

Office of the Data Protection Commissioner.  
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AUSTRIA

Vienna, 19<sup>th</sup> of September 2011

Complaint against Facebook Ireland Ltd. – 18 “Obligations as Processor”

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.

## Complaint 18: "Obligations as Processor"

As explained on the previous page, Facebook Ireland is a "cloud service". This means that users have the possibility to store data on Facebook Ireland's systems of which they are the data subject. Users are also able to process information of third parties.

Following the Irish DPA and the Directive 95/46/EG Facebook Ireland is a classic "processor" whenever the data concerns a third party, while the user is the actual controller. This means that all users within the European Union have to comply with Article 17 of Directive 95/46/EG.

As an example for one national law the Irish DPA reads:

### Section 2C

(...)

*(3) Where processing of personal data is carried out by a data processor on behalf of a data controller, the data controller shall—*

*(a) ensure that the processing is carried out in pursuance of a contract in writing or in another equivalent form between the data controller and the data processor and that the contract provides that the data processor **carries out the processing only on and subject to the instructions of the data controller** and that the data processor **complies with obligations equivalent to those imposed on the data controller by section 2(1)(d) of this Act,***

*(b) ensure that the data processor **provides sufficient guarantees in respect of the technical security measures, and organisational measures, governing the processing,** and*

*(c) take reasonable steps to **ensure compliance** with those measures.*

When the different functions of facebook.com are observed and the terms of Facebook Ireland are read it seems clear that a user of Facebook Ireland's services has no contractual guarantees that have to be given according to the Directive 95/46/EG and the various national laws within the EU.

**Instructions.** All data about a third party that a controller (user) is uploading is initially included into the system following the controller's (user's) instructions (e.g. by clicking a button). From that point on Facebook Ireland is processing all data for various unclear purposes and there is very limited control or even instructions of the data controller. The controller (user) usually only instructs Facebook Ireland to simply host the information.

The controller (user) usually does not instruct Facebook Ireland to analyze hosted third party data for the purpose of advertisement, friend suggestions, the aggregation of news feeds or whatever other purpose Facebook Ireland processes data for (the specific purposes of processing are unclear, see complaints 08 and 10).

In other cases it seems obvious that Facebook Ireland is not even following the instructions of the controller (user) as can be seen in different complaints I filed concerning "removed data" that was still stored by Facebook Ireland.

**Obligations & Security Measures.** Facebook Ireland is explicitly not guaranteeing any technical or organizational security of hosted personal data (see complaint 12). This means that under the current terms Facebook Ireland and all controllers (users) within the European Union are breaching the relevant national data protection laws whenever they process any third party data on facebook.com.

**Compliance.** Facebook Ireland has no system that allows the user to ensure compliance with the obligations Facebook Ireland has. The obligations may be different in each member state of the EU and would make it necessary to have a very transparent and open system that each controller could access. There is no such system on facebook.com, there are only individual help pages and links the controller can follow but there is in no way a clear management system as controllers of e.g. webhosts, blogs or video websites are employing. Under the current privacy regime it seems also impossible to develop such a system because there is no clear rule on who is the controller, processor or data subject of a particular piece of information.

I think Facebook Ireland and all its users can only process data legally on facebook.com if:

- Facebook Ireland clearly defined who are the controllers and who is the processor of each piece of data,
- Facebook Ireland does not process third party data that controllers upload for any other purpose as hosting (or other processes the controller is fully in control of) and
- Facebook Ireland gives the controller the possibility to ensure compliance with its obligations.

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]