

Federal Republic of Germany: Tight restrictions on telemarketing

As the previous two contributions have shown, restrictive laws on the practice of telemarketing could seriously impair marketing research activities. Such laws have already been proposed in the US and in some European countries. The fact that the Federal Republic of Germany already has tight legal restrictions on telemarketing makes it a particularly instructive example for those marketing researchers concerned about the future of their profession.

German marketing researchers have been forced to take legal steps to ensure that a clear distinction is made between telemarketing and marketing research. These have taken the form of declarations of restraint against those telemarketing companies who operate in breach of the law.

Robert Schweizer

The ADM (Arbeitskreis Deutscher Marktforschungsinstitute - Association of German Marketing Research Institutes) has now enforced its first declarations of restraint against telemarketing companies. Lately the more support that telemarketing has received, the more negative have been the restrictions placed upon it. These restrictions are not of sole interest to telemarketing companies - they are just as important for their clients. After all, the

client is also liable in injunctions and damages.

Marketing and social researchers must be aware of these restrictions to safeguard their own interests and to preserve public confidence in legitimate telephone interviews.

1. Prohibition, the fundamental principle

Telemarketing is in principle prohibited in Germany, both in private life and in business life. In the case of the former, the principle has been established at least since 19.6.1970 when it was laid down in a Federal Supreme Court ruling. The Court held:

'It is a breach of fair practice in competition to make unsolicited telephone calls to owners of private telephone equipment, with whom no contact has previously existed, for the purpose of initiating or preparing the way for business dealings, and in particular for the purpose of offering goods or services.'

While the Supreme Court has not as yet delivered a ruling directly affecting the use of telemarketing in business, the same prohibitory principle can already be found in Appeal

Court and District Court decisions. In addition the Supreme Court in a ruling delivered on 6.10.1972 held that telex advertising constituted an impairment of competition under § 1 of the Unfair Competition Act, and also gave a foretaste of how it was likely to react to telemarketing in business.

2. Tight restrictions on exemptions

The exemptions are very narrowly defined. The following opinion published in the literature (Baumbach/Hefermehl) is typical:

'A more important point is whether the business client wished to receive the call or whether the canvasser had been able to assume that the client had consented to the canvassing call.'

Even this exemption is construed very narrowly. The prior existence of business relations alone will not in itself justify the presumption that - as the above-cited reference puts it - 'the client has consented to receiving the canvassing call.' Also, written notification of a call is not sufficient. Another unfavourable aspect of exemptions as far as telemarketing companies are concerned is that courts are not guided by the individual case. In the above-mentioned ruling on telex advertising, the Supreme Court was guided by the risk of imitation. The literature already suggests that the risk of imitation will also be a contributory factor in rulings in telephone marketing cases. To quote the literature (Dobbeck):

'The court must be primarily guided by the public nuisance caused. Fortuitous results, that could create an undesirable uncertainty in law,

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FRAME 1 ADM WARNING NOTICE TO TELEMARKETING COMPANY

'Your brochures do not state that you are only allowed to perform telephone interviews in exceptional cases, if at all. However this is an established point of law: see for example BGH (Supreme Court Rulings, published in) GRUR 1970, 523; Baumbach/Hefermehl, 14th Ed., § 1 UWG (Unfair Competition Act), RdNr. 54; v. Gamm, 2nd ed., § 1 UWG, RdNr. 151; Schröder/Hohl, Wettbewerbsberater, Stichwort Telefonwerbung Gruppe 4/T 4, RdNr. 1 et seq. In addition to being in breach of § 1, you are contravening § 3 UWG, because in your advertisements you give the misleading impression that you are allowed in general to perform telemarketing for clients. § 3 is contravened if a not inconsiderable proportion of the addressees is misled.

For this reason, in the name and on behalf of our client, we must demand that you make either verbatim, or to the same intent, the following declaration, that you will refrain, on pain of penalty, from the above activities:

"T... including its employees and authorised agents, will immediately

refrain from performing telephone advertising in business transactions for the purposes of competition. This declaration applies in particular to telephone calls to private households and equally to telephone calls to businesses. It also applies if there has been previous notification by letter.

This declaration does not apply to instances in which a telephone call is desired, or to instances in which T... using the due consideration that is required in business, can assume that the recipient of the call is willing to receive such a call.

T... will in business transactions for the purposes of competition not advertise itself in its brochures or otherwise to clients or prospective clients without stating expressly that telephone advertising is only legal if a telephone call is desired, or if using the care required in business, it can be assumed that the recipient of the call is willing to receive an advertising telephone call.

For every breach, T... shall pay the Arbeitskreis Deutscher Marktforschungsinstitute eV (ADM) a fine of DM 3,000. In the case of the dispatch of

copies, e.g., the simultaneous dispatch of brochures including inserts in magazines, the fine is DM 10 per brochure, per newspaper copy distributed in the case of newspaper advertisements and per similar part of an offence; but with a minimum total of DM 3,000. In the case of the continuation of the offence, e.g., in the case of several breaches of the declaration per day and if the breaches extend over several days, the fine of DM 10,000 per day is due (payable to the ADM)."

If you have not delivered the required declaration to us by noon on 14th March at the latest, our client will assume that you are not willing to remove the risk of repetition out of court.

As a precautionary note: In accordance with consistent court decisions you cannot rely on § 92 ZPO (Civil Procedure Code) to claim that you did not receive this letter. The courts have also declared inconsistent attested decisions that the issuing of the declaration to cease and desist without undertaking to pay the conventional fine does not remove the risk of repetition.'

would arise if the individual nuisance, caused in an isolated case, were the guiding factor. According to the law, promotional acts will constitute a nuisance and be in breach of § 1 of the Unfair Competition Act if, while being inoffensive in the individual case, they have unacceptable wider consequences. If it is expected that imitation of such acts by others will result in a neglect of normal ethics in competition, with attendant unacceptable adverse effects on the general public, such an effect can form the ground on which an activity is judged to be obstructive to competition. The risk of causing a public nuisance that is latent in the use of the telephone for the purposes of marketing... satisfies these criteria and is therefore prohibited, even if a business-related offer is made to a

business, by reason of causing unreasonable nuisance and so distorting the normal course of business.'

One does not have to be a clairvoyant to see that the Supreme Court is in fact very likely to rule even more restrictively than this. In the above mentioned Ruling on telex advertising the Court is after all explicit:

'In that case, other advertising companies would, for reasons of competition, be forced also to undertake telex advertising. Like telephone advertising, telex advertising could be extended to cover many branches of business. The danger of unacceptable nuisance and disturbance of telex clients is therefore an obvious one.'

In the case of telemarketing, the danger of imitation by others is just as obvious. The Supreme Court must therefore be expected to rule that every kind of telemarketing has implicit in it the risk of imitation and therefore constitutes a breach of § 1 of the Unfair Competition Act.

3. The consequences for market and social research

As already indicated, German market and social researchers will have to ensure that telephone marketing companies keep within the confines defined by the Courts and the literature, one reason being that when relations are well-ordered, market and social research (which is protected by the freedom of scien-

tific research that is guaranteed by the Constitution) will be safeguarded. This is why the ADM has taken early steps against telemarketing companies that are operating in breach of the law, particularly when such companies publish literature

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that is silent about the restrictions to which their activities are subject. A warning notice of this kind is reproduced in frame 1. This ADM warning notice prevented court action because the telemarketing company in question complied with the declaration as requested.

German marketing companies are well advised to make the required declaration. In the event of a refusal, a company would be taken to court for a restraining order. Needless to say, a court order of this kind is much more difficult to live with than a declaration. The Courts may set disciplinary fines of up to DM 500,000 for each offence. Also, legal proceedings will incur considerable costs, and more importantly, once a court ruling has been handed down, the likelihood of trading permission being suspended under § 35 of the German Industrial Code will be that much greater.

Summary

Dr. Robert Schweizer describes in this article the legal position of telemarketing in the Federal Republic of

Germany. Telemarketing is, in principle, prohibited. The legal restrictions are described in detail. In order to protect their position, marketing and social researchers in Germany have to ensure that telemarketing companies keep within the confines defined by the German courts and by the literature. To this end, the ADM (Arbeitskreis Deutscher Marktforschungsinstitute - Association of German Marketing Research Institutes) is enforcing declarations of restraint against German telemarketing companies who operate outside these legal confines.

Résumé

Dans cet article, Dr Robert Schweizer décrit la situation légale du télémarketing en République Fédérale d'Allemagne. Le télémarketing est en principe interdit. L'auteur donne une description détaillée des restrictions légales. Afin de protéger leur position, les spécialistes des études de marché et de comportements sociaux d'Allemagne Fédérale doivent s'assurer que les sociétés de télémarketing agissent dans les limites définies par la législation ouest-allemande. A ces fins, l'Association des Instituts Allemands d'Etudes de Marché (Arbeitskreis Deutscher Marktforschungsinstitute - ADM) est en train de mettre en vigueur des déclarations restrictives contre les sociétés allemandes de télémarketing qui opèrent hors de ces limites légales.

Zusammenfassung

Dr. Robert Schweizer beschreibt in diesem Artikel die Rechtslage von Telemarketing in der Bundesrepublik Deutschland. Telemarketing ist hier im Prinzip verboten. Die gesetzlichen Restriktionen werden detail-

liert beschrieben. Um ihre Position zu schützen, sehen die Marketing- und Sozialforscher in Deutschland sich gezwungen, dafür zu sorgen, daß die Telemarketinggesellschaften die von den deutschen Gerichten und in der Literatur definierten Beschränkungen beachten. Zu diesem Zwecke erteilt das ADM (Arbeitskreis Deutscher Marktforschungsinstitute) den deutschen Telemarketinggesellschaften, die diese rechtlichen Beschränkungen nicht einhalten, Disziplinarverwarnungen.