



Unauthorized Transfer of Customer Data During an Asset Deal – Substantial Fines for Both Company Sellers and Buyers!

The series of substantial fines imposed by German data protection supervisory authorities has been continued by the Bavarian State Data Protection Supervisory Authority, which ordered payment of a five-figure penalty fine:

During a company acquisition in the form of an asset deal, customer data – including email addresses – was transferred to the buyer without having obtained the relevant consent from customers. The data protection supervisory authority considers this unlawful and asserts that – depending on the case at hand – a transfer of data is valid only if customer consent has been obtained or if a corresponding opt-out option has been provided.

Objections in this case were, in fact, not related to the transfer of customers' names and postal addresses, which fall under the so-called „list privilege“ pursuant to Sec. 28 (3) Sentence 2 No. 1 and Sec. 29 (2) Sentence 2 of the German Federal Data Protection Act (“BDSG”). According to these provisions, it is permissible to use and transfer to third parties personal data for advertising and marketing purposes as well as public opinion polling subject to specific conditions.

The data protection supervisory authority does, however, consider the transfer of other forms of customer data, such as telephone numbers, email addresses, account and/or credit card information as well as „purchase history“, to be illegal.

According to the data protection supervisory authority, the transfer of data during an asset deal without customer consent cannot be justified on grounds of prevailing company interests pursuant to Sec. 28 (1) No. 2 BDSG.



The imposition of unpleasant fines on the buyer as well as on the seller (!) of the company will not likely remain an isolated incident. In our last newsletter, we referred to the press statement issued by the Bavarian State Data Protection Supervisory Authority, in which it expressly outlined its intentions for the near future to enhance examinations of the legal use of customer data, particularly for contacting customers via email.

In addition to the threat of fines, the buyer is also at risk of not being permitted to use the illegally transferred customer data.

Important tips

Based on the above, we recommend examining the legality of the acquisition and sale of customer data according to the following points, among others:

- As an exception to the rule, would the customer data in question fall under the so-called „list privilege“?
- Have the customers issued consent with regard to the transfer of the data? If not: Is it possible to subsequently obtain this consent during the purchase process?
- With regard to collecting customer data, did the seller make an informed decision to use the opt-out process or the opt-in process for advertising emails (only possible with the existing customer base)? Were the applicable process requirements complied with?
- Was the origin of the authorization to use the data documented in the CRM databases?



Significant issues of concern for company buyers

- Has sufficient security been provided for in a contractual agreement with the seller to cover the threat of damages arising from an unforeseeable lack of authorization to sell the data?
- Were the requirements for the opt-out process complied with at all times (including a reference to the opt-out option, use for similar goods and services only)?
- Were the requirements of the German Tele Media Act adhered to during the opt-in process and the double-opt-in process?

The penalty fine proceedings show that customer data is only of value if it can be used in a way permitted under German data protection law. As a result, companies should ensure from the start that consent has been obtained, also for any data transfers, as obtaining subsequent consent is usually only possible with a small percentage of customers.

When customer data is a significant economic factor for acquiring a company, the buyer should also consider pursuing a share deal instead of an asset deal in order to avoid the data protection problems related to the transfer of customer data.

Further questions? Please contact us anytime.



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