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LEGAL REGULATION OF ELECTRONIC MARKETING

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Abstract. *The article analyses the legal regulation of electronic marketing in the European context. The historical and teleological perspective on past and present regulations of electronic marketing is provided. Emphasis is given on the ability of the legal rules to preserve the balance of private and entrepreneurial interests, and the desirable principles of the regulation of the socially beneficial electronic marketing. The paper concludes that the harmonization of legal regulation of electronic marketing at the European Union level is limited, which causes numerous negative consequences, such as jurisdiction shopping. Some countries (e.g. Finland) follow opt-out regimes for at least some types of electronic marketing, while other countries (including Lithuania) prohibit most forms of electronic marketing without the prior consent of the customer (opt-in). Thus, further regulation and harmonization of the electronic marketing law is suggested at the regional (the EU) and national level, along with more self-regulation and a balanced approach towards future regulation.*

Keywords: *electronic marketing, electronic marketing law, data protection, privacy.*

Introduction

During the last decade, the significance and the scope of electronic marketing have drastically increased all over the world primarily due to an enormous growth in electronic communication. The Internet, the medium of electronic communication, is the most quickly developing new technology among households. Technological progress leads to an increase in the complexity of the Internet, a growth in the number of communication channels, an increase in the amount and quality of the information transferred, an improvement in the possibilities to use the Internet, an easy access to and an easy usage of the electronic communication by all groups of the population. Because of these reasons, business and consumers are getting increasingly more active in cyberspace. Cyberspace and electronic media became a frequently used business marketing instrument and means of communication of the public authorities and interest groups with the public¹.

Current electronic technologies provide unprecedented opportunities for marketing communication, including communication orientated to a particular user and his needs, for instance, direct electronic marketing. Completely new forms of marketing have emerged in the Internet, e.g. search marketing or viral marketing, which would be technically impossible to use in the traditional media. Electronic marketing in many aspects is efficient, especially in terms of costs, and results in better return on investment, scalability, measurability and adaptability.²

It should be noted that cyberspace has neither physical, nor legal boundaries. It does not have a “central authority”, which controls the circulation of communication. Communication placed in cyberspace immediately becomes accessible all over the world and can be accessed simultaneously by all interested users. The costs of delivering electronic communication to the user and the distribution thereof are very low, particularly in comparison with other means of information distribution (e.g. printed mass media).³ Such factors are extremely important to marketing communication. Cyberspace thus provides new exceptional opportunities for business and consumers to engage in marketing communication, which is relevant particularly to them, to offer and to buy products and services. Since 2003, the market for electronic advertising, i.e. marketing in the Internet, has been growing by about 10% per year and has been steadily replacing traditional marketing channels, i.e. printed mass media, radio and television. In 2008, electronic marketing comprised almost 9% of the US advertising market and surpassed the share of marketing attributed to radio and newspapers.⁴ Even the economic crisis of

1 Arens, W. *Contemporary Advertising*. Boston: McGraw-Hill, 2006, p. 17–18.

2 Hanson, W.; Kalyanam, K. *Internet Marketing and e-Commerce*. South-Western College Pub: San Francisco, 2006, p. 55–57.

3 Kiškis, M.; Petrauskas, R.; Rotomskis, I.; Štītīlis, D. *Teisės informatika ir informatikos teisė*. Vilnius: Mykolo Romerio universitetas, 2006.

4 Holahan, C. Advertising Goes Off the Radio [interactive]. *BusinessWeek*, December 2006 [accessed August 1, 2010]. <http://www.businessweek.com/technology/content/dec2006/tc20061207_485162.htm>.

2007-2009 did not affect these trends – social networking and mobile marketing gained a lot of ground during these years.⁵

Such rapid development has outpaced the legal regulation of electronic marketing. Traditional electronic marketing (e-mail marketing) was regulated in the same way as regular mail and telephone marketing, that is, by extending traditional rules to electronic forms of similar activities. Privacy and consumer protection issues have dominated the legal regulation up to date. In addition, the regulation has focused on illegal direct electronic marketing (unsolicited marketing or spam).

There is a clear lack of scientific research into the topic of the legal regulation of electronic marketing in Lithuania. Electronic marketing is commonly identified as a subtype of direct marketing, which, in turn, is given relatively little attention within the broad marketing topic and even less attention in the legal literature.⁶

The goal of this article is to provide the analytical perspective on the current legal rules, which regulate electronic marketing. The European legal rules and Lithuanian laws pertaining to electronic marketing are the focus of the article. Negative and positive considerations in regulating electronic marketing and shortcomings of the legal regulation are analysed. The article proposes guidelines for electronic marketing regulation in the future, while also emphasizing the need for greater harmonization of the legal rules within the EU and the need to extend the current rules to the new forms of electronic marketing.

The article employs the methods of systemic, historical, teleological and comparative analysis, and non-interventional qualitative research. Analysis of the European and Lithuanian experience covers the existing statistics on direct electronic marketing, regulatory environment and case law, as well as their efficiency.

1. The Definition of Electronic Marketing

Any marketing form through electronic means should be considered electronic marketing. All forms of electronic marketing have strong characteristics of direct marketing. Thus, electronic marketing is traditionally defined in the context of direct marketing and is hence regulated by direct marketing rules.⁷

The principal forms of electronic marketing are the following:

- Marketing websites, links and banners;
- Marketing by electronic communication (e-mail, instant messaging, SMS);
- Context marketing (search marketing, location based marketing, marketing within e-mail systems);
- Marketing in social networks;

5 Holzner, S. *Facebook marketing: leverage social media to grow your business*. Indianapolis (Ind.): Que, 2009. p. 42–44.

6 Markauskas, L. *Reklamos teisinis reglamentavimas: teorija ir praktika*. Vilnius: Mokesčių šrautas, 2008, p. 29, 156–159.

7 Strauss, J.; Frost, R. *E-Marketing*. 5th ed. Prentice Hall: New Jersey, 2008, p. 83–87, 101–104.

- Mobile marketing;
- Alternative electronic marketing (e.g. viral marketing).

Marketing websites, links and banners do not differ from their traditional counterparts, other than being in the electronic form. They are not regulated in any specific way and generally follow the same legal rules, which are applicable to all marketing tools.

Marketing by electronic communication historically is the first type of electronic marketing, which caused the introduction of specific rules for electronic marketing. It remains the only extensively regulated form of electronic marketing. Therefore, analysis in this article mainly focuses on electronic marketing as electronic marketing communication.

The definition of electronic marketing also requires delineation of the principal differences between traditional marketing and electronic marketing, especially those that supersede the mere form of expression and presentation. Some of the features of the electronic marketing are inherent in the electronic form and apply all forms of electronic information. Notably, electronic marketing is the fastest and least expensive way of providing consumers with the information about new products and services or other information relevant to the consumers (e.g. about discounts or special prices). Electronic marketing is also inherently unlimited in geographical scope, and is only limited by the comprehension of a certain language. Electronic marketing is much more accessible than traditional marketing, because it is largely dependent on individual customer settings and preferences, and can be delivered to a variety of different devices, which consumers keep at arm's length most the time (e.g. mobile phones). Finally, the sale of personalised or even custom tailored products or services have apt possibilities via electronic marketing.⁸

The above features of electronic marketing are rather evident. The most important advantage of electronic marketing over the traditional marketing, the active individualization/context potential, as well as feedback or traceability features, is less evident. Active individualization suggests that marketing may be adapted online and in real-time to the present request and the presentation of each individual consumer, what is essentially impossible in traditional media (e.g. there is no technical possibility for broadcasting different marketing clips to TV sets of consumers during the same program and the same time). Since electronic marketing is realized through embedded computer software, feedback and traceability is essentially built in into the marketing itself. This allows extreme and very efficient tracking of individual responses (response or click-through rate), and responses to the marketed goods or services (including attractive features and turn-offs). Moreover, it is possible to gather a lot of details about the consumer, such as his location, potential employment and household income, active time and his equipment parameters. Feedback and traceability features enable even higher degree of individualization of electronic marketing, which aids in attracting consumer's attention and provides business with the possibility to avoid irrelevant marketing attempts.⁹

8 Kiškis, M. Direct electronic marketing opportunities for SMEs. *Intellectual Economics*. 2009, 2 (6): 61–72.

9 Stone, B. *Successful Direct Marketing Methods*. 8th ed. New York: McGraw-Hill, 2007.

The above features inevitably give rise to legal issues, such as those related to personal data processing or security and legal liability risks (e.g. for unauthorised use of personal data). Unsolicited electronic marketing and even legal electronic marketing is a stress on the electronic communications infrastructure. During 2007–2008, unlawful direct electronic marketing and spam comprised almost 80% of the entire e-mail communication, while in 2010, this measure has approached 92% of all e-mail communication.¹⁰ Such volumes raise costs for the infrastructure owners in terms of network load, storage and electricity expenses. It is noteworthy that the electronic communications infrastructure is not owned by the marketers (the end-user infrastructure is owned by the customers themselves, while principal communications infrastructure is owned by service providers) and is very rarely intended for handling electronic marketing communications, thus raising the immediate questions of the legality of the usage of marketing. Electronic marketing may also be an impediment to usual activities, particularly in such cases when a consumer does not wish to receive any advertisements, and is unable or unwilling to make use of them.¹¹

Extreme legal conflicts arise, when electronic marketing is employed for the purpose of unlawful activities (e.g. marketing of controller pharmaceuticals). In spite of being undesirable and unlawful, spam has become a mass phenomenon, because the products promoted and services are usually either illegal or have only marginal value to consumers. Marketing through spam is intrusive or even deceptive. Spam is often used for electronic fraud, phishing, as well as distribution of computer viruses, electronic worms, and others. Spam hinders the operation of communications infrastructure. A consumer, swamped with spam, may lose other information, which is valuable to him. Merely opening spam messages (and especially attachments) can result in an exposure to computer viruses. Spam is increasingly proliferating both globally and in Lithuania. According to Google and Symantec, the amount of spam increased by 25% during 2008 compared to 2007. In 2008, an average user (in absence of security systems) would have received about 45000 spam messages (compared to 36000 spam messages in 2007), while presently the total amount of spam in the overall e-mail communication flow stands at about 80%.¹² Besides, Europe has become the major source of spam in the world. Presently, about 44% of the overall amount of spam is distributed from workstations registered in Europe. Only limited statistical data on spam is available in Lithuania. A quantitative research (a poll of consumers) performed upon an order of the Communications Regulatory Authority shows that in Lithuania the number of Internet users, which received undesirable marketing letters increased by 8% in 2008 from 2007. In 2008, undesirable e-mails were received by 65% of the Internet users and 75% of the companies surveyed.

10 Schwartz, J. S. Symantec Finds 92% Of All E-Mail Is Spam [interactive]. *Information Week*. August 12, 2010. [accessed 12-08-2010] <<http://www.informationweek.com/news/security/attacks/showArticle.jhtml?articleID=226700151>>.

11 Xingan, Li. E-marketing, Unsolicited Commercial E-mail, and Legal Solutions [interactive]. *Webology*, March, 2006, 3(1). [accessed 01-08-2010]. <<http://www.webology.ir/2006/v3n1/a23.html>>.

12 Kleha, A. The Year in Spam [interactive]. [accessed 01-08-2010]. <<http://googleenterprise.blogspot.com/2009/01/2008-year-in-spam.html>>.

According to the data of the survey, spam is the most frequent cause of network security incidents, while computer viruses rank second.¹³

This situation has led the legislators in Europe and Lithuania to strictly regulate or outlaw spam; legal prohibitions, however, are somewhat incomplete and have little effect in practice.

Despite such drawbacks, electronic marketing is the most accessible and often the only channel of communication with consumers for small businesses; it is also important to entrepreneurship and regional development. Consequently, the legal regulation of electronic marketing should acknowledge and observe the balance between the commercial activity and consumer rights.

2. The Legal Regulation of Electronic Marketing at the European Level

In the European Union, the legal regulation of electronic marketing started by introducing regulations on processing of personal data for the purposes of direct marketing. As early as 1985 the Committee of Ministers to Member States adopted the Recommendation No. R(85)20 “On the protection of personal data used for the purposes of direct marketing.”¹⁴

Even though at the time when the Recommendation was adopted most of direct marketing was in the form of direct mail, the principal features acknowledged in the Recommendation are applicable to the electronic marketing.

The Recommendation recognises that the use of personal data is essential to the maintenance and development of direct marketing. It is also recognised that the marketing sector is self-regulating, i.e., it develops its own rules to protect individual rights and interests. The promotion of legally binding and self-regulatory rules for direct marketing is envisaged in the Recommendation at the national level.

It is clear from the above principles that the Recommendation suggests the rules for the use of personal data for direct marketing purposes when such data are undergoing automatic processing. Therefore, as long as electronic marketing is dealing with personal data the rules of the Recommendation are applicable.

The Recommendation defines the direct marketing as all activities, which enable offering goods or services or transmitting any other messages to a segment of the population by post, telephone or other direct means aimed at informing or soliciting a response from the data subject as well as any service ancillary thereto. Based on the description and features of the electronic marketing, it is obvious that the electronic marketing falls within the legal definition of the direct marketing according to the Recommendation.

13 Communications Regulatory Authority of the Republic of Lithuania 2009 Report [interactive]. [accessed 01-08-2010]. <<http://www.rtt.lt/index.php?1739965296>>.

14 Council of Europe, 1985 [interactive]. [accessed 01-08-2010] <[http://www.coe.int/t/e/legal_affairs/legal_co-operation/data_protection/documents/international%20legal%20instruments/1Rec\(85\)20_EN.pdf](http://www.coe.int/t/e/legal_affairs/legal_co-operation/data_protection/documents/international%20legal%20instruments/1Rec(85)20_EN.pdf)>.

Article 2 of the Recommendation regulates the collection of data for the direct marketing purposes and acknowledges that marketers, when drawing up marketing lists, lists of names and addresses for their own marketing purposes in particular, should be able to make use of data derived from previous relations with actual or prospective customers, and/or contributors. The Recommendation allows collecting personal data for direct marketing purposes from public records and other published material, although also allowing the relevant restrictions to be introduced in the national law.

The collection of names and addresses of private persons from other private persons for marketing purposes is allowed only if the privacy of the affected individual is preserved. National law may prohibit such practices or restrict them.

The collection of data from an individual for any reason outside the customer or contributor relationship shall be permissible for direct marketing purposes only on condition that this has been expressly declared at the time of collection. The collection of data from an individual through deceptive representation is prohibited.

Sensitive data is essentially prohibited to be used in direct marketing.

The transfer of personal data collected for marketing purposes (marketing lists) to third parties is only allowed if the data subject has been informed at the time of the collection or at a later stage about the possibility of transmitting the data to third parties and the data subject has not objected to such transfer.

The availability of marketing lists to third parties for their direct marketing purposes should be documented by a written agreement and user records.

The Recommendation also recognizes the rights of the data subjects (the individuals who are marketing targets). The data subject is entitled to refuse to allow personal data to be recorded on marketing lists or to refuse to allow data contained in such lists to be transmitted to third parties. He can request such data to be erased or removed from all marketing lists.

In addition, any individual should be able to obtain and rectify personal data, which are contained on a direct marketing list.

It is the legal obligation of the controller of the marketing file to ensure that the will of the data subjects is exercised with respect to all users of the marketing file.

The Recommendation promotes the development of self-regulatory measures within the direct marketing sector, particularly regarding the removal of names from marketing lists.

The above EU Recommendation, although not mandatory, has been implemented in most of the EU Member States. The Scandinavian states (e.g. Finland or Sweden) taking into account the positive aspects of direct marketing have regulated direct marketing since late 1980s and adopted the opt-out approach for the publicly available data. The principles defined in the Recommendation as early as twenty years ago establish a balance between personal privacy, and social and business interests.

Another principal document regulating data protection matters in the European Union is the European Parliament and Council Directive 95/46/EC 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.¹⁵ Nevertheless, the Directive does not regulate marketing beyond the general principles, which are uniform for all activities, which affect personal privacy. Directive 95/46/EC does not provide the definition of the direct marketing or electronic marketing, and does not state any specific rules on direct marketing. Thus, the Directive does not change the premises of the Recommendation, and essentially allows full regulation of direct and electronic marketing through the national law.

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')¹⁶ also contains rules relevant to the electronic marketing. According to this Directive, the principle of country of origin jurisdiction is established. In particular the E-commerce Directive prescribes that information society services should be supervised at the source of the activity to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens. To improve the mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State, where the services originate. Moreover, to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established. This principle is most important in a sense that the Annex of the Directive disqualifies the permissibility of unsolicited commercial communications by electronic mail, from the legal shelter of the law of the Member State in which the sender of unsolicited commercial communication is established.

The E-Commerce Directive recognizes the importance of marketing for healthy markets, by acknowledging that commercial communications are essential for the financing of information society services and for developing a wide variety of new, charge-free services. At the same time, in the interest of consumer protection and fair trading, commercial communications, including discounts, promotional offers and promotional competitions or games, must meet a number of transparency requirements. The sending of unsolicited commercial communications by electronic mail may be undesirable for consumers and information society service providers and may disrupt the smooth functioning of interactive networks. The question of consent by recipient of certain forms of unsolicited commercial communications is not addressed by this Directive.

To control unsolicited commercial communications by electronic mail, the setting up of appropriate industry filtering initiatives is encouraged and facilitated. In addition, it is necessary that in any event, unsolicited commercial communication is clearly identifiable as such in order to improve transparency. Identification of such communication should be clear and unambiguous as soon as it is received by the recipient. The basic principle that unsolicited commercial communications by electronic mail should not

15 Official Journal L 281 , 23/11/1995 P. 0031 - 0050

16 Official Journal L 178 , 17/07/2000 P. 0001 - 0016

result in additional communication costs for the recipient is also established. These principles have evolved from the internet industry's own initiatives (self-regulation).¹⁷

Member States, which allow sending unsolicited commercial communication by electronic mail without prior consent of the recipient by service providers established in their territory, have to ensure that the service providers consult regularly and respect the opt-out registers, where natural persons wishing to no longer receive such commercial communication can register themselves. This is an important advantage of opt-out regimes, which is demonstrated in practice in the Scandinavian countries. Opt-out registers eliminate ambiguities and encourage the reasonable use of electronic marketing (such as not to provoke opt-out), while allowing marketing to customers, which do not opt-out.

The most recent European Union legal document regulating electronic marketing is the 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).¹⁸ This Directive deals with three aspects of electronic marketing:

- electronic marketing to the subscribers of the electronic communications services, and
- electronic marketing to non-subscribers of the electronic communications services;
- unsolicited marketing communication.

According to the Recitals of the Directive, the data related to subscribers, processed within electronic communications networks to establish connections and to transmit information, is acknowledged to contain information on the private life of natural persons and concern the right to respect for their correspondence or concern the legitimate interests of legal persons. Such data may only be stored to the extent that is necessary for the provision of the service for the purpose of billing and for interconnection payments, and for a limited time. Any further processing of such data, which the provider of the publicly available electronic communication services may want to perform, for the marketing of electronic communications services or for the provision of value added services, may only be allowed if the subscriber has agreed to this on the basis of accurate and full information given by the provider of the publicly available electronic communication services about the types of further processing it intends to perform and about the subscriber's right not to give or to withdraw his/her consent to such processing. Traffic data used for marketing communication services or for the provision of value added services should also be erased or made anonymous after the provision of the service. Service providers should always keep subscribers informed of the types of data they are processing and its purposes and duration.

The Directive requires providing safeguards for subscribers against intrusion of their privacy by unsolicited communication for direct marketing purposes in particular by means of automated calling machines, telefaxes, and e-mails, including SMS

17 Polanski, P. P. Spam, spamdexing and regulation of internet advertising. *International Journal of Intellectual Property Management*. 2008, 2: 139–152.

18 Official Journal L 201, 31/07/2002 P. 0037 – 0047.

messages. These forms of unsolicited commercial communication may on one hand be relatively easy and cheap to send and on the other hand may impose a burden and/or cost on the recipient. Moreover, in some cases their volume may also cause difficulties for electronic communication networks and terminal equipment. For such forms of unsolicited communication for direct marketing, it is justified to require that prior explicit consent of the recipients is obtained before such communication is addressed to them. The single market requires a harmonised approach to ensure simple, Community-wide rules for businesses and users. It is noteworthy that outright prohibition of spam (automated unsolicited marketing communication) is essentially the only aspect of electronic marketing rules, which is fully harmonized in all EU Member States. Other EU rules leave significant choices that can be made at the national level.

Notwithstanding of the above, the Directive clearly recognised the value of electronic marketing for business. It is acknowledged that within the context of an existing customer relationship, it is reasonable to allow the use of electronic contact details for the offering of similar products or services, but only by the same company that has obtained the electronic contact details in accordance with Directive 95/46/EC. When electronic contact details are obtained, the customer should be informed about their further use for direct marketing in a clear and distinct manner, and be given the opportunity to refuse such usage. This opportunity should continue to be offered with each subsequent direct marketing message, free of charge, except for any costs for the transmission of this refusal. This acknowledgment is important to note in view of the development of national regulations of electronic marketing, which is analysed in Lithuania below.

Other forms of marketing that are more costly for the sender and impose no financial costs on subscribers and users, such as person-to-person voice telephony calls, may justify the maintenance of a system by giving subscribers or users the possibility to indicate that they do not want to receive such calls. Nevertheless, in order not to decrease the current level of privacy protection, the Directive states that only calls to subscribers and users who have given their prior consent are allowed.

The use of false identities or false return addresses or numbers while sending unsolicited messages for marketing purposes is prohibited by the Directive.

It is important to emphasize that this Directive is without prejudice to the arrangements, which Member States maintain for the protection of the legitimate interests of legal persons with regard to unsolicited communication for direct marketing purposes. This is most important assuming the diversity of regulations on electronic and direct marketing in the laws of the individual Member States. In particular, where Member States establish an opt-out register for such communications to legal persons, mostly business users, they shall also ensure compliance with the principles of the E-Commerce Directive.

Article 13 of the Directive expressly deals with the issue of unsolicited electronic marketing. It regulates the use of automated calling systems without human intervention, facsimile machines (fax) or electronic mail for the purposes of direct marketing so that they may only be allowed in respect of subscribers who have given their prior consent. Thus, the Directive sets forth the so called opt-in rule. Opt-in principle is a very stringent

approach for direct marketing regulations, which requires prior action of the potential marketing target. The opposite alternative of the opt-in principle is an opt-out principle, which requires the expression of dissent against the receipt of the marketing communication. According to the opt-in principle, being passive, that is doing nothing or ignoring the messages, is not considered a dissent. Non-automated marketing communication may be sent to customers on either opt-in or opt-out bases, the choice between these options to be determined by national legislation. EU Member States are somewhat split in choosing these alternatives. Lithuania is strictly following the opt-in principle. Opt-in principle prescribed in the Directive provides for two exceptions – the above mentioned non-automated marketing exception (allowing the Member States to legislate opt-out), and the prior relationship or existing customers exception described below.

The most important exception from the opt-in principle is the prior relationship exception, which allows marketing to own customers on opt-out basis, i.e. where a person has legitimately obtained from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service then the person is entitled to send marketing communication to such customers without their prior consent (opt-out). The same natural or legal person may use these electronic contact details for marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details when they are collected and on the occasion of each message (in case the customer has not initially objected to the use of such details). The practice of sending electronic mail for purposes of direct marketing disguising or concealing the identity of the sender on whose behalf the communication is made, or without a valid address to which the recipient may send a request to cease such communication, is prohibited.

Breakdown analysis of this exception suggests five mandatory conditions, which have to be met for the marketing communication to be permissible:

- Marketing communication must be sent only to own customers;
- Marketed products or services must be own;
- Marketed products or services must be similar, to the products or services previously purchased by the customer (recipient of marketing);
- The customer has not refused such use initially or at any later time;
- The customer clearly and distinctly is given the opportunity to opt-out from future marketing with each marketing message.

The implementation of these conditions in the national law leaves significant leeway for interpretation. Also, as was noted above, the EU legal rules leave for the Member States to decide between the opt-in and opt-out for the non-automated electronic marketing, as well as to set the conditions for customer's consent. All this by default predisposes much variety and ambiguity within the European Union. The implementation of the EU legal rules in Lithuania, analysed in the following chapter of the article, may serve as a good illustration of such ambiguity.

3. Legal Regulation of Electronic Marketing in Lithuania

Direct marketing (and, accordingly, electronic marketing) in Lithuania is regulated by the 2000 Law of the Republic of Lithuania on Advertising No. VIII-1871, the 2008 Law of the Republic of Lithuania on Legal Protection of Personal Data No. X-1444 and the 2004 Law of the Republic of Lithuania on Electronic Communications No. IX-2135.

These laws are fully harmonised with the European Directives reviewed in the preceding chapter. The Recommendation No. R(85)20 of the EU Committee of Ministers is not considered in the regulation of direct electronic marketing in Lithuania. Further distinct feature of Lithuanian legal rules on electronic marketing is that it does not legislatively (i.e. in the text of the law) acknowledge the positive aspects of electronic marketing.

Overall, Lithuania has adopted the opt-in approach to direct and electronic marketing. Thus, the possibilities to use any data of the clients (collected from public sources or other undertakings) for marketing purposes are eliminated.

In paragraph 12 of Article 2 of the Law of the Republic of Lithuania on Legal Protection of Personal Data direct marketing is defined as an activity intended for offering goods or services to individuals by post, telephone or any other direct means and/or inquiring their opinion about the goods or services offered. This definition is rather limited (it does not include marketing meant for promotion of a trade mark or a company, also marketing without offering goods or services for payment), yet abstruse for persons with no legal knowledge.

The historically earliest regulations of direct marketing activity in Lithuania were introduced in the Law of the Republic of Lithuania on Advertising. Paragraph 1 of Article 13 of this law prohibits marketing by telephone, fax, telex and e-mail without consent of the person to whom marketing is aimed, i.e. it establishes the so-called opt-in principle. The opt-in principle means that marketing may be directed to a particular person and his or her personal data may be processed only subject to prior consent. To the contrary, Paragraph 2 of Article 13 of this law prohibits other marketing directed to a particular person only in a situation when a direct refusal of consent is expressed by that person, i.e. it establishes the so-called opt-out principle. An opt-out principle was also established in the Law of the Republic of Lithuania on Legal Protection of Personal Data which remained valid until 1 July 2003. The opt-out principle means that marketing may be directed to a particular person and his or her personal data may be processed as long as a refusal of consent for personal data processing is expressed.

In the Law of the Republic of Lithuania on Legal Protection of Personal Data which came into effect on 1 July 2003, the opt-out principle was replaced by the opt-in principle. In Paragraph 2 of Article 14 of the law it was established that personal data may be processed for the purposes of direct marketing if a person to whom the marketing is directed (i.e. the personal data subject) gives his consent. The above provisions of the Law of the Republic of Lithuania on Advertising, which establish opt-in for direct e-marketing and opt-out for direct marketing through non electronic channels, were not amen-

ded; therefore, the contradictory provisions caused much confusion and led to frequent application of administrative liability for marketing directed to a particular person.

The provisions of the Law of the Republic of Lithuania on Legal Protection of Personal Data must be followed in carrying out direct marketing activities, because direct marketing involves the use of certain personal data. The opt-in principle established in this law implies that in all cases a voluntary consent of a data subject needs to be obtained prior to using the personal data for the purpose of direct marketing.

Attention must be drawn to the fact that the use of personal data for the purpose of direct marketing should not be excessive. Item 4 of paragraph 1 of Article 3 of the Law of the Republic of Lithuania on Legal Protection of Personal Data sets forth that personal data must be identical, adequate and not excessive in relation to the purposes for which they are collected and processed. According to the State Data Protection Inspectorate, which supervises the observance of the Law of the Republic of Lithuania on Legal Protection of Personal Data, a personal code is excessive data for direct marketing because less specific data (e.g. name, surname, date of birth, place of residence) may be sufficient to identify a person. Therefore, using personal codes for the purpose of direct marketing is a violation of item 4 of paragraph 1 of Article 3 of the Law of the Republic of Lithuania on Legal Protection of Personal Data.

Besides, a business entity intending to process personal data for the purpose of direct marketing must determine the period for the storage of personal data (paragraph 1 of Article 14 of the Law of the Republic of Lithuania on Legal Protection of Personal Data). Usually the period for the storage of personal data for the purpose of direct marketing should be specified in internal documentation of a company. In practice, the period for the storage of personal data is defined in terms of time or the existence of certain circumstances. Even though it is not legally regulated, the State Data Protection Inspectorate is of the opinion that for the purpose of direct marketing personal data should be stored for as short period of time as possible; in addition, in the case of a consumer's (data subject's) refusal of consent, the storage of personal data must be immediately terminated.

When using personal data in direct marketing, it is also important to take into consideration the statutory duty of a marketing provider (businessman) to make a person (data subject) familiar with his right to refuse consent to his data processing for the purpose of direct marketing. A person may, without indicating reasons, refuse consent to his data processing for the purpose of direct marketing in any form acceptable to him, i.e. either orally or in writing. When a data subject expresses refusal of consent, the data controller (businessman) must terminate personal data processing immediately and without payment, and inform other persons to whom the respective user's personal data were transferred. Moreover, a businessman processing personal data for the purpose of direct marketing also needs to respect other rights of the consumer (data subject), including the right to be aware (be informed) of his personal data processing, the right to get access to his data being processed and be aware of the method of processing, the right to request correction or cancellation of his personal data or the right to request to stop processing his personal data.

Under the provisions of paragraph 2 of Article 14 of the Law of the Republic of Lithuania on Legal Protection of Personal Data, a business subject (data controller) must provide the consumer (data subject), whose personal data are being collected directly from him, with the following information, unless the consumer (data subject) already has such information:

1) information about its own (data controller's) identity and the identity of its representative, if any, and the place of residence (if the data controller or its representative is a natural person) or the requisites and the registered office (if the data controller or its representative is a legal person);

2) purposes for which the personal data of the data subject are processed;

3) other additional information (to whom and for which purposes the personal data of the data subject are provided; the personal data, which must be provided by the data subject and legal consequences of non-provision of data; information about the data subject's right to get access to his personal data and the right to require to correct erroneous, incomplete and imprecise personal data), required to ensure proper processing of personal data without violating the rights of the data subject.

In order to protect the interests of a person whose data are processed for the purpose of direct marketing, the Law of the Republic of Lithuania on Legal Protection of Personal Data stipulates the duty of the data controller, prior to providing personal data to any third parties (i.e. other business subjects), to inform the person about the third parties to which his personal data will be disclosed and for what purposes.

When processing personal data for the purpose of direct marketing, the required technical and organisational measures to ensure security and confidentiality of the data should be undertaken. The company's personnel should be constantly informed about such measures and the necessity to comply with them.

As stipulated in Articles 214¹⁴-214¹⁷ of the Republic of Lithuania Code of Administrative Violations of Law, a company may be held liable for unlawful processing of personal data for the purpose of direct marketing. In practice administrative liability is applied rather actively; it is one of the most frequent violations of the rules on processing of personal data. According to Article 214²³ of the Code of Administrative Violations of Law of the Republic of Lithuania, the liability is established for violation of the procedure for processing of personal data and protection of privacy stipulated in the Law of the Republic of Lithuania on Electronic Communications (see explanation below). Direct e-marketing, when done without consent may incur a significant monetary penalty under the Law of the Republic of Lithuania on Advertising Article 22 Part 5. Violations of this law are prosecuted by the State Consumer Rights Protection Authority and incur penalties up to almost EUR 9000 (LTL 30 000). Moreover, general civil liability is also applied for damage caused by unlawful marketing communication.

Yet another regulation related to direct marketing through electronic communication channels (direct electronic marketing) until 1 January 2009 was stipulated in paragraph 2 of Article 68 of the Law of the Republic of Lithuania on Electronic Communications: the use of the data of the company's clients for the marketing of the same company's products or services without a prior consumer's consent was allowed. Until

1 January 2009 different regulations of non-electronic direct marketing and electronic direct marketing existed; in the first case, the right to provide marketing materials to the existing clients and process their personal data for that purpose was not established.

Article 68 of the Law of the Republic of Lithuania on Electronic Communications sets forth that the use of electronic communication services, including sending of e-mail messages, for the purpose of direct marketing is allowed only if a prior consent of a subscriber is given. It should be noted that, differently from the Law of the Republic of Lithuania on Legal Protection of Personal Data, the Law of the Republic of Lithuania on Electronic Communications regulates direct marketing in respect of both natural and legal persons. The law does not specify how a prior consent of a subscriber (natural or legal person) needs to be obtained; it sets forth, however, that a sender (doing it on his own initiative or upon the instructions of other persons) is responsible for the compliance with the above provision, and in case of its violation administrative liability for unlawful use of electronic communications services (e.g. sending spam) applies to the sender.

The primary focus of the abovementioned legal regulations is the prohibition of spam. Nevertheless, they effectively restrict most electronic marketing communication.

Paragraph 2 of Article 68 of the Law of the Republic of Lithuania on Electronic Communications is devoted to the regulation of electronic direct marketing through e-mail messages, which is extremely significant. Until 1 January 2009 more preference was given to electronic direct marketing compared with non-electronic direct marketing. It stipulates that a person who obtains electronic contact details from its customers for electronic mail, in the context of the sale of a product or a service, in accordance with the procedure and conditions set out in the Law of the Republic of Lithuania on Legal Protection of Personal Data, may use these electronic contact details for marketing of its own similar products or services under the following two conditions:

1) customers clearly and distinctly are given the opportunity to refuse consent, free of charge and in an easy manner, to such use of electronic contact details for the above purposes when they are collected; and

2) on the occasion of each message, in case the customer has not initially objected to such use of the data.

It is prohibited to send e-mail messages for the purpose of direct marketing if:

1) the identity of the sender in whose name the information is sent is concealed, or

2) the valid address to which the recipient could send a request to terminate sending such information is not indicated.

From 1 January 2009 analogous provisions were transferred to the Law of the Republic of Lithuania on Legal Protection of Personal Data, thereby somewhat unifying the legal regulations of electronic and non-electronic direct marketing.

The rather messy situation with legal regulations of electronic marketing in Lithuania is a result of multi-layer approach (or multi-directive approach) in the European Union. Nevertheless, in the process of harmonization of the Lithuanian national law with the EU Acquis it was appropriate to eliminate conflicting and ambiguous provisi-

ons of the laws. Unfortunately that was not done. Only recently (as of 1 January 2009) the regulations for electronic marketing have been realigned.

Currently, according to the laws of the Republic of Lithuania (valid from 1 January 2009), electronic direct marketing is allowed only if a prior consent of a consumer is obtained (opt-in), except for the only case when it is carried out for marketing of a company's similar products or services to the already existing clients. Unfortunately, the Lithuanian legislator did not address the vague questions of defining the "similar products or services", as well as "existing client". Since these questions are undefined in the EU legal framework, as it was discussed in the preceding chapter, they lack further elaboration in the national law of most EU Member States. Only some Member States (notably Finland) elaborate the notion of "existing client", as the client with whom the relationship was maintained (e.g. sale occurred or customer actively communicated) within the last 6 months.

Court practice in Lithuania generally follows the above described rules without deviation. The first cases following these rules (although approaching them from afar) was ruled by the Supreme Court of Lithuania on 10 Oct 2001 case No 3K-3-927/01 UAB "Sėkmės sistemos" v. UAB "Telekomo verslo spendimai". Although at the time, there was no express prohibition for unsolicited marketing communication (only the above described rules of the Law of the Republic of Lithuania on Advertising were in place at the time), the court held that unsolicited electronic marketing communication is an abuse of the right to disseminate information via internet and constitutes illegal behaviour. The court defined unsolicited electronic marketing communication as sending of unsolicited information of a commercial character in huge quantities. The court also ruled that the internet access provider cannot be held liable for not supporting the spammer in his actions. The facts of the case were, that the defendant had terminated Internet access of the plaintiff because the latter was presumed to have sent spam emails. In a very similar case resolved by the Supreme Court of Lithuania on 13 January 2003 case No. 3K-3-35/2003 AB „Lietuvos telekomas“ v. Ž. Budros IĮ „Sėkmės vėjas“, the court expressly confirmed the above ruling and upheld the right of the internet access provider to block service and seek damages from bulk sender of unsolicited electronic marketing communication.

Subsequently, the amended Law of the Republic of Lithuania on Legal Protection of Personal Data, as well as the Law of the Republic of Lithuania on Electronic Communications were applied. In 22 June 2006 ruling in the case No. N3-733-06 of the Chief Administrative Court of Lithuania, the court presented a legal analysis of marketing calls made to random mobile numbers. Although the case was not resolved by this ruling, the court has argued that asking for consent and then presenting marketing information within the same call is not compliant with opt-in principle, according to the Law of the Republic of Lithuania on Legal Protection of Personal Data and Law of the Republic of Lithuania on Electronic Communications.

Following the above precedent, the Law of the Republic of Lithuania on Advertising was relied as a basis for most significant albeit controversial sanctions against electronic marketer. In 6 April 2009 Decision of the Vilnius District Administrative Court

in the case No. I-679-473/2009, the court reiterated that opt-in consent must be express and that lack of response shall not be deemed consent or willingness to receive further marketing communication. Therefore, the mobile marketing calls, where the respondent is asked for consent at the beginning of the call is not deemed acceptable marketing communication. Sanctions – monetary penalties – according to the Law of the Republic of Lithuania on Advertising Article 22 would be applicable in these cases.

The supervision of the application of the regulations by the State Data Protection Inspectorate and the State Consumer Rights Protection Authority is rather strict. According to the State Data Protection Inspectorate, the above regulation of direct marketing is primarily aimed at fighting spam and other undesirable direct marketing. Unfortunately, it is not efficient enough, since sanctions applied in practice for the violation of direct marketing rules are relatively mild (the highest penalty so far is slightly above 600 EUR), while the efficiency of such marketing and return on investment is high and compensates for direct risk. Thus, the volume of electronic marketing communication sent by Lithuanian entities without the consent of the recipient is growing exponentially.

Moreover, strict legal regulation does not safeguard at all against direct electronic marketing originating from abroad. From the social-economic point this is also important because foreign entities are gaining advantage over Lithuanian business. Yet another shortcoming emanating from the above analysis is that the legal regulation of electronic marketing is generally aimed at the sender, rather than the seller of the marketed goods and services. This may encourage certain cover-up schemes, where the seller of the marketed goods and services escapes any liability and explains the growing volume of electronic marketing communication sent without consent in Lithuania.

Overall, strict and complex legal regulation of electronic marketing communication in Lithuania is insufficient to address the negative aspects of electronic marketing – the sanctions are mild and target only part of the culprits. It follows that the flow of most EU countries in leaving the ambiguous European law regulations unexplained in the national law. The courts are trying to compensate for this ambiguity to certain extent.

4. Perspectives for Future Legal Regulation of Electronic Marketing

The analysis of the Lithuanian legal regulations pertaining to electronic direct marketing shows overemphasis at regulating electronic marketing communication and essentially no regulation for other forms of electronic marketing. Also, it is troublesome that Lithuanian legislation does not acknowledge the benefits of electronic marketing and provide little room for legitimate e-marketing. The only exception, which shall be commended, is the recent liberalization of the marketing to existing customers.

The unconditional requirement of a consumer's prior consent may be too restrictive. Based on case law, which requires unambiguous separate consent, it essentially outweighs one of the key benefits from direct electronic marketing. In many situations the clear prior consent may be impossible to obtain, especially if a consumer does not

realise the benefit he could derive from direct electronic marketing, i.e. the consumer has no possibility to see the marketing itself, the individualised offers, discounts, and other features. Even if considering marketing directed to the existing clients of certain companies, only their own similar products and services can be advertised, thus restricting competition, by favouring companies offering many products and services. Lack of unambiguous legal definition of the “similar products and services” is therefore also adverse to new businesses, which do not have an established customer base and may prevent marketing of complementary but unrelated products.

Lack of regulation of other forms of electronic marketing generally corresponds to the situation in the other EU countries. Either way, it is not justified. As it was noted, other forms of electronic marketing – especially context marketing and social network marketing present very significant and even graver challenges to the customer privacy, compared to electronic marketing communication. From privacy law perspective especially troublesome is active individualization and traceability features, which allow collecting vast amounts of private information about consumers. Recent turmoil about the Facebook (world’s biggest social network, exceeding 500 million users) use of private customer information and opt-out treatment of such information as not private demonstrates these risks. Since the electronic marketing is inherently global, also due to the above outlined variations and ambiguities in regulating electronic marketing communication within the current EU rules, further regulation and harmonization at the supra-national level shall be encouraged. Jurisdiction shopping across the EU, as well as unequal conditions for businesses to take advantage of electronic marketing add yet additional rationale for further harmonisation of the electronic marketing rules. Greater role for self-regulation based on best practice overseas examples support these findings¹⁹.

The legislative process shall account not only the excessive and unlawful electronic marketing communication, but rather a balance is necessary at the level of personal interests, i.e. the same person wishes to receive information, to protect his privacy and to provide information about his products and services to others. When business does not have the possibility to provide and does not receive the required information, products and services are of lower quality, while their prices are higher. If legal risks in the processes providing and obtaining information are not reduced, the cost of products and services will become substantially higher, i.e. the risks will be shifted to consumers.²⁰ Opt-out register approach established in the Scandinavian states, which also have burgeoning electronic business jurisdictions, may serve as a best practice legal regulation example.

Future regulations of electronic marketing should focus on the following principles:

19 *Network Advertising Initiative, Self-Regulatory Principles for Online Preference Marketing by Network Advertisers* [interactive]. 2000. [accessed 01-08-2010]. <<http://www.ftc.gov/os/2000/07/NAI%207-10%20Final.pdf>>.

20 Tapp, A. *Principles of Direct and Database Marketing: A Digital Orientation*. 4th ed. Financial Times, 2009, p. 25.9.

- Non-discriminatory regulation for all forms of electronic marketing. Regulation should not be limited to essentially one form of electronic marketing. All privacy invasive and socially challenging forms of electronic marketing should be regulated.
- Non-discriminatory regulation for national marketers compared to marketers acting in other Common Market Countries.
- Regulation of electronic marketing according to the combination of opt-out and opt-in principles. The former (opt-out) shall be applicable for less privacy intruding forms of electronic marketing, while the latter (opt-in) shall be applicable to intrusive forms of electronic marketing. It should be mentioned that previous research clearly concludes that the acceptability of electronic marketing is proportional to the extent of privacy invasion – the more forthright and personal direct electronic marketing is, the less it is acceptable, e.g. marketing by SMS messages or pop-up marketing is identified as extremely invasive and unacceptable, while direct electronic marketing by e-mail messages (in cases when a consumer has expressed his wish to receive them) is more acceptable to consumers.²¹
- Opt-out registers of all consumers not wishing to receive direct electronic marketing messages may be compiled. Sending direct electronic marketing messages to a consumer registered in such a register is treated as a violation of law; however, sending direct marketing messages to the remaining part of consumers shall be allowed.
- Additional regulations regarding the consumers' consent. The ways of possible refusal of consent in future (taking into account the fact that it might be difficult for a consumer to find a business subject to which his consent was previously given and contact it). State interference would both ensure protection of consumers' interest and provide transparency to business units.
- Self-regulation and codes of ethics are means of non-state social regulation, which may be successfully applied to electronic marketing. The establishment of self-regulation and codes of ethics for electronic marketing is envisaged in the EU legal rules. Self-regulation would provide businesses with a possibility to determine acceptable and reasonable rules. It would be desirable that such rules and not state regulation define the undesirable electronic marketing, presumptions on violations, ascribe certain privacy quality seals for electronic marketers, which comply with the codes of ethics.²² It is very important to note that self-regulation is able to tract the rapidly developing electronic marketing much hastier than state regulation.

21 Elkälä, K. Paper or Electronic? Preferred and Disfavored Reception Channels for Direct Marketing In *Regulatory and Economic Challenges in the Postal and Delivery Sector*. Crew, M. A.; Kleindorfer, P. R. (eds.). New York: Springer, p. 333–354.

22 Todd, R.; Collins, G. The Privacy Implications of Deep Packet Inspection Technology: Why The Next Wave In Online Advertising Shouldn't Rock The Self-Regulatory Boat. *Georgia Law Review*. 2010, 44: 544.

- Sanctions against the abuse of electronic marketing (extremely invasive forms of electronic marketing) should be significantly increased. Sanctions should cover not only senders of unlawful electronic marketers, but also the sellers of marketed goods and services.²³

The above mentioned principles should be considered when regulating electronic marketing in Europe and Lithuania.

Conclusions

In sum, the following conclusions can be drawn:

1. Electronic marketing brings considerable social value to the society, consumers and competition; it is, however, easy to abuse and compromise personal privacy. Legal regulation to date is mostly aimed at regulating abuse of electronic marketing – unsolicited electronic marketing (spam), nevertheless fails in achieving this goal – the volume on unsolicited electronic marketing is growing rapidly worldwide and in Lithuania. Unfortunately, legitimate and useful electronic marketing is severely restricted in the collateral effects of such regulation.

2. Survey of electronic marketing rules in Lithuania and other EU countries suggests limited, however rather diverse and somewhat ambiguous legal rules. The only harmonized aspect of electronic marketing law is the prohibition of automated unsolicited electronic communication – spam. Diverse rules apply towards the consumer consent requirement, lack of regulatory clarity is observed with regulating prior relationship exception, no harmonization exists in the field of the legal liability for abuse of electronic marketing rules. No legal regulation whatsoever applies to electronic marketing outside of electronic communication. This situation is disadvantageous for development of the Common Market, discourages new national entrepreneurs and favours liberal jurisdictions.

3. Analysis of the Lithuanian legislation and case law on electronic marketing reiterates concerns raised from analysis of the European framework. There is emerging emphasis on overreaching restrictions of socially beneficial electronic marketing in the case law and administrative practice, which however fails to contain the volume of unsolicited electronic marketing. Also, European rules (with all the vagueness attached) are transplanted into the national law verbatim, thus creating undesirable legal uncertainty. Non-communicative forms of electronic marketing are left outside of the legal regulation so far.

4. Principles for future regulation of electronic marketing shall be based on acceptability of electronic marketing to consumers. Regulation shall embrace all different forms of electronic marketing, combine opt-out and opt-in regimes, greater role for self-regulation and strict sanctions against the abusive forms of electronic marketing. Further

23 Nettleton, E.; Turner, I. Tougher enforcement and increased power for the Information Commissioner? *Journal of Database Marketing & Customer Strategy Management*. 2008, 15: 207–212.

extension and harmonisation of the electronic marketing rules at the European level is urgently needed in order to eliminate jurisdictional distortions..

References

- Arens, W. *Contemporary Advertising*. Boston: McGraw-Hill, 2006.
- Communications Regulatory Authority of the Republic of Lithuania 2009 Report [interactive]. [accessed 01-08-2010]. <<http://www.rtt.lt/index.php?1739965296>>.
- Elkelä, K. Paper or Electronic? Preferred and Disfavored Reception Channels for Direct Marketing In *Regulatory and Economic Challenges in the Postal and Delivery Sector*. Crew, M. A.; Kleindorfer, P. R. (eds.). New York: Springer.
- Hanson, W.; Kalyanam, K. *Internet Marketing and e-Commerce*. South-Western College Pub: San Francisco, 2006.
- Holahan, C. Advertising Goes Off the Radio [interactive]. BusinessWeek, December 2006 [accessed 01-08-2010]. <http://www.businessweek.com/technology/content/dec2006/tc20061207_485162.htm>.
- Holzner, S. *Facebook marketing: leverage social media to grow your business*. Indianapolis (Ind.): Que, 2009.
- Kiškis, M. Direct electronic marketing opportunities for SMEs. *Intellectual Economics*. 2009, 2(6).
- Kiškis, M.; Petrauskas, R.; Rotomskis, I.; Štitiš, D. *Teisės informatika ir informatikos teisė*. Vilnius: Mykolo Romerio universitetas, 2006.
- Kleha, A. The Year in Spam [interactive]. [accessed 01-08-2010]. <<http://googleenterprise.blogspot.com/2009/01/2008-year-in-spam.html>>.
- Markauskas, L. *Reklamos teisinis reglamentavimas: teorija ir praktika*. Vilnius: Mokesčių srautas, 2008.
- Nettleton, E.; Turner, I. Tougher enforcement and increased power for the Information Commissioner? *Journal of Database Marketing & Customer Strategy Management*. 2008, 15.
- Network Advertising Initiative, Self-Regulatory Principles for Online Preference Marketing by Network Advertisers [interactive]. 2000. [accessed 01-08-2010]. <<http://www.ftc.gov/os/2000/07/NAI%207-10%20Final.pdf>>.
- Polanski, P. P. Spam, spamdexing and regulation of internet advertising. *International Journal of Intellectual Property Management*. 2008, 2.
- Schwartz, J. S. Symantec Finds 92% Of All E-Mail Is Spam. *Information Week*. August 12, 2010. [accessed 12-08-2010]. <<http://www.informationweek.com/news/security/attacks/showArticle.jhtml?articleID=226700151>>.
- Stone, B. *Successful Direct Marketing Methods*. 8th ed. New York: McGraw-Hill, 2007.
- Strauss, J.; Frost, R. *E-Marketing*. 5th ed. Prentice Hall: New Jersey, 2008.
- Tapp, A. *Principles of Direct and Database Marketing: A Digital Orientation*. 4th ed. Financial Times, 2009.
- Todd, R.; Collins, G. The Privacy Implications Of Deep Packet Inspection Technology: Why The Next Wave In Online Advertising Shouldn't Rock The Self-Regulatory Boat. *Georgia Law Review*. 2010, 44.
- Xingan, Li. E-marketing, Unsolicited Commercial E-mail, and Legal Solutions. [interactive]. *Webology*. 2006, 3(1). [accessed 01-08-2010]. <<http://www.webology.ir/2006/v3n1/a23.html>>.

ELEKTRONINĖS RINKODAROS TEISINIS REGULIAVIMAS

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Santrauka. Straipsnyje nagrinėjamas elektroninės rinkodaros teisinis reguliavimas Europos valstybėse ir Lietuvoje. Analizuojami elektroninės rinkodaros socialiniai-ekonominiai pranašumai ir neigiami aspektai, lyginant su tradicinės rinkodaros priemonėmis. Pateikiama elektroninės rinkodaros vadybinė ir teisinė samprata, identifikuojamos pagrindinės formos ir jų ypatumai.

Teisinio reguliavimo analizė pateikiama istorinėje ir teleologinėje perspektyvoje, akcentuojamas europiniame teisiniame reguliavime nuo 1985 m. pripažintas poreikis balansuoti asmens privatumo ir ekonominius verslo interesus. Europinės teisės ir jurisprudencijos analizė fokusuojama į Europos Sąjungos direktyvų ir ankstesnių teisės aktų analizę, taip pat teisinio harmonizavimo vertinimą. Analizėje ypač skiriamas dėmesys tiems aspektams, kurių ES teisė nereguliuoja, o nacionalinės teisės sistemos reguliuoja įvairiai. Pastebima, kad elektroninės rinkodaros teisinis reguliavimas gana ribotai harmonizuotas europiniu lygiu. Daug svarbių principų ir taisyklių paliekama reguliuoti nacionalinei teisei, todėl įvairiose ES valstybės narėse reguliavimas gerokai skiriasi, o tai sukuria teises kolizijas ir vertinama negatyviai.

Šiuo metu elektroninės rinkodaros teisiniame reguliavime iš esmės dominuoja privatumo pažeidimų ir neteisėtos elektroninės rinkodaros draudimo klausimai. Šie klausimai, ypač Lietuvos teisėje ir teismų praktikoje, užgožia teigiamus elektroninės rinkodaros aspektus, kurie Lietuvoje priešingai nei ES dokumentuose, net nėra ištatymiškai pripažinti. Taip pat pasakytina, kad didelė dalis elektroninės rinkodaros apskritai nėra reguliuojama, nepaisant to, kad jos keliami privatumo iššūkiai yra dar didesni.

Straipsnyje nagrinėjama užsienio jurisprudencija ir kai kurių ES valstybių patirtis ieškant geriausios elektroninės rinkodaros reguliavimo praktikos. Identifikuojami teisinio reguliavimo principai, kuriais turėtų būti grindžiama elektroninės rinkodaros teisinio reguliavimo plėtra. Rekomenduojamas išsamesnis visų elektroninės rinkodaros formų teisinis reguliavimas ir jo harmonizavimas europiniu lygiu, būtinybė griežtinti sankcijas ir plėsti atsakomybės subjektų ratą už neteisėtą elektroninę rinkodarą, taip pat toliau plėtojant savi-reguliacijos plėtrą elektroninės rinkodaros srityje.

Reikšminiai žodžiai: elektroninė rinkodara, elektroninės rinkodaros teisė, asmens duomenų teisinė apsauga, privatumas.

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