

Unacceptable Harassment or Permissible Marketing According to § 7 Para. 3 of the German Unfair Competition Act?

In its decision from 15.02.2018 (Az.: 29 U 2799/17), the Higher Regional Court in Munich needed to deal with the question of whether the sending of a marketing email is permissible from the operator of a dating site to members who had registered without charge. The marketing email was sent without the express consent of the members who had registered without charge. As a result, it needed to be decided whether this usage of email addresses for marketing purposes was permissible according to § 7 Para. 3 UWG (an existing customer relationship). The legal interpretations presented in the court's decision are not undisputed and conflict at least in part with other court decisions.

Background

By providing gender, date of birth, city, pseudonym, and email address, it is possible to register for free for the dating website in question. Subsequently, the user is prompted to answer further questions and receives an email for the activation of the user profile.

A consumer protection association took action against the operator of the dating site on the grounds of unacceptable harassment as defined in § 7 Para. 2 No. 3 UWG (Unfair Competition Act) caused through the sending of the marketing email without the express consent of the user. The complainant was of the opinion that the free registration would have no added value for the defendant, and the registered users would be unable to take advantage of any services of the defendant aside from the possibility of looking at photos, meaning that an exception according to § 7 Para. 3 UWG would not apply.

Conversely, the defendant argued that there was value in having as great a number of profiles as possible. Users registered without charge can see photos of other members and in addition can be written to by paying users.

The decision of the Higher Regional Court in Munich

The Higher Regional Court in Munich decided in the second instance that the existence of unacceptable harassment was not to be assumed. The verdict and its explanatory memorandum concerns several questions that we come up against time and again in practice/in the processing of complaints about marketing emails from CSA senders, and that we would like to briefly present here.

1. Contractual relationship: Data as payment in kind?

One point that we want to have a closer look at is the question of whether free registration leads to a contractual relationship as defined in § 7 Para. 3 No. 1 UWG. Specifically, is the purchase of a service as defined in § 7 Para. 3 No. 1 UWG to be seen here?

The court in Munich answered this in the affirmative. Its view was that the defendant obtains the email address of the user in conjunction with concluding a contract and gains the customer as a member, who can then be included in the marketing of the portal. In addition, the defendant can send the user advertising messages. The user is given the possibility of looking at the images of other members on the portal. The free registration therefore results in a contract of exchange.

This interpretation is not without controversy. Contrary to this interpretation, the mutual obligations in a reciprocal contract (must) stand in a dependent relationship to each other. Each contractual partner promises their service in return for that of the other; the service is payment in kind for the service of the other party. Reciprocal contracts are therefore focused on the exchange of reciprocal services.

However, the user who registers free of charge with a dating website does not, with his or her registration, pursue the goal of making his or her data available to the operator, increasing the number of members on the portal, and/or receiving advertising messages, but rather his/her interest is in the images of other members and being contacted by a paying user. Generally, the partner search is the only reason for registering with a dating website.

2. Reference to possibility to withdraw consent: How should it be worded?

The Higher Regional Court considered the following reference to withdrawing consent to be sufficient: "If you do not want to receive these emails any more, please click here." The court determined that it was sufficient if the defendant, in the mailing, informed the customers that they can arrange to no longer receive these emails.

This conflicts with the previous judgement of the Higher Regional Court of Thuringia (verdict from 21.04.2010, Az.: 2 U 88/10), according to which it must be unambiguously stated during the collection of the email address that, in the case of a withdrawal of consent for the further use of the email address, transmission costs arise according to the basic tariffs. Merely referring to the possibility that consent can be withdrawn at any time without costs, according to the unambiguous wording of the law, is just as insufficient as the notice in a mailing to say that a newsletter subscription can be cancelled.

The exemption clause in § 7 Abs. 3 UWG is to be interpreted in the narrow sense of providing protection to the customer against unwanted advertising. Email marketing without the express consent of the recipient represents, according to § 7 Para. 2 No. 3 UWG, unacceptable harassment and is only permissible under the already mentioned conditions of § 7 Para. 3 UWG. The first point of reference is typically the interpretation of the wording, according to which a simple reference to the withdrawal of consent is not sufficient, but rather the customer is additionally to be clearly informed that no further costs will be incurred for the withdrawal of consent other than the transmission costs according to the basic tariff. The interpretation based on the underlying intention of the provision also cannot lead to a different conclusion. Given that the provision in § 7 UWG deals with the protection of the customer against unwanted advertising, in the case of § 7 Para. 3 UWG the customer must be informed that consent for the use of his or her email address can be withdrawn and also about what costs (transmission costs) are incurred. If the lawmakers had only been interested in the reference to the possibility of withdrawing consent at any time, the last half sentence could have been omitted.

In short

Whether a change in the prevailing legal interpretation has taken place through the decision of the Higher Regional Court in Munich is at least open to doubt. In both points of contention, there are, not least from the arguments mentioned above, contradictory interpretations in the literature, and there are also directly contradictory verdicts.

It is a constant concern for the CSA to ensure the greatest possible legal certainty in the sending of marketing emails. When it comes to - as here - debatable issues, this is only possible if our standards do not constitute a violation even for stricter interpretations. The CSA will therefore, for exactly this reason, retain our legal interpretation until there

has been a clarification by the German Federal Court of Justice or confirmatory rulings by courts that have previously represented the contradictory legal interpretations.

In addition, as has been demonstrated, there are, in terms of the content, also good grounds against the legal interpretation involved in the verdict discussed here.

Authors: Legal Team Certified Senders Alliance