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Case officer: Our date: Our reference: Your date: Your reference:
TN 20.05.10

Complaint on the collecting, processing and storing of personal data on the Facebook platform

The Norwegian Consumer Council is hereby formally reporting Facebook and the third-party application provider Zynga to the Data Protection Agency for possible breaches of the Personal Data Act.

Facebook, Inc
156 University Avenue
Palo Alto, California - 94301
USA

Zynga Game Network Inc.
4104 24th Street, #363
San Francisco, CA 94114-3615
USA

The Norwegian Consumer Council is of the opinion that the collecting, processing and use of personal data by Facebook and third parties are in breach of the Personal Data Act. Following a brief introduction and presentation of the Norwegian Consumer Council and of the outline of our work on data protection we will give a brief account of the facts concerning the two service providers Facebook and Zynga. We will then provide a short and non-exhaustive summary of the provisions in the Personal Data Act that we deem to be relevant to this complaint.

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The Norwegian Consumer Council's work with social media

The Norwegian Consumer Council is an independent interest organisation working for increased consumer influence in society, fostering consumer-friendly development and promoting measures to improve consumers' standing. The Norwegian Consumer Council has a board of directors and its own statutes and is financed through the budget of the Ministry of Children, Equality and Social Inclusion.

For several years the Norwegian Consumer Council has been working to promote consumer rights in relation to social media. We have found that consumers are, to a significant extent, reliant on a parallel online contractual reality where basic principles are circumvented, overruled and skewed.

Over the last year the Norwegian Consumer Council has particularly looked at the consumer's role when using social media services. Using social media services represents a new way to communicate and that we socialise in a manner that was previously not possible. At the same time this form of communication leaves us vulnerable in terms of data and consumer protection.

Social media are in principle free, but consumers still pay by sharing their personal data and devoting attention to commercial messages. The financing of such services is largely based on the onward distribution of personal data to commercial entities or on making provisions to distribute third-party services such as programmes and games (hereafter referred to as applications).

As part of our work on social media the Norwegian Consumer Council has examined the terms and conditions of a number of social networking sites, and together with SINTEF we have mapped Norwegian consumers' usage patterns and skills when using social media services. (Please find attached *Privat 2.0: Person- og forbrukervern i den nye medievirkeligheten*).

Facebook is often used as a starting point in this process because it is by far the largest social networking site in Norway and the rest of the world, thus highlighting most of the problems relating to the consumer's position in the world of social media.

In the last year a number of consumer organisations in Europe, the US and Canada have raised questions about Facebook's collecting and use of personal data – see EPIC's complaint to the Federal Trade Commission in the US¹, the complaint from the Privacy Commissioner of Canada² and EU Commissioner Viviane Reding's comments about Facebook³.

The SINTEF survey shows that most internet users are concerned about the implications of sharing personal information online. The study also found that most internet users have limited knowledge of how social media work. **At the same time users relinquish a number of rights in relation to personal data and content when they accept the terms and conditions. In one fell swoop they also grant permission for this information to be sold on.** The survey also uncovered that most people do not know the difference between a social networking site and a third-party application.

The fundamental aspects of the Norwegian Consumer Council's work with social media are:

The user shall own the information that she shares. The user shall also be told which personal data is being stored and how this information is being used.

¹ http://epic.org/privacy/facebook/EPIC_FTC_FB_Complaint.pdf

² http://www.priv.gc.ca/media/nr-c/2010/nr-c_100127_e.cfm

³ <http://www.euractiv.com/en/infosociety/eu-slam-new-facebook-privacy-settings>

The default settings must limit who can see and use information about you. This is often described as an “opt-in” and means that you must actively agree to share information.

Third-party applications should only be given access to the information they need in order to function. Facebook should not be able to renounce responsibility for the way in which third parties collect, store or use personal data. As a facilitator and operator Facebook must take direct responsibility for the applications available on the platform.

What is Facebook?

Facebook is a social networking site launched in February 2004 and was initially aimed at students and staff at several US universities. Facebook has gradually opened up to new members, and from September 2006 anyone over the age of 13 with a valid email address was able to register⁴.

Facebook has more than 400 million active members (by spring 2010), i.e. members who have returned in the last 30 days⁵. 70 per cent of its members live outside the US⁶. Facebook’s head office is in California, but the company has several branches both in the US and Europe⁷. In September 2009 it was estimated that Facebook had 2.18 million active users in Norway, which means that more than 45 per cent of the population uses Facebook⁸.

Facebook requires registration in order to join, and by registering users accept the terms and conditions set by Facebook (attached). After registration members create a profile, which includes personal information, pictures and interests. Members can then create links to other members, with whom they can exchange private and public messages. Facebook also allows members to join various groups, sign up for events, indicate their areas of interest by stating that they “like” certain activities, or they can use one of Facebook’s third-party applications.

⁴ <http://www.facebook.com/press/info.php?statistics#!/press/info.php?timeline>

⁵ <http://www.facebook.com/press/info.php?factsheet>

⁶ <http://www.facebook.com/press/info.php?statistics>

⁷ <http://www.facebook.com/press/info.php?factsheet>

⁸ <http://www.insidefacebook.com/2009/09/25/facebook-used-by-the-most-people-within-iceland-norway-canada-other-cold-places/>

Privacy settings and complexity

Since its beginning Facebook has made several changes both to its terms and conditions and to functionality and privacy settings. Facebook's regulation of data protection following the changes dated 22 April 2010 (attached) has been applied.

Facebook has changed its terms, conditions and functionality on several occasions, and following a change in December 2009 members were urged to accept the new privacy settings, see Figure 1.



Figure 1 "Facebook's new, simplified privacy settings give you more control over the information you share". Recommended settings when logging in after the changes were made.

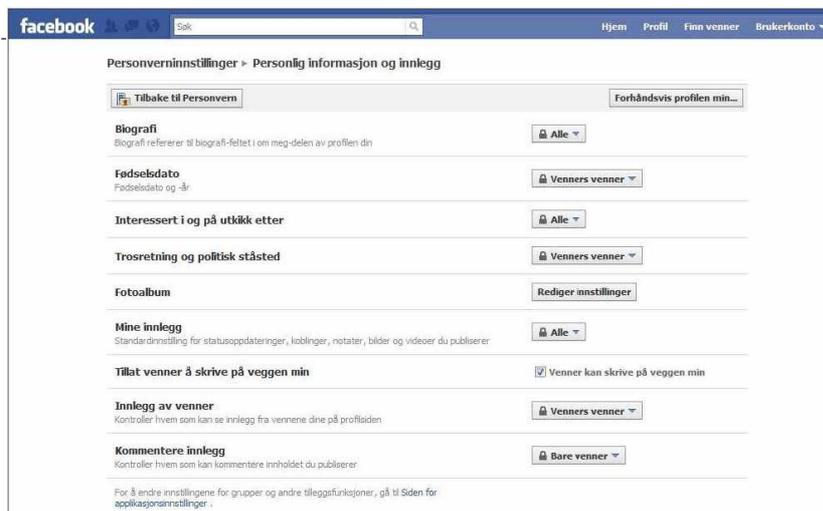


Figure 2 Some of the recommended settings for those who registered after the changes were made.

Facebook's recommendations include making the following available to everyone, including to people who do not use Facebook:

- 1) "Posts by me" (what you write on your own profile page),
- 2) Bio
- 3) "Interested in and Looking for" (sexual orientation)

The following was also made available to friends of friends:

- 4) Birthday
- 5) Religious views
- 6) Political views

Facebook also removed the possibility to block all third-party applications with a single click. This was a privacy-friendly functionality that prevented applications from accessing a user's profile information when that person's Facebook friends used these applications. See also the graphic illustration of the changes that have been made to Facebook's default settings at mattmckeon.com (attached).

The current solution means that members now have to block each of the more than 550,000 applications one by one to prevent them from accessing their profile information. This can be done via each application's individual Facebook page. Profile information can be shared by one of the user's Facebook friends' using a third-party application or visiting a website associated with Facebook.

Third-party applications, users and Facebook

Third-party applications are applications developed by someone other than Facebook or the user himself – something that is possible on “open” platforms such as Facebook. Examples of such applications are games, quizzes, sharing of information from external websites or other activities that are published and operated by a third party. Information about the user is disclosed when using third-party applications, often along with information about the user's friends, see Figure 3⁹.



Figure 3 When given access, the applications can extract profile information from the user and the user's friends

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<http://www.facebook.com/settings/?tab=privacy§ion=contact#!/settings/?tab=privacy§ion=applications&field=learn>

Third-party applications pose a challenge in themselves with regard to data protection in social media. Facebook describes the applications and their popularity as follows:

“Every month, more than 70% of Facebook users engage with Platform applications. More than 550,000 active applications currently on Facebook Platform. More than 250,000 websites have integrated with Facebook Platform. More than 100 million Facebook users engage with Facebook on external websites every month.”¹⁰

The SINTEF survey shows that many people believe the applications to be a part of Facebook, and they are therefore not even aware that they are interacting with a third party. Facebook also denies responsibility for any personal data collected by third parties and for how third-parties use this information. Facebook’s terms and conditions do not apply to these applications.

Facebook also allows some of these applications to automatically access a user’s profile information without the user’s consent. So far this permission has been extended to Microsoft Docs, Pandora and Yelp. Mark Zuckerberg describes this in the Facebook blog as follows:

“For example, now if you’re logged into Facebook and go to Pandora for the first time, it can immediately start playing songs from bands you’ve liked across the web. And as you’re playing music, it can show you friends who also like the same songs as you, and then you can click to see other music they like.”¹¹

The third-party application developer Zynga

Zynga is a “casual gaming” company based in San Francisco, USA. The company develops browser-based games that can be either freestanding games or applications on social networking sites such as Facebook.

Zynga currently operates 37 different games and applications on various platforms. Every day more than 60 million people play one of the five largest Zynga games¹². As at 10 May 2010 Zynga operates six out of the nine most popular applications on Facebook, including Café World, Farmville and Mafia Wars¹³.

The company’s terms and conditions are the same for all applications¹⁴. With regard to the use of applications via Facebook, not only do the terms and conditions regulate the relationship between Zynga and the gamer, they also imply direct disclosure of information about the gamer’s Facebook friends.

The Norwegian Consumer Council wishes to highlight two issues that are particularly problematic:

The collecting and collating of personal data that may be in breach of the Personal Data Act.

Unreasonable and unbalanced terms and conditions and Zynga’s one-sided changing of these.

¹⁰ <http://www.facebook.com/press/info.php?statistics>

¹¹ <http://blog.facebook.com/blog.php?post=383404517130>

¹² <http://edition.cnn.com/2010/TECH/02/23/facebook.games/index.html?hpt=C1>

¹³ <http://www.facebook.com/apps/directory.php>

¹⁴ <http://www.zynga.com/about/terms-of-service.php>

Harvesting of personal data

Zynga's services are based on its Terms of Service and a Privacy Policy that users must accept in order to use the services (attached). By accepting the agreements the user gives Zynga the right to collect, store and share personal data with Zynga's partners. There is no clear description of what the information will be used for, how long it will be stored for or how the information is protected against unwanted access. The Norwegian Consumer Council interprets the terms and conditions to mean that Zynga claims the right to store this data for all eternity, even if the user deletes his account.

In the first part of the privacy agreement Zynga states that it collects the information provided when you register ("name, address, gender"). Later Zynga states that along with the information provided by the user it also collects information from other sources. However, it does not specify which types of information this is, which specific sources it collects the information from or how it is stored. Zynga does state that it collects information about the user from the profiles of other Zynga users.

Zynga also stores the contact information of persons you invite to use a Zynga service. It is not specified what the company uses this information for, how long it is stored for or whether it is shared with others. It is not specified whether Zynga's general collecting and collating of information applies to everyone who is "invited" or just to persons accepting such an invitation.

The company also states that it does not share "Personally Identifiable Information" with third parties. No clear definition is given of what Zynga means by this term.

The Norwegian Consumer Council's concerns are particularly related to the complex and sometimes contradictory information provided about which data is being collected, how it is collated and used and the fact that it can be shared by Zynga. It does not help matters that Zynga also claims the right to keep the stored data indefinitely, even after a user account has been closed.

The avatar with a profile picture is one example of how Café World extracts profile information about a user's Facebook friend, "Ragnhild", and her profile picture. "Ragnhild" had not granted access to Café World and continued to appear in the game even after she had blocked the application, see Figure 4.



Figure 4 Print screen from "Café World" (7 May 2010).

Legal considerations

The Norwegian Consumer Council is lodging a complaint with the Norwegian Data Protection Agency about the collecting and processing of personal data by Facebook and Zynga and asks the Data Protection Agency to verify that statutes and regulations concerning the processing of personal data are complied with and that errors and deficiencies are rectified, cf. the Personal Data Act section 42, 3rd paragraph, number 3.

Below we will give a brief review of the procedural and material conditions for collecting and processing personal data under the Personal Data Act. A separate and ever more important aspect of the evaluation of the services being offered and used, of which Facebook and Zynga are two examples, is that a growing amount of user data is being collected and used as part of marketing activities. The Norwegian Consumer Council is therefore asking that the Data Protection Agency evaluate whether the information provided by Facebook and Zynga respectively complies with the provisions of the Personal Data Act section 21.

The Norwegian Consumer Council's complaint is based on the factual presentation by the two service providers as described above. As described, the respondents' terms and conditions for the collecting and processing of personal data are continually changing, and the Norwegian Consumer Council's factual description thus represents a current snapshot of the terms, conditions and service content. The Norwegian Consumer Council is therefore urging the Data Protection Agency to also consider other aspects of the services that are relevant to personal data. The Norwegian Consumer Council is happy to assist with more detailed or supplementary information about the services and factual assessments of the services.

Personal data, the Personal Data Act section 2

Referring to the description of the two providers given above, the Norwegian Consumer Council considers both Facebook and Zynga to be processing personal data and refers to the attached privacy terms offered by the providers to users.

Sensitive personal data, the Personal Data Act section 2, no. 8

Facebook encourages its users to also register information such as race, political affiliation and other data that the Personal Data Act deems to be sensitive information. Such information about the user is therefore also stored and used as described in the terms. It is the Norwegian Consumer Council's view that Facebook can therefore be considered to be a controller of sensitive personal data. The Norwegian Consumer Council has not found Zynga to be registering such information but is uncertain whether Zynga collects and uses such information from Facebook users' profiles.

The Norwegian Consumer Council urges the Data Protection Agency to examine whether Facebook processes sensitive personal data and, if so, whether it can be deemed to be legally entitled to collect, store and use such information. The Norwegian Consumer Council would also like to ask the Data Protection Agency to examine whether Facebook's processing of data requires a licence under the Personal Data Act section 33.

Substantive scope of the Act, the Personal Data Act section 3, letter a

In the Norwegian Consumer Council's view both Facebook and Zynga must be considered to be controllers of personal data by automatic means.

Territorial extent of the Act, the Personal Data Act section 4

Both Facebook and Zynga's applications are offered to Norwegian consumers.

Facebook is designed and presented in both Norwegian language forms, while the terms of use and other conditions relating to the service are written in Norwegian. Facebook has more than 2 million unique users in Norway. Facebook also appears to have agreements with Norwegian advertisers and application providers.

Zynga is published in English, and both its terms of use and personal privacy information are in English. At the same time Zynga provides applications through Facebook, and the Norwegian Consumer Council believes that it would be appropriate to treat the two providers equally. As we will set out below, it is the Norwegian Consumer Council's view that Facebook should also be responsible for applications and services offered through its service.

If the Data Protection Agency were to conclude that Facebook and Zynga should not be considered to be established in Norway under the first paragraph of this provision, both services should be deemed to be covered by the Personal Data Act because they both use cookies that are probably stored on machines in Norway and must therefore be considered to be making use of equipment in Norway, cf. the second paragraph of the provision. According to preliminary legislative documentation relating to the law the term "equipment" includes "computers and computer terminals, telecoms networks and interview forms" [*datamaskiner og -terminaler, telenett og intervju skjemaer*] (Ot. Prp. No. 92 (1998–99), p. 106). As long as Facebook uses such equipment in its interaction with Facebook users who use computer equipment located in Norway, one could argue that Facebook makes use of such equipment. This argument is also valid if Facebook stores cookies on the hard disks of these users (cf. also Art. 29 WP 2002, p. 11¹⁵).

Conditions for the processing of personal data

The Personal Data Act section 8 sets out certain conditions for the processing of personal data.

Consent

The Norwegian Consumer Council refers to the account given above of how to enter into an agreement with Facebook and Zynga respectively. In light of this the Norwegian Consumer Council cannot see that the terms can be deemed to comply with the Personal Data Act's stipulation of giving consent as "any freely given, specific and informed declaration by the data subject to the effect that he or she agrees to the processing of personal data relating to him or her". It is true that the users have access to information on the collecting and use of personal data for both services, but in the view of the Norwegian Consumer Council the contract mechanisms used (click-wrap, actual use, references etc.) do not comply with the terms stipulated by this provision. The complexity of the agreements is also so extensive that there is little opportunity for ordinary users to obtain an adequate overview of the agreements they enter into.

¹⁵ http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2002/wp56_en.pdf

To highlight the complex contract regime operated by Facebook, please refer to the overview written and published in the *New York Times* on 12 May 2010 (attached) and to the Norwegian Consumer Council's own matrix, showing the terms and conditions of a number of social media, published in November 2009 (attached).

Statutory access to processing of personal data

The Norwegian Consumer Council is not aware of the existence of any right by positive law for social media, including Facebook and Zynga, to process personal data.

Necessity principle

For the providers to be able to process personal data, (at least) one of the requirements in section 8, letters a–f, of the Personal Data Act must be met. The requirement that is used will also be of great significance in relation to which information is processed and for which purpose.

It is the Norwegian Consumer Council's view that none of the requirements b, c, d or e is applicable. Requirements a and f may possibly be applicable, but they should also set out strict limitations as to which data can be processed and which purposes it can be used for.

The Norwegian Consumer Council is therefore asking the Data Protection Agency to assess whether Facebook and Zynga meet the requirements set out by the Personal Data Act for the processing of personal data.

Processing of personal data

If the Data Protection Agency were to conclude that Facebook and/or Zynga are permitted to process personal information, it is the Norwegian Consumer Council's opinion that both services provide insufficient and therefore unlawful information about which type of personal data is being collected, what it is used for and by whom. As described below, the collecting and use of personal data appear to go far beyond what is specifically and directly stated by Zynga and Facebook and beyond what could be deemed necessary for the service to work as described and offered.

The Norwegian Consumer Council should like to give two examples of what it deems to be relevant regulations that the two respondents are alleged to be breaching. The Norwegian Consumer Council reserves the right to widen the scope of the complaint at a later date.

The Personal Data Act section 11

The Norwegian Consumer Council is querying whether the data is processed in accordance with the Personal Data Act sections 8 and 9, cf. letter a) of the provision.

The Norwegian Consumer Council is querying whether the data is used in a way and to an extent that can be reasonably justified on the basis of the controller's business, cf. letter b) of the provision.

The providers reserve the right to amend terms and conditions as they see fit – the exercising of which has been documented, at least on the part of Facebook. The Norwegian Consumer Council is therefore querying whether the personal data is used at a later date for purposes that

may be incompatible with the initial aim of the collecting, without the registered party having given its consent, cf. letter c) of the provision.

The Norwegian Consumer Council is querying whether the personal data being processed is relevant to the purpose of the processing, cf. letter d) of the provision.

The Norwegian Consumer Council is also querying whether the personal data being processed is stored for longer than is necessary given the purpose of the processing, cf. letter e) of the provision.

Breach of the Personal Data Act section 19

According to this provision, the data subject, i.e. the user of the services, enjoys clearly defined rights with regard to obtaining information about the data processing. This obligation to provide information rests with the controller.

In light of the above the Norwegian Consumer Council should like to query whether either of the providers meet their information disclosure duties in relation to users.

Directive 95/46/EC and regulation of the so-called “Safe Harbour” principle

The Norwegian Consumer Council actively participates in a number of European and international fora and organisations, including the Trans Atlantic Consumer Dialog (TACD). TACD is a forum for US and European consumer organisations that develops joint consumer policy recommendations (resolutions) for US and European governments to promote consumer interest.

TACD presented a resolution on social media at a meeting with US and European authorities in Washington in April 2010¹⁶. The discussion between the consumer organisations and the authorities was based on Facebook’s being a US entity with a global target market. The consumer side raised questions about whether the so-called “safe harbour” rules, which are addressed in chapter 5 of the Personal Data Act, can be said to insufficient and partly outdated in relation to the type of personal data processing that social media represent. However, they remain fully applicable until a revision takes place. As at 20 May 2010 Facebook is included in export.gov’s “safe harbour” list (attached). Zynga is not on this list.

On that basis the Norwegian Consumer Council is asking the Data Protection Agency to examine whether Facebook’s processing of personal data complies with the provisions in this chapter of the Personal Data Act.

If further clarification or information is required, please do not hesitate to contact us.

Kind regards

Randi Flesland
Director

Thomas Nortvedt
Deputy Director

On behalf of the Norwegian Consumer Council

¹⁶ http://www.tacd.org/index2.php?option=com_docman&task=doc_view&gid=265&Itemid=40

Appendices:

Report: "*Privat 2.0: Person- og forbrukervern i den nye medievirkeligheten*", SINTEF 2009

Facebook's Statement of Rights and Responsibilities and Privacy Policy, both dated 22 April 2010

Graphic illustration of changes to Facebook's default settings, downloaded 20 May 2010
<http://mattmckeeon.com/facebook-privacy/>

Zynga's Terms of Service and Privacy Policy, downloaded 20 May 2010

Article: "Price of Facebook Privacy? Start Clicking", [nytimes.com](http://www.nytimes.com), 12.05.10
<http://www.nytimes.com/2010/05/13/technology/personaltech/13basics.html>)

The Norwegian Consumer Council's matrix of the privacy policies of various social networking sites, 10.11.09 http://forbrukerportalen.no/filearchive/matrix_vilkaar.jpg

Printout of Facebook's registration process from export.gov, 20 May 2010