

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

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AUSTRIA

Vienna, 18th of August 2011

Complaint against Facebook Ireland Ltd. – 11 “Removal of Tags”

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 11: "Removal of Tags"

The Facebook Platform gives every user the possibility to "tag" other users or him/her. This is done by placing a box on the image that is shown in the picture around the face of the user in the picture. It is defined by coordinates that are saved with the picture (see data structure in attachment 03). The tagged or the tagging user can click a small link, called "remove tag" then the tag is not displayed anymore (see screenshot in attachment 04).

The Oxford Dictionary defines "to delete" as "to remove (data) from a computer's memory", which clearly shows that by using "remove" the user expectation of "deleted" data is triggered. This is the same in many other languages that the Facebook platform is available in. For example, the German version uses the word "entfernen" which is the name of the "delete"-key on any German keyboard. The user experience is that the "tag" is gone and not displayed in any way anymore.

Surprisingly Facebook Ireland seems to only "deactivate" the tags but not delete them. This can be seen in the data structure that has a field called "active", which indicates that there has to be an "inactive" mode as well (see attachment 03).

It can also be easily discovered by the fact that it is not possible to tag other users again in a picture where they have removed a tag (see attachment 05). This might be intended to protect the users, but in my opinion the only way of protecting the user when they are tagged is that they have to consent to the tag before it is saved on facebook.com.

In summary the user has the experience that the tag is deleted, while in fact Facebook Ireland is only deactivating the tag.

Since any purpose of the "tag" for the user and all possibility to process the "tag"-data is gone at the time the user clicked the "remove tag"-link, any further processing of the "tag" is done by Facebook Ireland, which must be seen as the sole controller.

Under the section of Facebook Ireland's privacy policy (see attachment 06) which describes the use of data by Facebook Ireland ("5. How We Use Your Information"), Facebook Ireland tells the user:

"We may use information about you that we collect from other Facebook users to supplement your profile (such as when you are tagged in a photo or mentioned in a status update). In such cases we generally give you the ability to remove the content (such as allowing you to remove a photo tag of you) or limit its visibility on your profile."

The last sentence clearly states that photo tags can be "removed", while the second possibility (limit its visibility) is only covering other "information".

I 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 poke is "removed", 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. In contrast to that it even tells the user that the "tags" get "removed". This constitutes another breach of the principle of fairness in Section 2(1)(a) of the DPA.

3. There is no longer a legitimate purpose for holding on to these bits of data. There is no other purpose for these bits of data specified by Facebook Ireland. 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 these bits of data is no longer relevant for the purpose of the processing and seems to be also excessive, 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 seems to be longer than necessary to fulfill the purpose and therefore seems to be illegitimate. 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 with having the option to "remove" this content later. If Facebook Ireland does not remove any of this content, the consent seems to be not informed and not 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 decided to send you just 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] or [REDACTED] if you have any further questions.

Sincerely,

[REDACTED]