

Germany implements e-marketing controls

Dr Jan-Peter Ohrtmann explains how new regulations and existing case law are affecting consumer and B2B e-marketing in Germany.

The provisions in the Privacy & Electronic Communications Directive on spam have been incorporated into Section 7 of the new German Unfair Competition Act ("Gesetz gegen den unlauteren Wettbewerb"), and approved by the German Parliament on April 1st, 2004. As a result, unwanted direct e-marketing will be unlawful, and establishing contact with individual subscribers will require prior approval, although establishing contact with corporate subscribers might only need implied consent.

Individual subscribers

Section 7, paragraph 2 of the new Unfair Competition Act generally requires the prior consent of recipients before sending electronic advertising.

Consent

Therefore, as a rule, e-mail marketing is only lawful if the recipient has given their express prior consent. Implied consent is regarded as sufficient only to a very limited degree.

This raises the question as to whether consent must be given in any specific form. It is not clear whether a direct marketer can market straight away based on an e-mail address provided by a subscriber – as it is possible that an incorrect address may have been provided. To avoid this, it may be necessary to send an e-mail to the address provided and obtain a reply giving permission to market (a double, or confirmed opt-in).

The rules for e-mail marketing also apply to SMS marketing. According to

E-marketing rules

- E-mail/SMS marketing must be sent with the consent of the recipient, unless they are existing customers and the advertising concerns similar products or services.
- Business e-mail addresses are covered by the new rules.
- The identity of the businesses must be disclosed.
- Consumers must be provided with a means to opt-out from further commercial contact.

Corporate subscribers

The opt-in rule also applies to corporate subscribers. Ignoring the rules is regarded as an act of unfair competition and as a breach of established business operations. This has been confirmed by the Federal Court of Justice in a decision of March 11th 2004. In general, the same assessment applies as for individual subscribers.

A deviation from the rule is that it is easier to rely on implied consent for business contacts than it would be for individuals. In the case of B2B marketing, it is more likely that a business relationship with the recipient justifies the sending of unsolicited e-mail, whereas with an individual consumer, it would not. Lawfulness depends on the specific circumstances of the case.

E-mail opt-out registers

As German law is governed by the "opt-in" concept, an "opt-out" register for unsolicited commercial e-mail is not required.

However, in practice, such lists do exist. To avoid unsolicited e-mail and

Under German law, claims against unsolicited e-mail may not only be directed at marketers but also at service providers.

This requirement is in line with preceding case law. However, according to Section 7, paragraph 3 of the Act, a company may send commercial e-mail without prior consent if:

- the company has obtained the e-mail address in the context of the sale of goods or services
- the company uses the e-mail address for direct advertising of its own similar goods or services
- the customer has not opted-out; and
- the customer has been clearly informed during collection of the e-mail address that he/she can opt-out at any time without additional cost other than the general cost of sending the e-mail.

a decision of the Regional Court of Berlin of January 14th 2003, the disturbing and potentially privacy-breaching effects of a SMS message are equal to, or more invasive than, e-mail. Therefore, the Regional Court of Berlin has regarded unsolicited SMS marketing as unlawful.

In practice, this means direct marketers should obtain written consent from individuals. The consent should be carefully worded so that it is broad enough to cover the intended use. If the direct marketer is buying-in e-mail or SMS addresses, the form of consent given by the prospects should be carefully reviewed – as such use is only rarely covered adequately.

SMS an 'e-Robinson' list has been established by an industry group, IDI Interessenverband Deutsches Internet eV. The list is available at www.robinsonlist.de.

As most German spam originates in the US it is also recommended to register at the American Direct Marketing Association (www.dmaconsumers.org/optoutform_emps.shtml).

Ban on concealed identities

Marketers must identify themselves in each marketing message that they send.

Territorial application

The provisions on spam apply to organisations based in Germany and those outside that target German recipients. This is because the tort occurs in Germany.

Enforcement

Individuals may seek compensation from the marketer for unlawful unsolicited e-mails. However, this requires the recipient to have suffered damage. Since physical or economic loss due to unsolicited direct marketing rarely occurs - and additionally must be proven - such claims rarely succeed. Business competitors may also bring a claim as unsolicited e-mail is regarded as an act of unfair competition.

Under German law, claims against unsolicited e-mail may not only be directed at marketers but also at service providers. According to a very recent decision of November 13th 2003, the Regional Court of Leipzig held a service provider liable under Section 1 of the Unfair Competition Act because it was unable to provide information on the identity of the organisation which was sending the direct marketing.

In addition to civil law claims, the Data Protection Authorities may address spam through investigation, order or even imposition of a fine.

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