

# Germany's consent requirement for advertising creates confusion

**Katharina A. Weimer** explains how to reach your customers now that the grace period for amendments to the German Data Protection Act has expired.

In 2009, the German Federal Data Protection Act (*Bundesdatenschutzgesetz* – the “Act”) was amended in two stages. The first change altered the landscape regarding scoring and similar instruments used by credit and other agencies. The second change brought about some fundamental changes to the Act regarding the general use of personal data and the requirements for proper use. Some of the most noteworthy changes are the introduction of a breach notification duty, a strengthening of the position of the data protection officer and of the data protection authorities, and amendments to the provisions on the use of personal data for advertising and address dealing purposes.

The latter has caused considerable stir and uncertainty not only in the advertising industry, but generally with

businesses that use personal data for promoting their products or services. While the provisions lacked clarity even prior to the changes, the amendments made to them are not of the kind that facilitates ease of reading of legal texts. The legislator's initial intention was clear: among others, to strengthen the individual's position by making the use of personal data dependent on the data subject's consent, and to achieve more transparency, especially regarding the data flow, for the data subject. However, during the process, the legislator gave heed to the voices of the industry, and severely curtailed these intentions by providing several important exceptions. The good news resulting from this is that the use of personal data for advertising purposes is still permissible to a great extent. The bad news is that it's complicated.

Three years into the experience there still is significant confusion about what is permitted and what should be avoided. Luckily, the law provided for a grace period for companies to familiarise themselves with the new requirements. This grace period for personal data collected or stored prior to 1 September 2009 (“old data”) expired on 31 August 2012. Regarding personal data collected and/or stored after 1 September 2009, the new provisions already applied, while old data benefited from the grace period. However, since the full force of the law now hits all personal data that is used for advertising purposes, a refresher of what is permitted and in which circumstances, is of benefit to companies, especially to those businesses that have failed to obtain proper consent from the concerned data subjects within the grace period.

### PERMISSION TO COLLECT PERSONAL DATA

Section 28 of the Act regulates the collection, storage and other use of personal data for own purposes conclusively within the Act. This provision contains several important permissions for the use of personal data. In its first paragraph, it provides for the permission to collect, store, change or transfer personal data for own purposes if this is necessary for the contractual or quasi-contractual relationship with the data subject, if necessary for the legitimate interests of the data controller (i.e. the company that collects and “owns” the data) and there are no overriding interests of the data subject, or if the data are publicly available. Changes to this paragraph were restricted to editorial changes.

### USE FOR ADVERTISING

Section 28 para 3 et. seq. of the Act is where advertisers will focus their attention. The English translation of the text reads as follows:

*“(3) The processing or use of personal data for purposes of advertising or trading in addresses shall be lawful if the data subject has given his or her consent and, if such consent was not given in written form, the controller proceeds in accordance with subsection 3a. In addition, processing or use of personal data shall be lawful where the data consist of lists or other summaries of data from members of a category of persons defined only in terms of the data subject’s membership of this category, his or her occupation, name, title, academic degree(s), address and year of birth, and where processing or use is necessary*

1. *for purposes of advertising from the controller which collected the data, except for information on membership of the category, from the data subject under subsection 1 first sentence no. 1 or from publicly accessible sources such as telephone or business directories,*
2. *for purposes of advertising in view of the data subject’s occupation and at his or her work address, or*
3. *for purposes of soliciting donations eligible for tax concessions under Section 10b (1) and Section 34g of the Income Tax Act.*  
*For purposes under the second*

*sentence no. 1, the controller may record data in addition to the data referred to there. Summarised personal data under the second sentence may also be transferred for advertising purposes if the transfer is recorded in accordance with Section 34 (1a) first sentence; in this case, the advertisement must clearly identify the body which first collected the data. Regardless of whether the conditions of the second sentence are met, personal data may be used for advertising third-party offers if the data subject can clearly identify from the advertisement the controller responsible for using the data. Processing or use as referred to in the second through fourth sentences shall be lawful only where it does not conflict with legitimate interests of the data subject. Data transferred under the first, second and fourth sentences may be processed or used only for the purpose for which they were transferred.<sup>1</sup>”*

Further provisions of the Act provide for regulation on how to obtain consent (section 28 para 3a), permission regarding dependability of a potential contract on consent by the data subject (section 28 para 3b), and relating to objections to data processing for advertising as well as information obligations (section 28 para 4), all of which will be addressed further below.

To reiterate: The original intention of the reform was to make the processing and use of personal data for advertising purposes dependent on the data subject’s consent. However, this has only become the general principle – with numerous exceptions. While it is beneficial for businesses to have exceptions that permit marketing communication to (potential) customers, the language of the amended provisions is difficult to understand and companies tend to struggle when trying to find a permissible way of advertising their goods and services. Giving up (by either not advertising at all, or ignoring the new rules) is not an option though: the enacted changes also considerably increase the amount of fines that can be issued by the data protection authorities to up to 300,000 per instance (section 43 of the Act). Thus any company wishing to use personal data for advertising purposes is well advised

to spend a little time in understanding the new rules, and apply them.

### VALID CONSENT

Principally, for consent to be valid it needs to be freely given, and the data controller needs to provide sufficient information to the data subject. Another requirement is a right to revoke consent at any given time. Generally, consent needs to be in written form (section 4a of the Act). The reform of the Act eases the requirement of written form for the purposes of advertising in section 28 paras 3 and 3a of the Act:

- It can be obtained in written form, but not a “must”.
- If consent is not in writing, the data controller has to confirm the content of the consent to the data subject in writing.
- If consent has been declared electronically, no written confirmation is necessary if the data controller ensures recording the consent and availability of its content for the data subject and revocability at any given time with effect for the future.

It is important to note that any consent obtained during a telephone conversation does not fall within the electronic form facilitations but requires a written confirmation. It is also important to be aware that any such telephone conversation for the purposes of advertising must either be initiated by data subjects themselves, or must be pre-approved by the data subject by prior opt-in pursuant to the Act against Unfair Competition<sup>2</sup>.

### THE LIST PRIVILEGE

While obtaining consent is in principle a requirement for processing and using the data for advertising purposes, this rule is broken by one major exception: the so-called “list privilege” has been maintained in the new legislation. The list privilege permits the processing and use of personal data that is collected in a list or similar arrangement. The permissible data categories are limited to the following information on data subjects that belong to a certain group:

1. The fact that the individual data subject is part of that group (i.e. “all customers of company X”, “all physicians in Munich”)
2. Name

3. Title
4. Academic degree
5. Job title, industry name, or business name
6. Address (important: only the postal address, not the email address)
7. Year of birth (important: only the year, not exact birthday).

The purposes for which the list data may be processed and used are also limited. The processing or use must be necessary (and not merely convenient) for:

- Purposes of advertising own offers of the data controller if the data controller has collected the list data (except for the fact that the data subject belongs to said group to which the list pertains) from the data subject itself for a contractual or quasi-contractual relationship with the data subject (as set forth in section 28 para 1 no. 1 of the Act), or the data is publicly available;
- Purposes of advertising with regard to the professional occupation of the data subject – such advertising must be sent to the business address of the data subject;
- Purposes of advertising for donations.

The law permits the adding of additional data that the data controller has legitimately collected to the list data in situations falling under the first bullet point above (advertising for own offers). This highly relevant exception allows the operation of customer relationship management tools and storage of customer product preferences. However, the creation of entire profiles of customers is not permitted through this exception, as it does not fall within the purposes for which the additional data was originally collected.

Dealing with list data is permitted under section 28 para 3 sentence 4 of the Act if the transfer is recorded and every advertisement for which the transferred list data is used identifies the data controller that originally collected the data.<sup>3</sup> In addition, this advertisement (like any other advertisement) must contain the information on the right to object to the processing and use of personal data for advertisement purposes that is guaranteed under section 28 para 4 of the Act. This provision also requires the data controller to identify itself in the advertisement.

Contrary to the legislator's original intentions of limiting the advertising use of personal data to advertising for own goods and services, advertising for third parties (e.g. as enclosed advertising or as "recommendation advertising") remains permissible. The requirement to identify the data controller that is responsible for this use of personal data in every advertisement (i.e. not the third party whose goods and services are advertised) is the only concession made to achieve a certain level of transparency. In these circumstances, it is all the more important to provide sufficient information to the data subjects on their right to object to the data processing (section 28 para 4 of the Act).

Any processing, transfer and use of list data is subject to a balancing of interests: it is only permissible if there are no overriding interests of the data subject. While this seems to be a negligible requirement the data controller should take care to document that such a balancing has actually taken place, for instance by maintaining a protocol of a relevant discussion or recording a note/memorandum on the weighted interests, pros and cons of such an advertisement.

### YOUR CHECK-LIST

If your company wants to address advertising to individuals, the following points need to be checked, and the rules applied accordingly<sup>4</sup>:

- Does the company have the data subjects' valid consent to use their data for advertising in the intended way? Lacking consent, generally only data that falls under the privilege of list data can be used. If not:
  1. Does the company have a list of data that contains no more than the permitted information?
  2. What is the origin of such list data? The data subject itself (from a contractual or quasi-contractual relationship with the data subject), publicly available registers, address dealers? Then such list data may be used for advertising for own products.
  3. Will the data also be used for advertising of third party products? Ensure that the origin / the owner of the personal data is identified

unequivocally in the advertisement.

4. Ensure that every advertisement contains information on the right to object to the receipt of such advertisement.
5. Does your company want to transfer the data to a third party? Ensure that such transfer is recorded, and oblige the third party to identify your company as the origin of the personal data, and, if possible, to generally comply with the applicable data protection provisions.
6. Ensure that any data that is added to the list for certain data subjects stems from legitimate sources.
7. Review the data subject's legitimate interests and record any such review and balancing.

With these check-points in mind, companies should be in a position to evaluate whether the campaign they are about to launch complies with the Act.

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### REFERENCES

- 1 For an English translation of the full text, see [http://www.bfdi.bund.de/cfn\\_134/EN/DataProtectionActs/DataProtectionActs\\_node.html](http://www.bfdi.bund.de/cfn_134/EN/DataProtectionActs/DataProtectionActs_node.html).
- 2 The Act against Unfair Competition contains rules on the permissibility of unsolicited advertising in its section 7. According to this provision, telephone advertising to consumers requires the express prior opt-in; for email advertising it is generally the same but if there is already an existing customer relationship in the course of which the company has obtained the electronic address, and the consumer has not objected to receiving email advertising, electronic correspondence advertising own similar goods or services is permissible.
- 3 This requirement is a manifestation of the legislator's intention to achieve more transparency in advertising and address dealing.
- 4 This check-list does not claim completeness, and further issues may have to be considered, in particular under the Act against Unfair Competition.

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