

Marketing Compliance in 2025 – how should legal teams respond?

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| Rebecca Cousin | Hello and welcome. I'm Rebecca Cousin, a partner in our Technology, Digital, Data and IP team here at Slaughter and May and I head our Data Privacy practice, and I am joined today by one of the associates in our team, Rosie Wilson. Hi Rosie. |
| Rosie Wilson | Hi Rebecca. |
| Rebecca Cousin | So today, as part of our Digital Horizon Scanning series, Rosie and I are going to discuss what each of us see as the reasons that 2025 is shaping up, in our view at least, to be a pivotal year for marketing compliance. |
| Rosie Wilson | That's right. There's been a lot of recent change in this space, and in this podcast we'll outline some of those recent changes, what's been driving them, and what businesses should be doing now to stay ahead. |
| Rebecca Cousin | So I'll pick up first I think with some thoughts about the new Data Bill that's going through parliament, so that's the Data Use and Access bill which we are expecting to be passed in the next couple of weeks, because that covers a whole load of different areas, the Data Bill, but one area that it does cover is around fines for marketing, with the headline being, "they're going up". So, at the moment, the regulator, the Information Commissioner's Office, which we will refer to as the ICO, has ability to fine up to a maximum of £500,000, but they are moving up to GDPR standard. They are going to go up to a maximum of 4% of annual worldwide turnover, or £17.5 million, whichever is the higher, so that will align them to the position under the GDPR, the General Data Protection Regulation, so a massive increase. It actually will align it as well with the position in some of the EU member states as well, who already have that GDPR level of fines. But, not all bad news under the Data Bill I would say, because there are also some positives from a marketing perspective. So, first of all it does reaffirm that legitimate interest can be used for direct marketing or at least, you know, you have to do your assessment of course, but in principle it can be used. There's also some new exceptions for cookie consent coming through as well. They are very technical and detailed, so they won't apply to everything, but definitely worth having those there to try to simplify some cookie compliance. And the final bit of good news really is for charities. So, charities have not been able to rely to date on what's referred to as the soft opt-in, so that's when someone's engaging with an organisation as part of a sale or purchase of something, you get that little box where you have to opt-out if you don't want communications, and because charities don't sell things, they haven't been able to use that to date. So that is being extended to charities, so really good news for charities there. |
| Rosie Wilson | And then, just to pick up on what you said about the marketing fines going up, I think it would be interesting next to think about how the ICO and other data protection regulators have been looking at issues in the marketing space, in particular issues like pay or consent, targeted advertising and the use of attacking technologies, and then looking at how those new marketing powers might be |

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| | <p>applied to those issues. So in the UK we've seen the ICO publish a number of statements recently, including an online tracking strategy which emphasised that online advertising is a top priority for it this year. This includes an announcement that it is planning to work with the UK government to review the UK's marketing rules to create privacy friendly online advertising and drive economic growth.</p> |
| <p>Rebecca Cousin</p> | <p>Great idea.</p> |
| <p>Rosie Wilson</p> | <p>As part of its strategy, the ICO will continue to monitor cookie banners, having successfully driven changes to the top 100 UK websites so far, now it's looking at the UK's top 1,000 websites. Regulators in Europe are also investigating cookie banners. For example, the Dutch Data Protection Authority recently sent the first 50 of 500 warnings to organisations about misleading cookie banners, and it's also stated that it intends to automatically scan cookie banners of websites to monitor compliance in the coming years, with a risk of enforcement action for serious violations or if companies refuse to make changes. Then in the US we are also seeing an increase in use of cookie banners and that's coming as a reaction to the rise in class actions alleging that the collection of data via cookies and the subsequent sale and use of such data is unlawful including under wiretapping laws, and that's then increasing the risk profile even more.</p> |
| <p>Rebecca Cousin</p> | <p>That's interesting isn't it, because actually with all this activity going on, organisations could clearly face multiple actions at the same time. So you could have the Dutch complaining about the Dutch website of a business and the ICO looking at the UK one, so you could definitely have sort of multiple things going on, and it's definitely turned into fines in a number of cases around digital marketing that we've seen, so I think you are quite right about this regulatory focus, so some of the really big fines that we've seen coming through were LinkedIn was fined just over €300 million by the Irish Data Protection Authority for its targeting practices, and Orange also got a big fine, around €50 million, for displaying ads without consent. Now some of the things do get appealed and interestingly, Amazon appealed its fine from the Luxemburg regulator, that was just under €750 million, but that appeal has been rejected, although I think they might be appealing again. But that's the thing, with these sorts of size of fines, you know they are going to get challenged and appealed but there is definitely a big risk here in terms of the amount of fines that people could be receiving.</p> |
| <p>Rosie Wilson</p> | <p>And although there are these big fines that we're seeing, and there's potential for more fines to come, there is some good news, because in the UK and elsewhere, there's lots of updated guidance that are telling businesses how they can comply. For example, in the UK the ICO has published new guidance in the last few months on both pay or consent models and the use of cookies and other tracking technologies, and these provide some helpful steers on what it expects from businesses in these areas. The Belgian Data Protection Authority has also just published some new draft guidance on direct marketing which also includes a new definition of direct marketing and we're expecting the European Data Protection Board to publish new guidance on pay or consent models very soon, and this is</p> |

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| | <p>more general guidance following the guidance published last year on large online platforms.</p> |
| <p>Rebecca Cousins</p> | <p>Yeah, and it will be really interesting to see how that guidance, when it lands, compares to the ICO's guidance, which obviously was quite pragmatic guidance, so that will be really interesting. Rosie, maybe it's not guidance in quite the same way, but maybe the other thing it's worth us mentioning here is the <i>O'Carroll and Meta</i> case, as that sort of did provide effectively some further guidance; and I know you've written a blog on it so you're probably better placed to talk about it if you want to just sort of mention that a little bit.</p> |
| <p>Rosie Wilson</p> | <p>Yeah of course. So this case was brought by an individual against Meta for breach of UK data protection laws on the basis that Meta had failed to stop collecting and processing her data to deliver targeted advertising to them following an opt-out request. So unfortunately for us this case was settled before it reached the High Court so we haven't received any guidance from the Court on how this would be interpreted but interestingly, although the case was settled, the ICO did confirm that online targeted advertising should, in its opinion, be considered as direct marketing under the UK General Data Protection Regulation, and then it also stated that if individuals ask an organisation to stop processing their data to target ads at them, and the organisation fails to do so, that individual can file a complaint with the ICO.</p> |
| <p>Rebecca Cousin</p> | <p>Yeah, it's a real shame for everybody other than the parties involved that the case settled, because it would have been really good to get some clear Court positioning on that, because ICO guidance is great but of course it is just guidance, it's not law in the same way, but at least we have a little bit from that.</p> <p>We've focused so far Rosie very much on the requirements that are coming from the General Data Protection Regulation and the e-privacy regulations, but we probably should also just touch on the fact that the real matrix of laws in this sort of digital space, and particularly around e-marketing, we have to remember that the competition authorities have been using competition law to look at this in terms of different practices, there's consumer laws and there's also advertising codes as well so we mustn't be siloed in our way of thinking about this. And I think that's particularly come to the fore in the UK recently with the Digital Markets Competition and Consumers Act because we've had provisions coming through from that coming into force in April that impact in this area, and that itself has led to the advertising code under CAP and BCAP also being updated to reflect that, so I think we have to sort of, remember that we have to look at this from a number of different sides I think.</p> |
| <p>Rosie Wilson</p> | <p>So it's clear that lots of the different regulators are focusing on marketing compliance and then I think its maybe just helpful at this stage to think about what's driving this renewed focus. So, I think there's a couple of factors – a key factor is changes to the technology landscape – so there's been a rise in cookieless technologies and the introduction of features such as Apple's App tracking transparency framework. This interestingly has recently come under fire by the French Competition Authority who fined Apple €150 million in relation to its</p> |

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| | <p>implementation and interestingly, as you just said, we are seeing more collaboration between the Data Protection regulators and Competition regulators. The French Competition Authority did state that it was working in collaboration with the French Data Protection Authority as part of this.</p> <p>Another key factor, I think, is just increased consumer awareness and expectations around the use of user data online. So we are seeing more consumers seek to opt-out of the use of their personal data for targeted ads and then rejecting optional cookies when the banner prompts them to do so.</p> |
| Rebecca Cousin | <p>And I think that consumer expectation piece is really interesting because when we see people's approach, individual's approach to sort of the consent or pay banners that have been coming up, actually I think most people have been sort of viewing that as a fair exchange. They are getting a service and they have seen that benefit through that way. I think you know, when you're faced with that reject or accept all on the cookie banners I think yes, a number of people are definitely doing now reject all when they wouldn't have done before, but I think that the other thing that I find surprising is a lot of people are still hitting the accept all button...</p> |
| Rosie Wilson | <p>Yeah</p> |
| Rebecca Cousin | <p>...so, it's really, really quite interesting and I think there are differences across different age ranges, demographics, so I think that really understanding your consumers and what they expect from your brand is going to be a key part of that.</p> <p>So we said that we would come back to sort of practical things for businesses, so let's pull this together. I think the first thing I would say is that given this focus from the regulators and indeed from individuals that this is definitely a time, if you haven't done it recently, to look at what your marketing practices are, doing an audit review of those. Businesses take risk-based decisions, but the risk has gone up. What is expected has changed. So whilst your existing practices may have made perfect sense against the landscape a few years ago, I think it's definitely worth having a look at how does that align with the situation now, so you can understand what the risks are with that and decide whether you should be taking some steps to address that.</p> |
| Rose Wilson | <p>Yep, and then as part of this, legal teams should be making it a priority to try and stay on top of and understand all of these regulatory changes and how the regulators are likely to interpret and enforce the marketing rules. As we've discussed there's been lots of changes happening, but there's potentially some more changes to come this year as, for example, we've noted that there's more guidance due, so just staying on top of these different updates and then trying to think about how these apply to your business.</p> |
| Rebecca Cousin | <p>Yeah and I think one of the challenges legal teams have had for the last few years is trying to future proof their advice to the business because if we just take the UK, a few years ago I think we could have confidently said that the ICO was not</p> |

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| | <p>particularly interested in cookie compliance, now that's definitely not the case, and I think things are settling down. I think the direction of travel is now clear so staying on top of those updates and sort of being able to future proof the advice would be really helpful for businesses, and it's also about putting that advice in a sort of risk-based context. Every business has its own risk appetite and so understanding how that should work because advertising/marketing is key for a lot of businesses, so you need to think about how do you balance out the risk with that value which goes back full circle really to what I was saying about doing the review and the audit to make sure that what you are doing is the right sort of risk-based position, given the changes in risk in this area.</p> |
| Rebecca Cousin | <p>Well I think Rosie, you know that's a pretty fast, whistle stop tour of this area but I think we have drawn out most of the key things there, but the good news is of course that we have written that article. Rosie, myself and our senior knowledge lawyer, Bryony Bacon, recently wrote an article all about marketing and the changes so if you want more information on anything that we've talked about or more broadly in this area, have a look at that. We originally published it in Privacy Laws and Business UK Report and it's now available on our website as well. And Rosie, I mentioned a blog you have written earlier so we should also flag our blog.</p> |
| Rosie Wilson | <p>Yes definitely. So for further regular updates on developments and all things technology, data, digital you can see the blog that's on our website called "The Lens", or even more easily you can subscribe to it so it just arrives in your inbox. We've also got the Data Privacy Newsletter and our Digital Horizon Scanning series for further information on all these topics.</p> |
| Rebecca Cousin | <p>So lots of things you can subscribe to so you get regular updates. Thank you for listening. We hope you found this discussion helpful.</p> |
| Rosie Wilson | <p>Thanks Rebecca.</p> |
| Rebecca Cousin | <p>Thanks Rosie.</p> |