

DIRECT ADVERTISING AND DATA PROTECTION

Information on data protection | April 2022

Introduction

Advertising is an important means for companies to address and win customers, to increase their own visibility and to increase sales. According to Article 2(a) of the UCP Directive concerning misleading and comparative advertising (EU Directive 2006/114 EC of December 12, 2006), the term “advertising” includes “the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations”. According to this broad understanding of the term, this includes all activities of a company which are aimed at promoting the sale of its products or services. Direct advertising is characterized by the direct addressing of the target person, for example by mail, e-mail or telephone.

Direct advertising measures are regularly accompanied by the processing of personal data. In this respect, responsible companies must comply with the relevant provisions of data protection law. On February 18, 2022, the German Conference of the Independent Federal and State Data Protection Authorities (Data Protection Conference, DSK), published its [guideline on the processing of personal data for direct advertising purposes under the GDPR](#), in which it addresses the special data protection features of direct advertising. The guidance can be drawn upon to help choose the correct procedure when using direct advertising.

Legal basis

Within the scope of application of the GDPR, the processing of personal data for the purpose of direct advertising requires the existence of a legal basis. The legal basis for data processing for the purpose of direct marketing can be the consent of the data subject pursuant to Article 6(1)(1)(a) of the GDPR as well as overriding legitimate interest pursuant to Article 6(1)(1)(f) of the GDPR. The latter can be inferred from Recital 47 of the GDPR, according to which the processing of personal data for direct marketing purposes may be regarded as being carried out for a legitimate interest.

Determining whether a company can rely on its legitimate interests for data processing for the purpose of direct advertising, or whether it must obtain the consent of the data subject for this purpose, usually requires a case-by-case assessment. When assessing the conditions under which direct advertising in its various forms is permissible, the values set out in the German Act Against Unfair Competition (UWG) must also be taken into account. Under competition law, it is especially Section 7 of the UWG which regulates the conditions under which advertising can be assumed to cause an unacceptable, unreasonable disturbance.

Legitimate interests

According to Article 6(1)(1)(f) of the GDPR, the processing of personal data is lawful if the processing is necessary to protect the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by those interests or fundamental rights and freedoms of the data subject which require protection of personal data. In this respect, a balancing of interests is required in the individual case. If this weighing of interests is in favor of the interests of the controller, data processing for direct advertising purposes is also possible without obtaining the consent of the data subjects.

One criterion for the balancing of interests is, among other things, whether the data subject can reasonably foresee, at the time of collection of his or her personal data and in view of the circumstances under which the collection takes place, that data processing may possibly take place for the purpose of advertising. If personal data are processed in circumstances where a data subject cannot reasonably expect further processing, the interests and fundamental rights of the data subject could override the interest of the controller (Recital 47 p. 4 of the GDPR).

In the opinion of the DSK, the interests of the data subject that are worthy of protection are generally not predominant if customers who have placed an order with a controller receive an advertising catalog or an advertising letter for the purchase of further products from that controller by mail without special selection. In contrast, more intrusive measures such as automated selection procedures to create detailed profiles, or behavioral forecasts and analyses that lead to additional knowledge (profiling) can generally no longer be based on a legitimate interest, but are only possible with consent.

In the case of advertising by means of a telephone call to a market participant who is not a consumer, according to Section 7(2) no. 2 alt. 2 UWG, it depends on whether the likelihood of the consumer’s consent can be presumed. In the case of presumed consent, a legitimate interest can be considered as a legal basis for telephone advertising to a non-consumer.

Consent and dispensability in exceptional cases

In the case of advertising by means of a telephone call to a consumer, the consumer’s consent is required pursuant to Section 7(2) no. 2 alt. 1 UWG. The consent of the data subject must be documented by the responsible party in accordance with Section 7a UWG; the proof must be kept for five years from the granting of the consent and after each use of the consent.

According to Section 7(2) no. 3 UWG, the use of e-mail addresses, computerized autodiallers ("robocalling") or a fax machine for advertising purposes generally requires the consent of the addressee. An exception to the consent requirement applies if the conditions of Section 7(3) UWG are met. This is the case if an entrepreneur has received the customer's electronic postal address in connection with the sale of a good or service, the entrepreneur uses the address for direct advertising for its own similar goods or services, the customer has not objected to the use, and the customer is clearly and unambiguously informed of his right to object when the address is collected and whenever it is used.

The reason for the consent requirement in the two cases mentioned – apart from the exceptional cases of Section 7(3) UWG – is both the stronger potential for disturbance, especially from calls, and the possibility of mass sending, especially of e-mails. If the data subject's consent is not available in these cases, the data processing cannot be based on the legitimate interests of the data controller due to the overriding legitimate interest of the data subject.

The general requirements of data protection law, in particular Article 7 of the GDPR, apply to obtaining consent for data processing for the purpose of direct advertising. In particular, consent must be given voluntarily, in relation to a specific case, and in an informed manner. In order for the consent to be informed, it is necessary, in the opinion of the DSK, that the type of intended advertising (for example, by mail, e-mail, telephone), the products or services to be advertised, and the advertising company all be named. For the assessment of the voluntariness of consent, the greatest possible consideration must be given to the circumstances – for example, whether, among other things, the performance of a contract is made dependent on consent to data processing that is not necessary for the performance of the contract (Art. 7(4) of the GDPR).

In practical implementation, the consent text should be formulated in clear and simple language and the data subject should be given the opportunity to give active consent – for example, by ticking a checkbox. Although the written form is not mandatory for consent under data protection law, data controllers must be able to prove compliance with data protection requirements and thus also the existence of consent. The double opt-in procedure can serve as proof of consent, although it should be noted that the procedure must be specifically suitable for proving consent with regard to the specific means of communication used. As a rule, a double opt-in procedure by e-mail is therefore not sufficient to prove the ownership of a telephone number entered online, and thus the authenticity of consent to advertising calls to this telephone number given at the same time.

Information obligations

Data subjects must be informed about the processing of their personal data for advertising purposes in accordance with the general requirements of Articles 13 and 14 of the GDPR. Accordingly, information must be provided about, among other things, the purposes and legal basis of the data processing, the legitimate interests (if applicable), the data recipients or categories of recipients, the storage period, and the rights of the data subject. This also includes information about the right of the data subject to revoke consent once it has been given.

Separately from other information, data subjects must also be informed about their right to object to advertising in accordance with Article 21(4) of the GDPR. This information must be provided at the latest at the time of the first communication with the data subject.

For practical handling, it is advisable to prepare appropriate data protection information in advance and keep it available. The information can then be handed over to the data subject immediately when the data is collected or otherwise transmitted.

The wording of Articles 13 and 14 of the GDPR initially refers to data collections after the GDPR has come into effect. However, due to the general obligation to process data transparently, the DSK recommends not only informing existing customers whose data was collected before May 25, 2018 when further personal data is collected from them for the first time or when existing data is changed, but also updating and broadening the scope of the information provided to all customers, including existing customers, to meet the requirements of the GDPR.

General principles relating to the processing of personal data

The other general principles of data processing from Article 5 of the GDPR must also be taken into account. According to these, data processing must above all be fair, transparent and proportionate to the purpose of the processing. According to the principle of purpose limitation, personal data must be collected for specified, explicit and legitimate purposes and may not be further processed in a manner incompatible with those purposes.

In the event of a change of purpose, Article 6(4) of the GDPR must be observed. If personal data that were not originally collected or were not also collected for advertising purposes are to be used for advertising purposes, data controllers must check whether the advertising purpose is compatible with the original purpose, unless the data subject has consented to the processing for advertising purposes. The controller shall inform the data subject of any subsequent change in the processing purposes prior to further processing (Article 13(3) of the GDPR).

Revocation of consent and right to object to direct advertising

Consent under data protection law can be revoked at any time with effect for the future (Article 7(3)(1) of the GDPR). The revocation must be as simple as the granting of consent.

A data subject also has the right to object at any time to the processing of personal data concerning him or her for the purposes of direct marketing (Article 21(2) of the GDPR). If a data subject objects to processing for direct marketing purposes, his or her personal data may no longer be processed for these purposes.

To ensure that inquiries from data subjects regarding an objection to advertising or revocation of consent can be taken into account without delay, it is advisable in practice to agree on a procedure for dealing with corresponding inquiries within the company and to establish processes that ensure the implementation of objections and revocations. To improve the organization and channeling of such inquiries, it is helpful to set up a separate communication channel for this purpose, such as an e-mail address. However, if a data subject's inquiry is received via a communication channel other than the one provided, the data subject should not be referred to the specially established e-mail address. Instead, internal processes should be established for these cases to ensure that the inquiry is forwarded to the responsible department. It can also be made easier for the data subject to exercise his or her rights, for example, by including a link to unsubscribe directly in every advertising e-mail.

In the event that advertising campaigns that have already begun can no longer be stopped at the time of the revocation or objection,

the data subjects should be informed in an individual response both of the fact that their request has been heeded and of the fact that they may still receive advertising for a short period of time, which should be specified as precisely as possible.

Conclusion

Before processing personal data for the purpose of direct advertising, data controllers must check on a case-by-case basis which legal basis they can use for data processing. If a balancing of interests fails due to the overriding interests of the data subject, the only legal basis that can be considered is the consent of the data subject. The data subjects must also be informed about the processing of their personal data for advertising purposes in accordance with the requirements of Articles 13 and 14 of the GDPR, which also

includes, in particular, information about the right to revoke consent once it has been given with effect for the future. Data subjects also have the right to object at any time to the processing of personal data concerning them for the purpose of direct advertising.

In order to ensure that data subjects are informed in accordance with data protection requirements and that revocations and objections are taken into account, it is advisable for companies to establish suitable processes in advance, for example by providing data protection notices and agreeing on procedures for the proper response to and consideration of data subject inquiries.

Johanna Schmale



Contact:

BRANDI Rechtsanwälte
Partnerschaft mbB
Adenauerplatz 1
33602 Bielefeld

Johanna Schmale
Research Associate

T +49 521 96535 - 890
F +49 521 96535 - 113
M johanna.schmale@brandi.net