

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. – 08 “Consent and Privacy Policy”

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 08 – Consent and Privacy Policy

Facebook Ireland is basing all processing of data on facebook.com on the consent to its privacy policy. Facebook Ireland holds excessive amounts of personal data, many of which is sensitive information (see personal data in attachment 03). Facebook Ireland is processing the data for multiple purposes. The data subjects are average (or even inexperienced) consumers in 192 countries worldwide. Following the principle of proportionality this would mean that Facebook Ireland would have to publish very clear, easy to understand and at the same time detailed information about its processing.

1. Privacy Policy

As a first step I would like to analyze the privacy information that is given by Facebook Ireland and that the user is asked to consent to (see privacy policy in attachment 04).

a. Access

A link named "privacy" can be found on the very bottom of all pages of facebook.com. It is often times hard to scroll all the way to the bottom, since the start page expands about three times whenever the user reaches the end of the page.

If the user clicks on the link he/she does not see the privacy policy but a "privacy guide" that gives very limited information if compared to the actual privacy policy. The most disturbing information (e.g. that many things can never be deleted again) cannot be found here (see attachment 05).

On this "privacy guide" page, there is a link in the fifth line "read our privacy policy" that brings the user to the actual privacy policy. During the sign-up-process the user can see a little link that directly links to the privacy policy on one of the second page of the sign-up process.

b. Role of Facebook Ireland and the user

One of the most basic questions for any form of processing of personal data is the role of the different entities. Facebook Ireland does not specify in any way who actually is the controller, processor and data subject when data is processed on facebook.com. Many problems arise out of the uncertainty who is having ultimate responsibility for a breach of privacy laws on facebook.com.

Generally a data subject cannot specifically consent to the processing of his/her personal data, if he/she does not even know who is or will be the actual controller.

c. Extent of the privacy information

If printed in normal size letters, the privacy policy is 12 pages long (see attachment 04). Other privacy relevant information can be found in Facebook Ireland's terms (attachment 01) and the "privacy guide" (attachment 05). This means the data subject has to deal with three primary documents. The privacy policy is not very well structured and many provisions cannot be found easily.

In addition, the policy links to countless other pages that hold even more relevant (and irrelevant) information (see chart in attachment 06). If the user follows these links, he/she will end up finding more than 200 pages of additional information that governs or further explains Facebook Ireland's processing of personal data (see a selection in attachment 07).

d. Contradictions

Facebook Ireland's privacy policy is contradictory in many details, to list all contradictions would be too much for this complaint, but please take a look at the information issues in other complaints.

As an example I picked the different provisions in this system of policies concerning the deletion/removal of data (see attachment 08). Note that these provisions and information are 6 (!) pages long.

For example, Facebook Ireland states in one section:

"If you are uncomfortable with sharing your profile picture, you should delete it."

At the same time it states at some other place in its policy:

"Even after you remove information from your profile or delete your account, copies of that information may remain viewable elsewhere to the extent it has been shared with others, it was otherwise distributed pursuant to your privacy settings, or it was copied or stored by other users." (Note: profile pictures are always shared with everyone).

Facebook also states in its terms:

"For content (...) like photos (...) you specifically give us the following permission (...): you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it."

Summary: If a user is uncomfortable with sharing his/her picture, he/she can delete it, but it may be further used by others and Facebook Ireland. The first provision turns out to be contradictory to the other provisions, because deleting the picture will not necessarily help the user's privacy concerns.

At the same time Facebook Ireland states that it is following these provisions of "TRUSTe":
"Participant must implement reasonable mechanisms to allow the Client or Individual to request deletion of PII or that collected PII no longer be used" and *"Provide a reasonable and appropriate mechanism to allow the Individual request deletion or deactivation of a profile."*

Apparently Facebook Ireland is not following this set of rules, as we can deduct from the contradictory statements above.

e. Vague provisions

Similarly to the issue of rather contradictory provisions, many provisions are also very vague. As an example I picked the provision of the privacy policy (attachment 04) explaining how Facebook Ireland is using all personal data. In fact this whole section consists of only one binding provision that governs all personal data:

"We use the information we collect to try to provide a safe, efficient, and customized experience."

It is very hard to think of a more vague provision than *"providing a safe, efficient, and customized experience"*, every company (e. g. car dealers, gyms, shops, airlines) tries to do so. This meaningless sentence is actually the only one controlling Facebook Ireland's use of the data subjects' personal information.

This general provision is accompanied by some examples how this might/can/could be done:

"Here are some of the details on how we do that (...)"

The following examples are by far not covering all the forms of processing by Facebook Ireland and even these examples are very vague.

2. Consent to the Privacy Policy

In this second step I want to analyze the user's consent to Facebook Ireland's processing of personal data as necessary under section 2A(1)(a) DPA and Article 7(a) Directive 95/46/EG.

a. Unambiguous Consent

The consent to the processing of data has to be made unambiguously. This means that the data subject needs to actively consent and the consent cannot be implied. This can be achieved by making the data subject tick a box to consent to the privacy policy (see e.g. *Denis Kelleher, Privacy and Data Protection Law in Ireland, page 210*).

Facebook Ireland is using one of the most nebulous ways of gathering the data subjects consent during its sign-up process:

- The consent to the privacy policy is included in a page that is titled "security check" (see attachment 08b). The user has to identify letters in a picture and write them in a text box and then click on a "sign-up" button.
- This security measure distracts the user from the little text that claims that the user is now consenting to the privacy policy and terms.
- The text claiming that the user is now consenting is underneath all the three elements the user has to interact with (picture, text box and button).
- The page directs the user to a center of attention while the actual text that informs the user about the consent to the privacy policy is outside of this center of attention (see attachment 09)
- There is no check box (or other form of unambiguous consent) that has to be ticked.
- The text that informs the user about the consent is the text with the smallest print on the whole page. All other elements (especially the once that the user has to interact with) are in much bigger print (see attachment 10)
- Colors and contrast are used in a way that further distracts the user from the text that informs him/her about his/her consent to the privacy policy.
While all three interactive elements are black/white or in green color, the text that claims the consent of the data subject is in grey tones. The contrast of this text is much lower due to a lighter grey of the text and a darker background than in other areas of the "security check" page (see attachment 11).
- Facebook Ireland is not using anything like a check-box that has to be ticked.
- Facebook Ireland has recently changed the page, which lead to an even bigger button, while the text that claims that the data subject is consenting has moved even further down the page (see attachment 12).

b. Freely given Consent

Facebook Ireland has a factual monopoly in most European and international markets. This means that an average user has no other option than joining facebook.com if they want to get engaged in social networks. Other pages have specific audiences (e.g. XING or LinkedIn) or have only a regional audience (e.g. the German "VZ"-networks).

Since there is not really any other option, the free will of the data subject (consumer) is so far limited to one realistic option, which is facebook.com. Even if the data subject might have seen the little text claiming that he/she has consented and has read *and* understood all of the privacy policy (see letters c – e below), it is very likely that these users will click on the "sign up" button without really expressing his/her free will.

The problem of factual monopolies generally leads to a very tough test on contracts, terms and conditions that these monopolies are using. I think this higher standard has to be applied to Facebook Ireland in particular because of the very limited competition.

c. Specific Consent

After analyzing Facebook Ireland's practices and policies for an extent time, I am convinced that there is no specific consent.

This starts with the specification of who is actually the controller / processor and data subject and goes on to the kinds of data that are processed, the specific purpose and the possibilities to delete information. The privacy policy is very vague and does not specifically clarify Facebook Ireland's handling of the gathered data (see above, "1. Policy"):

"We use the information we collect to try to provide a safe, efficient, and customized experience."

If we look just at the example given at section 1.e. of this complaint, it is easy to see that the user is consenting to anything but a specific form of processing of his/her data. What could be more of a general (and therefore illegitimate) statement than *"We use the information we collect to try to provide a safe, efficient, and customized experience."*?

Facebook Ireland even claims that the data subject is 'consenting' to the processing that anyone is uploading to facebook.com in the future and any information that Facebook Ireland is gathering from unspecified sources. The data subject also 'consents' to the use by any unspecified third party that runs applications that one of the data subjects friend happen to use.

This means that the user is e.g. 'consenting' to the processing and publication of an embarrassing picture that someone else will take and upload (without his consent) in some future day. In addition, a third party operator of an application may process this picture further for whatever purpose, as long as one of the data subject's friends consents to that. All these "consents" are prime examples of a non-specific consent.

At this point Facebook Ireland frequently argues that the users have the option to remove such content. This argument is irrelevant for two reasons:

1) The DPA and the Directive 95/46/EG do not allow replacing the specific consent with an "option to remove". The burden of the controller to get the consent cannot be replaced by the burden for the data subject to constantly check for data and remove it manually.

2) Most of this information (e.g. a "tag" in a picture) is only deactivated when a user removes it, while Facebook Ireland is still processing it in the background (see other complaints).

d. Informed Consent

If Facebook Ireland's practice is compared to the minimal standard set down in section 2D(2) DPA, it is clear that the information given by Facebook Ireland is not sufficient:

Facebook Ireland is not even properly disclosing its identity (section 2D(2)(a) DPA). In its privacy policy the first sentence leads the data subject to its parent company in the US: *"contact us by mail at 1601 S. California Avenue, Palo Alto, CA 94304"* (see attachment 04). T

he only hint to Facebook Ireland that can be found, is hidden in its terms under section "18. Other", subsection 1 where the user may find a company named "Facebook Ireland Limited", without an address, telephone number, e-mail or any other form of further information (see attachment 01).

The purpose for which the individual information is processed is not properly disclosed (section 2D(2)(c) DPA) as explained above (see 1.d., 1.e. and 2.c. above). Even after questioning Facebook

Ireland via e-mail they were unable to name me the specific purpose of processing my personal data (see attachment 13).

There are very invasive forms of processing (e.g. face recognition, publishing on the internet without limitations, very limited possibilities of deleting data) that are rather hidden than highlighted. This is contradictory to the “red-hand” rule. (see e.g. *Denis Kelleher, Privacy and Data Protection Law in Ireland, page 218*). Generally it is very likely that the data subject does not expect such forms of processing, so that he/she must be especially informed about this.

The rest of the given information is vague, unclear, poorly arranged and contradictory (see above).

e. Consent obtained by deception or misinterpretation

There are many cases where Facebook Ireland gives wrong, misleading or deceptive information. Many of them can be found in my other complaints, here are some examples:

- Facebook Ireland constantly stresses that users are only sharing with their friends and that the user has control over all data he/she is sharing.
In fact, even the most private information is always visible to and used by Facebook Ireland for its purposes. The data subject can only limit what others can see, but he/she can never limit Facebook Ireland’s processing. Over the time Facebook also changed the default privacy settings. Today most private information is now shared with anyone on the internet and indexed by search engines, if the user does not know how to change the settings.
- The users are told that their content is “removed” while in fact this is often times not possible (e.g. pokes, wall posts, messages).
- Functions like “deleting” the account are hidden on some help page, but can not be found in the normal menu.
- The “synchronizing” functions are not telling the user that Facebook Ireland is going to use the gathered information for more than only an initial matching process.
- Data subjects have the option to delete messages on facebook.com, while in fact they will be kept on Facebook Ireland’s systems.
- Even in the privacy policy the user is told that he/she can remove tags or profile pictures while in fact they are only deactivated.

After analyzing this circumstance, I think that Facebook Ireland does not have the right to use personal data of its users according to its privacy policy, since there is no consent that is in any way effective under section 2A(1)(a) DPA or Article 7(a) of the Directive 95/46/EG.

Facebook Ireland may continue to process some personal data because of the performance of the contract with the user, as defined in section 2A(1)(b)(i) DPA and Article 7(b) of Directive 95/46/EG. This limits Facebook Ireland’s ability to use personal user data to the mere hosting of the users data. Any other processing of personal data could only be done after all users consented to a privacy policy that fulfills Irish and European standards.

I know that a decision by the commissioner in this case is very sensitive, but I would like to remind you of the obligation the Republic of Ireland has under the Directive 95/46/EG to enforce any processing that is not legitimate under our common standard of data protection.

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]