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CONCLUSIONS

Informal English translation of the conclusions of the Dutch Data Protection Authority in its final report of findings about its investigation into the processing of personal data by the Facebook group, 23 February 2017

The Dutch Data Protection Authority [Autoriteit Persoonsgegevens, hereinafter: Dutch DPA] has launched an investigation of the processing of personal data of users in the Netherlands by the Facebook group. The investigation is based on Article 60 of the Dutch Data Protection Act [Wet bescherming persoonsgegevens, hereinafter: Wbp]. At first, the Dutch DPA targeted the investigation at Facebook Inc. from the USA, while addressing Facebook Netherlands B.V. (hereinafter: Facebook Netherlands) as office of Facebook Inc. in the Netherlands. During the investigation, the Dutch DPA has extended the scope of the investigation to Facebook Ireland Ltd. (hereinafter: Facebook Ireland) as a result of the views of Facebook Inc. and Facebook Ireland Ltd. that Facebook Ireland Ltd would be (the only) data controller for the data processing of users of the social networking service in the Netherlands.

The company Facebook Inc, established in California, USA, provides a globally accessible social networking service. There are approx. 9.6 million users of the Facebook service in the Netherlands, of which almost 90% uses the Facebook app on a smartphone.

The social networking services provided by the Facebook group are free for the end users. The business model of the Facebook group is based on revenues from targeted advertisements. The Facebook group enables advertisers to select very specific target audiences, based on the interests and behavior of users of the service.

It follows from the privacy policy of the Facebook group and from specific information about advertising on the service that the group infers the interests of users for advertising purposes from the data they share with other people on the social networking service (profile information, content of messages, reports, pictures, location data). This also includes data from other users about them (also through, amongst others, their pictures, their location data, contact lists and content of messages). The Facebook group does not only collect data within the Facebook environment, but also outside of it. The Facebook group reads information contained in cookies through more than half of the 500 .nl websites that are most frequently visited by Dutch people. Many of these websites contain a 'Like' button. The Facebook group gains insight, through these cookies, in the web surfing behavior and app usage of users outside of the Facebook service, even if they do not click on such a 'Like' button, and even if they are logged out of the service.

Data controller, processors, establishments and applicable law

Facebook Inc. has an office in the Netherlands, Facebook Netherlands. According to the Facebook group this office is no establishment of the group, but only a data processor for Facebook Ireland. According to the group, Facebook Ireland is the (only) data controller for the processing of personal data of users in Europe, including users in the Netherlands. Facebook Inc, by its own account, would only be a data processor for the personal data of users in Europe. Therefore, according to the Facebook group, only Irish law would apply to the data processing of Dutch users of the Facebook service, and only the Irish Data Protection Commissioner would be authorized to start an investigation. However, the Dutch DPA concludes, based on the investigation, that Facebook Inc. and Facebook Ireland are joint controllers for the processing of personal data of users in the Netherlands. This follows from the fact that the Facebook group operates as a single financial operational business entity, that the group provides one global service to data subjects (barring a few specific exceptions), that there is one globally applicable privacy policy and that the Facebook group centrally (and globally) carries through changes in the policy and purposes and means of the processing, including the information to data subjects.



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It follows from the information provided by Facebook Inc. and Facebook Ireland in their written views that Facebook Ireland is in the position, in a limited number of situations, to exert a (jointly) decisive influence on the processing of personal data of European users of the Facebook service. This follows from the findings on the customer service / helpdesk for European users, the providing of data to law enforcement authorities in Europe, the guaranteeing of the data protection rights of users, the influence on parts of the storage and hosting of data of European users of the networking service in a new datacenter in Ireland and the influence on the employees and workspace of Facebook Netherlands. This joint controllership also shows from the stopping of three functionalities ('Tag suggest', 'Moments' and the 'Buy button') for users in Europe, the delayed introduction in Europe of the service Online Behavioural Advertising (targeted advertisements based on the web surfing behavior and app usage outside of the Facebook service) and the introduction of a cookie banner on the service for users in Europe. In practice however, there is a close integration of tasks and activities regarding the determination of the purpose of, and means for, the processing of personal data (amongst which also are customer service and communication to all Facebook users globally). Therefore there is joint controllership of Facebook Inc. and Facebook Ireland for the processing of personal data of Facebook users in the Netherlands. For parties to be joint controllers, it is not required that the span of control is divided equally over parties.

The Dutch Facebook office is set up to promote and increase the sales of the advertising space and other advertising products in the Netherlands. For its revenues, the Facebook group almost completely depends on the sales of advertising space. The activities of the Dutch Facebook office relating to the advertising constitute the means of rendering the networking service economically profitable, and that service is, at the same time, the means enabling those activities to be performed. Therefore the activities of the Dutch Facebook office to promote the sales of advertisements are inextricably linked to the specific business model of the Facebook group for which data is ultimately processed. Additionally, the activities are targeted at the Dutch market. The Dutch establishment is a relevant establishment of the Facebook group in the Netherlands, as laid down in Article 4, first paragraph, of the Dutch Wbp. This is in line with the jurisprudence of the European Court of Justice in the rulings Weltimmo, Google Spain and Amazon, because Facebook Netherlands performs activities that are inextricably linked to the data processing by the controlling entities Facebook Ireland and Facebook Inc. Therefore, the Wbp applies to the processing of personal data of users of Facebook in the Netherlands and the Dutch DPA is authorized to supervise.

Personal data

The Facebook group processes large amounts of personal data from and about natural persons (data subjects). The Facebook group has a strict identification policy, by which data subjects are obliged to provide their real name and keep their contact data up to date. Through this, the personal data of the owner of an account are known to the Facebook group. The data subjects are therefore (directly) identifiable for the group. These, and all additional data that the Facebook group processes from and about data subjects are therefore personal data as defined in Article 1, under a, of the Wbp.

The Facebook group collects those data partially with the help of tracking cookies that are retrieved whenever a website or an app contains a 'Like' button or other interaction with the Facebook group. In conformity with the legal presumption from Article 11.7a of the Telecommunications Act, this (also) concerns processing of personal data, because the group has as a purpose for these cookies to collect information about the use of several services of the information society, to combine those data, and infer profile aspects from the data.



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Special categories of data

The Dutch DPA has factually ascertained that the Facebook group enables advertisers to select “men that are interested in other men” for targeted advertisement purposes. Data subjects provide this information themselves, in the contents of their profile, when they answer a multiple choice question from the Facebook group during the creation of an account.

Facebook Ireland has categorically denied in her written views that she processes special categories of data for advertisement purposes. The Dutch DPA has established, based on experiments with self created accounts, that these (fake) data subjects have been approached in a targeted way by the Facebook group with advertisements based on the profile aspect 'men interested in men'. This both involved an advertisement specifically created by the Dutch DPA for this investigation purpose, as well as an advertisement from an ongoing (real) advertising campaign from a Dutch dating website. In both cases, the advertisement was exclusively targeted at the profile aspect 'men interested in men'. The dating website labeled its ad campaign target group as gay. The accounts created by the Dutch DPA did not perform any activities inside or outside of the Facebook service, aside from visiting their own profile page. Therefore it is a fact that the Facebook group has derived the aspect 'men interested in men' from the contents of the profile of the investigation accounts. The selection by the Facebook group of these data subjects based on their sexual preferences for advertising purposes has to be qualified as processing of special categories of data, as laid down in Article 16 of the Wbp, because there is a direct link between the data subject and the sensitive aspect.

Based on Article 16 of the Wbp, the processing of special categories of personal data is prohibited, unless one of the exceptions contained in the Articles 17 to 23 of the Wbp applies. The only two exceptions the Facebook group could possibly use for this processing are: explicit consent of the data subjects, or if the data have been manifestly made public by the data subjects. Both exceptions do not apply in this case. The Facebook group does not ask data subjects for their explicit consent for the processing of special categories of data for advertising purposes. For that matter, explicit consent can not be obtained from acceptance of general terms and conditions by data subjects, nor can it be derived from the lack of an opt-out action. Furthermore, the Facebook group can not rely on the exception that the data have been manifestly made public by the data subjects, because that exception only applies to spontaneous behavior. It cannot be the consequence of a response to a request by any other person with a view to processing personal data. On top of that, users have not consciously made these data available to the Facebook group for advertising purposes.

Because Facebook Inc. and Facebook Ireland cannot rely on any of the exceptions to the legal prohibition, the Facebook group acts in violation of the prohibition in Article 16 of the Wbp to process the special category of data concerning sex life for advertising purposes. To the extent that the group also processes other special categories of data from the contents of profiles, the group also violates the prohibition on the processing laid down in Article 16 of the Wbp.

Information about the data processing for advertising purposes

A data controller has the obligation to provide users with adequate and understandable information about the categories of personal data that are being processed and the purposes of the processing. The data controller must provide as much information as necessary in order to guarantee fair and careful processing toward the data subjects. There is no obligation for data subjects to investigate how the data controller is processing their personal data. Moreover, data subjects are too a large extent dependent on the use of Facebook's services. Therefore the Facebook group must provide further information about the processing of personal data for advertising purposes, certainly when it concerns special categories of data (such as



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data relating to sexual preferences or health data from the content of the profile), or personal data of a sensitive nature, such as location data and information derived from web surfing behavior, amongst which visits to erotic or medical websites, or the use of health oriented, religious or political apps. Because of the lack of essential information about the categories of personal data that are being processed by the group for advertising purposes, and the lack of further information about the nature (purposes) and scope (impact) of the data processing, the Facebook group violates the provisions of Article 33 and 34 of the Wbp when processing the personal data for advertising purposes. Where Facebook simultaneously violates the principle of fair processing / due care, Facebook also violates Article 6 of the Wbp.

The Dutch DPA concludes that the Facebook group, where it concerns the information about the processing for advertising purposes, acts in breach of the information obligation in the articles 33 and 34 of the Wbp, in combination with Article 6 of the Wbp, in the following 7 ways:

1. The Facebook group does not offer a central overview of the personal data it processes for advertising purposes since the change of the privacy policy. The information is scattered over different sources. Because of this, data subjects do not receive a clear and understandable overview of the data processings with the highest impact on their private life in the first information layer;
2. The Facebook group does not provide data subjects with an overview of the categories of personal data it processes for advertising purposes in the first information layer;
3. The Facebook group does not inform data subjects that it processes special categories of data from the contents of profiles for advertising purposes (anyhow the data concerning sexual life);
4. The Facebook group informs advertisers that it processes location data of 'friends' of data subjects for advertising purposes, but omits to specifically inform data subjects about this, in the first information layer;
5. The Facebook group omits to adequately inform data subjects (in the first information layer) that, based on the new privacy policy, it can track web surfing behavior and app usage outside of Facebook and use these data for advertising purposes. The Facebook group is able to do this as soon as a Facebook user visits a website or uses an app that contains a Facebook 'like' button, or other interaction with Facebook, even if the user does not click on that button, and even if the user has been logged-out of the service.
6. The Facebook group provides incorrect information in its general terms and conditions and in the cookie-banner about the meaning of consent for the use of personal data for advertising purposes;
7. The Facebook group informs data subjects incorrectly and in an incomplete way about the user control possibilities for targeted advertisements and consequences of exercising the different opt-out options.