

Submission by „Facebook Ireland Ltd“ to the Office of the Irish Data Protection Commissioner

Response to Complaint(s) Number: 18

The following submission by “Facebook Ireland Ltd” is a response to complaints filed by “europe-v-facebook.org” before the Irish Data Protection Commissioner as amended by our “request for a formal decision”. It was received by “europe-v-facebook.org” on September 30th 2013.

The submission starting on page 2 of this PDC does only reflect the view of “Facebook Ireland Ltd” and was not changed or amended. The submissions were likely drafted by Facebook Ireland’s law firm “Mason, Hayes & Curran”. We did not receive any addition documents from “Facebook Ireland Ltd”. All other documents of this procedure can be downloaded on “europe-v-facebook.org”.

After we took a first look at the submissions by “Facebook Ireland Ltd” we want to mention the following points, to ensure that any reader will get the full picture of the procedure:

1. In the submissions Facebook Ireland Ltd does in many cases **not responded to our complaints**, but produced arguments and submissions that are irrelevant to the complaints filed. It seems that Facebook Ireland Ltd is trying to “bypass” the arguments we entertained.
 2. In the submissions Facebook Ireland Ltd does in many cases **summarize our complaints** in a way that does not reflect the content of our complaints. We do not know why Facebook Ireland Ltd has chosen this approach other then again “bypassing” the core of the complaints.
 3. In the submission Facebook Ireland Ltd does not respond to the **legal arguments** that were submitted by us, but only focus on facts. The law is not cited in any of the submissions.
 4. In the past 2 years Facebook Ireland Ltd has changed many functions. In the submissions Facebook Ireland Ltd does in many cases **mix the factual situation** throughout this time period. Our complains are usually separating facts and consequences before and after such changes.
 5. In the submission Facebook Ireland Ltd does in many cases refer to the “**audit reports**”. The basis for these reports is not public or independently verifiable. In many cases the DPC has only relied on unverified arguments by Facebook Ireland Ltd when making its assessment. Facebook Ireland Ltd is now relying on these findings, as if they were independently verifiable facts.
- ➔ **Therefore we recommend to consult our original complains, as amended by the “request for a formal decision” [[DOWNLOAD](#)] when analyzing the submissions from “Facebook Ireland Ltd”.**

COMPLAINT 18 – DATA PROCESSOR

1. BACKGROUND

FB-I processes data on behalf of its users. FB-I also processes user data for its own purposes, including the targeting of advertisements and the protection of Facebook users.

The Data Use Policy is clear on this point; users own (and control) their information, but they allow FB-I to process it in accordance with the Data Use Policy:

While you are allowing us to use the information we receive about you, you always own all of your information.

2. FACTUAL ASSERTIONS MADE BY COMPLAINANT

The Complainant makes the following allegations:

- a) *Users of the Facebook platform are subject to data protection obligations as ‘data controllers’ and, under the current terms of the Facebook service, users are in breach of their own data protection obligations.*
- b) *There is confusion as to who is the controller and/or processor of certain categories of data hosted on the Facebook platform.*

3. AUDIT PROCESS

3.1. Introduction

FB-I’s and its users’ respective obligations were considered during the audit process. No issues were raised by the DPC in this respect.

3.2. 2011 Audit Report

In the 2011 Audit Report, the DPC summarised this Complaint in the following terms:

***Complaint 18 – Obligations as Processor from “Europe-v-Facebook”** contended that Facebook’s operation as a processor is at variance with both Irish Data Protection legislation and Directive 95/46/EC. The Complainant states that Facebook and its users can only process data legally if Facebook clearly defines, in relation to each piece of data held, who is the data controller and who is the data processor.¹*

The 2011 Audit Report considered the respective data protection responsibilities of FB-I and its users. The DPC noted that FB-I was a data controller with respect to the personal data of users:

FB-I is the entity with which users based outside the United States and Canada have a contractual relationship. FB-I is the “data controller” in respect of the personal data of these users.

As a “data controller”, FB-I has to comply with the obligations set out in the law. The report summarises the audit team’s conclusions on how FB-I gives effect to the basic principles of data protection law: that data protection law should be collected “fairly”; that the individual should be given comprehensive information on how personal data will be used by FB-I; that the personal data processed by FB-I should not be excessive; that personal data should be held securely and deleted when no longer required for a legitimate purpose; and that each individual should have the right to access all personal data held by FB-I subject to limited exemptions.²

Indeed, the recommendations in the various audit reports are fundamentally predicated on FB-I acting as data controller.

¹ Page 39 of the 2011 Audit Report

² Page 3 of the 2011 Audit Report

The DPC also accepted that FB-I, as data controller, had entered into appropriate agreements with the other entities in the Facebook group who acted as its data processor:

FB-I provided the Inspection Team with a copy of a model contract entitled “Data Transfer and Processing Agreement” between FB-I Limited and Facebook Inc in which FB-I Limited was referred to as the data exporter and Facebook Inc the data importer. The Team was also provided with a copy of a data hosting services agreement between FB-I Limited and Facebook Inc as the service provider. Relevant sub-processing agreements with Facebook India and Facebook Singapore (these Offices perform essentially user operations functions in their regions) were also examined. All the relevant contracts which were effective from September 2010 were considered to be in order.³

...

As outlined earlier this Office sought and assessed all the contractual arrangements entered into by FB-I and Facebook operations throughout the EU and outside as appropriate to ensure that all required conditions for the processing of personal data were met. Transfer to the US is handled by way of the Safe Harbour provisions and an explicit contract between FB-I and Facebook Inc. Transfer from FB-I to territories outside of the EU is handled by way of processing contracts entered into by FB-I and/or Facebook Inc., and the Facebook entity in the importing territory if it has a responsibility for processing user data. Access to user data by Facebook entities throughout the EU as described earlier in the report is handled by way of data controller to data processor contracts which are consistent with the requirements of Section 2C of the Data Protection Acts. FB-I indicates that such access only takes place in very limited circumstances under controlled conditions in the context of the marketing/ advertising and limited engineering functions performed by these Offices.⁴

The 2011 Audit Report also accepted that, in line with the Article 29 Working Party position, Facebook users could also be data controllers. However, many such users would be entitled to avail of the “household exemption”.

Under Irish Law, where an individual uses Facebook for purely social and personal purposes to interact with friends etc they are considered to be doing so in a personal capacity with no consequent individual data controller responsibility. This so-called domestic exemption means for instance that there are no fair processing obligations that arise for an individual user when posting information about other individuals on their Facebook page. The Article 29 Working Party Opinion 5/2009 on online social networking also recognised this distinction. The Opinion also specifies circumstances where the activities of a user of a Social Network Service (SNS) are not covered by the ‘household exemption’. If an SNS user acts on behalf of a company or association, or uses the SNS mainly as a platform to advance commercial, political or charitable goals, the exemption does not apply.⁵

The 2011 Audit Report noted that the application of the household exemption resolved this complaint.

The Complainant states that Facebook and its users can only process data legally if Facebook clearly defines, in relation to each piece of data held, who is the data controller and who is the data processor. This issue is dealt with in the introduction [of the 2011 Audit Report] by reference to what is termed the household or domestic exemption and the responsibilities of a business for instance when using the site.⁶

4. APPLICATION TO CURRENT COMPLAINT

In light of the foregoing, FB-I responds as follows to the specific factual allegations which have been made by the Complainant:

- a) *Users of the Facebook platform are subject to data protection obligations as ‘data controllers’ and under the current terms of the Facebook service, users are in breach of their data protection obligations.*

³ Page 25 of the 2011 Audit Report

⁴ Page 144 of the 2011 Audit Report

⁵ Page 24 of the 2011 Audit Report

⁶ Page 39 of the 2011 Audit Report

The DPC has found that most Facebook users can avail of the “household exemption” when using Facebook.

- b) There is confusion as to who is the controller and/or processor of certain categories of data hosted on the Facebook platform.*

The DPC expressed no such concerns in the course of the audit process.