



**DLA CLIFFE DEKKER
HOFMEYR**

ALERT

5 MARCH 2014

IN THIS ISSUE

.....

SPAM A FRIEND...
TO RECOMMEND OR
NOT TO SEND

.....

DATA PROTECTION AND PRIVACY

SPAM A FRIEND...TO RECOMMEND OR NOT TO SEND

Users of online shopping websites and social media platforms would recently have encountered the 'send-to-a-friend' or 'tell-a-friend' option which in some cases is accompanied by an incentive in the form of a gift or voucher.

These options are marketing tools used by online service providers whereby they can obtain email and other details for their existing users' friends and family. On the face of it, this appears to be an effective way for online service providers to generate access to a wider customer base by leveraging off of their existing customer base. As this is in effect a form of direct marketing, it is however important to evaluate the permutations of these options from a data protection and consumer protection perspective.

The German Federal Court recently adopted a conservative approach in finding that the 'send-to-a-friend' option constitutes illegal spam unless the recipient of the email expressly consents thereto. In the matter before the court, the recipient of the emails had, despite objecting thereto, been flooded with emails. Although it is the friend of the recipient who initiates sending an email by making use of the 'send-to-a-friend' functionality, the email is ostensibly generated and sent by the online service provider. As a result, the court found that the onus is on the online service provider to obtain the recipient's consent. The basis for this decision lies in the specific requirements under German law for a consumer to expressly opt-in for the purposes of direct marketing.

continued

From a South African perspective, one would need to evaluate the provisions applicable to direct marketing under the Consumer Protection Act, No 68 of 2008 (CPA) and the Protection of Personal Information Act, No 4 of 2013 (PPI). (It is important to note that whilst PPI has been enacted, it is yet to come into force). The CPA provides a consumer with the right to opt out of direct marketing or the right to pre-emptively block the receipt of certain forms of direct marketing. The PPI contemplates that only existing customers can be approached for the purposes of direct marketing and must be given the option to opt out. By implication, under PPI, an online service provider would not be entitled to directly market to data subjects (being natural or juristic persons, as defined under PPI) who are not existing customers without obtaining their consent. However, it is yet to be determined whether the South African Information Regulator under the PPI or the courts will construe the 'send-to-a-friend' functionality as an email initiated by the friend or the online service provider.

In the interim, it is prudent for online service providers to consider the following in order to mitigate the risks associated with the 'send-to-a-friend' emails:

- clearly stating to website users that they should only make use of the 'send-to-a-friend' function if they have reason to believe that the recipient would consent to receiving an email from the online service provider;
- identifying the website user as the sender of the email;
- not sending emails to recipients who have previously opted-out from receiving direct marketing communications; and
- placing a limit on the number of emails that the online service provider is allowed to send.

Tayyibah Suliman and Nabeela Latib



2013
1st by M&A Deal Flow, 1st by M&A Deal Value

2012
1st by M&A Deal Flow
1st by General Corporate Finance Deal Flow
1st by General Corporate Finance Deal Value
1st by Unlisted Deals-Deal Flow

2011
1st by M&A Deal Flow
1st by M&A Deal Value
1st by General Corporate Finance
1st by Legal Advisor (Deal of the Year)

DealMakers

HIGHEST RANKING FROM CLIENT SATISFACTION AMONGST AFRICAN FIRMS 2013

Legal Week

VOTED NO.1 LAW FIRM FOR CLIENT SERVICE EXCELLENCE FOUR YEARS IN A ROW.

pmr
africa

continued

CONTACT US

For more information about our Data Protection and Privacy services, please contact:



Nick Altini

National Practice Head
Director
Competition
T +27 (0)11 562 1079
E nick.altini@dlacdh.com



Gillian Lumb

Cape Town Regional Practice Head
Director
Employment
T +27 (0)21 481 6315
E gillian.lumb@dlacdh.com



Preeta Bhagattjee

National Practice Head
Director
Technology, Media and
Telecommunications
T +27 (0)11 562 1038
E preeta.bhagattjee@dlacdh.com



Simone Gill

Director
Technology, Media and
Telecommunications
T +27 (0)11 562 1249
E simone.gill@dlacdh.com



Aadil Patel

National Practice Head
Director
Employment
T +27 (0)11 562 1107
E aadil.patel@dlacdh.com



Brigit Rubinstein

Director
Dispute Resolution
T +27 (0)21 481 6308
E brigit.rubinstein@dlacdh.com



Faan Coetzee

Consultant
Employment
T +27 (0)11 562 1600
E faan.coetzee@dlacdh.com

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com