

24th of January 2014

**Key Statements on the Judgment by the Court of
Appeal of 01/24/2014, Ref. No. 5 U 42/12**

**Federation of German Consumer Organizations v. Facebook
Ireland Limited**

Falls nötig

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Background information

In a letter of 07/28/2010, the Consumer Rights in the Digital World project of the Federation of German Consumer Organizations (vzbv) had given Facebook Ireland a written warning because of its Friend Finder, address book import function, as well as impermissible terms of use and data protection rules. After Facebook failed to declare discontinuance, vzbv filed a lawsuit with the Berlin Regional Court. Facebook Ireland filed an appeal with the Berlin Court of Appeal against the judgment in favor of vzbv pronounced by the Berlin Regional Court on 03/06/2012. The Berlin Court of Appeal rejected the appeal in its judgment on 01/24/2014. This judgment is not yet final.

The **main contents and key statements** of this judgment are provided below:

1. Application of German privacy laws (Judgment, pp. 24 ff.)

Facebook has a parent company in the United States and a subsidiary in Ireland. The servers and installations used for Facebook's website in Germany are kept by Facebook's parent company in the United States – that is, outside the European Economic Area. Likewise, information collected and used via the website of Facebook Ireland is actually processed by the parent company in the United States. By placing cookies on users' computers in Germany, Facebook's parent company uses “means” for data processing and therefore “collects” and “processes” data as defined in the German Federal Data Protection Act (BDSG). Hence, German data protection legislation becomes applicable and is not excluded by Irish data protection laws (due to Facebook's subsidiary in Ireland):

Facebook Ireland has not shown that it has its own effective and actual data processing, using its own data processing facilities and personnel. There is also no indication that Facebook Ireland is programming the website for Germany by itself with its own personnel and data processing equipment. Nor is Facebook Ireland responsible by way of commissioned data processing on behalf of the parent company in the U.S. that wholly owns it. In the final analysis, it is decisive who has de facto responsibility for the data processing. It may well be that Facebook Ireland is contractually authorized to make decisions on data processing vis-a-vis Facebook U.S.A. But this authorization is superseded and replaced by the authority the parent company in the United States has under company law. The parent can in effect take over decision-making processes at any time: as a shareholder, it can give instructions to the subsidiary's bodies or even replace these bodies.

In any event, German data protection legislation will apply in this case even under contract law due to a choice of law by the contracting parties (Facebook Ireland – Facebook members). Since the BDSG contains provisions under public law as well as private law clauses, a choice of law agreement is permissible.

2. Invitation emails and Friend Finder

a. Invitation emails (Judgment, page 15)

Facebook invitation emails are undue, harassing, and therefore illicit advertising as defined by the German Law against Unfair Competition (UWG).

It is decisive that sending the recommendation emails goes back to the Recommendations feature Facebook provided for this purpose. This is not changed by the fact that it is not Facebook, but a respective third party using Facebook, who is displayed to the recipient as the sender of the invitation email. This practice misleads the consumer (at least in the disputed Friend Finder from 2010) into believing that this feature limits its search for friends on Facebook, whereas in fact it also addresses such relatives, friends, and acquaintances who are outside of Facebook and have not agreed to receive advertising emails.

The invitation email in dispute is disguised as a private message. It therefore qualifies as a misrepresentation under the law on competition because it actually is advertising for which Facebook is responsible.

b. Friend Finder (Judgment, page 24)

The Find Friends feature violates German privacy laws. After the user clicks the Find Friends button, Facebook processes and uses personal data for advertising purposes without informing the user or obtaining the user's consent as required by law. This is a violation of the requirement to obtain consent under German privacy laws as stipulated in Art. 28 (3), Art. 4a (1) BDSG: Facebook members do not consent to the data collection after clicking the Find Friends button. Such a lack of consent results in an anti-competitive breach of Art. 4 No. 11 of the Law against Unfair Competition (UWG) because the provisions of the BDSG regarding data protection are "regulations on market conduct." The BDSG and the EU Data Protection Directive protect an individual consumer's right to privacy, which includes consumer protection with respect to data processing by companies. After all, the BDSG and the EU Data Protection Directive regulate data processing in the people's personal lives as well as with respect to their economic activity as consumers.

3. General terms and conditions (for an overview of the clauses, see the Judgment of pages 11-12)

The content review of the terms of use and data protection provisions will be based on an interpretation that is most unfriendly to customers. Clauses are impermissible if they breach legal regulations.

a) General terms and conditions clauses in the terms of use IP license clause – "The exchange of your contents and information" (Judgment, page 35)

This clause grants Facebook the general authority to use all copyright-protected works posted by Facebook members (especially photos and videos) worldwide and free of charge. This does not comply with the principle of appropriate remuneration of the author. In the most customer-unfriendly interpretation, this clause leads to the conclusion that

Facebook may grant sub-licenses to other companies for their commercial use of copyright-protected contents posted by Facebook members and even charge them a fee, while the user cannot make a claim for remuneration and gets no share in the revenue. Furthermore, the restriction to “use on, or in connection with, Facebook” is unclear because any type of “connection to Facebook” may be sufficient and cannot be sufficiently monitored by the user.

The license clause is also not clear and straightforward. This follows from the fact alone that the purpose of granting a license is not defined in detail. But also the passage saying that the use of Facebook members' contents is limited to “the use on, or in connection with, Facebook“ does not clearly detail the rights to use granted. For example, third-party companies as licensees could use the contents without limitation, at least “on” Facebook.

Advertising clause – „Advertising on Facebook” (Judgment, page 38)

Facebook wants to use the names and profile pictures of its Facebook members for advertising purposes. Despite the reference to the privacy settings, the context in which his or her name or profile picture may be used does not become clear to the user. It is not apparent if the advertising is limited to the Facebook member's profile pages or if the name and profile picture will also appear on other pages of Facebook next to advertising and/or if Facebook provides advertising spots on the Facebook website to advertisers.

The ineffectiveness of this clause also results from data protection provisions of the German Federal Data Protection Act (BDSG). For the reasons mentioned above, it is not ensured that a Facebook user gives his or her informed consent in conformity with the law when it comes to the use of his or her data (name and profile picture) for specific advertising purposes.

Amendment clause (Judgment, page 40)

Facebook wishes to reserve the right to make any changes to its terms of use. Among other scenarios, it would be conceivable that the use of the Facebook platform will in the future depend on paying a fee and that Facebook then will include provisions on users participating in the costs or on a fee-based service in its terms of use. Such a comprehensive amendment clause is ineffective in its specific unrestricted formulation.

Termination clause (Judgment, page 42)

Facebook grants itself the right to terminate its service for users who violate “the letter or the spirit” of its terms of use. This clause is ineffective because it grants Facebook an extraordinary right to terminate without requiring good cause or having given the user unsuccessful prior written warnings.

**b) Terms and condition clauses in the “Facebook Data Use Policy”
Advertising response data clause**

**“Information we receive – Information from other websites”
(Judgment, page 43)**

Facebook wishes to grant itself the right to exchange data about its users with other websites, especially about the users' responses to advertisements and websites outside of Facebook. The consent

contained in this advertising response data clause is ineffective because the user does not receive information on data use policy and the declaration of consent before clicking the Register button. This information is provided underneath this button. In addition, the clause is too vague because it does not become clear to a user from its wording if the advertising is limited to the Facebook platform or websites affiliated with Facebook, or if it could appear on any other website.

Connection clause – “Information you share with others – establishing a connection to an application or website (Judgment, page 45)

The so-called connection clause to an application such as apps or other websites is ineffective due to its lack of clarity. It remains unclear what authority is granted to a third party when the Facebook user grants such a party “access” to data such as name, profile picture, and gender. The basis for evaluation should be the understanding of an average consumer. According to this understanding, “access” to information on the Internet typically just means that third parties may view this information on the website

According to the undisputed presentation by vzbv, this clause instead relates to information that allows a data user to create a profile of the individuals affected. This link to an individual advertising profile created by the operator of the application or website clearly exceeds the consent given by the user from his or her point of view.

Amendment clause (Judgment, page 47)

The amendment clause of the Facebook Data Use Policy is ineffective because the mere announcement of changes does not meet the legal requirements. Publication on websites with mere general administrative contents does not comply with the requirement of a “special notice” in the meaning of an individual message, such as by email.