

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

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AUSTRIA

Vienna, 19th of September 2011

Complaint against Facebook Ireland Ltd. – 21 “Groups”

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 do 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 is processing 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.

Case 21: "Groups"

The Facebook Platform gives users the possibility to "add" another user ("friends") to "groups". Groups are also displayed on the data subject's Facebook page and the "news feed". Data subjects do not have any possibility to prevent other "friends" from adding them to groups, other than not having friends at all. The membership in the group is fully active before the data subject even knows about its existence. There is no functionality that prevents unwanted adding to groups. The only option the data subjects are given is to leave to group, as soon as it sees it, but this may be too late.

In practice this means that the data subject may be added to a group that the user does not want to be associated with. Since groups can be "public" anyone on the internet can see the membership of a data subject in such a group. The only option the data subject has is to remove the tag after all this has already happened (opt-out).

That this practice is highly problematic can be with a Swiss group that was used for different forms of hate speech against foreigners. "Friends" of politicians and other public figures were added to the group without their consent. The politicians were questioned by the media about the group (see story in German, attachment 03).

To prevent other users from "adding" the data subject to the same group again, Facebook Ireland keeps the information that the user was a member of the group. This information is given when the user leaves a group (see attachment 04). This means that the user can in fact never fully remove the relation to the group on the Facebook platform. All members are kept by Facebook Ireland, even if the user left the group.

In summary Facebook Ireland processes personal data (group membership) without the specific consent of the user. General provisions in the privacy policy do not constitute a specific consent. The user knows that some friend might add him/her to some group, but this information is in no way substituting a specific consent. There is a major difference in the processing of different kinds of group memberships. Facebook Ireland does not add the users itself but it uses the personal data that is obtained without the specific consent of the user for its own purposes (e.g. aggregating the news feed, analytics about users).

If this practice is analyzed, I think that it is illegal under the following provisions of the DPA:

1. There is no specific and informed consent by the data subject for the individual membership (opt-in). This constitutes a breach of section 2A DPA and Article 7(a) of Directive 95/46/EG. This would make any further processing illegitimate.
2. There is no transparent notice beforehand that former memberships are still held after the user clicked "leave", which breaches the principle of fairness in section 2(1)(a) DPA and Article 6(1)(a) of Directive 95/46/EG.
3. If an opt-in system would be employed, there would be no need to keep information about former memberships. Keeping the information would then be illegitimate under section 2(1)(c) DPA and Article 6 (b-e) of Directive 95/46/EG.

I therefore kindly ask you to take the necessary steps to change this illegal practice by Facebook Ireland. If the Commissioner finds some other reason as the specific consent, which would make the processing by Facebook Ireland legitimate, I want to add that there is no way for the data subject to ever fully remove the membership. The user can only make it "invisible" for others, but Facebook

Ireland will not stop processing it. This seems to be a breach of the right to object and seems to breach section 6A DPA and Article 14 of Directive 95/46/EG.

A possibility that would meet European and Irish laws would be the opt-in-solution that the German "studivZ"-network was using: The membership is inactive until the data subject gives its consent. This could be done by a notification that pops up when the data subject logs on to the platform. If the user does not consent, the data would need to be deleted immediately.

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]