

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

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AUSTRIA

Vienna, 18th of August 2011

Complaint against Facebook Ireland Ltd. – 16 “Opt-Out”

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 16: "Opt-Out"

Facebook Ireland is frequently claiming in public statements that the users consented to the use of their data. This would be within the legal boundaries of the Irish and European regulations. In fact Facebook Ireland is generally following an opt-out-system:

1) No Consent

When signing up to facebook.com the users are consenting to a privacy policy but not to specific settings, since none of the documents specifically lists the settings. The users could have just consented to a general framework but did not consent to any specific setting. This means that there is a lack of specific consent in the first place (see privacy policy, attachment 03).

The consent is also not unambiguous since the user never clicks on a check-box or anything that could be seen as an unambiguous act (see *David Kelleher, in Privacy and Data Protection Law in Ireland, Page 210*).

2) Collection of Data before the possibility to change settings

When the Facebook user goes through the standard process as it is designed by Facebook Ireland, the user gives the following information during the "first steps" (see attachment 04)

1. Importing all e-mail-addresses of other data subjects from his e-mail-provider
2. Information about his education and employee
3. His picture

When the user proceeds through this process, he is then asked to give the following additional information (see attachment 05):

4. More profile information
5. Activate his mobile phone
6. Type in more friends

As the very last point (that is not even shown on the start screen, if now scrolled down) he will find a link to an information page about privacy on facebook.com (not the page for the settings!)

This means that according to the sign-up process of Facebook Ireland, the user is publishing his/her information before he will ever have the possibility to change any of the settings. The privacy settings are not even a part of the sign-up process. This is especially worrying since Facebook Ireland's privacy policy and terms are tying many consequences to these settings like e.g. limitations on deleting the data, sharing the data or IP rights.

3) Standard Settings

The standard privacy settings are very liberal. Most settings are set in a way that anyone on the internet can see the content and even search engines can index all the content. Even very sensible information such as "religious views" are set to "friends of friends" (see attachment 06). Since an average user of facebook.com has 130 "friends" this means that this sensible information is viewable to about 16.900 "friends of friends".

That these privacy settings are more in the interest of Facebook Ireland than the users' can be seen if one looks at statistics about the preferred privacy settings. From my personal experience most users set their settings to more private ones than originally set by Facebook Ireland, despite the discouragement by the barriers on facebook.com.

That these settings are too liberal can also be seen if we look at the legal obligations of the user of facebook.com. Following the "Lindquist" decision (06.11.2003, C-101/01) and the Article-29 Working party paper 5/2009, the user falls under the DPA him-/herself if he processes third party information that is visible to more than just his friends. This would be even true for his "friend list" or maybe pictures of third parties that he posts on his facebook page. The standard settings that Facebook Ireland uses are far off this Irish and European understanding of privacy and are instead following a rather US-American understanding of privacy. Facebook Ireland also does not inform about the legal obligations of the user that follow the standard settings.

4) Barriers and discouragement when opting-out

For inexperienced or older users it is very hard to change all settings.

Generally Facebook Ireland "hides" many settings. On the main page there are a couple of big buttons that are accompanied by very small links (see attachment 07). Many settings can only be seen when the user clicks on these small links. E. g. these important settings cannot be edited on the main page:

- Editing the access of third party applications to the users' information
- Editing if search engines can find the user's profile (can be found under "apps and websites"!)
- Editing the face recognition system of facebook.com
- Editing who can "tag" the user in pictures, videos or other elements
- Editing who can publish the current location of the user

Facebook Ireland has claimed in the past that these main settings should make it easier to find the most important settings (see e.g. here: <https://www.facebook.com/blog.php?post=391922327130>) but in fact all the important settings above are now "hidden" behind small links. The user has to find settings at absurd places (such as the option to be found on public search engines under "apps and websites").

Even after the user has clicked on these links, there is the general rule that the more invasive the use of data is and the more the user wants to restrict it, the more clicks he/she has to make.

For example, sharing information with a smaller group than "friends" (e.g. only certain groups of friends, or not sharing them at all, "only me") is not suggested, but takes another click on "costume settings". Certain settings are not even shown at all on the main menu, but the user has to click on "edit settings" in order to see the settings in a new window and change them (see attachment 08).

The user is generally discouraged by Facebook Ireland to change the settings rather than informed on what the functions mean. For example, when the user wants to change the settings that control which data applications of other users can access, there is no option to "unselect all" - the user has to remove 18 (!) check marks individually. The prompt is accompanied by the following statement: "*The more info you share, the more social the experience*" (see attachment 09).

In many windows Facebook Ireland shows that other friends are using a function too but of course they do not show the friends that opted out (see attachment 10). This tells the user not only that other friends use it too but indicates that the user should act just like them.

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

1. There is no *specific, informed* and *unambiguous* consent by the actual data subject (opt-in). This constitutes a breach of section 2A DPA and Article 7(a) of Directive 95/46/EG. In contrast, to seek the unambiguous and informed consent of the user, Facebook Ireland is discouraging any change of preset settings (opt-out). This makes any processing by Facebook Ireland generally illegitimate.
2. The information is not obtained fairly because the user is only getting one-sided information and is generally discouraged by Facebook Ireland to change the privacy settings. This breaches section 2(1)(a) DPA and Article 6(1)(a) of Directive 95/46/EG.

I therefore kindly ask you to take the necessary steps to change this illegal practice by Facebook Ireland.

In my understanding the privacy options have to be "opt-in" in a way that the privacy settings are set to the highest level of privacy, or at least to a level that makes the processing by the user legitimate under section 3B(4)(c) DPA and Article 3 of Directive 95/46/EG. This would be given when all settings are set to "friends only".

The settings should be part of the sign-up process that new users go through and could be accompanied by neutral information. I think under these conditions the use by Facebook Ireland would be legitimate. Existing users would have to go through such a process again since there is no valid consent of these users at this time.

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]