

# Online advertising in Germany: what is permitted?

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**O**nline advertising – regardless of whether on a web page or in emails – is a growing market. This medium is attractive especially due to the fact that the costs for such advertisements are minimal.

However, there is a certain risk that email advertising will be considered as spam by the recipient with the result that the commercial impact of such advertisements is impaired and the image of the advertising company may be damaged. Actions taken by German legislators create the impression that advertising by email in Germany is to be rolled back. Nevertheless, companies should not be deterred from using new kinds of advertising mediums in Germany. However, there are certain rules and limitations that one needs to be aware of:

In part, the German Unfair Trade Practices Act (*Gesetz gegen den unlauteren Wettbewerb, 'UWG'*) which applies to both B2B and B2C advertising, deals expressly with some kinds of online advertisements. Thus, anyone who unreasonably disturbs another market participant acts contrary to fair competition. This is the case in particular where the email advertisement was sent without the prior consent of the recipient. An exception to this rule applies only if there is an ongoing business relationship between the sender and the recipient. In this case, the company is generally permitted to use the email address for advertisement purposes if the following conditions are fulfilled: the sender has obtained the email address

from the customer in connection with a previous sale of goods or services; the address is used for direct advertising for identical or similar products or services of the sender; the customer did not object to the use of its email address; and the sender clearly informs the (potential) customer – when the email address is first acquired and in every case when the email address is used – that the customer has the right to object to use of the email address and that there are no costs (except for transmission according to the basic rates) for the forwarding of such objection.

In addition, the German courts have also created certain limits for online advertisements:

For instance, the unauthorised use of registered trademarks as Ad-Words or the use of trademarks in an invisible form on a webpage (eg, by displaying white type-face on a white background) in order to improve the ranking of the homepage on internet search engines infringes German trademark law. This also applies to the unauthorised use of trademarks in META tags and to the implementation of contents of third parties that are not visible to the web page visitor. Advertisements using framing technology also constitute legally shallow waters.

Yet, despite the fact there are certain important restrictions, most of these are manageable and sufficiently clear-cut so that there is a broad spectrum of advertising forms available which may be used for online advertising in Germany. In particular with

regard to email advertisements there are numerous strategies which are commercially promising despite the fact that there are some legal restrictions.

The key issue in this regard is how to acquire addresses which can be used for email advertising. A company should use any contact with a potential customer to get possession of the customer's email address. It will then have to obtain the customer's consent as outlined above. To ensure that the email address owner is aware of the consequences of his consent, these must be explained to him. General clarifications are not deemed sufficient. Instead, information must be provided on which data is used for what purpose. If the email address will be forwarded to third parties, the address owner must be informed about the recipient of the address.

There are also certain restrictions and regulations under German law with regard to raffles: linking an advertisement campaign with participation in a raffle is generally permitted, but certain circumstances may lead to an infringement of German competition law, eg if the conditions for participation are ambiguous or if there is a condition to acquire certain goods in order to participate in the raffle. However, raffles provide a good opportunity to not only acquire email addresses of participants but may also provide an easy way of obtaining permission to use the email addresses for advertisement purposes.

In any case, it is advisable

to document the acquisition of the email address and also the owner's permission to use it for advertisement purposes as only then is it possible to prove the owner's permission in case of a dispute. This is important since the user of the email address bears the burden of proving he was permitted to use it.

The consequences for companies infringing German competition law are serious and far-reaching and should be kept in mind in particular in case of 'aggressive' and innovative advertisement strategies. An eye should always be kept on the legal requirements and conditions under German law in this regard. Otherwise, there is a risk of costly warning notices (*Abmahnung*), legal proceedings and claims for damages. Furthermore, an infringement may severely damage the advertising company's reputation. A reputation for being an aggressive or unsound competitor is always a 'double edged sword'.

Irrespective of the legal aspects outlined above, it is always bothersome for the recipient to receive an unwanted email and thus rather unlikely to attract new customers. On the contrary, a company may even generate 'bad will' by using the wrong email advertising strategy. The easiest way to avoid such results is to obtain competent advice prior to implementing any advertising campaigns via email or the internet. ■

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