

**G-Regs™**Belgium – Royal Decree of 4<sup>th</sup> April 2003

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**Title:** Royal Decree of 4th April 2003 regulating the sending of electronic commercial communications

*(Koninklijk besluit tot reglementering van het verzenden van reclame per elektronische post / Arrêté royal visant à régler l'envoi de publicités par courrier électronique)*

Entry into force: 28/05/2003

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**Article 1** Notwithstanding Article 14, § 1, paragraph 1, of the Law of 11 March 2003 on certain legal aspects of services of the information society (NOW Art. 13, s.1, para. 1 of Book XII of Code of Economic Law: "Law of the electronic economy", which integrates the provisions from Law of 11 march 2003), and without prejudice to Article 2 of this ordinance, every provider is exempt from asking for prior consent to send commercial e-mail:

1. to its customers, natural or legal persons, when each of the following conditions is met:
  - a) it has obtained directly their electronic contact details in connection with the sale of a product or service, in compliance with legal and regulatory requirements relating to the protection of privacy;
  - b) it uses said electronic contact information exclusively for the direct marketing of similar products or services which itself provides.
  - c) it provides to its customers, at the moment their electronic details are collected, the opportunity to object free of charge and in an uncomplicated manner, to such use.
2. to legal persons, if electronic contact details used for this purpose are of an impersonal nature.

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**Article 2** Any person can directly notify a particular provider, without charge or stating any reasons, his desire not to receive, on his part, advertisements by email. The provider concerned must:

1. deliver/ issue, within a reasonable time, an acknowledgment email confirming the registration of that person's request;
2. take, within a reasonable time, the necessary measures to respect the will of that person; and
3. maintain up-to-date lists of those persons who have notified their wish not to receive advertisements from them via email.

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**Commentary** This is the commentary from the legislators providing guidance for advertisers on the individual articles of the law above which are set out above.

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**Article 1 Commentary:** COMMENTARY ON ARTICLES

Article 1. The article aims to provide exceptions to the prohibition in § 1, paragraph 1, Article 14 of the Act (now Art. 13, s.1, para. 1 of Book XII Economic Law Code)

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The first exception is provided for in Article 1(1), wherein the provider is exempt from applying to its customers, either individuals or legal entities, their consent to receive commercial electronic mail, subject to compliance with three conditions:

1. The first condition allows the supplier to send email advertising to the people with whom he/she has maintained a contractual relationship, i.e. the supplier's customers, without prior consent. It seems legitimate to allow a supplier who obtains from their customers their electronic contact details in connection with the sale of a product or service, to send their advertising to keep them informed of its activities. In this case, the user voluntarily provides their electronic contacts when concluding a commercial arrangement with a company, e.g. via a website. Of course, the electronic contact details must be obtained from the client in accord with privacy protection legislation.
2. The second condition says that only the provider who obtained the contact details of the customer can use these contacts to promote products or services that he/she provides. It is not allowed to disclose this information to third parties for advertising purposes without the prior consent of the person concerned. In this respect, third party companies are considered to include those belonging to the same group of companies (subsidiaries, sister companies, parent...), as the supplier who holds the consent of their customer, as they are different legal entities.

In addition, the supplier must limit deployment of advertising operations only to products or services similar to those originally sold to his/her client when using the contact details directly obtained from a customer. Therefore, if the supplier wants to send to its customers advertising for other products or services, it must first obtain their consent. Similar products or services are considered to be those that belong to the same category of products or services. For example - and, for now, as conjecture - CDs, DVDs, videotapes and possibly books could be considered as equivalents. Similarly, fire insurance and life insurance can be considered as similar products in the Insurance category. However, it is not always easy for the supplier to determine whether two products or services belong to the same category (e.g., a bank-insurance company authorised to send email advertising for insurance products whether it can also send similar advertising for banking products.). The issue of product or service "analogue" has been raised by the European Parliament; one should wait as interpretation develops gradually at European level to deal with some intricate questions.

3. The third condition requires the supplier to provide its customers, when their electronic contact details are obtained, with the opportunity to object, free of charge and easily, to their use for advertising purposes. Thus, on the collection of electronic contacts from the customer, the supplier must clearly inform the customer of the subsequent use of their contact information for advertising purposes, and give him/her the opportunity to object to such usage at the outset, for example by means of a checkbox.

The second exception provided for in Article 1(2), relates to legal entities (i.e. company/employees). It is not necessary to obtain consent from corporations to receive commercial electronic mail. In practice, corporations may hold one or more email addresses to allow contact with them, or with some of their services or operations (info@..., contact@..., privacy@..., sales@..., orders@..., customer-service@...etc.). Unsolicited email advertisements can be sent to these addresses, insofar as, in the circumstances, it is clear that these addresses relate to "legal persons". By contrast, when a corporation assigns its employees email addresses associated with the domain name (e.g. Firstname.lastname@company.be), these are individuals' addresses, regardless of whether they use them for business or personal purposes. It is not permitted to send advertising to these addresses without the prior consent of the individuals concerned. It is the responsibility of each advertiser to proceed with caution if he/she holds the address of a legal person. In any event, it is for him/her to prove that he/she is exempt from obtaining consent. In addition, the products or services offered through the advertising

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should seek legal entities and not individuals. Indeed, an advertiser cannot rely on the exemption to send advertising to addresses of corporations actually to target individuals, thus bypassing the requirement to seek the consent of the latter.

All legal persons nevertheless have a right to object that they may exercise in individually advising a supplier of their wish not to receive commercial electronic mail from them (art. 2). They must be informed of this right in every advertising e-mail, in accordance with Article 14 § 2 of the Act (now Art. 13(2) of Book XII Economic Law Code). Specifically, when sending any commercial electronic mail, any supplier must provide an e-mail address to enable the recipient to communicate his/her desire not to receive this type of mail.

It should also be noted that the concept of email covered in this provision must be interpreted very broadly. Indeed, the prevailing regime intends to address, inter alia, short messages on a mobile phone (Short Message Service or SMS). Indeed, one must interpret the concept of electronic mail in accordance with the definition of the law, namely "any message via text, voice, sound, or image sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until the latter retrieves it."

In parallel, it is necessary to refer to Article 13 of 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) which closely links the concepts of email and electronic coordinates since it refers to the acquisition by the service "electronic contact details for an email." The terms "electronic coordinates" were preferred to those of "email address" to remain as neutral as possible in terms of technology, and include in the concept of other types of electronic contact points. Thus, the concept of electronic coordinates covers not only the email address of a person, but also his/her mobile phone number and other contact information allowing the sending of advertising by email.

Finally, it should be noted that the supplier may send advertising by email to its customers and / or legal persons as long as they have not notified him directly of their desire not to receive such advertising (see Article 2 of this Order). It should be recalled that Article 14 § 2 of the Act requires the supplier each time a commercial electronic mail is sent to provide clear and comprehensible information about the right to object to receiving advertising going forward, and to point out and provide an appropriate way of exercising this right by effective electronic means. Specifically, when sending any commercial electronic mail, any supplier must provide an e-mail address to enable the recipient to notify his wish not to receive this type of mail.

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#### Article 2 commentary

Article 2 refers to cases where a supplier has been notified directly of a person's desire not to receive from the supplier advertising by email.

In this event, the supplier should contact this person within a reasonable time, via an acknowledgment email confirming that his/her application has been taken into account. This requirement is justified by the desire to establish the confidence of the person concerned; as the latter (the recipient of the advertising) does not want to be bothered by advertising emails, so ignorance of the outcome of his/her application should not be allowed. The "reasonable" period (for response) will be considered to depend on the evolution of techniques and practices. It goes without saying that the final or "closing" email cannot include any aspect of advertising.

The supplier must also respect the wishes of that person and to update their (the supplier's) internal lists. This means that the supplier must cease sending any commercial electronic mail to this person. If he/she had also consented to the outset that their data can be conveyed to third parties, the service provider cannot provide these data to anyone after notification.

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No fees nor providing rationale may be requested by the supplier to the person concerned. The person will only pay the costs of notification (e.g., The costs of using an email service recommended, the costs of email communication...).

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