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LD4-61.43/12.003

Kiel, 21. August 2012

## **Processing of personal data by Facebook Inc., 1601 Willow Road, Menlo Park, California 94025**

Compliance with the Safe Harbor Privacy Principles and the Settlement of November 2011

Dear Mr. David Vladeck,

I contact you on behalf of the Independent Centre for Privacy Protection Schleswig-Holstein (ULD – Unabhängiges Landeszentrum für Datenschutz), the data protection authority of the German federal state Schleswig-Holstein. The ULD monitors the compliance of public and private bodies with German and European data protection regulations. In this capacity, we examined the services offered to German customers by the US-based company Facebook Inc.

With great interest we follow the FTC's efforts to demand that providers of social networks comply with privacy and consumer protection requirements. According to our information, Facebook Inc. committed itself to comply with the Safe Harbor Privacy Principles since 2007 (first certification: 5/10/2007). Additionally, the settlement of FTC charges in November 2011 is authoritative. In this settlement several data protection requirements were imposed (press release of November 11<sup>th</sup>, 2011, "Facebook Settles FTC Charges That It Deceived Consumers By Failing To Keep Privacy Promises"):

<http://ftc.gov/opa/2011/11/privacysettlement.shtm>

Based on our investigations, we come to the conclusion that Facebook Inc. seriously violates European and German data protection law when collecting, processing and using personal data.

Especially some of the provided services conflict with the applicable law. Result of these investigations is that Facebook Inc. is the legally responsible data controller in the EU and EEA for processing of personal data. However, Facebook Inc. claims otherwise in its Safe Harbor statement, suggesting

that Facebook Inc. is only data processor on behalf of Facebook Ltd., Ireland. According to the documents and information we have at hand, Facebook Inc. determines business policies as well as purposes and means of the processing of personal data cooperating with Facebook Ltd., Ireland. Therefore, Facebook Inc. shares the joint controllership with Facebook Ltd. Ireland and is a responsible data controller according to European law.

We share the FTC's concerns that were raised during the investigation in 2011. Although these were addressed in the settlement with Facebook Inc. in November, 2011, we believe that Facebook Inc. still violates the Safe Harbor Privacy Principles and that the commitments in the settlement have not yet been met. According to our knowledge, Facebook Inc. violates several Safe Harbor Privacy Principles. In the present case, we focus on examples of violations of the Principles "Notice" and "Choice".

We therefore wish to inform you about our assessment in the following:

### **1. Facebook "Insights"**

*Facebook Inc. violates the Safe Harbor Privacy Principles „Notice“ and „Choice“ by creating user profiles for the service Facebook „Insights“.*

Facebook Inc. collects data on the behavior of visitors of Facebook websites (fanpages) using the cookie „datr“ and IP address information. Facebook Inc. links this information with the registration data of [www.facebook.com](http://www.facebook.com) (name, first name, birth date, gender). Operators of these fanpages are provided with Facebook "Insights", a tool showing them anonymous user statistics. Facebook Inc. itself processes the users' personal data for advertising purposes. It does not obtain any consent of the users for the collection of behavioral information and the linking with the directly identifying registration data. For unregistered visitors Facebook Inc. also sets the cookie "datr" without the visitor's knowledge whenever she or he visits a Facebook website. Via this cookie even an unregistered visitor can be immediately and unambiguously recognized, when visiting a Facebook site anytime later. Facebook users as well as unregistered visitors have no way to object to the use of their personal data for advertising purposes. Please refer to our corresponding and more detailed assessment in the report "Datenschutzrechtliche Bewertung der Reichweitenanalyse durch Facebook" (assessment of the reach measurement and analytics by Facebook in terms of compliance with data protection and privacy laws) of August 19<sup>th</sup>, 2011. Please note that the document is currently only available in German.

<https://www.datenschutzzentrum.de/facebook/facebook-ap-20110819.pdf>

While registering on [www.facebook.com](http://www.facebook.com) the service "Insights" is never mentioned to the user. There is no transparent information about what personal data are collected, processed and used for which purpose. Reference is made only to the general data use policy, the Terms and Conditions and the cookie usage policy of Facebook, which contain no reference to the service "Insights". The user does not receive information about the linking of registration data with behavioral data, the cookie "datr" and IP addresses. The principle of "Notice" is clearly violated.

The linkage of registration data with the cookie "datr", IP addresses and behavioral data and the following processing for advertising purposes is incompatible with the purpose for which the data were originally collected (registration). Originally, the registration data are only collected to open a

user account to the Facebook portal. The user cannot object the processing of personal data for the secondary purpose of advertising since Facebook Inc. does not provide clear and comprehensible, easy-to-find mechanisms to exercise choice. Facebook Inc. violates the Safe Harbor Privacy Principle of "Choice".

According to our understanding, Facebook Inc. furthermore violates the FTC settlement of November 2011 by not providing the users with correct and complete information on data use.

## **2. Automatic Face Recognition Function**

*By activating the face recognition service by default, Facebook Inc. has violated the FTC settlement. The enacted changes have overridden the users' privacy preferences. This also violates the Safe Harbor Privacy Principles of "Notice" and "Choice".*

Facebook Inc. has activated a function of face recognition in photos to identify registered users without informing the users and obtaining their affirmative consent. The company uses a software that biometrically analyzes all photos uploaded by the users.. This means that for all persons in the photos the distances between the facial features are measured and stored in the form of a number (template). If the face of a registered person is recognized in the photo and this person is on the "friend list" of the user who uploaded the photo, the face recognition service proposes one or more names to identify the photographed person(s). The user then has the option to mark the person(s) on the photo.

The procedure of face recognition of Facebook Inc. violates European and German data protection law. The Commissioner for Data Protection and Freedom of Information of the German federal state Hamburg demanded from Facebook Inc. to meet the following requirements:

- a. Facebook Inc. has to ensure that an analysis of digital photographs for the purpose of automatic face recognition is exclusively based on the voluntary, informed and affirmative consent of the users.
- b. Users will be informed about the means of the creation of biometric recognition patterns and the privacy risks in a clear and comprehensible way before granting consent.
- c. Biometric recognition patterns created without the user's consent are erased.
- d. To verify the implementation of these measures Facebook Inc. has to create a procedural documentation.

We believe that Facebook Inc. violates the Safe Harbor Privacy Principles "Notice" and "Choice" with the biometric analysis of the photographs and the creation and storage of the templates.

According to our information, users get no clear information about the automatic face recognition function – neither as part of the registration process on [facebook.com](https://www.facebook.com) nor by reading the data use policy or the Terms and Conditions. There is no easy-to-find information for the users about the choices and means available to them to restrict the use of their photos. The menu path the user has

to click to disable the feature for face recognition is very complex and confusing. The desired function is deeply hidden in the privacy settings.

We believe that by biometrically analyzing the photographs and the creation and storage of the templates Facebook Inc. may use the data for a secondary illegitimate purpose that is incompatible with the purpose for which they were originally collected. The user cannot exercise choice with clear and easy-to-find mechanism to consent or object to this data processing.

In our perception, Facebook Inc. also violates the settlement of November 2011 by changing privacy settings without further notice and explicit consent of the users. Facebook Inc. has introduced this function without informing the users and acquiring the necessary consent, paying no attention to their privacy preferences.

### **3. Policy changes without consumers` affirmative express consent**

*Policy changes by Facebook Inc. may influence and override the privacy preferences and privacy settings of users without sufficient information or choice. This violates the Safe Harbor Privacy Principles of "Notice" and "Choice"; further, it is not compliant with the settlement.*

Facebook Inc. reserves its right to change its Terms and Conditions and therefore the privacy settings for users. In order to obtain information about planned changes, users must visit the „Facebook Site Governance“ site and click the „Like“ button to subscribe to changes in the Facebook policies. Only if 7,000 users leave a substantive comment on a particular proposed change, the users will have the opportunity to participate in a vote in which they will be provided alternatives. Facebook Inc. considers the outcome of this vote binding only if more than 30 percent of all active registered users (from the date of notification) participate in the vote (Number 14 of Terms and Conditions; [www.facebook.com](http://www.facebook.com)).

In our opinion, the fact that users have to subscribe to the „Facebook Site Governance“ site first to get informed about changes clearly violates the Safe Harbor Privacy Principles „Notice“ and „Choice“. Among others, Facebook Inc. is obliged to inform its users and offer the opportunity to choose whether their personal data are to be used for a purpose that is incompatible with the purpose for which it was originally collected or subsequently authorized by the user. The requirement of an additional subscription to obtain the information on an intended change in the first place thwarts the exercise of choice, because users do not receive readily available information. Many users are unaware of upcoming changes and the possibility of a vote.

Furthermore, the vote violates the requirements of the Safe Harbor Privacy Principle „Choice“ because Facebook Inc. considers the outcome of the vote mandatory only when more than 30 percent of the registered users participate in the vote. Considering that Facebook itself states to have 900 million users worldwide, it is unrealistic to achieve this huge voting turnout. Many of these users are inactive, fake accounts or company accounts. Moreover, most of the active users have not subscribed to the governance site and do not get informed about the changes and the vote. There is no way for users to object to a change of their privacy settings and the subsequent change to the original purposes of collecting individually. In a recent amendment to the Terms and Conditions, 342,632 registered users have submitted their vote. Although this is a remarkable number for an online vote, it is less than .04 percent of the overall number of Facebook accounts. 297,883 users voted against



the proposed change. These votes however were not considered by Facebook Inc. in any way because the voter turnout was below 30 percent.

In our opinion, Facebook Inc. also violates the settlement of November 2011 with this voting procedure, because the policy changes that are voted on may override the users' privacy preferences and change privacy settings without acquiring their affirmative consent.

I kindly ask you to support us and the other German Data Protection Authorities regarding this matter. Please let me know if you need more information for your assessment.

I will be gladly available for any questions and further cooperation.

Yours sincerely

Dr. Thilo Weichert

A handwritten signature in black ink, appearing to read 'Thilo Weichert', written over the printed name.