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

Response to Complaint(s) Number: 6

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 6 - POSTING ON OTHER USERS' PAGES¹

1. BACKGROUND

User timelines are an integral part of the Facebook experience. A user's timeline is a space where a user can share his or her opinions, photographs and other content. Each user controls the privacy settings for his or her timeline, including who is in the audience for posts on the timeline and who can post on the timeline.

1.1 Data Use Policy

In the Data Use Policy, FB-I stresses that posts on Facebook are not private in nature and advises that users should exercise necessary caution:

Always think before you post. Just like anything else you post on the web or send in an email, information you share on Facebook can be copied or re-shared by anyone who can see it.

Furthermore, FB-I explicitly highlights in the "Control each time you post" section of the Data Use Policy that:

When you comment on or "like" someone else's story, or write on their timeline, that person gets to select the audience. For example, if a friend posts a Public story and you comment on it, your comment will be Public. Often, you can see the audience someone selected for their story before you post a comment; however, the person who posted the story may later change their audience.

1.2 Help Center

The Facebook Help Center contains further information and advice for Facebook users in relation to the implications of posting on other users' timelines. It states as follows:

When I share something, how do I choose who can see it?

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Remember, when you post to another person's timeline, that person controls what audience can view the post. Additionally, anyone who gets tagged in a post may see it, along with their friends.

2. FACTUAL ASSERTIONS MADE BY COMPLAINANT

The Complainant objects to the manner in which posts made on other users' timelines are treated on the Facebook platform. The Complainant contends that Facebook settings allow a user's posts to be exposed to a wider audience than had originally been intended by that user. In his Original Complaint, the Complainant appears to rely on the following central factual assertion which is repeated in the Request for Formal Decision of 28 August 2013:

a) The Complainant asserts that it is not possible to ascertain another user's privacy settings in advance of posting on that user's timeline; the Complainant was concerned that such activity could result in users making public posts where they may have had a reasonable expectation that the post or activity would only be viewed by that user's friends.

In the Request for Formal Decision, the Complainant relies on the following further factual assertion:

h) That if a Facebook user changes their privacy settings, other users' previous posts may become visible to a wider audience without warning or notification.

3. AUDIT PROCESS

¹ The Complainant refers to these as "Users' Pages", but for clarity's sake, FB-I refers to these as timelines (formerly "profiles").

3.1 Introduction

During the course of the audit, the DPC examined how posting on other users' timelines operated on the Facebook platform, with particular focus on the ability of one user to see the privacy settings of another before choosing to post on their timeline.

3.2 Other users' privacy settings

3.2.1 2011 Audit Report

In the 2011 Audit Report, the DPC described the Complainant's concerns in the following terms:

The complainant stated that when a user makes a comment, both the comments and the actual name of the person making the comment are visible. The complainant contends that the person making the comment is under the impression that he is simply sharing the comment with his own friends, but in actual fact, the comment made is subject to the privacy settings of the other user and may be available to a much wider audience — it could be restricted to friends only, but equally, could be viewed by everyone on the internet, including search engines²

The DPC referred to the fact that the Data Use Policy informs users that:

When you post information on another user's profile or comment on another user's post, that information will be subject to the other user's privacy settings.

The DPC further noted that since the complaint was submitted, FB-I had amended its platform in order to provide more transparency to users about the visibility of posts to which they might wish to add a comment. In particular, the DPC noted the improvements that would be made when Facebook's innovative timeline profiles were rolled out:

Additionally, FB-I stated that with Timeline, visitors to a user's profile can now see the privacy settings of posts on which they might want to make a comment³

However the DPC observed that the Complainant was not fully satisfied with the modifications made by FB-I:

The complainant welcomes this increase in control but reasonably pointed out that if the member on whose profile the post was made subsequently changed their settings to expand access to the post then the other member's post on their profile would be equally accessible.⁴

The DPC observed that FB-I took the following view of its users' privacy expectations:

FB-I does not share the complainant's view that a user commenting on a post on another user's page would assume that the comment would be subject to anything other than the other user's privacy settings. It has pointed out that in the new profile called Timeline, the setting in the post box expressly states that the privacy of the post is governed by that user's settings.⁵

In balancing the competing interests in this area, the essentially social function of Facebook was highlighted by the DPC together with the (then) recent modifications made to the platform which encourage users to resolve any concerns they may have with other users directly, or *via* another trusted friend:

In assessing this issue account must be taken of the inherent social nature of Facebook and the close interaction and relationship that exists between members who have chosen to accept each other as friends.

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² Page 129 of the 2011 Audit Report

³ Page 130 of the 2011 Audit Report

⁴ Page 129 of the 2011 Audit Report

⁵ Page 129 of the 2011 Audit Report

...Facebook has in recent months introduced enhanced tools, which are described elsewhere in this Report, for friends to raise concerns with each other or via another trusted friend about behaviour on Facebook as an alternative to invoking Facebook itself. The introduction of these tools are to be welcomed from a data minimisation perspective as solely providing tools for complaint to Facebook increases the amount of data held on members submitting and the subject matter of complaints.

The enhanced tools introduced by Facebook and referred to by the DPC above are dealt with in the "Abuse Reporting" section of the 2011 Audit Report. These tools were described as follows in the 2011 Audit Report:

FB-I has indicated, for instance, that if a friend posts content about a user that the user does not like, the user can use the social reporting feature to ask that friend to remove it. Because the reporting process is both private and similar to the kind of communication that two people might have in the offline world, FB-I reports that it has proven to be a hugely successful content removal system.

Moreover, social reporting has also proven an extremely efficient mechanism to combat bullying and other abusive behaviour. Through Facebook's social reporting tool, people also have the option to block communication with others, report content that may be in violation of our policies to Facebook for removal, or even send a copy of abusive content to a trusted friend or adult who may be in a position to help address the person's concern.⁷

While the DPC recognised that FB-I could not reveal its users' privacy settings to other users without risking a breach of data protection laws itself, the DPC did recommend that FB-I provide users with more information in relation to the audience of posts on other users' pages. The DPC also recommended implementing a system which would notify any posters on other users' walls of any change in the privacy settings of such users, thus allowing the posters the option of deleting any posts previously made on the wall of another user before the privacy settings were changed. Accordingly, FB-I agreed to examine the broader implications for the Facebook platform of the modifications which had been suggested by the DPC in advance of the re-audit in July 2012.

3.2.2 The Update Report

Facebook considered the DPC's recommendations in advance of the 2012 Audit Report and came to the view that the functionality of the Facebook platform offered sufficient protection to Facebook users who posted on other users' walls and that users could opt for more private means of communication on Facebook if they wished:

FB-I considered both suggestions carefully and concluded that neither could be implemented in a user-friendly way that respected the privacy model of Facebook and the privacy of users.

It is important to FB-I that users understand that content they share may, in turn, be shared by others more broadly and, if it is content shared on another user's timeline, will be visible to an audience that may be as wide as "everyone". It is a simple model, and it encourages responsible sharing. Users have the most control over own timeline. But when a user decides to post on another user's timeline, he or she does so on the understanding that he or she does not control the visibility of the post. Users who wish to communicate privately can use any one of Facebook's messaging products — messages, emails, or chat.

Furthermore, Facebook already offers users the ability to see the general audience of a user's post on his or her timeline, which means, users who wish to make a comment on that post can see the general audience of the comment, e.g., friends of friends of the user whose timeline it is.⁸

3.2.3 2012 Audit Report

In its 2012 Audit Report the DPC stated that it had considered the issue of privacy for users posting on other users' profiles in detail in light of the position adopted by FB-I in the Update Report and concluded as follows:

⁶ Page 130 of the 2011 Audit Report

⁷ Page 139 of the 2011 Audit Report

⁸ Page 71 of the Update Report

This Office has considered in detail taking account of FB-I's response and is inclined to the view that if a Facebook user chooses to post on another Facebook user's page that they do not do so with an expectation that the post will be either private or restricted to an audience that they are comfortable with. If a user has a concern about the audience for a post they make or that the audience might be subsequently expanded from say "friends only" to "Public" then there is a simple solution available to them and that is not to post on other user's pages. Each user can fully control the audience for all items on their own page but they cannot have an expectation, at least from a data protection perspective, that they should be able to control the use of information they post on another user's profile.9

The DPC therefore concluded that no further action was required of FB-I by the DPC in respect of the operation of posting on other users' profiles on the Facebook platform.

4. APPLICATION TO CURRENT COMPLAINT

In light of the foregoing, FB-I responds to the specific factual assertions made by the Complainant as follows:

a) The Complainant asserts that it is not possible to ascertain another user's privacy settings in advance of posting on that user's timeline; the Complainant was concerned that such activity could result in users making public posts where they may have had a reasonable expectation that the post or activity would only be viewed by that user's friends.

As noted above, visitors to a user's timeline can see the privacy settings of most posts on which they might want to comment. In addition, the DPC has found that users do not have an expectation that posts or activities on other users' timelines would only be viewed by that user's Facebook friends. FB-I's Data Use Policy and Help Center clearly explain this aspect of the Facebook platform to users.

b) That if a Facebook user changes their privacy settings, other users' previous posts may become visible to a wider audience without warning or notification.

This feature of the Facebook platform has also been examined by the DPC which clearly found that FB-I's current practice was in line with data protection requirements. The Data Use Policy referred to in Section 1.1 above expressly discloses to users that other users may change the audience of a story after posts have been made on that story.

The Complainant's current objection to the operation of posting on other users' timelines has therefore previously been comprehensively addressed by the DPC and no material change in functionality has occurred since September 2012 in this respect.

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⁹ Page 49 of the 2012 Audit Report