

**europe-v-facebook.org**

**INVOLUNTARY**

**RESPONSE TO FB-I'S SUBMISSIONS**

Vienna, October 31<sup>st</sup> 2013

## A. General Issues

### Quality of FB-I's Submission

Despite intensive effort I had to find that Facebook Ireland Ltd (FB-I) has in fact not reacted to most issues brought forward in the complaints. FB-I is in many ways trying to bypass the clear legal and factual allegations with obfuscation tactics. In many ways FB-I has not reacted to the arguments brought forward or ignored proven facts by e.g. simply saying that it "contests" these findings. This can in no way be an acceptable response that would rebut my complaints. It seems like the intention of FB-I's submissions is to be tiresome, but not to really react to the matters on the table.

FB-I is not making any arguments or submitting any evidence for its counterclaims. While I have made it a point to be very precise and argue every detail under the law, FB-I is often reacting with facts and arguments that have practically nothing to do with the claim made. To not produce even more paperwork that must be processed I did not deal with irrelevant parts of FB-I's submission, but hereby generally rebut that these findings and arguments.

I felt very much reminded of our meeting with FB-I in Vienna in 2012, where FB-I was not disclosing its position in writing, because FB-I was afraid that disclosing their position could harm their position.

- ***F1: The submissions from FB-I are of poor quality and mainly irrelevant given the claims made.***
- ***R1: I explicitly ask the DPC to ask FB-I for a proper reaction to the complaints made, or find that FB-I was unable to contest or rebut the arguments and facts submitted from my side.***

### FB-I's References to „Complaints“

It seems to be a technique before the DPC to simply ignore the explicit wording or clear intention of complaints. FB-I has in most submissions "summarized" the complaints in ways that have nothing to do with the original complaints submitted by me. In many cases FB-I is simply leaving out the more problematic issues raised - pretending that they are not here. In other cases FB-I is arguing about issues and matters that are in no way related to the complaints made. Such sections seem to be inadmissible for the decision making process. Overall one can say that FB-I is in many ways not reacting to the complaints before the DPC, but to complaints it has made up or altered in a way that they are easier to rebut.

I am aware that the DPC is claiming that it runs an "informal" procedure, but I have to highlight that this is a matter of EU law and that any decision has to live up to the precise wording of the law and the clear intention of my complaints. Anything else would be subject to an appeal. I have tried my best to assist the DPC to focus on the relevant facts and claims to ensure that the final decision is properly made. However there is little use of precise arguments if the other side is simply not reacting to them, or if the DPC would be tricked by the tactics of FB-I.

- ***F2: FB-I has in many ways tried to obscure the clear intention or wording of my complaints and the matters raised in them. I hereby contest the summaries made by FB-I.***
- ***R2: I hereby ask the DPC to ignore submissions that are irrelevant in relation to the legal and factual questions raised in the complaints.***

## References to „Audit Reports“

In its submissions Facebook Ireland Ltd (FB-I) is referring to the “Audit Reports” 595 (!) times. In fact FB-I is thereby mainly relying on these two documents in its submission.

While this report is published the underlying evidence, arguments and files are not accessible to me or anyone else. The facts found in these reports cannot be independently verified and contested. In many ways (see submissions from December 4<sup>th</sup> 2012 and August 28<sup>th</sup> 2013) the findings could be proven wrong on the face of the record, however many other claims are not verifiable as the underlying arguments or facts are not disclosed. In other cases there is no solid explanation of the basis for such findings. In many cases FB-I claims that there was a finding by the DPC, but when reviewed in more detail it becomes clear that the DPC did not investigate these matters as they were outside of the scope of the “Audit”.

In many ways the “Audit Reports” also only relying on FB-I’s claims. Overall this leads to even circular strings of evidence where FB-I points at the DPC and the DPC points back to FB-I. In plain English FB-I says “*This is true because the DPC said so*” and the DPC said in its Audit Report “*This is true because FB-I said so*”. This can in no way be a proper “investigation” or establishment of facts that the DPC can rely on when making a decision.

I strongly object to FB-I’s attempt to pretend that the “Audit Reports” are in any way an independently verifiable form of evidence. If the DPC would accept this form of evidence this would effectively mean that I am in no way able to properly respond to the submissions by FB-I.

This approach is no different than someone relying on a report about evidence that is locked away in a cabinet, shielded from any scrutiny or questioning. Natural Justice and the right to a “fair trial” prohibit that evidence is hidden from parties in an adversarial hearing. By referring to the “Audit Reports” FB-I is trying exactly this. In addition it can in no way be a form of evidence to merely point back to oneself in a circular argument.

- ***F3: I am therefore generally contesting the validity of the “Audit Reports” as a form of evidence and do not accept this as a form of evidence or prove in any way.***
- ***F4: I feel that I am unable (as previously) to fully respond to the submissions by FB-I since evidence and files are still missing. I am therefore involuntarily commenting on this submission and do in no way accept this procedural approach.***
- ***R3: I hereby ask the DPC to require FB-I to produce independently verifiable evidence for its claims or find that the claims were not properly proven.***

Independently from FB-I’s submission the DPC has still not allowed access to the arguments, files and evidence produced in the past two years.

- ***R4: I am hereby (again) asking the DPC to disclose all evidence, arguments and files obtained in relation to my complaints as specified in my submission from August 28<sup>th</sup> 2013 and other previous communication.***

## Basis for Decision

Despite previous communication with the DPC I was still not informed about the basis of a decision by the DPC. There are considerable amounts of evidence, files and arguments from the previous investigation that is not disclosed. On the other hand FB-I has rarely submitted any credible arguments and practically no facts in its submission. Currently it seems like there is a huge lack of properly established facts, so that there is no basis for a final decision in all complaints.

I am again very much insisting that all documents are properly disclosed and may then be the basis for a decision. However I could in no way accept if the DPC would rely on its own "Audit Reports" or part of the undisclosed evidence when making a decision. I see no way that such a decision would be upheld in an appeals situation given the issues outlined previously.

The DPC may return to the temporary entertained argument by Gary Davis that the "Audit" was an independent procedure (which I strongly contest) but in this case it would be inappropriate to rely on facts established in this "other" procedure in my case.

**→ R5: I hereby ask the DPC to declare this form of evidence to be inadmissible and to clarify on which forms and sources of evidence he will rely when making a decision.**

## Duty to Investigate

As FB-I has not given any material response I have to highlight that many facts are still unclear and definitely need proper and reliable investigations of facts. The DPC has a duty to "investigate" and cannot only rely on submissions made, but has to clarify unclear facts properly. I am aware that this needs considerable resources, but I remind the DPC of its statutory obligations under Irish and EU law and the responsibility it has for over 800 Million data subjects factually concerned.

Currently it seems to me that the DPC is only able to make its decision on a "he said - she said" basis, which will not be sufficient to establish reliable facts. I am relying on facts that are clearly outlined and proven, despite the fact that a complainant does not have to prove more than a "probable cause". A complainant can in no way substitute the DPC's duty to investigate.

The DPC will either have to ensure that facts are voluntarily proven by FB-I or use its statutory powers to establish facts without the help of FB-I. Currently there seems to be no proper basis for a final decision given the unwillingness of FB-I to provide proper evidence. If facts are not properly investigated the DPC will risk that any decision will be squashed in an appeals situation.

**→ R6: I am hereby (again) asking the DPC to investigate all matters that are not properly argued or where FB-I was not able to submit independently verifiable evidence. The DPC has a statutory duty to investigate and substitute facts that are not submitted by the parties. This can e.g. be done through the Swedish data centers of Facebook.**

## Access to Documents & Requests Made

I am explicitly holding up my criticism expressed in my submission from August 28th 2013. So far the DPC was at least stringent with its unlawful denial of access to all arguments, evidence and files. To my great surprise this position was now changed by sending me some submissions from FB-I. However this (very limited) information is in no way adequately allowing me to protect my rights. Overall FB-I is for most of the 200 pages only copy/pasting the "Audit Reports". I clearly object to a useless substitution of my right to access all files, evidence and arguments via these submissions.

The DPC has so far not responded to any of the Requests made in this submission. I am asking the DPC to inform me about the approach it is taken given these 59 explicit requests.

→ **R7: I am hereby asking the DPC to grant me full access to all evidence, arguments and files and respond to the requests made in my previous submissions and in this document.**

## Outline of Procedure

The DPC has so far been very opaque about the procedural details. In many letters I have repeatedly tried to get a clear outline of the procedure. As a matter of legal certainty and to establish the facts in an appeals situation I am hereby (to the best of my knowledge) summarizing the DPC's opinion about the complaints procedure:

1. The steps in the DPC's procedure are:
  - Complaints are filed (*s 10(1)(b) DPA*)
  - Complaints are found not to be "frivolous or vexatious" (*s 10(1)(b) DPA*)
  - An "amicable resolution" should be found (*s 10(1)(b) DPA*)  
(*Never happened in this case.*)
  - The complainant may make a "request for a formal decision" (no statutory basis)  
(*The DPC may require complainants to make such a request or decide without a request.*)
  - The DPC is circulating a "draft decision" to both parties (*no statutory basis*)
  - Both parties may comment on the "draft decision" (*no statutory basis*)  
(*The DPC is agreeing on the time limits with the parties. I would need at least one month.*)
  - The DPC considers the comments and delivers a final decision (*no statutory basis*)
  - Within 21 days both parties may appeal to the circuit court (*s 10(1)(b) DPA*)
  
2. Other Matters:
  - I have no right to see evidence, files or arguments from FB-I (*2<sup>nd</sup> Schedule s 10(1) DPA ?*)  
(*Except the recent submissions the DPC has sent to me.*)
  - The relation between the "Audit" and the "Complaints" is unclear

I am in not sharing this view and refer to my previous submissions about my legal standpoint on procedural matters. However feel that this summary might be helpful to clarify positions.

→ **R8: I am hereby asking the DPC to indicate if I have any misunderstanding in this relation.**

## B. Material Issues

### Roles of Controllers not Contested

In its submission FB-I has not reacted to the general remarks made at the beginning of the “request for a formal decision”. From the reaction to the complaints (especially complaint 19 - see below) I currently assume that FB-I does not want to take a specific position in relation to his matter. In different situations FB-I is “flip-flopping” between wanting to have full control over all data on Facebook and not wanting to take on the attached responsibilities. Overall FB-I is not taking any clear position, but surely does not contest the submissions made from my side.

Unfortunately this will mean that the DPC will have to determine out of my submissions and its own observations that the controller is for each processing operation. This may not have been necessary for the informal “best practice” suggestions in the “Audit Reports”, but it will be crucial when making a formal decision on the complaints. Since the rights and duties are dependent on the roles of each entity a clear determination in every case a legal analysis of all other matters is logically impossible.

- ***F5: FB-I has not contested my general claims on the roles of the “controller” being split between users and FB-I in different situations. However FB-I is still not clarifying its view on these positions, making many of the further legal analysis unstable.***
- ***R9: I hereby ask the DPC to make a finding in relation to every use of data who is the controller and/or processor. There may be different controllers dependent on the purpose and the processing operation (e.g. the user may be controller data used for the timeline, but FB-I may process the same data as a controller for targeting advertisements).***

### Legal Arguments

In most cases the facts are rather clear, but the legal consequences were not dealt with or blankly ignored. The DPC has only made an informal “best practice” assessment of FB-I during the “Audit” that targeted the “bigger picture”, but has explicitly not considered the exact wording of the DPA, Directive 95/46/EC and the relevant Working Papers of the Article 29 Working Group.

Interestingly FB-I has made practically no arguments on the interpretation of the law as outlined in my complaints, despite this being the most important issue in these complaints. I therefore assume that my legal arguments are not contested by FB-I, or that FB-I simply had no stringent argument under the law. This is especially relevant as the DPA and Directive 95/46/EC are set up to prohibit processing unless a controller can claim certain exceptions. These exceptions were in most cases factually never claimed (and not even indicated) by FB-I.

- ***F7: FB-I has usually not contested my legal analysis, but has at the most made purely political***
- ***R11: I therefore ask the DPC to make its findings in line with my legal arguments based on the DPA and the Article 29 Working Papers, or require FB-I to submit stringent legal arguments.***

## FB-I as the Legislature?

In many submissions FB-I is referring to ridiculous arguments like the “*social nature*” of the platform or the “*user experience*” as an argument to process data. As I am not aware of a Section 2A(1)(e) DPA that allows processing “*if necessary in line with the social nature and improved user experience of a product*” I generally want to refute all these arguments in all its varieties as being legally irrelevant.

Overall I want to highlight that we are in a procedure governed by EU and Irish statutory law, leaving little discretion for interpretation or any “*common law*” exceptions or interpretations. In many ways FB-I is however arguing in a political way that targets at exactly such discretion or “*common law*” exceptions from the duties under the DPA and Directive 95/46/EC.

If read between the lines, it is clear that FB-I is factually saying that the law does not “fit” FB-I’s products and the DPA and Directive 95/46/EC shall therefore not be applied. This suggestion by FB-I is showing the ignorance of FB-I in relation to Irish and European law. The European legislature is not compelled to make the law “fit” the products of FB-I, but FB-I is under the law compelled to make its services be in line with the law.

The fruitless efforts of FB-I when lobbying against the reform of Directive 95/46/EC on a European level have again shown that the legislature has decided not to consider such arguments. There is no reason that such arguments should now be considered in a procedure that is based on a clear statutory regime outlining a number of criteria that have to be fulfilled to make processing legitimate. In practically all cases I have outlined very simple and practical changes that would bring FB-I into line with the law, while being able to provide the same service to its users.

There is also no argument under the law that it “cannot be fulfilled”. If FB-I is unable to bring its products in line with the law then there is only one possible result: The product is simply illegal under European law. Overall I am left with the impression that FB-I is unable to accept that there are limits under the DPA and Directive 95/46/EC.

It is somewhat silly that this point has to be made, but apparently FB-I is to a large extent relying on operating on arguments that are not reflected in the law. As this matter is coming up in many forms and ways throughout FB-I’s submission I want to generally refute this obscure argument.

→ **F6: FB-I is in many ways claiming that the law does not fit the product, ignoring that it is not above the legislature and indicating that there should be some “special treatment” of FB-I.**

→ **R12: I hereby ask the DPC to not embark on such arguments.**

## Complaint 1 - "Pokes"

In its response FB-I is not separating between the system as provided in 2011 and the modifications done afterwards. My complaints are clearly asking for two findings by the DPC for both situations.

### Original Situation (2011)

In 2011 there was no "activity log" and no possibility to remove pokes and no information that "removed" pokes were retained by FB-I. There is nothing in the response from FB-I that would contest the facts in the original complaint. FB-I is referring the "Audit Reports" to demonstrate an alleged inconsistency of my complaint with the findings of the DPC but I was unable to find any section of the "Audit Report" that would suggest this. In contrast FB-I is even citing the DPC's finding that users were not facilitated with adequate methods to delete pokes (page 3 of the submission).

→ ***F7: Therefore I have to summarize that FB-I is in no way contesting the facts relied upon in the original complaint. FB-I has also not contested the legal consequences as outlined in my complaint (amended by the submission from August 29<sup>th</sup> 2013).***

### Situation after Audit (2013)

In its response to the situation after the "Audit" FB-I is highlighting many functions of the activity log and sections of the "Audit Reports" that have nothing to do with "Pokes", but with other functions (e.g. liking photos or "educational tours"). This is absolutely irrelevant in relation to the complaint.

FB-I has not delivered any evidence that removed "pokes" are now really removed if users have clicked the "remove" button. The "Audit Reports" do not hold any explicit prove thereof, but merely says that such data is not included in the "Download Tool" after deletion and may therefore be deleted. This finding of the DPC is inconsistent with the fact that FB-I itself is claiming that "pokes" are kept as long as senders and receivers have not deleted it. In addition the fact that data does not surface in the "Download Tool" is no way prove of the fact that it is not held on FB-I's servers. To the contrary FB-I also claims that keeping such information is necessary to prevent "poke harassment".

Overall these claims are contradictory and FB-I was in no way able to demonstrate the previous practice of keeping deleted pokes was in any way changed.

→ ***F8: Therefore I have to summarize that FB-I has not submitted any evidence that "removed" pokes are really deleted and the previous practice was in any way changed.***

### Inbox/Outbox Plot

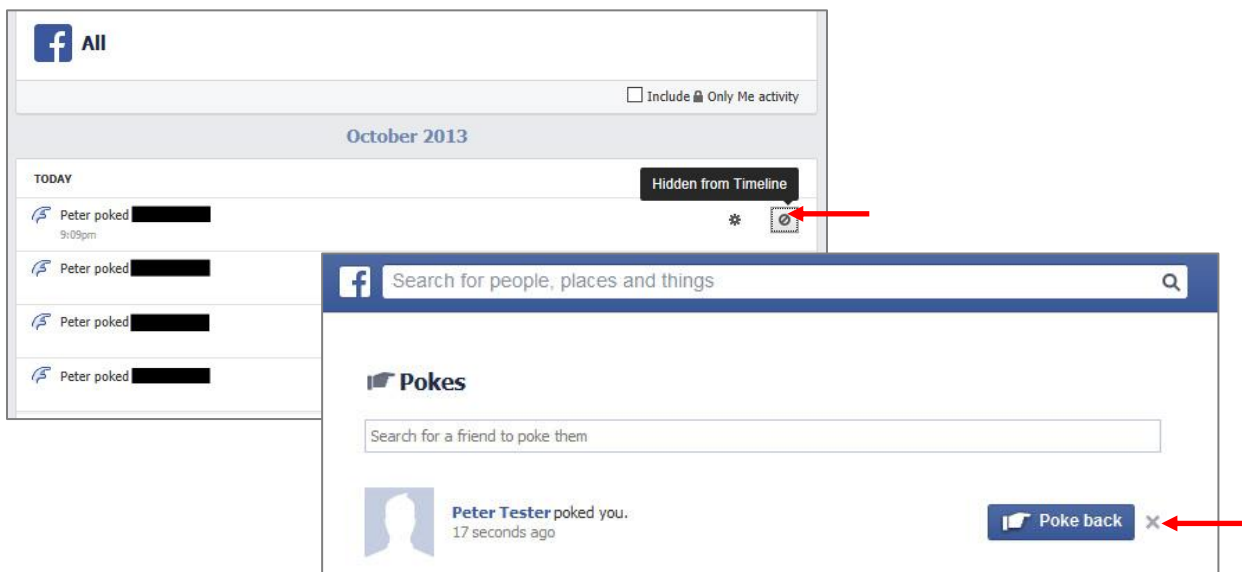
In a malicious move FB-I has now apparently split "pokes" into an inbox/outbox system that is totally inadequate given the one-sided way of such messages. There has never been any use for the sender to see pokes that were sent to others and FB-I has previously not offered such a function.



By doing so FB-I is ensuring that the information can be kept if only the recipient is deleting such “pokes” as the full deletion is now needing “double opt-out” by both parties. The both parties are however not informed that the “poke” is still kept after removal. A sender may also reasonably expect that the “poke” is not shown after removal from his “Activity Log” - despite this the poke cannot be taken back by deleting it. Therefore it seems like there is absolutely no use for this function other than hindering the recipient to fully remove a poke.

In reality this makes “pokes” practically undeletable instead of providing more control. It seems like FB-I is rolling out such systems more systematically to then rely on the same arguments for keeping all data indefinitely as it already did with deleted messages (see complaint 07). The idea of control through consent and withdrawal of consent is in no way adequately implemented if the removal of data needs the withdrawal from multiple data subjects. FB-I is also not claiming that it does not process such data in relation to the data subject that has taken back his/her consent. Thereby it is generating another form of “third party consent” where only User A (e.g. the sender) is consenting, but the data is uses in relation to User A (e.g. the sender) and User B (e.g. the recipient).

In addition there is no information for the sender/recipient that pokes are still kept after “removing” the poke. The removal is done by clicking an “X” button, with the title “remove” if one hovers over the button. There is no information that the “poke” is in kept further.



Screenshot: “X” is allowing to delete poke. Tag reads “remove” when mouse if over “X”.

In similar ways FB-I could also go on to splitting all other forms of data to make sure that they are even harder to delete. If this plot is accepted there is nothing holding FB-I back from e.g. splitting postings, photos, comments or “likes” into an object of the “sender” and a second object of the “recipient”- just to make sure that postings are factually never deleted.

→ **F9: Therefore I have to summarize that FB-I has instead of giving users more control, ensured that “pokes” are kept forever by - without any need - splitting it into a “sent” and “received” poke. Users are wrongly informed that they could delete such pokes.**

Given this additional information from the submission by FB-I I need to expand my complaint to also include the “inbox/outbox” method. I am relying on the same legal grounds as in the complaint and the “request for a formal decision” but now additionally claim that this is:

1. A form of unfair processing of data as the reasonable expectations are contravened by FB-I, the inbox/outbox system is for no good reason making it impossible to delete data and is therefore in breach of the principle of fairness.
2. FB-I is processing data in relation to all data subjects, even if one of them has withdrawn its consent by “removing” such pokes and is thereby processing without consent. In addition there has never been an informed consent given the fraudulent opaque system.
3. There is no proper information of this process, no longer any legitimate purpose, they are no longer relevant and necessary after the removal and the inbox/outbox system is overall excessive given the purpose of “pokes”.

➔ **R13: Therefore I ask the DPC to amend my complaint given the additional submission from FB-I.**

## **Complaint 2 - “Shadow Profiles” / “BIG DATA”**

In its submission FB-I is not responding to the overall allegation, which is that FB-I is effectively processing users’ data in a way that is recently been called “Big Data” analysis. Overall this means that massive amounts of information from many sources and across purposes and causes are processed to deliver information about one person. This problem is partly a matter of information gathering via third parties (e.g. external partner or other users) and the form of boundless processing itself that is irrespective of the purpose, the specific consent and the information to users. The complaint and the “request for a formal decision” have only listed a number of cases that are documented to show this form of processing to deliver a “probable cause”. There could very well be many more examples like a recent publication that FB-I can predict the functioning of a relationship (see e.g. this [New York Times Report](#)).

However there was little investigation into this matter by the DPC as this matter went far beyond the scope of the “Audit Reports”. The factual actions by FB-I can only be established through a detailed investigation into the data processing operations of FB-I when e.g. targeting advertisements or analyzing behavior of users. FB-I is at the very most only disclosing that all data may be used for all purposes or for advertisement. In some public statements FB-I has given examples (usually very simple functions) but FB-I has never given an overall explanation of what may be called “BIG DATA” analysis. Small parts that relate to the overall issue were investigated, but the “Audit Reports” did not have a focus on this matter and are not explaining the findings, evidence is missing. The “Audit Report” is in many ways just restating FB-I’s vague, generic and general phrases.

**On the individual claims by FB-I I want to comment that:**

- a) The matter of access to data is of no relevance to this complaint.
- b) There is no evidence that messages are not scanned. The Audit Report says that there was no technical analysis due to time constraints.

- c) There is no evidence other than FB-I's claims that "social plugin" data is not used in a "Big Data" analysis. The "Audit" could not deliver any such evidence in either direction.
- d) Telephone numbers that are obtained for "security" reasons were also used for "friend finder" purposes without the users' intention to share such number.
- e) FB-I is in no way contesting that the "profile completion" functions are using data about other users to find out more about a particular other user.
- f) My complaint has not said that friend lists of others are shown, FB-I is misrepresenting my complaint. I claimed that factually the list of a friend is shown user by user as a "friend suggest", which is practically disclosing "hidden" friend lists to other users against the explicit wish of the user. FB-I could e.g. randomize suggestions in a way that this is not possible. For the sake of this complaint I again want to highlight that FB-I has not contested that it uses data shared by third parties to find out more about another user.
- g) FB-I is repeatedly claiming that it is the "social nature" of its platform that others may share information about a user. This is correct, but only reassuring my complaint which is that FB-I is using massive amounts of information that are provided by third parties and without the consent of the data subject concerned.
- h) In relation to FBX I want to highlight that the system is at least allowing FB-I to gain the information that it shall "send advertisement A to user X". This in itself is data that related to a data subject and constitutes personal data. That the system could have been engineered in an even more intrusive way does not mean that there is no exchange of information. If there would not be any exchange of information FB-I would not know who to send an advertisement to. Again FB-I is overall not contesting that it gathers data from third parties (in this case advertisers) without any informed or specific consent.
- i) In relation the "Partner Categories" I acknowledge that this system may only be available in the USA. However I am again just using this as an example of an overall pattern. In addition it is again unclear how FB-I is separating between users from the US since Facebook is in reality a single technical platform and FB-I is only a legal entity to save taxes, but in no way a separate operator of a separate platform. I was for example living in the US repeatedly any may very well be in the databases of Facebook's US advertisement partners.
- j) In relation to the very clear evidence that FB-I is using other sources like Wikipedia to find out more about users FB-I has simply claimed that this is not true, but did not give any explanation for the phenomena described in the "request for a formal decision".

Overall there I have to summarize that there is doubt that FB-I is linking and processing data from multiple third party sources and process them for various reasons irrespective of the original purpose, a specific consent and the possibility to control such processing. By doing so it is generating more information about a user than this particular user has voluntarily shared with FB-I. This may be called "shadow profiles" or "big data". In any way FB-I was unable to deliver any arguments or evidence that this form of processing is not happening. In addition FB-I has in no way contested the legal consequences from such analysis as outlined in my submissions.

➔ ***F10: Therefore I have to summarize that FB-I was unable to contest the fact that it overall engages in conduct and does not contest the legal consequences described.***

➔ ***R14: I ask the DPC to thoroughly investigate the exact forms and means of processing of all data held by FB-I and produce the necessary evidence.***

## Complaint 3 & 11 - Tagging

In its response FB-I is not separating between the system as provided in 2011 and the modifications done afterwards. My complaints are clearly asking for two findings by the DPC for both situations.

### Original Situation (2011)

FB-I has in no way explained how there should be an informed, specific and unambiguous consent by data subjects if third parties (that might not even be friends with them) can “tag” them. FB-I has therefore not contested my claim that there is no consent for these tags by the data subject. While the private user may be exempt by the “household exemption”, further use by FB-I is clearly happening without proper consent and against the law.

➔ ***F11: FB-I did not contest that there is no consent by the data subject when others “tag” them.***

In 2011 there was no “activity log” and no possibility to fully delete tags and no information that “removed” pokes were in fact retained but hidden by FB-I. FB-I has not put forward any claims against this. However it says that deleted tags were factually deleted. This is untrue based on the evidence in the original data sets and screenshots provided that clearly show that “removed tags” are held and lead to prevention of re-tagging. The claims made by FB-I on page 14 of the submission that the DPC would have found that such data is deleted, is simply absurd given the clear evidence. The DPC was apparently only looking at data surfacing in the “download tool”, however the experiments explained in my previous submissions show that “tags” are still kept by FB-I. The claim by FB-I that such data is not held is clearly a lie and shows that FB-I is not

➔ ***F12: The finding of the DPC and the claim by FB-I is inconsistent with the facts obtained through screenshots and the data in the response to my access request.***

### Situation after Audit (2013)

There is still no possibility to prevent “tagging” by others and FB-I is clearly using such tags for its own purposes. This is not contested by FB-I.

The fact that there is now a “review” function, which controls the visibility of tags, is a factual improvement but irrelevant under the law as the DPA does apply to “invisible” data just like it applies to visible data. There is still no consent for the use such “invisible” data that is processed by FB-I.

In reference to the possibility to fully delete such tags I refer to the above. It is still not possible to fully delete “tags” as demonstrated in previous submissions. Users can again only object to the visibility - not the processing of the data itself.

➔ ***F13: FB-I was unable to contest that there is no consent for the use of such data by FB-I. The improvement in control over the visibility of tags does not change the legality of the processing of such personal data. FB-I has in no way contested my legal claims.***

## Complaint 4 - Synchronizing

Overall the functioning of the “synchronization” tool seems to be undisputed. FB-I claims that data from the tool is only used for limited purposes, which was in no way proven in an independently verifiable way. The technical analysis seems to be only based on a couple of experiments and claims that were submitted by FB-I. There is no verifiable evidence that FB-I is not using such information for other purposes than the “friend finder”.

### No use of Phone Numbers?

FB-I also claims that it only uses email data and does not use other information obtained through synchronizing (mainly phone numbers). On page 13 of its submission FB-I highlights that the DPC was “satisfied” that phone numbers were not used in the “friend finder” process. Correspondingly the “Audit” from December 2011 says on page 121::

*“In response to a specific element of the complaints, we are however satisfied that, aside from storage of such data for its users, no additional use is made of telephone numbers or other contact details uploaded as part of the synchronisation feature. FB-I only processes email addresses for friend finder purposes.”*

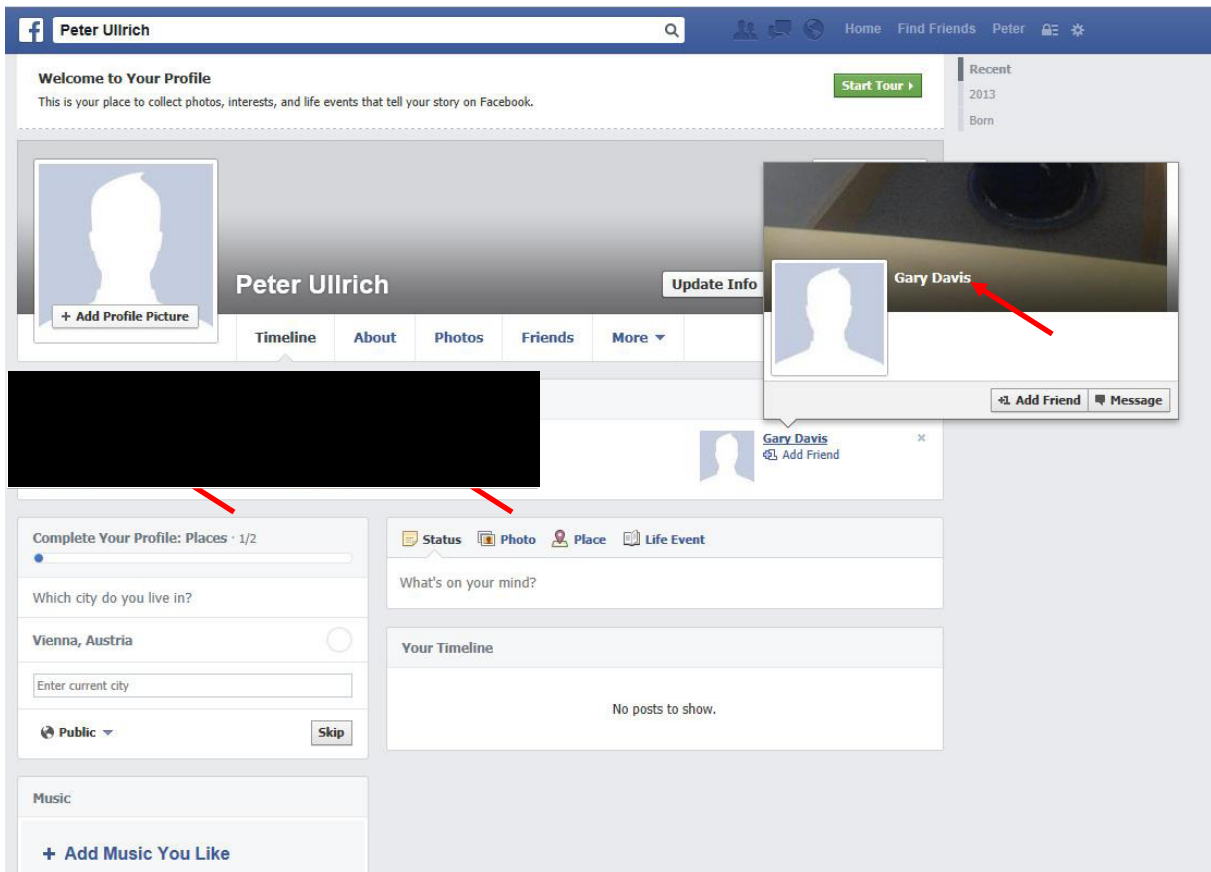
However we had to find that the DPC’s satisfaction was not reflected by the reality on my screen. This is (again) questioning if other claims by FB-I that the DPC was relying on are not similarly fraudulent.

### A Telephone Number Experiment:

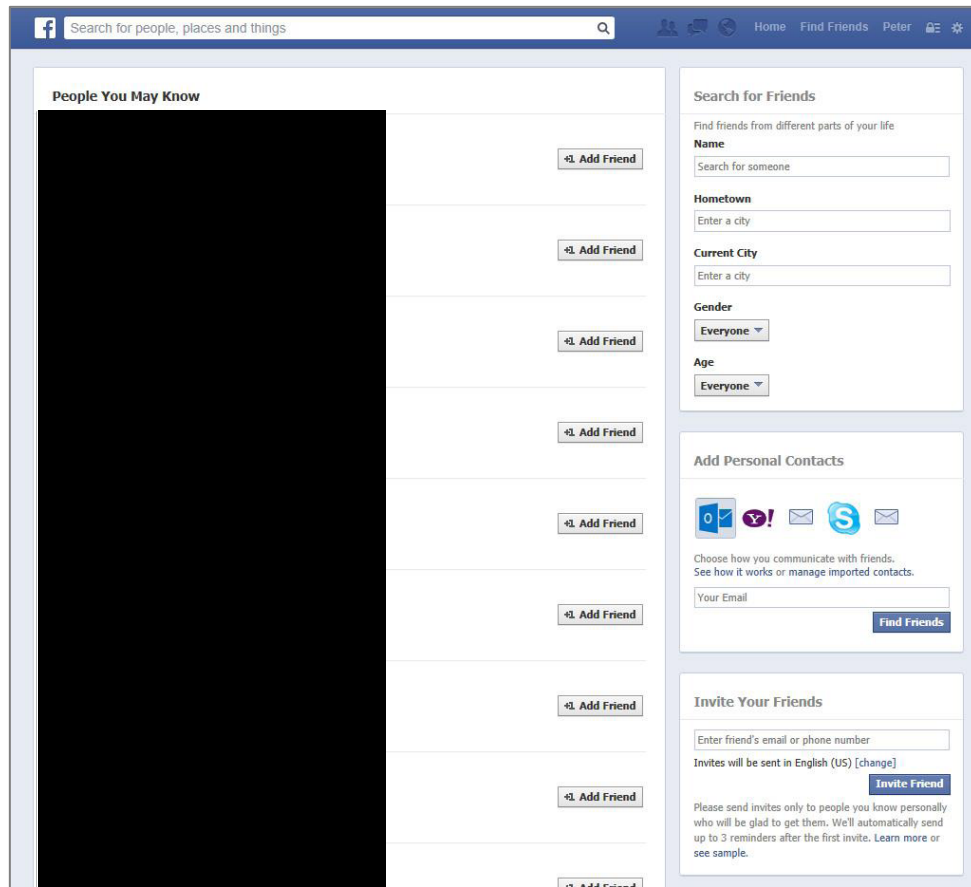
In an experiment I have set up a new Facebook account (“Peter Ullrich”). This account was set up with a clear browser and an unused email address ([peter.ullrich\[REDACTED\].com](mailto:peter.ullrich[REDACTED].com)) on October 27<sup>th</sup> 2013. Facebook has (as with almost every newly set up account) requested to provide a telephone number to verify the user via a text message for “security reasons”. I have put in my phone number (+43 [REDACTED]) and set the visibility of it to “only me”.

Interestingly the newly set up account got a number of “friend suggestions” that were my real friends, or people that have my phone number, including Gary Davis - the former deputy DPC.

It was obvious from the list of suggestions that this was not in any way related to my real Facebook profile, but to my phone number. Some of the suggested people only have my phone number and I have never exchanged any other information (email, my full name or Facebook account) with them. With many of the suggested people I have not talked to in a long while, but all of them had my phone number at some point. Some suggestions were seriously problematic as the relationship I had to these other people is a very personal or even confidential matter.

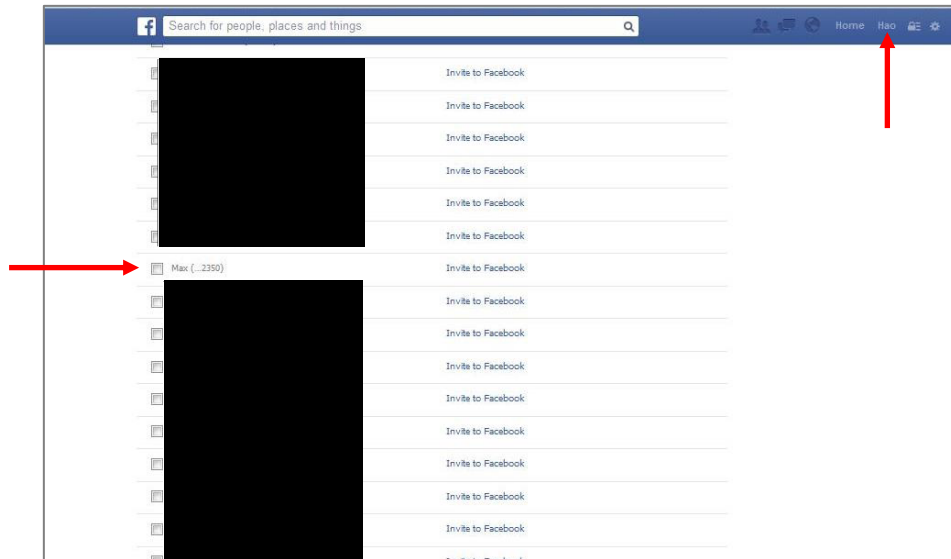


Screenshot: Imaginary "Peter Ullrich" is suggested to become friends with the former Deputy DPC "Gary Davis"



Screenshot: Imaginary "Peter" is suggested to become friends with people that have Max Schrems' number.

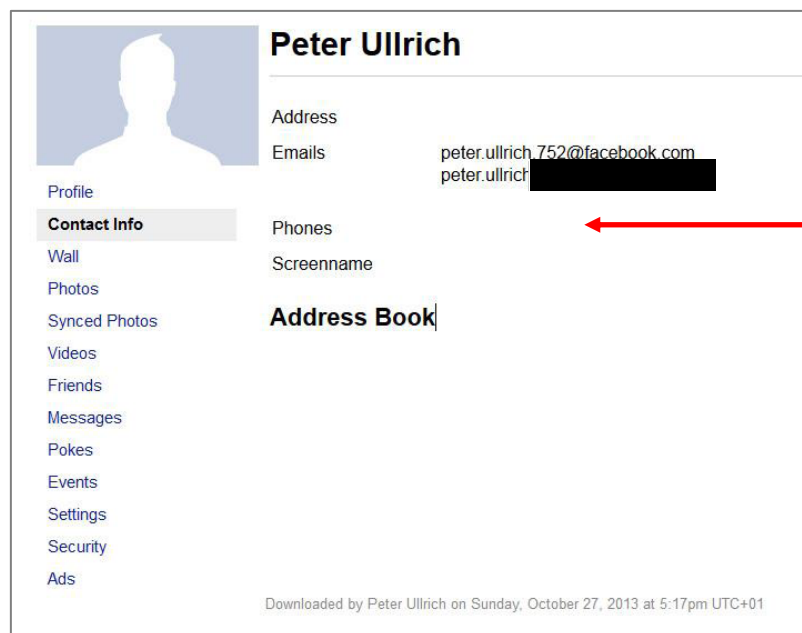
To clarify that this is really based on “synchronized” data I have called different people that were suggested to me and ensured that all of them have at some point used Facebook apps on their phones. Some were uncertain that they have ever allowed FB-I to upload their phone books, but all have confirmed that they have my number stored had at some point used a Facebook app on their phone. As a solid proof I was sent this screenshot by [REDACTED] (suggested in the first screenshot above) showing my number to be imported on Facebook:



Screenshot: [REDACTED] is holding my phone number.

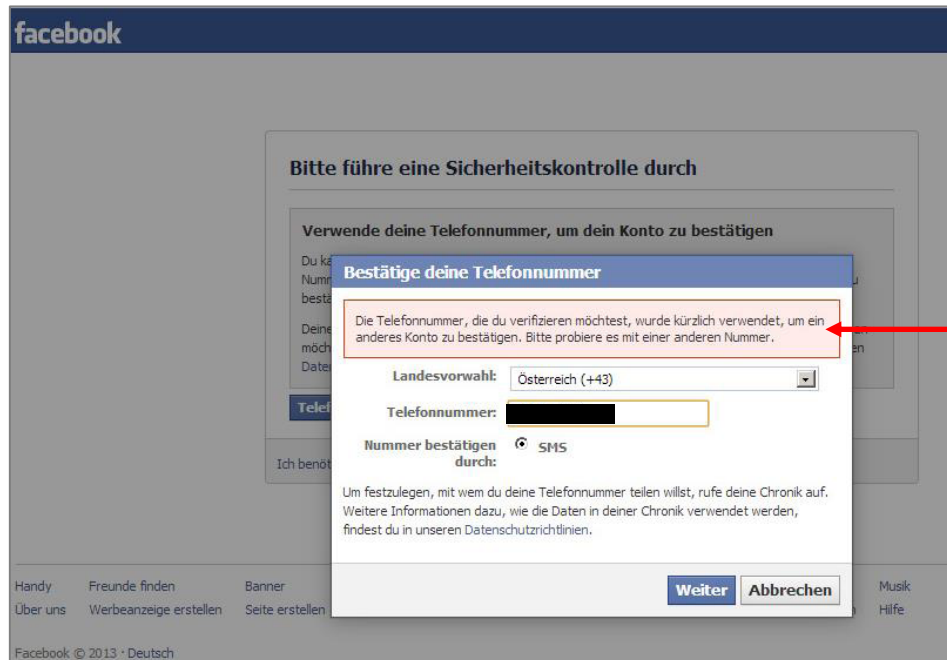
### Possibility to delete Phone Numbers?

In a further step I have deleted the phone number from the account of “Peter Ullrich”. The “download tool” did not show any numbers to be associated with the account anymore (see screenshot). However the suggestions were the same as previously.



Screenshot: No phone number associated with “Peter Ullrich”

In another step I then tried to set up another, new account in another clean browser and was (again) ask to provide a phone number for “security reasons”. The number was not accepted because it “was recently used by another user”. This showed that FB-I has not deleted the number, despite the clear wording on Facebook and the fact that the phone number was not surfaced in the “download tool”.



Screenshot: The phone number previously associated with “Peter Ullrich” cannot be used again

- ➔ **F14: While it is undisputed that third parties are asked to submit other peoples’ data to FB-I, the use of such data is not properly clear. At least in respect to phone numbers the claims by FB-I were fraudulent. There is no reason to belief that claims about the use of other synchronized data is in any way more credible.**
- ➔ **R15: I ask the DPC to investigate the details of FB-I’s processing and establish credible facts.**

## Business Upload

The main counterargument by FB-I in relation to this matter is that it has “geoblocked” 300 European domains from being spammed with emails of page owners.

First of all there is no technical possibility to accurately “geoblock” European email domains. Major email providers like Gmail (..@gmail.com) or Microsoft (..@hotmail.com) are in no way using specific European domain names. In addition many people have personal email servers. I am e.g. using ..@[redacted] or most emails. In addition FB-I is also not only responsible for users in the EEA but for all users outside of the USA and Canada. Users in other parts of the world are protected under EU law just like Europeans. “Geoblocking” European domains is therefore insufficient.

Finally just the fact that such data is “imported” is a form of processing that has to be legal under the law. Just the fact that some emails are blocked further down the processing operation cannot waive the law in the moment of the import of these addresses.

- ➔ **F15: FB-I has in no way adequately protected the rights of users in this respect.**



## Legal Consequences

Overall FB-I claims that in relation to the import of third parties the users' have given a specific, informed and unambiguous consent when signing up to Facebook, by agreeing to the privacy policy that says that other may upload contact details. FB-I is in no way limiting the purpose or the use of this personal data obtained through third parties. Overall users are "agreeing" that any other person, may share any (invisible) information for any purpose with FB-I.

This is in no way adequate to be a valid consent, as users have no idea which information is shared by whom and for what purpose it is used. Unless a user undertakes tests like the one above he has no idea what relationships FB-I is able to calculate. There is no information or access to such data.

Users may feel very differently about their normal email address and e.g. addresses used for more personal or even embarrassing purposes (e.g. "sexting"). FB-I is even supplementing existing data with emails that were imported by others and can then again link these (invisible) emails with other imported mails. This can be seen with the email "max.schrems[REDACTED]" which shows up in my "access request" files, but was apparently submitted by others.

Users may not want FB-I to map their network of relationships that they did not actively agree to it (e.g. by being "friends" with another person). Under the system FB-I is operating they are however subject to the actions of others and have no chance to agree or even just opt-out of such "mapping" of relationships. There is clearly a lot of ambiguity that can in no way lead to a valid consent.

→ ***F16: Therefore there can in no way be a valid consent by agreeing to FB-I's privacy policy, as such a consent would be neither informed, nor specific, nor unambiguous.***

## Non-Users

For non-users FB-I is claiming that they consent as long as they do not opt-out when receiving an email. This is even more absurd given the clear requirements under the law. As FB-I is also including the data of users in its invitations there is also a breach of users' rights.

First of all consent has to be obtained *before* data is gathered and processed for "friend suggestions" in the emails sent by FB-I. Secondly, there is no act whatsoever in *not* clicking a little gray link in an email. If recipients are deleting an email without reading it, there is not even inactivity in this case.

If the DPC would allow this to be a valid consent every other data controller could start to send out similar emails and claim that he may use all data of the recipients if they do not "unsubscribe". This would undermine all European laws on data protection. There is no reason to allow FB-I to get consent this way, while not allowing it for any other controller in Europe.

→ ***F17: Therefore there can in no way be an unambiguous, specific and informed consent by not clicking an "unsubscribe" button in an email.***

In relation to all other legal claims FB-I has in no way contested my complaint, which means there is no need to submit any additional arguments.

## Complaint 5 - Deleted Posts

On the factual level the main argument is how long the “deleted” postings were deleted previous to the access request. FB-I is claiming that it was strictly 12 days (the time between the submitted screen shot and the access request) and not one day more than that. I am claiming that I have deleted my Facebook wall repeatedly in the previous years and months (mainly by using a Firefox plug-in from time to time). There is no evidence that would be contrary to my claim. I am willing to submit my claim under oath in form of an affidavit or any other way the DPC is willing to accept. While my argument is stringent there is documentation about previous deletion.

FB-I has so far not given any details about the deletion routine and is simply claiming that it takes up to 90 days to delete things - despite the fact that they are not shown on Facebook as soon as a user clicks the “remove/delete” button. There is no explanation about the functioning of the deletion routine: Why is data not shown, but not deleted? Was the data in the “back up”? Why is only some data in the excerpts and other data is gone? How can FB-I ensure that it was within the 90 day period? Is there some form of time stamp when users delete things? There is no explanation by FB-I.

Overall the position of FB-I is not stringent and raises many questions that it did in no way answer to a level that allows independent verification of these claims. Given the ambiguity and the lack of clarification there is no reason why FB-I’s claim is in any way more credible than my claim. To the contrary I feel that my submission of facts is stringent while FB-I’s is not.

FB-I has also not claimed that the undeleted postings were “back-ups”, but is apparently saying that normal data may also take up to 90 days for deletion. This was (and is) not reflected in its privacy policy that only says that “backups” may be kept longer. “Backups” are however by definition kept separate and not just data that is queued for deletion. Wikipedia e.g. clarifies: “*a backup, refers to the copying and archiving of computer data so it may be used to restore the original after a data loss event.*” Data subjects were therefore never informed about a general 90 day delay when deletion “live” data on Facebook. It is not arguable that FB-I has the agreement by users that ordinary deletion takes up to 90 days, just because it might have gotten consent for backups.

- ➔ ***F18: Both claims are not proven beyond reasonable doubt, but FB-I’s claims are clearly less stringent than mine and amount only to blanket assertions without credible arguments.***
- ➔ ***R16: As there are two different claims that are both not proven in an unchallengeable way I am hereby asking the DPC to investigate the facts about FB-I’s deletion routine.***

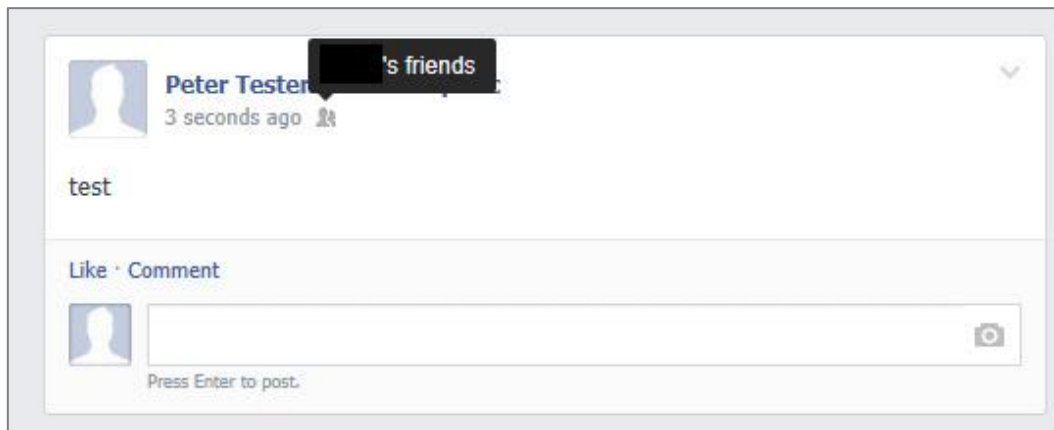
### Legal Consequences

FB-I has in no way informed users in its privacy policy that “deleted” information is kept, except of “back-up” copies that may be kept for 90 days. These back-up copies are not part of the “live” system and are therefore usually exempt from the right to access. Since FB-I has in no way informed users about a general 90 day deletion period it seems irrelevant for the complaint if my data was kept for another 12 days or 2 years. FB-I had no right to keep data after users have hit the delete button.

- ➔ ***F19: In relation to my complaint it is irrelevant if postings were kept for 12 days or longer, as FB-I had no right to keep them after I have deleted them in any way. There is no argument to be made that “live data” is covered by information that explicitly covers only “backups”.***

## Complaint 6 - Posting on other Users' Pages

While the facts seem to be clear on this matter, the intention of users is disputed. FB-I is claiming that users have no expectation that data is only shared with a certain audience. The DPC has initially not shared this view but found in the 2012 Report that the users should simply not share information on Facebook if they are concerned. I have no doubt that given the clear intention of FB-I to make the users feel comfortable by sharing “only with friends” there is a clear expectations raised and intensified that there is a restricted audience when posting or commenting on others' pages. This expectation is undermined if the user may change settings at any time.



*Screenshot: Clear Indication of Audience “User X’s friends”*

It is in no way stringent to argue that while the (14 page long) privacy policy might have some vague wording this would not be overruled in the perception of an average user by the clear wording on a users' screen when commenting or posting on another persons' page.

FB-I may argue that the page is controlled by the other user and these actions are therefore falling under the “household exception” however FB-I would then need to ensure that such data is not further processed by itself for other purposes that would not be possible if data would be set to a more restricted setting.

Overall the arguments by FB-I can in no way succeed against the clear wording on the page. The DPC has suggested changes that were not undertaken by FB-I. There is no specific, and especially no informed and unambiguous consent by data subjects, if the conditions of processing are later changed.

For postings the most relevant factor defining the consent by a data subject is if data is “public” or shared only with a restricted audience. There is also no predominant interest by the timeline owner in changing these settings once others have e.g. commented on a posting. If FB-I wishes to have these settings changeable it may store the change in settings and not display comments accordingly.

FB-I has in no way contested the legal arguments made in my complaint and the “request for a formal decision”. I therefore assume that they are accepted by FB-I.

**→ F20: FB-I was unable to credibly demonstrate that there is no reasonable expectation that data is only shared with a restricted audience. FB-I has not commented on other arguments made.**

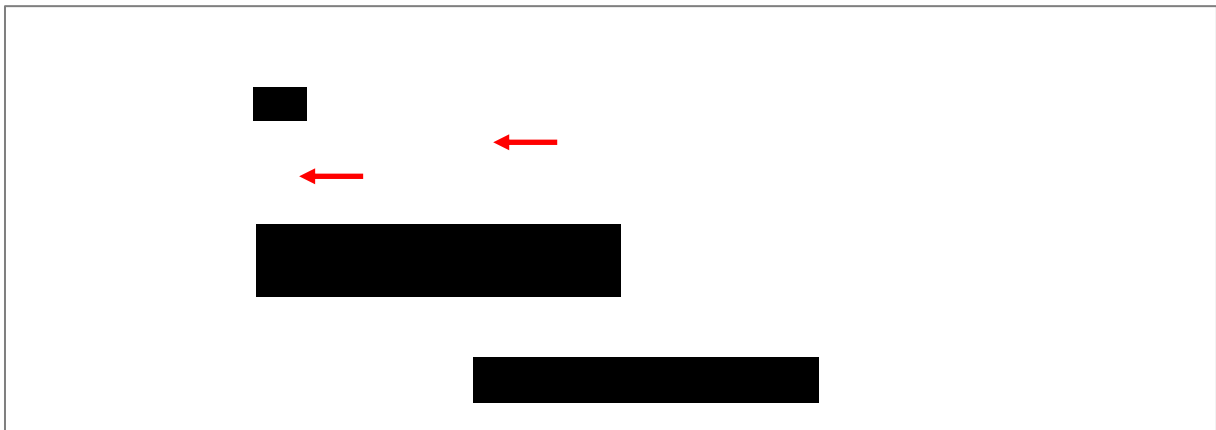
## Complaint 7 - Messages

In its response FB-I is not separating between the system as provided in 2011 and the modifications done afterwards. My complaints are clearly asking for two findings by the DPC for both situations.

### Retrieval of “Deleted” Messages

FB-I is claiming that its system does not allow retrieving messages of an individual user once this person has deleted messages from his inbox/outbox. A corresponding second message is held in the other user’s inbox/outboxes, but FB-I claims that this cannot be centrally searched or found.

This is totally inconsistent with the data obtained by myself through the original “access request” in its submission FB-I was unable or unwilling to explain why I it was able to provide me with 300 (!) pages of deleted messages when it is at the same time saying that this would be impossible. The “Audit” does in no way explain why there is a folder “[fb]deleted” shown in the original data sets. According to FB-I’s claims such a folder is not existing and the data would not be accessible.



*Screenshot: Excerpt from about 300 pages of “deleted” messages that should not exist according to FB-I*

Overall the claims by FB-I are false on the face of the record. Further investigations are clearly needed to clarify the inconsistency between the claims made and the facts that were submitted through a copy of the “access request”.

- **F21: FB-I was unable to explain why it sent me about 300 pages of deleted messages, when at the same time claiming that deleted messages cannot be retrieved.**
- **R17: I hereby ask the DPC to investigate the inconsistency between the claims by FB-I and the clear evidence submitted through a copy of FB-I’s response to my “access request”.**

### Change of Systems?

It may be that the data structure has changed between 2011 and 2013. In this case I ask the DPC to clarify what was changed and what happened with data that was held in the data structure previously operational. In this case the DPC has to separate between the facts in 2011 and now.

- **F22: There is no independently verifiable evidence or information about any different approach by FB-I since 2011.**

### **Searching of Deleted Messages in other Accounts**

FB-I claims that it is impossible to find the “counterparts” of deleted messages. Despite the fact that this is inconsistent with the facts established through the “access request”, FB-I has not delivered any evidence that it would be unfeasible to search such counterparts on an individual basis (e.g. if law enforcement authorities request it or a user makes a formal access request).

After talking to experts for “big data” systems I was reassured that it would be unfeasible to make such searches in a system as described by FB-I for regular operations (e.g. use for advertisements), but it is surely possible to search for data in individual cases (e.g. law enforcement requests).

→ ***F23: FB-I was unable to verify that it is factually impossible to search for the counterparts of messages on an individual basis.***

### **Scanning of Message**

In respect to the scanning of message I want to highlight that the DPC’s report is expressly saying that it has not undertaken any investigation. It is clear that FB-I is using content and traffic data to a certain extent. Therefore it is clear that FB-I is at least to a certain extent the controller of message data. This is e.g. uncontested in the case of prevention of “sexual grooming” or obvious when lists of friends are arranged dependent on the last person a user has corresponded with.

→ ***F24: FB-I is clearly processing messages of users for its own purposes.***

→ ***F25: FB-I has not commented on other factual arguments made.***

### **Legal Arguments by FB-I**

FB-I has not contested legal claims in its submission. It has especially not elaborated about the core of the complaint which is that the system is overall designed to be “spying by default” through making it practically impossible to delete all messages, while centrally keeping every chat message sent through the system forever and not allowing to shrink the amount of information retained.

→ ***F25: FB-I has not reacted to the legal claims made.***

## Complaint 8 - Consent / Privacy Policy

In its response FB-I is not separating between the policy and sign-up process as provided in 2011 and the modifications done afterwards. My complaints are clearly asking for two findings by the DPC for both situations.

FB-I is further not taking any response towards the very detailed and clear allegations made in my complaint and the “request for a formal decision”. It is referring to the “Audit” that has only dealt with the matter on a general and abstract way (“the bigger picture”). My complaint was however not dealing with the “bigger picture” alone, but with a large number of individual problems.

FB-I has e.g. in no way argued why wording like “*We use the information we receive about you in connection with the services and features we provide to you and other users*” is not vague and general to a point that is in no way in line with the Article 29 Working Party Documents.

FB-I is (in great length) highlighting the improvements undertaken, however they did not - or only partly address the issues raised in the complaint.

- ➔ ***F26: FB-I has not reacted to the factual and legal claims made, but merely referred to an improvement of the “bigger picture”.***
- ➔ ***R18: I strongly insist that FB-I is asked for a more serious response to the details of the claims made, otherwise I ask the DPC to find that FB-I was unable to rebut the claims made.***

## Complaint 9 - Facial Recognition

In its response FB-I is not separating between the system in 2011 and the modifications done afterwards. My complaints are clearly asking for two findings by the DPC for both situations.

In its submission FB-I is again (in full length) restating the events but is in no way responding to the claims made. There is e.g. still no evidence that the system is properly distinguishing between users of “Facebook Inc” and FB-I. How about users that haven a US IP address (e.g. users of a VPN connection)? How about users only visiting the US? How about users living in Europe that entered a US city as a hometown? How about pictures of Europeans uploaded in the US?

There is also no explanation what happened to non-EEA temples (e.g. Swiss users) that are covered by the Irish DPA and Directive 95/46/EC. There is no evidence that data of EEA citizens (including my own data) was properly deleted.

There is also no response to the fact that even an “ad hoc” processing of facial recognition data is a form of “processing of data” that needs to be in line with the law just like the generation of templates for permanent

- ➔ ***F27: FB-I has not reacted to the factual and legal claims made and could not provide any evidence for the little arguments made.***
- ➔ ***R19: I insist that FB-I is asked for a more serious response to the details of the claims made.***

## Complaint 10 - Access Requests

In its response FB-I is not separating between my original access request made in 2011 and the modifications done afterwards. My complaints are clearly asking for two findings by the DPC for both situations.

### Original Access Request

There is no doubt and I FB-I is clearly not contesting that I did not receive a full copy of my data within 40 days from the original request made. The roughly 1.200 pages did not hold numerous forms of data that were later included in the download too.

➔ ***F28: There is no doubt that my original access request was not properly reacted to.***

### Current Situation (“Download Tool”)

FB-I is in its submission in no way responding to the examples of missing personal data that is not provided by it. It is merely referring to the DPC’s findings in the “Audit Repots” however the method entertained by the DPC had clearly not lead to a full inclusion of all data in the “download tool” as demonstrated in my previous submissions. There is also no evidence or arguments that would explain the discrepancies between screenshots, downloads, the provided functions and the data obtained through the access requests. FB-I is making no argument on all other matters (e.g. disclosure of the purposes, sources and recipients, or access to the raw data).

➔ ***F29: FB-I has in no way reacted to the detailed list of inconsistencies and discrepancies as well as my other claims. There is no evidence provided that would in any way make it credible that FB-I is currently providing all data to users.***

## Complaint 12 - Data Security

In its response FB-I is not separating between the situation in 2011 and the modifications done afterwards. My complaints are clearly asking for two findings by the DPC for both situations.

### Situation in 2011

As outlined in previous correspondence there is little doubt that FB-I did not have appropriate measures in place. The DPC has found a number of issues that had to be fixed by FB-I. FB-I is in no way contesting these facts or the legal arguments made in relation to all the matters resolved during the “Audit”. I have nothing further to add in relation to these issues.

➔ ***F30: There is no doubt that my original complaint was justified given the findings of the DPC.***

## **Current Situation**

FB-I has again ignored most facts submitted in my complaint and the “request for a formal decision”. In relation to the matters dealt with I want to add the following points:

- a) FB-I claims that it allows for encryption by “https” access. This is however not contested, but the question raised was that maybe this is not enough given that all data is stored unencrypted.
- b) There was no evidence submitted that proves that FB-I’s security standard is appropriate.
- c) FB-I is ignoring that the matter of privacy policies of apps and the enforcement of security at third party applications are two different things.
- d) The response that FB-I has “endeavored” to make applications safe is legally irrelevant as the law requires factual protection, not just efforts to protect data.
- e) FB-I is absolutely ignoring the facts submitted, which show that large scale scrapping is still possible to a level that allows to target individual users.
- f) See above for the argument that FB-I had proper security practices in place before the “Audit”.
- g) FB-I is absolutely ignoring the fact that the “technical expert” did not have access to the real infrastructure and had to substitute facts obtained from the live system with general assumptions.
- h) There was no information submitted to me about the expert witness David O’Reilly and the facts his findings are based on. I am therefor unable to independently verify the independent and the findings.
- i) FB-I is not separating about the different times the complaints procedure is focusing on.

➔ ***F31: FB-I has not reacted to most of the material matters raised and did not submit any evidence that would support its claim that it had sufficient security methods in place.***

## **Complaint 13 - Applications**

FB-I has again ignored most facts submitted in my complaint and the “request for a formal decision”. It is again in no way separating between the situation in 2011 and the situation after subsequent changes. In relation to the matters dealt with I want to add the following points:

### **Consent by the User of an Application**

FB-I is (in a very lengthy way) explaining its practices. However it is (again) not reacting to the problems raised in the complaint. It mixes a) original problems with the assessment of the DPC on the b) improved old system with then b) newly developed system. I was unable to identify any argument that deals with the matters raised. FB-I does in no way argue how the actions can overall fulfill the elements of an informed, specific and unambiguous consent.

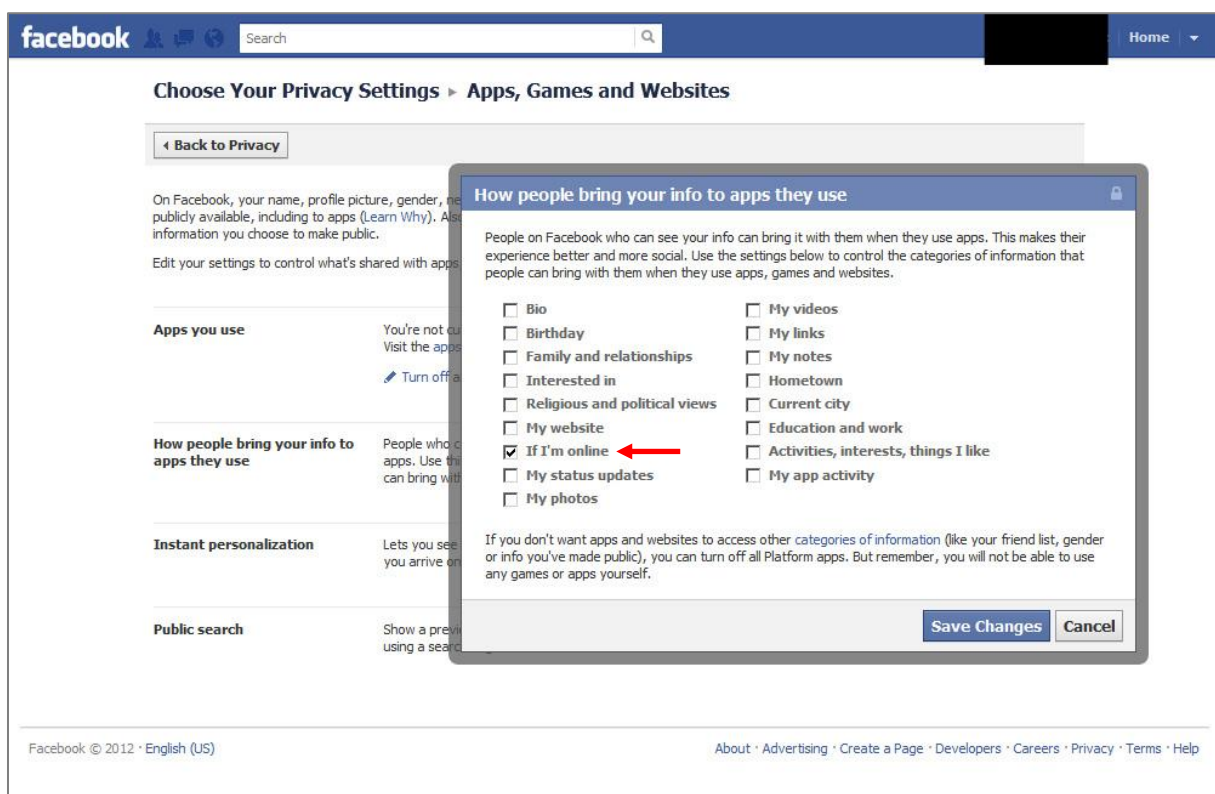


## Third Party Consent

FB-I seems to overall claim that users have given somewhat like a “general consent” to other users’ being allowed to forward their data to applications (see section 3.3.4 on page 17 of FB-I’s submission). This is in no way arguable under the conditions necessary for a valid (informed, specific and unambiguous) consent as users have no idea what data is used by which controller for what purpose. Totally absurd is FB-I’s argument that others data (e.g. names and pictures about friends) would be the users’ (not the third parties) personal data. Such data clearly relates to a third party.

FB-I highlights that users can “opt-out” of the processing of data by others, however this is not possible for all kinds of data unless users is not using “platform” at all - which results in being unable to e.g. use mobile phone integration of Facebook. There is no option to use Facebook Applications only with ones’ own data, but prohibit others form the usage of ones’ data.

An “opt-out” is clearly not a valid form of consent. In this case it is especially problematic because of the hurdles to opt-out. Users have to a) know about this form of processing to take place, they have to b) find the (sub-sub-)submenu where they can “opt-out” and have to click 18 (!) check-boxes to “out-out”. On top of that FB-I has over time “added” new options and “pre-ticked” them for the users. In my case I have opted-out of all forwarding of data. When I revisited the options later, FB-I has simply “added” a new category and “opted-in” for me. This is in no way constituting an “unambiguous” or “specific” consent, but it mere uninformed inaction.



Screenshot: FB-I is “opting-in” behind the back of data subjects.

FB-I is in no way properly reacting to the detailed problems set out in the complaint and the “request for a formal decision”. It does in no way argue how the actions of the third party data subject can overall fulfill the elements of an informed, specific and unambiguous consent.

In relation to the summary in FB-I's submission I want stress that they are not reflecting the claims made and to react as follows:

- a) The Complaint is not concerned with data shared before a user interacts with an application. The complaint is questioning if there is an informed, specific and unambiguous consent when users are clicking on the appropriate buttons in the "apps" center. FB-I has not reacted to the details matters outlined why I am not of the opinion that there is a valid consent.
- b) FB-I is mixing up the original situation where about half the applications did not even have any privacy policy and the current situation. FB-I is highlighting that it "requires" applications to fulfill certain criteria. However they do not have to fulfill an "adequate protection" or compliance with Directive 95/46/EC. FB-I's internal policies are in many ways not at all ensuring a level of protection that is in any way adequate. In addition FB-I is totally ignoring that the matter raised is not only the level of protection on paper, but the factual enforcement of such policies. It is irrelevant what FB-I puts in its policies if they are factually ignored and not polices. A perfect example is the requirement to have a proper "privacy policy". While FB-I is now (finally) checking that there is some link to a policy, it does in no way check if these policies are adequate. Many policies are only a couple of lines, saying nothing relevant. FB-I has in no way argued that it enforces the policies it published. There is no evidence that there is an adequate *factual* protection. FB-I is in reality sharing information with any little developer anywhere in the world without in any way ensuring proper protection.
- c) The fact that something is included in a 14 page privacy policy is in no way guaranteeing that users are factually informed. FB-I also mixes up the fact that there is some kind of information with the other requirements of a valid consent. Just because there is information does not mean that there is consent.
- d) FB-I is again missing the point. The complaint in this respect is that a user cannot only share his own information, but must also share "basic information" about friends. There is no option to prevent this by the user accessing an application. There is also no option for the third party user to prevent this information from being shared, other than totally turning off applications.
- e) FB-I is again misinterpreting the complaint. The complaint is that there is no "only share my own data" option. Users cannot prevent applications of others to access e.g. basic information without totally turning off applications. There is nothing that would hinder FB-I to allow users to have apps only access their own data and prevent other apps from accessing all their data.
- f) FB-I is again missing the point as it has made changes but not in relation to the core matters raised in the complaint.
- g) FB-I is ignoring the facts relied on and is blankly saying that the claim is "groundless" without any further counterarguments to the matters raised in the complaint.

FB-I has not contested other matters raised in the complaint and the "request for a formal decision".

➔ ***F32: FB-I has not reacted to the detailed matters raised but has instead given general comments that are in no way connected to the issues raised.***

## Complaint 14 - Removed Friends

FB-I is again in no way separating between the situation in 2011 and the situation after subsequent changes. In relation to the matters dealt with I want to add the following points:

### Situation in 2011

There is no doubt that FB-I has kept “deleted” friends in the background without any information of the user and against the clear expectation of the users that have clearly taken back their consent to keeping this data by deleting a friend. The argument that keeping the information was necessary to not suggest such people again is baseless as this does not constitute any legal basis to keep removed data under the law.

In addition there purpose is out of proportion to the amount of retained data: FB-I is constantly suggesting mainly irrelevant “friends” to users, it seems to make little difference if a couple of “deleted friends” would show up in these lists. If users would really want to “block” these users FB-I may add an “opt-in” black list (see e.g. the solution when it comes to “groups”) to deliver the same result in a much less intrusive way and with clear consent by the user. Even if there would be such a basis the processing would still be illegal under other sections of the law named in the complaint and the “request for a formal decision”. FB-I has not contested these facts and legal arguments.

### Current Situation

There is still no information by FB-I that “deleted” Friends are kept. Neither the function gives “inline” information, not the policy is making this in any way clear. FB-I has apparently recently introduced very well hidden information in the “activity log” that marks the fact that another users was deleted. I was not aware of this function due to its hidden and unexpected appearance. FB-I argues that this now leaves the user the option to fully remove the “deleted friends”.

This new feature is another plot of FB-I to ensure that data is unexpectedly any without any proper consent by the user retained and very much reminds me of the “inbox/outbox” solution for pokes: New functions that are totally irrelevant are introduced to justify the keeping of data that otherwise would need to be deleted.

FB-I is however missing the point that such an entry in an “activity log” is irrelevant in relation to the withdrawal of consent and the other principles of data protection. Just because the “deleted friends” list is now visible in the “activity log” does in no way change the legal analysis. There is no doubt that the law does not require to “double-withdraw” consent by first deleting a friendship and then deleting the deletion of a friendship.

If this would be legal then FB-I could simply create a “deletion of the deletion of a friendship” entry in the activity log to make sure users have to “triple opt-out”. This could well be repeated 100 times so that a data subject has to *delete the fact that he deleted the deletion of the deletion of the deletion ... of a piece of information*. This is in breach of all the sections named in the complaint.

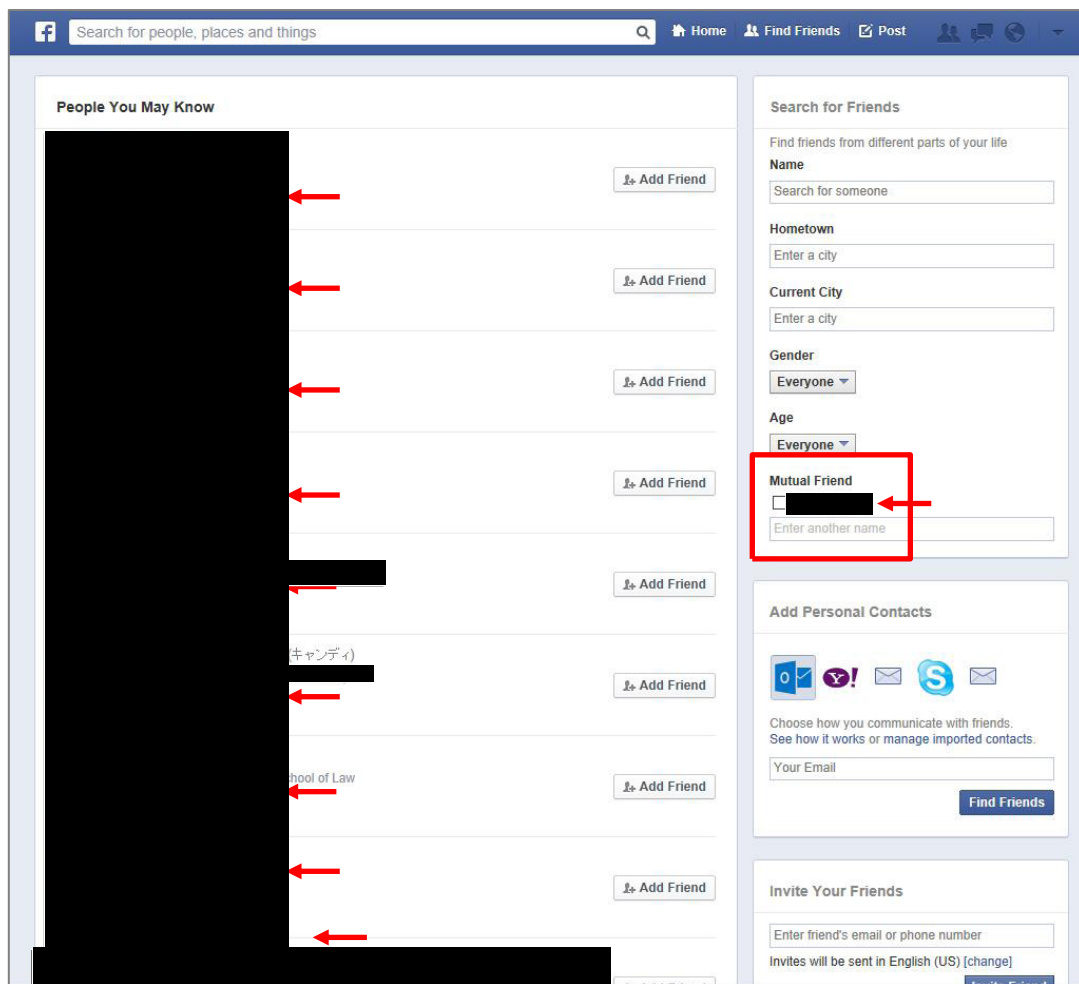
➔ ***F33: Needing to delete the fact that data was deleted amounts to a hideous “double withdrawal” of consent that is in no way adequate.***

### Experiment: Deletion of the “Deleted Friendship”

FB-I is (as said) claiming that this new function is now allowing to fully remove data. I tested the function but had to find that FB-I’s claim that this would lead to a full removal of a friendship is wrong.

I set up a test user that was only friends with me real profile. After this I deleted the friend and removed the “deleted friendship”. There was no sign of a friendship shown in the “friends” section and the “activity log” of both profiles. Despite following all instructions to fully delete my friendship I had to find that FB-I has still suggests only my friends to the test profile - meaning that the connection is still stored in the background.

To make it even better: My profile name was even shown in the “mutual friends” section on the right of the “people you may know” section. Therefore the claim by FB-I that a full removal of friends is now possible is clearly a lie.



Screenshot: Despite “deleting” the “deleted Friendship” it is still shown as “mutual friend” and the friend list of the former friend is suggested as “people you may know”.

➔ **F34: FB-I’s claim that “deleted” “deleted Friends” are not kept is factually wrong.**

I could not identify any other relevant arguments or claims in FB-I’s submission. The rest of my complaint was not contested.

## Complaint 15 - Excessive Processing

In its submission FB-I is totally missing the point of the complaint. FB-I argues that a) users can control the visibility of their personal data (e.g. by “inline controls” or the “activity log”) and FB-I argues that b) it put in place (undisclosed) shorter retention periods.

The complaint is not targeting the retention or the access/use of data by other users (which are controlled by the settings), but the use of FB-I. Privacy controls can only limit the access by others, not the access and processing by FB-I.

The core of the complaint is that FB-I is allowing itself to sift through all hosted data for any purpose. This has nothing to do with retention or privacy controls in relation to others. If FB-I would allow to limit the use of data by itself (e.g. limiting the kinds of data used for targeting advertisement) this would be relevant. However the named controls are not providing such a function in any way. For the rest of the complaint I refer to my previous submissions.

→ ***F35: FB-I's has in no way contested the factual and legal claims made, but submitted absolutely irrelevant facts in relation to the complaint.***

## Complaint 16 - “Opt-Out”

In its submission FB-I is in no way elaborating about the clear duty to provide “Opt-In” consent as outlined by the Article 29 Working Group. On page 28 of its submission FB-I is touching on the “Opt-In/Opt-Out” matter but only argues that it has moved buttons and functions. FB-I also blankly contests the claim that the systems are designed to discourage users from finding them, without any argument. This has however nothing to do with the matter of a valid consent through opt-in.

The fact that there is no specific, informed and unambiguous consent through an “opt-out” solution is becoming especially clear when one views the history of FB-I’s change in settings: It is changing settings on a very regular basis and is repopulating or even changing the words of once set “opt-outs”. For example users could “opt-out” from being included in “searches”. When FB-I stated to roll out “Graph Search” the text over the check box was suddenly changed to an “opt-out” from “other search engines”. In other cases FB-I has added new categories of email notifications or data that can be shared with applications (see above). In all cases it has “opted-in” for users, despite the fact that they have previously opted out from all emails, search functions or data to be shared.

→ ***F36: FB-I's has in no way contested the factual and legal claims made in relation to its “opt-out” policy.***

## Complaint 17 - "Like Button / Social Plug-Ins"

In its submission FB-I is again not differentiating between the original situation in 2011 and today and is also only referring to the "Audit" and claims various things without providing any evidence for these claims. I do not want to go into the details, as they are already outlined in my complaint and "request for a formal decision".

However I want to highlight that FB-I confirms that it collects personal data via social plugins for what it calls "any of the stated reasons". Despite the fact that I have clearly outlined that FB-I is inconsistent about the actual purposes of this collection FB-I has not clarified the purposes of collecting this information. FB-I only claims that it is not using such information for advertisement purposes, but is again not delivering any evidence for this claim.

From a legal point of view it seems actually irrelevant for which purpose data is held and if it is further processed. Just the fact that data is collected has to be in line with the limitations of the law. FB-I has in no way contested the legal arguments entertained, but is of the mistaken opinion that processing data for purposes other than advertisement would be legal. FB-I has in no way argued what the data is actually used for any how such a collection could possibly be in line with the law.

The other claims by FB-I seem to be irrelevant or do not make sense. FB-I is e.g. arguing that it is not subject to the "Data Retention Directive" which was in no way matter of this complaint. In contrast this was only used as a comparison to FB-I's logging of information.

→ ***F37: FB-I's is confirming that data from "social plug-ins" is processed.***

→ ***F38: It is irrelevant for the legality of such a collection if it is used for advertisement. Despite the duty to justify processing FB-I was unable to explain why it should be legal to collect data.***

## Complaint 18 - "Duties as Data Processor"

In its submission FB-I is again not really dealing with the matters outlined, but bypassing it by referring to the "audit" that has not expressly dealt with this matter. FB-I is only saying that users "could" be the controllers in certain ways, but can avail of the "household exemption". This is in line with the complaints made. However FB-I has not taken any specific standpoint on this matter. There is no way that FB-I is simply saying "1 Billion people could be controllers" and not taking any clear standpoint. It is therefore also not stringent, that FB-I sees no confusion about the roles of users and FB-I. This is in the end the basic question all other complaints are influenced by.

If FB-I would be the controller of all data on the platform it would be factually impossible for FB-I to comply with the law, especially if data of other people is uploaded. If e.g. a picture of a data subject that is not a user of Facebook is shared online there would be no way that FB-I could in any way justify processing of such data. Only if this is "controlled" by the user (that falls under the household exemption as long as this is not done publicly) the overall functioning of the network could possibly be in line with the law. Ignoring this would make FB-I liable for every processing operation triggered by the 800 Million costumers of FB-I. This would not only be a wrong interpretation of the law, but also make social networking impossible.

In my previous submissions I have clearly highlighted that one cannot generally assume that all private users in Europe are covered by their national version of a “household exception”. The Austrian law is e.g. having a very limited “household exceptions” that does not allow to share data with others. Under ECJ’s *Lindqvist* judgment a public web page is e.g. not exempt (timelines are “public” as a standard setting on Facebook). Similarly the Dutch DPC has taken the standpoint on its web page that users of social networks have to comply with the Dutch Act.

In addition FB-I is apparently having the absurd view that a processor of data that is held by a controller who falls under the “household” exception does itself not have any duties under the DPA and Directive 95/46/EC.

This would mean that e.g. a web hosting company or a “cloud” service does not have to process data in line with the instructions of the costumers if only the costumer is acting in his private capacity. This is a totally irrational view since a controller that is covered by the household exception is still a “controller” within the meaning of the law, just with reduced (or no) duties under the act. The law does not know a “household person”, only controllers (and processors) that fall under the household exemption. The very wording “exemption” indicates that generally such a person is a controller that can only claim an “exception” under the law from a general rule.

- ***F39: FB-I has not submitted any clear position other than the fact that users “could” be controllers of some functions. There is no doubt that processors of data controlled by controllers that fall under the “household exemption” have to comply with the DPA and the duties as processor.***
- ***R20: Unfortunately I have to ask the DPC to make a final determination about the roles of users and FB-I in relation to each processing operation.***

## **Complaint 19 & 20 - “Picture Privacy Settings and Deleted Pictures”**

In relation to both complaints FB-I is mainly arguing that the random code in the link is sufficiently protecting against third party access to pictures. This is undisputed in the complaints.

However the matter is that others can retrieve pictures after they were deleted once they got the link. In this relation FB-I makes overall two arguments: a) users are informed since FB-I says that data is kept in “backup” copies and b) that users could also just copy pictures from the page before deletion of the picture or a change to the settings.

The first argument is not correct as “backup” copies are by definition a copy of the original file, kept separately to restore the original file in case of technical problems. The pictures stored with Akamai are in no way a “backup” but a cached version of the original that can in no way be used to restore the original and is especially not kept separate and protected from use. Relying on this section of its policy is in no way adequate. No average user would expect “cached” data to be “backups”.

The second argument is even more absurd. The fact that data could have been obtained during a time where a third party had legal and proper access to data has nothing to do with the fact that it still has such access even after settings were changed or a file was deleted. This is legally irrelevant. Otherwise any company in the world could claim that once something was online it has no duty to remove it when the legal basis for processing it has chased. Legally the user has limited or withdrawn his/her consent and there is no longer a legitimate use of such data. It is irrelevant for the legality of the processing by FB-I if third parties could have made a copy before a decision by the data subject.

I am aware that there might be bigger problems, but this does not mean that the law may be “waived” in this case. To make it more practical: If a user has accidentally posted an embarrassing picture, others might not have saved this picture right away. But as soon as the picture was deleted another person might be interested in restoring this picture. This is possible because of the technical insufficiencies of FB-I’s system.

It would be unacceptable if a host of a normal web page would not take a file “offline” and fully delete it when a user has “deleted” a file. There is no reason why the same would not apply to FB-I.

➔ ***F40: FB-I has made two arguments that are both irrelevant from a legal perspective.***

FB-I has not made any arguments and did not produce any evidence in relation to the other matters raised in the complaint and the “request for a formal decision”.

## **Complaint 21 - “Groups”**

FB-I has confirmed the facts outlined in the complaint. However the legal consequences were not dealt with. FB-I was unable to explain how a data subject would have consented to being shown in the group, just when a third person has added this data subject. There is also no explanation how the visit of a group could possibly be seen as an unambiguous, informed and specific consent to being member of it. Just because I might be invited to a Nazi group and consequently look at it does in no way mean that I want to be a member of it.

In addition FB-I was unable to demonstrate why a proper and straight forward “invitation/accepting” approach would be not more proportionate or impossible to implement.

As with other cases FB-I is arguing that it is possible to “leave” a group. Such an option is however not substituting non-existing consent in the first place. There needs to be a justification in the moment data is for the first time processed, which cannot be substituted by an option to “leave”.

As far as I can see there are no other arguments entertained by FB-I.

➔ ***F41: FB-I has made not contested the legal arguments made.***



## Complaint 22 - “New Policy”

FB-I is in no way separating between previous - uninformed - policy changes and a pledged approach it wants to entertain in the future. There is no doubt that previous changes were made without the information of users.

### Current Situation

Overall FB-I is claiming that it has in recent months and will in the future inform data subjects actively about changes (e.g. via email). This is however not reflected in its current privacy policy:

*“Notice of Changes*

*If we make changes to this Data Use Policy we will notify you (for example, by publication here and on the [Facebook Site Governance Page](#)). If the changes are material, we will provide you additional, prominent notice as appropriate under the circumstances. You can make sure that you receive notice directly by liking the Facebook Site Governance Page.”*

The claims by FB-I are therefore not credible. If FB-I would clearly move towards an approach where all data subjects are actively informed about policy changes (e.g. via a pop-up when logging in, or emails) I would expect that FB-I would consequently adapt its policy in this respect.

If this is dealt with I see no reason to keep up this complaint. Currently there is however no evidence or guarantee that FB-I is in fact proceeding as promised in the future. The DPC cannot decide on promises alone, but has to decide in line with the facts, which currently are that FB-I is claiming that it can change its policy unilaterally at any time and without actively informing existing users. This cannot be in line with an unambiguous and informed consent.

- ➔ ***F42: FB-I has pledged to follow a legal approach, but this is not reflected in the relevant privacy policy. There is no evidence or guarantee that would ensure that this approach will be followed in the future.***
- ➔ ***F43: FB-I has not contested that previous policy changes were done without consent or even information of users.***