

You've Got Spam

By Stefan Hanloser

Unsolicited commercial email messages are not only a violation of netiquette conventions, but are also illegal in EU Member States, which banned commercial spam when implementing the European Directive (2002/58/EC) on privacy and electronic communication. It is common knowledge in Europe that sending promotional emails to individuals requires their prior consent. This is the core principle of the "opt-in" solution as opposed to the "opt-out" approach practised in the United States, where sending commercial email messages is generally permitted unless and until the sender has been notified to the contrary by the recipient.

When it comes to putting the opt-in principle into practice, however, there is still a considerable amount of uncertainty. Since the consumers' consent rate significantly depends on an intelligent wording and design of the consent form or clause, companies are tempted to test the limits of the opt-in requirements.

On 16 July, the German Federal Court handed down a decision on the formal requirements for consumers' consent in receiving direct marketing emails and SMS.



The Federation of German Consumer Organisations brought to court Germany's leading loyalty card scheme for a practice that is quite common among German companies. Basically, an opt-out checkbox, through which loyalty card participants could decline direct marketing emails and SMS from the scheme operator, was combined with a signature line at the end of the form. Arguably, the participants, when signing the form without having ticked the opt-out box, made a valid opt-in declaration for future commercial emails and SMS.

The Munich Higher Regional Court overturned the Munich Regional Court's decision in favour of the consumer groups. Now, however, the German Federal Court has finally ruled that signing a form or clicking an "accept" button without having ticked an opt-out checkbox does not meet the threshold for a valid consent as required under German unfair competition law. The Court relied on the wording of Recital 17 of the Directive, which requires a specific indication of the user's wishes. Thus, the judges held, not ticking a checkbox cannot be qualified as specific consent, even if the form is signed or acceptance given by clicking a button.

As a consequence, companies will have to change their printed forms and web sites and move to an unqualified opt-in. Since the German Federal Court explicitly refers to the wording of a European Directive, courts in other EU Member States might simply adopt this approach, or refer the question to the European Court of Justice for a preliminary ruling under Article 234 of the EC Treaty. **H**



Stefan Hanloser is a senior associate in the Munich office of Howrey LLP. He can be contacted at HanloserS@howrey.com.