercial purpose (promotion for a product or service);
- the addresses are often obtained without the owner’s knowledge (violation of the personal privacy regulations);
- on the one hand the message is often illegal, misleading and/or harmful and on the other hand the sender disguises his identity or uses a false one.

In a more narrow sense and within the meaning of the Act of 11 March 2003 on certain legal aspects of information society services (electronic commerce act), [loi du 11 mars 2003 sur certains aspects juridiques des services de la société de l’information](#), “spamming” means sending unsolicited commercial communications by electronic mail. Within the framework of this document that aspect will essentially be dealt with for it is part of a legislation that falls within the competence of the Federal Public Service Economy, SMEs, Self-employed and Energy, [Service public fédéral Economie, P.M.E., Classes moyennes et Energie](#), (hereinafter called FPS Economy).

2. What problems are inherent to « spam » ?

Spamming causes great dissatisfaction among internet users and, consequently, creates numerous problems.

Firstly, spamming entails considerable costs for all internet users (private persons, enterprises and service providers). These costs are notably linked to the time necessary to download this unsolicited electronic mail and, if need be, read and delete it, to the purchase of filtering software, to possible damage caused by a virus that has been spread through spamming, etc.. If sent in bulk, “spam” can also block electronic mailboxes, and even cause a network saturation.

Secondly, spamming is often considered as an intrusion on privacy, since it generally results from the “unauthorised” and unconsented collection of e-mail addresses of internet users.

Thirdly, “spam” is frequently illegal (for instance, forbidden publicity for medicines), deceptive (with a view to ripping-off the internet user) or harmful (e.g. a pornographic or an aggressive message received by children).

One of the most worrying consequences of spam is that it undermines user confidence in electronic mails, in the internet and, more generally, in electronic commerce.

In this respect we refer to a document published in July 2003 by the Privacy Protection Commission, in which the phenomenon of “spam” in Belgium is discussed. In October 2002 the Commission opened a “spambox” to which internet users could return unsolicited electronic communications that had been sent to them. In two and a half months 50 000 electronic mails were sent back. The Commission analysed the origin and content of those forms of “spam” and came to the following conclusion : the great majority of “spam” originates from the United States, whereas “spam” from Belgium, the European Union or Asia only represents a negligible part. “Spam” originating from the United States or the rest of the EU is mainly erotic, whereas “spam” from Belgium is more often of a financial nature. The document concerned can be downloaded on the website of the Privacy Protection Commission: <http://www.privacy.fgov.be/>.

3. How do “spam” senders know my e-mail address?

“Spam” senders can easily obtain your e-mail address in different ways.

First of all it is possible that you have communicated it yourself. When visiting a website in order to buy a product or a service, or when subscribing to a mailing list or a discussion forum, you are often asked to give personal data such as your name, geographic address ... and e-mail address. Often you are also asked to communicate the e-mail address of a relative or close friend. Those data are frequently re-used by the person to whom you have given them or by others to whom the first person has communicated them. Moreover, some providers of free electronic messages demand that you accept to receive commercial messages in return. Likewise, some offers for free internet access are linked to the willingness to receive commercial communications by electronic mail.

There are various methods to collect unauthorised or unconsented personal data: using software allowing to subscribe to a maximum of mailing lists in order to obtain the electronic addresses of their members; collecting electronic addresses automatically in public internet spaces (e.g. directories or search engines, your personal webpages, ...); using different fraudulent methods (e.g. fake competitions, ...).

There is also a real market of electronic mailing lists that companies put at people’s disposal (most often through leasing). It is also possible to obtain lists on the internet containing thousands of e-mail addresses that can be downloaded for a relatively modest sum of money.

Some of those collecting methods can pose problems with respect to the provisions of the Act of 8 December 1992 on the protection of individuals with regard to the processing of personal data, [loi du 8 décembre 1992 relative à la protection de la vie privée à l’égard des traitements de données à caractère personnel](#). The Privacy Protection Commission, which is competent in that matter, has already had the occasion to give opinions on that issue. We refer to the extensive information available on its site (<http://www.privacy.fgov.be/>).

4. Do advertisers have the right to send unsolicited commercial communications by electronic mail ?

In principle, they have not! According to article 14, § 1, of the [Act of 11 March 2003](#), [loi du 11 mars 2003](#), *the use of electronic mail for commercial purposes is prohibited without the prior, free, specific and informed consent of the recipient of the message*, in jargon called the *opt-in* principle.

Sending commercial messages by electronic mail (smtp, sms, voice mail) is not prohibited as such, but is subject to the prior consent (before sending the commercial e-mail) of the recipient of the message. **Not only should the consent be prior to the sending, it should also be:**

- **free** : the consent is not free if, for instance, a site does not offer the technical possibility to the internet user to tick the “no” box when his consent is asked for or simply if the “yes” box is pre-ticked!, or if a person is penalised for refusing to receive commercial electronic mail by denying him access to a product, a service, a discount coupon, a gift, etc.. Neither can presumed consent in the absence of a reaction within a certain time limit be considered as free ;
- **specific** : the consent must directly and particularly be given by the person in question, but also specifically imply the acceptance to receive commercial electronic mail from a particular provider for the category(ies) of specified products ;
- **informed** : when asking for his consent, the internet user must receive sufficient information about the fact that his e-mail address has been collected with a view to using it for commercial purposes. In this context it can reasonably be presumed that this condition is not fulfilled when the aforementioned information has been diluted in general conditions : it is recommendable to provide for an *ad hoc* box to tick and, if necessary, to refer clearly to a specific provision of the general conditions for the additional information.

However, the principle of prior consent is not absolute, for electronic mail can be used to send commercial messages - without prior consent – within the framework of two exceptions provided for in article 1 of the [Royal Decree of 4 April 2003 regulating the sending of advertising material by e-mail](#), [l'arrêté royal du 4 avril 2003 visant à réglementer l'envoi de publicités par courrier électronique](#) (*cf. infra*).

5. What is meant by “electronic mail” ?

Attention should be paid to the large definition of “electronic mail” given by the legislator. According to article 2, 2° of the [Act of 11 March 2003](#), [la loi du 11 mars 2003](#), « electronic mail » means : “*any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient’s terminal equipment until it is collected by the recipient.*”.

Thus “electronic mail” not only covers the traditional e-mail, **but also** “chatting”, video conferencing, voice telephony on the internet and SMS messages (Short Message Systems) currently used in portable telephony such as GSM. Messages left on telephone answering machines or GSM voice mail boxes also meet the definition criteria. So, if a commercial communication is sent by means of those instruments, all legal provisions, including the principle of prior consent, have to be met.

On the other hand pop-up should not be considered as electronic mail. The European Commission has given its opinion about the matter in a written communication and has clearly stated that the “pop-up window” is not considered as electronic mail and therefore not subject to the recipient’s prior consent. According to the European Commission the definition of electronic mail “*only covers messages that can be stored in terminal equipment until they are collected by the addressee. Messages that depend on the addressee being on-line and that disappear when this is not the case, are not covered by the definition of electronic mail*”. Even though commercial pop-up is not subject to prior consent (opt-in), it must however satisfy the obligations mentioned in article 13 of the act (cf. *infra*).

Very shortly regulations comparable to those applying to the sending of unsolicited commercial communications by electronic mail will be applicable – in accordance with European law – to the sending of commercial messages by fax and automatic calling machine (a bill is about to be adopted).

6. What is meant by “commercial” electronic mail ?

Whether an e-mail is commercial or not must be judged on the basis of the definition of “commercial communication” laid down in article 2, 7° of the [Act of 11 March 2003, loi du 11 mars 2003](#) : “*any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.*”.

The definition is very extensive indeed. The words “*designed to promote, directly or indirectly, ...*” need to be commented.

The communication has to be commercial in the sense that it is designed to promote the sale of goods or services or to boost the development of a company, an organisation, etc., in the hope that it will benefit from it economically. A mere informative message falls outside the scope of the definition and therefore is not subject to the legal obligations. **However, in practice it remains extremely delicate to judge of the commercial or merely informative nature of a message.** When the electronic mail emanates from a commercial enterprise, it is likewise difficult to judge whether or not the message is merely informative. In the event of a dispute the decision is made by the judge and depends on the circumstances, in particular on the context in which the message has been sent, on its content, on its real purpose, on the quality of the recipient and of the writer of the message (a message sent by a commercial enterprise will be more easily qualified as commercial than a message emanating from a public service).

Nevertheless in order to determine whether the message is “commercial” or not, **the two exclusions mentioned in article 2, 7° have to be taken into account** : “*do not in themselves constitute commercial communications : a) information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic mail address, b) communications compiled in an independent manner, particularly when this is without financial consideration.*”.

In this respect and save another interpretation given by the courts and tribunals, **the Directorate-General Regulation and Market Organisation of the FPS Economy is of the**

opinion that the distinction between a commercial and a merely informative communication should be made reasonably and proportionately. The Act of 11 March 2003 aims above all at combating illegal and irritating publicity campaigns and unfair practices, contributing to the proper functioning of the market and avoiding network saturation without restraining or hampering the dissemination of informative messages or independent messages comparing products or services (even if they would reveal a slight form of promotion of a company's image).

On the basis of this interpretation the Directorate-General Regulation and Market Organisation is of the opinion that a newsletter from a non-profit-making association destined to send topical news to schools can qualify for this exception (for instance, a newsletter on directives of the French Community, on the progress of the debate with the headmasters, or containing an independent comparative table on the different centres for green classes, ...). However, if the provider who sends this newsletter for instance receives a financial compensation for adding to the topical news the details of a particular centre for green classes and an outline of its services, one could speak of commercial communication within the meaning of the law. The electronic mail would then be subject to prior consent.

It is also clear that a newsletter from a commercial enterprise will less easily qualify for the exception than a newsletter prepared by a non-profit-making association or a public service. For example, electronic mail containing various questions sent by a commercial enterprise with a view to carrying out a survey on one of its products or services can be qualified as "commercial" for the communication is, at least indirectly, meant to promote a product (by means of a survey). However, this would probably not be the case if the same survey were sent by a consumers association with a view to comparing products of competing companies.

Messages sent by political parties or politicians for electoral purposes are neither considered to be "commercial" messages within the meaning of the Act of 11 March 2003 and, pursuant to that act, not subject to the principle of prior consent. That does not mean that those messages can be freely sent : they have to comply with the legal provisions on the protection of personal data that fall within the scope of the Privacy Protection Commission, Commission de la protection de la vie privée.

7. The Act of 11 March 2003 is only applicable to "commercial" electronic mail. Does that mean that non-"commercial" electronic mail is not subject to the principle of prior consent ?

The European directive (2002/58), directive européenne (2002/58), laying down the opt-in principle uses the concept of "direct marketing" rather than "commercial communication". The question is whether in Belgian law "commercial communication" can be confused with "direct marketing".

Although the concept of commercial communication has been defined in Belgian law, there is no definition of "direct marketing", neither in the European directives, nor in Belgian law. Only in preamble 30 of European Directive 95/46/EC do we find a broad description of the purposes of marketing : "(...) Member States will similarly specify the conditions under which personal data may be disclosed to a third party for the purposes of marketing whether carried out commercially or by a charitable organisation or by any other association or foundation,

of a political nature for example, subject to the provisions allowing a data subject to object to the processing of data regarding him, at no cost and without having to state his reasons”.

The Federation of European Direct Marketing gives a large definition of the concept of direct marketing : *“The communication by whatever means (including but not limited to mail, fax, telephone, on-line services, etc ...) of any advertising or marketing material, which is carried out by the direct marketer himself or on his behalf and which is directed to particular individuals.”*¹ This definition seems to presuppose that besides the concept of commercial communications, there is another concept, namely that of marketing, which enlarges the definition.

In a recent opinion the Belgian Privacy Protection Commission adopts an extremely broad vision of the concept of direct marketing : *within the meaning of the law direct marketing not only covers commercial marketing, but also marketing for political purposes*². It is clear that this concept goes much further than “commercial communication” within the meaning of the Act of 11 March 2003, [loi du 11 mars 2003](#).

The concept of “direct marketing” is very large and includes commercial direct marketing (commercial messages) as well as non-commercial direct marketing (political and religious canvassing, door-to-door visits by associations, ...).

The Act of 11 March 2003, [loi du 11 mars 2003](#), only applies to “commercial” electronic mails. Does that mean that “non-commercial” electronic mails are automatically exempt from the principle of prior consent? Certainly not. If the message is considered to be “non-commercial direct marketing”, as interpreted by the Privacy Protection Commission (political and religious canvassing, door-to-door visits by associations, ...), its sending will probably be subject to the recipient’s prior consent. In that case the solution will not result from the Act of 11 March 2003 but from the Act of 8 December 1992 on personal privacy. In this respect we refer to the explanatory opinions of the PPC (<http://www.privacy.fgov.be/>). So, in Belgian law it is not because an electronic mail is not commercial within the meaning of the Act of 11 March 2003, that this mail is automatically exempt from the principle of prior consent.

8. Is it possible to obtain the required consent by sending a first electronic mail ?

According to article 14, § 1 of the Act of 11 March 2003, [loi du 11 mars 2003](#), *the use of electronic mail for commercial purposes is prohibited without the prior, free, specific and informed consent of the recipient of the message.*

Article 14 of the Act of 11 March 2003 does not mention the way in which prior consent must be obtained. The provision only says that the consent should be free, specific and informed. Consequently the user should be able to give his consent in a free, specific and informed way.

¹ The FEDMA code is available on the following website :

http://europa.eu.int/comm/internal_market/privacy/docs/wpdocs/2003/wp77-annex_in.pdf

² Opinion of 02/04/2003 of the PPC, [Avis du 02/04/2003 de la CPVP](#) , on the fundamental principles with regard to privacy observance by political parties and politicians when using personal data (except voters lists), page 11, available on the following website : <http://www.privacy.fgov.be/publications/Se025009FR.pdf>

More specifically, article 14, § 1 of the Act of 11 March 2003 only prohibits the use of electronic mail – without prior consent – for sending a commercial communication. However, it does not formally prohibit the use of electronic mail for other purposes, notably for asking for free, specific and informed consent to send commercial electronic mail in the future.

So the Directorate-General Regulation and Market Organisation is of the opinion that providers can (among other things) use electronic mail for obtaining prior consent as mentioned in article 14, § 1, 1° of the Act of 11 March 2003. **However, the department deems that electronic mail by which the consent is asked, must meet a number of requirements** in order to offer a reasonable and proportionate solution for all parties concerned.

The following requirements should be met :

- the collecting and processing of the electronic details by the provider should fulfil the legal and regulatory requirements with regard to privacy protection;
- the electronic mail should explicitly ask for the consent to send commercial messages in the future by means of this address;
- this first electronic mail may not contain a commercial message;
- this first electronic mail should ideally inform the recipient that, for every commercial electronic mail that has been sent, he has the right to object in compliance with article 14, § 2 of the Act of 11 March 2003, loi du 11 mars 2003, and article 2 of the Royal Decree of 4 April 2003, l'arrêté royal du 4 avril 2003 ;
- the electronic mail may not contain a mention presuming the consent of the internet user in absence of his answer within a determined period; in that case the consent can not be considered as “free”. So a tacit consent is not enough: an affirmative answer from the recipient is needed. Moreover, the replying electronic mail offers the provider a useful piece of evidence;
- the provider may not make a new request for consent by electronic mail within a reasonable period (2 years) when the user has not replied or has not explicitly agreed to receive commercial messages by electronic mail. The consent can not be considered as “free” when the provider repeatedly and frequently asks for consent and the recipient does not answer or even refuses it.

As to the first condition, the providers must ensure that the electronic addresses they use for asking for consent are collected and used in compliance with the Act of 8 December 1992, loi du 8 décembre 1992, and the explanatory opinions given by the Privacy Protection Commission (PPC). Special attention should be given to the following opinions that are available on the website of the PPC (<http://www.privacy.fgov.be/>) :

- initiative opinion No 34/2000 of 22 November 2000 on privacy protection within the framework of electronic commerce ;
- opinion of 24 March 2003 on direct marketing and the protection of personal data ;
- note on “Spam in Belgium : State of Affairs in July 2003”.

9. Is there a transitional period regulating data bases that were composed before the entry into force of the Act of 11 March 2003 ?

Before the implementation of the Act of 11 March 2003, [loi du 11 mars 2003](#), the *opt-out* system was general practice: with that system a commercial electronic mail could be sent without asking for prior consent. However, those mails had to be stopped the moment the recipient showed his objection. Since the entry into force of the Act of 11 March 2003 the *opt-in* system is being used: the prior consent from the person concerned is necessary before sending him a commercial electronic mail. In that context the following question arises: what about e-mail address files that were composed under the ancient act when *opt-out* was general practice, but are being re-used since the entry into force of the new act ? Was a transitional period necessary to regulate those data bases ?

In principle it was not. Since the consent for receiving electronic commercial communications can be asked by electronic mail in accordance with the Act of 11 March 2003 (*cf.* previous question), the question of a transitional period for regulating the data bases composed prior to the implementation of the new act is not at issue. If the e-mail addresses were/are collected and used legally, which means in compliance with the Act of 8 December 1992, [loi du 8 décembre 1992](#), (whether before or after 28 March 2003), there is no problem – within the meaning of the Act of 11 March 2003 – in using these addresses for asking for prior consent to send commercial mail in the future, provided that the aforementioned conditions are met. So the data bases that were legally composed before the application of the *opt-in* principle do not automatically become unusable.

However, since 28 March 2003 it is no longer possible to use these e-mail addresses to send commercial communications directly (unless, of course, the provider has already obtained the free, specific and informed consent – the onus of proof rests with him – or he can benefit from one of the exceptions) : he will have to ask the free, specific and informed consent beforehand (tacit consent is excluded!) by means of the e-mail address collected before 28 March 2003.

10. Is adding “taglines” by a free e-mail service provider at the bottom of electronic mails sent by clients of this service subject to prior consent ?

Providers of a free e-mail service frequently add “taglines” at the bottom of electronic mail sent by clients of this service. “Taglines” are messages that the provider (for instance MSN Hotmail, Yahoo, Telenet, etc.) adds at the bottom of each e-mail sent by his clients in order to provide information on products and services of the provider or even third persons.

Some providers wanted to support the idea that the provisions with regard to commercial communications laid down in the Act of 11 March 2003 are not applicable because the commercial message is not added to the e-mail by the sender but by a third person (the provider).

This interpretation can not be defended because it is not in keeping with the law. According to article 14, § 1 of the Act of 11 March 2003, [loi du 11 mars 2003](#), *the use of electronic mail for commercial purposes is prohibited without the prior, free, specific and informed consent of the recipient of the message*. The lawmaker provides a general definition of the use of

electronic mail for commercial purposes and does not make a distinction between use by the direct sender of the electronic mail or use by the e-mail service provider.

So if a provider wants to add a commercial message at the bottom of an e-mail sent by one of his clients of the free e-mail service, he must obtain the free, specific and informed consent from the recipient beforehand, provided that a number of conditions are met (cf. *supra*).

In requiring the recipient's prior consent, an intrusive and inappropriate use of this private communication instrument by advertisers can be avoided, which could be prejudicial to the recipient, particularly when the commercial message is long or contains an attached file. One should also try and avoid that providers of free e-mail services use this system to distort competition. There is no reason why these providers may use electronic mail to send commercial messages without asking for prior consent, while traditional advertisers are obliged to do so.

11. With whom does the onus of proof that commercial messages have been asked for by electronic mail rest ?

Article 14, § 4 of the [Act of 11 March 2003](#), [loi du 11 mars 2003](#), lays down that the onus of proof that commercial messages have been asked for by electronic mail (in other words that the consent has been given to send commercial messages) is incumbent upon the provider.

In this respect it is advisable that providers set up mechanisms that can easily prove the prior consent.

12. Are there any exceptions to the principle of prior consent ?

Yes, there are two exceptions. Pursuant to article 14, § 1, 2° of the [Act of 11 March 2003](#), [loi du 11 mars 2003](#), the King has adopted the [Royal Decree of 4 april 2003](#), [l'arrêté royal du 4 avril 2003](#), laying down the two exceptions to the principle of prior consent to send commercial e-mails.

The provider is exempt from asking for prior consent to send commercial e-mails in the two following cases:

1. the electronic mail is sent to the provider's **clients**;
2. the electronic mail is sent to **legal persons**.

However, these exceptions are subject to strict conditions.

13. What conditions are to be met in order to qualify for the first exception to the principle of prior consent ?

The provider is exempt from asking for prior consent to send commercial electronic mail, provided that the e-mails are sent to his **clients**. This first exception is subject to three conditions.

Firstly, the person in question has to be a real client (it does not matter whether he is a natural or a legal person, a consumer or a professional), which means a person with whom the provider has had at least a contractual relationship. So the provider must have obtained the client's electronic details for selling products or providing a service directly (and not through a third party). In practice a provider may legally send his catalogue of products and services by electronic mail to all clients having subscribed at least once to one of these products or services (asking for specifications is not sufficient to fulfil the condition), and having communicated their particulars on that occasion, without being compelled to ask for their prior consent. The collection of those data must comply with the privacy legislation.

Secondly, the provider may use the electronic data for commercial purposes exclusively for analogous products offered or services provided by him. On the other hand the provider may not use a client's e-mail address - without his prior consent – for sending publicity for a product or a service of a third enterprise (a partner, for instance), nor communicate the e-mail address to third enterprises for promoting analogous products or services³. Neither may the provider use the e-mail address of a client for sending publicity for a product offered or a service provided by him, that is not analogous to the product or service sold at the time of the data collection.

Analogous products or services are those belonging to the same category of products or services (e.g. CDs, DVDs, video tapes, books). Fire and life insurance policies can likewise be considered as analogous products belonging to the insurance category. However, it will not always be easy for the provider to determine whether two products or services are part of the same category (example : is a bank/insurance company that is authorised to send publicity for insurance products by electronic mail also allowed to send similar commercial messages for banking products ? It should be if the insurance product is essentially looked upon as a savings product. However, this would not be the case if the insurance policy, such as a fire insurance or a civil liability insurance, has nothing to do with the banking service). As the requirement with regard to “analogous” products or services has been laid down in European law, we will have to await an interpretation that will be developed progressively at European level in order to be able to deal with some more delicate questions.

In the event that this second condition is not met, the commercial mail is not necessarily forbidden. However, the prior consent of the person concerned is needed. In order to obtain this consent and considering the uncertainties about the concept of analogous product, the provider can, on the occasion of the first contractual relations, systematically ask for the client's consent to use his e-mail address for sending him publicity for all of the provider's products - whether or not analogous - (request to be mentioned on the registration or order form), provided that the categories of products are indicated.

Thirdly, the provider must, at the moment of collecting the client's electronic details, clearly inform him of the future commercial use of these data and offer him the possibility to object to that use right away, free of charge and in an easy manner, for instance by means of a box that has to be ticked (on the paper form or on-line).

³ Enterprises belonging to the same group as the provider, who has obtained the consent of the person (subsidiaries, sister companies, parent companies, ...), are also considered to be third parties since different legal persons are involved.

14. What conditions are to be fulfilled to qualify for the second exception to the principle of prior consent ?

The provider is exempt from asking for prior consent to send commercial messages by electronic mail, provided that the electronic mail is sent to **legal persons**. This exception even applies to legal persons not being clients.

How to distinguish an e-mail address of a legal person from one of a natural person ?

The report to the King accompanying the Royal Decree of 4 April 2003 mentions that in practice legal persons may have one or more e-mail addresses in order to contact them or some of their services or departments (info@company.be, contact@..., privacy@..., sales@..., orders@..., customersservice@..., etc.). Unsolicited commercial mail may be sent to these addresses, provided that they clearly concern legal persons and are “impersonal” within the meaning of the royal decree.

However, the e-mail addresses that a legal person allocates to his employees and that are linked to his domain name (e.g. surname.firstname@company.be), are addresses of natural persons, whether they are used for professional or private purposes. Consequently it is not allowed to send commercial messages to these addresses without the prior consent of the natural persons concerned.

So the provider should carefully verify whether or not it is an address of a legal person, even if he buys or hires addresses from a third party. In any case the provider has to prove that he is exempt from asking for prior consent.

Moreover, products or services that are offered in commercial messages sent by electronic mail should be meant for legal persons instead of natural persons. According to the Report to the King an advertiser can not benefit from the exception for sending commercial messages meant for natural persons to addresses of legal persons (e.g. publicity for retail food, holiday places or personal clothes sent to a legal person who is working in the informatics or banking sector), and, in doing so, circumvent the obligation to ask for prior consent. It would be different for insurance products or professional literature.

However, even though a commercial e-mail may be sent to a legal person without asking for his prior consent, that person has the right to object by notifying the provider individually of his wish not to receive commercial e-mails anymore. Each time the legal person receives a commercial e-mail, he should be informed of this right in compliance with article 14, §2 of the act. When sending commercial electronic mail, the provider must mention an e-mail address to which the recipient can return his wish not to receive this type of mail anymore (cf. *infra*).

15. Does the recipient has the right to object to receiving commercial electronic mail, even if he has given his consent ?

Yes, he does! The user can always decide not to receive commercial electronic mail anymore, even if he has given his prior consent. Not only should the provider inform the user of this right to object, he must also implement it, if necessary. According to § 2 of article 14 of the Act of 11 March 2003, [loi du 11 mars 2003](#), *when sending commercial electronic mail, the provider should:*

1° provide clear and comprehensible information on the right to object to receiving commercial messages in the future;

2° indicate and make available an appropriate instrument for efficiently exercising that right by electronic mail.

In practice it means that, when sending a commercial electronic mail, the provider should on the one hand make a clear mention concerning the right to object (for instance: ***“If you do not wish to receive our commercial electronic mail anymore, please answer this mail.”*** or ***“If you do not wish to receive our commercial electronic mail anymore, please click here.”***) and on the other hand give an e-mail address to which the recipient can notify the provider of his wish not to receive this type of mail anymore. This obligation has to be met, even if the recipient has given his prior consent and/or if one of the two aforementioned exceptions is concerned (sending to a client or a legal person).

In order to ensure the efficiency of point 2° of article 14, § 2 of the act, article 2 of the [Royal Decree of 4 April 2003](#), [l'arrêté royal du 4 avril 2003](#), lays down that :

Any person can directly notify a provider, free of charge and without having to state his reasons, of his wish not to receive commercial electronic mail from him anymore.

The provider concerned must :

1° send that person, within a reasonable time limit, an acknowledgement of receipt by electronic mail, confirming the registration of his request;

2° take, within a reasonable time limit, the measures necessary for complying with that person's wish;

3° update lists of persons having notified of their wish not to receive commercial electronic mail from him anymore.

Article 2 of the royal decree mentions the case in which a provider has directly received a notification from a person not wishing to receive commercial electronic mail from him anymore.

In that case the provider must, within a “reasonable time limit”, send that person an **acknowledgement of receipt by electronic mail**, confirming him that his request has been taken into account. According to the report to the King this obligation should notably strengthen the confidence of the person concerned. In the event the latter does not wish to receive commercial electronic mail anymore, he should be informed of the fact that his request has been granted. Whether the time limit is “reasonable” or not should be judged on the basis of the evolution of techniques and practices (where an acknowledgement of receipt can be sent automatically and immediately by electronic mail, a term of 24 to 48 hours should

never be exceeded). It is obvious that this final e-mail may in no case be of any promotional nature.

Moreover, the provider must **respect that person's wish and update his internal lists**. That means that he has to stop all sendings of commercial electronic mail to that person. Even if that person had initially given his consent for sending his data to third persons, the provider may not send them to anybody anymore after the notification.

The provider may not ask the person concerned **any charges nor a statement of his reasons**. He only has to pay the costs for notifying (e.g. costs for sending electronic communications, costs for using an electronic registered mail if the user freely decides to use that means to procur himself a proof ...).

This article of the act laying down the right to object only applies to commercial electronic mail (smtp, sms, voice mail). It does not however apply to other forms of on-line commercial messages (webpages, banners, interstitials, pop-up).

In order to implement the right to object, the *Association Belge de Marketing Directe* (Belgian Direct Marketing Association) has introduced the Robinson list, which means that persons wishing not to receive commercial messages anymore at least from the enterprises being member of this association, can register to the Robinson lists of their choice (mail, phone, e-mail or sms). They can register on-line (www.robinson.be.) or by post.

16. What information should be mentioned in a commercial electronic mail ?

Where a commercial electronic mail is sent, whether or not it is subject to prior consent by virtue of one of the two aforementioned exceptions, the provider should meet the following obligations.

According to the Act of 11 March 2003, [loi du 11 mars 2003](#), "*commercial communications which are part of, or constitute an information society service comply at least with the following conditions:*

1° as from its reception the commercial communication, considering its overall effect and including its presentation, shall be clearly identifiable as such. If not so, the mention "commercial communication" shall be indicated legibly, clearly and unambiguously;

2° the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;

3° promotional offers, such as discounts, premiums and gifts, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;

4° promotional competitions or games shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously."

These points need to be commented.

Point 1°. As mentioned in article 23, 5°, § 1 of the Trade Practices Act⁴, the commercial message must indicate the words “commercial communication” only where it is not identifiable as such as from its reception. In principle it is not obligatory to mention the words “commercial communication” systematically. This relaxing measure was introduced by article 72 of the programme law of 9 July 2004 (Belgian Official Gazette, 15 July 2004) modifying article 13, 1° of the Act of 11 March 2003. Before that modification the aforementioned act demanded that “commercial communication” should be mentioned systematically.

The main logic to be remembered is that from now on the term “commercial communication” must not be mentioned systematically anymore, except for cases where a commercial communication is not identifiable as such as from its reception. This should be judged systematically case by case depending on the circumstances (besides, that is the reason why the text mentions “*considering its overall effect and including its presentation*”). So, it is impossible to work out a text that can be generally interpreted.

Most commercial banners are generally identifiable as such for they have a specific design that is clearly distinct from the rest of the site’s content, and do not have to mention the term “commercial communication”. On the other hand the more the commercial banner adopts a design that is similar to the non-commercial site, the less that banner will be considered “identifiable as such” as commercial communication. When conceiving such a banner each advertiser who prefers not to mention the term “commercial communication” has to make sure that the banner contrasts as sharp as possible with mere informative messages.

Point 2°. This point aims at transparency by requiring the identification of the natural or legal person on whose behalf the commercial communication is sent. That requirement can easily be met by the following mention at the end of each mail: “***Commercial communication from and on behalf of XXXX***“, with a hyperlink referring to the particulars of the provider in question. The commercial banner can also meet the requirement by containing the provider’s name and by being a hyperlink referring to the provider’s particulars. According to the preamble of the act *it is not necessary that this information directly appears in the commercial message. So a hyperlink is undoubtedly the most adquat tool for meeting this transparency obligation.*

Points 3° and 4°. The act lays down that “*promotional competitions or games shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously*”. The same goes for promotional offers. The preamble says that *such a requirement can easily be met by referring to a webpage containing this information, the rules of the game, an enrolment form, ...*

⁴ This article says that *any commercial communication, considering its overall effect and including its presentation, that is not clearly identifiable as such and does not indicate the mention « commercial communication » legibly, clearly and unambiguously, is forbidden*. From this negative phrasing can be deduced that the mention « commercial communication » is only required where the commercial nature of the message is not immediately clear as from its reception and at first sight.

17. What methods are prohibited for « spam » senders ?

In order to avoid all kinds of abuses and that a provider acts anonymously, the law maker prohibits certain methods that are unfortunately too often used. Article 14, § 3 of the Act of 11 March 2003, [loi du 11 mars 2003](#) lays down that :

When sending commercial e-mails, it is prohibited :

1° to use the e-mail address or the identity of a third person ;

2° to falsify or to disguise any information allowing to identify the origin of the e-mail message or its transmission path.

18. What sanctions are provided for if advertisers do not meet the aforementioned obligations ?

The provider's non-compliance with the obligations mentioned in articles 13 and 14 of the Act of 11 March 2003, [loi du 11 mars 2003](#), is subject to sanctions. The officials of the Directorate-General Enforcement and Mediation enjoy wide powers to detect, establish and put an end to infringements of these provisions.

After having established the infringement, on their own initiative or as a result of a complaint, these officials can send the offender a warning asking him to cease his acts. The warning may be notified by traditional registered post as well as by fax or electronic mail.

If the offender disregards that warning, several actions can be taken :

- the Minister for the Economy can start a prohibitory injunction in order to force the offender by judicial means to put an end to his illegal acts ;
- the Directorate-General Enforcement and Mediation can propose a compromise settlement to the offender, i.e. the payment of a sum of money that extinguishes the penal action (before the criminal judge), or inform the public prosecutor.

If the case is brought before the criminal judge, the sanctions provided for in the act are relatively severe. In case of non-compliance:

- with article 13 (identification of the public nature of the message, of its advertiser, of promotional offers, competitions or games) the provider is fined from 250 to 10.000 € (to be multiplied by a surcharge, i.e. by 5);
- with article 14 (prior consent, information on and application of the right to object, use of prohibited methods) the provider is fined from 250 to 25.000 € (to be multiplied by a surcharge, i.e. by 5).

If the infringement has been committed in bad faith (the e-mail was for instance intended to do harm or the provider was fully aware that he infringed the legal provisions since he had been informed of it by the public services), the fine may in both cases amount to 50.000 € (to be multiplied by a surcharge, i.e. by 5).

19. Is it useful to lodge a complaint against receiving commercial e-mails?

The question may seem surprising! It is certainly not the intention to discourage the victim of spamming to lodge a complaint. We only want to make him aware of his responsibilities and to point out to him that lodging a complaint is an important action not to be trifled with and only to be taken on legal grounds.

Receiving an e-mail may be disturbing or even irritating for an internet user. Nonetheless that does not mean that this e-mail is illegal ! Therefore the internet user needs to be offered means to verify whether or not the electronic mail complies with the law. One should also try and avoid returning the e-mail immediately – by electronic mail ! – to the competent complaints service without checking first, and to deluge those services with unfounded complaints. It would only entail a lot of useless work and mean a loss of time, time that should be spent on legitimate complaints.

Before lodging a complaint, it is useful to consider the following questions:

- Are you sure not to have given your prior consent ?

It may happen that internet users forget that they have given their consent to receive commercial e-mails by subscribing to a newsletter, by answering an opinion poll, by filling in an on-line information form or a paper coupon, by subscribing to a free electronic mail service, ... In that case the provider has the right to send you commercial electronic mail. However, you can always use your right to object and ask him to stop sending you that kind of electronic mail in the future.

- Does the commercial e-mail emanate from a provider with whom you have already ordered an analogous product? In that case the provider can benefit from the first exception laid down by the Royal Decree of 4 April 2003, provided that he fulfils the different conditions of it (see *supra*), and is not obliged to ask for prior consent. Anyhow, you have always the right to object in the future.
- Has the commercial electronic mail been sent to an impersonal address of a legal person within the framework of that person's activities ? It is possible that you practise a profession with a legal person (commercial company, non-profit-making association, public enterprise, public service, ...) and for that reason you have noted an impersonal e-mail address (info@company.be, contact@..., privacy@..., sales@..., orders@..., customersservice@..., etc.). If the commercial communications are sent to that kind of address and if they are related to the legal person's activity, the provider does not have to ask for prior consent. Again, you have the right to object to receiving commercial mails in the future (cf. *supra*).
- The electronic mail may be disturbing, but is it therefore illegal ? Receiving certain electronic mails may sometimes be irritating, notably because its content is unpleasant (mail containing inappropriate comment on colleagues, for instance) or they are sent excessively (a friend sending you jokes all day long). Generally these e-mails are not opposed to the law since they are not commercial, the data have not been collected illegally, their content is not reprehensible, etc. Confronted with this type of electronic

mail, it is advisable to contact the sender of the message directly and to try to settle the problem amicably. Lodging a complaint will not have any results.

If you find that the electronic mail is opposed to the law after having analysed these questions, you can lodge a complaint, even if the unsolicited electronic mail comes from abroad. It is however advisable to settle the problem amicably with the provider – unless it is not clear who the provider is – by reminding him of his obligations and informing him of your intention to lodge a complaint in case he waves aside your request not to send commercial e-mails anymore.

20. How and where to lodge a complaint as a « spam » victim ?

If you deem it necessary to lodge a complaint, you should determine how and to what authority to address your complaint. There is a wide range of “spam” the illegal nature of which is subject to different regulations that fall within the competence of different public authorities. For an effective settlement the complaint should be addressed to the most efficient authority.

There are two types of illegality characterising most “spams”:

- an electronic mail may be illegal by its prospective nature (the content of which however is not illegal) and because it has been sent without having obtained the receiver’s prior consent or because it continues to be sent in spite of his objection;
- an electronic mail may have an illegal content (publicity for medicines, lottery, attempted swindle, deceptive commercial communications, paedophilia, etc.). generally this type of electronic mail is sent without prior consent and the e-mail address is often collected in breach of the provisions regarding privacy.

Depending on the type of illegality, the indicted electronic mail gives cause for lodging a complaint with one of the following public authorities :

- the Directorate-General Enforcement and Mediation of the FPS Economy;
- the Privacy Protection Commission;
- the « Federal Computer Crime Unit », which is a special criminal investigation department of the federal police .

In order to help the internet user to lodge a complaint with the most efficient authority, a number of examples are given below. This list is not exhaustive and does not anticipate the authority’s decision on the lodged complaint.

The Directorate-General Enforcement and Mediation of the FPS Economy deals with complaints concerning electronic mail :

- that has been sent without the provider having obtained the recipient’s prior consent and that is of a commercial nature (promoting the sale of a good or service, cf. *supra* for the definition of commercial nature);
- the content of which does not comply with the consumer protection regulations, commonly called consumption fraud : :
http://mineco.fgov.be/protection_consumer/informations_and_advices/informations_and_advices_fr_003.htm
 - o deceptive commercial communications on diets and “miraculous” health products;

- deceptive offers for credit cards or better credit conditions;
- deceptive commercial communications on “interesting” package tours, etc.;
- forbidden publicity for medicines (viagra, ...);
- publicity for forbidden lotteries, ...
- in which the sender uses a false identity, a hidden address or a third person’s identity.

The **Privacy Protection Commission** notably deals with complaints with regard to electronic mail :

- sent by someone you have not had any contact with, you do not know and who has collected your e-mail address without your knowledge;
- sent without the provider having obtained the recipient’s prior consent and being of a prospective nature without being commercial (religious, associative mail or political propaganda).

The « **Federal Computer Crime Unit** » of the federal police is particularly charged with dealing with complaints concerning electronic mail of a manifestly illegal content :

- paedophile e-mail;
- e-mail containing attempted swindle or blackmail : the most known is the “Nigerian letter” in which a person pretends wanting to share a considerable sum of money with the recipient but in order to deblock that sum, the recipient has to pay an advance. Once the advance is paid, you can whistle for the money of course!
- e-mail containing viruses;
- e-mail proposing the sale of drugs, weapons or other prohibited products;
- racist or xenophobe e-mail or e-mail inciting to hatred for sex or religion related reasons, etc.;
- e-mail usurping a third person’s identity (tel e-bay, skynet, citibank) and asking the receiver to communicate, for alleged security reasons, his confidential details (password, credit card number, etc.). For further information on the phenomenon of “phishing”, a press communiqué spread by the FPS Economy is available at the following address :

http://www.mineco.fgov.be/press_releases/press_releases_pdf/press_release_05022004_fr.pdf.

Details of the different authorities that can be contacted :

Federal Public Service Economy, SMEs, Self-employed and Energy

Directorate-General Enforcement and Mediation

Simon Bolivarlaan/Boulevard Simon Bolivar, 30

B - 1000 Brussels

e-mail: eco.inspec@mineco.fgov.be

Tel: +32 (0)2 208 36 11

Fax: +32 (0)2 208 3915

<http://www.mineco.fgov.be>

Privacy Protection Commission

Hoogstraat/Rue Haute, 139

B - 1000 BRUSSELS

e-mail: commission@privacy.fgov.be

Tel: +32 (0)2 213 85 40
Fax: +32 (0)2 213 85 65
<http://www.privacy.fgov.be/>

Federal Police
DGJ/DJF/FCCU
« Federal Computer Crime Unit »
Notelaarsstraat/Rue du Noyer, 211
B - 1000 BRUSSELS
E-mail : contact@fccu.be
Tel : +32 (0)2 743 74 74
Tel : +32 (0)2 743 73 84 (permanence 24/7)
Fax : +32 (0)2 743 74 19

Attention: in order to enable the competent authorities to deal with complaints about spamming legitimately, the header of the suspect electronic message must be annexed to the message, for the information contained in these headers is essential for identifying and locating the spam sender. The procedures to be followed for making headers according to the type of e-mail programme used are available at the following address :
<http://www.spamcop.net/fom-serve/cache/118.html>

21. What basic rules should be taken into account in order to avoid or limit « spam » ?

In order to avoid the collection and use of your e-mail address by spammers, we ask you, following the Privacy Protection Commission, to take a number of precautions :

- be observant when communicating your e-mail address and avoid communicating it to anybody without any particular reason;
- avoid displaying your e-mail address on a website, because it can automatically be copied by using software to detect and file addresses automatically;
- if you want to avoid “spam” being sent to your main e-mail address (that you use for your family and friends or for your professional relations), create a second address with a free provider in order to use it for more risky applications with regard to “spam” (subscription to newsletters, participation in forums, orders on commercial websites, display on your webpage, etc.);
- if the origin of the message or identity of the sender seems clearly dubious to you, avoid answering this “spam” - even if you are offered the possibility to use your right to object – or clicking on the hyperlinks that are inserted in the message, for malicious spammers use techniques to verify if your e-mail address is still active and ... to send you even more “spam”!
- do not make the e-mail addresses of your correspondents visible when creating a group or mailing list or when forwarding an e-mail. When sending the same message to different people simultaneously, you should hide the addresses of all recipients.

Therefore use the function “blind carbon copy” of your e-mail software, which is often symbolised as “BCC”;

- do not communicate e-mail addresses of other persons (family, friends, professional acquaintances, etc.) to third persons without their prior consent;
- when the sender of the message is not clearly identified or known by you, do not open a file annexed to the message (especially when it contains the extension .src, .exe, .scr), because it may be a virus;
- do not participate in e-mail chains;
- install reliable anti-virus software and download an update of it regularly;
- inform your children of the aforementioned rules and of how they can use their e-mail address (which is preferably different from yours!).

22. Are there any technical means to protect yourself against « spam » ?

There are indeed various filtering methods to combat spamming. These filters isolate the unsolicited messages according to different search criteria, notably the origin of the message (e.g. the recipient’s IP address) and its content.

Filters programmed according to the origin of the messages make it possible to block commercial communications from identified IP addresses, whereas filters programmed according to the content of e-mails allow to remove commercial communications containing a word or a combination of specific words (e.g. sex or make money fast). In that case there is a risk of also losing solicited messages.

Whatever filter you choose, it can be installed on the server of your access provider or on your own computer.

Filtering by your access provider is the most practical solution since he sorts and removes unsolicited commercial mail himself. However, this method implies that you do not have any control of the sorting process. Some selection criteria (e.g. similarity and quantity of messages sent) can block solicited messages. Moreover, filtering by content implies an automatic checking of the content of all e-mails that have been sent to you and can pose problems with regard to privacy protection.

When the filter is installed on your computer, all commercial communications inevitably end up in your in-box. Consequently, you can not avoid being swamped with messages, nor an increase of your connection charges. If you have filtering software, it probably is already configured (most e-mail software offer filtering possibilities). Yet you can personalise the filter by adding or removing selection criteria. So the risk of losing solicited commercial communications is more limited since you have adjusted the selection mode yourself. Moreover, your e-mails did not have to be opened by third persons.

23. What legal texts are applicable ?

At Belgian level :

- [Loi du 11 mars 2003 sur certains aspects juridiques des services de la société de l'information](#), Act of 11 March 2003 on certain legal aspects of information society services (*Belgian Official Gazette*, 17 March 2003), especially articles 13 to 15;
- [Arrêté royal du 4 avril 2003 visant à réglementer l'envoi de publicités par courrier électronique](#), Royal Decree of 4 April 2003 regulating the sending of advertising material by e-mail (*Belgian Official Gazette*, 28 May 2003);
- Article 72 of the programme law of 9 July 2004 (*Belgian Official Gazette*, 15 July 2004) modifying article 13, 1° of the Act of 11 March 2003 on certain legal aspects of information society services;
- [Loi du 8 décembre 1992 relative à la protection des données à caractère personnel](#), Act of 8 December 1992 on the protection of individuals with regard to the processing of personal data and the explanatory opinions of the Privacy Protection Commission (available on the site : <http://www.privacy.fgov.be/>) merit particular attention :
 - initiative opinion No 34/2000 of 22 November 2000 on privacy protection within the framework of electronic commerce;
 - opinion of 24 March 2003 on direct marketing and the protection of personal data ;
 - opinion of 2 April 2004 on the fundamental principles with regard to privacy observance by political parties and politicians when using personal data (except voters lists);
 - note on “Spam in Belgium : State of Affairs in July 2003”;
- [Loi du 28 novembre 2000 relative à la criminalité informatique](#), Act of 28 November 2000 on computer criminality.

At European level :

- [Directive 2002/58/CE du Parlement européen et du Conseil du 12 juillet 2002 concernant le traitement des données à caractère personnel et la protection de la vie privée dans le secteur des communications électroniques](#), Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications, *OJEC*, 31 July 2002, L 201/37), especially article 13;
- [Directive 2000/31/CE du Parlement européen et du Conseil du 8 juin 2000 relative à certains aspects juridiques des services de la société de l'information, et notamment du commerce électronique, dans le marché intérieur](#), Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information

society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce, OJEC, 17 July 2000, L 171);

- Directive 95/46/CE du Parlement européen et du Conseil, du 24 octobre 1995, relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJEC, 23 November 1995, L 281);
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on unsolicited commercial communications or “spam”;
- Avis 5/2004 du 27 février 2004 du « groupe article 29 » portant sur les communications de prospection directe non sollicitées selon l'article 13 de la Directive 2002/58/CE, Opinion 5/2004 of 27 February 2004 of the “article 29 group” on unsolicited direct marketing communications according to article 13 of Directive 2002/58/EC.

24. Other information on “spam” ?

- The FPS Economy : http://mineco.fgov.be/information_society/consumers/home_inter_fr.htm
- The Privacy Protection Commission : <http://www.privacy.fgov.be/>
- The Internet Rights Observatory : http://www.Internet_observatory.be
- The CNIL (Commission Nationale de l’Informatique et des Libertés) – France : <http://www.cnil.fr/>
- The French site of the *Direction du Développement des médias* : http://www.ddm.gouv.fr/dossiers_thematiques/documents/spam00.html
- The site of the American Federal Trade Commission on spamming : <http://www.ftc.gov/bcp/online/edcams/spam/index.html>
- The site of the Australian Department of Communications, Information Technology and the Arts on spamming : http://www2.dcita.gov.au/ie/trust/improving/spam_home
- The OECD (Organisation for Economic Cooperation and Development) that has set up a group of experts in order to coordinate the work of the public authorities, enterprises and citizens in combating “spam” : <http://www.oecd.org>
- The Belgian Direct Marketing Association: [listes Robinson](#), [Robinson lists](#)