

Litigation Chamber

Appeal Decision 143/2021 of December 22, 2021

File number: DOS-2021-07613

Subject: Appeal against an interim measure - Hospital network c. Inspection Service

The Litigation Chamber of the Data Protection Authority, made up of Mr. Hielke Hijmans,

chairman, and Messrs. Dirk Van Der Kelen and Jelle Stassijns, members;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 relating to the protection

of natural persons with regard to the processing of personal data and to the free movement

of this data, and repealing Directive 95/46/EC (General Data Protection Regulation),

hereinafter "GDPR";

Having regard to the Law of 3 December 2017 establishing the Data Protection Authority, hereinafter "LCA";

Considering the documents in the file;

made the following decision regarding:

The requesting party:

the X hospital network, represented by Me Inger Verhelst

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The defendant :

the Inspection Service of the Data Protection Authority, rue de la

Press 35, 1000 Brussels

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I. Facts and procedure

1. On December 8, 2021, the Data Protection Authority (hereinafter the DPA) receives a request for appeal against the provisional measure imposed by the Inspection Service by the decision of the November 10, 2021 with respect to Hospital Network X. The interim measure was imposed in application of Article 70 of the LCA¹ and aims to "order the temporary suspension of the verification and the processing of the Covid-19 vaccination status of candidates with the requesting party". The request seeks that the appeal lodged against the interim measure be declared admissible and founded and that the aforementioned decision of the Respondent to impose the interim measure is completely cancelled.

2. On November 15, 2021, the requesting party objects in writing to the interim measure in accordance with article 70, paragraph 2 of the LCA which provides that the party concerned may make known its grievances, either verbally or in writing, within five days of the execution of the measure.

On November 16, 2021, the respondent confirms receipt of the written grievances.

3. On December 10, 2021, the Litigation Chamber finds that the appeal was lodged by motion substantiated and signed, filed within thirty days of notification of the decision of the defendant, so that the requirements as defined in Article 71 of the

ACL². The Litigation Chamber was thus seized under article 92, 2° of the LCA³.

4. Also on December 10, 2021, the Litigation Chamber granted the defendant a deadline for the submission of conclusions. The deadline for receipt of submissions in response of the Respondent is set for December 16, 2021. Pursuant to Article 93 of the LCA⁴, the Chamber Litigation further provides that the parties will be heard in order to allow it to assess whether the respondent may or may not lawfully impose the provisional measure as defined in the

¹ Article 70 of the LCA. The Inspector General and the inspectors may order the suspension, limitation or temporary freezing of processing of data which is the subject of an investigation if a situation likely to cause serious harm is to be avoided, immediate and difficult to repair.

The parties concerned may be heard by the Inspector General or an inspector before a provisional measure is

executed. If the parties concerned are not heard beforehand, they can make their grievances known, either verbally, or in writing, within five days of the execution of the measure.

The decision of the inspection service is substantiated and sets the duration of the provisional measure, which may be three months or a new duration of a maximum of three months.

2 Article 71 of the LCA. An appeal to the litigation chamber is open to the parties concerned against the measures referred to in

Article 70. The appeal does not suspend the measure.

The appeal is brought by reasoned and signed request, filed with the secretariat of the litigation chamber under penalty of forfeiture, within 30 days of notification of the decision by registered mail with acknowledgment of receipt.

3 Article 92 of the LCA. The litigation chamber can be seized by:

1° [...]

2° a party concerned who lodges an appeal against the measures of the inspection service, in accordance with Articles 71 and

3° [...]

4 Article 93 of the LCA. The procedure before the litigation chamber is in principle written. However, the litigation chamber may hear the parties concerned.

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decision of November 10, 2021. The parties are informed that the hearing will take place on

December 22, 2021.

5. On December 16, 2021, the Litigation Chamber receives the submissions in response from the defendant,

who resume

the argument developed in

the temporary suspension order.

The defendant also communicates that he waives the possibility of participating in the hearing.

6. On December 22, 2021, the applicant was heard by the Litigation Chamber and thus

the opportunity to put forward their arguments. The requesting party sets out the elements of its request and

refers, as a new element, to the doctrine, more specifically to an article entitled "COVID-19 in

verwerking van gezondheidsgegevens op de werkvloer"⁵ (Editor's note: Covid-19 and data processing

health in the workplace - only available in Dutch), to support its

argument that there is no question of any treatment.

II. Motivation

A. Scope of the decision

7. Before examining the grounds set out in the request, the Litigation Division specifies that it has

been seized under article 71 of the LCA, in order to examine the appeal lodged against a measure

defendant's interim. The scope of this decision must be limited to the subject of the referral.

This means that the Litigation Chamber must determine whether or not the defendant could impose

lawfully the provisional measure as defined in the decision of November 10, 2021.

In this decision, the Litigation Chamber renders a decision on the legality of the measure

provisional without, however, pronouncing on the merits of the case.

8. The Litigation Chamber also draws attention to the fact that this decision is not intended

to decide on the usefulness of vaccination, or of compulsory vaccination. Bedroom

Litigation obviously recognizes the importance of the instruments used to combat

COVID-19 pandemic, of which vaccination is an extremely important factor.

This decision does not therefore call into question the obligation to vaccinate. Bedroom

Litigation decides solely on the legal basis making it possible to subject the citizen to

a determined measure in connection with vaccination in the current legal context.

5 Simon Taes, Arbeidsrecht Journaal 2021: "Er kan daarentegen geen sprake zijn van een geautomatiseerde gegevensverwerk

een louder mondelinge vraag van een werkgever aan werknemers zonder dat deze informatie opgenomen wordt in een bestand

on the other hand, there can be no question of automated data processing in the event of a simple oral question from an employ

workers without the information being included in a file" - Free translation by the General Secretariat of

the Data Protection Authority, in the absence of an official translation]

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B. Material scope of the GDPR

9. The Requesting Party argues that a distinction should be made between two elements

mentioned in the defendant's order, namely the verification of the Covid-19 vaccination status of candidates on the one hand and the processing of this data on the other hand. The requesting party declares that it only orally asks candidates for their vaccination status and that it does not process or have processed any data relating to the vaccination against Covid-19 of candidates. The requesting party therefore states that in the absence of data processing within the meaning of Article 2.1 of the GDPR, the GDPR does not apply and that the respondent therefore did not have jurisdiction to impose the measure provisional.

10. The Litigation Chamber firstly refers to Article 4. 2) of the GDPR⁶ which defines the notion of treatment as any operation or set of operations whether or not performed using automated processes applied to data or sets of personal data personnel, including data mining. This means that it is established that asking for information concerning personal data, in this case the vaccination status of candidates, constitutes processing within the meaning of Article 4.2) of the GDPR.

11. The Litigation Division examines below whether the processing which consists of requesting the status candidate vaccine falls within the scope of the GDPR as defined in Article 2.1 of the GDPR, which requires that it be automated processing in whole or in part or processing of personal data contained or required to be included in a file.

12. Based on the publication on the Internet page of the requesting party, where it is stated to candidates who apply that if they are not vaccinated, they have the possibility of being vaccinated during recruitment, specifying that in the event of refusal, the candidate would not be hired, the Litigation Chamber must note that the requesting party has information as to the vaccination status of each candidate. Indeed, the requirement of vaccination as a condition prior to recruitment implies ipso facto that the requesting party knows the vaccination status of each candidate. A non-vaccinated candidate will only be recruited after vaccination. The candidates will therefore by definition be separated into two groups: the vaccinated and the non-vaccinated. Only the vaccinated candidates can actually be recruited. In order to achieve the purpose that the party

applicant is looking for, namely to recruit only vaccinated candidates, it will therefore

necessarily have to process the "vaccination status" data linked to a person

determined and identified, namely the candidate concerned.

6 Article 4. 2) of the GDPR - "processing": any operation or set of operations whether or not carried out using processes

automated and applied to personal data or sets of data, such as the collection, recording,

organization, structuring, storage, adaptation or modification, extraction, consultation, use,

communication by transmission, dissemination or any other form of making available, the bringing together or interconnection, the

limitation, erasure or destruction;

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13. Despite the Claimant's assertion that the candidate is only interviewed

verbally and that in a second step, a proof of vaccination is only read without

no conservation, note, annotation or recording, the Litigation Chamber considers that the

requesting party does not plausibly justify how it would then achieve its own

purpose, namely to recruit only vaccinated candidates. The requesting party denies all

simply that the vaccination status is treated, but it does not demonstrate how the finality

it aims can be achieved without the processing of this information within the meaning of the GDPR.

As indicated on the relevant web page, non-vaccinated persons can only be recruited after

got vaccinated. This means that the requesting party should at least register a

any way - and therefore process within the meaning of Article 2.1 of the GDPR - which applicant does not meet

the prerequisite for recruitment, namely "to be vaccinated". If such processing prior to

recruitment did not take place, the verification of the vaccination status during the application phase would be

actually completely meaningless. It would then suffice, when we propose

effectively to the person concerned to proceed with the recruitment, to check their vaccination status

by asking, if the vaccination is confirmed, to provide proof of vaccination, or in the absence

of vaccination, to ask the person concerned to be vaccinated. Since the part

applicant declares that the candidate's vaccination status is checked during the application phase and that he

It appears from the evidence in the file, as was also confirmed during the hearing, that no other motivation is given only the fact that the information communicated following this verification is decisive for the possible recruitment, the arguments of the requesting party are not sufficient not have to convince the Litigation Chamber of the absence of any data processing within the meaning of GDPR article 2.1. The requesting party cannot demonstrate that the intended purpose of 'recruitment vaccines' can be performed without data processing. The prior information obtained during the application phase are intended to allow the requesting party to adapt its recruitment accordingly, which involves treatment. The fact that the vaccination status is checked from the job interview stage proves that this is not just a snapshot where the simple acknowledgment by the requesting party of the response to this verification does not would not constitute treatment. On the contrary, it is a request for information having an impact on the subsequent course of the procedure leading or not to recruitment. In view of the achievement of the intended purpose - to recruit only vaccinated candidates - the response to the verification of the vaccination status which is carried out during the application necessarily involves a processing of personal data. It is hardly conceivable that no treatment intervene, especially given the size of the hospital network which employs thousands of staff.

14. In addition, the Litigation Chamber points out that on the Internet page in question, the part applicant indicated "anticipate the law" by already providing for compulsory vaccination for new employees. The requesting party's intention to do so, which it describes itself as being the desire to optimally protect its employees and its patients, which it is committed to as a hospital network, is commendable.

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15. However, the Litigation Chamber must adopt a point of view based on the elements legal documents. In this respect, one cannot ignore the fact that the compulsory vaccination law of the nursing staff envisaged by the federal government has not yet been voted on in parliament nor published in the Belgian Official Gazette and has therefore not yet entered into force. Develop legislation and,

where appropriate, imposing obligations on citizens is the prerogative of the legislator. In the case □

At present, this competence rests with the federal legislator who not only determines the content □

of the law, but also the date on which the law relating to the compulsory vaccination of personnel □

carer - which has yet to be adopted - will come into force. It does not belong to every network □

hospital or each separate hospital to impose certain rules itself in the absence of the basis □

necessary and still non-existent for this purpose, likely to offer the related guarantees □

for the protection of data subjects. By imposing rules unilaterally, the □

applicant substitutes itself, so to speak, for the legislator. The Litigation Chamber cannot □

accept it. □

C. Vaccination status as health data □

16. The applicant disputes that the vaccination status constitutes health data within the meaning of □

Article 4. 15) of the GDPR⁷, as indicated by the defendant in the interim measure. According to the part □

applicant, the vaccination status does not include any information on the physical or mental health □

of somebody. □

17. The Litigation Chamber draws attention to the fact that the requesting party is unaware of the □

recital 35 of the GDPR which explains the scope of article 4. 15) of the GDPR and from which it follows □

clearly that personal health data includes all □

data relating to the state of health of a data subject which reveal □

information about the past, present or future physical or mental health of the person □

concerned.⁸ The concept of health data must be widely interpreted. It encompasses □

not only the current state of health of the person concerned, but also the possible development of □

his health in the future. It is certain that - as the applicant itself points out - the □

risk of contamination with Covid-19 is particularly high. People who are not □

⁷ Article 4. 15) of the GDPR - "data concerning health": personal data relating to physical or mental health □

of a natural person, including the provision of health care services, which reveal information about the state of health of □

that person ; □

8 Recital 35 GDPR. Personal health data should include all data

relating to the state of health of a data subject which reveal information about the past physical or mental state of health,

present or future of the data subject. This includes information about the natural person collected during registration

of that natural person for the purpose of receiving health care services or when providing such services within the meaning of

Directive 2011/24/EU of the European Parliament and of the Council (1) for the benefit of this natural person; a number, symbol

specific item assigned to a natural person to uniquely identify them for health purposes; informations

obtained during testing or examination of a body part or bodily substance, including from genetic data

and biological samples; and any information relating to, for example, illness, disability, risk of illness,

medical history, clinical treatment or the physiological or biomedical condition of the data subject, regardless of

its source, whether it comes from, for example, a doctor or other healthcare professional, a hospital, a medical device or

of an in vitro diagnostic test.

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vaccinated run a significant risk of being contaminated in the future, with the consequence

a possible serious course of the disease. This also explains that the vaccination status of the person

concerned is included in his medical file.

18. The Litigation Division finds that the applicant reduces the notion of health data to

whether or not you are sick by stating that a vaccinated person can be sick and that a

unvaccinated person may be healthy. As explained above, this interpretation

of the notion of health data does not correspond to that of Article 4. 15) and recital 35 y

relating to the GDPR. It is clear to the Litigation Chamber that a person's vaccination status,

in this case the candidate, undeniably constitutes health data.

19. This implies that the legal basis under which the treatment of vaccination status takes place

must be considered in the light of Article 9.2 of the GDPR.

20. The requesting party invokes in this case Article 9.2 b) of the GDPR and its obligation as

as an employer within the framework of the law of 4 August 1986 relating to the well-being of workers under

which it is responsible for protecting the health of its workers and from which would derive

the obligation to develop measures, based on a dynamic risk management system,□

in order to prevent/limit the risk of Covid-19 infection or damage due to such infection.□

21. It is obvious that the law relating to the welfare of workers, on which the applicant relies in order to□

to attempt to found post factum the treatment of the vaccination status on a legal basis, is insufficient□

to allow the employer to compel staff to be vaccinated. This is additionally□

confirmed by the federal government because the decision in principle to impose vaccination on the□

nursing staff was taken on August 20, 2021 and will be applied from□

January 1, 2022, with the consequence, from April 2022, of dismissal in the event of refusal.□

The requesting party indicated not only on the Internet page "anticipate the law", but in the□

request also, it is mentioned that the requesting party wishes to protect its personnel and□

its patients against future sources of infection "while waiting for the legal anchoring of this obligation□

vaccine".□

22. The Litigation Chamber therefore concludes that Article 9.2 b) of the GDPR cannot be upheld□

as a legal basis for processing the vaccination status of applicants.□

D. Criterion of 'serious, immediate and difficult to repair damage'□

23. The applicant submits that the refusal to recruit candidates who persist in refusing the□

vaccination does not lead to serious, immediate and difficult to repair harm for the□

candidates concerned, as they will have to leave the short-term care sector and it is□

preferable that they are already looking for a reorientation on the labor market. So the part□

Applicant declares that the Respondent did not comply with the condition set out in Article 70, first□

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paragraph of the ACL in order to be able to impose an interim measure, namely the necessity of such□

measure to avoid serious, immediate and difficult to repair damage.□

24. The Litigation Division emphasizes that the factual elements of the file are taken into consideration□

taking into account the legal framework in force at the time of the facts. Here again, the Chamber□

Litigation must note that the requesting party anticipates the law in terms of□

compulsory vaccination of nursing staff to refute the idea that it would be a question of a
any damage within the meaning of Article 70, first paragraph of the LCA. At the time of taxation
of the interim measure by the Respondent, there was no legal basis that could
legitimize the method and the related treatment of the vaccine status of candidates. This means that the
plaintiff could not lawfully distinguish between vaccinated candidates
and unvaccinated. Given that the requesting party nevertheless did so, in defiance of the
legislation in force, it did indeed cause serious, immediate and difficult
reimbursable to non-vaccinated candidates.

25. This prejudice is not solely of a financial nature in the sense that this category of persons
concerned not only loses the difference between the salary obtained from work
actually realized on the one hand and the replacement income on the other hand, but it is also
question of immaterial damage following the refusal of recruitment, given that the persons concerned
are prevented from doing a job, that they cannot therefore make themselves useful in a sector
determined and cannot gain additional work experience there either.

The Respondent has discretionary jurisdiction in this matter to assess whether the measure it
envisages is necessary to avoid serious, immediate and difficult to repair damage and may
take all relevant aspects into account in this regard. In the present case, the defendant decided
that such damage existed and the Litigation Chamber finds no argument in the request
of such a nature as to make it possible to refute that such prejudice existed.

26. The Litigation Division further observes that the interim measure as imposed by the
defendant concerns the treatment of the vaccination status of applicants. Although the requesting party denies
that verification of vaccination status be addressed in the application phase due to the fact that at
that time, only an oral question would be asked without any treatment, the information having
therefore no influence on the recruitment, the requesting party confirms on the other hand that the
information obtained during the application phase does have an effect in the
recruitment. The alleged absence of any serious, immediate and difficult to repair damage

is indeed linked by the applicant itself to the non-recruitment of non-vaccinated persons.□

III. Publication of the decision□

27. Saw□

the importance of□

transparency regarding□

the decision-making process of□

bedroom□

Litigation, this decision is published on the website of the Authority for the protection of□

data. However, it is not necessary for this purpose that the identification data of the party□

applicant are communicated directly.□

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FOR THESE REASONS,□

the Litigation Chamber of the Data Protection Authority decides, after deliberation, pursuant to□

of its jurisdiction under Article 71 of the LCA:□

- to declare the action brought by the applicant party admissible, but unfounded;□

- to confirm the provisional measure carrying the order of temporary suspension of the verification□

and the treatment of the vaccination status against Covid-19 of candidates with the requesting party,□

as imposed by the defendant on November 10, 2021.□

Under article 108, § 1 of the LCA, this decision may be appealed to the Court□

contracts within thirty days of its notification, with the Protection Authority□

data as a defendant.□

(Sr.) Hielke Hijmans□

President of the Litigation Chamber□