

G-Regs™Centre for Protection against Unfair Competition
(Wettbewerbszentrale) – Direct Marketing Review

Full title: Direct marketing

Overview

- Direct marketing: what is direct marketing?
 - What forms of direct marketing are there?
 - What is meant by spamming?
 - Are there special legal provisions for direct marketing?
 - What do I have to bear in mind with direct marketing measures as a businessman?
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What is direct marketing?

Direct marketing groups together those forms of advertising characterised by the fact that they directly address targeted, potential customers. The target of the advertising is the individual person with whom the advertiser establishes direct contact (Federal Supreme Court, judgement of 15.12.2015, ref. VI ZR 134/15, cited in: BeckRS 2016, 02711). The promotional measures of direct marketing therefore differ from mass advertising, which is aimed at the general public, e.g. radio and television advertising, display advertising, shop window advertising or advertising on billboards.

WHAT FORMS OF DIRECT MARKETING ARE THERE?

Direct marketing measures manifest themselves in many varied ways. They can be subsumed under different groups according to their respective nature, though they can also overlap.

Direct marketing with voice contact

Voice contact between the advertiser and the targeted, potential customer occurs in telephone advertising, when being spoken to in public and in door-to-door advertising.

Direct marketing via telemedia

In telephone advertising (telemarketing), fax advertising, email advertising and SMS advertising, the advertising message is sent to the individual recipient via a telemedium.

Addressed Direct Mail Marketing (*lit.* Direct marketing through being personally addressed)

The targeted, potential customer can be addressed personally in an individual manner in direct advertising. This is done in personally addressed advertising letters delivered to the addressee's letterbox. The personally addressed advertising letter can also be sent by fax or email. People are also addressed individually through being sent unsolicited/unordered goods. Speaking to somebody in public and door-to-door advertising are inevitably related to the person targeted. Telephone advertising can also be individually tailored to the person being called.

Unaddressed Direct Mail Marketing (lit. Direct Marketing without being personally addressed)

In this form of direct marketing, the advertising message is delivered to the recipient irrespective of his/her identity (as a person). A classic example of this is the delivery of advertising material in people's letterboxes at home. The mass sending of advertising material to fax numbers and email or SMS addresses is also often done without any regard to the identity of the terminal subscriber. This is also true for telephone advertising where the caller is only aware of the telephone number of the person being targeted by the advertising but does not know the actual subscriber.

WHAT IS MEANT BY SPAMMING?

The term "spamming" describes the mass sending of advertising material by fax or email. As a rule, this is done by the computer-controlled dialling of a fax number or entering an email address. From the legal standpoint, spamming does not represent a particular category.

ARE THERE SPECIAL LEGAL PROVISIONS FOR DIRECT MARKETING?

The law against unfair competition (UWG) also applies to direct marketing measures. However, the statute does not use the term "direct marketing" (G-Regs note: see Section 7 UWG¹ – entitled "Unconscionable pestering/ Unreasonable Harassment" - *Unzumutbare Belästigungen*). The forms of advertising subsumed under this keyword do, nonetheless, address the targeted, potential customers individually and touches on their privacy. From the perspective of those to whom the advertising is addressed, such advertising measures are often unwanted (unsolicited) and perceived as bothersome. Direct marketing measures therefore have to be measured against the elements of unreasonable harassment under Section 7 of the Act against Unfair Competition.

WHAT DO I HAVE TO BEAR IN MIND WITH DIRECT MARKETING MEASURES AS A BUSINESSMAN?

The legal requirements for direct marketing from the perspective of harassment under Section 7 of the Act against Competition are essentially determined according to the form of communication used to carry out direct marketing. A distinction has to be made between the following areas in this regard:

Telephone advertising

In the case of telephone marketing, it depends on whether it is directed at a consumer or another market player (trader, freelancer, etc.).

- Telephone advertising is deemed to exist towards consumers if the target person is addressed in his/her private sphere. This is also the case if the person is called in his/her capacity as a trader/ businessman, employed person (employee) or association official using their private telephone number (Higher Regional Court of Halle, judgement of 23.04.2015, ref. 8 O 94/14, cited in: WRP 2015, 1029). Telephone advertising to consumers (B2C) is only permissible if the person being called has previously given his/her consent to be contacted for advertising purposes by telephone (Section 7, Paragraph 2, Clause 2 of the Act against Unfair Competition [UWG]). It is not sufficient for the person being called to give his/her consent to the purpose of advertising during the telephone call (Federal Supreme Court judgement of 20.12.2001², ref. I ZR 227/99, cited in: WRP 2002, 676; Higher

¹ https://www.gesetze-im-internet.de/englisch_uwg/index.html

² <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=I%20ZR%20227/99>

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Regional Court of Traunstein, judgement of 20.05.2008, ref. 7 O 318/08, cited in: MMR 2008, 858). Ticking a declaration pre-formulated by the businessman/trader, e.g. when entering a competition, represents effective consent if the pre-formulated wording clearly shows what goods or services the consent is to be valid for and for the benefit of which companies it is given. In addition, the declaration must be contained in separate wording or a separate text section that does not include any content other than the declaration of consent (Federal Supreme Court, judgement of 25.10.2012, ref. I ZR 169/10, cited in: WRP 2013, 767). Under these conditions, the granting of consent is also possible in the context of general terms & conditions of business (Federal Supreme Court, judgement of 18.07.2012, ref. VIII ZR 337/11, cited in: WRP 2012, 1545). These principles also apply to the declaration of consent in the context of a competition on the Internet. The field in which a cross or tick is to be put may not be preconfigured (pre-ticked) with these symbols. For effective consent, the person entering the competition must, rather, him/herself be active in entering the symbol (tick/ cross). The boundaries are exceeded, however, if the consent is to be valid for 59 companies entered in a list and the participant has to unsubscribe from the companies by removing the pre-set tick if he/she does not wish to receive advertising material from them (Higher Regional Court of Frankfurt, judgement of 17.12.2015, ref. 6 U 30/15, cited in: WRP 2016, 364). Whether making contact by telephone to ask about the customer's satisfaction with the company's services represents telephone advertising is currently the subject of proceedings before the Federal Supreme Court.

- Telephone advertising towards other market players/ participants also requires prior consent. However, so-called implied consent is sufficient for this (See Art. 7(2.2) UWG). This is deemed to exist if relevant interest in the telephone advertising on the part of the person being called can be assumed on the basis of specific factual circumstances. From the perspective of the advertiser, it is decisive whether it could be assumed on the basis of the specific circumstances that the person being called was expecting such an advertising call or would in any case react positively to it (Federal Supreme Court, judgement of 11.03.2010, ref. I ZR 27/08, cited in: WRP 2010, 1249). In the event of an existing business relationship with the person being called, the caller may assume that there is presumed consent to the advertising call (Federal Supreme Court, judgement of 11.03.2010, ref. I ZR 27/08, cited in: WRP 2010, 1249). A mere general reference to the business operation of the person being called (Federal Supreme Court, judgement of 24.01.1991, ref. I ZR 133/89, cited in: WRP 1991, 470) or the fact that the person being called states his/her telephone number in The Yellow Pages, for example, is not sufficient (Higher Regional Court of Frankfurt, judgement of 24.07.2003, ref. 6 U 36/03, cited in: WRP 2003, 1361).
- In the case of dispute, the advertiser bears the burden of proof that the person being called has given his/her effective consent to be contacted for the purpose of advertising via the telephone (Federal Supreme Court, judgement of 10.02.2011, ref. I ZR 164/09, cited in: WRP 2011, 1153).

Fax advertising, email advertising, SMS advertising

Fax advertising, email advertising and SMS advertising to consumers as well as other market players/ participants are only permissible with the prior express consent of the recipient (Section 7(2.3) UWG). According to the previous legal position, under which implied consent was sufficient, the Federal Supreme Court ruled that consent to receiving advertising was deemed to exist if the party receiving fax advertising stated his/her fax number in his/her own advertising material (Federal Supreme Court, judgement of 17.07.2008, ref. I ZR 75/06, cited in: WRP 2008, 1328). Whether this precedent still applies as the law stands now, according to which express consent to receive advertising is

required, is questionable. The Federal Supreme Court also ruled under the previous law that the setting-up of an email address did not signify consent to receiving advertising material via that address (Federal Supreme Court, judgement of 17.07.2008, ref. I ZR 197/05, cited in: WRP 2008, 1330). This should now apply *a fortiori* (all the more certainly/ with even stronger reason) since, under the new legal framework, express consent to receiving advertising material is required. A case of email advertising is also deemed to exist when the company combines an automatically generated confirmation email with advertising for goods or services (Federal Supreme Court, judgement of 15.12.2015, ref. VI ZR 134/15, cited in: BeckRS 2016, 02711). Consent is also required in the case of a so-called refer a friend e-mail that the company sends to an email address "referred" to it by a third party for this purpose (Federal Supreme Court, judgement of 12.09.2013, ref. I ZR 208/12, cited in: WRP 2013, 1579). Providing a recommendation/ referral function alone is anti-competitive on account of it establishing a seriously imminent and immediate risk of sending referral emails even without the consent of the addressees (Higher Regional Court of Hamm, judgement of 09.07.2015, ref. 4 U 59/15, cited in: BeckRS 2015, 20832). Consent to email advertising, proof of which has to be provided by the company advertising, can be effectively given by way of the so-called double opt-in method³ (Federal Supreme Court, judgement of 10.02.2011, ref. I ZR 164/09, cited in: WRP 2011, 1153).

Email advertising and SMS advertising are anti-competitive despite the existence of consent if the sender does not clearly disclose his/her identity or give a valid address to which the recipient of the advertising can send a request for cessation without any costs being incurred for this other than according to the basic rate (Section 7(2.4) UWG – *G-Regs note*: please note that this clause – 2.4 has been amended (see translation below) to incorporate s. 6(1) Telemedia Act).

Section 7(3) of the Act against Unfair Competition (UWG) contains an exemption provision under which advertising is permitted by means of electronic mail (email, SMS) without consent under certain conditions (G-Regs: known as Soft opt-in). This is of significance for online traders in particular. If the four requirements set out below are met, email advertising in particular does not require any prior express consent of those to whom the advertising material is sent.

- The company has obtained the customer's email address from the customer in connection with the sale of goods or a service.
- The company uses this email address for the direct advertising of its own goods or services similar to those that were the subject of the sale from which the company obtained the customer's email address.
- The customer has not objected to use of his/her email address.
- The company has clearly pointed out to the customer when collecting the email address that the customer can object to its use at any time without any transmission costs being incurred for this other than according to the basic rates.

All four requirements must be met for the email advertising to be justified without any previous express consent. If even one of these conditions has not been met, the email advertising is deemed to be anti-competitive. The question of whether the company / businessman can also invoke this exemption provision if the customer has cancelled a distance contract has not yet been clarified. However, if the customer has objected to use

³ Higher Regional Court argued that a "double opt-in" is required (that is, an opt-in button must be clicked, followed by a link to be activated via a confirmation e-mail; the confirmation details should then be saved and recorded). Because of the uncertainties concerning the legal requirements and the lack of a clarifying decision by the Federal Supreme Court, many online services implement the "double opt-in" procedure as their best practice. The Dusseldorf District – a body monitoring data compliance in private sector – has produced [application guidelines](#) on collection, processing, and use of personal data for advertising purposes. It clarifies the requirement that marketers must secure confirmed opt-in (aka double opt-in).

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of its email address for advertising purposes, the company/ businessman cannot invoke the provision of Section 7(3) of the Act against Unfair Competition for e-mail advertising.

Letterbox / mailbox advertising

Putting advertising material in letterboxes is permissible in principle. It is prohibited if the letterbox/ mailbox owner is addressed in a persistent manner (at least twice), even though he/she has made it understood that he/she does not want any advertising material, e.g. through a sign saying "No advertising please" ("*Bitte keine Werbung*") (Section 7 (2.1) of the Act against Unfair Competition) (Federal Supreme Court, judgement of 20.12.1988, ref. VI ZR 182/88, cited in: WRP 1989, 308 and Federal Supreme Court of 30.04.1992, ref. I ZR 287/90, cited in: WRP 1992, 638).

Advertising by letter (Direct mail advertising)

Advertising in personally addressed mail promotions is permissible in principle. It is prohibited, however, if the recipient has expressed an opposing view (Section 7(1.2) UWG). The person to whom the advertising is addressed must have made it understood to the sender that he/she does not wish to receive any such advertising, e.g. through written or telephone communication (Federal Supreme Court, judgement of 16.02.1973, ref. I ZR 160/71, cited in: WRP 1973, 329). Besides, there is no additional obligation to affix a sticker to the letterbox saying "Advertising – no thank you" (Higher Regional Court of Nuremberg, judgement of 04.11.2011, ref. 4 S 44/11, cited in: WRP 2012, 365). If the recipient of a personally addressed advertising letter informs the company that he/she does not wish to receive any more advertising from it, the sending of so-called "partially addressed" advertising mail (to the residents of the house in Xyz Street 1, 00000 Anytown) is also anti-competitive (Higher Regional Court of Munich, judgement of 05.12.2013, ref. 29 U 2881/13, cited in: WRP 2014, 233). If the recipient has not expressed a contrary view/ intention (i.e. has not objected), advertising by letter is still anti-competitive on the grounds of harassment if it is forced on him/her and it is perceived as bothersome because of its nature alone, irrespective of the content. The interest of the addressee to be spared from advertising has to be weighed up against the interest of the advertising company in promoting its products through advertising. Unreasonable harassment / unconscionable pestering cannot be assumed if, although the envelope is not identified as advertising, the advertising nature is immediately and unmistakably evident after opening the letter (Federal Supreme Court, judgement of 03.03.2011, ref. I ZR 167/09, cited: WRP 2011, 1054). Unreasonable harassment / unconscionable pestering is deemed to exist, on the other hand, if inappropriate instructions or references such as "Delivery notice ... Confidential information", "To be opened personally by the recipient only!" or "Urgent matter!" are printed on the envelope of a personally addressed advertising letter (Berlin Court of Appeal, judgement of 19.06.2015, ref. 5 U 7/14, cited in: WRP 2015, 1534). Mail advertising for tombstones sent to relatives of deceased persons is not to be judged as constituting unreasonable harassment / unconscionable pestering if two weeks have elapsed since the death in question (Federal Supreme Court, judgement of 22.04.2010, ref. I ZR 29/09, cited in: WRP 2010, 1502).

Sending unsolicited merchandise

Delivering unsolicited merchandise to a consumer does not establish any entitlement against the latter (Article 241a, Paragraph 1 of the German Civil Code). However, the recipient may be of the view that he/she could be faced with payment, storage or return obligations. Sending unsolicited merchandise therefore represents harassment if it is not pointed out to the recipient that he/she will not incur any payment, storage or return obligations (Federal Supreme Court, judgement of 11.11.1958, ref. I ZR 179/57, cited in: GRUR 1959, 277) and is prohibited in principle unless express or implied consent exists. If the company combines the sending of unsolicited merchandise with a request for payment, return or safekeeping of the product, this is in any case prohibited (No. 29 Annex 1 to the Directive on unfair business practices). The sending of a letter described as an

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“order confirmation” that dupes the consumer into thinking he/she has ordered goods represents unreasonable harassment / unconscionable pestering (Section 7(1.1) UWG) (Federal Supreme Court, judgement of 17.08.2011, ref. I ZR 134/10, cited in: WRP 2012, 198).

Door-to-door advertising

Visiting potential customers in their homes for advertising purposes is permissible in principle. Any contrary wish on the part of the house or apartment owner must be respected, however. Door-to-door advertising is otherwise deemed anti-competitive (Article, 7 Paragraph 1 of the Unfair Competition Law; no. 26, Annex to Article 3, Paragraph 3 of the Unfair Competition Law) (Federal Supreme Court, judgement of 16.12.1993, ref. I ZR 285/91, cited in: WRP 1994, 262 and Federal Supreme Court, judgement of 05.05.1994, ref. I ZR 168/92, cited in: WRP 1994, 597). Visits by representatives are also anti-competitive without any objection (contrary wish) being expressed by the addressee if advertising behaviour lacks deference / respect for the feelings of people in mourning e.g. in door-to-door advertising for tombstones aimed at the relatives of a deceased person (Federal Supreme Court, judgement of 12.03.1971, ref. I ZR 119/69, cited in: WRP 1971, 226).

Being spoken to in public

The assessment of people being spoken to in a public place for advertising purposes under competition law depends on whether the advertiser can be recognised as such. Advertising in public is prohibited if the person addressed cannot recognise the person speaking to him/her as an advertiser (Federal Supreme Court, judgement of 01.04.2004, ref. I ZR 227/01, cited in: WRP 2004, 1160 and Federal Supreme Court, judgement of 09.09.2004, ref. I ZR 93/02, cited in: WRP 2005, 485). If the advertiser is recognisable, talking to passers-by for advertising purposes is only anti-competitive if their opposition is not respected or passers-by are prevented from going their way or are followed. It is also anti-competitive if the passer-by cannot avoid being spoken to because of lack of space, e.g. in narrow shopping arcades or on public transport (Federal Supreme Court, judgement of 09.09.2004, ref. I ZR 93/02, cited in: WRP 2005, 485). Speaking to people involved in an accident at the scene of the accident for the purpose of acquiring towing or repair jobs or concluding a car rental agreement is prohibited (Federal Supreme Court, judgement of 08.07.1999, ref. I ZR 118/97, cited in: WRP 2000, 168).

UWG

Relevant sections from Act against unfair Competition (Gesetz gegen den unlauteren Wettbewerb – UWG)

Section 2: Definitions

(1) Within the meaning of this Act the following definitions shall apply:

1. *“Geschäftliche Handlung”* (“Commercial practice”) shall mean any conduct by a person for the benefit of that person’s or a third party’s business before, during, or after, the conclusion of a business transaction, which conduct is objectively connected with promoting the sale or the procurement of goods or services, or with the conclusion or the performance of a contract concerning goods or services; “goods” shall be deemed to include immovable property as well, and “services” also rights and obligations;
2. *“Marktteilnehmer”* (“Market participant”) shall mean, in addition to competitors and consumers, any person who supplies or demands goods or services;
3. *“Mitbewerber”* (“Competitor”) shall mean any person who has a concrete competitive relationship with one or more entrepreneurs supplying or demanding goods or services;
4. *“Nachricht”* (“Communication”) shall mean any information that is exchanged or passed on among a finite number of participants via a publicly accessible electronic communications service; this shall not include information that is passed on to the public

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as part of a broadcasting service via an electronic communications network, so far as such information cannot be linked with an identifiable participant or user receiving it;

5. "*Verhaltenskodex*" ("Code of conduct") shall mean an agreement or set of rules which defines the conduct of entrepreneurs who have undertaken to be bound by the code in relation to business sectors or individual commercial practices, without such obligations having been imposed by statutory or administrative provisions;

6. "*Unternehmer*" ("Entrepreneur/ Trader/ Businessman") shall mean any natural or legal person engaging in commercial practices within the framework of his or its trade, business, craft or profession and anyone acting in the name of, or on behalf of, such person;

7. "*Unternehmerische Sorgfalt*" ("professional diligence") shall mean the standard of special skill and care towards consumers, to which an entrepreneur can reasonably be expected to conform, commensurate with good faith and having regard to market practices, in the entrepreneur's field of activity.

8. "*wesentliche Beeinflussung des wirtschaftlichen Verhaltens des Verbrauchers*" ("To materially distort the economic behaviour of consumers") using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise;

9. "*Geschäftliche Entscheidung*" ("transactional decision") means any decision taken by a consumer or other market participant concerning whether, how and on what terms to make a deal, purchase, make payment, retain or dispose of a product or service or to exercise a contractual right in relation to the product or service, regardless of whether the consumers or other market participants decides to take action.

Section 7 - Unconscionable pestering / Unreasonable Harrassment

1) A commercial practice by which a market participant is being unreasonably harassed / unconscionably pestered shall be illegal. This shall apply to advertising particularly in cases where it is apparent that the solicited market participant does not want this advertising.

(2) Unconscionable pestering / unreasonable harassment shall always be assumed in the case of:

1. advertising using a medium of commercial communication not listed under numbers 2 and 3 which is suited to distance marketing and through which a consumer is persistently solicited although it appears that he does not want this;

2. advertising by means of a telephone call, made to a consumer without his prior express consent, or made to another market participant without at least the latter's presumed consent;

3. advertising using an automated calling machine, a fax machine or electronic mail without the addressee's prior express consent; or

4. advertising using a communication where:

a) identity of the sender on whose behalf the communication is made, is disguised or concealed

b) § 6 paragraph 1 of the Telemedia Act (see translation below) is violated or where the recipient is prompted to visit a site that violates this provision, or

c) no valid address is available to which the recipient can send a request to stop such messages, without costs arising by virtue thereof, other than transmission costs pursuant to the basic rates

(3) Notwithstanding subsection (2), number 3, unconscionable pestering / unreasonable harassment shall not be assumed to exist in the case of advertising using electronic mail if:

1. the entrepreneur has obtained from the customer the latter's electronic mail address in connection with the sale of goods or services;
2. the entrepreneur uses the address for direct advertising of his own similar goods or services;
3. the customer has not objected to this use; and
4. the customer has been clearly and unequivocally advised, when the address is recorded and each time it is used, that he can object to such use at any time, without costs arising by virtue thereof, other than transmission costs pursuant to the basic rates.

Section 6(1) Telemedia Act: Special information to be provided in the case of commercial communications

(1) In the case of commercial communications which are telemedia or parts of telemedia, service providers must observe at least the following preconditions:

1. Commercial communications must be clearly identifiable as such.
 2. The natural or legal person in whose name the commercial communications are made must be clearly identifiable.
 3. Promotional offers, such as discounts, premiums and gifts, must be clearly identifiable as such, and the conditions which are to be met to qualify for them must be easily accessible and presented clearly and unambiguously.
 4. Prizes and games of an advertising nature must be clearly identifiable as such and the conditions of participation must be easily accessible and presented clearly and unambiguously.
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