

Legal notice in a newsletter – What do you need to know?

Everybody knows they should, but not everybody does: **Include a legal notice in the newsletter!** Not having one or having a partially incorrect notice may trigger high costs. In context of the legal assessment of the CSA certification process, the **Certified Senders Alliance (CSA)** notices time and again that the legal notice in newsletters often does not conform to legal requirements. The legal notice is the information that senders, in particular companies, are required to provide in many jurisdictions, also called imprint, trading details inter alia. In Germany, the details that senders are required to list in the “Impressum” or legal notice are clearly defined in law. Find out here how to **avoid unnecessary mistakes and high fines**.

What is the meaning and purpose of a legal notice?

The obligation to provide a legal notice is supposed to secure a minimum of **transparency and information on the internet in order to protect the consumer** while at the same time **building trust** in the e-commerce sector. Its statutory regulation in Germany can be found in § 5 of the German Telemedia Act (TMG) and § 55 of the German Broadcasting and Telecommunications Treaty (RStV). The TMG primarily deals with the technical and economic aspects of websites. Questions regarding the content of telemedia are dealt with in the RStV. The duty of disclosure, in particular, serves the determination of identity in order to minimize any prosecution in the case of litigation.

Caution: The obligation of providing a legal notice is binding, no matter whether the information is given on the website or regularly sent out per email. It applies to all providers offering telemedia on a commercial basis. There is no need to provide a legal notice for a single private email.

Which details must be provided in the legal notice?

1. The name and address of the service provider, name and address of the place of business; in the case of legal entities, also the legal form and the correct and full legal name and the name of the authorized representative,
§ 5 (1) No. 1 TMG
2. To the extent that the service is offered or provided in the context of an activity subject to approval of a state agency, details of the relevant supervisory body, § 5 (1) No. 3 TMG
3. The commercial register, association register, partnership register or co-operative register in which they are entered and the corresponding register number, § 5 (1) No. 4 TMG
4. To the extent that the service is offered or provided in exercising an occupation defined in Article 1(d) of Directive 89/48/EEC of the Council of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration (OJEC No. L 19 p. 16),
or as defined in Article 1(f) of the Directive 92/51/EEC of the Council of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC (OJ EC No. L 209 p. 25, 1995 No. L 17 p. 20), most recently amended by Directive 97/38/EC of the Commission of 20 June 1997 (OJ EC No. L 184 p. 31), details of
 - a) the chamber to which the service providers belong,
 - b) the statutory designation of the occupation and the country in which the designation of the occupation was awarded,
 - c) the designation of the professional rules and of how these can be accessed,§ 5 (1) No. 5 TMG
5. in cases in which they possess a VAT ID number pursuant to Section 27a of the Turnover Tax Act or a business identification number pursuant to Section 139c of the Fiscal Code, the details of this number,
§ 5 (1) No. 6 TMG

6. in the case of joint-stock companies, companies limited by shares and limited-liability companies which are in liquidation, details of this.
§ 5 (1) No. 7 TMG
7. details which permit rapid electronic contact and direct communication with them, including the electronic mail address, § 5 (1) No. 2 TMG:

- a) the email address

- b) phone number

The obligation to provide a telephone number used to be controversial with German courts. This question reached the German Federal High Court of Justice (BGH), who eventually referred the question to the European Court of Justice (ECJ). According to the decision of the ECJ (16.10.2008, Case C 298/07), a telephone number is not mandatory. However, another direct and efficient communication channel must be listed in addition to the email address: This may be the telephone number, however, an electronic inquiry mask may also suffice.

Beware: Should replies to enquiries through the contact form take too long, then it is best to list the telephone number. A fax number may also be published in the legal notice.

- c) Is it enough to provide an automatic email reply in the legal notice?

This question was discussed by the Berlin district court, which ruled (court decision from 28.08.2014, Az. 52 O 135/13) that automatically generated emails without any option to contact the website operator do not fulfill the requirements of the obligation to provide a legal notice according to § 5 (1) No. 2 TMG. As a result, it granted a prohibitory injunction to the Federation of German Consumer Organisations - vzbv. The defendant's automatic reply read as follows: „Please note that due to the high number of email inquiries arriving under this email address, they can neither be read nor taken note of." The defendant offered instructions for self-help as well as a contact form. The provision of an email address must allow individual communication through that address.

How to include the legal notice?

1. Clearly visible: The provider identification must be identifiable as such and marked. A font size must be used which is easy to read. It is not sufficient to hide the provider identification in the terms and conditions. The information needs to be visible and easy to find without having to search for long.
2. Directly accessible: Ideally, the required information according to § 5 TMG should be placed at the bottom of every newsletter with a heading like "Impressum" „legal notice“, „About Us“, „provider identification“. The BGH clarified in a judgement (BGH judgement I ZR 228/03) that the operator's details may be supplied by making them available via two clicks („two-click-rule“), provided that those are indicated in a clear manner for the consumer.
3. Continuously available: The legal notice must be continuously available, retrievable at any time. Even though the language of the legal notice is not defined, there must not be a conscious barrier. If the whole website is published in German, it would be deemed bad faith if the legal notice was in Chinese. The content of the newsletter as well as the information of the legal notice must be published in the same language.

What are the legal consequences for providing a faulty legal notice or no imprint at all?

1. Infringement as defined in § 16 TMG:
According to § 5 (1) TMG, it is an administrative offence to intentionally or negligently either not, not correctly or not completely provide a piece of [required] information. The administrative offence may be punished by a fine of up to 50,000 Euro under § 16 (3) TMG.
2. Is a violation of § 5 TMG a violation of competition law?
Under certain circumstances the violation of § 5 TMG may result in injunctive relief and claim for damages, in line with the German Act Against Unfair Competition (UWG). However, not every violation of the obligation to provide a legal notice leads to unlawful competition. Rather, more unfair practices are required in order to result in unlawful competition.
Inadmissible and therefore subject to a warning, business according to § 3 Abs. 1

UWG is unfair as a rule only if it is „capable of appreciably affecting the interests of competitors, consumers or other market operators“ (so-called level of materiality).

A violation may always be excluded if there is way of influencing the competitive situation in favor of the infringer. If the operator’s identity may be ascertained by other means on the website, the requirements of the consumer protection are fulfilled and therefore no aggravation of litigation is given (cf. Beckmann, CR 2003, 140, 141). The written warning of mere bagatelle offences an abuse of law. As a result, the costs for the written warning are not be reimbursed.

Example 1:

The service provider’s address is incorrect or missing: It will be more difficult for the customer to make a claim, giving the provider a competitive advantage.

Example 2:

The Commercial Register/VAT ID is missing: The consumer does not fundamentally need those details in order be able to assert his rights. Information like the VAT ID serve the tax office than rather the consumer. Therefore, there may be no competitive advantage over other competitors.

Conclusion:

A legally secure legal notice is absolutely mandatory. Not only does it protect against high fines or warning letters, but also demonstrates seriousness and the professionalism of the service provider. Through clear identification and easy access to the service provider confidence in the provider can be established. Please consult an attorney for legal advice if you are not sure whether your legal notice fulfils all legal requirements in Germany.

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