

The New EU General Data Protection Regulation

What will change for email senders?

From 25 May 2018 on, the new EU General Data Protection Regulation (GDPR) will apply in all Member States of the European Union. What will that mean for the commercial use of data, particularly in the field of email marketing? Is everything going to change? Is it even possible to continue to use the data that has been collected to date?

The following table compares the current legal situation under the German Federal Data Protection Act (BDSG) and the German Act Against Unfair Competition (UWG) with the new General Data Protection Directive. The focus is on the relevant requirements for legal email marketing, and will hopefully clarify matters for senders at a glance.

	Current legal situation in Germany (BDSG, UWG)	From 25 Mai 2018, GDPR
Is Consent Required?	<ul style="list-style-type: none"> • Consent required • Exception: Existing customer relationship (Para. 7 (3) UWG), N.B.: restrictive application 	<ul style="list-style-type: none"> • Consent required • Weighing up of interests • Exception: Existing customer relationship(Para. 7 (3) UWG), N.B.: restrictive application •
Formal Requirements for Consent	<ul style="list-style-type: none"> • Voluntary • Active, explicit • Concrete • Transparent • Strictly in written form • Prohibition of coupling 	<ul style="list-style-type: none"> • Voluntary • Active, explicit • Informed (related to the concrete case) • Written form not explicitly required (though recommended, see below) • Prohibition of coupling
Ability to Give Consent	<ul style="list-style-type: none"> • Not clearly defined 	<ul style="list-style-type: none"> • From 16 years of age

Obligation of Proof	<ul style="list-style-type: none"> Burden of proof for the user of the declaration of consent, therefore a written declaration of consent, double opt-in procedure etc. are recommended 	<ul style="list-style-type: none"> Burden of proof for the user of the declaration of consent (burden of accountability), therefore a written declaration of consent, double opt-in procedure etc. are recommended
Possibility to Revoke	<ul style="list-style-type: none"> Must be possible at all times without any undue effort 	<ul style="list-style-type: none"> Must be possible at all times without any undue effort
Legal Notice (Impressum) Required?	<ul style="list-style-type: none"> Must be included in every email 	<ul style="list-style-type: none"> Must be included in every email
Sanctions in Case of Violations	<ul style="list-style-type: none"> Warning costs, liability for damages in Germany under Act Against Unfair Competition (UWG), the Telemedia Act (TMG), German Civil Code (BGB) up to several 100,000 Euro 	<ul style="list-style-type: none"> Warning costs, liability for damages in Germany under UWG, BGB, TMG Fines up to 20,000,000 Euro or 4% of the total annual turnover of the company, whichever is higher

Summary:

When comparing the current legal situation in Germany with the future situation, it quickly becomes clear that the requirements for a legal declaration of consent and other important requirements for commercial email sending are basically the same. Existing consent to the use or transfer of personal data which were conform with the German Federal Data Protection Act (BDSG) stays valid, insofar it conforms with the basic requirements of the GDPR. The much harder sanctions must be considered; not only does an email sender stand to damage their reputation if they violate the regulation, but they also face millions of Euros in fines.

A detailed discussion of the requirements for legal email marketing and the most important points on the GDPR can be found in the current issue of the eco Directive for Permissible Email Marketing (<https://certified-senders.eu/wp-content/uploads/2016/09/Marketing-Directive.pdf>).

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