

THE AUSTRIAN DATA PROTECTION LAW REQUIRES INFORMED AND EXPRESS

CONSENT BEFORE USING DATA FOR DIRECT MARKETING

The Austrian Data Protection Commission has caused alarm in Europe's direct marketing community by taking a decision which involves a strict interpretation of both the Austrian Data Protection Act and the Council of Europe Convention and Recommendation on Direct Marketing (PL&B Sept '89 p.3). The Commission required the Austrian direct marketing subsidiary of Bertlesman, the German-owned advertising and publishing company, to sell lists to other organizations only with the informed and express consent of consumers. Dr. Christian Singer, Deputy Director of Austria's Data Protection Office, explains the rationale for the Commission's case which he prepared.

Austria's Data Protection Commission has taken a decision concerning direct marketing and data protection, which has reduced advertising companies' opportunity of obtaining data for direct marketing purposes.

This decision, which was announced on 16th of March 1989, reflects the worst fears of the direct marketing industry.

The major part of the activities covered by the listbroking part of the direct marketing industry, is not in accordance with the law, without the informed and express consent of the data subject.

The sources of information

An advertising company, which conducts direct marketing activities, has two sources from which it collects data for direct marketing purposes.

1. Public lists: There are many public lists, which contain names and addresses useful for direct marketing activities (for instance, the telephone directory). Data collected from these public sources the direct marketing industry calls "own addresses".

2. Private lists: Much data is available from mail order business or other companies, which have a lot of data about their customers. This information is very useful for direct marketing purposes because it also contains data about data subjects' purchasing patterns.

This information is transferred from the owner of the data to the listbroker, who makes this data available to third parties for their own advertising activities.

So it is possible that without requesting it, individuals receive offers from a company they have never contacted and obviously the company knows something about their behaviour in their private life. Frequently the Data Protection Commission has to answer questions like:

- * from where has this company obtained my address?
- * from where does it know that I have children?

- * how does it know that I like to go skiing and so on?

The data protection issues

What, from the view of data protection law, are the main problems of direct marketing:

1) Who is responsible for complying with the Data Protection Act when the data is processed by the listbroker? This question was the main reason for the Bertlesman case. It was intended to clarify whether the listbroker is a data controller or a service processor. The Data Protection Commission solved the legal problem by stating, that the listbroker is responsible for the data processing, and he must not use the data for purposes other than the owner of the data has allowed.

2) The Austrian Data Protection Act gives everyone the right to information, as to who is collecting and processing his personal data, their sources, their nature and content and their use, insofar as his data is subject to automated processing.

The problem is that the listbroker sometimes is unable to find the data of someone who requests this information, because he cannot select this data with a criterion like the name or the address of the data subject. This problem was not a question in the current case, but it is a problem we often hear about in connection with listbroking.

3) The main legal problem the Data Protection Commission had to solve was: whether the collection and processing of the data by the direct marketing company was in accordance with the law or if it was illegal. Section 17 of the Austrian Data Protection Act provides that data may be collected and processed by a person:

a) if the contents and the purpose of this data processing are covered by his legitimate tasks, and

b) if the interests of the data subject which need protection are not violated regarding the respect of his privacy and family life.

The questions hang on the provisions of the law about the activities of an enterprise (mainly the trade law) on what will be regarded as the legitimate task of this enterprise and what it will be permitted to do with the data. The Austrian trade law permits an advertising enterprise to collect data for direct marketing purposes. The collection of data is the legitimate task within the meaning of Section 17 of the Austrian Data Protection Act.

Legally acceptable criteria for the transfer of customer information to a third party

Insofar as the data is collected from public sources, the Data Protection Commission had no doubts about the right of the direct marketing industry to collect, store and process this information.

But the Data Protection Commission had to take into account that the Austrian Data Protection Act also requires the respect of interests that need protection. As I said, the most important part of listbroking is to make

addresses of customers available to the client company. When transferring this list to the company, Section 18 of the Austrian Data Protection Act must be taken into account. This section provides for permitting this transfer. But the transmission shall only be permitted when:

* the data is collected and processed in accordance with the law and

* if either the data subject has expressly and in writing agreed to the transfer or if the transfer is necessary for the safeguarding of the prevailing justified interests of third persons.

If the data subject agrees with the transfer from the enterprise to the listbroker and if this agreement was given expressly and in writing, the Data Protection Commission had no problem in permitting this transfer.

But if the data subject has not consented, the Data Protection Commission refuses permission, because this activity is not the legitimate task of the enterprise. When a company collects information about its own customers for its own purposes, this is a legitimate task. When it transfers the data to a listbroker or to another third party for direct marketing, this is not a legitimate task. The company may use this data only for such purposes as the data was given for. For example, data was given to order goods or services but not to sell the data to a third person.

The advertising industry's definition of its legitimate rights

The advertising industry claims that every enterprise has a legitimate right to sell data about their own customers, and considers it is a legitimate task under Section 18 of the Austrian Data Protection Act. The Data Protection Commission has not followed this idea. Since the Austrian Data Protection Act became operative, the legal grounds of such activities have been changed. The Austrian legislator wanted to restrict data transfers to those which are necessary for the purposes of the main task of a data controller. The main task for instance of a mail order business is to deliver items purchased to customers, to send them offers and bills and to inform them about the company's activities. For these purposes, the data may be used without restrictions. But there is no mandate to use the data for another purpose. The customer, who gives a great deal of information, trusts that the data will be used fairly and confidentially and only for those purposes for which he gave it. So this provision of Section 18 cannot justify transferring data to a third party.

But also the last part of Section 18 - which permits transfers when it is necessary for the safeguarding of prevailing justified interests of third persons - cannot justify transfers of data to third persons.

The interest in obtaining the data which a listbroker has, is only an economic interest. But Section 18 requests justified, legitimate interests. If a listbroker does not obtain this data, it - maybe - will be bad for his economic situation. But the transfer of the data will not help the listbroker to improve his legal position, because the legal position does not depend on the possession of the data. So he has no justified interest in the transfer, only an economic interest, which does not justify the transfer.

The only possible result of these legal problems was: the transfer

between the owner of the data and the listbroker is illegal.

The collection and processing of illegally transmitted data

A further part of the Data Protection Commission's case is that a recipient must not collect and process data which has been illegally transmitted. This was the first time, the Data Protection Commission had expressed this principle clearly. It does not change anything if the listbroker had - in the abstract - the legitimate task of collecting and processing data for direct marketing purposes. The violation of Section 18 of the Austrian Data Protection Act - on illegal transmission - causes the violation of the law by collecting this unfairly transferred data. The illegal transfer violates the data subjects' interest that needs protecting. Therefore, the subsequent collection and processing of the data also does not respect these interests. From this it follows, that unfairly transferred data will be regarded as having been unfairly obtained and the processing of such data by the recipient will be definitely illegal.

The decision as an interpretation of the Council of Europe Convention

Finally, let me say that this decision is not only an interpretation of the Austrian law, but also an interpretation of the Council of Europe Convention on Data Protection and its Recommendation on Direct Marketing. The Convention on Data Protection provides in Article 5 that personal data shall be obtained and processed fairly and lawfully and shall be stored for specified and legitimate purposes and not used in a way incompatible with those purposes. And the Recommendation on Direct Marketing provides that the data subject should be able:

- * to refuse to allow data concerning him to be recorded on marketing lists;
- * or to refuse to allow data contained in such lists to be transmitted to third parties;
- * or unconditionally and on request to have such data erased or removed from several or all of the lists held by users.

Summary

The Data Protection Commission had to consider these facts. There was no other possibility but to refuse permission to the direct marketing company. Therefore, companies in Austria may sell lists to direct marketing organisations only with the informed and express consent of consumers. If there is no consent, the collection, processing and the use of the data by the direct marketing organisation will not be in accordance with the law.

The direct marketing company has appealed against this decision to the Supreme Administration Court. This court could decide on legal grounds that the interpretation by the Data Protection Commission was not in accordance with the law. If it did that, the Commission would have to reconsider the case.

Dr. Christian Singer is Deputy Director of Austria's Data Protection Office. This is an edited version of his presentation at the 1989 PL&B conference.