Terms and Conditions Optimizely Campaign

1. Scope

(1) These General Terms and Conditions (hereinafter "GTC") apply to Optimizely Campaign (hereinafter "Campaign") from Optimizely GmbH (hereinafter "Optimizely"). They also apply to all future offers or services in connection with Optimizely Campaign, even if they are not separately agreed to again. Additional terms and conditions may apply depending on the scope of the product in the service contract. You can review the current version at any time at

https://www.optimizely.com/legal/marketing-automation/integrations

https://www.optimizely.com/legal/marketing-automation/print

https://www.optimizely.com/legal/marketing-automation/mobile-push

https://www.optimizely.com/legal/marketing-automation/sms

(2) The content of the contract is primarily determined by the order prepared by Optimizely, in addition to these GTC. Deviating stipulations in orders or other letters from the customer will only take effect if they are expressly confirmed by Optimizely.

(3) Offers referring to the service contract must be accepted by the customer's signature.

(4) The customer's terms and conditions do not become part of the contract even if Optimizely renders services to a customer's order without expressly contradicting the customer's terms and conditions referred to therein, or if it is referred to in a PO number of the customer.

2. Subject matter and conclusion of contract

(1) The subject of the contract is the provision of the Campaign software as a SaaS solution for the contractually agreed period. Campaign enables the customer to send advertising, newsletters or other information in electronic form (e.g. e-mail, SMS) and as a print product (letter, postcard) to their contacts (contractual partners, interested parties, etc.) and to evaluate statistics of sent information. Details of the service can be found in the service description, which will be transmitted on request.

(2) In addition to the provision of Campaign, Optimizely offers services that support the customer when using Campaign. The type and scope of the service as well as the payment structure are specified in the Optimizely offer.

(3) A contract ("Master Services Agreement" or "MSA") is concluded when the customer accepts Optimizely's offer in writing. As a rule, acceptance takes place by the customer returning the signed offer in advance by scan or fax.

(4) In case of doubt, the customer must prove that the acting person is authorized to represent the customer.

3. Performance and approval

(1) Optimizely provides work services such as setup, configuration and / or programming services (hereinafter referred to as "project") for the customer in connection with the use of Campaign if commissioned separately.

(2) Partial approval within a project

    a) In each project phase, the submission of certain work results is agreed upon, which must be approved by the customer using the subsequent correction loops.

    b) Level 1
- Optimizely hands over a work result (e.g. template concepts) to the customer.
- The customer gives Optimizely approval (acceptance) or notifies Optimizely of correction

specifications within 10 working days. The correction specifications must include all issues in detail that Optimizely has to process

c)   Level 2
- If Optimizely receives correction specifications, these are implemented by Optimizely and the corrected work results are passed on to the customer
- The customer then gives Optimizely approval within 10 working days or notifies Optimizely of any correction specifications. It should be noted that these correction specifications only relate to the corrections mentioned and processed in level 1

d)   Recommissioning
Change requests that are outside of the change specifications already mentioned in level 1 are subject of a separate order. The resulting effort will be charged separately.

(3) Final project approval

a)   Optimizely declares readiness for acceptance. The customer must declare acceptance within 10 working days. Otherwise, the services are considered accepted after the deadline.

b)   If the customer commissions payments without reservation after the service has been commissioned, Optimizely will regard this as an acceptance of the services provided by Optimizely.

(4) The acceptance cannot be refused due to minor defects.

4.   Readiness for dispatch

(1) If the setup of a user account is commissioned, Optimizely will be ready for dispatch upon receipt of the notification of readiness for acceptance by the customer in accordance with Section 3 (3) a). Readiness for dispatch includes the determination that Optimizely has fulfilled all essential contractually agreed services to use the Campaign dispatch function.

(2) In the event that the customer does not fulfill the duty to cooperate in the set up of a user account in accordance with Section 8 and the contractual readiness for dispatch cannot be established as a result, Optimizely is entitled to create a user account with a standard setup for the customer three months after the conclusion of the contract. Upon receipt of the notification to the customer that the standard account has been set up, readiness for dispatch is deemed to have occurred according to to paragraph (1).

5.   Change Request

(1) The customer can request changes and additions to the contractually agreed project scope up to the time of acceptance of a project, if these are technically feasible and reasonable for Optimizely. The following procedure is used:

a)   Optimizely examine the change request in text form and will present the customer with the result together with any resulting costs and postponements of the service period in the form of a binding offer within 10 working days.

b)   The customer will reply to the offer within 10 working days of receipt.

c)   If the customer accepts the offer in text form within the deadline, the changes become part of the contract. If the customer does not accept the offer, the parties will execute the contract within the scope of the agreed scope of services.

(2) During an ongoing change request process, Optimizely will continue the contractual services as planned, unless the customer gives instructions that the work should be suspended or restricted until the decision is made.

6.   Technical usage requirements, availability

(1) The customer can use Campaign with a current version of the Mozilla Firefox or Microsoft Internet Explorer browser via the Internet. For this purpose, Optimizely provides an interactive user interface.

(2) Optimizely is not responsible for the quality of the required software on the part of the customer or the telecommunications connection between the customer and Optimizely up to the transfer point.

(3) Optimizely guarantees an availability of 99.8% as a monthly average for Campaign services in their area of responsibility for the following services:

- Email send out
- Receipt of email returns
- Quantifying statistics
- Online versions of mailings
- Hosting of pictures and files
- Login and logout pages
- Campaign user interface
- Campaign API (SOAP, HTTP and FTP).

(4) Optimizely is entitled to carry out care and maintenance work and to discontinue or limit the provision of Campaign for this reason (scheduled downtime). Optimizely will inform the customer accordingly. If it is foreseeable for Optimizely that the scheduled downtime will exceed one hour, Optimizely will inform the customer of this at least one week before the start of the respective work via email. Care and maintenance work are carried out by Optimizely when possible during periods of low usage. Scheduled downtimes are not considered when measuring the guaranteed availability. However, the scheduled downtimes may not exceed a total of 3 hours per month.

7. Rights of use for Campaign

(1) The customer receives simple, non-transferable rights of use limited to the term of this contract to the Campaign application and the work results provided within the framework of the provisions of this contract. If new versions, updates, upgrades or patches for the application are made available during the term of the contract, the right of use also extends to these.

(2) The customer receives a simple, non-transferable right of use for the contractual use for the duration of the contract for all documents, programming and other services created by Optimizely for which Optimizely holds copyrights and other property rights.

(3) If the customer sells Campaign services to end customers (resellers) in its own name on the basis of contractual agreements with Optimizely, the customer is entitled to grant end customers the rights of use in accordance with paragraphs (1) and (2) for contractual use.

(4) The customer is not granted any further rights to the software or other work results.

8. General obligations of the customer

(1) The customer has to promote the execution of the contract through active and appropriate cooperation. In particular, the customer provides Optimizely with all information, data and documents required to provide the contractually agreed services in good time.

(2) If certain services cannot be carried out within an agreed period due to the lack of cooperation on the part of the customer, the service period is extended accordingly.

(3) At the customer's request, Optimizely will name a contact person to coordinate the implementation of the contract. The contact person answers inquiries from the customer or forwards them to the responsible departments at Optimizely. There are no rights and obligations under Section 8 (4).

(4) Contact person and contract implementation

a)   The customer is obliged to name a technically competent contact person who is responsible for the necessary internal coordination of the project at the customer's and, if necessary, with third-party service providers, and who provides Optimizely with the necessary information and documents in usable form.

b)   The contact person is also authorized to make the decisions (such as changes to the scope of services, acceptances) required for the smooth implementation and completion of the project.

c)   Optimizely points out that changing the contact person within the framework of an ongoing project as well as the suspension of projects by the customer for a period of more than a month is regularly associated with increased effort on the part of Optimizely. If the customer nevertheless changes the contact person or if the customer has not cooperated for more than a month and if this results in increased expenses on the part of Optimizely, the customer must bear the resulting additional costs.

(5) The customer takes the necessary precautions to prevent the use of Campaign by unauthorized persons. In particular, this includes the secure use of passwords. The customer is responsible for ensuring that Campaign is not used for illegal purposes if he is responsible for this.

(6) Unauthorized use of the software is also given if the customer does not use Campaign for their own business operations (e.g. newsletter to their own end customers), but completely or partially for a third party. Such use must be reported to Optimizely in advance and requires written consent from Optimizely. The customer must ensure and prove that a third party has submitted to the same obligations of this contract towards Optimizely (e.g. general obligations from section 8, guarantee of rights and indemnification from section 14, regulations regarding the sending of messages from section 9, in particular submission of the consent in text form, Rights to restriction and blocking from section 10, restrictions on the fixed term from section 17).

(7) The customer is responsible for creating regular data backups.

(8) The Customer is obliged to comply with the Optimizely Code of Conduct in the current version (www.optimizely.com/legal/code-of-conduct/).

9.   Special regulations for sending messages

(1) The customer is obliged to ensure that the use of Campaign does not violate applicable law. Both when collecting, selecting and using addresses and data of the recipients, as well as with regard to the content to be sent (texts, images, etc.) and the links used, the customer is obliged, in particular, to comply with national and international data protection, competition, criminal, copyright, trademark, labeling, patent and naming regulations, as well as regulations for the protection of minors and other rights of third parties.

(2) Illegal or immoral content may neither be saved nor transmitted. Reference to such information is also not permitted. This includes, above all, information that serves to incite people, instigate criminal acts, glorify violence or is sexually offensive.

(3) The customer assures that the customer has the explicit permission or other legal grounds in accordance with Art. 6 GDPR, of the recipient for each data record concerned to send advertising or commercial communication in the communication channel chosen by the customer (e.g. e-mail or SMS).

(4) The customer undertakes to comply with the recognized and widespread codes of conduct and standards for the proper bulk mailing of advertising messages. This applies in particular to so-called whitelist programs for sending e-mails (e.g. CSA – Certified Senders Alliance). The aim of these codes and standards is to ensure that messages are sent technically and legally free of complaints. Further information can be found at: https://webhelp.optimizely.com/latest/de/campaign/basics/csa-guidelines.htm

(5) Upon request, the customer must immediately provide Optimizely with the information, evidence and written consent with all information available to the customer on the respective data record, unless this is demonstrably prohibited for legal reasons. This can concern the following information:
- Information on registration e.g .: double opt-in procedure, tracking opt-in / opt-out, connection with the collection of the e-mail address, text of the declaration of consent, information on the possibility of revocation

- Date and time of the confirmation of registration by the customer for the double opt-in procedure
- Copy of the confirmation email for the double opt-in procedure
- URL of the website from which the registration was made
- Time (date, time and IP address) of registration and registration confirmation (double opt-in)
- Reason and content of the customer relationship (e.g. purchased product)

10. Restriction and blocking of the Campaign services

(1) If there are specific indications that the customer is violating legal regulations, third party rights or contractual obligations, Optimizely is entitled to restrict the customer's use of Campaign, in particular to deactivate the dispatch function. When selecting the measures, Optimizely takes into account its own operational requirements and liability risks as well as the legitimate interests of any claimants and the customer (e.g. fault, weight of the breach of duty, risks, comments from the user). The customer can avert the implementation of the measures, provided that he clears up the existing indications of an infringement at his own expense by submitting suitable evidence.

(2) If Optimizely becomes aware of indications of breach of duty by the customer, e.g. if third parties complain, Optimizely will inform the customer thereof. In the individual case, Optimizely can set a reasonable deadline for commenting, which is only a few hours in the event of particular urgency. The sanctions Optimizely can impose on a customer are:
- Issue of a warning to the customer to stop the violation immediately upon request;
- Restriction / restriction of the use of Campaign by the customer;
- Temporary blocking of the customer.

(3) In particular, Optimizely is entitled to deactivate the dispatch function immediately,
- As soon as there are indications that the consents guaranteed in accordance with Section 9 (3) are not available
- If the customer does not submit the proof of consent requested in accordance with Section 9 (5) immediately upon request or refuses to submit them

(4) The right to terminate remains unaffected.

11. Legal consequences of an improper shipping

(1) If the customer has not obtained the legal consent for the sending of marketing messages, or if the customer is unable to present it in accordance with Section 9 (3), or if Optimizely has lodged a complaint from a person concerned or a person concerned because of this unauthorized sending of marketing messages (spam) Association, a self-acting association or a competitor, the customer is obliged to pay a contractual penalty of EUR 5.000,00. This may also occur if we have information that the e-mail dispatch does not comply with applicable law.

(2) Associations within the meaning of Paragraph 1 include the institutions authorized to take legal action in accordance with Section 8 Paragraph 3 UWG (Fair Trade Practice Act). This includes institutions in the field of online marketing and the internet economy such as whitelist providers or the competition center

(3) Optimizely reserves the right to claim damages; in this case the contractual penalty will be offset against any claim for damages.

12. Compensation

(1) The fees to be paid by the customer are based on the offer sent by Optimizely.

(2) The remuneration for contractual services is due thirty (30) days after invoicing, unless otherwise agreed to.

(3) The customer will be billed for the use of Campaign at the end of each month. The billing period is the calendar month. Billing takes place from the first day the customer starts using the Campaign services, but

no later than when readiness for dispatch in accordance with section 4 is established. The first billing month will be billed proportionally.

(4) Fees are given as net prices plus the applicable sales tax.

(5) Payments are made in Euros.

(6) After the end of the first contract year, a price increase based on the previous contract year's compensation may be implemented on each anniversary of the date of readiness for shipment by a maximum of seven point five percent (7.5%) per year. The price increase shall become effective upon ninety (90) days written notice from Optimizely to the Customer.

(7) It is made clear that the customer is obliged to reimburse Optimizely separately for the costs incurred in connection with the provision of contractual services outside Berlin (travel and accommodation costs, time expenditure). They are not part of the remuneration. The contractually stipulated daily and hourly rates apply. Train tickets for journeys in 2nd class or flights in economy class, as well as accommodation costs in the 3 to 4 star category, up to a maximum price of 150 euros per night, are reimbursable. Other expenses are not to be reimbursed.

(8) The Customer is not permitted to offset or withhold payments against Optimizely's claims unless the claims are undisputed or have been legally established.

13. Liability and warranty

(1) The following provisions on Optimizely's liability and warranty apply to all claims for damages or other compensation claims of the customer arising from or in connection with the execution of this contract and liability cases regardless of the legal basis on which they are based (e.g. warranty, delay, impossibility, any breach of duty, the existence of an impediment to performance, unlawful act, etc.) except for claims of the customer:

    a)   for damages resulting from injury to life, limb or health,

    b)   in the event of fraudulent concealment of a defect by Optimizely or due to a lack of quality for which Optimizely has assumed a guarantee

    c)   which are based on willlful or grossly negligent behavior on the part of Optimizely, its organs or senior employees and

    d)   according to the law of product liability,

For these exceptions, the statutory regulation remains.

(2) Optimizely and its vicarious agents are only liable for negligently caused property and financial damage in the event of a breach of an essential obligation, i.e. an obligation, the fulfillment of which enables a proper execution of the contract and on whose compliance the customer can regularly rely, but limited to the compensation of the typical and foreseeable damage at the time of conclusion of the contract. Incidentally, Optimizely's liability for slight or simple negligence is excluded.

(3) Optimizely guarantees the technical availability of the services in accordance with the provisions in Section 6 (3) of these GTC. Optimizely accepts no liability for disruptions within the line network for which Optimizely is not responsible.

(4) In the case of work-related services, the customer has no right to self-implementation in accordance with § 637 BGB (German Civil Code). Contractual warranty rights are limited to a period of 12 months after acceptance of the work. Claims for damages remain unaffected.

14. Legal guarantees and indemnification

(1) The customer guarantees that all content transmitted by him to Optimizely, such as images, texts, photos

and designs, is free of third-party rights and that their use in accordance with the contract does not interfere with third-party property rights.

(2) The customer is obliged to exempt Optimizely from all claims and demands of third parties based on a culpable violation of third party rights by the customer. It is made clear that this also includes legal violations in connection with the use of Optimizely Campaign using the customer's access data. The claim for indemnification also includes all costs and expenses of legal defense.

(3) If the parties learn of possible claims by third parties, they will inform each other immediately. The customer is obliged to take all reasonable measures to defend Optimizely against the asserted claims and to eliminate the alleged infringement.

15. Contract periods, contract termination

(1) The contract comes into force upon receipt of the declaration of acceptance and is valid for a period up to the end of the 12th calendar month from the time of readiness for dispatch in accordance with section 4 is established. The contract is automatically extended by 12 months, unless it is terminated three months before the end of the contract period.

(2) This does not affect the right of both parties to terminate the contract for good cause without observing a period of notice. An important reason for Optimizely is in particular if

   a)   the customer has culpably violated essential obligations under this contract;

   b)   the customer has used Campaign to disseminate illegal information;

   c)   the customer sent messages to people via Campaign without being authorized to do so

   d)   contrary to clause 8 (5) and (6) the customer grants a third party access to Campaign without authorization

   e)   insolvency proceedings have been filed against the customer's assets or the opening of such proceedings has been rejected for lack of assets.

(3) Notice of termination must be made in writing by letter. Sending by fax is in writing.

16. Data processing

(1) The services under this contract are provided by Optimizely as data processing on behalf of the customer. The customer is the client and person responsible within the meaning of Art. 4 No. 7 GDPR. Optimizely is obliged to keep personal data that is processed on behalf of the customer secret and to process it only in accordance with the customer's instructions.

(2) If the customer uses Campaign to send content using a print product, E-POST Solutions GmbH will be included as a subcontractor.

(3) Employees of Optimizely as well as third parties who work within the scope of the order or who have access to personal data are obliged in writing to maintain confidentiality and maintain data secrecy in accordance with Section 53 BDSG (German Federal Data Protection Act).

(4) The parties also regulate the data processing agreement in Optimizely's data processing agreement "DPA") as an appendix to the MSA. This DPA is an integral part of the Master Services Agreement and is mandatory for the execution of the Agreement. Before signing the DPA, Optimizely is released from its obligation to perform.

17. Data release after contract termination or in the event of bankruptcy

(1) Optimizely is obliged to keep the recipient data provided by the customer or stored on behalf of the customer for a period of one month after the end of the contract. The customer's right to request the deletion

of the data in accordance with Section 17 (5) at any time remains unaffected.

(2) Optimizely must notify the customer of the deletion of the data in writing or by fax ten (10) days before the deadline in accordance with paragraph (1) expires. After this period, Optimizely is entitled to delete the customer's data.

(3) The customer is granted access to the recipient data stored in the customers otherwise deactivated user account at any time until the end of the period specified in paragraph (1). The customer is enabled to export the recipient data in a customary data format such as .csv and to save it on a data carrier.

(4) In the event that insolvency proceedings have been applied for or opened against Optimizely's assets or the opening of such proceedings has been refused due to lack of assets, the customer will be granted unlimited access to the data analogous to the provision in paragraph (3).

(5) If the customer gives Optimizely a binding consent to the deletion in writing or by fax, Optimizely is entitled and obliged to delete the data within ten (10) days of receipt of the declaration of consent, even before the retention period in accordance with paragraph (1) has expired.

(6) When data is deleted, only data that Optimizely is legally obliged to store is excluded.

18. Non-disclosure

(1) The parties agree to treat the content of the agreements made between them as well as all information exchanged between them and the knowledge gained during the implementation and processing of the contract confidentially.

(2) The parties shall also oblige all contractual partners, subcontractors or clients employed in connection with this contract to maintain confidentiality.

(3) The duty of confidential treatment does not apply to information which is generally known or which has been communicated to a contracting party by a third party without breach of an obligation of confidentiality or which the disclosing party is obliged to disclose for legal reasons or due to a court or official order.

19. References

(1) Optimizely is entitled to name the customer as a reference after prior approval in publications on the Internet and in print media.

(2) The customer names the advertising material released for this purpose, such as logos, and undertakes to grant all necessary rights. If there are special requirements for the use (e.g. corporate identity), the customer will notify Optimizely without being asked.

(3) A reference will only be made in a factually correct manner and is excluded if the customer has obvious legitimate interests against it.

(4) The customer has the option at any time to object to future references in writing. Print media that have already been created may be used up. It can be named as a reference up to three years after the end of the contract.

20. Final Provisions

(1) If the customer is a merchant, a legal entity under public law, special fund under public law or has no general place of jurisdiction in the Federal Republic of Germany, the exclusive place of jurisdiction is Optimizely's registered office.

(2) Declarations according to these terms and conditions must be in text form (such as fax, email), unless otherwise agreed.

(3) All legal relationships on which these terms and conditions are based are subject to the law of the Federal

Republic of Germany without the regulations that lead to the applicability of foreign law or the CISG.

(4) The German version of these GTC is authoritative for the contractual relationship with Optimizely. This applies in particular if there are inconsistencies or contradictions between the German language version and a translated version.

(5) Central European Time or Central European Summer Time (CET / CEST) applies to all times, periods and deadlines.

(6) Should a provision of these terms and conditions be ineffective in whole or in part, this shall not affect the legal validity of the remaining provisions.