

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

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AUSTRIA

Vienna, 19th of September 2011

Complaint against Facebook Ireland Ltd. – 22 “New 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.

Complaint 22: "New Policy"

Facebook Ireland changed its privacy policy on September 7, 2011. The old privacy policy was from December 22, 2010 and lasted for just a little more than 8 months. The past years Facebook Ireland has renewed its privacy policy every year. Facebook Ireland did not amend the policy but rewrote it from scratch. It is almost impossible to compare the two versions and get a clear picture of the differences. In addition to that, Facebook Ireland was changing the policy unilaterally and without gathering consent or even giving prominent information.

In its (latest) privacy policy Facebook Ireland states:

"If we make changes to this Privacy Policy we will notify you by publication here and on the Facebook Site Governance Page. If the changes are material, we will provide you additional, prominent notice as appropriate under the circumstances. You can make sure that you receive notice directly by liking the Facebook Site Governance Page."

According to section 2A(1)(a) DPA and Article 7 of Directive 95/46/EG the data use is only legitimate if the data subject has given an *unambiguous, specific* and *informed* consent.

There is no doubt, that the data subjects have never given such consent to the recent changes of the policy. There has not even been any form of action that could possibly be interpreted as consent.

Facebook Ireland might now argue that users have consented to the described regime of policy changes by consenting to the policy when signing up. Besides the fact, that this initial consent is generally invalid (see complaint 08) it seems that the consent to Facebook Ireland's system of unilateral policy changes is especially questionable under section 2A(1)(a) DPA and Article 7 of Directive 95/46/EG. In fact this means that the user needs to permanently check on changes every time he/she uses facebook.com. The general "opt-in" rule, that means Facebook Ireland has to come after the user to get consent, is turned into a system where the user has to control Facebook permanently. This has the effect that the legal concept of section 2A(1)(a) DPA and Article 7 of Directive 95/46/EG would be undermined.

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

I think it is necessary that Facebook Ireland adopts a system where the user is asked for his/her consent to a new policy when the user logged on to facebook.com. Users that do not want to consent should have the option to delete the account.

I can be reached at [REDACTED] if you have any further questions.

Sincerely,

[REDACTED]