

The Declaration of Consent in E-Mail-Marketing According to the GDPR

It hasn't arrived yet, but a lot is already being written and said about it: As of 25 May 2018, the General Data Protection Regulation (GDPR) comes into effect throughout Europe. And it's raising a lot of questions. One question that plays a very relevant role in the context of e-mail marketing is how a declaration of consent should be formulated so that it complies with the GDPR.

What is understood as consent according to the GDPR?

Consent is, according to Article 4(11) GDPR, "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her".

What does that mean exactly?

The individual points will be explained in the following:

1. **Unambiguous:** The consent must be given expressly - that means deliberately and actively - by the owner of the data. This can be in written form, through a signature from the consenting party, or electronically, through ticking a check-box. A pre-selected check-box therefore does not fulfill this requirement.
2. **Freely given:** The consent assumes a voluntary decision, which means without pressure or coercion. According the GDPR, consent is not considered to be freely given "if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment".
3. **Separate from other declarations:** Closely related to the free choice aspect is the prohibition on combining the consent with other agreements. Consent for the use of personal data, as is required for the use of an e-mail address for marketing purposes, must not be connected to other declarations. For example, the consenting party must have the choice of whether he or she, alongside giving

consent for the conclusion of a purchase contract, also wishes to provide consent for the processing of his or her personal data for marketing purposes.

4. **Informed:** Users must be informed in an understandable manner, BEFORE providing their consent, of the purpose for which their data will be processed - the kind and the extent of processing - as well as whether the data will be forwarded to third parties and when the data will be deleted. The information needs to be as specific as possible. It would not be sufficient to formulate the declaration of consent text in this way: *"Register for our newsletter to receive information about our services."*

The consenting party does not know what to expect and which services he or she will receive information about.

5. **Capacity to provide consent:** The minimum age for providing legal consent is not unambiguously defined in the current legal situation. This will change with the GDPR. The GDPR places the minimum age for the capacity to grant consent at 16 years. However, the EU Member States have the possibility of making provisions for a lower age limit (minimum 13 years).

According to Article 8 GDPR the minimum age of 16 is required for offers of information society services made directly to a child. Whether that means that the offers specifically or exclusively serve the interests of the child¹ or whether the protection is also valid for offers that are equally interesting to adults and children², is currently subject to a range of different interpretations. It is yet to be seen how this develops in practice and in case law, and which position will be represented by the majority. The CSA will keep you up-to-date on the developments.

6. **Burden of proof:** If data processing occurs on the basis of consent, the data processor must provide evidence, according to the accountability regime in the GDPR, that the affected person provided consent for the data processing.

As a result of this burden of proof for the processor regarding the consent, logging is required for electronic consent. The record should include the declaration of consent text and the unambiguous identification of the affected person (incl. the type of verifying authentication, e.g. Double-Opt-In with the e-

¹ DS-GVO Kommentar, Gola, 2017, Art. 8 Rdnr. 15

² BayLDA, EU-Datenschutz-Grundverordnung (DS-GVO) XV

mail address of the affected party) and the time of consent. Warning: The Double-Opt-In e-mail must be free of advertising!

In short: Not all declarations of consent are equal. In Germany, the requirements for legal consent will not change significantly. However, from May 2018 at the latest more care than ever will be necessary, because the GDPR makes provisions for fines of up to 20 million Euro for violations. eco has summarized the most important requirements for legal e-mail marketing in the “eco Directive for Permissible E-Mail Marketing”. More about the directive can be found here certified-senders.org/wp-content/uploads/2017/07/Marketing-Directive.pdf.

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