

The legal situation for email marketing in Germany, Austria and Switzerland

Which differences and similarities exist?

Increasingly, the legal experts of the Certified Senders Alliance (CSA) are asked at exhibitions and email marketing events, most recently at the DMX Austria 2016 in Vienna, how the legal conditions differ in Germany, Austria and Switzerland. In principle, without written consent it is not allowed to send advertising emails. Nevertheless, there are some differences which must be followed with regard to the concrete declaration of consent and existing exceptions in the single countries.

We have put together a table for you in which the legal specifics are shown clearly:

	Germany	Switzerland	Austria
Legal basis	Section 7 (2) no. 3, no. 4 and (3) of the UWG, Section 4a (1) sentence 2 of BDSG Section 28 (3) s. 1 BDSG and (4), Section 13 TMG Applicable to b2b and b2c	Section 3 UWG, Art. 45 a FMG, Art. 4 (3) and (4) DSGVO Applicable to b2b and b2c	Section 3 UWG, Art. 45 a FMG, Art. 4 (3) and (4) DSGVO Applicable to b2b and b2c
Opt-In	Principle in sending of commercial emailing	Principle	Principle for commercial mailing or when the email is addressed to more than 50 recipients
Consent for Opt-In	Transparent, optional, Conscious, unambiguous, explicit and separate	Explicit, no pre-selected checkboxes	None, also conclusive consent valid in principle

	Germany	Switzerland	Austria
Burden of proof for mailing to receiver	On sender	On sender	On sender
Double-Opt-In	Recommended	Recommended	Recommended
Exceptions (Opt-Out)	<p>Existing customer relationships,</p> <p>Requirements:</p> <ul style="list-style-type: none"> The sender must have received the customer's email address from the customer "in connection with the sale of goods or services." In addition, it must have been pointed out to the customer "in a clear and unequivocal manner in the collection of the address and in each use thereof" that he or she can object to the use of his or her email address for advertising at any time Without costs other than the transmission costs pursuant to the basic tariffs being incurred in this regard" - and the customer must not have, of course, objected to it. In the emails subsequently sent to the customer, solely "the company's own similar goods or services" may be advertised. 	<p>Existing customer relationships,</p> <p>Requirements:</p> <ul style="list-style-type: none"> There is a link between the service purchased at a particular time and the service advertised (advertising of comparable products or services). No third-party services are advertised With the mailing of advertising emails to existing customers, the sender must be clearly discernible, and each email must contain an easy-to-find, free-of-charge Unsubscribe option 	<p>Existing customer relationships,</p> <p>Requirements:</p> <ul style="list-style-type: none"> The sender has received the contact data in connection with a sale or a service to its customers The message is sent to directly advertise the company's own similar products or services The recipient has, during collection and also during each transmission, the possibility of rejecting this contact free of charge and easily The recipient has not rejected the mailing from the outset, in particular not as the result of entry in the list named in Section 7 para. 2 of the E-Commerce Act
Unsubscribe	Obligation	Obligation	Obligation
Legal notice	Obligation	Obligation	Obligation

	Germany	Switzerland	Austria
Identity/ commercial character	Concealment of the identity and the commercial nature are forbidden	Concealment of the identity and the commercial nature are forbidden	Concealment of the identity and the commercial nature are forbidden
Sanctions for ignoring rules	<p>Injunctive relief and claims for damages from Article 1004, 823 I BGB for private individuals and commercial companies</p> <p>Injunctive relief from Article 8 UWG for competitors</p>	Deliberate engagement in unfair competition as per Article 3 UWG shall upon application be punished for three years or penalty (Art. 23 UWG).	<p>Section 109 para. 3 no. 20 TKG 2003, determination of the administrative offense fine of up to EUR 37 million</p> <p>Injunctive relief B2B/BCB pursuant to Article 354 AGBG</p> <p>Competing companies can file a claim against the sender pursuant to Section 14 para. 1 in conjunction with Section 1 UWG and pursuant to Section 16 para. 1 UWG</p>

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