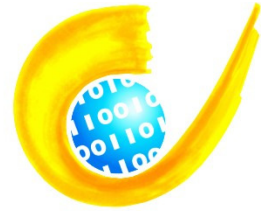


ULD



Unabhängiges Landeszentrum für
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Kiel, 5. September 2011

Data protection analysis on Facebook's web analytics

Your letter of August 25th, 2011

Dear Mr. Long,

Thank you very much for your letter dated August 25th, 2011, by which you react to our PR of August 19th, 2011. We thereby pointed out to website owners in Schleswig-Holstein that implementing Facebook's social plug-ins as well as operating Facebook-fan pages infringes German and European data protection law. The objective of your letter is declaredly to contribute by clarifications about your service that "will lead to people in Schleswig-Holstein being able to continue to use [your] service".

First of all I must point out to you that neither the law nor the Unabhängige Landeszentrum für Datenschutz Schleswig-Holstein (ULD) prohibits the use of Facebook. Rather it is in our understanding a part of the right to informational self-determination that every person may decide freely which internet services he or she would like to use. A prerequisite for self-determined internet use in line with our data protection law is sufficient information directed to the user and straightforward and free choices. Website owners are legally bound to that end. The objective of ULD is to make this a reality for providers in Schleswig-Holstein. The point of ULD therefore is to enable the data protection compliant use of Facebook's services.

I was delighted to learn that you intend to examine the content of our public working paper and to respond to it in detail. We are all agog, because we do not have any knowledge about Facebook's internal data processing which we hope to learn from your response. Up to now all our knowledge

is based on the technical analysis of the communication in the internet to and from Facebook. According to European data protection law internal data uses of a data processor like Facebook are processes subject to fundamental rights that need to be made transparent and must be legally legitimized.

We have acknowledged with interest that Facebook does not log IP addresses "that geo-locate to Germany unless the visitor to a website with a Like Button is a logged in Facebook member". This limitation is relevant because from our knowledge Facebook does have more than 18 million members of which apparently IP information is logged. You are adding to your explanation that a person may use any website in the world with a social plug-in "and [you] would not log the IP address if he or she were using an IP address located in Germany".

ULD has not been in a position and currently cannot validate whether your statement is correct. In order to geo-locate you need according to your statement the IP address to begin with. Insofar we are interested to learn more details about the technical processes taking place for geo-location and for deletion of IP addresses.

For our technical and legal analysis the issue of storing and interpretation of IP addresses is not of key importance. As a means for identification of a computer, to generate a profile, and for commercial use you are using cookies. You are explaining that you use cookies "for two purposes primarily: to support site security and to provide a social context and social features to Facebook members on Facebook and around the web". You would not use cookies "to track Facebook members or non-members". It is your point to learn from the web users "what they like".

This is exactly the important connecting link to our criticism. The discovery of what somebody likes is deemed as profiling under German data protection law. To be allowed to do this the legal requirements set out by TMG and the e-Privacy Directive need to be complied with which to our knowledge is not guaranteed when using the Facebook services subject to our analysis.

ULD does not assert that when using use data the names of users matter to Facebook. From a data protection point of view the subjective purpose of the data controller is not relevant but rather the objective facts. It is significant whether personal or material circumstances of an identified or identifiable individual are processed, and in which form and for what purposes the processing takes place. According to our knowledge you are processing personal information by e.g., using cookies as identification that generate results offered for the function "Insights" or commercial web content.

You asked us, in order "to understand more about the origins of this investigation" to inform you "how many complaints [we] have received from residents of Schleswig-Holstein concerning a) Like Buttons and b) Pages/Insights and describe the nature of their concerns".

This does not matter for the application of data protection law. Controls by data protection supervisory authorities may be conducted in line with sect. 38 BDSG without cause. As a matter of fact ULD has been informed by web users, jurists, data protection officers, and journalists for more than

a year that the services criticised by us on August 19, 2011 are illegal and we therefore need to intervene.

That the data protection infringements of Facebook services meet with massive public criticism we noted at ULD after publishing our analysis. After publication we also received without doubt critique about our proceeding, but we mainly received approval by the people concerned.

You are expressing concern about "the actions that [we] are proposing to take ... such as levying fines against individuals and organisations in Schleswig-Holstein who use [your] service" and that these "are potentially very damaging to a wide range of interests". This would "clearly place people in Schleswig-Holstein in an extremely difficult position". This has been considered by ULD from the beginning. It is a fact that institutions that have previously been using Facebook have brought forward that the sanctions announced could entail a locational disadvantage to Schleswig-Holstein. However, this cannot make us refrain from our proceedings as it is our duty as a supervisory authority to oppose data protection infringements. It should be undeniable that it is possible to offer the criticised functionalities in a way conforming to legal requirements. In any case legal infringements cannot be accepted over a long period of time and to such an extent. This would be a massive discrimination also economically against website owners who conform to the law.

In the past ULD has communicated with Richard Allan from Facebook in London. Unfortunately the contact was only little informative and slow so that ULD did not pursue this communication any further. We are well aware that there is a communication between representatives of Facebook and the Hamburg Data Protection Commissioner (HmbBfDI). However, according to my information he was bound to confidentiality on any communication with Facebook even towards the other data protection commissioners. I have recognized that you are now willing to agree to "share this information with the other German DPAs".

Unfortunately, I have to inform you that this level of transparency is not enough. Because of the legal controllership imposed upon website owners they need to be able to acknowledge which data processings are prompted by you or the use of a site respectively. It is therefore inevitable that such relevant information is made available to them. Therefore, I would like to ask for your approval to have our communication published by ULD. As far as confidential business information is involved we would ask you to mark this accordingly so that we can ensure confidentiality in this respect. This, we are happy to assure you. As a quid pro quo I give my permission to you to publish the letters ULD sent to you. This will hopefully have the effect that the public debate on data protection in Facebook will be lead at a more qualified level than before.

You propose in your letter that "we jointly ask" the Hamburg Commissioner "Professor Caspar to continue to lead any direct discussions with Facebook". This suggestion will be unrewarding: The legal supervisory authority of ULD in Schleswig-Holstein cannot be neutralized by an agreement with a corporation. Besides – due to the limited resources available to supervisory authorities – we need to make sure of an effective use of means and meaningful division of work. With this in mind I have informed my colleagues already a few months ago at the conference of data protection commissioners of the Federal State and the Laender as well as at the "Düsseldorfer Kreis" that ULD

will be working on web analysis in Facebook. This was generally welcomed. There is a constant exchange of information about our insights and our correspondence. Additionally, I can assure you that also a consultation with respect to the operative proceedings among the supervisory authorities in Germany and perceptively even beyond that takes place.

For the first time you inform me about potential "advisors on data protection policy issues" at Facebook. These are Richard Allan in London, Virginie Rousseau in Dublin, and Eva-Maria Kirschsieper (Manager of Privacy & Policy) in Germany. For the national point of contact, Ms. Kirschsieper, you provide an e-mail address (kirschsieper@fb.com) but neither a telephone number nor an office or postal address. As much as ULD appreciates electronic communication as little satisfactory is this in terms of a legally binding communication, for which reason sect. 5 of the German Teleservices Act (TMG) requires information about the (postal) address and for reasons of timely availability, suggests indicating a phone number. Therefore, I would appreciate if you could provide me with this additional information.

Full of curiosity ULD is awaiting your results with respect to our analysis and we will publish and comment it gladly. You are not required to communicate with ULD - as in the present case - by postal service. We gladly accept electronic communication – encrypted and signed if needed – and use it ourselves.

By courtesy you will find an English translation attached to this letter.

With best regards,

A handwritten signature in black ink, appearing to read 'Thilo Weichert', written in a cursive style.

Thilo Weichert

