

RIGHT TO PRIVACY AND SOME METHODS OF DIRECT MARKETING

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Abstract

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Promotion constitutes part of the marketing mix which consists of advertising, sales support, public relations, personal sale and direct marketing. It may be stated that the law delimits boundaries to all these elements of the communication mix. In the following contribution I will only focus on some methods of direct marketing and I intend to investigate the “purposeful appeal to purchase and consumer behaviour of clients” as viewed by the present Czech law. These communications often disturb the privacy of individuals, harass in an inappropriate time, marketing companies often illegally collect and share customers’ personal information. My target is to list legal limits instituted in the sphere of direct marketing for the individual marketing practices by the Czech law.

direct marketing, Czech law, spams, unsolicited advertising

Direct marketing is defined as “utilizing direct channels to address the clients and to deliver both goods and services to the client without involving marketing intermediaries. These channels include direct mail, brochures, telemarketing, interactive television, kiosks, internet pages and mobile facilities”¹. Other authors include the following methods among direct marketing tools: ... e.g. printed offers delivered by post, telemarketing, electronic commerce through the Internet, mail delivery of goods ordered from the mail-order catalogues and also commercials on television and radio or printed advertisements which entail an immediate response on the part of the client.² It is obvious that in the Czech society the traditional delivery of printed brochures by post is still topical and there is a group of citizens, especially the senior ones, who still respond to this way of advertising. For some other authors the direct-marketing methods also include personal sale, when the dealer visits a concrete client in person and offers goods or services.

All literature dealing with marketing unanimously praises the advantages of the afore-mentioned tools, namely measurability of the marketing campaign effect, possibility to personalise and select the market, thus reducing the costs.

It can be agreed upon that the increase in internet, electronic mail and mobile phone usage has facilitated the process of choice and order from the customer’s perspective, on the other hand these communication means invade the privacy of the individual, address them at inconvenient times, marketing companies often illegally collect and share personal data of their clients and, last but not least, use unscrupulous psychological manipulation of the clients, namely in case of personal sale or printed offers delivered by post.

Undoubtedly these unsolicited or in any other way discomforting offers infringe on personal rights of individuals by invading their privacy, broadly speaking violate personal rights by forcing the individuals to spend money and time on at least disposing of or explicitly rejecting similar offers.

¹ Kotler, P., Keller, K. L.: Marketing a management, 12. edition, Grada Publishing, Prague 2007, ISBN 978-80-247-1359-5.

² Foret, M., Procházka, P., Urbánek, T.: Marketing základy a principy, Computer Press, Inc. Brno, 2005, ISBN 80-251-0790-6.

Some literature dealing with marketing does to some extent admit the negative implications of direct marketing methods, they refer namely to ethic codex, not legal regulation and sanctions, though.

My intention in the following part is to sum up the legal regulation of the most frequently used practices of direct marketing existing in the Czech legal environment. Taking into account the length of this text, I will purposefully omit personal sale, despite it being a largely applied method of sales. It will namely be electronic mail marketing, printed offers delivery by post and telemarketing that will come to the fore of my attention.

Dissemination of electronic mail messages to clients – spams

The method of sending email messages with offers of goods and services is considered part of internet marketing and, in terms of law, this method is regulated by Act No. 480/2004, Collection of Laws concerning certain information companies services (further only ICSA). This rule of law regulates unsolicited mail forwarded through electronic mail in compliance with the European Community Law. To be concrete, it concerns the transposition of Directive 2000/31/ES of June 8, 2000 dealing with legal aspects of information companies services, namely electronic commerce, on the internal market (Electronic Commerce Directive). The aim of this Community regulation was protection of consumers and providers of the information company services against dissemination of unsolicited commercial messages (spams) through electronic mail, and ensuring proper function of interactive networks.

With the expansion of the Internet and growth in electronic communication the intrusion on the privacy of consumers has increased substantially. It is surely difficult to find an electronic mail user who would not read tens of spams in his/her electronic mail boxes every day which contain promotion of various goods or services. The spams are forwarded using public address books, collections of addresses from internet pages or they are forwarded to a discussion group – chat, from where it automatically disseminates to all participants of the discussion. Such way of advertising is carried out practically without any costs on the part of the sender, all the costs, including indirect ones, are on the part of the recipient. The internet service provider is thus compelled to maintain rather large channel transmission capacity of mail servers so as to manage to process considerable data volume and the costs are then in effect covered by the mail recipient.

The intrusion also consists in forcing the electronic mail recipient to focus attention on such mail, spending time waiting for the antispam programme to identify and delete the advertisements downloaded into the mail box, and in mail box and transmission capacity overloading, which results in blocking the free disc capacity and

the recipients are thus restricted in their activities, which may cause damage or loss of profit.

The Czech legal regulation defines electronic mail as text, voice, sound or visual message forwarded through the public electronic communication network that may be saved on the network or the user terminal until the user collects it. That includes electronic mail messages, mobile phone texts – both text and video messages (SMS and MMS) and also fax messages.

The information company service provider is also defined in the Act as every natural person or legal entity that provides any of the information company services. The user is then defined as every natural person or legal entity that uses the information company service, namely with the scope of searching for information or making it accessible. The term user is obviously broader than the term consumer but, undoubtedly, the protection granted by the respective law relates also to the consumer as well as private entrepreneur, in fact to every natural person or legal entity.

In the act, the term advertising is substituted by a broader term “commercial communication”. The commercial communication are all forms of communication, including advertising, and encourage you to visit the website, for direct or indirectly, the goods, services or image of a business person who is an entrepreneur or performs a regulated activity.

The law also specifies that domain name, electronic mail address and information concerning the goods, services or image of natural person, legal entity or enterprise obtained independently by the user are not commercial communication.

§ 7 ICSA incorporates the following list of rules for dissemination of commercial messages through electronic means:

Commercial messages shall disseminate using electronic means only on conditions approved by ICSA.

- The user shall approve the use of his/her electronic contact, e.g. electronic mail address, in advance.
- In case natural person or legal entity receives their client's electronic mail address in connection with the product or service sale, and in compliance with the law on personal data protection, the person or entity is thus entitled to use the contact for dissemination of commercial messages concerning similar products or services of their own provenance provided that the client has an indisputable right to disapprove of the use of his/her electronic mail address in an easy and free of charge way.
- Commercial messages forwarded through electronic mail shall clearly be specified as commercial messages.
- Commercial messages forwarded through electronic mail shall not conceal or cover the identity of the sender who performs the communication.

Commercial messages forwarded through electronic mail shall contain valid address of the sender, to which the recipient is entitled to send directly the expression of his/her disapproval of any further commercial communication being forwarded to them by the sender.

From the afore-mentioned it results that unless the sender is in possession of preliminary approval by the customer, commercial messages may only be forwarded to those customers whose electronic mail addresses have been obtained in connection with concrete business transactions.³ The forwarding of messages thus operates in the so called opt-out mode. In case the sender obtains the addresses indirectly, that means not from the clients in connection with his/her business activities (e.g. data base purchase, address collection based on public lists etc.), then commercial communication is based on opt-in mode, which means that the sender shall have a proof of preliminary approval by the recipient. A relatively common practice of elusion is contemporaneous forwarding of both enquiry about approval and offer of a concrete product.

This act has also produced a fundamental change in replacing the regional Trade Licensing Offices with The Office for Personal Data Protection as the state administration body that holds supervisory and sanction powers over ICSA observance.

The Office for Personal Data

Protection started to record and proceed the complaints about unsolicited commercial communication. This change in competence is mainly due to the fact that companies concerned with marketing activities often process personal data not in compliance with the law on personal data protection.

To enhance efficiency, The Office established a link on its websites that deals exclusively with unsolicited commercial communication and where an electronic form for making complaints can be found.

ICSA determines in §11 facts of the administration torts, containing violation of the afore-mentioned legal obligations, the commitment of which can be fined with the sum of up to 10 million Kč. The identical responsibility holds for natural person, should the illegal action occur in the course of his/her entrepreneurial activities or in close connection to such activities. ICSA amendment, by Act No. 468/2011 Coll., effective from 1 January 2012, introduced a punitive sanction for individuals non-entrepreneurs – a fine of up to 100 000 Kč., for that, without the consent of the addressee bulk or

repeatedly spreading commercial communications by electronic means. So far, the question is to what extent this new legislation effectively prevents the still widespread practice of – the use of individuals to send spam. This is the so called **viral marketing**, which has spread in the last two years and causes considerable increase in spamming. “Viral marketing is based on “forward it” principle. The offer then disseminates thanks to a human chain. The target is to increase sales, business potential and brand awareness with minimal costs. Such offers, to ensure efficiency, present themselves in the form of various games, entertaining videos, audio files, where only at the end the recipient discloses what it offers or which company it promotes.”⁴ ICSA bases the delinquency competence of the subjects on the principle that those who themselves or via intermediary can be proven to have forwarded the spam are held responsible. Proposals have been submitted suggesting that subjects should be prosecuted on the basis of responsibility of the subjects that profit from spamming but, as Polčák justly points out, such regulation could easily be abused.⁵ “It might easily happen that an entrepreneur orders a zombie spam that will pretend to be promoting the goods of its competitor. Should sanction on the basis *cui bono* be implemented, not only rage on the part of the network users but also severe sanctions by supervisory bodies would inevitably follow.”

Competent self-governing professional chambers have been appointed to supervise the observance of duties specified in § 8 subsection 3 ICSA for entities performing regulated activities. When undertaking the regulated activities, the entities operating within the EU countries are allowed to disseminate commercial information in compliance with § 7 and regulations set by business, professional and consumer organizations, which primarily deal with independence, dignity, professional honour and honest treatment of clients. Even entities undertaking business activities without being members of the professional self-governing chambers shall observe § 7 ICSA when disseminating commercial information.

The commercial information by entities undertaking regulated activities shall include:

- the name of the professional self-governing chamber instituted by law where the entity undertaking regulated activity is registered,
- reference to professional code applied in the member state of European Union, where the entity undertaking the regulated activity has their seat and

3 Polčák, R., *Právo na internetu spam a odpovědnost ISP*, Computer Press, Inc., 2007, First edition, ISBN 978-80-251-1777-4, p. 125.

4 Výroční zpráva Úřadu pro ochranu osobních údajů za rok 2009 (Annual report of the Office for Personal Data Protection for the year 2009), p. 45 [quoted 8. 9. 2010]. Available on <http://www.uoou.cz>.

5 Polčák, R., *Právo na internetu spam a odpovědnost ISP*, Computer Press, Inc., 2007, First edition, ISBN 978-80-251-1777-4, s. 129.

- mode of continuous public access to information concerning the respective professional self-governing chamber in which the entity undertaking commercial activity is a member.

The supervisory body (self-governing chamber established by law) imposes a fine of up to 1 million Kč on the subject that disobeys one of the above mentioned duties. It needs to be emphasized that the law subdivides the supervisory powers between The Office and professional chambers; those only exert the supervisory powers on duties specified in §8 subsection 3 ICSA.

In the common provisions of § 12 the liberation causes are defined as follows: legal entity is not responsible for administration tort provided they prove that they have exerted all the skills available on inhibiting the breach of legal duties. When assessing the fine of the legal entity, the importance of the administration tort is taken into consideration, namely the way the tort was committed, what the consequences are and under which circumstances it was committed. The provisions of the law on the liability on the part of and sanctions against the legal entity apply to liability for actions arising in the course of the entrepreneurial activities or directly connected with them. The fines are levied by the supervisory body and exacted by customs authorities. The proceedings are in compliance with the administration rules.

In conclusion of this part it is worth mentioning even **other ways of spam protection** that were available in the past, before ICSA entered into operation.

Some authors⁶ mention Act No. 151/2000 Coll., concerning telecommunications, as a means of spam protection. This act establishes conditions on which telecommunication facilities and networks can be set up and operated, conditions on which telecommunication services can be provided and state administration including regulation can be executed. On the grounds of this law, spamming may be regarded as telecommunication network abuse.

Spam advertising may undoubtedly be classed as unsolicited advertising, as it is defined by the act on advertisements regulation. An explicit **prohibition of dissemination of unsolicited advertisement** appeared for the first time in the Act No. 40/1995 Coll., on advertisements regulation, in the amendment No. 138/2002 Coll., in operation since June 1, 2002 in § 2 subsection 1 letter e), which explicitly prohibits advertisement that inflicts expenses on the part of the addressee or annoys him/her. This regulation could be used even as protection against dissemination of unsolicited advertisement through electronic mail. I do not

share some of the published opinions⁷ saying that a necessary prerequisite for applying the regulation § 2 subsection 1 letter e) of the advertisements regulation act for the protection against unsolicited mail must be financial expenses of the addressee due to the collection of this unsolicited mail. According to the act, the conditions for prohibition of such advertisement are given alternatively: “..... provided it inflicts expenses on the part of the addressee or it annoys the addressee...” “ Therefore the fulfilment of the addressee being annoyed is sufficient. But the practical aspect of protection against unsolicited advertisement was rather problematic. The protection was aggravated by the anonymity of the Internet and also by the fact that the supervisory and sanction bodies were the regional Trade Licensing Offices which often had no specialists in ascertaining the real identity of unsolicited mail senders.

Dissemination of unsolicited advertising through electronic mail may also be sanctioned as **unauthorized collection of personal data** according to Act No. 101/2000 Coll. on protection of personal data (further only PPDA). Spam dissemination may be sanctioned as unauthorized handling of personal data in case the conditions stipulated by PPDA are fulfilled and where personal data are defined as any type of information concerning a specified or determinable subject of data. The subject of data is considered specified or determinable if it can be identified namely on the basis of a number, code or one or more elements specific for his/her physical, physiological, mental, economic, cultural or social identity. Provided that **a concrete natural person may be identified on the grounds of an e-mail address** and the fact whether this is a private person or entrepreneur is irrelevant, the addressee may protect himself/herself on the grounds of this Act as well. That is the case when the e-mail address of the natural person is composed of e.g. first name and surname and the name of the employer is given in the domain. Any subject collecting or processing personal data of natural persons is obliged to maintain the conditions stipulated in this Act, in particular have approval of the subject in question. The approval may be given by implied consent but publishing the e-mail address on web pages of individual institutions, companies etc. may not in any case be regarded as approval.

§ 21 of personal data protection Act provides means of protection. Each subject of data, i.e. each natural person that detects or presumes that his/her data are being processed by the administrator or agent without complying with protection of his/her private or personal life or without complying

6 Matejka, J., Problematika spamu a spammingu, Právní rádce 2/2003, p. 30 (monthly journal).

7 Černý, M., Nová právní úprava proti nevyžádaným elektronickým (spamovým) zprávám, Právo a podnikání 10/2004, p. 6–7 (journal).

with the law is entitled to demand an explanation on the part of the administrator or agent or demand elimination of the incurred state of affairs – may e.g. demand blockage, correction, update or elimination of personal data. Should the administrator or agent not obey the demand of the subject of data, then the subject is entitled to address the Office for Personal Data Protection (further only Office). This may also be the first step, as the law explicitly states, without being obliged to address the administrator or agent first. Even persons unauthorized to the personal data collection are subject to the afore-mentioned duties. The administrator and the agent are liable for the breach of duties stipulated by PPDA jointly and severally, should injury to property or another injury be sustained. When non-property injury is claimed, it is acted upon § 13 of Civil Code that regulates the means of protection of general personal civil rights in case the right of a natural person to human dignity, personal honour, good reputation, name etc. was violated. The claims then are: stop unauthorized interventions into the right of personal protection, elimination of the consequences of the afore-mentioned interventions, grant appropriate compensation, which may be even financial, namely when personal dignity of the natural person or his/her respectability have been considerably impaired. The amount of compensation will be decided upon by the Court.

When claiming the injury to property the proceedings will be taken in compliance with Civil Code or Commercial Code and with the general regulations on liability for damage.

The criminal law aspects of unauthorized personal data processing must also justly be pointed out, namely the **crime of unauthorized handling of personal data**, § 180 of Criminal Code, as well as the fact that action constituting this crime may be penalized as negligent offence. The crime of unauthorized handling of personal data is committed by “he who, though due to negligence, communicates, renders accessible, processes or appropriates himself/herself of personal data about another person, collected when exerting the powers of public authority “ or he who, though due to negligence, breaches the bound to secrecy which he/she was laid under by the state and, without being authorized, publishes, communicates or makes accessible to the third party the personal data obtained when performing his/her profession or function, thus inflicting serious injury to rights or duly justified interests of the person in question.

Protection against unsolicited advertising by means of legal regulation of **unfair competition** in the Commercial Code, i.e. since January 1, 1992 may be considered. The overwhelming majority of unsolicited advertising would surely meet the characteristics in the general clause of unfair competition: conduct in economic competition or economic relations (the latter characteristic only after the amendment to the commercial code legislated by Act No. 152/2010 Coll., in operation

since July 1, 2010), contradiction to good manners, ability to inflict injury to other competitors or consumers. These characteristics must be met contemporaneously. The number of persons involved in economic competition or economic relations is clearly broad.

The idea of a consumer taking legal action against unsolicited advertising dissemination by e.g. an entrepreneur on the grounds of unfair competition can easily be conceived. Natural persons (that includes consumers), whose rights have been violated or infringed by unfair competition, may demand that the law-breaker refrain from similar conduct, rectify the defects, they may demand reasonable compensation for non-material injury, compensation for damage and return unjustified enrichment (§ 53 Commercial Code).

Apart from legal means, also **nonlegal, namely technical means of spam protection** should be mentioned. These may prove more comfortable and accessible for the user than claiming the protection legally, although they also have their negatives. Mail may already be assorted and filtered by the mail server administrator or internet connection provider. The addressee is running the risk of even an important message thus being filtered and then the only option is to leave the sorting of the mail up to the addressee, using the program in his/her computer. It is not advisable to return the unsolicited mail to the sender's address as this way the validity and usage of the address is confirmed and may be used for forwarding spams in future. Some institutions that present contact data of their employees avail themselves of the possibility to present email addresses in an unusual format, thus preventing the automatic collection of electronic addresses. The disadvantage is lower user-comfort.

Unfortunately, from the afore-mentioned results that although the Czech legal regulations present several possibilities to natural persons of how to protect themselves from spams, practical usage of such protection is rather demanding in terms of both time and costs. This is largely caused by the fact that most spam advertisements come from abroad and demanding action would involve employment of foreign system of law, legal representation in a foreign country and within a foreign legal system, which discourages most claimants. Since the entry into effect of the Act on specific services of information companies, an effective protection against spams by native spam senders is possible. Using the electronic form for complaint, published on the Office for Personal Data Protection web pages, a complaint may be sent to the Office.

Printed matters delivered by post

The Act on personal data protection also regulates another method of direct marketing, the classical sending of advertisements through the post to the recipient's address. The regulation of forwarding this type of unsolicited mail is based on a different principle. The postal matter with offers may be

forwarded until the addressee shows disagreement in writing. This forwarding is subjected to opt-out mode.

In compliance with § 5, subsection 5 ICSA practically anybody, according to the terms of ICSA the administrator or agent who processes the personal data with the scope of offering business or services to the subject of the data, is entitled to use the name, surname and address of the subject of the data for the respective scope, provided he/she obtained the data from a public list or in connection with his/her activity as administrator or agent. The administrators or agents may be the entrepreneurs running the business themselves. They collect the personal data of their customers e.g. by issuing discount customer cards, organizing consumer competitions or they are administrators or agents of a marketing or trade agency, as a rule hired by the entrepreneurs to perform various marketing activities.

According to § 4 ICSA, personal data processing is any operation or complex of operations that the administrator or agent systematically conduct with personal data either automatically or by other means. Personal data processing means namely their collection, storage on data carriers, making them accessible, their modification or alteration, search, usage, transmission, dissemination, publishing, saving, exchange, sorting or combining, blockage and elimination.

The administrator processes personal data in order to offer the products or services and may transmit these data to another administrator only after meeting the following conditions:

- the data of the subject of data were collected in connection with the activity of administrator or they are already published personal data,
- the data shall be used only with a view to offer business and services,
- the subject of the data was informed about the proceedings and has not expressed disapproval with the proceedings.

The subject shall express the disapproval with the processing in writing. The administrator is obliged to inform every administrator to whom he/she has transmitted the name, surname, and address of the subject of data about the fact that the subject of the data has expressed disapproval of the data processing. Also, without the approval of the subject of data, other personal data shall not be amended to the given data.

Another administrator, who was the recipient of the data about natural persons, is bound not to forward the data to anybody else.

The dissemination of the offers by post is one of the least annoying methods of direct marketing. The risk for the addressee is constituted by the use of sophisticated methods of psychological pressure. Certain types of consumers as, for example, senior citizens find it hard to resist such practices.

Telemarketing

Telemarketing means phone calls by the so called call centre employees to potential clients. Call centres have a database of people with their phone numbers and they address them with an offer of goods. This activity is legally regulated in ICSA and the rules for commercial communication apply to telemarketing but only provided that a phone call may be considered a communication forwarded through electronic communication network. According to the Office for Personal Data Protection this arises when the phone call can be saved in memory (e.g. on the answer phone) both on the part of the caller and on the part of the called line.⁸

The application of PPDA may also be considered, concerning the collection of personal data. Companies that run call centres create a database of persons with telephone numbers, thus processing personal data by course of PPDA and hence are obliged to fulfil duties set by PPDA. In case only name, surname and address obtained through their own activity or from an authorized source of personal data (such as telephone directory) are processed, then § 5 subsection 5 PPDA, aforementioned, is applied, that means the company is not obliged to obtain approval of the person – subject of the data, meet information duty towards him/her and meet notification duty towards The Office.

In case the caller proposes to conclude a deal on goods or service delivery through the phone, then the contractual relation is regulated by private law as well, namely § 53 of Act 40/1964 Coll., Civil Code. This gives a legal form to consumer contracts concluded using means of communication at a distance and the consumer (called line) is protected as the weaker party to the contract by duty of the calling supplier to fully inform the client before the conclusion of the contract itself, and also by the right to withdraw from the contract within 14 days of acceptance of the contact performance.

CONCLUSION

Form the afore-mentioned it results that there are discrepancies in the legal regulation of the individual methods of direct marketing. At times the regulation is based on the opt-in principle, i.e. claim of preliminary approval of the application of this method, in other cases the opt-out principle

8 Výroční zpráva Úřadu pro ochranu osobních údajů za rok 2005 (Annual report of the Office for Personal Data Protection for the year 2005), p. 13 [quoted 1. 9. 2010]. Available on <http://www.uoou.cz>.

suffices, i.e. the right of the contacted person to express subsequent disapproval of the goods and service offer. The Czech public authorities, namely the Office for Personal Data Protection, are aware of these discrepancies in legal regulations and they intend to subject the issue to change.

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