

Office of the Data Protection Commissioner.
Canal House, Station Road
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IRELAND

[REDACTED]
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AUSTRIA

Vienna, 19th of September 2011

Complaint against Facebook Ireland Ltd. – 17 “Like Button”

To whom it may concern,

This is a formal complaint against “Facebook Ireland Ltd.” under section 10 of the Irish DPA. I am convinced that “Facebook Ireland Ltd.” breaches the Irish DPA and the underlying Directive 95/46/EG and I kindly ask you to investigate the following complaint.

I am a user of “facebook.com”. The contract is governed by the “terms” used by Facebook (attachment 01). They state in section 18.1. that all users that live outside of the United States of America or Canada have a contract with Facebook Ireland while all users within the United States of America and Canada have a contract with Facebook Inc., based in California, United States of America (further called “Facebook USA”).

Therefore I have a contract with “Facebook Ireland Limited, Hanover Reach, 5-7 Hanover Quay, Dublin 2, Ireland” (further on called “Facebook Ireland”). For performing my contract with them, Facebook Ireland processes my personal data in different means. Since this controller is established in Ireland, I understand that according to section 3B(a)(i) DPA the Irish Data Protection Act (DPA) applies.

Because facebook.com is similar to a “cloud” service, I want to distinguish between the mere “hosting” of my data and all further processing of my data. For the purpose of hosting my data I see Facebook Ireland as a processor and myself as the controller. For any form of further processing of my data for Facebook Ireland’s own purposes (e.g. analytics or advertisement) I see Facebook Ireland as the sole controller (see graphic in attachment 02).

Generally all my hosted personal data is also used for Facebook Ireland’s purposes, which is why Facebook Ireland must always be seen as a controller. Whenever Facebook Ireland processes data that was “removed” by the user, it is obvious that the user is not in control of the data; therefore Facebook Ireland is the sole controller at this time. Facebook USA must be seen as the sub-processor or the processor in each case.

Unfortunately Facebook Ireland does not have a certain structure in its processing that would make it easy to distinguish certain forms of processing. In order to make the handling of my complaints easier for you, I decided to split them into individual cases. I want to inform you that some cases are overlapping to a certain extent.

Complaint 17: "Like Button"

Facebook Ireland provides scripts that providers of webpages across the web can implement in their webpages. Facebook Ireland refers to them as "social plug-ins". The most common one is the "Like" button, which enables the user to click on it and therefore share the webpage it is placed on with all his "friends" on facebook.com.

Besides this basic functionality the "like" buttons are also used by Facebook Ireland to track the users across the web (see investigation of the DPC of German Schleswig-Holstein). Most webpages now have "like" buttons which enables Facebook Ireland to track users not only on some pages but on the major part of their internet activities.

This is even more worrying if we consider that "like" buttons can not only be found on "normal" pages such as news, company or entertainment sites, but also on pages that contain sensitive information (e.g. pages of political parties, action groups, churches, porn sites, websites containing health information or pages of trade unions; see attachment 03). The user does usually not know if the website has a "like" button before visiting it and can therefore not make informed and specific choices.

Facebook Ireland changed its underlying system for the "like" button previously from a more privacy friendly version to the current version. The old version (called "sharer") still works but cannot be found in Facebook Ireland's online documentation and is not promoted anymore. The key difference is that with the old system, the "like" button was only a link to a page on facebook.com. When the user clicked a button on a webpage, a pop-up opened and the facebook.com page was shown to the user (see e.g. the "share" link on www.europe-v-facebook.org). There was no interaction with Facebook Ireland if the user did not click on the link.

Now Facebook Ireland only provides a more sophisticated version of the same button that shows the number of people that already liked the website. This button results in an interaction with Facebook Ireland in the very moment the page is first visited.

Facebook Ireland's privacy policy does not directly say what information Facebook Ireland Ltd. gets when a user visits a page with a "like" button. In the section "About social plugins" Facebook Ireland says *"We receive data when you visit a site with a social plugin. We keep this data for 90 days. After that, we remove your name or any other personally identifying information from the data, or combine it with other people's data in a way that it is no longer associated with you."*

The information that Facebook Ireland gathers every time any user is visiting a site is the following: date, time, URL, and "other technical information" including the IP address, browser information and operation system information (see attachment 04). In addition to this the DPC of German Schleswig-Holstein found out in a technical study that Facebook Ireland also reads cookies that Facebook Ireland has placed in the users' browser cache. This cookie is placed when a user interacted with facebook.com, including users that did not sign up to facebook.com but only visited it facebook.com, or visited some person's or company's public page on facebook.com. The cookie stores an individual ID that allows tracking individual users over longer periods of time (cookie is valid for 2 years). A user has the possibility to delete cookies, but users of facebook.com are also traced by IP addresses that usually are the same for every user over a certain period of time.

Facebook Ireland claims that the data is only used for "improving its systems". It seems questionable what exactly the improvement is in this case. Facebook Ireland does not answer how the collection of random users that did not even interact with a social plugin on some external site is in any way useful for "improving" facebook.com.

For whatever reason, Facebook Ireland replaces individual IP addresses of German users, as Richard Allen, a spokesperson of Facebook Ireland Ltd told the press in Schleswig-Holstein. Users of other European countries like Ireland or Austria are tacked with their individual IP address.

If this practice is compared to the telecommunications data retention directive (Directive 2006/24/EC) it seems very problematic, that a private company is, without any obligation to do so and without any specific purpose, logging detailed information about the webpages a user visited. Facebook Ireland Ltd. is not only logging the IP addresses of users, but also knows their names and can connect all website visits to an extended pool of other information. The data is not held on European territory, but in the US and Facebook Ireland does not guarantee any sufficient forms of data security, as telecommunication providers under the Directive 2006/24/EC are required to. There is no guarantee that US law enforcement agencies or European authorities do not access this sensitive information of European citizens. No matter if Facebook Ireland is using the collected data for illegitimate purposes the mere fact that these (unnecessary) data are held is a tremendous privacy risk that seems to be out of proportion.

I think that this practice of Facebook Ireland is illegal under the following provisions of the DPA and Directive 95/46/EG:

1. There is no *specific, informed* and *unambiguous* consent by the actual data subject. This constitutes a breach of section 2A DPA and Article 7(a) of Directive 95/46/EG. The data subject is tracked no matter if it is a user of facebook.com or not and without any specific prior notice.
2. The information is not obtained fairly because the user does not have sufficient information from the privacy policy and their data is obtained before the data subject has any chance to see if the individual webpage uses a "like" button. This breaches section 2(1)(a) DPA and Article 6(1)(a) of Directive 95/46/EG.
3. The purpose of the "like" button is to share a URL or other information with friends on facebook.com. Facebook Ireland is using this functionality to also establish an intensive tracking scheme across the web by further processing the information. This constitutes a breach of section 2(1)(c)(ii) DPA and Article 6(1)(b) of Directive 95/46/EG.
4. The collection and retention for at least 90 days of all the data listed above for the mere purpose of transferring the URL of the "liked" page is inadequate, irrelevant and excessive and therefore breaches section 2(1)(c)(iii) DPA and Article 6(1)(c) of Directive 95/46/EG.
5. The older version of the "like" button shows that there are ways of providing the same service in a more privacy friendly way. This means that by providing it with today's specifications breaches section 2(1)(c)(iii) DPA and Article 6(1)(c) of Directive 95/46/EG.

I therefore kindly ask you to take the necessary steps to change this illegal practice by Facebook Ireland.

The DPC for Schleswig-Holstein has banned Facebook Ireland's social plugins for all pages that are run by entities in its territories. He can be reached at [REDACTED] and might be helpful for further technical information on this case, as well as further information about his legal opinion. Since this question does not only concern Facebook Ireland but all websites that use the "like" button, it seems important that there is a common legal practice across Europe.

In the ongoing discussion, Facebook Ireland Ltd. tends to claim that whatever it is doing is an "industry standard". This may be true for what is the standard in the United States of America but I want to insist that the only standard relevant within the European Union must be the law.

I am convinced that Facebook Ireland can develop a more privacy friendly technical solution of its "like" button and a legally binding guarantee that this function is not used for tracking users across the web. I could see that this would ensure compliance with the Irish DPA and Directive 95/46/EG.

I decided to send you just the relevant parts of the original documents as attachments to this complaint, the original files can be sent any time by airmail, if necessary. I can be reached at [REDACTED] if you have any further questions.

Sincerely,

[REDACTED]