

Spam Enforcement in Austria

Legal basis

- Directive 2002/58/EC – Directive on privacy and electronic communications, Art. 13
- Austrian Telecommunications Act 2003, Art. 107

Directive 2002/58/EC

Article 13

Unsolicited communications

1. The use of automated calling systems without human intervention (automatic calling machines), facsimile machines (fax) or electronic mail for the purposes of direct marketing may only be allowed in respect of subscribers who have given their prior consent.
2. Notwithstanding paragraph 1, where a natural or legal person obtains from its customers their electronic contact details for electronic mail, in the context of the sale of a product or a service, in accordance with Directive 95/46/EC, the same natural or legal person may use these electronic contact details for direct marketing of its own similar products or services provided that customers clearly and distinctly are given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details when they are collected and on the occasion of each message in case the customer has not initially refused such use.
3. Member States shall take appropriate measures to ensure that, free of charge, unsolicited communications for purposes of direct marketing, in cases other than those referred to in paragraphs 1 and 2, are not allowed either without the consent of the subscribers concerned or in respect of subscribers who do not wish to receive these communications, the choice between these options to be determined by national legislation.
4. In any event, the practice of sending electronic mail for purposes of direct marketing disguising or concealing the identity of the sender on whose behalf the communication is made, or without a valid address to which the recipient may send a request that such communications cease, shall be prohibited.
5. Paragraphs 1 and 3 shall apply to subscribers who are natural persons. Member States shall also ensure, in the framework of Community law and applicable national legislation, that the legitimate interests of subscribers other than natural persons with regard to unsolicited communications are sufficiently protected.

Austrian Telecommunications Act 2003 (=TKG), Art. 107

Unsolicited communications

- § 107. (1) Calls, including facsimile transmissions, for marketing purposes shall not be permitted without the prior consent of the subscriber. The consent of the subscriber shall be equivalent to the consent of a person authorised by the subscriber to use his line. The consent given may be withdrawn at any time; withdrawal of the consent shall not have an impact on any contractual relationship with the addressee of the consent.
- (2) The sending of electronic mail – including SMS messages – without the recipient's prior consent shall not be permitted if
1. the sending takes place for purposes of direct marketing or
 2. is addressed to more than 50 recipients.
- (3) Prior consent to electronic mail pursuant to subsection (2) shall not be required if
1. the sender has received the contact details for the communication in the context of a sale or a service to his customers and
 2. the communication is transmitted for the purpose of direct marketing of his own similar products or services and
 3. the recipient clearly and distinctly has been given the opportunity to object, free of charge and in an easy manner, to such use of electronic contact details when they are collected and on the occasion of each message in case the customer has not initially refused such use and
 4. the recipient has not rejected from the start the sending in particular by entering on the list mentioned in § 7 (2) E-Commerce Act.
- (4) (abrogated)
- (5) The sending of electronic communications for purposes of direct marketing shall be prohibited in any case if the identity of the sender on whose behalf the communication is transmitted is disguised or concealed or if there is no valid address to which the recipient may send a request that such communications cease.
- (6) If administrative offences pursuant to subsection (1), (2) or (5) have not been committed in Austria, they shall be considered as having been committed in the place where the unsolicited communication reaches the subscriber's line.

NON-BINDING TRANSLATION

Differences

- Art. 13:
- Only calls without human intervention
- Only electronic mails for purposes of direct marketing
- Art. 107:
- Any kind of cold call
- Includes electronic mails without advertising content, if sent to more than 50 recipients

Art. 107 para. 6 TKG

- (6) If administrative offences pursuant to subsection (1), (2) or (5) have not been committed in Austria, they shall be considered as having been committed in the place where the unsolicited communication reaches the subscriber's line.
- **In practice no administrative penal proceedings against foreign suspects!!!**
- **EXCEPTION:** the perpetrator is located in Germany; bilateral treaty concerning administrative and legal cooperation in administrative (penal) proceedings

Spam Authorities I

- 4 Telecommunications Offices (=TO) in Austria
- Subordinate to the Federal Ministry of Transport, Innovation and Technology (BMVIT)
- 90% of work of the Telecommunications Offices refer to issuing authorizations for radio systems
- Approx. 130 employees...
- ...but only four of them responsible for spam enforcement

Spam Authorities II

- Only responsible for the enforcement of Art. 107 TKG
- Cases with suspicion of fraud or other relevant criminal / penal behavior: responsibility of police, public prosecution departments and courts
- According to Art. 107 TKG spam is an administrative offence
- No prison sentences but fines up to EUR 37.000,-- (substitute confinement if fine cannot be collected)
- Right to appeal to the Independent Administrative Tribunals

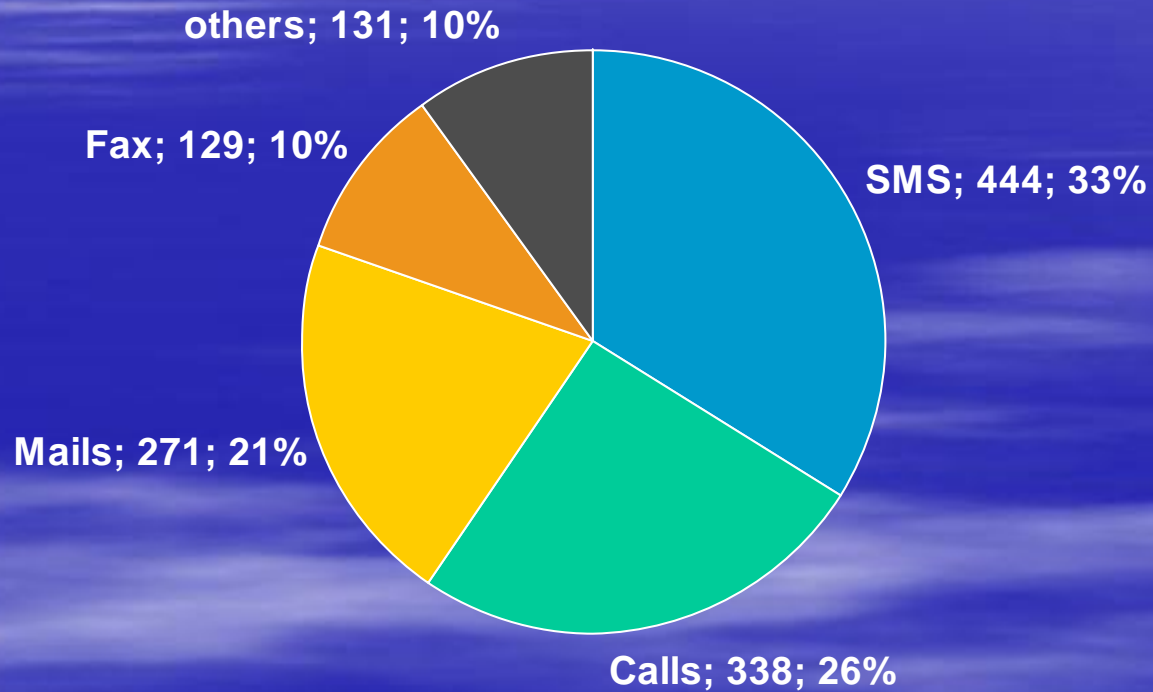
Some of the difficulties to contend against

- Only master data available for TOs: Number or IP-address always necessary for further investigation; dynamic IP-addresses!
- No headers
- Electronic mails are deleted after reception
- Complainants do not cooperate
- Statute of limitation after 6 months
- Lack of personnel resources

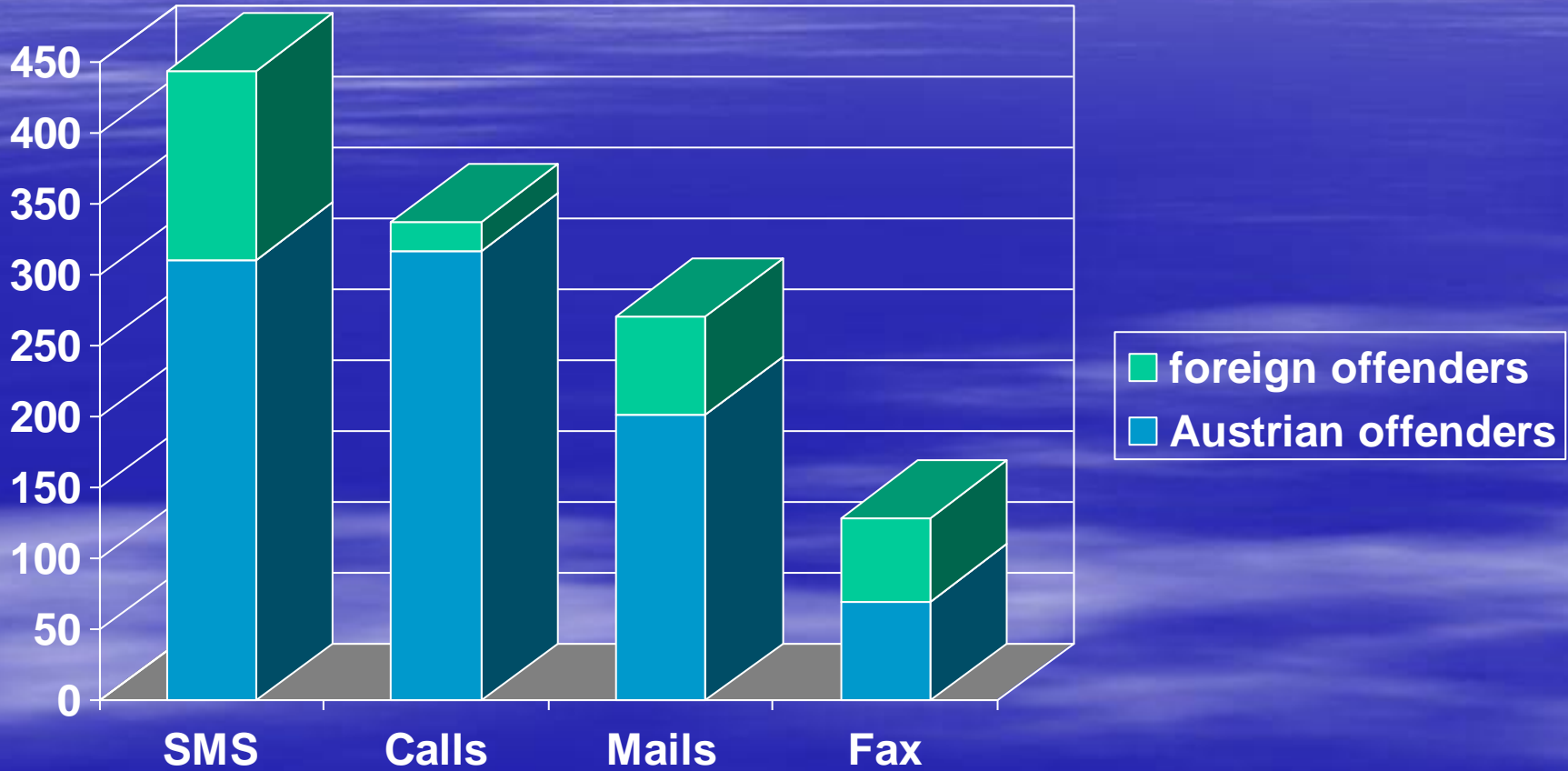
General remarks on complaints

- TOs responsible for all complaints concerning the violation of the TKG
- In the jurisdiction range of the TO Vienna 90% of complaints refer to violations of Art. 107
- Major part of the complaints refer to Austrian offenders, “small fry”
- So far no major cases known where spam was sent from Austrian spammers

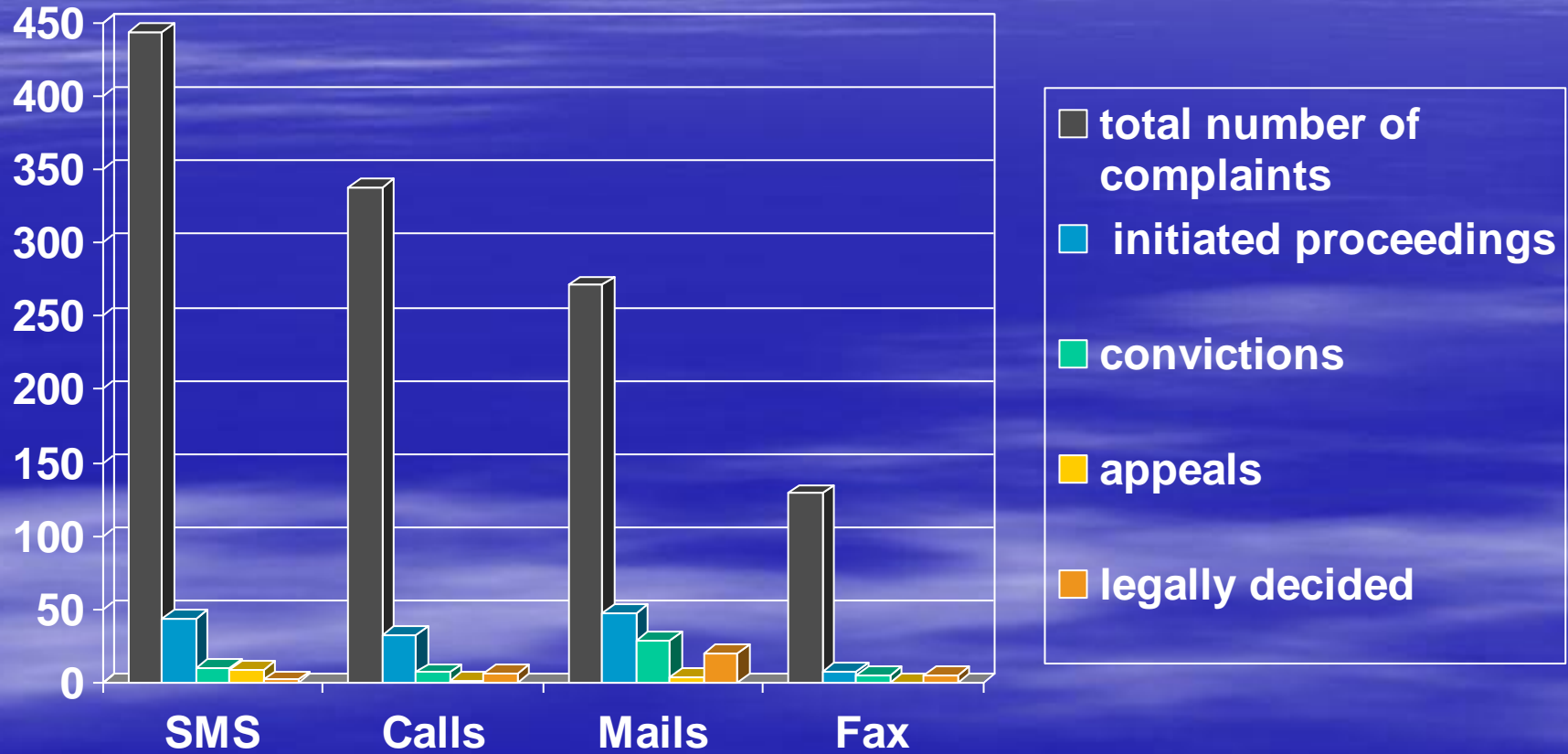
Complaints 2008



Complaints 2008 II



Complaints 2008 III



Discrepancy

number of complaints / convictions

- Statute of limitation
- Missing cooperation of the complainants
- Suspect cannot be tracked down
- Prior consent is proven during investigation
- Possibility to refrain from a penalty (guilt of a minor degree)
- Lack of personnel resources

Cooperation with other Spam Authorities I

- In 2008 various complaints concerning fax spam
- No information about the number of the line from which the faxes were sent
- Contact information a Dutch number
- Cooperation with OPTA in investigating on that case
- Deactivation of the number

Cooperation with other Spam Authorities II

- In 2008 various complaints concerning fax spam
- No information about the number of the line from which the faxes were sent
- Contact information a British number, advertising company located in Gibraltar
- Information Commissioner's Office (GB) was informed

Wishes for the future

COOPERATION

COOPERATION

COOPERATION

Thank you for your attention!

Mag. Nikolaus Koller
Telecommunications Office for Vienna, Lower Austria and Burgenland
Höchstädtplatz 3, 1200 Vienna
Austria