

## Obtaining Consent - Guidance of German Data Protection Authorities

**In March 2016 the Duesseldorfer Kreis, an association of the German data protection authorities, issued a guidance on obtaining consent with forms ("Guidance"). The Guidance contains instructions and recommendations on how to draft consent forms when obtaining consent in written or electronic form.**

### Background

In many cases the collection, processing and/or use of personal data is only lawful if the data subject has validly consented to the respective activities. The reality in day-to-day business is that the data subject's consent is in most cases obtained by asking the data subject to provide consent on the basis of a consent form drafted by the data controller.

The exact legal requirements applying for obtaining consent by the use of consent forms are, however, not completely clear and to a certain extent contentious.

### Content of the Guidance

The Guidance contains several statements on the view taken by the German data protection authorities. **According to the Guidance:**

- A valid consent requires clear and unambiguous wording. For example the words "I acknowledge that..." are not sufficient to provide for a consent.
- The consent wording – if combined with other contractual declarations – must in principle be provided directly above the signature line and the signature may in such case also relate to the main contractual declaration (i.e. the signature works as confirmation of the contract and as consent). However, in some cases, a valid consent requires a separate signature for the consent (in addition to the contractual declaration).
- The consent wording may not be combined with information on other data processing activities that do not require consent (because they are permitted under a legal provision). However, if it is not clear whether a consent is required (e.g. in case of a weighing of interest), the respective activities may – as a matter of precaution – be included in the consent wording.
- General data protection information must be clearly separated from the consent wording. Lack of separation may result in the consent being invalid.
- The consent wording should also inform the data subject that he/she is entitled to withdraw his/her consent. This should be done irrespective of whether the underlying service is a telemedia service, where the obligation



to inform on the right of withdrawal is required by Sec. 13 (3) German Telemedia Act. (A general provision in this respect is also contained in Article 7 (3) of the General Data Protection Regulation adopted by the European Parliament on April 14, 2016 ("GDPR") that will apply as of the second quarter of 2018.)

The Guidance is very helpful in order to better understand the German data protection authorities' interpretation of the requirements for obtaining a valid consent. However, the Guidance also contains some statements that are slightly stricter than the prevailing opinion in Germany (e.g. resulting from the case law cited below). For example, the Guidance states that a valid data consent requires an opt-in mechanism and that pre-ticked checkboxes and/or consent wording that can (only) be deselected or deleted by the data subject would **generally** not be sufficient. (This requirement is not contained in the Data Protection Directive 95/46/EC but is contained in the recitals of the GDPR.)

At first view, this requirement contradicts two decisions taken by the Federal Supreme Court (VIII ZR 348/08 – Payback and VIII ZR 12/08 – Happy Digits) where the Federal Supreme Court confirmed that a consent wording requiring the data subject to opt-out was sufficient. However, in an informal discussion with one of the German data protection authorities, the respective official stated that in exceptional cases (e.g., in case of the two decisions of the Federal Supreme Court), an opt-out solution may still be sufficient and that the Guidance was not intended to contradict the decisions of the Federal Supreme Court.

### **To-dos for companies**

The Guidance aims to provide clarity for companies with activities in Germany. Unfortunately, the German data protection authorities' guidance documents – and also this Guidance – tend to take a fairly strict view/interpretation of applicable data protection laws, sometimes stricter than the prevailing opinion or precedents by the German Federal Supreme Court. However, the Guidance anticipates certain developments associated with the General Data Protection Regulation coming into force around April/May 2018. Therefore, it is a good basis to rely on when drafting consent forms suitable to obtain a valid consent.

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