

Important Decision of the German Federal Court of Justice (BGH) for the Area of Email Marketing: Multichannel Consent Legal After All?

Following a long period of inactivity on the topic, the German Federal Court of Justice (BGH) got to grips once more with the subject of email marketing. In its judgment of 01.02.2018 - III ZR 196/17, the BGH has now ruled that a single consent to advertising can refer to several communication channels at the same time without infringing on the conditions of Section 7, Para. 2, Nos. 2 and 3 of the German Act against Unfair Competition (UWG). The BGH formulated its guiding tenet as follows:

“The conditions of Section 7, Para. 2, Nos. 2 and 3 of the UWG are not contravened if the consent of a consumer to contact for advertising purposes contained in the General Terms and Conditions refers to several advertising channels. A separate declaration of consent for each advertising channel is not required.”

What exactly was the case in point in this particular case?

The subject of the dispute was the following consent clause:

“In future, I would like to be personally informed and advised about new offers and services of T. GmbH by email, telephone, SMS, or MMS. I agree that my contractual data from my contracts with T. GmbH can be used by T. GmbH for individual customer service until the end of the calendar year following the termination of the respective contract. My contract data are the data required by T. GmbH for the fulfilment of the contract (contract conclusion, amendment, termination, billing of fees) and are voluntarily submitted.”

The BGH declared this consent text to be lawful and dismissed the complaint.

In its justification, the BGH stated, among other things, that a separate declaration for each advertising channel was not necessary, given that the legal conditions in Section 7, Para. 2, Nos. 2 and 3 UWG for the consent of a consumer to an advertisement via the channels are met, meaning that this would not give rise to a reason for separate declarations of consent. According to the senate, any alternative would be a “virtual incomprehensible formulation” which would offer no benefits in terms of transparency.

It was also concluded that nothing different could be deduced from the “Payback” case law of the BGH (BGH, judgment of 16 July 2008 - VIII ZR 348/06). The issue here centered on consent in advertising being connected to explanations which should have

been distinguished in terms of content. In the case of the opt-out solution - which the BGH deems to be inadmissible - the declaration was made together with all other contractual declarations and regulations, which runs counter to the condition of a declaration specifically relating to advertising. At the time of the ruling, however, no concrete statement was made regarding the separation of the individual advertising channels. While other courts (District Court Braunschweig 21 O 1703/12, District Court Berlin 15 O 343/11) interpreted the Payback ruling partially to the effect that a summary of different advertising channels in a declaration of consent was not admissible, this legal question was not clearly clarified. Now the BGH has finally offered a higher court clarification of the - until now - unresolved issue.

For purposes of clarification, it was also once more pointed out that a mixture of advertising consent and other declarations is not permissible, even after the new judgment. This consent should continue to be clearly separated in order to satisfy existing legal requirements.

What does the decision mean for CSA senders?

The Certified Senders Alliance (CSA) is pleased with the clarification of the - until now - unresolved issue. To date, the CSA has always been guided by existing court rulings and has opted for a stricter interpretation for reasons of legal certainty. As a result, the separate listing of the individual advertising channels within a declaration of consent was recommended or listed as a mandatory criterion in the CSA admission criteria. The aim was to provide CSA senders with the greatest possible protection against damage claims and other legal disadvantages. In order to continue to comply with the applicable case law, the CSA will take into account and incorporate the judgment of the BGH in a pending amendment to its admission criteria (https://certified-senders.org/wp-content/uploads/2017/07/CSA_Admission_Criteria.pdf).

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