

Full title	Dusseldorf Circle ¹ (Düsseldorfer Kreis) Guidance on the collection and processing of personal data for advertising purposes http://www.gregsregs.com/downloads/DE_DusseldorfCircle_GuidanceSep2014_DE.pdf
Point	2. Consent to the processing or use of personal data for advertising
Clause	<p>2.1 – Structure and form of consent</p> <p>Pursuant to section 4a (1) sentence 2 BDSG², the relevant case law (see, for example, BGH judgment of 25 October 2012, ref. I ZR 169/10, decision of the KG of 29 October 2012, ref. 5 W 107/12) and the recommendations of the Art. 29 Data Protection Working Party in WP 187³, consent is only valid if declared in full knowledge of the circumstances (i.e. informed) and for the specific case (specific). The design of the consent must therefore be understandable and concrete/ concise.</p> <p>Consents for the processing or use of personal data for advertising must also state the form of the envisaged advertising (e.g. letter, e-mail / SMS, telephone, fax), the products or services to be advertised, and the advertising companies.</p> <p>For this purpose, a separate text or text section without other content is to be used.</p> <p>In principle, the consent requirement must be in writing (signature), s. 4a(1) sentence 3 BDSG. For exceptions to the written form – see point 4.</p> <p>If the consent is to be given in writing together with other declarations (in particular contractual declarations), the declaration of consent under data protection law pursuant to § 28 (3a) sentence 2 BDSG⁴ must be particularly emphasized in terms of print technology.</p>
Point	<p>4. Guidance on s. 28 (3a) BDSG</p> <p><i>s. 28(3a): If consent as referred to in Section 4 a (1) third sentence (Consent shall be given in writing unless special circumstances warrant any other form) is provided in other than written form, the controller shall provide the data subject with written confirmation of the substance of the consent unless consent was provided in electronic form and the controller ensures that the declaration of consent is recorded and the data subject can access and revoke it at any time, to take future effect. If consent is provided in written form together with other declarations, the printing and format of the declaration shall distinguish it from the others.</i></p>
Clause	<p>4.1 Other form of consent for advertising</p> <p>Section 28 (3a) BDSG – refers only to consent for the advertising of personal data due to the assignment to §28(3) BDSG and concerns in the first part of sentence 1⁵, consent declared verbally and by telephone.</p>

¹ Informal association of German Data Protection Authorities for the Private Sector that gather and consult on a regular basis in order to achieve a consistent interpretation of data protection legislations. Resolutions or decisions are not binding but constitute basis upon which DPA's follow and enforce the law. <https://www.lda.bayern.de/en/duesseldorferkreis.html>

² Data subjects shall be informed of the purpose of collection, processing or use and, in so far as the circumstances of the individual case dictate or upon request, of the consequences of withholding consent.

³ Opinion 15/2011 on the definition of consent:

http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2011/wp187_en.pdf

⁴ If consent is provided in written form together with other declarations, the printing and format of the declaration shall distinguish it from the others.

⁵ If consent as referred to in Section 4 a (1) third sentence (*Consent shall be given in writing unless special circumstances warrant any other form*) is provided in other than written form, the controller shall provide the data subject with written confirmation of the substance of the consent unless consent was provided in electronic form and the controller ensures that the declaration of consent is recorded and the data subject can access and revoke it at any time, to take future effect

	Business cards left at a trade shows or other events for the express purpose of being sent (receiving) information and any other form of business contact, may constitute such other consent.
Clause	<p>4.2 Written Confirmation of Consent</p> <p>The text form according to § 126b BGB⁶ (E-Mail, PDF-Document) can be regarded as sufficient in the sense of the protective purpose of § 28 (3a) Sentence 1 BDSG for the written confirmation of an otherwise granted consent.</p> <p>The written form in accordance with § 126 BGB⁷ is not required according to the confirmation or information purpose of the provision.</p>
Clause	<p>4.4 Double opt-in procedure for electronic consent:</p> <p>For the electronic provision of consent – to verify the declaration of consent of the person concerned – the double opt-in procedure is required (depending on the specific type of contact: email or SMS). Whereby the verification (proof) requirements from the BGH (judgment of 10 February 2011, I ZR164 / 09) must be taken into account when recording / logging (the consent). The mere storage of the IP addresses of subscribers and the assertion that they have consent is not enough for the BGH. The proof of consent requires more, for example, the print out of an email of the person concerned with the corresponding declaration of consent.</p> <p>However, such proof does not suffice in the case of the intended use of telephone numbers for advertising calls obtained via website entries. By sending a confirmation e-mail, proof of identity between the person who declares his consent by e-mail and the owner of the telephone number cannot be provided.</p>
Point	<p>5. Guidance on s. 28(4) BDSG</p> <p><i>s. 28(4) (1st part): If the data subject objects vis-à-vis the controller of the filing system to the processing or use of his/her data for purposes of advertising or of market or opinion research, processing or use for such purposes shall be inadmissible. In approaching the data subject for the purpose of advertising or market or opinion research... the data subject shall be informed of the identity of the controller and the right of objections in accordance with sentence 1 above</i></p>
Clause	<p>5.2 Implementation period of objection according to s. 28 (4) sentence 1 BDSG</p> <p>The implementation of the objection to the future processing or use of the concerned parties' contact information for advertising purposes must in principle be effected immediately / promptly in the companies involved.</p> <p>If concrete promotions have been commenced and the contact details of the person concerned are already in technical processing, it may, in individual cases be unreasonable for the company to implement an intervening advertising objection at considerable effort, for example, sorting out a specific already addressed letter from a large amount.</p> <p>Here too, those affected are largely unaware that already "commenced / underway" promotions cannot be stopped on a regular basis. But to avoid unnecessary complaints the advertiser should notify/ inform the parties concerned in an individual reply letter, firstly to the compliance/ observance of the advertising objection, and second about the</p>

⁶ If text form is prescribed by statute, a readable declaration, in which the person making the declaration is named, must be made on a durable medium. A durable medium is any medium that:

1. enables the recipient to retain or store a declaration included on the medium that is addressed to him personally such that it is accessible to him for a period of time adequate to its purpose, and
2. that allows the unchanged reproduction of such declaration.

⁷ i.e. signature – s. 126 BGB (1) If written form is prescribed by statute, the document must be signed by the issuer with his name in his own hand, or by his notarially certified initials.

fact that they may receive further advertising for a period of time which must be specified as precisely/ exactly as possible.

Clause

5.3 Notification about the right of objection according to § 28 (4) Sentence 2 BDSG

Effective notice (of the possibility to object to the use of one's personal data for advertising purposes) within the meaning of the law is assumed if an average consumer gains knowledge of the notice during the usual handling of advertising material or contractual information. The concealment / hiding of the notice in lengthy general business terms and conditions does not constitute notification within the meaning of the law.

Notification of the responsible body means the body responsible for the use of the advertising data (data owner).

In the case of several advertising messages, notification of the existing right to object to advertising must be provided in each advertising message (i.e. *each one must contain a reference to the right to object to the use of personal data for advertising purposes*).
