

Office of the Data Protection Commissioner.  
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Portarlinton , Co. Laois  
IRELAND

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AUSTRIA

Vienna, 18th of August 2011

Complaint against Facebook Ireland Ltd. – 04 “Synchronizing”

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 04: "Synchronizing"

Facebook Ireland gives its users the possibility to "synchronize" mobile phones and other devices with the Facebook platform. This gives the user the possibility to find people they know on Facebook. For doing so the user must transfer all the personal data held in his device to the Facebook platform, Facebook Ireland then checks if they can find users by matching names, e-mails and other information.

After matching the users, Facebook Ireland does *not* delete the personal data it gathered, but saves it further for its very own purposes, such as promoting the platform and sending out invitation e-mails on behalf of the user. In this scenario it has to be noted, that not only the sender of the invitation is shown in these e-mails but all other users that Facebook believes the invited person might know. This includes people that have previously uploaded this e-mail by synchronizing.

The actual data subjects do not have any possibility to prevent users from uploading this personal data. The data subjects also do not get informed about the processing by Facebook Ireland.

If a user does not want Facebook to know its work e-mail, but only a private e-mail, the user does not have any chance to prevent Facebook Ireland from gathering this information from one of the other users. The same is true for workplaces, telephone numbers and other information.

There is no consent by the data subject for this processing of personal data. The data subject might not even be a member of Facebook. When using Facebook Ireland's "iPhone App" the user is not even asked if all data subjects gave their *consent*. The Software only asks if the data subjects are "*comfortable*" with the use of their personal data. There is also no hint that all the data will be used by Facebook Ireland for other purposes than just finding friends for the user (see attachment 03).

The idea that any user would actually ask all its hundreds of contacts if they are comfortable with the use of their personal data is more than absurd. It is also legally impossible that the user of the "iPhone App" consents to the use of someone else's personal data. Only the data subjects can give their consent.

I think that a Facebook user can use the information he/she holds for the purpose of searching for friends on Facebook as a form of a purely private or household activity, as defined in section 3A(4)(c) DPA and Article 3 of the Directive 95/46/EG, as long as the information is not transferred to another party (such as Facebook Ireland). Any processing by Facebook Ireland which goes beyond its services as a host of the information cannot be legitimate without the specific consent of the actual data subject. Facebook Ireland is clearly mixing its role as host/processor with its role as a controller of the data and two different purposes of processing for its own benefits.

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

1. There is no specific and informed consent by the actual data subject. This constitutes a breach of section 2A DPA and Article 7(a) of the Directive 95/46/EG. This makes any processing by Facebook Ireland illegitimate.
2. Facebook Ireland is using the personal data it gathers for the "matching process" as the primary purpose, but also for other secondary purposes such as advertising its own services. This breached the principle of purpose-based processing of personal data in section 2(1)(c) DPA and Article 6(b) of the Directive 95/46/EG.

3. The user of the "iPhone App" is left with the idea that she/he can consent to the use of another data subject's personal data, which breaches the principle of fairness in section 2(1)(a) DPA and Article 6(1)(a) of the Directive 95/46/EG.

I therefore kindly ask you to take the necessary steps to change this illegal practice by Facebook Ireland. A solution would be that the information is only used for the initial synchronizing process of the user but not used by Facebook Ireland for any further purpose.

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] or [REDACTED] if you have any further questions.

Sincerely,

[REDACTED]