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



Vienna, 18th of August 2011

Complaint against Facebook Ireland Ltd. - 09 "Face Recognition"

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 preforming 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.

Complaint 09: "Face Recognition"

Facebook Ireland started to analyze photos that users were tagged. The product of this analyzing process is biometrical information that is stored by Facebook Ireland.

According to Facebook Ireland the sole purpose of this generated data is to suggest to users people they could tag in pictures they upload. This means that instead of having to type in a name Facebook Ireland is suggesting a person and the user has to say yes/no. This saves the user that wants to tag another person a couple of key strokes, since before that he/she had to first click on a part of the picture and then enter the first couple of letters of the person's name in order to find the person.

The mere existence of such data bears tremendous privacy risks, since this could enable the holder of the data to analyze live information (e.g. CCTV) or to analyze information on the internet or by using cell phones. Public authorities may demand access to this information for their purposes.

Facebook Ireland is indicating its use of photos in its privacy policy, but not in the general explanation about privacy that users see when they click on "privacy" on facebook.com. Within the 12 pages (!) of the privacy policy the following two (!) sentences clarify the use:

"Similarly, if one of your friends uploads a picture of you, we may suggest that your friend tag you in the picture. We do this by comparing your friend's pictures to information we've put together from the photos you've been tagged in" (see attachment 03).

Facebook Ireland is not clearly saying that it generates biometrical data of every individual user and is avoiding the term "face recognition".

This provision is new and users that signed up to facebook.com years ago might not have agreed to this provision at all. The users are not asked to agree to changes in the policy after they were changed. This would be really easy by simply having a prompt when users log on to facebook.com.

The new feature was automatically activated without the prior specific information of the user. Users did not get any information (like e.g. a prompt after logging on) by Facebook Ireland about the activation of this new and very intrusive feature.

It is rather hard to deactivate the feature. It takes at least 7 clicks from the front page, some links are rather small and are hard to find. Users without good internet skills might not even find the appropriate buttons (see attachment 04). The user is only informed about the benefits of this function. This might be manipulating the free will of the data subject. The data subject is by far not "informed" in a balanced or neutral way.

Even if the user deactivated the function, the user's tags are still used. Only after visiting the help center on facebook.com the user finds out, that it he/she deactivated the feature, the biometrical data is still saved (see attachment 05). According to the help center information the user has to click on another button to actually delete the biometrical data that was generated. When I tried to do so, there was no button on the page described (see attachment 06)

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 a *specific, informed* and *unambiguous* consent by the user to the face recognition program. The function was activated automatically, and the biometrical

- data generated without a possibility for the user to object beforehand. The processing of data is therefore illegitimate under Section 2A(1)a DPA and Article 7(a) of Directive 95/46/EG.
- 2. Gathering biometrical information of about 750 million users, of which about 500 million have a contract with Facebook Ireland (all users outside of the USA and Canada), seems to be excessive in comparison to the purpose. Highly sensitive data with a high risk of misuse is generated to save the user a couple of key strokes to enter a name. This form of processing personal data is clearly excessive in comparison to the purpose as specified in section 2(1)(c)(iii) DPA and Article 6(1)(c) of Directive 95/46/EG.
- 3. There is no transparent notice that the generated biometrical data is still held after the function is disabled. This breaches the principle of fairness in section 2(1)(a) DPA and Article 6(1)(a) of Directive 95/46/EG.
- 4. There is no information in Facebook Ireland's privacy policy that would substitute an accurate information of this process, as 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.
- 5. There is no longer a legitimate purpose for holding on to the biometrical data after the user has deactivated the function. There is no other purpose specified by Facebook Ireland. The data would have to be deleted according to section 2(1)(c)(i) DPA and Article 6(1)(b) of Directive 95/46/EG.
- 6. After the user has deactivated the function, any further processing of the biometrical data is no longer relevant for the purpose of the processing and seems to be also excessive, which constitutes a breach of 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 and make Facebook Ireland comply with Irish and European law.

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Sincerely,