Litigation Chamber

Decision on the merits 72/2020 of 09 November

2020

File number: DOS-2018-02075

Subject: Complaint Against a hospital (processing of data relating to the membership

union)

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

Hijmans, chairman and Messrs. Yves Poullet and Christophe Boeraeve, 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 GDPR;

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

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;

made the following decision regarding:

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the plaintiff: Mr. X

the defendant: Hospital Y

Decision on the merits 72/2020 - 2/14

1. Facts and procedure

1. On May 6, 2018, the complainant sends an email to the Data Protection Authority (DPA)

requesting an opinion concerning data processing carried out by his employer, which he identifies

then as a hospital institution, located in the Walloon Region.

2. According to his email, the complainant is a union representative for union A in the institution
hospital in question. It seeks the opinion of the DPA on the direct debit by the employer, on
their salary from the union dues of the members of union B.

3. The complainant raises the question of the legality of such a practice with regard to the GDPR. He indicates
also that this debit would be done under vague conditions and not respectful of the will
workers, as well as the confidentiality of their data. He adds that the treatment of
union data would lead to discrimination between employees on the basis of membership
union. He wonders generally about the interest that an employer would have in collecting
data on the union membership of its employees.

4. After exchanges of letters, the complainant lodged a complaint with the DPA on August 28, 2020,
for the facts mentioned in the various exchanges of letters. The complainant's employer, which is
also the data controller, is identified as Hospital Y.

5. On September 12, 2018, the complaint was declared admissible by the President of the APD. admissibility
was confirmed to the complainant by letter dated October 4, 2018. During session no. 2 of October 23
2018, the Litigation Chamber decides to request an investigation from the Inspection Service. Requirement
inquiry was sent to the Inspection Department on October 29, 2018. The complainant was informed on
same day by mail.

6. The Inspection Service contacted the complainant by letter dated March 5, 2019. In this letter,
the Inspection Service asks if the complainant can communicate the contact details of the
data protection officer of the controller, at the highest level of the
Management of Hospital Y and the highest level of the human resources hierarchy. By one
series of questions, the Inspection Service also requests from the complainant all types of documents
able to substantiate the content of his complaint. A reminder email is sent to the complainant by the Service
inspection on June 4, 2019.

7. On June 12, the complainant replied to the Inspection Service by email. He explains that the Y hospital took

the decision to put an end to the system of taking union dues from affiliates' salaries

to union B. A first date of definitive interruption had been established as March 31, 2019, before

Decision on the merits 72/2020 - 3/14

to be postponed to June 30, 2019. The complainant also confirms the data that the Service

inspection asked him to please check.

8. On 19 June 2019, the Inspection Service sends a letter to the Data Protection Officer

hospital Y which he asks him to provide certain information within the month, including in particular

the purposes, the lawfulness of the processing, as well as the list of data processed and the documentation

relating to said processing. In a letter dated August 13, 2019, received by the APD on August 19, 2019, the

General Management of Hospital Y gives its answers to the questions of the Inspection Service.

9. The letter from the data controller begins with a historical summary of the processing which

was in effect at Hospital Y and which is set out in the paragraphs below.

10. The controller explains that the processing was implemented at a time when there was only one

only trade union delegation at hospital Y, namely trade union B. It had been agreed orally

that the affiliated workers who so wished could give a mandate to hospital Y so that it

which deducts union dues from their salary. An example of a mandate signed by a worker on

April 17, 2018 is attached to the letter. According to the data controller, the social inspection

had confirmed on several occasions that each worker could give a mandate of this type to his

employer.

11. During the 2008 social elections, a second trade union, trade union A, obtained

union representatives. They were offered to subscribe to the payroll deduction system, which

which they refused. According to the data controller, following the entry into force of the GDPR, the union

A has made it known that he considers this system to be illegal.

12. The management of hospital Y has requested an opinion from its data protection officer on this

question. The notice was provided on September 11, 2018. The notice is attached to the letter. The delegate y

recommends in particular the abandonment of the practice given that it does not appear useful to the objectives

of the institution.

13. Hospital Y took the decision to stop collecting union dues from June 30

2019. Attached to the letter are two excerpts from the minutes of Business Councils. The first dated

of January 10, 2019, indicates that "the problem of the deduction of contributions will be resolved within 3

month ". The second, dated April 4, 2019, indicates that "the direct debit system will be terminated at

from June 30, 2019.

14. In the second part of the letter, the data controller answers the questions of

the Inspector General. It specifies in particular that the basis of lawfulness of the data processing revealing

Decision on the merits 72/2020 - 4/14

the worker's union membership is the "individual and written mandate given by the worker to

Y Hospital.

15. Regarding the purpose of the processing, the controller indicates that it has never been done

another use of this data than that intended.

16. Hospital Y adds that the system was set up following a “historic oral agreement between a

union and management. There was no formal writing. He also explains that it was not about

not a system generalized by the employer but a facility granted by the latter at the request

specific to the worker.

17. The Inspection Service issued its investigation report on 27 August 2019. It noted in particular that the

purpose of the processing was to deduct union dues from the salary and that the processing was

based on consent. He also adds that the legitimacy of the purpose does not seem to be

in accordance with social law, but that according to the complainant (Exhibit 1) and the general management of the hospital

Y (Exhibit 21), the social inspection admits such a practice. In addition, the Inspection Service

raises the question of whether, in view of the manifest imbalance in the context of labor relations

between the data subject/employee and the controller/employer, the free nature

of the worker's consent can be questioned (recital 43 of the GDPR and opinion of the

work “Article 29” on data protection n°2/2017 of 8 June 2017 on the processing of

workplace data (WP249). The Inspection Service finally finds that it has been terminated

processing from June 30, 2019.

18. On September 20, 2019, the President of the Litigation Division decided, pursuant to Article 98 of

the LCA that the file can be examined on the merits. On the same date, the Litigation Chamber

sent the complaint and the documents to the defendant by registered letter and invited the parties to

make their case according to a set schedule.

19. By email sent on October 3, 2019, the data controller informed the Chamber

Litigation that he will not conclude in this case, considering that he has brought to the attention of

the Data Protection Authority all the elements in its possession.

20. The complainant did not send any conclusions to the Litigation Chamber.

2. Motivation

21. Based on the complaint transferred to it and the investigation report provided by the Service

inspection, the Litigation Chamber considers it established that hospital Y was responsible for

processing for the processing of data concerning the trade union membership of certain

workers, with the aim of deducting union dues from the wages of the persons concerned

(exhibits 1, 21 and 23).

22. The Chamber finds that several issues need to be addressed. First of all, given the

period during which the facts took place, the Chamber wishes to examine the question of the

applicable law and its jurisdiction (section 3.1 below). Next, the Chamber finds that the

legality of the disputed data processing must be analyzed from the perspective of its lawfulness (section 2.2 below).

below) and its purpose (section 2.3 below). Finally, she will address the question of the

penalty (section 2.4 below)

2.1

Applicable law and competence of the DPA

23. It appears from the documents in the file that the processing of trade union data for the purpose of

a payroll deduction of union dues for workers affiliated to union B exists at least

since 2008.

24. It also emerges, both from the statements of the complainant (Exhibit 17) and the Respondent (Exhibit

21), that the processing was definitively terminated on June 30, 2019. The Litigation Chamber

therefore retains that the data processing in question took place over a period from 2008

as of June 30, 2019, i.e. more than 10 years.

25. The law applicable to this data processing differs according to the period studied. Since its putting

in place until May 25, 2018, the processing was subject to the LPVP. The applicable legislation has changed

from the entry into force of the GDPR on May 25, 2018.

26. The Data Protection Authority, and hence the Litigation Chamber, were created by the

LCA, which entered into force on the same day as the GDPR, i.e. May 25, 2018. Therefore,

the Litigation Division does not consider itself competent to verify the legality of the processing for the

period prior to May 25, 2018. It will therefore analyze the processing of data for the period

from May 25, 2018 to June 30, 2019.

2.2

The lawfulness of the processing

27. The Litigation Chamber recalls first of all that the processing of data concerning

trade union membership are in principle prohibited (article 9.1 of the GDPR). The second paragraph of

However, the same article provides for a series of exceptions, including in particular the “consent

explicit [of the data subject] to the processing of such personal data for one or more

several specific purposes” 1.

28. Even if it is not asserted directly, the Litigation Chamber notes that the

data controller uses explicit consent as the lawful basis for processing

of data in question, since he declares that it is based on “an individual and written mandate

given by the worker at Hospital Y”. He adds that “it is not a generalized system by

the employer, but with a facility granted by the latter at the specific request of the worker" (Exhibit

No. 21, p. 2). The data controller provides a copy of the mandate, signed by a worker

(whose identification data have been removed) as of April 17, 2018.2

29. It is therefore necessary to examine whether the constituent elements of express consent are indeed

fulfilled on this occasion. A definition of "consent" is provided in Article 4.11 of the GDPR which

establishes that it must be "free, specific, informed and unambiguous". Article 9.2.a) adding by

other than for the processing of data related to trade union membership, the consent must

also be "explicit".

30. Concerning the free nature of the consent, it appears from the documents in the file (see point no.

27) that it was given by written mandate, as a facility given by the employer to the employee.

The parties, no more than the inspection, provide any element leading to the conclusion that the

consent would have been vitiated, or would have been given under duress.

31. The investigation report notes, however, that in view of the manifest imbalance in the framework of

labor relations, between the data subject who is employed and the controller who

is an employer, the free nature of the processing may be questioned. The Inspection Service is based

on recital 43 of the GDPR and on an opinion of the Article 29 Working Party on the processing of

workplace data3 to make this finding. The guidelines for the

1 Article 9.2.a) of the GDPR.

2 In the absence of any contrary specification from the data controller, the Litigation Division presumes that

mandate form has not been modified since then and that the same mandate form has continued to be used

after the entry into force of the GDPR.

3 "ARTICLE 29" Data Protection Working Party, "Opinion 2/2017 on the processing of data at the place of

work", adopted on 8 June 2017 (https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=610169)

consent4, which were in force at the time the processing in question took place5, refer to

there is also the risk of an imbalance of power between the controller and the data subject.

concerned that could vitiate the consent, particularly in the field of the relations of the work, which is the case in this case. The guidelines specify, however, that as exceptionally, the worker's consent may be considered validly given, when the fact that the worker gives his consent or not cannot have any consequences negative for his person.

32. In other words, exceptionally, a worker can validly consent to the processing data from his employer, when the latter derives no benefit from the processing. As developed below (see points 41-44 and 56), the Litigation Division does not have of any element allowing it to conclude that the disputed processing would be carried out for a purpose other than the facility given to the worker. The Litigation Chamber therefore considers that the data controller derives no benefit from the consent of the worker, and that the imbalance of power between the parties is therefore unlikely to vitiate consent. The worker can therefore be considered to have freely given its consent.

33. On the specific nature of the consent, the Litigation Chamber considers that it is fulfilled by the individual mandate that the worker is asked to fulfill (a copy of which is provided in Exhibit 21, Appendix 1). The mandate only seeks the consent of the worker for a single data processing, which is that related to the collection of union dues directly on salary.

34. With regard to the informed nature of the consent obtained, the guidelines on consent adopted in 2018 identify several criteria that allow it to be assessed. For a person concerned gives consent qualified as informed, it must in particular have received the information following:

- “The identity of the data controller,
The purpose of each of the processing operations for which consent is sought,
The data that will be collected and used,
The existence of the right to withdraw consent,

[…]"7

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4 "ARTICLE 29" Data Protection Working Party, "Guidelines on consent within the meaning of

Regulation 2016/679", adopted on April 10, 2018 (https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=623051)

5 These guidelines have since been superseded by a new EDPB document adopted on 4 May 2020

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

6 "ARTICLE 29" Data Protection Working Party, "Guidelines on consent within the meaning of

regulation 2016/679", op. cit., , p. 8 .

7 Ibid, p. 15.

35. The Litigation Division notes that the first three elements appear in a

relatively clear on the copy of the mandate provided (Exhibit 21, Appendix 1). She notes, however, that

no mention is made of the fact that the person concerned (the worker) can withdraw his

consent at any time in order to end the processing, while the guidelines consider

that it is a required element on the basis of article 7.3 of the GDPR. The Litigation Chamber considers

therefore, consent cannot be considered to have been given in an informed manner.

36. Due to the elements set out above (and particularly in point 35), the Chamber

Litigation concludes that Article 9.2.a) juncto 7.3 of the GDPR has not been complied with, in the sense that the

consent cannot be qualified as informed.

37. As to the express nature of the consent, required by Article 9.2.a) of the GDPR, the Chambre

Litigation considers that this is fulfilled by the written mandate signed by the person concerned and which

explicitly and specifically specifies the data processing that will be carried out.

38. In these communications, the Complainant repeatedly refers to the fact that the

the consent of the persons concerned would not be systematically sought, and that the processing

would therefore sometimes take place without a basis of lawfulness (Exhibit 1). However, the Litigation Chamber notes

that the complainant does not provide any document to demonstrate these elements and that the

data controller specifies that the worker's consent is systematically requested

(see point 43 above). The Inspection Service also did not make any findings

particular in this regard, the Litigation Division does not have any information allowing it to

consider that the workers' consent would not have been systematically required.

2.3

The purpose of the processing

39. Article 5.1.b) of the GDPR establishes that personal data must be collected

“for specified, explicit and legitimate purposes, and not to be further processed by a

manner incompatible with those purposes.

40. For the interpretation of this principle, the Litigation Chamber may rely on the opinion

developed at the time by the Article 29 Working Party, which details what is meant by

an explicit purpose. It is important to note that the main characteristics of the principle of

8 “ARTICLE 29” working group on data protection, “Opinion 03/2013 on purpose limitation”, adopted on 2

April 2013 (https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf)

purpose limitation have remained identical between Directive 95/469 and the GDPR. The lines

guidelines developed in 2013 therefore remain valid with regard to the interpretation of the three

essential characteristics of the purpose principle.

41. As to the determined nature of the purpose, the Litigation Chamber notes that in its

request for information, the complainant clearly refers to a mechanism for “collecting

the union B union dues directly on the remuneration” (Exhibit 1).

42. It also appears from the letter from Hospital Y (Exhibit 21) that “workers affiliated to the trade union

B who so wished, could give a mandate to hospital Y to deduct from their salary

the amount of union dues. This is confirmed by the sample mandate provided by the

data controller, which includes the following sentence: “I, the undersigned […] request

expressly to the management of hospital Y that my union dues to union B be deducted from

my remuneration, from…” (Exhibit 21, Appendix 1).

43. The note from the Data Protection Officer also mentions this purpose (Exhibit 21,

appendix 2) and the investigation report of the Inspection Service comes to the same conclusion (Exhibit 23

).

44. On the basis of these documents, the Litigation Division considers that the purpose of the processing was indeed

determined, insofar as it was a question of allowing the direct debit of the union dues

on salary.

45. As to the explicit nature of the purpose, the opinion of the Article 29 Working Party explains

what follows :

"The purposes of the collection must not only be specified in the minds of the people

responsible for data collection. They must also be explained. […]

The ultimate objective of this requirement is to ensure that the objectives are specified unambiguously or

vagueness as to their meaning or intent. The meaning should be clear and should not leave

no doubt or difficulty in understanding. […]

The obligation to specify the objectives "explicitly" contributes to transparency and predictability.

It makes it possible to determine unambiguously the limits of the use that data controllers

may make personal data collected, with a view to protecting individuals

9 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons

with regard to the processing of personal data and on the free movement of such data

concerned. It helps all those who process data on behalf of the data controller, as well as

that data subjects, data protection authorities and other stakeholders,

to have a common understanding of how the data can be used. That

reduces the risk that the expectations of the people concerned differ from those of the

controller”10.

46. The opinion of the working group therefore insists on the need for an explanation of the purpose that

allows everyone to understand the purpose of the data processing and to avoid the

misunderstandings. Regarding the way in which this purpose should be explained, the opinion underlines the

following elements:

"In terms of responsibility, the specification of the objective in writing and the production of documents

adequate will help demonstrate that the controller has complied with the requirement of Article

6(1)(b)11. This would also allow data subjects to exercise their

rights more effectively - for example, this would provide evidence of the original purpose and

would allow a comparison with the subsequent processing purposes. »12

47. According to the data controller, the data processing in question was set up on

basis “of a historic oral agreement between a union and management. There has been no formal writing.

(Exhibit 21, p. 2). The purpose of the processing appears however on the individual written mandate given by

the worker, as indicated above (see point 42).

48. The fact that the purpose of the processing is only described on the individual mandate of the

worker concerned raises questions on several counts. Indeed, this means first of all that the finality

is only made explicit when consent is requested from the worker and vis-à-vis the

this worker. It is therefore not made explicit for other workers, for example. This

absence of documentation formalizing the mechanism contributes to maintaining a certain ambiguity.

49. The Litigation Chamber recalls once again (see point n°27) that the processing of personal data

regarding trade union membership is in principle prohibited. Article 24.1 of the GDPR also specifies

than :

10 “ARTICLE 29” Working Party on Data Protection, “Opinion 03/2013 on purpose limitation”, op. cit., p.

17. Free translation.

11 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of persons

with regard to the processing of personal data and on the free movement of such data.

12 “ARTICLE 29” Data Protection Working Party, “Opinion 03/2013 on purpose limitation”, op. cit., p.

18. Free translation.

“Taking into account the nature, scope, context and purposes of the processing as well as

as risks, the degree of likelihood and severity of which vary, for the rights and freedoms

natural persons, the controller implements technical measures and

appropriate organizational arrangements to ensure and be able to demonstrate that the processing is

carried out in accordance with these regulations. »13

50. The Litigation Chamber considers that the processing of union data by the employer

presents an obvious risk for the workers concerned, since it provides the employer with data

of a sensitive nature that could be misused to put pressure on workers or

discriminate in particular during promotion procedures. It is therefore appropriate to put in

place special precautions when processing this type of data. In this

regard, the Litigation Chamber considers that the absence of any written agreement and the fact that the

mechanism was decided on the basis of a simple oral agreement constitutes gross negligence.

51. The Chamber also notes that this absence of a written document contributes to maintaining a vagueness

as to the intentions of the data controller and casts some doubt on the part of

workers not concerned by the processing, as revealed by the request for information and the

plaintiff's request. This lack of documentation also creates some uncertainty as to

the limits and methods of processing. Indeed, as pointed out in the complaint, questions arise

ask, for example, whether the amounts of unpaid union B dues can cause

the subject of a reminder from the data controller to the workers (Exhibit 1).

52. Only after obtaining information from the complainant and requesting an investigation from the Service

inspection (who questioned the data controller) that the Litigation Chamber was able to

determine the purpose of the processing (see points 41-44). In other words, only after a

in-depth analysis by the Litigation Chamber that the purpose has been clarified. He is,

for the Litigation Division, it is undeniable that a purpose which requires this type of examination to be

clarified, cannot be considered explicit.

53. As to the legitimacy of the purpose, which is questioned on several occasions by the complainant

(exhibits 1, 3, 6), the investigation report notes that this "is nevertheless problematic: a

such a systematic deduction does not appear to be able to be practiced on the salary given the provision

imperative of article 23 of the law of April 12, 1965 concerning the protection of the remuneration of

workers which prohibits in principle any deduction from remuneration, even in the presence of an agreement

prior. The report states, however, that "it appears from the complainant's statements (exhibit 1) and

13 Emphasis added by the Litigation Chamber.

from the general management of hospital Y (Exhibit 21) that the social inspection admits such

convenient ".

54. Under Article 4, § 1 of the LCA, “the Data Protection Authority is responsible for the

control of compliance with the fundamental principles of the protection of personal data,

within the framework of this law and the laws containing provisions relating to the protection of the

processing of personal data”. The Chamber therefore considers itself incompetent

to determine the legality of a practice (in this case, a direct debit by the employer of a

contribution on the salary of employees) in relation to social law. It notes, like the

Inspection service, which both the complainant and the controller declare that the

practice would have been accepted or at least tolerated by the social inspectorate. Accordingly, the Chamber

cannot find a violation of Article 5.1.b as regards the legitimacy of the purpose of the processing.

55. On the issue of further processing of trade union data for purposes other than

than those provided for, treatment alleged by the complainant (see point 3) and consisting in particular of

the granting of benefits on the basis of trade union membership, the Litigation Chamber finds that no

evidence is provided to support these claims. Nor does the investigation report

particular finding in this respect, and the data controller indicates that the data is not

processed for no other purpose than salary deduction (Exhibit 21, p. 2). Therefore, the

Chamber considers this element to be unfounded.

2.4

Punishment

56. Based on the above analysis, the Litigation Chamber considers that the data controller

has breached the following articles of the GDPR:

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Article 9.2.a) juncto 7.3 in the sense that the consent was not informed (see point 36);

Article 5.1., b) juncto 24.1 of the GDPR in the sense that the purpose was not explicit (see point

#52).

57. The Litigation Chamber notes, however, that according to the two parties and the investigation report,

the processing was definitively terminated on June 30, 2019, in particular following a notice

in this sense of the data protection officer of the controller.

58. The Litigation Chamber considers that even if these violations were of a structural nature,

since they concerned the entire mechanism and not a few isolated cases, they do not proceed

probably not out of a deliberate intention to circumvent the protection legislation

personal data.

59. It is also important to note that the Complainant was never concerned with the treatment of

data in question, since he is part of the union that refused to participate in the mechanism. The

Litigation Chamber further considers that it has not been demonstrated that he suffered any

prejudice.

60. The fact that the controller has requested an opinion from his data protection officer

data and that it has decided to implement this opinion demonstrates an obvious taking seriously of the

obligations arising from the GDPR. In addition, the definitive interruption of the treatment exempts its

responsible for further compliance.

61. On the basis of these elements, the Chamber considers that it is not necessary to pronounce one of the

measures provided for in Article 100, §1 of the LCA.

2.5

Transparency

62. Given the importance of transparency with regard to the decision-making process and

the decisions of the Litigation Chamber, this decision will be published on the Authority's website

data protection by deleting the direct identification data of the parties

and the persons cited, whether natural or legal.

Decision on the merits 72/2020 - 14/14

FOR THESE REASONS,

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

- that there has been a violation of Articles 5.1., b) juncto 24.1 and 9.2.a) juncto 7.3 of the GDPR;

- that it is not necessary to pronounce one of the measures provided for in Article 100, §1 of the

ACL.

Under Article 108, § 1 LCA, this decision may be appealed within 30

days, from the notification, to the Court of Markets, with the Data Protection Authority

as a defendant.

Hielke Hijmans

President of the Litigation Chamber