# [NL] First Spam Case in the Netherlands

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An Internet Provider can refuse the sender of unsolicited commercial e-mail (also known as spam) the use of its transport facilities, because it does not have a universal service-connected legal duty to deliver. This was the judgment of the President of the Court of Amsterdam in the first-ever spam case in the Netherlands on 7 March 2002. XS4All, a Dutch Internet Provider, had applied for a temporary injunction.

The injunction was sought against AbFab, a Dutch marketing company, which had sent unsolicited commercial e-mail messages to a number of XS4All subscribers. After receiving complaints from several subscribers, XS4All requested AbFab to stop sending XS4All subscribers unsolicited e-mail. AbFab refused to stop, stating that the sending of unsolicited commercial e-mail was permitted under Dutch law. Furthermore, AbFab was acting in accordance with the Industry's Code of Conduct. Subscribers who did not want to receive commercial e-mail could opt out.

Matters were brought before the Court. Under debate was the question of whether unsolicited commercial email is forbidden by European law, notably Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, and the Dutch implementation thereof in the Telecommunicatiewet 1998 (Telecommunications Act 1998 - Tw). Furthermore, it was a matter of discussion whether the sending of unsolicited e-mail and the way in which AbFab gathered the required e-mail addresses was an intrusion of privacy, forbidden by Article 10 of the Dutch Constitution and Article 8 of the European Convention on Human Rights, as well as the Wet bescherming persoonsgegevens 2001 (Act on the Protection of Personal Data 2001 - Wbp).

According to XS4All, the use of XS4All e-mail addresses by AbFab was also a violation of the trademark XS4All. Finally, using the XS4All facilities for unsolicited commercial e-mail was in breach of XS4All's code of practice. XS4All has no legal duty to deliver and can therefore determine its own conditions for providing services. However, XS4All forbids its own customers to send spam and is contractually obliged to protect its customers against spam. AbFab was therefore

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acting unlawfully by using the XS4All Internet facilities for the transport of spam.

The judge considered that while XS4All has no legal duty to transport, it has imposed a contractual duty on itself to do so. However, because XS4All has forbidden its customers to send spam, it can also prohibit third parties from using its facilities to send unsolicited e-mail messages to its customers, especially since XS4All has no legal duty to transport. It was on these grounds that the requested injunction could be granted. The other issues were not addressed in the judgment. AbFab is now forbidden to send unwanted commercial e-mail to XS4All subscribers who use an XS4All e-mail address.

***Rechtbank Amsterdam, uitspraak van 7-03-2002, LJN-nummer: AD9917 Zaaknr: KG 02/183 P***

http://www.rechtspraak.nl/uitspraak/frameset.asp?ui_id=31892

*Judgment of the President of the Court of Amsterdam of 7 March 2002 (XS4All v. AbFab), LJNno. AD9917 Caseno.: KG 02/183 P*

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