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RESEARCH ARTICLE

Facebook Decision of the Berlin District Court: Does the use of Unfair Terms Constitute Unfair Competition?

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Abstract

Unfair terms regulation is aimed at protecting consumers from differences in negotiation power and information asymmetry between the consumer and the entrepreneur. However, the unfair terms regulations serve not only for the protection of consumers but also the protection of competition between entrepreneurs so as to prevent unfair competition. Hence, based on the regulation the use of terms contrary to the rule of good faith may constitute unfair competition (TCC Art.55/1/f.). Nevertheless, the legal consequences of unfair terms and unfair competition regulations are different. This study analyses the effect of the use of unfair terms on the claims based on unfair competition. The decision of the Berlin District Court on 16 January 2018 regarding Facebook's terms of use has been selected as a reference to answer to the question. Thereby, the interaction of different protection mechanisms is demonstrated. The decision is analysed not in terms of data protection law, but in terms of the assessments regarding whether the use of unfair terms constitutes unfair competition. The court assessed the terms of use for conformity with the provisions of BGB §§305-310 and decided whether the provision of services based on terms of use containing unfair terms constitutes unfair competition. This case, filed by a consumer organisation to protect the interests of consumers, has been chosen deliberately. It is aimed at emphasising the significance of the collective action in consumer protection. Evaluating the protection mechanisms as a holistic approach will ensure a more effective protection of both the consumer and competition.

Keywords

Consumer Protection, Holistic Approach, Unfair Terms, Unfair Competition, Terms of Use

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I. Introduction

It is safe to say that data processing is shaping the market and bringing a breath of fresh air to various business models. Data-driven business models are diversifying day by day and strengthening their place in the market. Despite all the scandals, the number of active users of Facebook is 2.96 billion depicts the sheer size of this market. It is followed by Youtube (2.57 billion) and WhatsApp (2.5 billion)¹. As every benefit comes with a burden; data-driven business models are subject to many authorities and court decisions in various aspects. In this context, in the list of companies with the largest data protection law penalties (fines) imposed since the effective date of the GDPR (30 largest fines), it is seen that 7 of the top 10 largest fines were imposed on the above-mentioned companies².

The subject of this study is the 2018 judgement of the Berlin District Court, in which Facebook's terms of use (and thus its data policy) were subject to review under the unfair terms provisions. In this respect: (1) the facts in the case will be analysed in detail. (2) Subsequently, the importance of the relationship between unfair terms and unfair competition in terms of the legal remedies that consumers have will be emphasised. (3) This case, filed by a consumer association to protect the interests of consumers, has been deliberately chosen. Thus, it is aimed at emphasising the importance of collective action for protection of consumers, and the thesis of this study is that the evaluation of protection mechanisms as a whole will ensure the effective protection of both consumers and fair competition.

A. Subject Matters of The Case

In the present case, a German consumer association (the claimant³) filed an action against Facebook for injunctive relief (§ 3a D-UWG), seeking a declaration that the terms of use and default settings on Facebook's website, accessible in Germany, constitute unfair competition (§ 3a D-UWG)⁴. Characteristic of the Berlin District Court's judgement is that it assessed the terms of use and default settings in accordance with §§ 305-310 BGB and German data protection law and then decided whether the defendant had caused unfair competition with its terms of use. The claimant alleged that Facebook's terms of use applicable to users with permanent residence in Germany infringed the UWG (*Gesetz gegen den unlauteren Wettbewerb - Unfair Competition Act*) in the following respects:

¹ Statista GmbH, "Ranking der größten Social Networks und Messenger nach der Anzahl der Nutzer im Januar 2022", Date of Access 08 November 2022.

² <https://www.tessian.com/blog/biggest-gdpr-fines-2020/>, Date of Access 08 November 2022.

³ See also on the status and activities of the Claimant, Facebook (n 1) N. 2.

⁴ Facebook (n 1) N. 1.

1. Although Facebook gives the impression that it offers a free service, data-driven business models are an additional cost for the consumer and in this respect, Facebook misleads consumers⁵. It was claimed that Facebook provides a service in return for the opportunity to process the personal data of its users, that it generates income through the processing of personal data, and that such practice constitutes unfair competition⁶. It was argued that Facebook's data processing activity contravened the indirect pricing regulation (§ 3(3)(21) of the UWG and § 3(2) of the UWG)⁷.
2. Data processing in violation of data protection law is unfair competition. In particular, data processing without the consent of users (based on default settings) violates the fundamental rights of users. Data processing based on these default settings is an unfair condition (tipping the balance against the consumer), as it is contrary to the rules of data protection law⁸.
3. An assessment of the terms of use and privacy policy shows that the data subject is not provided with transparent information. Users will try to figure out how to use the service on their own, which is contrary to BGB § 309 Nr. 12 b⁹.
4. Provisions in the terms of use that oblige the user to provide true data and impose an age limit for use are contrary to BGB § 307 Nr. 1 and 2¹⁰. In addition, while it is Facebook's legal obligation to check the age of users and whether they are able to enjoy the relevant service, it has been claimed that Facebook is trying to get rid of this by means of the terms of use. Facebook must check the age of the counterparty before concluding the contractual relationship. Otherwise, it is Facebook, not the contracting party, that is in breach of its obligation¹¹.
5. Finally, it was claimed that the provision allowing unilateral modification of the contract was an unfair term¹². The main reason for this is that the term "modification" is defined in a very broad manner, and therefore, it disrupts the balance against the consumer in violation of the rule of Good Faith. This is because the use after the change is also linked to the conclusion that consent to the change has been given, which is unacceptable. It is unfair to expect users to predict the respondent's need to make changes. The inclusion of such an amendment provision within the scope of the contract is the use of unfair terms and therefore constitutes a violation of the principles of unfair competition¹³.

⁵ Facebook (n 1) N. 6.

⁶ Facebook (n 1) N. 6.

⁷ Facebook (n 1) N. 7.

⁸ Facebook (n 1) N. 7 ff.

⁹ Facebook (n 1) N. 9.

¹⁰ Facebook (n 1) N. 10.

¹¹ Facebook (n 1) N. 11-12.

¹² Facebook (n 1) N. 13.

¹³ Facebook (n 1) N. 13-14.

B. Court Decision

The Court stated the following conclusions:

- Firstly, it determined that the applicable law is German law¹⁴.
- It also ruled that it was possible for the claimant to pursue this action because the common interests of German consumers could be prejudiced by any objectionable content and conditions of use on the websites¹⁵.
- The Court considered that the central issue in dispute was the directly accessible and easily understandable nature of the terms of use¹⁶. It was stated that the respondent's terms of use were redirected to many pages in order to be accessed as a whole (in the rights and responsibilities section, which is the following link within the scope of the terms of use/legal explanation-legal warnings at the bottom of the site) and that a reasonable consumer could not easily access the information. It was emphasised that it does not matter if the default settings can be changed by the user after registration, as the obligation to inform before registration must be fulfilled¹⁷.
- The Court characterised the “default settings” as a “commercial act” within the meaning of UWG §2 1/1/1¹⁸. It was stated that the default settings were also the respondent's practices for data processing¹⁹. Default settings are technical features for the scope of processing of user data. In this context, as the Court correctly pointed out, Facebook did not rely on a valid ground of lawfulness in terms of the data processing activity carried out with default settings²⁰. In this framework, it has been determined that these settings shall be subject to examination, taking into account the German data protection regulations.
- The Court then indicated that the rules of data protection law also regulate market behaviour²¹. The provisions of data protection law are intended to regulate market behaviour in the interest of consumers (as well as the respondent) as market participants within the meaning of UWG §3a²². The collection, processing and use of data within the scope of the default settings objected to by the claimant is

¹⁴ Facebook (n 1) N. 30 ff. The decision has not been analysed in this study in terms of determining the applicable law. On the other hand, the Court has made relevant assessments on the basis of the provision in the contract that Irish law shall be applied. See also Facebook (n 1) N. 31 ff.

¹⁵ Facebook (n 1) N. 33 ff.

¹⁶ Facebook (n 1) N. 39.

¹⁷ Facebook (n 1) N. 39.

¹⁸ Facebook (n 1) N. 42.

¹⁹ Facebook (n 1) N. 42.

²⁰ Facebook (n 1) N. 42 and 44.

²¹ Facebook (n 1) N. 44.

²² Facebook (n 1) N. 44 ff.

unlawful under German data protection law. This unlawfulness will persist until the user either changes one of these settings himself or gives valid consent²³. At this point, the Court held that the question to be answered is whether the use based on default settings implies consent. The Court considered that such consent is not valid. This is because the user's consent for the collection and use of data must be disclosed (expressed) beyond any doubt²⁴. Moreover, consent must be based on informed decisions. The user must be able to make a decision of his/her own free will; for this, the user must first be thoroughly informed about the context-meaning, background and consequences of his/her declaration. It may not be defended that the valid consent is given only on the basis of use²⁵.

- However, the Court disagreed with the description of “additional costs”. Accordingly, since there is no economic burden on the consumer, the principles of indirect pricing do not apply to the concrete case²⁶. According to the UGW (§3/3 (annex to paragraph 3) a number of cases are recognised as additional costs. Examples of additional costs are cases in which a hidden cost actually arises for the consumer in the form of direct or indirect payment obligations or financial burdens (charging a fee after the broadcast of adverts that are deemed to be free of charge)²⁷. The Court held that this was not the situation in the present case. Here, the possibility of processing personal data affects the non-material interests of the consumer, i.e., his or her right to self-determination with regard to information (innuendo the data processing concerns non-material interests)²⁸. The labelling of the service as free of charge is also not misleading. Because the average informed and reasonable consumer understands the meaning of “free of charge”²⁹. Personal data is a counter-performance, but not a price. However, Facebook does not claim to provide a free service³⁰.
- As mentioned above, the Court emphasised that the information requirements for all contractual provisions were not complied with³¹. The user must also be informed of the purpose of the collection, processing or use (of the data) before consent is given BDSG (§4a (1) sentence 2). The respondent failed to do so. It is not clear which of the user's data will be transferred to the USA and how it will be

²³ Facebook (n 1) N. 44-45.

²⁴ Facebook (n 1) N. 46 ff.

²⁵ Facebook (n 1) N. 46-47.

²⁶ Facebook (n 1) N. 49 ff.

²⁷ Facebook (n 1) N. 50.

²⁸ Facebook (n 1) N. 50.

²⁹ The statement that there is actually an awareness of what is in return here is an important determination, although not in the context of this study.

³⁰ Facebook (n 1) N. 51.

³¹ Facebook (n 1) N. 52 ff.

processed there, and what data security standards will apply there³². This is also a violation of the transparency requirement. Since the user cannot determine the consequences of his or her declaration on the basis of the information provided to him or her in this respect either, a conscious decision on the part of the user cannot be assumed (§§ 4,4a BDSG, 12, 13 TMG). This provision constitutes an unfair term according to the BGB and the consent based on this provision is also invalid (BGB §307 Abs. 1; BDSG §§ 4, 4a, 12, 13 TMG). Because it is not possible to assume the existence of informed consent³³.

- The Court considered that the unilateral granting of the possibility of modification and the provision that consent is given by use are also unfair terms and void pursuant to BGB §307³⁴. Here, the Court assessed the consequences of the post-amendment use³⁵. It is noticed that the Court draws attention to the fact that consent is a separate legal transaction from the contractual relationship. Accordingly, the user's continued use after becoming aware that he or she has consented to changes in the applicable conditions has a dual function: (1) acceptance of the terms of the contract (2) declaration of consent in accordance with data protection law³⁶. Even though it is possible and legally valid for the user to implicitly accept a change in the general terms and conditions, it is not possible to come to the same conclusion for consent, considering the nature of consent³⁷.
- The Court held that it was not clear why the age limit provision existed. Accordingly, it is not clear why a minimum age limit of 13 years is applied to the contractual relationship between the user and the defendant³⁸. For reasons of protection of minors, the respondent may wish to ensure that its services can only be used by persons over the age of 13. However, it is not clear from the terms of use what legal obligation the respondent has to impose such an access restriction. Furthermore, the users were not informed about the age limit. Moreover, this obligation belongs to the defendant in any case and cannot be shown as an obligation of the user by the contract³⁹.

³² Facebook (n 1) N. 65.

³³ Facebook (n 1) N. 59 ff.

³⁴ Ibid.

³⁵ Facebook (n 1) N. 60.

³⁶ Facebook (n 1) N. 71 ff.

³⁷ Facebook (n 1) N. 61 ff. However, not every change in the terms of use will mean that the type or scope of data processing has changed. There may also be purely formal changes which have no impact on the data processing activity. The Court emphasised that these possibilities are not covered by article (contractual provision in the terms of use). See also Facebook (n 1) N. 68 ff.

³⁸ Facebook (n 1) N. 74.

³⁹ Facebook (n 1) N. 74 ff.

C. The Court's Decision and its Consequences

As a result of all these considerations, the Court ruled that the use of unfair terms also constitutes unfair competition⁴⁰. As it is known, the purpose of the existence of the rules on unfair terms (the aim of the norm) is the protection of consumers. This protection is based on the difference in negotiation power and information asymmetry between the consumer and the entrepreneur⁴¹. However, the protection of unfair terms has the function of protecting not only the consumer but also the competition between entrepreneurs and preventing unfair competition⁴². Unfair terms principles (and the control of general terms and conditions) also play a role in stabilising market failure⁴³. In Switzerland, unfair terms are regulated under the Unfair Competition Act (S-UWG §8). In German Law, the principles of the control of unfair terms are regulated under §§ 305-310 of the BGB. Nevertheless, it is accepted that unfair terms have legal consequences in terms of contract law in Swiss Law and in terms of unfair competition in German Law⁴⁴.

This correlation is much easier to establish under Turkish law. It is regulated that the use of terms contrary to the rule of good faith may constitute unfair competition (TCC Art.55/1/f.⁴⁵). However, it should be underlined that the legal consequences of both regulations are different⁴⁶. As seen in the sample court decision, the unfair terms control is considered as a criterion for the existence of unfair competition (violation of a rule of conduct)⁴⁷. Namely, the Berlin District Court used the principles of unfair terms and data protection law as a criterion. A review of the force, interpretation or validity of the terms of use was not carried out. However, the contractual provision/entrepreneurial practice, which is determined to be an unfair term in accordance with the principles of the law of contracts, will allow the assertion of claims based on unfair competition.

What is unique about the judgement of the Berlin District Court is the court's review of the valid consent criterion under data protection law. Accordingly, the court determined whether a provision can be characterised as an unfair term within the framework of the principles of data protection law. In other words, the rules of data

⁴⁰ Facebook (n 1) N. 80.

⁴¹ See also Marcus Stoffels, *AGB-Rechts* (4. Auflage, C.H. Beck 2021) 29 ff.

⁴² Yeşim Atamer, *Sözleşme Özgürlüğünün Sınırlandırılması Sorunu Çerçevesinde Genel İşlem Şartlarının Denetlenmesi*, (2. Bası, Beta 2001) s. 30 ff.; Ramazan Aydın, "Tüketici Sözleşmelerindeki Haksız Şartlar (TKHK m. 5)", 2016 11(1) Erciyes Üniversitesi Hukuk Fakültesi Dergisi 83, 89 ff.

⁴³ Aydın, (n 43) 116; Stoffels, (n 42) 21 ff.

⁴⁴ O. Gökhan Antalya and E. Doğa Doğançlı, "Genel İşlem Koşullarında Saydamlık Kuralının, Bunun TBK m. 20 vd.'daki Görünümlerinin ve TTK m. 55 f. 1 f ile TBK m. 20 vd.'nın Birlikte Uygulanabilirliğinin Değerlendirilmesi", 2018 24(2) Marmara Üniversitesi Hukuk Fakültesi Dergisi 823, 825. In this context, § 3a of the German Unfair Competition Act (UWG) stipulates that the violation of a legal provision aiming to regulate market behaviour for the benefit of market actors, including consumers, shall constitute unfair competition.

⁴⁵ "particularly in a misleading manner to the detriment of the other party"

⁴⁶ See also Antalya and Doğançlı, (n 45) 836.

⁴⁷ Ibid.

protection law are used as a criterion when assessing whether the balance between the parties in the contractual relationship has been disturbed in violation of the rule of good faith⁴⁸.

The claims based on unfair competition are also important in terms of their consequences. This is one of the reasons why the relevant decision is preferred. This is mainly because the range of persons who may be claimants in the assertion of claims based on unfair competition is wide. As a matter of fact, in this particular case, the claimant is a German consumer association. Contents and services (products) in the digital world are complex. As seen in the decision under review, the terms of use of free products (privacy policies) are the terms of the contract the consumer has to deal with. Understanding the relevant conditions is difficult, let alone protecting consumer rights effectively within the framework of these provisions. Despite all efforts, the privacy policies in practice have not been simplified. In addition, consumers are hesitant to apply for legal actions for unfair-contractual terms or product defects individually⁴⁹. For the effective protection of consumers, “collective actions” should be taken instead of individual claims⁵⁰. The connection between unfair competition and unfair terms will allow non-governmental organisations to step in for more effective consumer protection⁵¹.

Furthermore, important improvements are taking place in the European Union in terms of class actions. Directive (EU) 2020/1828 is aimed at activating collective actions in favour of the consumer⁵². Article 9(6) of Directive 2020/1828 states: “*Member States shall ensure that a redress measure entitles consumers to benefit from the remedies provided by that redress measure without the need to bring a separate action.*” Redress measure is defined in Article 3 of the same Directive (Art. 3/10). Accordingly: “*redress measure means a measure that requires a trader to provide consumers concerned with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid, as appropriate and as available under Union or national law.*” Thus, the necessity to assert the claims in two separate actions, namely the case for determination of precedent and the subsequent action for performance, which are characteristic features of class actions, and the difficulties caused by this, have been overcome.

⁴⁸ Nonetheless, the decision has not been analysed in terms of its implications for data protection law. See also, Franziska Leinemann, *Personenbezogene Daten als Entgelt*, (Peter Lang 2020) 107 ff.

⁴⁹ The individual actions of the consumer do not compel the entrepreneur to act in accordance with the law or to refine the terms of the contract. See also Axel Metzger, “Verbraucherschutz bei der Bereitstellung digitaler Produkte Zur Durchsetzung der §§ 327–327u BGB”, in Antje G. I. Tölle, Jörg Benedict, Harald Koch, Stephan Klawitter, Christoph G. Paulus, Friedrich Preetz (eds.) *Selbstbestimmung: Freiheit und Grenzen-Festschrift für Reinhard Singer zum 70. Geburtstag*, (Berliner Wissenschafts-Verlag 2021) 431, 437 ff.

⁵⁰ Metzger (n 50) 438.

⁵¹ Ece Baş, “6098 Sayılı Türk Borçlar Kanunu’nda Genel İşlem Koşulu Kavramı ve İçerik Denetimi”, *Prof. Dr. Mustafa Dural’a Armağan*, (Filiz 2013) 276, 303.

⁵² See also <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020L1828&from=EN> Date of Access 08 November 2022.

Instead of a Conclusion

Data-driven business models are complex. This complexity prevents the consumer from understanding the rules and consequences of these rules when utilising the relevant business model. Frequently, as in the case under review, the consumer does not even have access to the terms of use in a single place in an organised manner. Unfair competition provisions have been introduced in order for consumers to be a party to contracts under better conditions in the market. They have an important function in protecting consumer interests in the market. Within the scope of the relevant audit, the existence of a contractual relationship “containing unfair terms” is also taken into consideration. In data-based business models, such control is carried out in the light of the principles of “data protection law”. The decision of the Berlin Regional Court is an important and guiding example in terms of the method to be followed in addressing the problem in Turkish law.

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