

Office of the Data Protection Commissioner.  
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IRELAND

[REDACTED]  
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AUSTRIA

Vienna, 19th of September 2011

Complaint against Facebook Ireland Ltd. – 20 “Deleted Pictures”

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 20: "Deleted Pictures"

Facebook Ireland Ltd. gives all users the possibility to upload pictures that are then hosted on facebook.com and also processed by Facebook Ireland Ltd. for its own purposes. All users are given the option to delete their hosted pictures whenever they want to do so. After clicking on "delete" the user is asked: "Are you sure you want to delete this photo?" After the user agrees by clicking "confirm", the picture is not shown to the user anymore.

Facebook's Privacy Policy reads:

*"When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others)."*

After reading the source code of the picture pages of facebook.com we easily found out that all URLs of pictures started with "http://fbcdn-sphotos-a.akamaihd.net/hphotos-ak" and were followed by numbers, of which a part was the (public) UserID of the Facebook user. The URL is registered with "Akamai Technologies Inc." situated at 8 Cambridge Center, Cambridge, MA 02142, USA (see attachment 03). This means that Facebook Ireland Ltd. has outsourced the delivery of the content to "Akamai Technologies" as a "Content Delivery Network". From the legal standpoint this company is a processor that is bound by privacy laws. All actions of "Akamai Technologies" are undertaken on behalf of Facebook Ireland Ltd.

To our surprise, the deleted picture was accessible at the URL after we deleted it from facebook.com. After a couple of minutes we tried loading the pictures again and it was still available. Even 32 hours later the deleted picture was still available on the servers of "Akamai Technologies" (see attachment 04). The next time I checked was the next day in the afternoon (about 48h from deletion), where the picture was finally not available anymore.

This means that anyone that was ever able to see the URL has potential access to the deleted files. After little research online we could also find guides on how to find (embarrassing) pictures that friends deleted from facebook.com (see attachment 05).

As a data controller or processor Facebook Ireland Ltd. can only outsource to a (sub-)processor if it can guarantee that the company is guaranteeing full compliance with the obligations set down in section 2C(3) DPA. In addition to that we were unable to find "Akamai Technologies" on the Safe Harbor List (see attachment 06).

I do 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. There is no transparent notice that these bits of data are still held. In contrast to that, the user is told that the picture is "deleted", which breaches the principle of fairness in section 2(1)(a) DPA and Article 6 (1)(a) of Directive 95/46/EG.
2. 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) DPA.
3. There is no longer a legitimate purpose for holding on to these pictures. 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.

4. The further processing of this data is no longer relevant for the purpose of the processing, which constitutes a breach of 2(1)(c)(iii) DPA and Article 6(1)(c) of Directive 95/46/EG
5. The processing of the data is longer than necessary to fulfill the purpose. This would constitute a breach of section 2(1)(c)(iv) DPA and Article 6(1)(d) of Directive 95/46/EG.
6. It seems that there has never been an informed consent by the user to the use of these bits of data since the user just agreed to the processing by having the option to "delete" this content anytime. If Facebook Ireland does not remove any of this content, 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.

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.

I think that this could only be achieved if Facebook Ireland is setting up contractual and technical measures to ensure that the content held by content delivery networks are deleted at the very moment they are deleted from facebook.com, just like they are available at the very same moment.

It seems very likely that Facebook Irelands systems for other content (e.g. videos) follow the same general rules so that I would encourage the DPC to investigate all other forms of content delivery by a third party as well.

I also encourage the DPC to investigate if "Akamai Technologies Inc." has some form of agreement with Facebook Ireland Ltd that would make this transfer of data legitimate under section 11 DPA and Chapter IV of Directive 95/46/EG.

I decided to only send you the relevant parts of the original documents as attachments to this complaint. All original files can be sent any time by airmail, if necessary. I can be reached at [REDACTED] if you have any further questions.

Sincerely,

[REDACTED]