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## PRESENTE:

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### Should pop-up windows be considered as electronic mails ? The EU Commission says no.

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In its answer to written question E-3392/02, the European Commission stated that pop-up windows are not considered as electronic mail, because they disappear when the addressee is no longer online. Therefore, the prior consent of the subscriber to receive such messages, as imposed by article 13, 1 of Directive 2002/58/EC, is not required.

In a time where the protection of personal data is written in the draft text of the European Constitution, this statement merits consideration.

According to the European Commission, the definition of electronic mail "*only covers messages that can be stored in terminal equipment until they are collected by the addressee. Messages that depend on the addressee being on-line and that disappear when this is not the case, are not covered by the definition of electronic mail*".

Nevertheless, article 2(h) of Directive 2002/58/EC states that electronic mail is any text, voice, sound or image message sent over a public communications network which can be stored in the network or in the recipient's terminal equipment until it is collected by the recipient.

In other words, any message that is i) stored in a network or in the recipient's terminal equipment and ii) is collected by the recipient, should be considered as an electronic mail. Does this definition encompasses pop-up windows ? :

1. As to the first requirement, a pop-up window is not only stored in the network, e.g., on the http server of the pop-up window sender, but is also stored in the terminal equipment of the recipient. In absence of any reference in this regard, all storages in the terminal equipment must be considered, even when only for a few milliseconds. Before a pop-up window can be displayed on one's computer screen, it needs to be stored in the RAM memory of the video card, i.e., a part of the recipients terminal equipment.
2. As to the second requirement, one could defend that a pop-up message is collected by the recipient, merely by connecting his terminal equipment, i.e., client side, with the server concerned. Indeed, one will have it difficult to defend that an hotmail address is not considered as an electronic mail address. However, unlike the more traditional inboxes, using the POP, IMAP or SMTP protocol, a hotmail "inbox" must be considered as a private HTTP web page. From a technical and functional point of view, there is not much difference between the functioning of a pop-window and the display of your "inbox" on [www.hotmail.com](http://www.hotmail.com). One of the only differences is that access to the latter page is subject of giving the corresponding personal login and password, often stored on a cookie or similar device.

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