

## Effective Consent for Sponsoring Taking Recent Case Law into Account

Consent for the sending of marketing emails is only valid if the statement of purpose is sufficiently specific and the consent is given based on an understanding of the situation. However, there are frequently uncertainties regarding the formulation of the consent declaration, and these may indeed mean that it does not correspond to the requirements mentioned above. These uncertainties are compounded in the case of competitions involving a variety of sponsors.

If marketing emails are sent without prior consent, this can have unpleasant consequences: The recipient may well react with annoyance.

If he or she marks the emails received as spam, then there is a high risk that the IP and domain reputation of the sender will suffer long-term damage.

But the recipient can also find other ways to express their annoyance at the unwelcome advertising. One of these is by submitting a complaint to the eco Complaints Office. The Complaints Office will then initiate a CSA complaints procedure, in the case that the unwanted mailing was sent by a CSA certified sender. If, in the context of a CSA complaints procedure, the consent declaration is found to contain a legally invalid formulation, notification of this must be provided to the sender. This is designed to support the sender in recognizing problems and initiating appropriate measures, before their reputation is damaged any further. In many cases the bone of contention is that the sender has used imprecise industry designations or has provided too many sponsor categories in the consent declaration. On the one hand, this makes it considerably more difficult for the recipient to recall the consent, which significantly increases the risk of a complaint and resultant damage to the sender's reputation.

On the other hand, such declarations of consent cannot withstand a judicial examination and, quite apart from a CSA complaints procedure, can therefore result in painful negative legal consequences for the sender.

Regarding the requirements for specificity of the industry designation in the context of consent, there have been landmark decisions in Germany in previous years, from both the Higher Regional Court of Frankfurt and the Federal Court of Germany.

On the topic of naming sponsors, the Higher Regional Court of Frankfurt explicitly elaborated on the necessity of informing the user clearly and precisely about which sponsors will later send the recipient advertising / information about what kind of product or service. Industry designations which require interpretation would be classified as insufficient. The Federal Court of Germany also confirmed in 2017 that the products and services which are to be advertised must be clearly defined. Furthermore, it was made clear that the consent is impermissible in the case that a sponsor is a marketing company that itself designs and executes marketing campaigns for customers, given that in such cases it is no longer possible for users to have an overview. In a recent decision related to this, the Higher Regional Court of Frankfurt additionally clarified that the consent of the marketing company is to be kept separate in its effect from that of the sponsors. This means that the consent of the marketing company remains effective, even if the industry designation of one of the sponsors is too imprecise and therefore invalid. In this case, there is only a lack of effective consent with regards to the too broadly defined industry designation of the sponsor.

The following are examples of impermissible industry designations according to this verdict:

“Media and journals”

“Capital formation services”

“Pension fund”

“Finance and Insurance”

“Telecommunication products or offers”

“Email marketing for companies”

“Mail-order retail”

“The sending of newsletters for the portal ....com, with a variety of offers, such as clothes, travel, and/or discounts”

Instead, in the opinion of the CSA, based on the current legal situation, a clear formulation of the industry would be, for example:

“baby food”

“car accessories”

In addition, in its recent decision from June 2019, the Higher Regional Court of Frankfurt treated the formulation “Electricity and Gas” as sufficiently specific.

The number of sponsors named also needs to be of a size that remains manageable for the recipient. In contrast to previously, there is now a legally binding ruling from the Higher Regional Court of Frankfurt, in which the number of 8 (eight) sponsors is seen as permissible. However, the court has not voiced a position as to what number of sponsors can apply as the upper limit. As a result, on this point we can continue to refer to the earlier judgement, according to which the number of 59 sponsors was seen as definitively too large. As a result, the CSA recommends keeping the number of sponsors as low as possible, in order to avoid the risk of a legally impermissible consent and/or reputational damage. Those who wish to be on the safe side according to the latest case law should therefore not use more than eight sponsors.

Even though some of these verdicts were reached before the GDPR came into effect, and no further higher or supreme court decisions have been taken in the meantime, the above clarification remains relevant today. This is because Recital 32 of the GDPR, in addition to Article 7 of the GDPR, makes clear that consent must be given for the specific case and in an informed, unequivocal manner. So ultimately, the GDPR has resulted in no change with regard to the requirements for the specificity of a declaration of consent.

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