

The Legal Notice in Newsletters: This is What Counts!

Everyone knows it, but not everyone has it: The legal notice in a newsletter! A missing or wrong legal notice be very costly. Time and again, the Certified Senders Alliance (CSA), in the course of the legal assessment part of the CSA certification process, has found that the legal notice in newsletters does not meet legal requirements. Read here how you can easily avoid mistakes and high costs.

What is the intention and purpose of a legal notice?

The obligation to include an legal notice is intended to ensure a minimum of transparency and information on the Internet to protect consumers and to strengthen confidence in e-commerce. Their legal regulation can be found in Article 5(1) of the EU E-Commerce Directive 2000/31/EC and in the national implementations; in Germany, in Article 5(1) of the German Telemedia Act (TMG).

The information obligations are intended in particular to establish identity in order to facilitate possible legal prosecution in the event of a dispute. Please note: Whether the information is provided on a website or sent regularly by email is irrelevant, the obligation to include a legal notice still applies. It affects all providers of commercial telemedia, which usually offered for a fee. A single individual email does not have to have a legal notice. The following comments describe the requirements which the CSA obliges its senders to meet and which are derived from the requirements of the German Telemedia Act (TMG), EU law, and established case law in Germany and in EU jurisprudence.

Which information must be included in the legal notice?

1. Name and address of the service provider, name and address of the branch office, in the case of legal entities also the indication of the legal form and the correct and complete company name, name of the legal representative, see Article 5(1)(1) TMG.
2. Information on the competent supervisory authority if the teleservice is offered or provided within the scope of an activity requiring official approval, see Article 5(1)(3) TMG.
3. Listing of the commercial register, register of associations, partnership register or register of cooperatives in which the providers are registered and the

corresponding register number, see Article 5(1)(4) TMG. Special information for AG, KGaA, and GmbH companies: In the case of public limited companies (AGs), partnerships limited by shares (KGaAs) and limited liability companies (GmbHs) which are in liquidation or being wound up; the indication thereof, see Article 5(1)(7) TMG.

4. Information which allows rapid electronic contact and direct communication with the provider, including the address of the electronic post; the email address (Article 5(1)(2) TMG).

The obligation to provide a telephone number used to be controversial in German courts. The question reached the German Federal High Court of Justice (BGH), which finally referred the matter to the Court of Justice of the European Union (EUCJ) for a decision. According to the decision of the EUCJ (16.10.2008, Case C 298/07), it is not strictly necessary to provide the telephone number.

However, a second direct and efficient communication channel in addition to the email address must always be offered: this can be a telephone number, but an electronic enquiry mask or contact form can also be sufficient.

But careful: If the answers to inquiries by a contact form take too long, then it is better to provide a telephone number. If a fax number is available, this can also be stated in the legal notice.

[Is the specification of an automatic reply email in the legal notice sufficient?](#)

The Berlin Regional Court dealt with this question in 2014 and decided in its ruling (Judgement of 28 August 2014, file no. 52 O 135/13) that an automatically generated email without the option to contact the website operator does not meet the requirements of the legal notice obligation pursuant to Article 5(1)(2) TMG and thus granted an injunction sought by the German Federal Association of Consumer Organizations (vzbv). The defendant's automatic response had stated: "Please note that due to the large number of requests, emails received under this email address cannot be read or taken note of." The defendant referred to specially offered instructions for self-help and a contact form. So if an email address is provided, it must also allow for individual communication.

How must the legal notice be designed?

1. **Easily recognizable:** The identity of the provider must be recognizable and marked as such. Therefore, a font size should be chosen that is easy to read. Hiding the provider identity in the general terms and conditions is not sufficient. The information must be easily discernible and easy to find at any time without needing to search for long.
2. **Immediately accessible** and constantly available: Ideally, at the end of each newsletter, the mandatory information required under Article 5 TMG should be included and labelled "Legal Notice," "Impressum," "About us," "Provider identification" or similar.
3. The legal notice must be **constantly available**, i.e. it must be retrievable at any time. The CSA admission criteria require that the full text of any email sent for commercial purposes must identify the contracting entity. This scheme was included in the criteria in 2019 already with a one-year transitional period.

Until now, the CSA had also considered it sufficient that the information on the legal notice could be accessed via a link. In practice, however, this often led to the recipient of the email not being able to open the link due to technical problems and thus not being able to access the information in the legal notice. Since this situation may give rise to complaints and legal challenges, the provision in point 2.4 of the admission criteria has been supplemented accordingly:

2.4. The contracting entity, that is the mailer's contractual partner for a business-related email, must be clearly identifiable. In every email sent, an easily recognizable legal notice (footer) must be contained as full text, no later than twelve months after the admission criteria come into force.

The legal trigger for this amendment was Article 5(1)(1) TMG, under which service providers for business-related telemedia must, among other things, keep the relevant information directly and permanently available. This requirement cannot be guaranteed with a link, but only by means of a legal notice which is written out in full.

A corresponding regulation already exists in Article 35a of the German Limited Liability Companies Act (GmbH-Gesetz), which lays down a corresponding regulation for limited

liability companies (GmbHs). According to this, all business letters of the GmbH must contain all relevant information about the GmbH. This includes all electronic communication.

The language of the legal notice is not predetermined, but there must not be any deliberate impediments. If the whole page is in German, it would be contrary to good faith if the legal notice is in e.g. Chinese. The content of the newsletter and the information provided in the legal notice must be written in the same language.

Further information obligations under national laws remain unaffected.

What are the legal consequences of an incorrect or missing legal notice?

1. **Administrative offence as governed by Article 16 TMG:** It is an administrative offence to deliberately or negligently not, not correctly, or not completely make information available contrary to Article 5(1) TMG. Pursuant to Article 16(3) TMG, the administrative offence can be punished by a fine of up to EUR 50,000.
2. Does the infringement of Article 5 TMG also constitute an infringement of competition law? Under certain circumstances, a violation of Article 5 TMG may also result in a **claim for injunction and damages under the German Act Against Unfair Competition (UWG)**. However, not every violation of the legal notice obligation leads to an infringement of competition law. Rather, it is necessary to establish further unfair practices in order to constitute an infringement of competition law.

According to Article 3(1) UWG, unfair acts are generally only inadmissible, and thus can be subject to a warning, if they are “likely to have a significant adverse effect on the interests of competitors, consumers, or other market participants” (the so-called materiality threshold). In any case, an infringement is always ruled out if there is no suitability to influence the competitive situation in favor of the infringer. Insofar as the identity of the provider can be determined by other means on the website, consumer protection requirements are satisfied and there is no complication of legal proceedings (see Beckmann, CR 2003, 140, 141).

The warning of purely minor infringements is an abuse of law, with the consequence that the costs of the warning are not to be reimbursed.

- a. Example 1: The address of the service provider is incorrect or missing: It is more difficult for the customer to make complaints, this can be a

competitive advantage.

- b. Example 2: The commercial register/ sales tax ID number is missing: In principle, the consumer does not need the number in order to assert their rights. Information such as the sales tax identification number serves the tax office rather than the consumer. A competitive advantage to the detriment of other competitors would therefore tend to be negated.

Conclusion:

A legally binding legal notice is mandatory. It not only protects against expensive fines or warnings, but also testifies to the seriousness and professionalism of the service provider. The necessary trust can be created by a clear recognizability and immediate accessibility of the service provider. If you are not sure whether your legal notice meets all legal requirements, you should consult a legal expert.

Author:
Astrid Braken, Legal Counsel CSA