



Verband der deutschen Internetwirtschaft e. V.

# Email Marketing / Privacy Regulations What's legal in Germany?

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**European Email Marketing Conference (EEMC)  
11 – 13 November 2009  
Barcelona**

## About eco

- ◆ **eco is the German Association of the Internet Industry and represents with more than 440 members from 35 nations the interests of all companies dealing with the internet**
  - as a non-profit organisation eco enjoys high confidence
  - the association is successfully working for 15 years now to bring forward the internet as a communication and business medium
- ◆ **eco operates several services and initiatives**
  - for instance, eco runs the DE-CIX ([www.de-cix.net](http://www.de-cix.net)), as well as
  - voluntary self-control of the internet economy [www.eco.de/ictf](http://www.eco.de/ictf)
  - and also runs the industry Anti Spam Initiative
  - Centralised German Whitelist CSA
- ◆ **eco is member of**
  - EuroISPA [www.euroispa.org](http://www.euroispa.org)
  - Euro-IX [www.euro-ix.org](http://www.euro-ix.org) (DE-CIX membership)
  - MAAWG
  - INHOPE [www.inhope.org](http://www.inhope.org)

# Agenda

- ◆ **Applicable Law**
- ◆ **Legal Requirements for Email Marketing**
  - Collection of email addresses
  - Legal Design of the marketing emails
  - Behavior Email Marketing
- ◆ **Trans-border Data Flow**

# Which law is applicable?



## Country of Origin Principle

Exceptions:

- Email advertising
- Gambling
- Copyright etc.
- Industrial property rights (i.e. trademarks)
- **In these cases:**  
**Country of Reception Principle**

Third countries

## Market Place Principle

Indications for the market place:

- Language of the online shop
- Country level domain etc.

## Which law is applicable?



- ◆ Regarding commercial mailings there is an exception of the „principle of the country of origin“.
- ◆ This exception means that e.g. German law applies for mails sent to recipients based in Germany, even when the sender is situated abroad.

## Legal Foundations



**Directive 2002/58/EC  
on Privacy and  
electronic  
Communications**



**Act against  
unfair Competition  
Art. 7 and  
German Civil Code**

# Basic Principles



- ◆ **Opt-in requirement for direct e-mail marketing**
  - ◆ **The sender must not conceal his identity**
- and**
- ◆ **The sender has to provide a valid address for opt-out requests**

## Definition of Electronic Mail



- ◆ *“Any **text, voice, sound or image message** sent over a **public communications network** which can be stored in the network or in the recipient’s terminal equipment until it is collected by the recipient.” (Art 2 Direktive 2002/58/EC)*
- ◆ This means email **and** text/picture/video messages, WAP messages and ‘bluetooth’.

# Concept of Direct Marketing



- ◆ **Covers any form of sales promotion**
- ◆ **Includes also direct marketing by charities and political organisations**

# OPT-IN Regime



## ◆ **Opt-in** means:

Senders must not send such messages unless they have the **prior consent** of the recipient to do so.

# Validity of OPT-IN



OPT-IN required for any kind of email contact.

# The Consent of the Recipient



## ◆ The definition in Art. 2 (f) of the Directive on privacy and electronic communications 2002/58/EC:

*„The consent of the recipient means any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.“*

**In other words:** This is where the recipient actively signs up for something and where he knows what he is signing up to.

# The Consent of the Recipient



- ◆ There may be a number of ways to indicate consent, e.g.:
  - to tick a box on an online-form as a positive indication that you agree to receiving marketing,
  - to send a postcard, fax or a letter
  - to tell it on the phone etc.

**or in other words:** always when the recipient made it clear that providing his email address means he agrees to receiving marketing e-mail.

# The Consent of the Recipient

## Judgment of the German Federal Court of Justice (BGH)



- ◆ **The consent has to be given separately.**
- ◆ **The receiver must either click/mark a box or otherwise give a comparatively clear declaration of consent to receive advertisements via email.**
- ◆ **This declaration may not be part of other declarations (such as agreeing to terms and conditions.)**
- ◆ **The receivers must give their consent actively through a conscious act. Pre clicked/pre marked boxes may not be used.**

## The Consent of the Recipient



### Please note:

- ◆ Failing to opt-out during the registration process **is not** the same as giving consent („Subscribers of our service automatically get our newsletter. Please click here if you do not wish to receive it“)
- ◆ The publishing of email addresses in advertisements, on a website, on a letterhead or in a public catalog **does not** express a consent to receiving marketing emails
- ◆ The sender has to provide an objective evidence, that he has got the consent of the recipient.

Therefore my recommendation: **Double-Opt-In**

## Prohibition of coupling



In Germany is prohibited to couple the use of monopolistic telemedia services with the consent to use the personal data of the user for other issues, e.g. email marketing. Sec. 12 Para. 3 German Telemedia Act.

Example: it is prohibited to addictive the participation in an online movie platform, which has a monopoly (over 95 % market dominance) with the use of the email adress of the visitor for sending him commercial emails.

# Soft-OPT-IN – the Exemption



## ◆ 3 exemption criteria:

- email address of the receiver was collected **‘in the context of the sale of the product or a service’**; **and**
- the sender only sends promotional messages relating to their **‘own similar products and services’**; **and**
- when the address of the recipient was collected, he was given the **opportunity to opt out** (free of charge except for the cost of transmission) which he did not take. The opportunity to opt-out must be given with every subsequent message.

## Soft-OPT-IN –The Definitions

**1 ‘in the context of the sale of the product or a service’**



In Germany is necessary to have a completely conclusion of a contract.

## Soft-OPT-IN –The Definitions

### 2. ‘own similar products and services’



That means products from the same range of needs (e.g.: french wine = spanish wine, all-inclusive tour in Bulgaria = all-inclusive tour in Spain) or accessory (e.g. computer – cable set)

## Prohibition of concealment



The sender must not disguise or conceal their **identity**. The sender's identity should be traceable at a minimum, without opening the message

The sender must not disguise or conceal the **commercial character** of the message in the subject line of the message. (NEW 03/2007)

# Imprint



According to the German Telemedia Law the following information must be provided as text **\*or\*** via a direct link in the commercial email:

- ◆ The **name** of the sender; for legal entities also the **legal form** and the **name of the authorized representative**
- ◆ The **geographic address** at which the sender is established; **email address** and **telephone number**
- ◆ Where the sender is registered in a trade or similar public register, the **name of the register** and the **registration number**
- ◆ The **VAT identification number**

## Sanctions



### **By civil law:**

- action for injunction
- damages

### **Administrative offence:**

Up to 50,000 EUR fine for

- disguising or concealing the commercial character or the identity of the sender (NEW 03/2007)
- sending a commercial email without an imprint

### **By criminal law:**

The intentional unwarranted collection and use of personal data in order to gain money is punished by two years' imprisonment or a penalty.  
(German Federal Data Protection Act, section 44 para. 1)

# Behavior Email Marketing

- ◆ **The sender has to create the utilization profile under a pseudonym.**
- ◆ **The pseudonymous profile should be stored and used separately from the personal data of the user.**
- ◆ **The behavior figures should be used only for the purpose of advertising, marketing analysis and improvement of the service quality.**
- ◆ **The sender has to inform the user about the nature, extent and purpose of use of the profiles.**
- ◆ **The user should be able to object this collection of data.**

# Trans-border Data Flow

## Basic Requirements

Permission for data handling according to the national law

equivalent data protection legal framework in the recipient state

## Equivalent data protection level ?

**Yes**  
**Where?**

- Within the EU.  
- Argentina,  
Switzerland (Decision  
of the EU-Commission)

**No (third-country)**  
**However allowed?**

USA Companies  
participating in the  
„Safe-Harbor-  
Arrangement“

*Permission of the Data  
Protection Authority  
because of  
conclusion or  
performance of a  
contract in the interest  
of the data subject  
between the controller  
and a third party*



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**Thank you !**

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