

KÜRZERE ABHANDLUNGEN
SHORT ARTICLES AND COMMENTS

Regulation on Spam in the EU and Japan

Takayuki Soda

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1. Introduction

In Japan, regulation¹ on spam² before the reform of 2008³ consisted of an “opt-out” system like in the United States. However, this regulation had some serious problems: First, when a receiver of an e-mail advertisement opted out, the e-mail sender realized that the receiver's e-mail address was really in existence. So after that, the receiver received ad e-mails one after another. Second, senders of bulk ad e-mails usually did not observe the law requiring senders to indicate that the e-mail contained advertisement. Third, there were many ad e-mails in which the sender information was disguised. For that reason, there were very few legal cases concerning spam regulation in Japan. Fourth, the number of ad e-mails that did not adhere to the Acts increased year by year so that they increasingly invaded receivers' privacy. Therefore, an “opt-in” system similar to that of the EU was adopted in Japan by the reform of 2008.

1 *Tokutei denshi me-ru no sôshin no tekisei-ka-tô ni kan suru hôritsu (tokutei denshi me-ru hô, Act on Regulation of Transmission of Specified Electronic Mail), Law No. 26/2002, as amended by Law No. 19/2009, Engl. transl. <http://www.japaneselawtranslation.go.jp> (accessed 7 May 2010) and*

Tokutei-shô torihiki ni kan suru hôritsu (Act on Specified Commercial Transactions), Law No. 57/1976; Engl. transl. <http://www.meti.go.jp/english/ASC.html> (accessed 7 May 2010).

2 In this article, “spam” refers to e-mail that contains advertisement without the receiver's consent.

3 Both of these new acts were put into force on December 1 2008.

Each EU member state has adopted the “opt-in” system in different ways (*Table 1*): In Germany, spam is regulated by civil action. In Sweden, spam is regulated by special civil action by a consumer ombudsman. In the Netherlands and the UK, spam is regulated in an administrative matter. In Italy, spam is regulated in an administrative and a criminal manner.

Table 1: The means of regulation on spam in the EU member states and Japan

<i>Germany</i>	<i>Sweden</i>	<i>Netherlands, UK</i>	<i>Italy, Japan</i>
Civil action	Special civil action by consumer ombudsman	Administrative regulation	Administrative and criminal regulation

Such different means of regulation on spam lead to differences in: 1) the power to collect evidence, 2) the burden of proof of receiver’s consent, 3) the level of sanctions, and 4) the deterrent effect on spam.

2. *The Power to Collect Evidence*

In Italy, when spam is prosecuted criminally (§ 167 Personal Data Protection Code⁴), a prosecutor can request sender information from the service provider by way of search warrant and identify the sender.

In Germany, where spam is regulated by civil action, receivers and consumer organizations have a right to request sender information from the service provider (§ 13 and § 13a Injunction Action Act⁵). This right releases the service provider from the duty of maintaining the secret of communication. By this right, receivers and consumer organizations can identify the senders of spam.

In the Netherlands, where spam is regulated administratively, the OPTA (*Onafhankelijke Post en Telecommunicatie Autoriteit*) can request necessary information for its activity from anyone. This right releases the service provider from the duty to maintain the secret of communication (client privacy in regards to mail content) and the client’s personal information. By this right, the OPTA can identify the sender of spam. OPTA also has the right to enter premises and to confiscate equipment (§ 18.7 New Telecommunication Act⁶).

In general, the power to collect evidence in criminal prosecution is stronger than that in administrative regulation or civil action. However, as in the Netherlands and Germany,

4 Personal Data Protection Code (*Codice in materia di protezione dei dati personali*) Legislative Decree no. 196 dated 30 June 2003.

5 Injunction Action Act (*Unterlassungsklagengesetz, UKlaG*), BGBI. 2002 I, 3422, 4346, as amended in BGBI. 2009 I, 2355, 2382 *et seq.*

6 New Telecommunication Act (*Telecommunicatiewet*) 1998:610.

the power to collect evidence is strong enough to regulate spam. Indeed, in Germany, receivers and consumer organizations have no right to enter premises and confiscate equipment (*Table 2*).

Table 2: The power to collect evidence

<i>Germany (by civil action)</i>	<i>Netherlands (by administrative regulation)</i>	<i>Italy, Japan (by criminal prosecution)</i>
Right to request sender information	Right to request sender information Right to enter the sender's premises Right to confiscate equipment	Right to request sender information by search warrant Right to enter sender's premises Right to confiscate equipment

3. *The Burden of Proof of Receiver's Consent*

In civil action and administrative regulation, the sender of spam takes the burden of proof of the receiver's consent (see *Table 3*). For example, in Germany, where spam regulation is carried out by civil action, by case law, the defendant who sent the spam must prove that there was receiver's consent to include advertisement in the e-mail. In the Netherlands, where spam is regulated in an administrative way, the New Telecommunication Act stipulates that the sender of spam bears the burden of proof of the receiver's consent (§ 11.7 New Telecommunication Act).

On the other hand, when spam is dealt with by means of criminal law, as in Italy, the prosecutor bears the burden to prove the absence of the receiver's consent, because the sender of spam is persecuted criminally only when he sent spam deliberately. However, in Italy, according to my research so far, there is no provision that stipulates any duty of the sender to keep a record of the receiver's consent. Therefore, it must be difficult for prosecutors to prove the absence of the receiver's consent.

Table 3: The burden of proof of receiver's consent

<i>Civil action (in Germany)</i>	<i>Administrative regulation (in Netherlands, UK, Italy and Japan)</i>	<i>Criminal prosecution (in Italy and Japan)</i>
Sender	Sender	Prosecutor (absence of receiver's consent)

4. *The Level of Sanctions*

In Italy, the sender can be taken into custody by means of criminal sanction.

Spam senders want to send spam because of a very high economic incentive for spam. So the amount of monetary sanction is directly related to spam regulation's deterrent effect on spam.

In Italy, the maximum sum of administrative sanction is €30 thousand, whereas in the UK it is only £ 5 thousand. On the other hand, in the Netherlands, the maximum sum of administrative sanction amounts to €450 thousand, and 5 hundred million Swedish Krona in Sweden (see *Table 4*).

In Germany, the receivers of spam and consumer organizations can request the sender to pay the profits that the sender has acquired through violation of § 7 Unfair Competition Act⁷ if intent can be proven (§ 10 Unfair Competition Act). This amount may be higher than administrative sanctions such as those in the UK. However, it is difficult to calculate profits in civil actions. Also, plaintiffs have weaker powers to collect evidence than administrative authorities such as those in the Netherlands.

Table 4: The level of monetary sanctions

<i>Germany</i>	<i>Sweden</i>	<i>Netherlands</i>	<i>UK</i>	<i>Italy</i>	<i>Japan</i>
Profits by intentional violation	5 thousand to 500 million Krona	€ 450 thousand (max.)	£ 5 thousand (max.)	€ 5 thousand to 30 thousand	¥ 1 million (max.) ⁸

5. *The Deterrent Effect on Spam*

Two factors influence the deterrent effect on spam. First, there is the degree of sanctions. Monetary sanctions in particular are important due to the high financial incentive of sending spam. Second, it is difficult to prove that a violation has occurred. This is affected by the power to collect evidence and the burden of proof of the receiver's consent.

6. *Summary of Spam Regulation in the EU, Especially in the Netherlands*

In recent years, spam regulation has been very successful in the Netherlands. Why did the amount of spam written in Dutch dramatically decrease recently? There are a number of reasons:

⁷ Gesetz gegen den unlauteren Wettbewerb (UWG), BGBl. 2004 I, 1414, as amended in BGBl. 2010 I, 254 *et seq.*

⁸ € 8571 as of 7 May 2010.

First, the power to collect evidence is adequate to discover the senders of spam and therefore to prove that violations have occurred. In the Netherlands, though an administrative sanction, the power is strengthened to the extent necessary for the administrative authority to identify the senders (see above, 2). Second, the burden of proof of the receiver's consent is on the sender. Therefore, the administrative authority can prove violations easily. Third, monetary sanctions are high enough to discourage spamming. Fourth, as a consequence, there is a very high deterrent effect on spam in the Netherlands. Fifth, according to the European Commission, there was an appreciable investment to overcome spam in the Netherlands.⁹

These have caused a dramatic decrease in spam originating from the Netherlands in the recent years.

7. *Regulation of Spam in Japan*

In Japan, there has been slight improvement in the administrative authority's power to collect evidence since the reform of 2008. The Japanese administrative authority now has the right to request information concerning contractors of service providers. However, the authority does not have the right to request the sender information of a concerned e-mail. Therefore, the collected information is not sufficient to discover the senders of spam. As of today (August 14, 2009), there are still no cases where the authority has used contractors' information to take administrative action against senders of spam.

When spam is regulated criminally (Art. 72 Act on Specified Commercial Transactions), the prosecutor must prove the sender's intent to violate the Act, and so bears the burden of proof of absence of the receiver's consent. Therefore, the act appropriately provides that the sender of ad e-mail must keep the records of the receiver's consent or request for the mail (Art. 12-3 (3) Act on Specified Commercial Transactions).

The level of monetary sanctions is low in comparison to the EU member states. Total monetary sanctions do not exceed 1 million yen (approximately €8 thousand). Given these factors, it is impossible to say that spam regulation in Japan is effective.

In the case where a sender continues to send spam despite having received sanctions from the administrative authority, criminal sanctions could be ordered up to the sum of 30 million yen (approximately €250 thousand). Although this sum is not low in comparison to EU member states, this action is very time-consuming and does little to protect spam recipients before coming into effect. In conclusion, the deterrent effect on spam in Japan is still not sufficient to prevent spam effectively.

9 EUROPEAN COMMISSION, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, On fighting spam, spyware and malicious software, Brussels, 15.11.2006, COM(2006) 688 final, 7.

ZUSAMMENFASSUNG

In Japan wurde durch eine Reform im Jahre 2008 ein System ausdrücklicher Zustimmung ähnlich dem der EU eingeführt. Jeder Mitgliedstaat der EU hat das System der ausdrücklichen Zustimmung auf andere Weise eingeführt (Zivilklage, Verwaltungsaufsicht oder Strafverfolgung). Diese Unterschiede der Regulierung von unerwünschten E-Mails (Spam) führen zu Unterschieden im Umfang der Beweiserhebung (1), der Beweislast bezüglich der Zustimmung des Empfängers (2), der Schwere der Sanktionen (3) und des erzielten Abschreckungseffekts (4).

Für den dramatischen Rückgang von Spam in Holland in den letzten Jahren gibt es mehrere Gründe. Dort haben Verwaltungsbehörden das Recht, von Service-Providern Absenderinformationen zu verlangen. Die Beweislast für die Zustimmung des Empfängers trägt der Absender. Die finanziellen Sanktionen sind hoch genug, um von der Versendung von Spam abzuschrecken.

In Japan haben Verwaltungsbehörden keine Befugnis, Informationen über Absender zu verlangen. Die finanziellen Sanktionen reichen nicht aus, von der Versendung von Spam abzuhalten, weshalb in Japan auch keinerlei Abschreckungseffekte erzielt werden.