

# Consumer Association Succeeds in First Round of Dispute Concerning Facebook's Terms of Service and Privacy Settings

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## I. Introduction

In the light of recent and upcoming developments – like the entry into force of the General Data Protection Regulation (GDPR), the heated debate on the proposed EU Regulation on Privacy and Electronic Communications or the EU-US Privacy Shield<sup>1</sup> – public attention focuses more and more on the big US companies such as Google, Facebook and the likes and their processing of personal data.<sup>2</sup> By offering services to and connecting people all over the world, acting as an advertising platform and providing user generated content, the contact with a wide range of personal (and sensitive) data is inevitable. So, especially consumer associations are closely observing the transparency and legal conformity of such platforms and are determined to enforce them if necessary in court. One recent and important example for these types of actions is a case before the Regional Court (*Landgericht*, LG) of Berlin<sup>3</sup> about Facebook's terms of service<sup>4</sup>, data policy<sup>5</sup> and privacy settings which will be outlined below. Following on one hand the claim of the Federation of German Consumer Advice Centres and Consumer Associations (*Verbraucherzentrale Bundesverband e.V.*, vzbv) the LG Berlin declared parts of the terms of services and privacy settings inadmissible under German data protection and consumer law. On the other hand, vzbv

failed *inter alia* with its action for an injunction against Facebook's slogan that 'it is free and always will be free' while the association argued this was misleading advertising. Although both parties have already appealed the ruling<sup>6</sup> or announced to do so<sup>7</sup>, the findings of the Court and the argumentation of the parties are interesting and newsworthy already at this early stage of proceedings.

## II. Facts of the Case

Vzbv – a nationwide association of 16 consumer associations of the German federal states (*Länder*) and 25 consumer and social organisations – directed a written warning to Facebook in February 2016 based on unfair practices under competition law. Assuming that Facebook hides default settings that are not privacy-friendly in its privacy centre and does not provide sufficient information about this when users register<sup>8</sup>, the vzbv attacked a number of sections of the platform's terms of services, data policy and privacy settings. As Facebook did not comply with this warning – mainly by arguing exclusive applicability of Irish and not German data protection law – the vzbv filed for an injunction before the LG Berlin.

At first, the imprint was appealed because Facebook's contact data is not available under the link to

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1 Cf Sebastian Klein, 'First Annual Review of the EU-US Privacy Shield' (2017) 3(4) EDPL 512-517.

2 Cf eg Lorna Woods, 'United Kingdom · CG v Facebook: The Interconnection between E-Commerce and Data Protection' (2017) 3(1) EDPL 106-110; Nicolas Blanc, 'Schrems v Facebook: Jurisdiction Over Consumer Contracts Before the CJEU' (2017) 3(3) EDPL 413-417; Sebastian Schweda, 'Germany · Under Close Scrutiny: German Courts and Authorities Investigate Facebook's Compliance with National Data Protection Law' (2016) 2(3) EDPL 414-421.

3 Case 16 O 341/15 (LG Berlin, 16 January 2018) <[https://www.vzbv.de/sites/default/files/downloads/2018/02/12/facebook\\_lg\\_berlin.pdf](https://www.vzbv.de/sites/default/files/downloads/2018/02/12/facebook_lg_berlin.pdf)> accessed 21 February 2018.

4 Terms of service, Facebook Ireland Limited, available under <<https://de-de.facebook.com/legal/terms>> (German version) accessed 20 February 2018, for an English version (UK) see <<https://en-gb.facebook.com/legal/terms/update>> accessed 20 February 2018.

5 Data Policy, Facebook Ireland Limited, available under <<https://de-de.facebook.com/privacy/explanation>> accessed 20 February 2018; for an English version (UK) see <<https://en-gb.facebook.com/privacy/explanation>> accessed 20 February 2018.

6 Cf report in the German media: 'Landgericht Berlin untersagt Klarnamen-Zwang bei Facebook' *Zeit Online* (12 February 2018) <<http://www.zeit.de/news/2018-02/12/landgericht-berlin-untersagt-klarnamen-zwang-bei-facebook-180212-99-35613>> accessed 21 February 2018.

7 Cf the vzbv press release: 'Facebook verstößt gegen deutsches Datenschutzrecht' (12 February 2018) <<https://www.vzbv.de/pressemitteilung/facebook-verstoest-gegen-deutsches-datenschutzrecht>> accessed 20 February 2018.

8 *ibid.*

‘Imprint/Terms of Service’ but it needs a second click on ‘Statement of Rights and Responsibilities’ to access that information.

Concerning the terms of service and data policy, the following sections were criticised:

- (1) Facebook users provide their real names and information, and we need your help to keep it that way. Here are some commitments you make to us relating to registering and maintaining the security of your account:1. You will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission....7. You will keep your contact information accurate and up-to-date.
- (2) You will not use Facebook if you are under 13.
- (3) Special Provisions Applicable to Users Outside the United StatesWe strive to create a global community with consistent standards for everyone, but we also strive to respect local laws. The following provisions apply to users and non-users who interact with Facebook outside the United States:1. You consent to having your personal data transferred to and processed in the United States.
- (4) About Advertisements and Other Commercial Content Served or Enhanced by Facebook:Our goal is to deliver advertising and other commercial or sponsored content that is valuable to our users and advertisers. In order to help us do that, you agree to the following:1. You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation

to you. If you have selected a specific audience for your content or information, we will respect your choice when we use it.... By using or accessing Facebook Services, you agree that we can collect and use such content and information in accordance with the Data Policy as amended from time to time.

- (5) By using or accessing the Facebook Services after 30 January 2015, you agree to this Statement, as updated from time to time and to our update data and cookie policies. ... You also agree to see improved Advertisement based on your visited websites and apps.<sup>9</sup>

By clicking ‘Create an account’, users agree to these terms and confirm that they have read the data policy, including the Cookie Use Policy.

Concerning the privacy settings of Facebook, the vzbv criticised especially the default settings. In his privacy settings, the user gets asked if other search engines should receive a link to the user’s profile history. He can choose between ‘yes’ or ‘no’. Other problematic features were the questions about the visibility of ‘social acts’ (eg likes, comments or subscriptions), which can be ‘only (for) friends’ or a pre-activated location service of Facebook Chat. In the view of vzbv, this is unlawful because users would not even know that these pre-formulated consent settings were set up.

Finally, the vzbv called on Facebook to refrain from the slogan ‘Facebook is and stays free’ based on the argument that users actually pay for the service with their data which is very valuable for the company.

### III. Judgment of LG Berlin

First, the judges upheld the claim concerning the majority of the disputed terms of service and the default settings as well as the imprint.

The Court stated that the claimant had an injunctive relief based on unfair competition law, § 8 (3) no 3 and 3a of the Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb, UWG*)<sup>10</sup> in conjunction with § 5 (1) of the Telemedia Act (*Telemediengesetz, TMG*)<sup>11</sup> because the imprint of the company – which has to provide important contact information for users – can only be accessed via two consecutive links. As an implementation of Ar-

<sup>9</sup> See ‘Terms of service’ (n 4).

<sup>10</sup> Act Against Unfair Competition in the version published on 3 March 2010 (Federal Law Gazette I, 254), as last amended by Article 4 of the Act of 17 February 2016 (Federal Law Gazette I, 233) <[https://www.gesetze-im-internet.de/englisch\\_uwg/englisch\\_uwg.html#p0116](https://www.gesetze-im-internet.de/englisch_uwg/englisch_uwg.html#p0116)> accessed 21 February 2018.

<sup>11</sup> Telemedia Act in the version published on 26 February 2007 (Federal Law Gazette I, 179), as last amended by Article 1 of the Act of 28 September (Federal Law Gazette I, 3530) <<https://www.gesetze-im-internet.de/tmg/BjNR017910007.html>> accessed 21 February 2018.

article 5 of the Directive on electronic commerce<sup>12</sup>, § 5 (1) TMG provides for service providers having to render their information easily, directly and permanently accessible to the recipients of the service and competent authorities. Such easy access was not ensured by providing this data under the section 'Statement of Rights and Responsibilities' because users did not expect it there. The fact that logged in users could access the imprint by one click was considered irrelevant on the ground that also new users had to be informed about the company.

Under §§ 4 and 4a of the German Federal Data Protection Act (*Bundesdatenschutzgesetz*, BDSG)<sup>13</sup>, personal data may only be processed with the consent of the data subject. To enable users to make a conscious decision, data processing companies must supply clear and plain information about the nature, scope and purpose of the intended data use. Whereas the Administrative Court (*Verwaltungsgericht*, VG) of Hamburg in 2016 concluded in a legal dispute about Facebook's terms of services that German data protection law was not applicable because the relevant data processing had stronger links to the law of Ireland (the seat of the platform operator Facebook Ireland Ltd)<sup>14</sup>, the LG Berlin deviated from this with reference to previous case law of the Court of Appeal (*Kammergericht*, KG) Berlin<sup>15</sup>: the only point of relevance in the view of this Court is the orientation of the activity of Facebook's subsidiary 'Facebook Germany GmbH' towards a German public because this company has to be classified as an establishment of the controller according to Article 4 (1) of Directive 95/46/EG<sup>16</sup>. Against this background the appealed default settings in Facebook's Privacy Settings did not meet the requirements of the BDSG. The Court stated that default settings during the registration process were generally unsuitable for informed consent unless the provider underlines this fact actively towards users *before* they start to use the social network. The 'privacy tour' Facebook offers through the settings was not sufficient as it was not guaranteed that users would take this opportunity of informing themselves more in detail.

Furthermore, the LG Berlin held another eight clauses in the terms of use to be invalid, especially with reference to the therein contained pre-formulated declarations of information proof and consent. The Court stated that the section by which users agree to the terms of service and confirm that they have read the data policy, including the Cookie Use Poli-

cy, was in breach of §§ 307 and 309 no 12b of German Civil Code (*Bürgerliches Gesetzbuch*, BGB)<sup>17</sup>. These sections prohibit shifting the burden of proof (which in this sense is a provision by which the provider modifies the burden of proof to the disadvantage of the other party of the contract, in particular by obliging the other party to confirm certain facts) to the user. The 'clear name principle' [point (1)] was also declared inadmissible. The Court interpreted the formulation as a (covered) consent to the processing of the users names. However, due to the chosen formulation users were not able to identify the provision as consent and, on this base, to make an informed decision about the use of their personal data. Facebook should have underlined at least the meaning and scope of this consent, argued the judges. Concerning the terms which allowed Facebook to use the name and profile picture of users for commercial, sponsored or related content [point (4)] and concerning transfer of their data to the US [point (3)] the Court emphasized the obligation to provide information and requirements of transparency in the national and European data protection law and its implications for pre-formulated declarations. As there were no more detailed explanations in the concrete clause, eg what kind of data will be transferred to the US and who will process it, in which way or how commercial content is defined etc, an informed consent was impossible. Moreover, this applied also to 'agree-

12 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L 178/1 <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&from=DE>> accessed 21 February 2018.

13 Federal Data Protection Act in the version promulgated on 14 January 2003 (Federal Law Gazette I, 66), as most recently amended by Article 10 of the Act of 31 October 2017 (Federal Law Gazette I, 3618) <[https://www.gesetze-im-internet.de/englisch\\_bdsch/englisch\\_bdsch.html](https://www.gesetze-im-internet.de/englisch_bdsch/englisch_bdsch.html)> accessed 21 February 2018.

14 Case 15 E 4482/15 (VG Hamburg, 3 March 2016) <<http://justiz.hamburg.de/contentblob/5359296/data/15-e-4482-15-beschluss-vom-03-03-2016.pdf>> accessed 20 February 2018; cf Schweda (n 2) 416.

15 Case 5 U 155/14 (KG Berlin, 22 September 2017) <<http://bit.ly/2FwzTgQ>> accessed 21 February 2018.

16 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/0031 <<http://bit.ly/2HbehUG>> accessed 21 February 2018.

17 Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette I, 42, 2909; 2003 I, 738), last amended by Article 4 para 5 of the Act of 1 October 2013 (Federal Law Gazette I, 3719) <[https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html)> accessed 21 February 2018.

ments' to collect and use content in accordance with the Data Policy as amended from time to time given by using or accessing Facebook Services. Future policies could not constitute effective present consent to the use of data as there was insufficient information about the (future) processing act. On this basis, the Court also stated that consent to the processing of personal data in accordance to §§ 4 and 4a BDSG could never be given through continued use.

However, some of the accusations were considered unfounded. This applies particularly to the provision that users will not use Facebook under an age of 13 [point (2)]. Contrary to the provisions mentioned above, the Court considered this formulation neither as a burden of proof nor as consent to data processing. Rather, the declaration had no obvious legal meaning and no drawbacks for consumers in any certain kind of way.

The Court also permitted the mentioned company slogan 'Facebook is and stays free'. The judges considered the slogan not to be misleading or unfair according to § 3 (2) and no 21 annex [to section 3 (3)] of UWG in conjunction with Article 5 (5) and no 21 annex I of Unfair Commercial Practices Directive<sup>18</sup> where misleading advertising is defined inter alia by 'describing a product as "gratis", "free", "without charge" or similar if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item'. The reason given was that these provisions referred obviously to cases of hid-

den costs. 'Paying with personal data' as an intangible consideration could not be seen as a cost in this sense. Consequently, the average consumer, who is reasonably well informed and reasonably observant and circumspect, associated the term 'cost' with an actual economic burden.

As the claim of vzbv was based on the German Act on Injunctive Relief (*Unterlassungsklagengesetz*, UKlaG),<sup>19</sup> the Court had to reject the argument against the agreement to data and cookie policy [point (5)] as unfounded. § 1 UKlaG allows only general terms and conditions to be reviewed in a proceeding under UKlaG and – in the view of the Court – the provisions of Facebook's data policy were not general terms and conditions. An action for an injunction or removal against the illegal processing of personal data was not foreseen in UKlaG when the proceedings were instituted.<sup>20</sup>

## IV. Conclusion

The decision includes some interesting statements concerning the meaning of informed consent and obligations of transparency towards consumers. Although the terms of service were declared inadmissible, there was no final decision about Facebook's processing of personal data based on these terms. Moreover, the Court did not decide over the legitimacy of the 'clear name principle' in general. Both enquiries were not part of the subject-matter of the dispute. So the question if Facebook is still allowed to continue using its terms of service by complementing required information, is still open. Furthermore, the emphasis on insufficient information and transparency avoided a confrontation with the admissibility of pre-formulated consent and default settings in general. This is regrettable as these controversial issues were discussed under the heading of 'privacy by design/ by default' and 'opt-in/opt-out solutions' since years. For this very reason the appeal and any possible further decisions are awaited eagerly.

18 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149/22 <<http://bit.ly/2FgB7h1>> accessed 21 February 2018.

19 Act on Injunctive Relief, in the version published on 27 August 2002 (Federal Law Gazette I, 3422, 4346), as last amended by Article 4 of the Act of 17 July 2017 (Federal Law Gazette I, 2446) <[http://www.gesetze-im-internet.de/uklag/\\_1.html](http://www.gesetze-im-internet.de/uklag/_1.html)> accessed 21 February 2018.

20 Now § 3 (2) no 11 UKlaG offers this opportunity.