

REQUIREMENTS FOR SENDING NEWSLETTERS

Information on data protection | March 2023

Introduction

In addition to contact forms, online and social media presences, many companies use regular newsletters to stay in touch with their customers or to inform interested parties about company offers and promotions, as well as current topics and news. Due to the lower costs and workload compared to postal advertising, and not least in view of increasing digitization, most of the advertising is sent by e-mail. If newsletters are sent for marketing purposes, the company must take into account various legal requirements that arise primarily from data protection law and competition law. Below we provide an overview of these legal requirements and specifications.

Data protection requirements

From a data protection perspective, the requirements to be complied with by the company result particularly from the General Data Protection Regulation (GDPR).

Legal basis

As with any other data processing, the data protection principle of "prohibition with reservation of permission" anchored in Art. 6 GDPR initially applies to the sending of newsletters. Accordingly, any data processing is only permissible if it can be established on a legal basis. In this respect, the consent of the potential addressee is particularly relevant. In order to ensure that only those persons receive the newsletter who expressly wish to do so, special technical measures must be taken as part of the registration process. In addition, Art. 13 GDPR imposes various information obligations that must be implemented by the company. If customer tracking is also to be carried out as part of the newsletter, this aspect must also be taken into account when designing the processes.

Consent

According to Art. 6 (1) (a) GDPR, data processing is lawful if the person concerned has given his/her consent to the specific processing for a specific purpose. Thus, if a potential addressee consents to his or her contact data being included in the newsletter distribution list and to the newsletter being sent to the e-mail address he or she has provided, his or her consent can be used as the legal basis for the data processing operations in connection with the newsletter mailing.

According to Art. 4 No. 11 GDPR, consent is effective if the data subject declares voluntarily, for the specific case, in an informed manner and unambiguously in the form of a statement or other intentional action that he or she consents to the processing of personal data relating to him or her.

With regard to the aspect of voluntariness, it must be taken into account in this respect that the potential recipient must not be pressured to order the newsletter beyond the normal extent. In particular, a voluntary declaration can no longer be assumed if the failure to give consent is associated with disadvantages for the potential addressee. Designs in which, for example, products can only be ordered if the company's newsletter is subscribed to at the same time should therefore be avoided. In contrast, it may be permissible within certain limits to link the consent to receive the newsletter to certain benefits for the recipient, such as the receipt of a discount coupon. In this respect, however, the specific design in the individual case must be evaluated with regard to permissibility.

With regard to the informed consent, it must be taken into account above all in the context of the newsletter mailing that it must be recognizable for the potential recipient in which frequency the newsletter is sent. In addition, it is also useful to provide information about the content that can be expected. In this respect, a daily newsletter with an offer of the day is to be evaluated differently than a monthly newsletter with general information. In December 2022, the [Berlin Court of Appeal](#) most recently ruled on this issue that, despite the existence of the consent of the person concerned, unlawful advertising by e-mail must also be assumed if a newsletter is sent more frequently than specified in the consent requested, as the sending is then no longer covered by the consent declared. To avoid such problems, it is advisable to inform potential recipients specifically how often the newsletter is expected to be sent. If the newsletter appears at irregular intervals, the potential addressee should at least be given an approximate idea of the intended frequency.

Apart from a declaration or an unambiguously confirming act, the GDPR does not prescribe a mandatory form for the granting of consent. An unambiguously confirming act, however, requires that the data subject must expressly and actively declare his or her consent. In this respect, it is conceivable, for example, that a box is selected or a clearly labeled button is pressed. Pursuant to Art. 7 (1) GDPR, the company responsible must also be able to prove that the data subject has consented to the processing of the data, so that the person responsible is subject to a documentation obligation.

According to Art. 7 (3) (1) GDPR, data subjects have the option to revoke their consent at any time. If a recipient declares to the company that he/she no longer wishes to receive a newsletter in the future, this request must be complied with immediately. The recipient must be removed from the distribution list and may not receive

any further newsletters. Nothing else can apply unless the newsletter mailing can be founded on another legal basis, if applicable. The lawfulness of data processing in connection with the Company's newsletter that took place prior to the revocation, however, shall not be affected by the revocation. The potential recipient must be informed of his or her option to revoke consent when it is obtained.

Legitimate interests

In addition, in some cases, the existence of an overriding legitimate interest within the meaning of Art. 6 (1) (f) GDPR may also be considered as a legal basis for sending a newsletter. An overriding legitimate interest of the company in direct advertising is to be assumed, taking into account the competition law requirements of the Unfair Competition Act (UWG), if the data subject has previously ordered goods or services from the company, the company has received the data subject's e-mail address in this context and the data subject has not objected to receiving information by e-mail.

Double opt-in procedure

Another challenge when sending newsletters is checking whether the consent given actually comes from the owner of the e-mail address given in each case. Without closer verification, it would be possible to subscribe to numerous newsletters for a third party without their knowledge, which could massively harass the owner of the e-mail address.

It is therefore necessary to check whether the owner of the e-mail address actually subscribes to the newsletter himself and has consented to the data processing before including the e-mail address in the distribution list for the newsletter. In this respect, the so-called double opt-in procedure has become established, in the context of which a notification e-mail is first sent to the respective e-mail address with the request to confirm that the e-mail owner would like to receive the newsletter by click on a link contained in the e-mail. The actual dispatch begins only if this was released by the renewed express confirmation of the e-mail owner.

In the past, courts have occasionally ruled that even the notification e-mail with the confirmation link is to be classified as unauthorized advertising if the owner of the e-mail address did not order the newsletter himself (OLG Munich, decision dated 27.09.2012 – Ref. 1682/12). However, since there is no other meaningful way of verifying the identity of the customer, this view is not convincing (OLG Celle, decision dated 15.05.2014 – Ref. 13 U 15/14).

Conversely, in individual cases, a separate check via the double opt-in procedure may not be necessary if the identity of the data subject and his or her e-mail address can be ensured in another way. If a registered user orders a newsletter, for example, and this order is placed after logging in with the same address that was used for registration, then the address does not need to be verified separately.

Information requirements

As with any collection of personal data, companies must also fulfill the information obligations arising from Art. 13 GDPR when collecting e-mail addresses for the transmission of newsletters. Accordingly, the company must provide the potential recipient with further information beyond that which is required for informed consent. This includes, among other things, the name and contact details of the person responsible and the data protection officer, the purposes of the data processing, the legal basis and, if applicable, recipients of the personal data.

If registration for the newsletter takes place via the company's online offering, it is often a good idea to remove the additional infor-

mation from the registration form and provide it in the privacy policy. However, as part of the registration process, the potential recipient should at least be told where to find the more detailed information. For this purpose, a link to the data protection declaration within the consent text, for example, is a good idea.

If, however, consent is obtained in writing – for example, via physical registration forms in brick-and-mortar retail – initial information can already be provided on the registration card. However, as this does not usually remain with the person concerned, the necessary information should also be made available, for example in the form of a notice or as a printout at the checkout or reception desk. In turn, the potential addressee should be informed of where the data protection-related information can be found.

Tracking

If, beyond the mere sending of the newsletter, it is also to be analyzed to what extent the recipients have opened and used the newsletter – e.g. to how many users an e-mail was sent, whether e-mails were rejected by recipients, whether recipients interacted with buttons in the newsletter or whether the recipient unsubscribed from the distribution list after receiving an e-mail – the existence of a legal basis is also required for this tracking. In this respect, only the consent of the respective addressee can be considered. Recourse to the legitimate interest is likely to fail because the interests of the data subjects worthy of protection outweigh this, since it cannot be automatically be derived from the mere ordering of the newsletter that data subjects must always tolerate a personal evaluation. The information obligations of the responsible company apply equally to tracking measures. The tools used as well as the specific data processing operations and purposes must therefore be addressed both within the scope of the declaration of consent and in the data protection declaration or other further information. Irrespective of consent, evaluations without a specific reference to an individual remain possible on an aggregated level.

If the sending of the newsletter is generally linked to tracking of the recipient, and the analysis processes is essential, the potential recipient must also be informed of this fact during the registration process.

Competition law requirements

In addition to the requirements of data protection law, the requirements of competition law must also be taken into account when addressing advertisers. These result in particular from Section 7 UWG. The individual requirements to be met when sending advertising, such as newsletters, depend on the method of sending. In general, it must also be taken into account that the term "advertising" is to be understood very broadly and includes surveys, evaluations or contacts following an order.

When sending advertising by post, for example in the form of flyers, brochures, newsletters or similar, it is only necessary to ensure that the character as advertising is recognizable. Even if the requirements under competition law are relatively low in this respect, it must be taken into account that, from a data protection perspective, there must nevertheless be a legal basis for the data processing.

If a customer is to be contacted by telephone for advertising purposes, a distinction must be made pursuant to Section 7 (2) No. 1 UWG as to whether the addressee is a consumer. If a consumer is to be contacted, his or her consent to be contacted by telephone must be obtained in advance. If there is no corresponding consent, the procedure is illegal from the point of view of competition law and thus also from the point of view of data protection law. If, how-

ever, it is another market participant (e.g. a company), its presumed consent is sufficient. This may be assumed if it is to be expected that the addressed market participant agrees to the contacting.

In the case of sending advertising by e-mail, which is likely to be the rule for sending newsletters, the customer's consent is mandatory under Section 7 (2) No. 2 UWG. In this respect, the UWG does not differentiate between consumers and other market participants, so that one should refrain from collecting e-mail addresses of companies, associations and clubs and adding them to one's own distribution list without being asked. If there is no sufficient consent, it must be assumed that contacting or data processing is illegal under both competition law and data protection law.

Competition law only allows a relevant exception to these strict requirements within narrow limits. According to competition law, consent is not required when sending e-mail advertising and accordingly also in the case of newsletters if all the requirements of Section 7 (3) UWG are met. These are in detail:

1. The company has received the customer's e-mail address in connection with the sale of a good or service.
2. The company uses the address for direct advertising of its own similar goods or services.
3. The customer has not objected to the use.
4. The customer was clearly informed at the time of collection of the address as well as at each use that he can object to the use at any time.

If such an exceptional case exists in accordance with Section 7 (3) UWG, the recipient's consent can also be dispensed with from the perspective of data protection law and the company's overriding legitimate interest in direct advertising can be taken as a basis.

If the newsletter is to be sent to a recipient who has not given his or her consent, it must be checked in each case whether all requirements actually apply to the specific circumstances. Whether the products or services to be advertised are similar goods or services within the meaning of Section 7 (3) No. 2 UWG must be examined in each individual case; strict requirements apply in this respect. For companies with a large product range, the exception therefore does not usually apply unless the newsletter is tailored to the customer. If there is also a lack of effective consent, the contact is accordingly illegal from both a data protection and a competition law perspective.

Consequences in the event of a violation

If a company sends a newsletter to a recipient in an unauthorized manner – for example, because there is no effective consent for the specific case, the recipient has revoked his or her consent, or the requirements of Section 7 (3) UWG are not met in their entirety – this may constitute both a relevant data protection violation and a violation of competition law. From the perspective of the person concerned, there is also an inadmissible encroachment on his or her general right to privacy. In this respect, it is conceivable that the competent data protection supervisory authority will sanction the breach and impose a fine pursuant to Art. 83 GDPR. In addition, the assertion of claims for damages pursuant to Art. 82 GDPR as well as claims for injunctive relief by the data subject itself may be considered. In addition, competitors of the company can also take action against the company by way of a warning or an injunction if this does not sufficiently take into account the various legal requirements.

Conclusion

When sending newsletters, the requirements of data protection law and competition law in particular must be taken into account. From a data protection perspective, the existence of a legal basis for all data processing in connection with the sending of the newsletter is particularly necessary. As a rule, this can only be the recipient's consent, since most newsletters – unless they are actually individually adapted to the customer and his or her previous orders – do not meet all the requirements of Section 7 (3) UWG. It must be taken into account here that data processing processes can only be based on consent to the extent that their scope is covered by the consent, and that the consent has not been revoked by the recipient. In addition, the recipients must be comprehensively informed about the data processing either as part of the data protection declaration or in some other way.

In conclusion, the following can be stated: If the advertising approach is not objectionable from the point of view of competition law, the contact is generally also permissible under data protection law. Insofar as the existence of consent is required under Section 7 UWG, this is also the legal basis under data protection law. If, however, the contacting is permissible for other reasons according to Section 7 UWG, a legitimate interest of the company in the data processing can usually also be assumed.

Christina Prowald

Contact:

BRANDI Rechtsanwälte
Partnerschaft mbB
Adenauerplatz 1
33602 Bielefeld

Christina Prowald
Research Associate

T +49 521 96535 - 890
F +49 521 96535 - 113
M christina.prowald@brandi.net

