

Service Provision in the Sense of § 7 (3) no. 1 UWG (German Unfair Commercial Practices Law): Paid or Unpaid Services?

What does § 7 (3) UWG actually say?

No doubt many senders are already familiar with the exemptions in § 7 (3) UWG, which are designed to provide relief from § 7 (2) UWG: Normally the advertiser requires the express (active and separate) and specific permission of the receiver, in order to be permitted to send marketing e-mails (what is known as Opt-In). However, in the case of an existing customer relationship, marketing e-mails may be sent to the customer if the customer has not disallowed this (what is known as Opt-Out). These exemptions, however, have particular formal prerequisites. One of the prerequisites is that the sender must have obtained the customer e-mail address “from the customer in conjunction with the purchase of a good or service”.

Now, on a few occasions in the recent past it has been discussed whether the service provision mentioned in § 7 (3) no. 1 UWG must necessarily occur in exchange for payment, or whether unpaid service provision also fulfills the requirements of the exemption.

In the following, we wish to explain why the scope of § 7 (3) UWG is only open to paid services.

Service Provision in the sense of § 7 (3) no. 1 UWG

“With the purchase” refers to a good or service

That “with the purchase” refers not only to goods but also to services can be ascertained from the wording of § 7 (3) no. 1 UWG. If the legislator had wanted that “purchase” refer only to goods, and not to services, then the sentence would need to have been formulated as follows:

(...) a merchant has obtained the customer’s electronic mail address from the customer in conjunction with the purchase of a good or with a service (...).

Service provision in the sense of the law

Furthermore, in the sense of the law, services are always in exchange for payment. The provision of a service in the context of a service agreement represents a mutual contract: One party provides the promised service, the other party is obligated to provide

remuneration for this service (§ 611 BGB - German Code of Law). Remuneration in the form of payment of money is the absolute rule.

The legislator is also aware of gratis agreements, which are colloquially referred to as “services”. These are named and regulated separately in the law, for example the mandate in the sense of § 662 BGB. The gratuity is then expressly mentioned in these cases.

In addition, it would be inconsistent to assume that a good would necessitate payment, whereas a gratuitous service would suffice.

Correspondingly, the dominant opinions in the literature assume that, with regard to service provision in the sense of § 7 (3) no. 1 UWG, a nongratuitous exchange agreement must exist.¹ Free offers (such as free membership in a community), however, do not suffice.²

Therefore, with the formulation “with the purchase”, an exchange agreement (= a nongratuitous agreement) is meant.

Definition of nongratitude

What does nongratitude actually mean?

The term nongratitude indicates the trade-off agreed in a contract. Therefore, there must be a contract in which the actions of each party stand in a reciprocal relationship. Every contractual partner promises his action for the sake of the counter-action - the one action is the payment for the performance of the other.³

However, care is needed: If, for example, data is collected in conjunction with a free product comparison, this does not represent nongratitude. Ultimately, this is also understandable, as the customer does not wish to and should not pay with his data. In the exchange agreement, as is illustrated above, the service is provided for the sake of the counter-service. The customer data is only provided because it is necessary for the finalization of the agreement, and is not seen by the data owner as a means of payment or counter-service.

As a result, care is needed with the § 7 (3) UWG: The exemption is considerably narrower than one thinks, and it has many perils.

1 Götting / Nordemann UWG § 7 Rn. 104ff. ; Ohly/Sosnitza: § 7 UWG recital 73.

2 Spindler/Schuster: UWG § 7 recital 185

3 Mutual Agreement (Austauschvertrag), Palandt before 320 recital 5.



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