

## The definition of advertising in email marketing

Advertising can take multiple forms. It is no wonder that there is often confusion about whether a mailshot is actually advertising as defined in competition law, and hence is subject to the strict conditions that apply to sending advertising emails (e.g. in Section 7 of the German Act Against Unfair Competition (UWG)) or in Article 13 of the European Data Protection Regulation for electronic communication). The sender is often not aware that they are actually sending an advertising email. This article uses examples to help clarify when an email is considered to be an advertisement.

### What is exactly is considered advertising?

Section 7 of the German Act Against Unfair Competition (UWG) mentions advertising in a number of places, but does not actually define it. The context and wording of the paragraph just state that advertising is a commercial transaction.<sup>1</sup> Other sections of the UWG also mention „advertising“, but do not define the term. A definition can be found in the EU Advertising Regulation.<sup>2</sup> In Article 2(a) advertising is defined as follows:

*„'advertising' means 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;“*

Corresponding definitions can be found in the legal commentaries.<sup>3</sup>

Case law has taken a particularly broad definition of the term, so that, for example, enquiries<sup>4</sup> can also be considered advertising. As a result, any communication which helps a business promote sales is to be classified as advertising. This aim of sales promotion always a given when the addressee is encouraged to enter a business transaction (e.g. a contract extension). It is also considered advertising when the communication aims to promote the sale or supply of goods or services.

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1 As stated in Section 7 UWG: " A commercial practice unconscionably pestering a market participant shall be illegal. This shall apply to advertising [...]".

2 Regulation 2006/114/EC concerning misleading and comparative advertising

3 Cf. Köhler/Bornkamm, UWG § 2, Rn. 15; Ohly/Sosnitza, Gesetz gegen den unlauteren Wettbewerb § 7 Rn. 42; Götting/Nordemann, UWG

4 German Federal High Court of Justice (BGH) I ZR 75/06, European Court of Justice C-657/11

### Examples for advertising:

- Sending information on current special deals
- Birthday, Christmas or new Years greetings: this are meant to remind the customer of the business and draw attention to it, even when concrete products are not being promoted.<sup>5</sup>
- Customer satisfaction enquiries: These are also meant to retain customers and so promote future transactions.
- So-called „service messages“, which aim at getting customers to use other services. These are also sent with the intention of retaining customers and promoting further sales.

Advertising also includes the highlighting or praising of special features, programs and apps which enhance or improve products already in use. In these cases, the customer is also being shown the advantages of the business, particularly when the purchase of such extra features is made easier or when changes are allowed to the existing contract.

- Information from political parties is also classified as advertising in the UWG. In 1990, German courts declared that the conditions of the UWG must also apply to such information or political advertising.<sup>6</sup>

### Advertising does not include:

- Information shared as part of the duty of disclosure. Here, however, the business must only provide essential information and is not allowed to advertise particular goods or services.
- Emails which were triggered by a transaction. This means that invoices or order confirmations (transaction emails) may not include advertising for other products unless prior permission to do so exists.

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<sup>5</sup> Ohly/Sosnitza/Sosnitza UWG § 4 Rn. 1/120 - 1/124

<sup>6</sup> Higher Regional Court Bremen, ruling of 18.06.1990 - 6 U 1/90; Higher Court of Justice Berlin, ruling of 21.09.2001 - 9 U 1066/00.