

Office of the Data Protection Commissioner.
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IRELAND

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AUSTRIA

Vienna, 18th of August 2011

Complaint against Facebook Ireland Ltd. – 03 “Tagging”

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.

Case 03: "Tagging Users"

The Facebook Platform gives users the possibility to "tag" another user ("friends") in photos. This means that the photo, which is not really machine-readable with today's technologies, is becoming easily machine-readable.

Tagged photos are also displayed on the data subjects Facebook page and the "news feed" which is the start page that all "friends" of the user will see when logging onto Facebook. This news feed is the information of friends that was aggregated by Facebook.

Data subjects do not have any possibility to prevent other "friends" from tagging them in pictures, other than not having friends at all. The tag is fully active before the data subject even knows about its existence. There is no functionality that prevents unwanted tags in pictures. The only option the data subjects are given is to remove tags, as soon as it sees it, but this may be too late.

In practice this means that the data subject may be tagged in a picture where it can be seen drunk, cheating on its partner/spouse, naked or any other problematic situation. This picture will be automatically distributed by Facebook Ireland to all "friends" of the data subject. When using the standard settings of the facebook platform, all internet users are able to see the data subject's pictures. The only option the data subject has is to remove the tag after all this has already happened (opt-out).

To prevent other users from "tagging" the data subject in the same picture again, the tag that got "removed" by the data subject is still saved on the facebook platform. This can be seen by the data field "active" that is used by Facebook Ireland (if the the tag would be removed there would be no need for an "active/inactive" option, see attachment 03) and by the prompt that the user is getting if he tries to tag the data subject a second time (see attachment 04).

This means that the user can in fact never remove the tag from the facebook platform. All tags are kept by Facebook Ireland, even if the user "removed" the tag.

In section 5.9. of Facebook Ireland's terms they are saying: "*You will not tag users (...) without their consent*" (see attachment 01). In the daily practice this provision is not known to the users at all. In my personal experience after 3 years of using the Facebook platform, there has never been another user that asked me for my permission before I was tagged in a picture.

I do think that this (unknown) provision is not sufficient to make Facebook Ireland a bona fide user of this information that is delivered by users. Different data protection authorities in the EU have ruled that a mere legal obligation or protection is not sufficient if it is not enforced in practice.

In summary Facebook Ireland is processing personal data (tags) without the specific consent of the user. General provisions in the privacy policy do not constitute a specific consent. The user knows that some picture might be tagged by some user, but this information is in no way substituting a specific consent. There is a major difference in the processing of different kinds of pictures. Facebook Ireland is not tagging the users itself, but it is using the personal data that is obtained without the specific consent of the user for its own purposes (e.g. aggregating the news feed, analytics about users).

If this practice is analyzed, I think that it is illegal under the following provisions of the DPA:

1. There is no specific and informed consent by the data subject for the individual tag (opt-in). This constitutes a breach of section 2A DPA and Article 7(a) of Directive 95/46/EG. This would make any further processing illegitimate.

2. There is no transparent notice that these bits of data are still held after the user clicked "remove tag". In contrast to that, the user is told that the tag is "removed", which breaches the principle of fairness in section 2(1)(a) DPA and Article 6(1)(a) of Directive 95/46/EG.
3. There is no information in Facebook Ireland's privacy policy that would substitute an accurate information of this further processing after deletion, 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) of the DPA.

I therefore kindly ask you to take the necessary steps to change this illegal practice by Facebook Ireland. If the Commissioner finds some other reason as the specific consent, which would make the processing by Facebook Ireland legitimate, I want to add that there is no way for the data subject to ever fully remove a tag. The user can only make it "invisible" for others, but Facebook Ireland will not stop processing it. This seems to be a breach of the right to object. This seems to breach section 6A DPA and Article 14 of Directive 95/46/EG.

A possibility that would meet European and Irish laws would be the opt-in-solution that the German "studiVZ"-network was using: The tag is inactive until the data subject gives its consent. This could be done by a notification that pops up when the data subject logs on to the platform. If the user does not consent, the data would need to be deleted immediately.

I decided to send you just the relevant parts of the original documents as attachments to this complaint, the 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]