

New Rules for Direct Marketing in Germany

By Stefan Hanloser

The latest revision of the German Data Protection Act (Bundesdatenschutzgesetz) marks another milestone in a step-by-step shift to a strict opt-in standard for direct marketing. Although cold calls and unsolicited commercial e-mail communication had already been banned, the German legislator has now restricted the secondary promotional processing and use of personal data for any means of communication. The new law, which came into effect on 1 September 2009, applies to any data controller processing or using personal data for marketing purposes in Germany. As a consequence, even a company headquartered abroad has to adhere to the strict rules if its German branch is involved in the data collection, processing or use.

Interestingly enough, the few exceptions to the opt-in requirement are tailored to the needs of companies that are already trading and can rely on existing customer databases. Newcomers however, in particular foreign companies that seek to enter the German market, will find it more difficult and costly to contact German customers individually to promote goods and services.

OPT-IN PRINCIPLE

With the entering into force of the general opt-in principle on 1 September 2009, checking whether the intended processing and use of personal data is actually covered by a valid consent becomes a vital part of any direct marketing campaign in Germany. For consent to be valid, there are a number of requirements that must be met. If the declaration of consent is included in general terms and conditions, it has

be withdrawn by the consumer at any time.

A consumer's consent to marketing is invalid if it was required as a precondition for entering into a contractual relationship with a dominant supplier. Online order processes that cannot be completed without consenting to a promotional processing and use of personal data have therefore come under scrutiny as of 1 September 2009.

OPT-OUT EXCEPTIONS

The exceptions to the opt-in principle include certain occasions of unsolicited marketing to existing customers. A company may process and use consumer data to promote its own goods and services if it has collected the data directly from the consumer and if it has an existing contractual relationship with the consumer; unless, of course, the consumer has made an opt-out request. Cross-promotion among affiliated companies is not covered by this exception, as each corporate entity is viewed as a separate data controller. For later data processing and use for promotional purposes, the controller may combine "list data" (i.e., the consumer's name, address, year of birth and profession) with any other personal data of the consumer.

There is, however, a pitfall that businesses need to avoid: the consumer must be informed about his right to object to the future processing and use of his data for marketing purposes at the time the contract is entered into. This obligation, which cannot be satisfied retroactively, exists irrespective of whether the company has any actual plans to market to that consumer in the future.



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Germany is moving to a consent-based approach for direct marketing that will impact on all businesses that market goods or services to consumers in Germany.

to be conspicuous to an average consumer who is reasonably observant and circumspect. However, neither a separate signature line nor an opt-in check box is mandatory. Oral consent must be confirmed in writing, whereas electronic consent may simply be recorded, if the text can be retrieved and consent can

Beyond the scope of its own marketing purposes, the controller may use data relating to its own consumers to promote third-party products. Since a data transfer is not permitted, this exception is limited to enclosed advertising distributed on behalf of another company together with the controller's

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own products or mailings and to testimonials and endorsements. The controller has to be identified clearly on the marketing material.

Transfer of “list data” to other companies for their own advertising has become rather burdensome. In this case, the marketing material must indicate who first collected the data and each member of the data transfer chain has to keep the data transfer information for two years.

Finally, “list data” may be processed and used for sending marketing communication for professional goods and services to an individual’s business address, regardless of whether the individual is self-employed or an employee. Marketing for charities is also privileged.

TRANSITIONAL PERIOD

Consumer data collected before September 2009 may still be used in accordance with the old law, most notably the “list privilege”, which once allowed an extensive processing and use of “list data” for marketing purposes. However, this connection with the former opt-out principle will fade out soon after September 2009 as legacy contact data are of little value. As a result, the swift adoption of the new consent-based approach is important for pan-European businesses to ensure compliance with legal obligations in Germany.