

Obligation to Delete vs. Burden of Proof

Outline of the Problem

In practice, CSA senders and their customers are faced with the problem that a recipient of an email (= data subject) can demand the deletion of their data, while at the same time the possibility exists that proof of the data subject's previous consent may need to be produced at some stage in the future. Such a situation might arise if the data subject seeks legal redress directly or through associations that are authorized to institute legal proceedings, if the data protection authorities are involved, or in connection with participation in the CSA. If all data of the data subject were to be deleted, the required proof of consent can necessarily no longer be produced.

It is beyond dispute that there is fundamental tension between a data controller's obligation to delete and the burden of proof of a sender for consent data. So, what must and can a sender or the customer do? The following information based on the General Data Protection Regulation (GDPR) is designed to give practical orientation.

Legal Situation

The right to deletion is regulated in Art. 17 GDPR. According to this provision, in the area of email marketing, the data controller must in principle delete the data when the data subject withdraws consent for marketing (see. Art. 17 Para. 1 b GDPR) or objects to the processing of data as set out in Art. 21 GDPR (Art. 17 Para. 1 c GDPR).

However, the right to deletion is not without exception. Rather, the GDPR itself defines exceptions in which there is no obligation to delete:

In Art. 17 Para. 3 GDPR, five exceptional situations are set out, in which the data controller has the possibility to refrain from deletion. For the area of email marketing, the assertion, exercise, or defense of legal claims can be considered as an exception, specifically the question of a (potential) obligation to provide proof of consent (Art. 17 Para. 3 e GDPR).

Defense of Legal Claims, Art. 17 Para 3 e GDPR

According to Art. 17 Para. 3 e GDPR, the obligation to delete is waived if the data is required for the establishment, exercise, or defense of legal claims. This exemption from the obligation to delete is designed to prevent the loss of evidence. In this, it is not limited to the pursuit of claims in a court of law. On the contrary, processes settled out of court are also covered.¹

This regulation applies without problem when the establishment, exercise, or defense of legal claims is already in process or is planned, for example, when a legal dispute is pending or has been threatened.

In the case that a legal dispute is not pending, but is merely an abstract possibility, a variety of positions are represented in the legal literature on the subject of the obligation to delete and the possibility to retain. Unfortunately, there have not yet been any relevant decisions made by courts or data protection authorities. However, we regard as convincing the view that also in these cases the continued retention of the consent data for the purpose of providing evidence of consent is permissible for a certain period of time. Because the data controller/sender must have the possibility to be able to defend themselves in the case of a legal dispute also in these cases. Without the possibility to retain the relevant data, the data controller /sender would suffer just such a loss of evidence that should be prevented through the regulation of Art. 17 Para. 3 e GDPR.

A good standard for the permissible retention period is the statute of limitations (in Germany, this is three years for claims by the complainant and fines for infringements of data protection law). Required data are the declaration of consent, the email address, the "place" and time of the data collection and the DOI. In the case of a reliance on a customer relationship, the legal prerequisites as set out in § 7 Para. 3 German Unfair Competition Act, and Article 13 Para. 2 ePrivacy Directive (2002/58/EG) must be documented. That means that it must be in relation to direct marketing for the company's own similar products or services, the customer must not have withdrawn consent for the use of their data, and the customer must be informed clearly and unambiguously at the time of collecting the address and for every use of it, that consent can be withdrawn at any time without incurring any costs other than the standard transmission costs according to the basic tariff.

In as far as use is made of the above-mentioned possibility for continued retention, it is urgently recommended to document this in detail in the records of data-processing activities required by the GDPR (why, despite the deletion request, the data has not been deleted, but rather retained for the period X, what will occur with the data during this period, etc.).

¹ M.w.N. Kühling/Buchner, DSGVO Kommentar, Art. 17. Rn. 83; Erwägungsgrund 52.