

Litigation Chamber

Decision on the merits 36/2020 of July 9, 2020

File number: DOS-2019-02649

Subject: Complaint regarding camera surveillance in and around a building

condominiums and the designation of the controller

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

Hijmans, chairman, and Messrs. Dirk Van Der Kelen and Frank De Smet, members;

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

protection of natural persons with regard to the processing of personal data and the

free movement of such data, and repealing Directive 95/46/EC (General Regulation on the

data protection, hereinafter the "GDPR");

Having regard to the law of 3 December 2017 establishing the Data Protection Authority, hereinafter the

ACL;

Having regard to the internal regulations as approved by the House of Representatives on

December 20, 2018 and published in the Belgian Official Gazette on January 15, 2019;

Considering the documents in the file;

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made the following decision regarding:

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the complainants:□

1) Mrs X□

2) Mrs X□

3) Mr. X□

4) Mr. X□

5) Mr. X□

6) Mrs X□

7) Mr. X□

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the defendant: Y□

1. Facts and procedure□

1. On May 9, 2019, the complainants filed a complaint with the Data Protection Authority□

against the defendant.□

The subject of the complaint concerns the use of surveillance cameras installed in the block□

of apartments "Résidence Z A", composed of 12 apartments, 3 of which belong to the□

defendant and 9 to other co-owners. The subject of the complaint does not concern the use of□

surveillance cameras, but the fact that a single natural person, namely the defendant,□

has access to the images of the cameras and that he uses them against the other co-owners.□

The defendant would also refuse to hand over to the co-owners and the trustee of the building the□

plans relating to the installation of surveillance cameras, as well as the connection code.□

Furthermore, the plaintiffs also contest the fact that they would have approved the installation of the□

surveillance cameras. In addition, the defendant would have installed additional cameras,□

directed in particular towards the interior garden of the block of apartments, the entrance to the underground garage□

and the meter room in building A, also without their consent.□

2. On June 13, 2019, the complaint is declared admissible on the basis of articles 58 and 60 of the LCA, the□

complainants are notified under Article 61 of the LCA and the complaint is forwarded to the□

Litigation Division under Article 62, § 1 of the LCA.□

3. On July 9, 2019, the Litigation Division decides, pursuant to Article 95, § 1, 1° and Article 98□
of the ACL, that the case can be dealt with on the merits.□

4. On July 12, 2019, the parties concerned are informed by registered letter of the provisions□
as set out in article 95, § 2 as well as in article 98 of the LCA. They are also informed□

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under Article 99 of the LCA, deadlines for transmitting their conclusions. The deadline□
for receipt of the respondent's submissions in response was set for August 23, 2019, that for□
the submissions in reply of the complainants on September 23, 2019 and that for the submissions in□
Respondent's reply dated October 23, 2019.□

5. On July 20, 2019, the Complainants, Mr. X and Mr. X, report that the communication will be through their□
intermediary, and at the request of the other complainants, accept any communication relating□
to the case electronically (article 98, 1° of the LCA) and indicate that they want to make use of the possibility□
to be heard (article 98, 2° of the LCA).□

6. On August 23, 2019, the Litigation Chamber receives the submissions in response from the□
defendant, who asserts that he is acting as building owner of a construction project Z of□
14 assisted living units, in a building complex to be built on a plot.□

It refers to the internal regulations which indicate that the buyers have been informed of the fact□
that the building is equipped with a surveillance camera system in the entrance halls,□
stairwells, the cellar and the underground garage. The notarized deeds of sale would specify that this□
internal regulations are signed for agreement by the buyers. This leads the defendant to□
state that the buyers were informed that the building was equipped with a security system□
surveillance cameras in the common areas and that he would not respect his obligations in□
as client if no camera surveillance was provided in the entrance halls,□
the stairwells, the cellar and the underground garage, since this would constitute a□
breach of its contractual obligations.□

7. He adds that camera surveillance is part of the surveillance system for the entire

project that has not yet been fully delivered, requiring camera surveillance to

security of the building and apartments in question, which would be in the interest of

co-owners.

8. On September 20, 2019, the Litigation Chamber received the submissions in reply from the

complainants. In these submissions, the Complainants state that the Respondent is talking about the proposed

construction B comprising 14 assisted living units, which does not concern the building in question

the subject of the complaint. The complaint, on the other hand, relates to building complex A, which does not

only 12 apartments.

The plaintiffs claim that cameras were installed after construction of the

two buildings and that there would never have been consent on the part of the association of

co-owners (hereafter ACP) Z A to install cameras.

According to the complainants, these are the following cameras in and around building A:

2 directed to the common garden and private terraces

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1 in the meter room, installed only in April 2019 (see evidence in the file of

complaint of 08/05/2019)

3 outside on the facade of the building in part A and filming the surrounding streets

3 in basement/garage.

Part A would have been completed during the period 2013/2014 and upon delivery of the apartments,

no camera installation would have been present. It is only during the last finishing of

part B that a device of cameras would have been placed in the building of part A, namely end

2016, and thereafter, other cameras would have been installed and directed in particular towards the garden

common and private terraces in 2017 as well as in the meter room in April 2019,

each time without the approval of the co-owners.

9. On October 23, 2019, the Litigation Chamber receives the submissions in reply from the

respondent. The latter expresses his wish to have recourse to the possibility of being heard (art. 98, 2° of the ACL). Furthermore, the defendant repeats the elements of the submissions in response and adds that the cameras have already been installed since 2016, so before the sale of the apartments in the part A, that they would have been approved by the general meeting of the ACP, and that they were then been extended to part B of the construction project, a phase for which the managing director of the real estate company would still be a trustee.

According to the defendant, the plaintiffs were also informed that the common areas, including the interior garden, the entrance to the garages and the garages – list which is not qualified as a list limited –, are monitored by cameras.

The defendant also mentions that on October 16, 2019, at the request of ACP A, the cameras installed on the exterior facades have been removed. The only cameras still present would be those of the underground car park in order to secure the entrance door and the common access to the part A and part B. In part A, there would only be 2 cameras left in the technical area and at the entrance to the garage door for part A and part B.

10. On April 29, 2020, the parties are informed that the hearing will take place on May 20, 2020.

11. On May 20, 2020, the parties are heard by the Litigation Chamber. Bedroom

Litigation asks the defendant to produce the basic act relating to part A (to which he refers

to prove that the plaintiffs gave their consent to the installation of the cameras

monitoring) as an attachment to the file. The Litigation Chamber gives the defendant

the possibility of delivering to him, as well as to the opposing party, the basic act until Friday

May 29, 2020 at 12:00 noon at the latest.

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The Litigation Division did not, however, receive any documents within the agreed timeframe, i.e. no later than late Friday, May 29, 2020 at 12:00 p.m. The documents transmitted after the expiry of this period and which must therefore be considered late are rejected from the deliberation.

12. On June 2, 2020, the minutes of the hearing are submitted to the parties.

13. On June 4, 2020, the Litigation Chamber received from the complainants a communication ☐

indicating that they have no further comments on the minutes of the hearing. ☐

14. On June 4, 2020, the Litigation Chamber receives from the defendant some remarks on ☐

the verbal procedure. ☐

15. On June 12, 2020, the Litigation Chamber informed the defendant of its intention to proceed ☐

to the imposition of an administrative fine as well as the amount thereof, in order to give the ☐

defendant the opportunity to defend himself before the penalty is actually imposed. ☐

16. The Litigation Chamber did not receive a reaction from the defendant within the three-week period. ☐

following receipt of the notification of the intention to impose an administrative fine, and which ☐

specify the amount. ☐

2. Legal basis ☐

☐ Data controller ☐

Article 4.7) GDPR ☐

For the purposes of these rules, the following terms mean: ☐

[...] ☐

7) "controller": the natural or legal person, public authority, service or ☐

other body which, alone or jointly with others, determines the purposes and means of the ☐

processing ; where the purposes and means of such processing are determined by Union law ☐

or the law of a Member State, the controller may be designated or the specific criteria ☐

applicable to its designation may be provided for by Union law or by the law of a State ☐

member. ☐

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☐ Lawfulness of processing ☐

Article 6.1 GDPR ☐

1. Processing is only lawful if and insofar as at least one of the following conditions is ☐

filled: ☐

a) the data subject has consented to the processing of his or her personal data for one or

several specific purposes;

b) the processing is necessary for the performance of a contract to which the data subject is party or

the execution of pre-contractual measures taken at the latter's request;

c) processing is necessary for compliance with a legal obligation to which the data controller

treatment is submitted;

d) processing is necessary to protect the vital interests of the data subject or of a

other natural person;

e) the processing is necessary for the performance of a task carried out in the public interest or relating to the exercise of

the public authority vested in the controller;

f) the processing is necessary for the purposes of the legitimate interests pursued by the data controller

processing or by a third party, unless the interests or fundamental rights and freedoms prevail

of the data subject who require protection of personal data, in particular

when the data subject is a child.

Point (f) of the first paragraph does not apply to processing carried out by public authorities in

the execution of their missions.

3. Motivation

a) Controller (article 4.7) of the GDPR)

17. The Litigation Division notes that the plaintiffs expressly mention that they do not

not oppose the use of surveillance cameras as such, but that they ask

that the defendant, in his capacity as managing director of the company for which he acts, has

no longer have access to the images of the cameras which relate to the block of apartments Résidence Z A and

use them more for personal purposes.

18. Above all, it is important to determine who is responsible for processing the images taken

by surveillance cameras. Given that, as stated by the Respondent in

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hearing, decisions about cameras, namely their installation and use, are
taken by the contracting authority, right from the start, for the construction of the complex
of apartments, the Litigation Chamber finds that the defendant must be considered as
controller within the meaning of Article 4(7) of the GDPR. The defendant determines the
purposes and means of data processing of camera images.

19. The Litigation Division also notes that the obligation to provide a building with a
surveillance by cameras and to provide for this purpose the installation of surveillance cameras at the premises
indicated in the internal regulations does not imply that the project owner/developer
can still qualify itself, at the time of signing the notarial deed of sale, as
controller within the meaning of Article 4(7) of the GDPR. When buyers
become owners and that the association of co-owners has been created, which was done by
through the statutes of the "Résidence Z" apartment building, the purposes and means of the
processing of images obtained by surveillance cameras must be able to be determined
by the ACP. The Litigation Chamber therefore finds that it is up to the ACP to rule on the
the use of surveillance cameras and the processing of the images obtained for what
concerns Residence Z A. The defendant does not dispute this, given that he asserts
expressly that the decision to withdraw or not the installation of cameras rests with the ACP.
The defendant confirms that the general assembly of the ACP, as a decision-making body, must
make a decision on the removal of the camera installation, which must then be carried out by
the trustee of the building. On October 16, 2019, the cameras were removed from the facades
by order of the ACP A. The Litigation Chamber follows this position in the sense that the ACP
decides not only on the possible removal of the surveillance cameras, but also that it must
be able to decide on their installation and use.

20. The Litigation Chamber relies on point 20. h) of the internal rules to affirm
that the defendant, namely the managing director, acted as a former trustee for what
concerns part A, but it appears that the "Association of Co-owners of the building

Residence Z A" (ACP A) has in the meantime appointed another trustee. The defendant, as
as managing director of the real estate company, however still acts as trustee
for part B. A separate PCA for part B has been named "Association des Copropriétaires
of the Residence Z B building".

21. The plaintiffs claim that the defendant refuses to provide the plans of the cameras installed as well
as the connection code, both to themselves and to the trustee appointed by the ACP A.
The Litigation Chamber notes that this refusal is not disputed by the defendant. The defendant
mentions only on this subject that the technical room is accessible to all and that all
information of the security company is clearly mentioned there and that they can

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consult at any time. The Litigation Chamber emphasizes that the mere mention of the name of the
security company, its website and its telephone number in the technical room
is not sufficient to enable ACP A to determine the purposes and means of the
camera surveillance and to allow the trustee of ACP A to carry out his duties.

22. The Litigation Chamber finds that the defendant, as contracting authority and promoter,
was certainly required to provide the physical infrastructure for the installation of security cameras
monitoring, but that this cannot in any way give rise to the defendant continuing to
access the camera images in this same quality, once the transfer of ownership has
occurred.

b) Lawfulness of the processing (article 6.1 of the GDPR)

23. Although the defendant argues that as project owner, it is contractually bound to
provide camera surveillance under the rules of procedure (which specifies in point 2.

g. "Law relating to the protection of privacy: You are informed that the building is
equipped with a camera surveillance system in the entrance halls, stairwells,
cellar and the underground garage") and that the notarial deed mentions that the internal rules
is signed for agreement by the buyers, the Litigation Chamber points out that the notarial deed

to which the defendant refers relates to the apartment complex B which is to be built.□

all the passages quoted in this decision have been freely translated by the Secretariat of□

the Data Protection Authority, in the absence of an official translation]. The clause of the deed of□

basis on which the defendant relies to assert that the purchasers were informed of the□

camera surveillance and have consented to it concerns the building complex "Z B". This clause□

has the following:□

"CAMERA SURVEILLANCE□

The common areas (interior garden, entrance to garages and garages – this list is not□

limited) will be monitored by cameras. Every owner/user must respect□

this form of surveillance and must expressly agree to the provisions□

relating to the protection of privacy in this regard."□

24. The defendant does not demonstrate that such a clause was also included in the agreement□

notarized concluded with the plaintiffs of Residence Z A.□

As regards the consent relied on by the Respondent in its capacity as controller of the□

processing, as a legal basis justifying the processing of camera images, the Chamber□

Litigation points out that this consent in no way meets the requirements established□

in Article 4.11) of the GDPR which provides that the consent of the data subject means:□

"any manifestation of will, free, specific, enlightened and unambiguous by which the person□

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concerned accepts, by a declaration or by a clear positive act, that personal data□

personal data relating to it are subject to processing". According to□

the defendant,□

the□

owner/user must respect surveillance by means of cameras and must expressly□

agree to the provisions relating to the protection of privacy. It means that□

as soon as the data subject proceeds to purchase an apartment, he is obliged to give□

his consent for the processing of data by means of surveillance cameras.□

The requirement of free consent is therefore not met.□

25. The Litigation Chamber also refers in this respect to the Guidelines of Group 29□

on consent within the meaning of Regulation 2016/679¹, which specify that the adjective "free" implies□

real choice and control for those affected. In general, the GDPR has□

that if the person concerned is not really able to exercise a choice, feels□

coerced into consenting or will suffer significant negative consequences if they do not give□

consent, the consent is not valid. If the consent is presented as□

a non-negotiable part of the terms and conditions, it is deemed not to have been freely given.□

Consent will therefore not be considered freely given if the□

data subject is not in a position to refuse or withdraw consent without suffering□

prejudice. In order to determine whether the consent was given freely, it is also necessary to take□

account of the specific situation of including consent in a contract for processing□

of personal data which is not necessary for the execution of this contract (article 7.4□

GDPR)². Anything that involves inappropriate pressure or influence on the person□

concerned, preventing it from making a free choice, renders this consent invalid. Because□

that in this case, as asserted by the defendant, the plaintiffs were unable to proceed with the purchase of a□

apartment only on the condition of accepting from the outset the provision of the notarial deed by which they□

mark their agreement on the rules of procedure which include a provision relating to the□

processing of images by means of surveillance cameras, we clearly cannot speak of□

free consent.□

26. Although the defendant does not invoke it, the Litigation Chamber verified to what extent the□

processing could be based on Article 6.1.f) of the GDPR, namely that it would be necessary for the purposes□

of its legitimate interests. The Litigation Chamber notes that to this end, it is necessary to carry out a□

weighting with the interest of the data subject in order to assess which interest prevails. For this□

¹ Guidelines on consent within the meaning of Regulation 2016/679, established on November 28, 2017, revised and adopted□

on April 10, 2018.□

2 Article 7(4) of the GDPR: "When determining whether consent is freely given, the greatest possible□

account of the question of, inter alia, whether the performance of a contract, including the provision of a service, is subject□

consent to the processing of personal data which is not necessary for the performance of this contract".□

See also recital 43 of the GDPR, which reads as follows: "[...] Consent is presumed not to have been given□

freely if separate consent cannot be given to different data processing operations□

personnel although this is appropriate in the particular case, or if the performance of a contract, including the provision of a service□

is subject to consent even though consent is not necessary for such performance."□

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legal basis also, the Litigation Chamber declares that such weighing of interests□

leads in this case to the conclusion that the interest of the plaintiffs takes precedence.□

Conclusion on the penalty to be imposed□

27. In view of all these findings, the Litigation Division considers that the defendant arrogates to itself the□

power to determine the purposes and means of data processing and therefore intervenes□

as data controller, while the quality of data controller is□

to ACP A with regard to the processing of camera images in the block of flats□

Residence Z A. The defendant cannot invoke any legal basis as set out in article 6.1□

of the GDPR, so that on its part the processing cannot be considered lawful.□

28. The Litigation Chamber decides that the violation of article 6.1 of the GDPR is proven and that it□

agrees on the one hand to notify the defendant that the processing which he carries out by means of the images□

obtained through surveillance cameras concerning block of flats A is□

definitively prohibited and on the other hand to order that the required documents, including the relative plans□

installation of surveillance cameras and the connection code, are provided to the "Association□

of the Co-owners of the Residence Z A building".□

29. As regards the cameras concerning both part A and part B, the Litigation Chamber□

notes that the data controller for part A must be the "Association des□

Co-owners of the Résidence Z A building", while for part B, it is the "Association of the Co-owners of the Residence Z B building". In order to respect the responsibility of each of the two ACPs, being the joint controllers of the processing of the cameras which concern the part A and part B, the Litigation Chamber decides to temporarily prohibit the processing of these images, i.e. until ACP A and ACP B have jointly taken a decision regarding the use of these surveillance cameras.

30. In addition to the corrective measure of definitive prohibition of the processing of images by means of cameras surveillance concerning apartment block A, a temporary ban on the processing of images by means of surveillance cameras concerning both part A and part B, as well as that the order to bring the processing into compliance with Article 6.1 of the GDPR, the Chamber Litigation also decides to impose an administrative fine which is not intended to put an end to an offense committed, but which is rather aimed at a rigorous implementation of the rules of the GDPR. As can be seen from recital 148, the idea pursued by the GDPR is that in the event of breaches serious, sanctions, including administrative fines, are imposed, in addition or instead of the appropriate measures that are imposed. The Litigation Chamber thus acts in application of Article 58.2.i) of the GDPR. The instrument of the administrative fine therefore has no

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in no way intended to end violations. To this end, the GDPR and the LCA provide for several corrective measures, including the orders cited in Article 100, § 1, 8° and 9° of the LCA.

31. In view of Article 83 of the GDPR and the case law of the Court of Markets, the Chambre Litigation motivates the imposition of an administrative sanction in a concrete way:

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the seriousness of the violation: the motivation set out above demonstrates the seriousness of the violation;
the duration of the violation: it does not appear from the elements put forward by the defendant in the proceedings before the Litigation Chamber that the infringement has ceased; so she continued

until May 20, 2020. In this respect, the Litigation Chamber does not take into account the

adjustments made after closure of discussions on findings;

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the necessary deterrent effect to prevent new infringements.

32. With regard to the nature and gravity of the violation (Article 83.2.a) of the GDPR), the Chamber

Litigation emphasizes that compliance with the principles set out in Article 5 of the GDPR – in particular

here the principle of lawfulness – is essential, because these are fundamental principles of protection

Datas. The Litigation Chamber considers that the violation of the principle of lawfulness of

Article 6 of the GDPR which is committed by the defendant therefore constitutes a serious violation.

33. Although there is no evidence of an intentional violation, it should be

to find a serious breach on the part of the defendant. Even if the defendant has already done

proof of efforts by removing certain surveillance cameras, we cannot ignore the fact that the

respondent continues to act as controller with respect to the processing

of data carried out by means of surveillance cameras still present, without having a

any legal basis for this.

34. All the elements set out above justify an effective, proportionate and

dissuasive, as referred to in Article 83 of the GDPR, taking into account the assessment criteria that it

contains. The Litigation Chamber draws attention to the fact that the other criteria for

Article 83.2 of the GDPR are not, in this case, likely to lead to another fine

administrative than that defined by the Litigation Chamber in the context of this decision.

c) Publication of the decision

35. Given the importance of transparency regarding the decision-making process of the Chamber

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 parties

are communicated directly.

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FOR THESE REASONS,□

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

- to serve on the defendant, pursuant to Article 58.2.f) of the GDPR and Article 100, § 1, 8° of the LCA,□

that the processing by means of surveillance cameras concerning block of flats Z A is□

definitely prohibited on its part and that the processing by means of surveillance cameras□

regarding both Party A and Party B is temporarily prohibited until ACP A and□

ACP B have jointly taken a decision on the use of these surveillance cameras;□

- pursuant to Article 58.2.d) of the GDPR and Article 100, § 1, 9° of the LCA, to order the defendant□

bringing the processing into compliance with article 6.1 of the GDPR by submitting the documents□

required, including plans for the installation of surveillance cameras and the connection code, to□

the "Association of Co-owners of the Résidence Z A building" which is responsible for□

treatment;□

- pursuant to Article 100, § 1, 13° of the LCA and Article 101 of the LCA, to impose a fine□

administrative fee of 5,000 euros.□

Under article 108, § 1 of the LCA, this decision may be appealed within a period of□

thirty days, from the notification, to the Court of Markets, with the Authority for the Protection of□

given as defendant.□

(Sr.) Hielke Hijmans□

President of the Litigation Chamber□