

JUS5630 Mock Exam Answer Guide

The following notes suggesting answers are not intended to provide exhaustive delineations of the applicable law(s) or the possible legal issues involved. They do, however, give some guidance as to principal points of law and related issues.

Exam question Spring 2011

Consider the following scenario:

HairLess (HL) is a company incorporated in the Federal Republic of Germany (FRG) with its head office in Düsseldorf. The company is in the business of promoting the sale of hair-removal products. HL maintains a website hosted on a server in the United Kingdom. The opening page of the website provides basic information about the operations of the company. At the same time, the website is configured such that visitors to the website who wish to access webpages providing detailed information about the products offered by HL, must first register their email address with the website. Immediately after a visitor specifies his/her email address, a message pops up on the screen of the webpage stating that he/she will now be able to receive information from HL's products in the future.

HL plans to move actively into the Norwegian market. In anticipation of this move, HL engages an Oslo-based marketing agency to advertise a new range of hair-removal products sold by HL. The agency pays for large advertising posters to be put up on billboards in Oslo during the springtime. The billboard advertising also specifies the HL domain name, <www.haless.com>.

In another move, HL passes on the list of email addresses it has gathered from its website operations to a subsidiary company, HairFull (HF). The latter company is based in the USA. HF then repeatedly sends emails to those addresses about a new product it is selling. This product is a special type of razorblade that is customized for use under armpits and is advertised with the following words: "Clears the worst armpit jungle in one swipe".

Ola, who lives in Oslo, has had his email address registered at the HL website because he is a keen cyclist who likes to find out about possible new ways to keep his legs free of hair. He receives a large number of emails sent by HF. Ola contacts the office of the Norwegian Data Protection Authority (Datatilsynet) to complain about these emails. What irritates him about the emails is not just that they are 'clogging up the mail system' (his words) but that they carry a wrongful imputation that he has a lot of hair in his armpits. Ola is rather vain and prides himself on his relatively hair-free body.

You are the officer at the Norwegian Data Protection Authority who deals with Ola's complaint. What advice would you give as to whether HL or HF has acted in breach of the data protection legislation in Norway and why would you give that advice? You may use the provisions of Directive 95/46/EC as the basis for your answer (i.e., you do not have to know and apply the actual rules of the Norwegian Personal Data Act of 2000 (Personopplysningsloven) but you may assume that these are basically the same as those in the Directive).

Advice:

Issue 1. Is email address personal data?

- DPD Art 2(a) and recital 26.
- Relevant national cases could be named (*Durant v. Financial Services Authority* [2003] EWCA Civ 1746 (personal data must be "biographical in a significant sense"; it must go beyond simply registering a person's involvement "in a matter or event that has no personal connotations"; and it must have the individual "as its focus") – but applicable only in the UK; Hong Kong cases.

Issue 2. Applicable law?

- Where is HL established? FRG. Also UK? Doubtful. Norway? Doubtful. Apply Art 4(1)(a) + recital 19; legal form not decisive. Art.29 WP opinion 8/2010 (not formally legally binding). Applicable law is most likely German.
- Is HF controller or processor? Most likely former. Is HF required to comply with EU/EEA data protection law? It does not fall under Art 4(1)(a) or (c). Arguable that it falls under Art 4(1)(c) if it is using cookies on Ola's browser but this argument is far from watertight due to control issue. HF best regarded as out-of-jurisdiction spammer.

Issue 3. Have requirements of Art 7 been met?

- Unambiguous consent to marketing? Doubtful, especially as consent can hardly be regarded as informed. Art 2(h) + Art 7(a).
- Possible application of Art 7(f)? Registration of email addresses probably not 'necessary' but in terms of balancing it is worth noting that the privacy interest is not particularly significant.

Issue 4. Have requirements of Art 6 been met?

- Possible breach of Art 6(1)(a) – doubtful that collection of email addresses has been 'fair'.
- Possible breach of Art 6(1)(b) - purposes not specified with sufficient precision; incompatible secondary use of data
- Possible breach of Art 6(1)(c) – registration of email addresses is 'excessive'; ought to be deleted if unnecessary (Art 6(1)(e)).

Issue 5. Breach of other requirements under Directive?

- Possible breach of Art 10 – doubtful that all relevant information is communicated up front.
- Definite breach of Art 14(b).
- What about Art 15? Doubtful that situation here falls within that rule.
- Possible breach of Arts 25-26 (non-consensual TBDF to USA). This might also be breach of Art 6(1)(b).
- Application of Safe Harbor Agreement: unknown if HF has signed up to this. NB: SHA does not mean USA itself is judged as adequate, only US organisations that sign up to it. Even if HF has signed up, it has arguably breached the agreement (see eg 'Choice' principle).

Issue 6. Breach of other rules under other instruments?

- Definite breach of anti-spam rules (see eg national implementation of Dir 2002/58/EC Art 13 on 'unsolicited communications').

Issue 7. Remedies and assistance?

- Datatilsynet in Norway can make contact with and request help from German DPA. Art 28(6)

- Apply right to object under Art 14.
- Possibility to get damages under German law (cf Art 23)? Yes, but is injury sufficiently significant (cf de minimis principle)?