

### III. Dokumentation

#### **International League for Competition Law: Code of Conduct in Regard to Fair Competition in Electronic Commerce**

– **Commented Version** –

#### **Vorwort**

VON PROF. DR. THOMAS HOEREN, Münster

Die Internationale Liga für Wettbewerbsrecht, die renommierteste Vereinigung für Werberecht mit mehr als 1500 Mitgliedern, hat auf ihrer letzten Generalversammlung in St. Malo (Frankreich) einen Verhaltenskodex für Online-Marketing verabschiedet. Der Verabschiedung lagen zweijährige Vorbereitungen zugrunde. Zunächst wurden Experten aus 15 Staaten bestellt, die die werberechtliche Zulässigkeit von Frames, Cookies und anderen internetspezifischen Marketinginstrumenten zusammenstellen sollten. Es entstanden auf diese Weise zahlreiche ausführliche Berichte, die demnächst veröffentlicht werden sollen. Auf diese Weise wurden erstmals die rechtlichen Grenzen des Online-Marketing in den USA, Japan, der EU und weiteren Industrienationen deutlich.

Auf dieser Grundlage erstellte der Schreibende als Koordinator des Projekts einen Entwurf für einen Verhaltenskodex zum Online-Marketing. Dieser wurde von den Delegierten der Wettbewerbsliga mit großer Zustimmung gebilligt. Der Kodex ist damit der weltweit erste Internet-Werbekodex, der auf rechtsvergleichender Grundlage die gemeinsamen Grundstrukturen der vielfältigen Werberechtsordnungen widerspiegelt. Behandelt werden Themen wie die Zulässigkeit von E-Mail-Werbung, Meta-Tags, Cookies, Hyperlinks oder Powershopping. Herausgestellt wird die Bedeutung wahrheitsgetreuer Werbung, eines behutsamen Umgangs mit Cookies und die Notwendigkeit alternativer Streitschlichtungsmechanismen.

**Section 1 – Scope**

[Application] This regulatory framework applies to commercial communication taking place on the Internet. It is aimed solely at fair competition in the context of electronic commerce and is to be regarded as a voluntary, self-restrictive addition to existing legal requirements.

The code as a whole should be clearly focused on issues relating to fair competition. By concentrating on a limited scope and taking certain issues out of consideration (e.g. data protection), the code can serve as an effective instrument for this particular segment of electronic commerce.

**Section 2 – Terms and Definitions**

Introductory note to this section: In order to prevent that regulations are misinterpreted – unintentionally or on purpose –, it is important to agree on a set of terms and definitions that is as precise and easy to handle as possible.

**In this Code,**

Cookie means an electronic file which is stored by an Internet provider on the computer of the user in order to store certain data of the user and/or his computer and make them available to the provider.

Customer means a person buying goods or services over the Internet.

Deep linking means the use of hyperlinks to make references to particular parts of a website without going to the homepage.

Frame means a special part of a homepage where general information is displayed apart and independently of other contents of the website.

Hyperlink means any technical tool which permits the linking of one homepage to another.

Inline linking means the use of frame technology in a way that conceals the true origin of the information displayed within the frame.

Intermediary service means the person who is carrying out the process of accumulating consumers on the Internet, thereby serving as a intermediary between merchant and consumer group.

Internet auction means the sale of goods through bidding that is carried out over the Internet.

Merchant means a person selling goods or services over the Internet.

Metadata means data which is used as part of the HTML code to identify the content of a website.

Person means a human being as well as a legal entity and any other third party.

Power shopping describes an accumulation of consumers that is gathered through over the Internet in order to buy goods or services at a reduced price that is granted by the providers of goods or services merchants to buyers that order large quantities of the product or service in question.

Resource means content, i.e. any material accessible via the Internet, regardless of the specific transmission protocol.

This is to extend the Code's scope beyond the main way of communication via the WWW (HTTP protocol) and to ensure that protocols such as FTP, SMTP, POP etc. are included. It should be clear that most regulations apply to Internet content and cannot be avoided by simply using a technically different communication channel. The advantage of such broad definition is that it covers a large variety of material distributed via the Internet (e.g. audio files, software, graphics) and need not be changed if technology extends existing standards or advances beyond the WWW.

Technological terms related to the communication on the Internet itself, not its content, are to be understood by the standards definitions of the WWW consortium.

This is to assure that regulations concerning technical issues cannot be misinterpreted. By using technical terms in compliance with the internationally accepted standards, their meaning will be capable of being understood beyond the scope of this Code of Conduct. The use of such terms also avoids the need to define each technological term specifically. Such information is available at <http://www.w3.org/>.

User means the person requesting resources via the Internet.

### Section 3 – Regulations

#### I. General Provisions as regards Commercial Communication

[General requirements on resources] Resources provided on the Internet should not be false or misleading. They should be clear, comprehensible and valid. It should be possible to identify the person responsible for the resource. Identification information should include the name and legal form of the person, full name of the authorised representative, full postal and eMail address as well as digital or non-digital registration numbers or certificates suitable or used in off-line contexts for identification purposes, i.e. Trade register numbers, VAT numbers etc., digital certificates etc.

The last part does not specify what kind of registration number would be appropriate with regard to the fact that specific means of registration and identification may differ from country to country.

[Accessibility] Resources should be designed in a way that allows the user to access identification information directly, regardless of which hierarchic level of the information system resources are requested. The user should not need more than two steps to obtain the identification information. Online advertisers should not covertly disable the back button of the customer's browser or appliance or otherwise interfere with a visitor's ability to exit a site.

[Presentation] Identification information should be presented accurately, should be readily accessible online and be (in addition) provided in a printable version. The design of identification information should not be easily overridden by the users' software settings.

The last part assumes that the possibility of presenting information in one specific way on the Internet is limited by technology.

[Transparency] Commercial communication has to be clearly and unambiguously identifiable as such, as soon as it is received by the recipient. In a context where it is difficult to distinguish between editorial content and advertising, the advertising should be labelled as such.

[Limited and transparent collection of data] It is not suitable to collect more information on the user than is voluntarily and knowingly given by the user.

If user information is supposed to be processed or used for other purposes than the single electronic commerce transaction, the user must be notified and must be given the opportunity to object.

This is to ensure that user information is not exploited unless the user is aware of it and has stated his or her consent prior to further processing. This regulation is intended to avoid unauthorised and covert collection of user information through online observation of eMail or IP addresses, the user's hard- or software or data related to the connection.

[Embedding sanctions in contract] Host providers and other persons in an intermediary position between merchants and consumers should ensure that, within the context of contracts which they enter into, they provide for effective sanctions that can be enforced against persons who break this Code of Conduct.

[Complaint procedures] Host providers and other persons in a mediary position between merchants and consumers should provide for sufficient complaint procedures. They should reserve themselves the right to remove a resource from the Internet that is the subject of a substantial complaint until the dispute is settled.

#### II. Provisions regarding specific Means of Communication

##### 1. Commercial Electronic Mail Messages

Introductory note: The League discovered that there are different opinions on the legality of unsolicited electronic mail messages. Some countries seem to prefer opt-in solutions; others adhere to opt-out principles. The League decided to take the opt-out model as a minimum standard for the code irrespective of further discussions.

[Directories] No person should initiate the transmission, conspire with another to initiate the transmission or assist in the transmission of a commercial electronic mail message if the addressee is listed in "robinson" directories stating that the addressee objects to receiving commercial electronic mail messages except on explicit request.

[Do not contact policy] Online businesses that engage in unsolicited email marketing should identify their postings as an advertisement in

the subject of their message. In addition, they have to post and adhere to a "Do not contact" policy that at least enables those customers who do not wish to be contacted online to "opt out" online from future solicitations. This policy should be available both on the website and in any email other than those relating to a particular order. The technical facilities for "opting out" should be easy to handle and react in a short time.

[False or misleading subject lines] No person should initiate the transmission, conspire with another to initiate the transmission or assist in the transmission of a commercial electronic mail message if the sender knows or has reason to assume that the message contains false or misleading information in the subject line.

[Concealed origin or transmission pass] No person should initiate the transmission, conspire with another to initiate the transmission or assist the transmission of a commercial electronic mail message if the sender knows or has reason to assume that his message misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message.

## 2. Frames and Hyperlinks

[Notification, objection] A person whose web pages or other resources accessible via the Internet are pointed to by frame or hyperlink technique should be notified upon publication of the frame or the hyperlink unless the link points to informative or educational content. No person should continue pointing towards other person's resources if there is knowledge or a substantial reason to assume that the other person objects that frames or hyperlinks point towards its resources.

A notification upon publication should only be pursued if it is possible to fulfil this requirement with reasonable effort. Nevertheless, if there is clean objection or substantial reason to assume objection, it must be ensured that the person does not continue using frames or hyperlinks.

[Inline linking] If frames are used to display information of a third party, the true origin of the information should be clearly and unmistakably visible. It is not sufficient that merely the third party's URL appears

in the URL column. Use of third party's information should be indicated directly by the link pointing towards the information itself or directly in relation to that link. Neither the link itself nor the frame design should suggest otherwise.

[Deep linking] It is not suitable to exploit the third party's work, contacts, references or its effort in collecting, processing or presenting the information by misrepresenting it as one's own.

[Correctness] If hyperlinks are used, this should not be done in a misleading or hostile context. A hyperlink should always show an objective relation to the content to which it is directed. In particular online advertisers should not mislead online customers by creating the false impression of sponsorship, endorsement, popularity, trustworthiness, product quality or business size through the misuse of hyperlinks, other technology, or another's intellectual property.

## 3. Metadata

[Correctness] Metadata should be correct and give a reasonable summary of the document they are part of. No person should set metadata that is suitable for generating confusion or that is likely to conceal the documents' true content.

[Intended use] Metadata should not be misused with the intention of obtaining an inappropriate ranking in search engine results.

[Competitors] Metadata should not give the impression that information of competitors or third parties is used with their permission if this is not the case.

## 4. Cookies

[Optionality] The user should be informed as to the intended purpose of a cookie. Cookies cannot be used unless there is a prior express consent of the person concerned. There should be no disadvantage in access, use or functionality of the system if cookies are not accepted.

[Expiration] Cookies should always have a reasonable expiration date.

### 5. Power shopping

Power shopping/community shopping is a useful instrument if the customer knows the price at the moment it is ordered. If customers act on a merchant's decision to grant reduced prices if a product is ordered in large quantities, it is not up to the merchant to change that decision or to exclude power shopping by customers. Since both parties may benefit from power shopping – the merchant may sell, in total, more products than without the benefit of power shopping while the customer is able to buy at a reduced price – it seems to be more a matter of business decisions than a question of self-regulation.

Nevertheless, persons who provide the intermediary services should respect a merchant's decision not to engage in power shopping. The question is whether the responsibility on this matter should rest with the intermediary service (so that the intermediary service would be requested to be aware of the merchants' power shopping policies) or with the merchants (so that the merchants would have to be aware of power shopping activities and come to a decision whether power shopping is welcome or not).

[Principle] Intermediary services should only engage in power shopping with merchants who offer goods or services at a reduced bulk price.

[Merchants] Intermediary services should make clear on which terms a merchant is chosen as a power shopping partner. The criteria should be objective, related to the purpose, transparent and accessible. It should also be transparent in which way merchant and intermediary services are related, e.g. by contract.

[Customers] Intermediary services should provide for transparent terms on which customers are eligible to take part in power shopping. The criteria should be objective, related to the purpose, transparent and accessible. Persons related to merchants that are power shopping partners of the intermediary service should be excluded from power shopping with the merchant they are related to.

[Registry] Intermediary services should register their customers prior to power shopping.

### 6. Internet Auctions

[Principle] Persons hosting auctions on the Internet should provide for a comprehensible description of the auction process and notify the user of the auctions' character.

[Customers] Auction services should provide for transparent terms on which persons are eligible to take part in the auction. The criteria should be objective, related to the purpose, transparent and accessible.

[Registry] Auction services should register their customers prior to the auction.

### Section 4 – Enforcement

Introductory note to this section: This Code is meant to help organizations or any other concerned body to build up their own system of regulating online marketing. In particular, it might be used as a sample for drafting voluntary codes of conduct (perhaps in combination with a quality label system). Therefore, enforcement depends on the possible sanctions within the organization concerned.

[Measures] Breach of this Code can be enforced inter alia by

1. Publication of the act leading to the breach, including the person responsible, in journals or websites, also including the site of the offender.
2. Notification of the offender and a request to stop the offensive behavior.
3. Taking the questionable material off the Internet.
4. Requesting the offender to pay a substantial fine without prejudice to damages.

[Complaint procedure] Everyone should have the possibility to submit complaints to the concerned body, which provides a sufficient administrative process in which the complaint can be settled in a simple and quick way.

[Dispute resolution procedure] Online merchants should use at least one mechanism that provides customers with either a guarantee of satisfaction or a fair method for resolving differences with regard to a transaction. If an online merchant offers third party dispute resolution, it should use a trusted third party that offers impartial, accessible, and timely dispute resolution procedures that are free to customers or at a charge to customers that is not disproportionate to the value of goods or services involved in the dispute. Online merchants should provide

customers with easy-to-find and understandable contact information for such third parties, including a link to any third party sites used for such means.