advertisers and the ASA over the correct application of the Code in individual cases.

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Virgin media defends 'service' email

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Topic: Email marketing

Who: Virgin Media

When: 28 July 2010

Where: Advertising Standards Authority

Law stated as at: 3 September 2010

What happened:

Virgin Media circulated an email communication headed 'An important message from Virgin Media'. The communication's headline read: 'What great stuff could you be missing out on?' and the body of the communication went on to recognise that the recipients of the email were not currently registered to receive information from Virgin Media but that Virgin wanted to let them know Virgin Mobile was now part of the 'big Virgin Media family'.

The email pointed out that as well as being able to keep on top of their services, recipients would be able to benefit from exclusive deals if they let Virgin Media know they now wanted to hear about such deals in the future. Virgin Media also offered to keep recipients informed about its reward schemes and to give recipients 'first dibs' on V Festival tickets and other offers. Recipients were therefore encouraged to register with Virgin Media to hear about offers, news and products and as a thank you for doing so, Virgin Media would enter them into a prize draw to win a free HTC HD2 phone handset.

One recipient of the communication challenged whether such an 'advertisement' breached the CAP Code as he had previously asked Virgin Media not to send him marketing communications by email. The first question to ponder was whether this was actually an ad.

Virgin email to consumers

... some of whom opted out

Virgin's response — the line between service and marketing messages?

Virgin's response to the Advertising Standards Authority ('ASA') was that the purpose of the email communication was to announce Virgin Mobile had become part of the Virgin Media group. Virgin felt that upon knowing this, customers may want to opt in to receiving marketing communications.

Was this a marketing message?

In Virgin's opinion, the email in question did not constitute a marketing communication and this was supported by the fact that it did not contain the kind of calls to action that a marketing communication would contain. Furthermore, Virgin believed it needed to make such an announcement to customers who may not have been aware of Virgin Mobile's status through other press announcements and marketing communications that had been circulated.

Finally, Virgin also argued that under the Data Protection Act 1998, it was entitled to contact customers in infrequent situations where there had been business developments to ensure their data remained up-to-date and accurate.

Was the ASA convinced?

ASA believed it was ...

The ASA was not persuaded by Virgin's arguments. It did not agree that the email communication was an update to customers who might otherwise not have been aware of the changes within the Virgin Media group as opposed to a marketing communication. The reason why — the email in question did not actually contain any information about such corporate changes. Instead the ASA felt the email was very much a marketing communication because of the fact it promoted a prize incentive and it also used language very akin to marketing speak such as:

'What great stuff could you be missing out on?'

'... you can get your hands on even more exclusive deals'

'As a thank you, you'll be entered into our prize draw to win a free HTC HD2* phone ...'

... & therefore broke the CAP Code

As the message was considered to be a marketing communication, Virgin did not therefore have the required consent of the recipients to send the communication to them by email and so this activity had indeed breached the provisions of the CAP Code.

Why this matters:

Virgin's ad was held to have breached sections 43.9 and 43.13c of the previous edition of the CAP Code which relates to database practices and the ASA instructed that the communication should not be used again in its current form.

Within the new version of the CAP Code which came into force on 1st September 2010, section 10 deals with database practices and in particular, databases used for direct marketing purposes. This section of the CAP Code must always be read in conjunction with applicable data protection legislation.

Was Virgin right to argue that its actions were permissible under the Data Protection Act? Well the guidance available from the Information Commissioner's Office regarding the use of personal data for direct marketing states that if an individual has asked a marketer to stop using their details for direct marketing purposes, they will have done so deliberately and marketers should therefore not assume '... that they did so lightly or are happy to receive requests to change their mind'.

Position of the Commissioner's office

'Opt back in?' requests problematic

ICO points out that a notice to stop direct marketing applies to both sending direct marketing materials and to processing personal data for direct marketing purposes. Therefore, any opt out notice an individual gives a marketer is likely to cover using their personal data to persuade them return to a marketing list. ICO's guidance is therefore that marketers should avoid asking individuals who have opted out whether they now want to opt back in.

However, ICO does recognise that people can change their minds and that there is some merit in making sure the preferences people have previously expressed are still up to date. ICO advises, however, that marketers should do this 'sensitively' and that they should '... certainly avoid doing anything that could mean an individual has to inform you that their preferences have not changed'.

ICO considers that it is acceptable to remind individuals of their ability to change their marketing preferences if such a reminder forms a 'minor and incidental addition' to a service message that is otherwise being distributed in any respect. It provides the example of a bank sending out annual statements to its customers as a matter of course and such statements having a message printed at the bottom of the page to remind customers that they may wish to review their marketing preferences and telling them how they can be revised and updated if appropriate.

Marketers should therefore ensure that any reminders of marketing preferences to those who have previously unsubscribed from receiving marketing materials should be dealt with carefully. Such reminders should form an incidental part of something that is a genuine service message only and they should certainly not be the essence of the communication in question.

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