



## Follow-up: Substantial Fines for Unauthorized Transfer of Customer Data During an Asset Deal - The Wording of the Penalty Order Is Now Available!

The wording of the German Data Protection Supervisory Authority's decision is now available on the case involving the penalty fine imposed based on the unauthorized transfer of customer data during an asset deal.

According to this, the two possible justifications for the transfer of data that were taken into consideration failed to convince in the end for the following reasons:

### The list privilege does not apply to email addresses

The so-called „list privilege“ as justification for advertising purposes was excluded based on the fact that the list privilege cannot be applied to email addresses. The reasons provided in the order are as follows:

*“Provided that the purpose of transfer in this case is considered to be the use of the email addresses for advertising purposes by (the buyer) as the recipient of data, the transfer of data would be subject to Sec. 28 (3) of the German Federal Data Protection Act (BDSG), which is a special provision governing the transfer of personal data for advertising purposes. As the email addresses are not included in the exhaustive list of data categories specified in Sec. 28 (3) Sentence 2 BDSG (i.e. data that can be processed for advertising purposes – meaning the data can be transferred – without having received consent from the affected parties in accordance with the conditions detailed in Sec. 28 (3) Sentences 2 et seq. BDSG), emails addresses may only be processed for advertising purposes (e.g. transferred) according to Sec. 28 (3) Sentence 1 BDSG with the consent of the affected party. As it is not evident that [...] the customers (the seller) issued consent regarding the transfer of their email addresses to (the buyer), Sec. 28 (3) BDSG cannot be used to justify the transfer.”*



**The balance of interests pursuant to Sec. 28 (2) No. 1 in connection with (1) Sentence 1 No. 2 of the German Federal Data Protection Act (BDSG)**

Another justification within the scope of balancing interests was also rejected because the initial consent issued by customers was only valid for the seller of the company and not for the buyer. The reasons provided in the order were as follows:

*“With regard to considering the balance of interests between the economic interests of the (buyer and seller) in transferring the email addresses on the one side and the legitimate interests of the affected customers on the other side, the legitimate interests of the customers to stop this type of transfer clearly outweigh those of the buyer and seller. This is based on the fact that the (buyer) itself would not legally be authorized to use these email addresses for its own advertising purposes because advertising involving the use of electronic mail (including email advertising) is generally not permitted without the prior express consent of the addressees in accordance with Sec. 7 (2) No. 3 of the German Act on Unfair Competition (UWG). Pursuant to Sec. 7 (3) No. 1 UWG, an exception to this requirement exists only in the event that a company received the customer’s email address from the customer in connection with the sale of goods or services. According to its specific wording, this exception permits email advertising without consent from the addressees to be performed only by those companies that received customers’ email addresses from the customers themselves in accordance with the specified requirements, i.e. particularly in connection with the sale of own goods or services. Sec. 7 (3) No. 1 UWG also only permits a company to conduct email advertising vis-à-vis its own customers.*

*Which means, that in this case, you (seller) as the legal entity were permitted up to now under Sec. 7 (3) No. 1 UWG to conduct email advertising vis-à-vis your customers under the conditions stipulated in this provision (also without prior express consent); however, this legal permission does not extend to email advertising to these customers by another company, for example by (the buyer). This legal finding must also apply to so-called asset deals, i.e. also in cases in which – as is the case here – a company owner sells individual assets of its company to another company in the context of the purchase of specific objects or rights. [...] this [applies] in any case where – for which there is, however, no indication of such in this case –*



*the affected parties have not also expressly issued consent to the (seller) for the transfer of their email addresses to a sufficiently and specifically designated other company."*

According to this, the customer's consent to the transfer of their email addresses must refer to a „sufficiently and specifically designated other company."

The Data Protection Supervisory Authority noted in their statement of further grounds that another conclusion regarding this balance of interests would only have been possible if the affected customers had been expressly informed about the planned transfer before the transfer of their addresses and provided with a right to object to the transfer. Following expiry of a reasonable objection period, the data of customers who do not object to the transfer may then be transferred.

### Important tips:

On this basis, we recommend checking the legality of the sale and purchase of customer data. Based on the information provided by the Data Protection Supervisory Authority, any initial consent for a data transfer provided by the customer must already refer to a „sufficiently and specifically designated other company." In practice, this is generally not possible.

As a result, it is particularly important in asset deals to examine the following:

- Is it possible to subsequently obtain missing declarations of consent regarding customer data, if necessary in the context of a company sale?
- Will the customer at least be provided with the opportunity to object to a data transfer before the data is transferred to the buyer?

We recommend considering these questions and, in particular, the consequences of a lack of consent as well as possible customer objections when drafting an asset deal agreement.

Please feel free to contact us with any questions.



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