

Public



Joint ruling of the CBP (Dutch Data Protection Authority) and OPTA (Independent Post and Telecommunications Authority) concerning “tell-a-friend systems” on websites

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Introduction

In the Internet and marketing world the term “Tell-a-friend” denotes a means or method that is used to persuade the reader or consumer to pass on a message to friends and relations. Related and somewhat wider concepts are “Word-of-mouth advertising” and “viral marketing”.

This ruling concerns “Tell-a-friend” systems on websites. It may concern various services, such as sending a virtual postcard, forwarding a news item, a specific offer or vacancy, or an invitation to play a game, for instance. The actual implementation of “Tell-a-friend” systems differs per website. This ruling is limited to systems that comply with the following conditions:

1. An Internet user passes the email addresses of third parties (relations or friends) on to the controller of the website by entering these addresses on a website.¹
2. The controller of the website² then sends an email to the provided email address(es).

¹ Including the provision of email addresses by providing access to an address book.

² The term “Controller” is derived from article 1 (d) Wbp: “the natural person, legal entity or any other person who, or the administrative body that, independently or in cooperation with others, determines the purpose and the means of the processing of personal data.”

Legal framework

Authority of OPTA and authority of CBP

The Onafhankelijke post- en telecommunicatieautoriteit (OPTA) [Independent Post and Telecommunications Authority] (hereinafter OPTA) regulates compliance with the provisions of the Telecommunicatiewet (Tw) [Telecommunications Act] (hereinafter: Tw) pursuant to the Wet Onafhankelijke post- en telecommunicatieautoriteit [Independent Post and Telecommunications Authority Act] (Bulletin of Acts and Decrees 1997, no 580). Within the scope of its regulatory powers the Authority sees to the proper compliance with the regulations concerning the sending of unsolicited electronic communications.

The Dutch Data Protection Authority (Dutch DPA) (College bescherming persoonsgegevens (CBP)) (hereinafter Dutch DPA) supervises compliance with the Dutch Data Protection Act (hereinafter: Wbp) pursuant to article 51 Wbp. Pursuant to article 6 Wbp personal data must be processed in accordance with the law. The word 'law' also refers to other laws concerning the processing of personal data, such as chapter 11 Tw about the protection of personal data and private life.

OPTA and the Dutch DPA reached agreement on carrying out supervision where their respective powers overlap. The "Dutch DPA-OPTA Cooperation Protocol" provides that principles of the general regulations – the Wbp – and principles of the special regulations – the Tw – concerning the protection of private life will be construed consistently by OPTA and the Dutch DPA.

Concerning article 11.7 Tw the cooperation protocol provides that OPTA will exercise its powers where electronic messaging is used to deliver communications for commercial, non-commercial or charitable purposes. The Dutch DPA will exercise its powers in all other cases that involve the processing of electronic contact details for electronic messaging.

Reason for the ruling

The Authorities note that the use of "Tell-a-friend" systems is widespread. The controllers of websites seem to be unclear about the lawfulness of "Tell-a-friend" systems. Since this involves concurrent powers of the supervisory bodies, they find it necessary to issue a joint ruling.

Applicability of the Tw

Article 11.7 Tw provides that:

“The use of [...] electronic messaging for passing on unsolicited communications for commercial, non-commercial or charitable purposes to subscribers is only permitted, if the sender can prove that the subscribers involved have given their prior consent for that, subject to the provisions of the second paragraph.”

Article 11.8 Tw provides that:

“The application of article 11.6 and 11.7 is limited to subscribers who are natural persons.”

In “Tell-a-friend” systems the controller of the website sends email to a recipient who has not given his prior, demonstrable consent for that electronic communication. The ban on sending unsolicited electronic messages for commercial, non-commercial or charitable purposes is currently limited to natural persons as recipients.³

Applicability of Wbp

In article 1 (a) of the Wbp personal data is defined as: “any information relating to an identified or identifiable natural person.” An email address may be both directly and indirectly identifying data, but is almost always personal data. This with the exception of functional email addresses, such as sales@<company name>, info@<company name> and other general denominations that directly or indirectly cannot be traced back to a natural person.

Lawfulness of “Tell-a-friend” systems pursuant to the Tw

The basic principle in article 11.7 in conjunction with 11.8 Tw is that the sending of unsolicited electronic messages for a commercial, non-commercial or charitable purpose is not allowed without the demonstrable, prior consent of the recipient. Because the recipients of tell-a-friend emails have not given their demonstrable, prior consent to receive these emails, “Tell-a-friend” systems in principle violate this ban. OPTA and the Dutch DPA recognize, however, that there is a grey area of personal communication, where it is not always clear beforehand if this ban applies to a message. Provided that he only plays a facilitating role and complies with the criteria below, the controller of a website may set up a possible “Tell-a-friend” system in such a way that in principle the messaging does not violate the provisions of article 11.7 in conjunction with 11.8 Tw⁴, because it concerns communications of a mainly personal nature.

³ The Cabinet proposed to delete the limitation to natural persons. The Lower House agreed to this on 22 January 2008, the Upper House on 11 November 2008. The expansion of the ban on spam is expected to become effective on 1 July 2009. "Amendment of Telecommunications Act concerning the establishment of an antennae register", Parliamentary Papers I, 2007-2008, 30 661. (<http://www.eerstekamer.n1/9324000/1f/j9vvgh5ihkk7kof/vhq7aoumb4vk>)

Pursuant to the Tw the following conditions must be met for the communication to be regarded as ‘communication of a mainly personal nature’:

- The communication takes place entirely at the Internet user’s own initiative. The controller of the website does not hold out the prospect of any (chance of) reward or other advantage, neither to the sender nor to the recipient.
- It must be clear to the recipient who the initiating Internet user of the email is. This gives the recipient the possibility of tackling the initiator about (arranging for) sending the email.
- the Internet user must have the opportunity to read the entire message that is sent in his or her name before he or she decides to send it, in such a way that he or she can take responsibility for the contents of the message.

Lawfulness of “Tell-a-friend” systems pursuant to the Wbp

Article 6 Wbp provides that:

“Personal data shall be processed in accordance with the law and in a proper and careful manner.”

The word ‘law’ in this article also refers to other laws than the Wbp concerning the processing of personal data, such as chapter 11 Tw about the protection of personal data and private life. Because the recipient has not given his demonstrable, prior consent for receiving the email, the processing of the email addresses by “Tell-a-friend” systems is also unlawful under the Wbp, unless the email is sent for mainly personal purposes.

An important principle of the Wbp is the requirement of purpose limitation. This is detailed in articles 7, 8 and 9 Wbp. Pursuant to article 7 Wbp personal data may only be collected for well-defined, explicitly described and legitimate purposes. Article 8 provides that the person responsible must have a ground for legitimate data processing. The only applicable ground for sending unsolicited email for a commercial, non-commercial or charitable purpose is the prior consent of the recipient, as provided in article 8 (a) Wbp in conjunction with 11.7 and 11.8 Tw.

Article 9 Wbp forms the tailpiece of the purpose limitation requirement in the Wbp.

Data may not be processed in a way that is incompatible with the purposes for which they have been collected.

⁴ It should be noted that both parties – the provider of the ‘Tell-a-friend’ system as well as the person who has a message sent in his name – can be regarded as ‘senders’ pursuant to article 11.7 Tw.

The controller of the website does not have a justified purpose for collecting the personal data as meant in article 1 (o) Wbp and does not have a basis for processing the personal data as meant in article 1 (b) Wbp for sending the unsolicited email for a commercial, non-commercial or charitable purpose. The controller may only use the personal data entrusted to him by the sender once for sending a message of a mainly personal nature. He may not store the email addresses and other personal data of recipients or process these data in any other way. Consequently, sending a reminder is also not allowed pursuant to the Wbp.

Other criteria

Apart from the above criteria controllers of websites are obliged to take the technical and organizational measures prescribed in article 13 Wbp to protect personal data against loss or unlawful processing. The person who offers a "Tell-a-friend" system must take the necessary measures to protect the system against abuse, such as the automated sending of spam.

Summary

"Tell-a-friend" systems on websites are forms of electronic communication and processing of personal data that must comply with the provisions of article 11.7 in conjunction with 11.8 Tw and the provisions of articles 6, 7, 8, 9 and 13 Wbp.

In this joint ruling OPTA and the Dutch DPA rule that "Tell-a-friend" systems can only be lawful, if the following conditions are met:

1. The communication takes place entirely at the Internet user's own initiative. The controller of the website does not hold out the prospect of any (chance of) reward or other advantage, neither to the sender nor to the recipient.
2. It must be clear to the recipient who the initiating Internet user of the email is.
3. the Internet user must have the opportunity to read the entire message that is sent in his or her name before he or she decides to send it, in such a way that he or she can take responsibility for the personal contents of the message.
4. The data controller may not process the email addresses and other personal data of recipients within the meaning of article 1(b) Wbp, including storing these data or using them in any other way than for the purpose of sending them once, as meant by the initiating Internet user.

The joint ruling should be regarded as a law interpreting policy rule. Pursuant to article 8:2 (b) of the Algemene wet bestuursrecht (Awb) (General Administrative Law Act) in conjunction with article 7:1 Awb an objection or an appeal against this ruling is not allowed.

THE INDEPENDENT POST AND
TELECOMMUNICATIONS AUTHORITY,

The Dutch Data Protection
Authority

on behalf of the commission,

For the Authority,

Mr. C. A. Fonteijn, Chairman
Chairman

mr. J. Kohnstamm,