Litigation Chamber

Decision on the merits 175/2022 of 28 November 2022

File number: DOS-2021-00684

Subject: Complaint relating to the sending of emails to a list of students and the display of school results with mention of the date of birth of the students - identification of the controller - principles of purpose and proportionality

The Litigation Chamber of the Data Protection Authority, made up of Mr Hielke Hijmans, chairman, and Messrs. Yves Poullet and Jelle Stassijns, 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 to the free movement of such data, and repealing Directive 95/46/EC (General Regulation on the data protection), hereinafter "GDPR";

Having regard to the Law of 3 December 2017 establishing the Data Protection Authority (hereinafter ACL);

Having regard to the internal regulations as approved by the House of Representatives on 20 December 2018 and published in the Belgian Official Gazette on January 15, 2019;

Considering the documents in the file;

made the following decision regarding:

The complainant :

Mrs X, represented by Maître Florent Loriaux, lawyer, whose firm is established avenue de Luxembourg, 152 at 5100 Jambes;

Hereinafter "the plaintiff";

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The defendants:

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Y1, Hereinafter "the first defendant";

Y2, Hereinafter “the second defendant”;

Hereinafter referred to together as “the defendants”;

Both represented by Maître Carine Doutrelepont and Maître

Inès Yahyaoui, lawyers, whose firm is located in Square Vergote,

20 at 1030 Brussels.

I. Facts and procedure

1. On February 5, 2021, the complainant lodged a complaint (hereinafter Complaint No. 1) with

the Data Protection Authority (DPA) against the first defendant, Y1.

2. The complainant was a student with the first respondent in September 2016

in the academic year 2020-2021. She was following a scientific bachelor's degree there. She left Y1 after

having been adjourned in October 2020.

3. The first defendant is a social advancement teaching institute organized by the

second defendant. It offers various secondary education programs and

short-type superior, including the bachelor's degree followed by the complainant.

4. The subject of the complaint lodged by the complainant concerns:

To. On the one hand, the sending in September 2020 of a group e-mail by a teacher from the

first defendant (Professor V) to his students; group email leaving

display the email addresses of all recipients, including the email address

plaintiff's private email. It is undisputed that this teacher initially

of the year, collected the e-mail addresses of its students directly from

these to communicate with them as part of his course.

b. On the other hand, the public display at the valves of the establishment, in October 2020, of results of the students with the mention of their date of birth, including that of the complainant.

5. On the same day, February 5, 2021, the complainant sent a letter to the Director of first defendant (Ms. Z) for the purpose of obtaining (i) access to her personal data held by Y1, (ii) a copy of this data as well as (iii) the erasure of this data. This mail is attached to the complaint.

6. On February 10, 2021, the second defendant, in response to these requests, sent a letter recommended to the complainant requesting proof of her identity. In the absence of withdrawal of this registered letter, the same request was sent to the complainant by ordinary mail specifying that the period of Article 12.3. of the GDPR would begin upon receipt of the asked documents. On March 12, 2021, the Data Protection Officer (DPO) of the second defendant acknowledged receipt of the complainant's response. On April 6, 2021, the data requested by the complainant were communicated to her by secure USB key accompanied by an access code sent by separate email dated April 15, 2021. In this same letter of April 6, 2021, the second defendant recalls that in accordance with Article 9 paragraph 7 of the Annex to the Internal Rules of the teaching institutions of social promotion of Y2 entitled “Terms and conditions relating to the application of the General Regulations on Data Protection” dated 2019 (hereinafter the Annex to the ROI), the data may be kept longer than the duration of the student's registration in the event of a dispute between the school and the latter as in this case. On June 17, 2021, the Complainant elsewhere requested the cancellation of its request for erasure.

7. The Litigation Division notes at the outset that these answers (point 6) were provided in the course of the proceedings before the Litigation Chamber. The complainant has indeed introduced its

requests to exercise rights on the same date as that on which it filed its complaint and not prior to it. The defendants therefore had no choice but to respond in parallel to the pending proceedings.

8. On February 10, 2021, complaint no. 1 was declared admissible by the Service de Première Ligne (SPL) DPA on the basis of Articles 58 and 60 of the LCA and the complaint was transmitted to the Chamber Litigation under article 62, § 1 of the LCA.

9. On March 5, 2021, the Litigation Division decided, pursuant to Article 95, § 1, 1° and Article 98 of the ICA, that the case could be dealt with on the merits.

10. On April 1, 2021, the plaintiff and the first defendant were informed, by mail recommended, the provisions as set out in Article 95, § 2 as well as in Article 98 of the ACL. They are also informed, under article 99 of the LCA, of the deadlines for report their findings.

The deadlines for receiving submissions in response and in reply to the first defendant were set respectively for May 13 and June 28, 2021. The deadline for the filing of the complainant's conclusions was set for June 4, 2021.

11. Respectively on April 13 and 29, 2021, the plaintiff and the first defendant agree to receive all case-related communications electronically and manifest their intention to avail themselves of the possibility of being heard in accordance with Article 98 of the ACL.

12. On May 12, 2021, the Litigation Chamber received the submissions in response to the first defendant. According to these, the first defendant considers that the complaint brought against her is inadmissible in that it is directed against her on the grounds, in particular, that it is not an entity with legal personality and therefore cannot be data controller of the complainant. The complaint would have, still according to the first defendant, had to be brought against an entity having the personality

legal or against the second defendant. The first defendant emphasizes to

In this regard, the second defendant is also designated as responsible for

treatment in article 1 of the Annex to the aforementioned ROI.

13. Alternatively, if the Litigation Division were to conclude that the complaint is admissible at its

regard notwithstanding the foregoing, the first defendant develops an argument

as to the substance that the Litigation Chamber details in point 19, these first conclusions

followed by summary conclusions.

14. On June 2, 2021, echoing the submissions of the first defendant, the plaintiff filed a

new complaint to the DPA, this time against the second defendant. This complaint n°2 has

subject to the same shortcomings as those denounced in the first complaint lodged on

February 5, 2021.

15. On July 23, 2021, the SPL declares this second complaint admissible and transmits it to the Chamber

Litigation.

16. On July 30, 2021, the Litigation Chamber joins complaints n°1 and n°2 which it considers related

by a link so close that it is necessary to treat them together and addresses a new calendar

exchange of submissions to the parties.

17. On September 23, 2021, the Litigation Chamber receives the submissions in response from the

defendants (point 19 below).

18. On October 15, 2021, the Litigation Chamber receives the submissions in response from the

plaintiff according to which the latter defends, in summary, the above arguments.

below.

- As for Complaint No. 1 lodged against the first defendant, the plaintiff indicates

that it does not dispute the lack of legal personality on the part of the latter nor

the inadmissibility of the complaint against him. The plaintiff nevertheless alleges that

the identification of the controller of the data processing carried out by the

first defendant remains particularly difficult. Article 1 of the Annex to the ROI

already quoted (point 6) indeed quotes “(…) [i.e. the second defendant] giving delegation to the Management of the educational institution concerned” under the title “responsible for treatment ".

- As to the merits, the complainant considers that the distribution of her private e-mail address was contrary to the principle of minimization of the GDPR (article 5.1.c) of the GDPR) when its collection by Professor V was superfluous, the teachers having at their disposal other communication channels with students that do not require the use of their e-mail address. The purpose of this collection also appears to him to be contrary to the purpose identified in the Annex to the ROI (also formulated too vaguely according to her) and whereby, as already mentioned above, identification data is processed for purposes of registration and establishment of official documents (diplomas).
- As for the disclosure of her date of birth, the complainant takes note of the error admitted by the second defendant while expressing surprise at the default configuration of the software (with mention of the date of birth) (see below, point 19) which would be the origin. This situation reveals, according to the complainant, a breach of Article 25 of the GDPR (privacy by design).
- As for the consequences of the breaches denounced, the complainant pleads for a ODA intervention that would not leave these shortcomings unpunished – even if measures were taken by the second defendant to remedy this without waiting for the this decision –. Otherwise, such an attitude could give an impression of impunity which is definitely not acceptable.
- Finally, with regard to the follow-up given to its request for access and erasure (points 5-6), the plaintiff does not contest the prompt reaction of the defendants.

19. On November 8, 2021, the Litigation Division receives the submissions in reply and from summary of the defendants. Their argument can be summarized as follows:

To. The defendants argue, as did the first defendant (point 12),

the inadmissibility of Complaint No. 1 with regard to the latter;

b. The second defendant alleges human error concerning the sending of the email

leaving the addresses of its recipients visible, including that of the

complainant. She adds that now teachers are required to use

exclusively the e-mail address […] (i.e. an e-mail address composed of the name of

student followed by the name of the organizer of the course) provided to each

student to communicate with them. The “Practical back-to-school guide” for the attention

of lecturers also now provides (point 5.7.) that teachers

are required to use exclusively

the email address above

[…] For

communicate with students. Their personal email address

is no longer required.

vs. The second defendant states that the dissemination of the date of birth of the

complainant is due to a clerical error due to work overload

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administrative engendered by the covid-19 crisis, more particularly given

the use of a computer that was not used for this type of manipulation and

whose program used had ticked the box "with mention of the date of

birth” by default. The defendant points out that after the event denounced

by the complaint, this box has been unchecked to avoid the error in the future. Only the

the student's registration number is also now displayed with his

results.

d. As for the complainant's requests for access and erasure (points 5-6), the

second defendant stresses that it took care to follow up quickly.

20. For the remainder, the defendants acknowledge the facts alleged by the complainant in the

two complaints (without prejudice to the absence of liability of the first defendant). There

second defendant adds that it provided, through its DPO, training to

GDPR correspondents of the administration in charge of education. Generally,

these correspondents then relay the information given – which is in particular

inspired by the 7-step plan developed by APD1 – to educational establishments, including

the first defendant, in particular on the principle of minimization, the need for a

prior consent or sensitive data.

21. On August 26, 2022, the parties are informed that the hearing will take place on September 13

2022.

22. On September 13, 2022, the parties are heard by the Litigation Chamber. During

At this hearing, the parties each presented their arguments, faithful to those they

had respectively developed under their conclusions. The defendants have

highlighted the inadmissibility of Complaint No. 1 against the first defendant. They don't have

not disputed the alleged breaches but highlighted the measures taken since

intended to prevent such breaches from occurring in the future. As for the complainant,

it particularly insisted on the breach of the principle of minimization with regard to the

collection of his private e-mail address.

23. On September 23, 2022, the minutes of the hearing are submitted to the parties.

24. The Litigation Division did not receive any comments relating to the minutes, nor from the

plaintiff nor of the defendants.

II. Motivation

II.1. Regarding breaches of the GDPR

1 https://www.jedecide.be/sites/default/files/2018-

06/The%20protection%20of%20data%20at%20school%20in%207%20steps.pdf

Identification of the data controller – inadmissibility of the complaint with regard to the first

defendant

25. As mentioned above (points 1 and 14), two complaints were lodged by the

plaintiff, one against the first defendant, the other against the second

defendant, following

the argument developed by

the first one

defendant that it was not the controller of the processing of

data denounced by the complainant. The Litigation Chamber notes that the plaintiff seems

also directly implicate a teacher (Mr. V – point 4) as well as the

director of the first defendant (Mrs Z – point 5).

26. The Litigation Division has already had occasion2 to point out that it is often complex for the

complainant to correctly identify the data controller with regard to the

treatment(s) that he denounces, these notions being legally defined in article 4.7 of the

GDPR and probably difficult to understand by a person not versed in the matter.

27. The Litigation Chamber recalls here that the definition of data controller is “the

natural or legal person or any other entity which alone or jointly with others,

determines the purposes and means of the processing of personal data” (article

4.7. GDPR). This is an autonomous notion3, specific to the European regulations in

in terms of data protection, the assessment of which must be based on the criteria

it sets out: the determination of the purposes of the data processing concerned as well as the

determination of the (essential) means4 of this.

28. It is up to the Litigation Chamber to qualify one or the other party as

controller based on the criteria of the definition in article 4.7. GDPR

recalled above. These criteria do not include the requirement of a legal personality

contrary to what the defendants argue. The Litigation Chamber has in this sense already

had the opportunity to consider that a de facto association (which does not have personality

distinct from that of its members) could be responsible for processing5. There

Litigation Division recalls that Article 2 § 4 of the Law of 8 December 1992 relating to the

protection of privacy with regard to the processing of personal data retained

a definition of the data controller which expressly mentioned

“de facto association”6. Just because the GDPR definition doesn't mention it

2 See. for example decisions 81/2020, 76/2021 and 115/2022 of the Litigation Chamber.

3 See. for example decisions 63/2022 of the Litigation Chamber.

4 European Data Protection Board (EDPB), Guidelines 07/2020 on the notions of controller

of processing and processor in the GDPR, Version 2.0. of 7 July 2021, points 39 et seq.

5 See. Decision 133/2021 of the Litigation Chamber.

6 Article 2 § 4: “Controller” means the natural or legal person, de facto association or

the public administration which, alone or jointly with others, determines the purposes and means of the processing of

personal data”.

that a de facto association (or any other structure that does not have a personality

own legal system) could no longer or no longer be qualified as data controller.

Indeed, the criteria qualifying the data controller remain unchanged. They

found both in the definition applicable before the entry into force of the GDPR (Article 2§4

of the law of December 8, 1992 mentioned above) and in that included in the GDPR (article 4.7.), all

two retaining the criteria for determining the purposes and (essential) means of the

treatment.

29. The Litigation Chamber adds that the fact that the plaintiff acquiesces to this lack of

legal personality on the part of the first defendant as well as the inadmissibility of the

Complaint No. 1 lodged against him which would result from it (conclusions of the defendants and

the complainant – points 18 and 19), is of no consequence. As already mentioned,

it is ultimately up to the Litigation Chamber to qualify one or the other party as

controller and to validate, where applicable, the qualification given to it by the

parts.

30. As a preliminary point, the Litigation Chamber recalls that in Guidelines 07/2020

adopted by the European Data Protection Board (EDPB) on the concepts of

controller and processor within the meaning of the GDPR7, the European data protection authorities

data protection state that if the data controller can, according to the definition

cited above in Article 4.7. of the GDPR, of course being a natural person, in practice, it is

usually the organization itself, not a person within it (such as

the general manager, an employee or a member of the board of directors), who acts as

controller within the meaning of the GDPR8. Indeed and in this case, even if the teacher or

the director of the first defendant certainly have a certain autonomy

in the exercise of their function, it is not they as individuals who determine the

purposes and means of the processing carried out by the organization within which they

working. Unless they exceed their functions - which has not been demonstrated in this case - they do not

are not controllers.

31. The Litigation Chamber notes that under the terms of the Annex to the ROI relating to the terms of

data processing and implementation of the GDPR, it is the second defendant who is

qualified as data controller (article 1 – point 6). The other provisions of this

Annex detail what is expected of schools with regard to the implementation of the

GDPR. The purposes of the processing are identified by the second defendant in the terms

of Article 5. It also follows that the essential means of processing are also

7https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-072020-concepts-controller-and-processor-gdpr_en

8 European Data Protection Board (EDPB), Guidelines 07/2020 on the notions of data controller

processing and processing in the GDPR, adopted on July 7, 2021 (version after public consultation) available here:

https://edpb.europa.eu/system/files/2022-02/eppb_guidelines_202007_controllerprocessor_final_en.pdf

determined by the second defendant, which does not exclude a certain autonomy in the
determination of the means, beyond those essential fixed by the data controller,
by establishments such as the first defendant in this case (such as the fact of unchecking
a box pre-checked by default in execution of the principle of minimization for example – point
19.c)).

32. The fact remains that the formal qualification provided for by the said Annex to the ROI must
be corroborated in the facts: the assessment of the quality of data controller must
effect to be made by the Litigation Chamber in the light of its concretization in the facts. In
in other words, there must be a balance between what is planned on paper and practice.

33. The Litigation Chamber notes in this regard that the letter of April 6, 2021 in response to
exercise of the complainant's request for access and erasure (points 5-6) emanated from the
second defendant. The latter thus acted as data controller. THE
defendants have also explained that the recommendations of the delegate for the protection
data (DPO) of
the second defendant, (…), apply to
all of the
establishments dependent on the second defendant. The latter ensures that its
agents are duly informed. The second defendant also indicates that it has, both
before, following the complaints lodged, provided training for the attention of
GDPR correspondents of
the administration in charge of
education (…), relaying
in particular the 7-step plan developed by the APD for schools
and produced documents attesting to this9. These correspondents then communicate the
information to educational institutions, including the first defendant. Finally, the

second defendant also reports that it has, still following the complaint, put in

place a student e-mail address (…) already mentioned (point 18) and modify the posting policy

of the results and that these measures are applicable in all the establishments which depend

from her.

34. In support of the foregoing, the Litigation Chamber concludes that the person responsible for

treatment solely on the part of the second defendant.

35. As to the reference to Article 17 of the Judicial Code10 made by the defendants, the

Litigation Chamber specifies that it is not bound by this provision. Bedroom

Litigation has already ruled that the Judicial Code was not applicable to it, except for the reference

by analogy made therein with Article 57 of the ODA Internal Rules for the calculation

delays (a contrario argument). The Litigation Chamber has certainly developed a policy

and case law relating to the interest in lodging a complaint pursuant to Article 77 of the

9 https://www.autoriteprotectiondonnees.be/publications/plan-par-etapes-la-protection-des-donnees-a-l-ecole-en-7-etapes.pdf

10 Article 17 of the Judicial Code: The action cannot be admitted if the plaintiff does not have the capacity and interest to bring

it.

GDPR through its note on the position of the complainant11 and a certain number of

decisions12. This requirement is imposed on the person filing the complaint and not on the person

who would be impleaded as the first and second defendants are in this case.

The lack of legal personality of the first defendant (or of its capacity to sue in

justice also mentioned) is therefore irrelevant here again. It cannot be opposed to

plaintiff who is undisputedly entitled to lodge a complaint.

36. Finally, the Litigation Division cannot agree with the complainant's analysis that as soon as

when the second defendant would be a data controller, the first defendant

would (necessarily) be its subcontractor.

37. The Litigation Chamber recalls in this respect that a subcontractor within the meaning of

section 4.8. of the GDPR, “the natural or legal person, public authority, service or

other body which processes personal data on behalf of the controller

treatment ". The processor is therefore, as the EDPS points out in his lines

guidelines on the notions of controller and processor in the GDPR

already mentioned13 “an entity distinct from that of the data controller”. The EDPS sets out

as well as "to be considered a subcontractor, two basic conditions must be met.

met: a) be a separate entity from the controller and b) process data to

personal character on behalf of the controller (point 76). The EDPS adds

that “a separate entity means that the data controller decides to delegate all or

part of the processing activities to an external organization (point 77)”.

38. For a situation such as that of the defendants where there is a centralization of decisions

as to the purposes and means at the level of the second defendant with application

from educational institutes such as

the first defendant via personnel

(teacher, management) which depends on the second defendant, it cannot be a question of sub-

contracting by the first defendant. The instructions given by the second

defendant in its capacity as data controller (via the Annex to the ROI) are in fact only

not addressed to a separate entity - as the subcontractor must be - but to its own

staff (even if at the operational level, this staff works for one or the other

educational institute, in this case for the first defendant).

39. The employees of the second defendant working within the first defendant are

on the other hand, “persons acting under the authority of the controller” within the meaning

of Article 29 of the GDPR which, when they have access to personal data, does not

11https://www.autoriteprotectiondonnees.be/publications/note-relative-a-la-position-du-plaignant-dans-la-procedure-au-sein-de

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the-litigation-chamber.pdf

12 See. for example decision 24/2022 of the Litigation Chamber and the references cited.

13 European Data Protection Board (EDPB), Guidelines 07/2020 on the notions of data controller

treatment

https://edpb.europa.eu/system/files/2022-

02/eppb_guidelines_202007_controllerprocessor_final_fr.pdf, page 4 of the French version.and points 76-77.

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may, with some exceptions, process them only on the instructions of the data controller, either on

instructions from the second defendant.

40. In conclusion, the Litigation Chamber notes in support of the foregoing considerations

that the first defendant is not responsible for processing and that only the second

defendant has this quality. Therefore, the Litigation Chamber dismisses the complaint

n°1 brought against the first defendant pursuant to Article 100, 1° of the

ACL.

41. In matters of dismissal, the Litigation Chamber must justify its decision by

step et14:

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to pronounce a classification without technical continuation if the file does not contain or not

enough elements likely to lead to a sanction or if it includes a

technical obstacle preventing him from rendering a decision;

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or pronounce a classification without further opportunity, if despite the presence elements likely to lead to a sanction, the continuation of the examination of the file does not seem to him to be appropriate given the priorities of ODA such as specified and illustrated in the Chamber's Discontinued Classification Policy Litigation15.

42. In the event of dismissal on the basis of several reasons (respectively, dismissal without technical and/or opportunity follow-up), the reasons for the classification without follow-up must be dealt with in order of importance.

43. In this case, the Litigation Chamber decides to proceed with the dismissal of the Complaint No. 1 for technical reasons against the first defendant. Since the quality of data controller is not established on its part with regard to the processing of data complained of, the first defendant is not liable for any breach of GDPR in this case. Indeed, the concept of "controller" plays a key role in the application of the GDPR, given that alongside the notion of subcontractor or that of of joint managers, it determines who is responsible for compliance with the various rules in terms of data protection. The GDPR clearly sets out under the principle of liability (article 5.2.), that it is the data controller who is responsible for ensuring the compliance with the principles relating to the processing of personal data referred to in Article 5 of the GDPR and who is able to demonstrate this compliance.

14 Market Court (Brussels Court of Appeal), 2 September 2020, 2020/AR/329, p. 18.

15 https://www.autoriteprotectiondonnees.be/publications/politique-de-classement-sans-suite-de-la-chambre-contentieuse.pdf

16 Dismissal policy of the Litigation Chamber, 18/06/2021, point 3 (“In which cases is my complaint likely on https://www.autoriteprotectiondonnees.be/publications/politique-de-classement-sans-suite-de-la-chambre-contentieuse.pdf Litigation?”),

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44. The Litigation Chamber nevertheless notes, as did the complainant, that the terms of the Annex to the ROI relating to the designation of the controller (article 1) could be clearer and invites the second defendant to improve the wording of this provision in order, both to make it more understandable to everyone, and to avoid any possible confusion with the notion of subcontractor - admittedly wrongly inferred by the complainant but understandable in its leader – with regard to the qualification of establishments such as the first defendant. Indeed, the use of the term “delegation” can, as the complainant points out, give to think that social advancement educational institutes are subcontractors within the meaning of article 4.8 of the GDPR. The Litigation Chamber wants as proof that in its Lines guidelines cited above, it is precisely the term “delegate” that the EDPS has used to qualify the subcontractor (see point 37 above: “a separate entity means that the controller of the processing decides to delegate all or part of the processing activities to an organization exterior (item 77)”.

Regarding the communication of the complainant's e-mail address to all the students of the course

45. Pursuant to Article 5.1.b) of the GDPR, any personal data must be collected for specified, explicit and legitimate purposes and not to be further processed manner incompatible with these purposes. Any processing of data must also be based

on one of the bases of lawfulness of Article 6 of the GDPR.

46. In this case, Article 4.1. of the Annex to the ROI mentions that the electronic address is one of the personal identification data of students processed by institutions of teaching such as the first defendant. The Litigation Chamber specifies here that this is the private email address of each student (as opposed to a student address which, if it was put in place since the facts denounced, did not exist at the time of these).

47. As regards the purposes of the processing carried out by the said educational establishments, Article 5 of this same Annex to the ROI specifies that the identification data – including the address electronic – are collected for the management of the student file (registration, re-registration) and in order to establish official documents such as diplomas and course certificates.

48. The description of these purposes does not include the processing of the email address of students in the framework of “school life/courses taught”, for example for communications that would take place within the framework of a lesson both between the teacher and his students and between the students among themselves. If these same student identification data can be communicated to third parties in several cases (Article 6 of the Appendix), these assumptions of communication do not however target the communication of the e-mail address of a student to other students participating in the same course.

49. The Litigation Chamber notes that in this case, the defendant proceeded to collect this data - via one of his teachers - as part of a course in which the complainant, thus relying on the consent of the latter (article 6.1. a) of the GDPR).

50. The complainant does not dispute having provided her private e-mail address to this teacher. She indicates that it has not, however, indicated its agreement for this data to be, in addition to its use in the context of the relationship with his teacher, communicated to other students classes.

51. The Litigation Division is of the opinion that the processing of an e-mail address may, failing

communication tools that avoid the systematic use of email communication
grouped, prove necessary within the framework of the organization of a course and communications
which apply in this context. However, the lawful basis of the consent
(article 6.1.a) of the GDPR) does not seem to him to be the basis of lawfulness on which to rely,
in particular because of the free nature that consent must have. It does not in fact appear
not at the Litigation Chamber that a student is really in a position to consent
freely to communicate his e-mail address to a teacher given the nature
of the relationship between them. Within the framework of this relation, the student can indeed feel
constrained ; the balance of the balance of power leaning in favor of the teacher17. The basis of legality
offered by Article 6.1.b) of the GDPR (processing necessary for the performance of the contract) seems more
adequate. If it is used (in compliance with the principle of minimization), the purpose of this
processing must also be provided for in the register of data processing activities
(Article 30 of the GDPR) as in the information provided to students (Articles 12 and 13
GDPR).

52. In the absence of a specific basis of lawfulness (the consent in support of Article 6.1.a) of the GDPR
may, according to the Litigation Chamber, be admitted), the Litigation Chamber will examine whether the
processing of the private e-mail address consisting of communicating this e-mail address to
all of the students of the course taken by the complainant could be qualified as treatment
admissible later, this private e-mail address having otherwise been collected, as has been
mentioned, at the time of the complainant's registration

53. The Litigation Chamber considers that in this case, given the description of the purposes
limited for which the e-mail address was collected during registration – i.e. the management of the
student file (registration, re-registration) and the establishment of official documents such as
than diplomas and course certificates (points 47-48 above), this processing is not
not compatible within the meaning of Article 6.4. of the GDPR. Of course, the context remains that of
teaching and data is not sensitive data within the meaning of Articles 9 or 10 of the

GDPR. Nevertheless, the communication of an e-mail address to the management of an establishment

teaching for the purposes of management and the awarding of diplomas is part of the

relationship of the student / complainant with the establishment as such, in charge of missions

17 See. in this sense European Data Protection Board (EDPB), Guidelines 5/2020 on consent

in the sense of

16 and following):

https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf

(EU) 2016/679 of 4 May 2020

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specific and legally framed. The communication of a private email address to others

people – whose only relationship is to follow the same course – is very different and

does not appear to have the same guarantees. She didn't live up to expectations

reasons of the complainant, a fortiori in view of the wording of the original purposes aiming in a

exclusive administrative management and the issuing of diplomas.

54. In absolute terms, and as noted in point 51 above, the Litigation Chamber does not judge

however not excessive to consider that an e-mail address can be used for the

communication within the framework of a course, including by the students among themselves. In this regard,

it does not appear excluded to the Litigation Division that such processing may be based

on a basis of proper legality, i.e. the performance of the contract with the educational institution

(see above). On this point, however, the Litigation Chamber lacks elements in this case18.

55. In conclusion, the Litigation Chamber finds that, in the absence of having relied on a

of permissible lawfulness on which to base the disputed processing, the second defendant infringed

section 6.1. of the GDPR.

56. As for the excessive nature of the collection - via the teacher - in violation of the principle of minimization invoked by the complainant (article 5.1.c) of the GDPR, the Litigation Chamber that admittedly the second defendant already had this e-mail address and that according to all likelihood, the teacher perpetuated a long-standing practice in the absence, perhaps, of having been made aware of the issue, which has since been the case (see below).

57. However, the purposes for which the processing of the private e-mail address was intended did not list the use of it in the course. Furthermore, the student complainant may have changed e-mail or wish to use another e-mail address in the framework of the course than that which he/she would have communicated for administrative management purposes to the school administration when registering. Without prejudice to the remark it makes to the point 59 – which in no way constitutes a corrective measure or a sanction to the meaning of Article 100 of the LCA -; The Litigation Chamber does not retain in this case any violation of Article 5.1.c) on this count.

58. In addition to the issues of legality and minimization discussed above, the Litigation Chamber thus notes, as it has just mentioned, that the purpose of this collection by the second defendant (through her teacher) was not provided for in the Annex to the ROI. There The Litigation Chamber therefore notes, in addition and with certainty, a lack of transparency on the part of the second defendant in violation of Articles 5.1.a) and 12.1 of the GDPR.

18 This analysis is without prejudice to the position of the Litigation Chamber according to which the data controller cannot rely on several bases of lawfulness for the same processing or attempt to base the lawfulness of a processing on another basis of lawfulness than that on which he declared to be based (cf. the obligation to inform the data subject on this point – Article 13.1.c) of the GDPR) in the event that this basis of lawfulness is contested or deemed inadmissible.

59. Finally, the Litigation Chamber emphasizes that the use of a student e-mail address allocated to each student for the duration of their student life within the establishment

concerned is a good practice (implemented by the second defendant) that the DPA
encourages. The same applies to the elaboration, as the second defendant took
initiative, a guide for teachers to raise their awareness of data protection issues.
data that they will encounter in the exercise of their teaching mission, in terms of
including questions about the use of e-mail in the context of their courses. As it concerns
the issuance of diplomas and other communications that would be necessary once
the student has left the institution and his student address is no longer functional, the
use of the private e-mail address must remain possible.

60. The Litigation Division again recalls, notwithstanding the measures put in place by the
second defendant during the proceedings and recalled above, that Article 24 of the
GDPR requires the controller to put in place the technical and
appropriate organizational measures (reviewed and updated if necessary) to ensure and
be able to demonstrate that the processing is carried out in accordance with the GDPR.
Article 32 of the GDPR, to which the controller is also bound, also requires
that data are not unduly disclosed, in breach of the obligation to
privacy.

61. The Litigation Chamber will return to the fact that the second defendant took a certain
number of measures intended to prevent the breaches denounced from reoccurring
the future. These measures do not eliminate the breaches that occurred in Articles 6.1. (point
55) as well as 5.1. a) and 12.1. of the GDPR (point 58) but are all elements for which the Chamber
Litigation will take into account in the assessment of the sanction or corrective measure
adequate.

Regarding the processing of the complainant's date of birth

62. All data processing must comply with the principle of minimization set out in Article 5.1.c)
of the GDPR under which the controller is required to process personal data
adequate, relevant and limited to what is necessary in relation to the purposes for which

they are processed.

63. In this case, the Litigation Chamber is of the opinion that the processing of the data “date of birth” coupled with the success or not of the complainant was not necessary. Regardless of whether the public and global posting of the results of the class (posting following the aforementioned automated processing) complied with the GDPR (see. point 66), the mere mention of the name and the result was sufficient to allow the realization of the purpose pursued, namely the communication of the said result. He was not by elsewhere it is not necessary for the others enrolled in the diploma, or even any person consulting

the public display of the results, have knowledge of the name and beyond the date of birth some participants.

64. The Litigation Chamber concludes that there has indeed been a breach of Article 5.1.c) of the GDPR, by the second defendant. Here again the Litigation Chamber notes that the second defendant took measures to ensure that this failure did not recur in the future by now only publishing the student's number with regard to the result. This taking of conscience will be taken into account by the Litigation Chamber in its determination of the penalty or appropriate corrective action. However, it does not erase this breach.

65. The justification advanced by the second defendant according to which this association of data was pre-checked by default in an institution program (first defendant) testifies to a potential breach of Article 25 of the GDPR. It is indeed required under the terms of this article that the data controller implement the measures appropriate technical and organizational measures to ensure that by default, only the data of a personal nature which are necessary with regard to each specific purpose of the treatment are processed. In this case, the Litigation Chamber does not have

enough elements subject to

the contradiction to conclude

the existence of a

breach of this provision. It nevertheless recalls the necessary respect for article

25 of the GDPR and its consideration when designing processing.

66. As for the public display of the results, it is not as such called into question by the complaint.

Only, as already mentioned, is the fact that the complainant's date of birth was

published alongside his name and the result obtained. The second defendant indicates that

now publish only the student's number (pseudonymized data) alongside the result,

In its own recommendations, the DPO of the second defendant indicates that such

display can only take place with the consent of all students

concerned (article 6.1.a) of the GDPR). The Litigation Chamber subscribes to this analysis. If such

consent is obtained, the fact remains that, in addition to the basis of lawfulness on which a

such publication could therefore be based, only proportionate data can be

processed. The publication

limited in

the time of the matricule of

the student

(given

pseudonymised) instead of his nominal identity is in this respect more consistent

to the GDPR and constitutes a good practice to be encouraged.

As to the follow-up given by the second defendant to the exercise of the plaintiff's rights

67. As recalled in the statement of facts, the second defendant focused on

respond to the complainant's request for access and erasure through its DPO

within the period of one month required by article 12.3. of the GDPR in a way that it considered

secure. In its response, it took into account the retention periods provided for in Annex

to the ROI (and in particular article 9.7 which provides for the retention of data in

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the hypothesis of a dispute) and the request for cancellation of the request for erasure

occurred on June 17, 2021.

68. In her submissions in response, the Complainant indicates that she does not dispute the prompt

reaction of the defendants in the treatment of its claims.

69. The Litigation Chamber concludes that the plaintiff no longer upholds this grievance. There

complainant had also attached her requests for the exercise of her rights to Complaint No. 1 before

even of having let the 1-month period from which the second defendant benefited for

respond to it in accordance with Article 12.3. of the GDPR.

70. Notwithstanding this withdrawal, the Litigation Chamber sees no reason to conclude that a

any breach arising from the absence or inadequacy of the response provided by the

second defendant and therefore dismisses this grievance for technical reasons on the basis of

article 100, 1° LCA, no breach can be retained in the second

defendant regarding compliance with Article 12 of the GDPR.

71. More generally, the Litigation Chamber insists on the fact that the exercise of their

rights by the persons concerned must be done before the filing of any complaint and that therefore,

this complaint may be lodged at the earliest on expiry of the period for the person responsible for

treatment implicated to answer. If this is not the case, the Litigation Chamber is not

necessarily not in a position to note any shortcoming on the part of the

data controller since the latter did not even have the opportunity to react (the case

appropriate by granting the request elsewhere). The Litigation Chamber can only

dismiss such a grievance.

72. As to the verification of the applicant's identity when requesting access or erasure

as in the present case (articles 15 and 17 of the GDPR), the Litigation Chamber insists, as

simple reminder which in no way constitutes any corrective measure or sanction within the meaning

of section 100 of the LCA, on the following.

73. In accordance with the position adopted by the data protection authorities within the EDPS, “the controller should act upon the requests of data subjects for exercising their individual rights, unless it can demonstrate - through a justification in line with the principle of accountability (Art. 5(2)) – that it is not in a position to identify the data subject (Art. 11). Tea controller is not obliged to acquire additional information in order to identify the data subject for the sole purpose of complying with the request. However, it should not refuse to take such additional information (Recital 57). In cases where the controller requests the provision of additional information necessary to confirm the identity of the data subject, the controller shall each time assess what information will allow it to confirm the data subject’s identity and possibly ask additional questions to the requesting person or request the data subject to present some additional identification elements, if it is proportionate (see section 3.3). Such

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additional information should not be more than the information initially needed for the verification of the data subject’s identity (authentication). (…) It should be emphasized that using a copy of an identity document as a part of the authentication process creates a risk for the security of personal data and may lead to unauthorized or unlawful processing, and as such it should be considered inappropriate, unless it is strictly necessary, suitable, and in line with national law”.19

II.2. Regarding corrective measures and sanctions

74. Under Article 100 LCA, the Litigation Chamber has the power to:

1° dismiss the complaint without follow-up;

2° order the dismissal;

3° order a suspension of the pronouncement;

4° propose a transaction;

(5) issue warnings or reprimands;

6° order to comply with requests from the data subject to exercise his or her rights;

7° order that the person concerned be informed of the security problem;

8° order the freezing, limitation or temporary or permanent prohibition of processing;

9° order the processing to be brought into conformity;

10° order the rectification, restriction or erasure of the data and the notification of

these to the recipients of the data;

11° order the withdrawal of accreditation from certification bodies;

12° to issue periodic penalty payments;

13° to impose administrative fines;

14° order the suspension of cross-border data flows to another State or a

international body;

15° forward the file to the public prosecutor's office in Brussels, which informs it of the

follow-up given to the file;

19 Extract from the Guidelines of the European Data Protection Board (EDPB) on the right of access:

Guidelines 01/2022 on data subject rights - Right of access, of 18 January 2022: https://edpb.europa.eu/system/files/2022-01/edpb_guidelines_012022_right-of-access_0.pdf. Free translation: The data controller must follow up on the requests of the data subjects unless he is able to demonstrate – by means of a justification in accordance with the principle of accountability (Article 5(2)) – that he is not able to identify the data subject (Article 11). controller should not be required to obtain additional information to identify the person concerned for the sole purpose of responding to his request. However, the controller should not refuse additional information provided by the data subject in order to facilitate the exercise of his rights (recital 57). In cases where the data controller requests the communication of additional information to confirm the identity of the person concerned, the data controller will examine in each case what information will make it possible to confirm the identity of the person concerned and, as far as possible, will address the person applicant or data subject to obtain them (if proportionate) (see section 3.3.). These informations additional information cannot go beyond those initially necessary for the verification of the identity of the person

concerned (authentication). (…). It should also be emphasized that using a copy of the identity card in the part of the authentication process creates a risk for data security and may lead to unauthorized processing. authorized or illegal. This remedy should be considered inadequate as such unless it is strictly necessary, appropriate and in accordance with national law.

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16° decide on a case-by-case basis to publish its decisions on the website of the Authority of Data protection.

75. The Litigation Chamber explained above that it was classifying complaint no. 1 lodged at against the first defendant without further action on technical grounds (point 43). She classifies moreover, complaint no. 2 against the second defendant was not followed up insofar as it accuses of having failed in its obligations arising from articles article 5.1.c) (collection excessive) and 25 of the GDPR, again for technical reasons, no breach on the part of these provisions that cannot be reproached to him. The Litigation Chamber decides on the other hand to issue a reprimand to the second defendant on the basis of article 100, 5° LCA of the head of breaches of Articles 6.1. of the GDPR (point 55 - lack of basis of lawfulness) and 5.1.a) and 12.1. of the GDPR (point 58 - breach of the obligation of transparency) and Article 5.1.c) of the GDPR (point 64 - publication of the date of birth of the complainant). The choice of this sanction aims to sanction past breaches to which it has certainly been partially remedied. It therefore intervenes independently of the good practices put in place by the second defendant and which the Litigation Chamber wished to underline. Bedroom Contentious also invites the second defendant to finalize the implementation of these measures by providing its documents (Annex to the ROI) with the corresponding clarifications.

III. Publication of the decision

76. Given the importance of transparency regarding the decision-making process of the Chamber Litigation, this decision is published on the DPA website. However, it is not it is not necessary for this purpose that the identification data of the parties be directly

mentioned.

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FOR THESE REASONS,

the Litigation Chamber of the Data Protection Authority (APD) decides, after

deliberation:

- to dismiss complaint no. 1 lodged against the first defendant

pursuant to Article 100, 1° of the LCA;

- to address a reprimand to the second defendant for the breaches

noted in articles 6.1. GDPR, 5.1. a) and 12.1. of the GDPR as well as Article 5.1.c) of the

GDPR under Article 100, 5° of the LCA and to pronounce a discontinuation

of Complaint No. 2 for the surplus pursuant to Article 100, 1° of the LCA.

In accordance with Article 108, § 1 of the LCA, an appeal against this decision may be lodged,

within thirty days of its notification, to the Court of Markets (court

d'appel de Bruxelles), with the Data Protection Authority as defendant.

Such an appeal may be introduced by means of an interlocutory request which must contain the

information listed in article 1034ter of the Judicial Code1. The interlocutory motion must be

filed with the registry of the Market Court in accordance with article 1034quinquies of C. jud.2, or

via the e-Deposit information system of the Ministry of Justice (article 32ter of the C. jud.).

(Sé). Hielke Hijmans

President of the Litigation Chamber