

## Fact Sheet on sending email advertising and/or email newsletters

When sending email advertising and/or email newsletters, please note the following:

### 1. Sending email advertising with express prior consent

In principle, the recipient's consent is necessary for sending email advertising. This principle applies irrespective of whether the recipient of the email advertising is consumer or trader.

Certain demands are placed on this consent when obtaining it in electronic form:

- a) The (informed and unambiguous) consent must be given by an **express** act of the recipient (recommended method: the double opt-in checkbox).

- **Double opt-in** = after sending his email address, the interested party (subscriber) receives a so-called confirmation email from the recipient (trader) containing the invitation to click on a link. Only after the activation of the link, the email address will be added to the distribution list. The confirmation email, which must not contain advertising, can only be sent once. If the interested party does not confirm the link, then it is considered that the supposed interested party does not wish to receive the newsletter.

- b) The recipient's consent needs to be **recorded** (log files).

- c) The content of the declaration of consent must be **accessible** to the recipient **at any time** (data protection policy).

- d) Before his consent is given, the recipient has to be **informed** about the possibility of cancellation (possibility to unsubscribe) at any time.

**The trader shall bear the burden of proof for the existence of the recipient's consent.**

According to the opinion of the Landgericht (Regional Court) Essen (decision of 20.04.2009, case number: 4 O 368/08), which has been followed by other courts, **the proof of a consent can only be provided effectively by using the double opt-in procedure described above. Because this procedure alone makes it possible** to rule out that unauthorised third parties subscribed to the newsletter. Used single opt-in procedures do not have the same evidential value.

**Please note:** (opt-out) checkboxes, which are already marked and where the customer has to uncheck it in order to refuse email advertising, do not constitute an express consent and therefore, they are **inadmissible** (German Federal Court of Justice: BGH 2008, VIII ZR348/06).

In the case of a double opt-in procedure, sending a confirmation email does not constitute unsolicited advertising because it is just about the interest of the recipient to clarify whether he has consented to the advertising and it is not about obtaining the consent (Oberlandesgericht (Higher Regional Court) Düsseldorf, decision of 17.03.2016, case number: I-15 U 64/15). The Oberlandesgericht Munich had previously decided the other way round (decision of 27.09.2012, case number: 29 U 1682/12).

#### **e) Speciality: “tell-a-friend” function**

According to a decision of the German Federal Court of Justice (Bundesgerichtshof, BGH), sending **recommendation emails** via a recommendation function (so-called “**tell-a-friend**” **function**) constitutes unsolicited and thus **unfair advertising** because the recommendations emails are regularly sent without the necessary recipient’s express **consent** (decision of 12.09.2013, case number: I ZR 208/12). This applies irrespective of whether the sending of the recommendation emails is initiated by a third party because the sending of the recommendation emails is **attributable** to the sphere of the online trader.

**Due to the high risk of written warnings, it is strongly recommended not to use this recommendation function.**

## **2. Sending email advertising without prior consent (so-called direct advertising)**

According to Section 7 (3) of the Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG), in exceptional cases **no express prior consent** of the recipient is **required** if the following conditions are cumulatively fulfilled:

- a) a trader has already obtained** from the customer the latter’s **electronic mail address in connection with the sale of goods or services** (so-called existing customers);
- b) the trader uses the address for direct advertising of his own similar goods or services;**

According to the decision of the Oberlandesgericht Jena (of 21.04.2010, case number: 2 U 88/10), “**own similar goods**” means that the **similarity of the advertised goods refers to the already purchased goods and they have to correspond to the same typical purpose or to the customer’s needs**. If appropriate, accessories and complementary products can be advertised. Therefore, standardised newsletters to a large number of clients by means of direct advertising are almost impossible, unless the trader only deals in his shop in products of a single range. Traders with a **mixed range** should therefore consider carefully whether they want to choose direct advertising because these traders would have to design the newsletters individually for every customer according to the purchased product.

- c) the customer has **not objected** to this use; and
- d) the customer has been **clearly and unequivocally** advised, when the address is collected and each time it is used, that he can object to such use at any time, without costs arising by virtue thereof, other than transmission costs pursuant to the basic rates.

**In practice this means:**

The customer must be **clearly and unequivocally** advised, **when the address is collected and each time it is used**, that he can object to such use at any time (without costs arising by virtue thereof, other than transmission costs pursuant to the basic rates).

However, the mere inclusion of the clause regarding the direct advertising into the T&Cs and/or into the data protection policy **is not enough** to make the otherwise required express consent requirement unnecessary.

### 3. Practical implementation

➤ **in an own online shop**

When the email address is collected within the framework of the collection of personal data, the following note must be clearly displayed:

*“Provided that you have not disagreed, we shall use your email address, which we received as part of selling an item or service, for the electronic transmission of advertising for your own goods and services, which are similar to those that you have already purchased from us. You may object to the use of your email address at any time by sending us a message. You'll find the contact details for exercising your objection in our imprint. You can also use the link provided in the advertising email. This shall not result in any costs other than transmission costs in accordance with your basic rates.”*

➤ **on eBay and similar platforms**

In **every** item description, the following note must be inserted in a clearly visible manner:

*“By way of the purchase, we obtain your email address. Provided that you have not disagreed, we shall use it for the electronic transmission of advertising for your own goods and services, which are similar to those that you have already purchased from us. You may object to the use of your email address at any time by sending us a message. You'll find the contact details for exercising your objection in our imprint. You can also use the link provided in the advertising email. This shall not result in any costs other than transmission costs in accordance with your basic rates.”*

- in the data protection policy, the clause should read as follows:

***“Using an email address for sending a direct advertising***

*Provided that you have not disagreed, we shall use your email address, which we received as part of selling an item or service, for the electronic transmission of advertising for your own goods and services, which are similar to those that you have already purchased from us. You may object to the use of your email address at any time by sending us a message. You'll find the contact details for exercising your objection in our imprint. You can also use the link provided in the advertising email. This shall not result in any costs other than transmission costs in accordance with your basic rates.”*

**In the subsequent advertising emails (without express consent), the following note must be displayed in the email in a clearly visible manner:**

*“You may object to the use of your email address for sending direct advertising for our goods or services at any time by sending us a message. You may find the contact data in the provider details in this email. You may also use the link provided for this purpose. There are no costs arising by virtue thereof, other than transmission costs pursuant to the basic rates.”*

In addition to the use of the above mentioned information text, a **link** called **“unsubscribe from the newsletter”** or **the like** – where a website with the confirmation of the cancellation opens by clicking on it – complies with the legal requirements. It is recommended not to hide this link in the small print but to highlight it in a **clearly visible** manner. The use of the link for the cancellation is useful for both the sending of email advertising with prior consent and the direct advertising.

In the case of a cancellation, re-entering of the email address or even the login data should be avoided.

#### **4. Unsubscribe from the newsletter**

If customers object to their expressly given consent to the receipt of a newsletter and/ or the receipt of any further direct advertising, this cancellation must **not** be ignored. On the contrary, the email address must be removed from the distribution list. From the date of the cancellation, **no further** advertising shall be sent by email. Otherwise, a written warning because of unauthorised sending of electronic advertising can be given.

**If there are uncertainties about the identity when unsubscribing from the newsletter, the traders must find out who sent the cancellation (cf. the decision of the Landgericht Braunschweig of 18.10.2012, case number: 22 O 66/12).**