

Transactional email, or newsletter?

During complaint procedures, the question arises again and again as to whether the mailing in question is considered a transactional email or perhaps a newsletter. Answering this question can have a particular impact on the legal requirements to be observed for sending. The strict legal requirements for email marketing¹ apply not only to classic advertising mails in which certain products are explicitly advertised, but also to the sending of newsletters.

So, when is an email “just” a purely transactional email, and when is it already considered to be a newsletter?

Transactional emails:

Transactional emails, also known as system emails, are characterized by the fact that they are usually sent automatically, triggered by certain actions of users or by certain business processes about which the user must be informed in online shops, online portals, booking systems, communities, social networks, and similar systems. One email is sent for each “process” or user action. Typical examples for transactional emails are:

- Registration confirmations
- Order and shipping notifications
- Invoices
- Return receipt confirmations
- Password reminders, requirements, and changes
- Status messages
- Double opt-in emails
- Changes to the Terms & Conditions

Newsletters:

In the case of newsletters, on the other hand, several or successive more or less regular emails which have no direct connection to a user action or specific contractual relationship are sent per registration/subscription process - as long as the subscription has not been cancelled.

¹ Article 7 GDPR, Article 13 RL 2002/58/EG (ePrivacy Directive), Section 7 of the German Act Against Unfair Competition (UWG), Inter alia.

Borderline cases from practice:

- Sending job advertisements or property advertisements

The legal evaluation of such emails must, as so often, be done on a case-to-case basis. If a special property brochure or a special job advertisement is requested on a portal and then automatically sent, the mailing can be regularly classified as a transactional email. If, on the other hand, several advertisements are sent in succession or over a longer period of time, for example as a result of registering on a portal, these mailings will have to be qualified as newsletters.

- Mailings from contact exchanges

The scenario in this instance is very similar to the previous example, assuming that a user registers on an appropriate portal and makes contact with another person. If the other person then replies, for example, a notification email about this process could be evaluated as a transactional email. It then represents to all intents and purposes an automated (re-)action to a trigger, so to speak. The situation would be different if, for example, the same user received regular updates about new members registering with the portal. Corresponding mailings are then characterized by the fact that they are not sent once due to a registration or a trigger, but are sent at more or less regular intervals to the users of the online marketplace or portal. Such mailings, therefore, are not considered to be transactional emails.

- New functionalities of a portal/service mail

Mailings announcing new functionalities of a portal or service emails are usually focused on customer loyalty or the sale of further products. The mails are also not sent just once, but at more or less regular intervals. As a result, these are not transactional emails, but promotional emails or newsletters.

Reminder: ad-free transactional email

A transactional email should never include advertising. Advertising in transactional emails is not forbidden per se. But as soon as transactional emails contain advertising, the strict legal requirements for email marketing also apply to transactional emails. In other words, permission, i.e. basically the consent of the recipient, is required to send the email. The term “advertising”² is to be understood broadly and includes any statement which serves the purpose of direct or indirect sales promotion.

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² For further details on the definition of advertising see https://certified-senders.org/wp-content/uploads/2017/07/CSA_Legal_The_definition_of_advertising_in_email_marketing.pdf