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## FACEBOOK IN BREACH OF GERMAN DATA PROTECTION LAW

Court upholds the majority of vzbv's claims against Facebook

- Default privacy settings require users' informed consent.
- 'Real-name' clause and other terms and conditions are unlawful.
- "Facebook is and always will be free" claim is not misleading.

**Facebook's default settings and some of its terms of service and privacy policies are in breach of consumer law. That was the decision of the Berlin Regional Court following a lawsuit brought by the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband – vzbv). The court found that parts of the consent to data usage obtained by the company are invalid.**

"Facebook hides default settings that are not privacy-friendly in its privacy centre and does not provide sufficient information about this when users register," says Heiko Dünkel, Litigation Policy Officer at vzbv. "This does not meet the requirement for informed consent."

### KEY DEFAULT SETTINGS ARE ALREADY ACTIVATED

Under the Federal Data Protection Act (BDSG), personal data may only be collected and used with the consent of the data subject. To enable users to make a conscious decision, providers must supply clear and easy-to-understand information on the nature, scope and purpose of the intended data use.

Facebook did not meet these requirements. In the Facebook app for smartphones, for example, a location service was pre-activated that reveals a user's location to people they are chatting to. In the privacy settings, ticks were already placed in boxes that allowed search engines to link to the user's timeline. This meant that anyone could quickly and easily find personal Facebook profiles. The judges ruled that all five of the default settings on Facebook that vzbv complained about are invalid as declarations of consent. They said there was no guarantee that users would even know they were there.

### CONSENT TO THE USE OF DATA IS FRAMED TOO BROADLY

The Berlin Regional Court held another eight clauses in Facebook's terms of use to be invalid. These included pre-formulated declarations of consent

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which allowed Facebook to use the name and profile picture of users “for commercial, sponsored or related content” and to transfer their data to the USA. The judges made it clear that such pre-formulated declarations cannot constitute effective consent to the use of data.

A clause obliging users to use only their real name and data was also ruled unlawful. “Providers of online services should allow users to use their services anonymously, for example using a pseudonym,” says Dünkel, explaining vzbv’s position. “That principle is enshrined in the German Telemedia Act.” However, in the view of the regional court, Facebook’s requirement that users must use their real names was a covert way of obtaining their consent to the use of this data, and that alone was reason enough to rule it unlawful.

### **FACEBOOK’S CLAIM THAT IT IS “FREE, AND ALWAYS WILL BE” IS PERMITTED**

vzbv did not succeed in its argument against Facebook’s claim that it is for free. The association believes the claim is misleading because, as Dünkel explains, “Consumers do pay to use Facebook. Maybe not in euros, but with their data. And this data is extremely valuable to the company.” The Berlin Regional Court found the claim was lawful because intangible consideration cannot be regarded as a cost.

The judges also rejected several other vzbv submissions against provisions of the Facebook privacy policy, stating that the policy only contains information about the company’s procedures and no contractual provisions.

vzbv intends to appeal to the Berlin Court of Appeal on the points that were rejected by the court.

*Judgment of the Berlin Regional Court dated 16 January 2018, Case no. 16 O 341/15 – not res judicata*

### **Further information**

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