

The Legal Declaration of Consent in Promotional E-mails

There are still uncertainties in the formulation of the declaration of consent for promotional e-mails. Under CSA complaints procedure this leads to more and more pronounced reprimands against CSA senders because of quite ineffective formulations of the declaration of consent.

When is a consent in the use of promotional e-mail address effective, in particular from the perspective of case law?

The so-called Payback judgment¹ of the BGH is widely known in the meantime: According to this, consent in e-mail advertising must be submitted separately from other declarations of consent. This means in particular that agreement to the general terms and conditions, the confirmation of age, participation in a competition or lottery etc. must be consented to separately. It was questionable whether declaration of consent forms are allowed to include the consent to advertising by telephone, email, fax and mail at the same time. The court did not comment expressly on whether several advertising channels require different declarations. The judgments concerned cases in which other declarations were combined with consent to advertising.

In these cases the courts have limited themselves to declaring the clauses used as invalid, due to the combination of advertising declaration with the acceptance of terms and conditions or equivalent. As a result, it could be concluded that advertising consent is one single declaration of consent, no matter how many channels it concerns. In 2011, however, there was a decision of the BGH² which specifically mentioned the separate declaration of intent for telephone advertising. The BGH invoked the afore-mentioned Payback judgment and continues by saying: „[...] Such a consent [for advertising via phone call] also assumes a separate declaration of consent - referring only to the consent to advertisement via phone - - from the affected person. [...]“ In this case it was about the coupling of consent for the telephone lottery with the general phone advertisement, nevertheless, in practice the judgment was also understood from the point of view that there must, as a consequence, be a separate approval per advertising channel. This is

1 BGH verdict from 16.07.2008, Akt.VIII ZR 348/06.

2 BGH decision from 14.04.2011, Akt. I ZR 38/10.

also the conclusion of the Landgericht Berlin, that referred to the BGH decision in the year 2011, stating „[...] For e-mail advertising, telephone advertising, postal advertising, etc., a separate declaration of consent form, each related to the type of advertising, must be obtained from the respective recipients. Standardized declaration of consent forms for multiple forms of advertising are therefore invalid[...]“.³ The requirement for individual declarations of consent for advertising via telephone, email, post, etc., is supported by the fact that the advertisement reaches users in different life situations, and that every user will be disturbed to a different extent by the advertising. Some users are more disturbed, for example, by phone calls, others would like to receive only the actually requested or expected e-mails. The declarations therefore have a different reach. In consequence, this means that the declaration of consent form must be provided separately for each advertising channel, each with the reference to the possibility of revocation at any time.⁴

Authors: Legal Team of the Certified Senders Alliance

³ LG Berlin verdict from 09.12.2011, Akt. 15 O 343/11 Rn. 42f.

⁴ Also Klinger in the judgment jurisPR-ITR 17/2011 Anm. 2.