

Anteriad have taken the stance not run German Email Marketing campaigns as German law supersedes GDPR and prior consent and double opt-in are required. The German courts have been very restrictive and are actively enforcing infractions.

Germany falls under the European Union, and broadly uses GDPR as their source of email marketing regulation. The GDPR states that only a single opt-in is required by marketers to remain compliant. In addition to this, Germany also has its own local regulations that govern marketing.

Email

You cannot email and I would also take this stance for Switzerland too - see below:

Be Aware of the Law

Because Germany has some of the strictest email marketing laws in the world, it is imperative you understand the email marketing laws that apply. One of the most important requirements of email marketing in Germany is consent. If you send an email to anyone who is not already a current customer, you must have his consent to send him an email before you send the email.

Can you send cold emails in Germany?

Germany has some of the toughest SPAM regulations out there. You can find them in the Federal Data Protection Act. Cold email is simply illegal. Also double opt in is necessary to prove consent

Overview

Direct marketing – the German approach

Direct marketing is a popular way for businesses to inform customers about goods, services and current offers of a company. As we all know, email marketing is particularly popular as it enables a business to approach a large circle of recipients in a fast and (usually) inexpensive manner. However, as direct marketing using electronic communications networks and services often involves sending unsolicited communications, approaching (potential) customers generally requires the recipients' consent.

In Germany, the consent requirement has been transposed into national law in Section 7 of the German Unfair Competition Act (UWG). Although the language does not provide for specific obligations other than the "prior express consent of the addressee" German courts tend to take a very restrictive approach to direct marketing and recent case law has confirmed this.

The fine line between (permissible) customer communications and (prohibited) marketing

According to the UWG, marketing is a business act, meaning any expression made in the course of a trade, business, craft or profession in order to promote the sale of goods or the provision of services. The concept of marketing covers all measures taken by an organisation to promote its products or services. The definition is broad and not limited to particular forms of marketing. It also includes free additional offers, sponsoring or image marketing.

The German courts have also identified as marketing automatic reply emails where those emails contained information about other services. In a Supreme Court case (German Federal Supreme Court, decision of 15 December 2015 – VI ZR 134/15) the Defendant had included information about its app in the automatic reply email. In a local court decision (Local Court Bonn, decision of 1 August 2017 – 104 C 148/17), the Claimant received an automatic email containing a confirmation receipt of his message and the following wording: "How do you protect yourself and your data against cyber-criminals and other threats? We show you what you should pay attention to in your digital everyday life www.....de." Both Courts found that by including the additional information, the Defendants advertised additional services. The Courts further ruled that the fact that the confirmation part of the email was lawful was not sufficient to save the email from being classified as marketing material; it was sufficient that the email was also used for marketing purposes.

Additionally, the German Federal Supreme Court (decision of 10 July 2018 – VI ZR 225/17) recently held that that a customer satisfaction survey also falls under the heading of direct marketing and, consequently, requires prior consent from the recipient. The Court argued that customer satisfaction surveys were – at least partially – used to pursue the purpose of promoting future business transactions because they conveyed the impression that the respective entity showed interest in the customer even after the conclusion of a contract. The company also brought itself to mind which enhanced customer loyalty and the possibility of further sales.

Furthermore, email vouchers redeemable for the entire product range of the sender constitute direct marketing according to the Regional Court Frankfurt Main (decision of 22 March 2018 – 2-03 O 372/17). In that case, the Claimant had purchased a gaming chair from the Defendant online. Sometime after the purchase was completed the Defendant sent an email to the Claimant including a voucher redeemable against its entire product range. The Court decided that the email was unlawful due to lack of consent. Although the parties had a prior business relationship, consent was necessary because the voucher was valid for the entire product range and was not limited to services/goods similar to the one the customer had purchased.

Explicit consent requires action

Section 7 UWG, states that direct marketing is only lawful where the addressee has given prior explicit consent. What constitutes "explicit" is interpreted very strictly by the German courts. It is not sufficient to provide a pre-ticked box giving the customer the possibility of opting-out. In fact, lawful consent to receive direct marketing requires an opt-in by the addressee.

It is also not enough to include a general consent in terms and conditions. The German Federal Supreme Court decided (decision of 14 March 2017 – VI ZR 721/15) that express consent required the consenting party to be aware of the specific services and goods the marketing materials would refer to. Consequently, the language "I would like to receive personal information and advice about new offers and services from the company by e-mail, telephone, SMS or MMS." in terms and conditions was found insufficient to constitute lawful consent (Higher Regional Court Cologne, decision of 2 June 2017 – I-6 U 182/16).

Express consent does not, however, require the customer to understand what they are consenting to or taking note of, provided they are given the opportunity to do so. Clicking consent without having read what is being consented to due to lack of interest, does not invalidate the consent obtained (Higher Regional Court Frankfurt Main, decision of 28 July 2016 – 6 U 93/15).

Two consents are better than one – the double opt-in requirement

German courts are not satisfied with a single consent declaration by the customer. They rather require a so-called 'double opt-in' procedure, meaning that after the customer has given consent using an opt-in option this opt-in must be confirmed by sending the user an email. This confirmation email contains a link that the customer clicks on to confirm they are the actual owner of the email address who provided the (first) consent. The confirmation email itself should not include any other information about the sender's services besides the link or it might also be seen as direct marketing requiring consent.

The burden of proof regarding the double opt-in procedure lies with the sender of the marketing communication. Thus, consent declarations (ticking the box and clicking the link) should be logged so that the sender can demonstrate lawful consent by the addressee.

Right to withdraw consent

Recipients of direct marketing in Germany must always be able to access their consent declarations. The advertiser can meet this requirement by, for example, including the wording in their privacy policy or by providing the language in the confirmation email.

Additionally, the customer has the right to withdraw consent at any time. It became best practice to include an opt-out link in marketing emails. Where consent is then revoked, it is now best practice (although not mandatory) to provide an email confirming the withdrawal of consent to marketing communications. Again, this confirmation must not contain any form of marketing.

Consequences of infringement

Where direct marketing is sent without prior consent following the double opt-in-process, the sender risks receiving a warning letter from a competitor or public authority requiring them to cease and desist. In rare cases the competitor might additionally be entitled to damages. The UWG does not contain regulations on fines in such cases. However, there is a risk that a lack of consent also constitutes a breach of the obligations under the General Data Protection Regulation with the effect that unlawful direct marketing might trigger a fine under the GDPR.

In fact, non-German readers will recognise that a number of the marketing requirements in Germany which have evolved through case law, have now been given statutory application in the GDPR (eg more explicit consent requirements, accountability). It remains to be seen whether the ePrivacy Regulation will further reflect Germany's strict rules on direct marketing.