

Office of the Data Protection Commissioner.  
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IRELAND

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AUSTRIA

Vienna, 18th of August 2011

Complaint against Facebook Ireland Ltd. – 07 “Messages”

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 07 – Messages

Facebook Ireland offers all users of facebook.com a messaging and chat service. Very recently Facebook Ireland merged its messaging and chat function into one messaging function. Users can send messages to each other, just like an e-mail but they are also displayed in a chat window with very little delay if both users are online. Unlike e-mails, all messages are held on Facebook Ireland's systems and the actual messages are never delivered to the users' systems.

Facebook Ireland's users have about the same options as users of usual "webmail" services (e.g. making messages as unread, replying and deleting the messages). After Facebook Ireland recently changed the system, all messages (including chat messages) can also be "archived" (see screenshots in attachment 03). When the user clicks on "delete messages" facebook.com is showing a prompt which tells the user that the deletion of the message cannot be undone (see attachment 04).

In fact messages are not deleted. When users "delete" messages, they are only tagged as deleted and the user cannot see them anymore, while Facebook Ireland is actually still holding them on its system (see attachment 05).

If the user digs through the 12 page privacy policy, he/she will find the following provision:

*"Certain types of communications that you send to other users cannot be removed, such as messages."*

Note: This provision can be found under the section "3. Sharing Information on Facebook", subsection "Other". This is fact is not mentioned under the section where users would actually look for such information "7. How you can change or remove information".

Messages are generally treated as very sensitive information (privacy of correspondence). This must be even more the case if the messages are stored on servers within the US (see Facebook Ireland's terms, section 16.1). The United States does not have a protection of correspondence similar to the European level under Art. 8 ECHR, this is especially true for information of foreign citizens.

It seems disproportional that information that was published on the user's wall can be deleted, while more personal and private messages will be saved on Facebook Ireland's systems forever. I could also not find any other "chat" service that would save all sent messages with the users' real names for an indefinite time.

Facebook Ireland announced that it is now planning that all users get their own 'facebook.com' e-mail address. Facebook Ireland wants that all users use facebook.com as their main provider for electronic communication, which would mean that all electronic communication would be stored by Facebook Ireland for an indefinite time.

At the time when Facebook Ireland becomes an e-mail provider these rules would also apply to messages that were sent from data subjects that are not even member of facebook.com. Third party senders of an e-mail would fall under this regime without any form of information, consent or legitimacy.

If this scenario is compared to the European Data Retention Directive (2006/24/EC), it seems very clear that it is disproportionate: The information is a) never deleted, b) consisting of not only traffic, but also content data, c) hosted with very limited data security, d) analyzed by the processor and e) held on a territory where the information is not protected from law enforcement agencies and secret services in a way that is common within the European Union.

I think this processing by Facebook Ireland is illegitimate under the Irish Data Protection Act and the Directive 95/46/EG for the following reasons:

1. It seems that there has never been an informed consent by the user to the use of this information since the user just agreed to the processing with having the option to "delete" messages later. If Facebook Ireland does not delete any messages, the consent seems to be neither informed nor unambiguous and therefore void under Section 2A(1)a DPA and Article 7(a) of Directive 95/46/EG.
2. There is no transparent notice that these bits of data are still held after the user has clicked the "delete" button. In contrast to that, the user is told that the messages are "deleted", which breaches the principle of fairness in section 2(1)(a) DPA and Article 6 (1)(a) of Directive 95/46/EG.
3. There is only (well hidden) information about the non-deletion of data in Facebook Ireland's privacy policy. Accurate information is needed to comply with section 2D DPA and Article 10 of Directive 95/46/EG. This constitutes another breach of the principle of fairness in Section 2(1)(a) of the DPA.
4. After both users have deleted the message, there is no longer a legitimate purpose for holding on to this data. The data would have to be deleted according to section 2(1)(i) DPA and Article 6(1)(b) of Directive 95/46/EG.
5. The further processing of this personal data is no longer relevant for the purpose of the processing, which constitutes a breach of 2(1)(iii) DPA and Article 6(1)(c) of Directive 95/46/EG.
6. The indefinite storage of personal messages (especially chat messages) seems to be extremely excessive, which constitutes another breach of 2(1)(iii) DPA and Article 6(1)(c) of Directive 95/46/EG.
7. The processing of the data seems to be longer than necessary to fulfill the purpose and therefore seems to be no longer necessary. This would constitute a breach of section 2(1)(iv) DPA and Article 6(1)(d) of Directive 95/46/EG.

I therefore kindly ask you to take the necessary steps to change this illegal practice by Facebook Ireland and make Facebook Ireland comply with Irish and European law.

Other providers give the option of deleting the information, they do not process the content or traffic data of messages for their own purposes and the automatically delete old messages after a certain period of time. Automatic deletion can be accompanied by a function which allows the user to save old messages of a longer period of time. It is questionable if the storage of such sensitive data as personal messages should not be done in a country with adequate protection of privacy of communications (such as countries that signed and respect the ECHR).

I can be reached at [REDACTED] or [REDACTED] if you have any further questions.

Sincerely,

[REDACTED]