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Email marketing ruling: scope of liability extended

A recent ruling of the Higher Court of Düsseldorf extended the scope of liability in cases where there is a failure to verify whether customers' consent has been obtained before sending out email communications. Joachim Dorschel, Attorney-at-Law with Bartsch und Partner, examines the ruling under competition and data protection law, and explains why it is remarkable.

The Higher Court (*Oberlandesgericht*) of Düsseldorf issued a judgment - on 24 November 2009 - on the duty of care of a company executive when the company uses email addresses purchased from a third party for direct marketing purposes (I-20 U 137/09).

The judgment

The first defendant in the case - a limited company - had purchased a database containing the email addresses of customers from a third party. The third party reassured the second defendant - the sole executive of the company - that all owners of the email addresses had opted in to the use of their email addresses for marketing purposes. The company executive did not, however, verify whether consent had in fact been obtained.

As a matter of fact, at least some of the email addresses contained in the database belonged to individuals who had not opted in to receiving email marketing. After several emails were sent out (the exact number is unknown), the claimant - a competitor of the first defendant - applied for an injunction against the company and its executive.

The Regional Court (*Landgericht*) of Kleve dismissed the application. Upon appeal, the *Oberlandesgericht* Düsseldorf granted an injunction against the company and its executive.

In its judgment, the Court stated that the sender of marketing emails was obliged to verify that all recipients had given their consent, as required by competition and data protection legislation. The sender should not rely on a statement made by an individual who collected the data in the first place.

The Court did not elaborate on the measures that need to be taken with respect to such verification. It assumed that, as the recipients had to make their opt-in statements 'explicitly' (§ 7 (2) 3 of the German Act on Unfair Competition or UWG), such opt-in statements were regularly recorded or documented in a traceable way.

Legal background

Commercial law

The injunction granted by the Higher Court of Düsseldorf is based on the provisions of the UWG relating to unsolicited commercial communications.

According to § 7 (2) 3 UWG, sending marketing communications to an individual using automated calling machines, fax or emails without obtaining the individual's prior explicit consent, constitutes as an act of unfair competition. The only exception to this strict opt-in principle is stipulated in § 7 (3) UWG with respect to email communications. Prior opt-in is not required if:

- the sender collected the email addresses from customers in connection with the sale of goods or services;
- the sender uses the email addresses for soliciting similar goods and services;
- customers do not object against the use of their email addresses for this purpose; and
- customers are clearly and explicitly informed that they may object against the further use of their email addresses at any time and at no cost.

Senders are liable for unfair competition if they do not obtain the recipient's consent and the exception under § 7 (3) UWG does not apply to them. Courts can issue an injunction against the individual who sent the unlawful communications and against the company on whose behalf the advertising was sent. Injunctive relief does not depend on whether the company or its employees acted intentionally or negligently.

According to the principles of commercial law as determined by the Federal Court of Justice (*Bundesgerichtshof*), the liability of executives of a company who are not personally involved in the unlawful act depends on whether they are aware of the act and whether they had the chance to prevent it (*Bundesgerichtshof*, judgment of 26 September 2009, case ref. I ZR 86/83 and judgment of 9 June 2005, case ref. I ZR 279/92).

Executives are not liable for unlawful acts conducted by their company of which they are unaware of, even if their lack of knowledge is a result of negligence.

Data protection law

Commercial law is flanked by the federal Data Protection Law (*Bundesdatenschutzgesetz* or BDSG) on the use of personal data for marketing purposes. These provisions were amended in 2009.

Whereas § 7 UWG only regulates contacting individuals for marketing purposes, data protection law applies, in particular, to preparatory activities such as the collection and transmission of personal data. The basic principles of data protection law are:

- Any processing and use of personal data for marketing

purposes is subject to prior opt-in by the data subject.

- Personal data can be exceptionally processed for advertising purposes without obtaining the consent of the data subject, if the processing is based on particular information summarised in lists called 'list data'. This data can also be transferred to a third party in the course of address trading. However, the data subject has the right to be informed on the original source of the data.
- Data subjects have the right to object against the use of their data for marketing purposes.

Commercial law and data protection law provisions are complementary: an activity deemed lawful under data protection law can nevertheless be found unlawful under commercial law.

Liability of the company

As far as the present case is concerned, the company was no doubt liable with respect to the unlawful email marketing. The exception stipulated in § 7 (3) UWG requires that email communications are sent by the entity which initially collected the addresses. Consequently, this exception is not applicable to address trading.

The liability of the company is not affected by any guarantee given by the vendor regarding the existence of opt-in statements made by the individuals listed in the database[1].

Personal liability of the executive

The remarkable point in this judgment is that the Court also granted an injunction against the company's executive. Whilst finding that the executive was aware of the marketing campaign, the Court did not state whether he was personally involved in the marketing campaign or whether he was aware that some of the individuals in the database had not given their consent. The Court found that the executive did not take any measures to safeguard the existence of the legal prerequisites for a lawful use of the email addresses: it was not sufficient to rely on the assertions of the vendor. This goes beyond the present position of the *Bundesgerichtshof* which states that a negligent lack of knowledge does not lead to personal liability *vis-à-vis* a third party.

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Duty of care

It is uncertain which security measures are necessary to avoid personal liability from the point of view of the purchaser of the data.

With respect to email marketing, consent needs not be documented in writing under competition and data protection law (§ 4a (1) and § 28 (3), BDSG). For the purchaser of address databases, the only way to avoid liability would be to contact each individual listed in the database. The effort necessary for this would however be enormous. Furthermore, it is possible that the attempt to contact the persons listed in the database would itself be classified as unlawful unsolicited communications.

Data controllers have to ensure that they can demonstrate that all requirements under commercial and data protection law have been met. Therefore, it is necessary to trace and document all written, electronic or oral statements made by the data subjects, as well as all information provided to the data subjects. This should ensure the existence of comprehensible documentation with respect to each individual in an address list, thus ensuring the legal basis for sending commercial communications.

The Oberlandesgericht Dusseldorf indicated that the purchaser of an address database was at least obliged to check this documentation. On the basis of this judgment, it can be considered as a minimum standard of diligence that the purchaser carefully reviews whether such documentation is available, complete and consistent.

It is advisable that purchasers of address lists ensure their rights to receive the relevant documentation and to conduct the necessary reviews in the purchase contract. From the vendor's viewpoint, it is likely that a consistent and considerable documentation of the legal basis will increasingly become a quality feature as it reduces the purchaser's risk of being held liable for sending unsolicited commercial communications.

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1. (Local Court (Amtsgericht) of Dusseldorf, judgement of 21 April 2006, case ref. 31 C 1363/06; Regional Court (Landgericht) of Traunstein, judgment of 20 May 2008, case ref. 7 O 318/08).

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