

Litigation Chamber

Decision on the merits 24/2020 of 14 May 2020

File number: DOS-2019-02902

Subject: Lack of transparency in a company's privacy statement

insurance

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

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

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

"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;

Decision on the merits 24/20201717

made the following decision regarding:

-

-

X, hereinafter "the plaintiff";

Y, hereinafter "the defendant".

a) Facts and procedure

1. On June 14, 2019, the complainant filed a complaint with the Data Protection Authority

against the defendant.

2. The subject of the complaint relates to the use of health data obtained from the person concerned by the insurance company within the framework of hospitalization insurance for other purposes, without the express consent of the insured person concerned. The complainant asserts that the processing of his health data for the fulfillment of obligations arising from the hospitalization insurance concluded with the defendant does not pose any problem, but that it is different when these same health data are processed for the purposes listed in point 4.3. of the respondent's privacy statement and for the transfer to third parties as mentioned in point 9 of this same declaration of confidentiality (this is point 6, the reference to point 9 is a clerical error). He requests that, specifically for these purposes, as well as for the transfer, the defendant gives the data subject the choice of whether or not to consent to the processing of their personal data. health. Finally, the complainant expresses his wish to receive an impact assessment from the respondent relating to data protection, since it concerns the processing of personal data involving a high risk for the persons concerned.

3. On June 26, 2019, the complaint is declared admissible on the basis of articles 58 and 60 of the LCA, the complainant is informed of this under Article 61 of the LCA and the complaint is forwarded to the Litigation Division under Article 62, § 1 of the LCA.

4. On July 23, 2019, the Litigation Division decides, pursuant to Article 95, § 1, 1° and article 98 of the LCA, that the case can be dealt with on the merits.

5. On July 24, 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. In accordance in article 99 of the LCA, the parties concerned were also informed of the deadlines for report their findings. The deadline for receiving the conclusions in reply has thus was set for October 7, 2019 for the complainant and November 7, 2019 for the respondent. Decision on the merits 24/20201717

6. On July 29, 2019, the defendant notified the Litigation Chamber that he had taken cognizance

of the complaint, he requests a copy of the file (art. 95, § 2, 3° of the LCA) and he agrees to receive any communication relating to the case by electronic means (art. 98, 1° of the LCA).

7. On July 30, 2019, a copy of the file is sent to the defendant.

8. On August 2, 2019, the Litigation Division received a letter in which the defendant expressed his wish to be heard by the Litigation Chamber (art. 98, 2° of the LCA).

9. On September 6, 2019, the Litigation Chamber receives the submissions in response from the respondent. In these submissions, the Respondent asserts that the treatment of categories

particulars of personal data, in this case health data, by a

health care insurance organization is carried out in a lawful manner. The treatment of these

special categories of personal data (Art. 9 GDPR) is in principle

forbidden. For this processing, the defendant invokes the exception ground of Article 9,

paragraph 2, point a) of the GDPR. The legal basis invoked here is consent.

explicitly from the data subject. Second, the defendant argues that a

separate consent is not required for each personal data transfer

staff. Third, the Respondent considers that there is no question of requesting the

consent for the processing of data other than health data. Finally, the

respondent submits that a data protection impact assessment is not

necessary in this case, since these are already existing processing operations and not new ones.

treatments started after May 25, 2018.

10. The Complainant did not make use of the right to lodge submissions in reply.

11. The Respondent does not introduce new conclusions and only provides, on November 7 2019, exhibits to support the submissions in response submitted on September 6, 2019.

12. On January 9, 2020, the parties are informed that the hearing will take place on January 28, 2020.

13. On January 28, 2020, the defendant was heard by the Litigation Chamber. Although duly summoned, the complainant did not appear. The defendant responds inter alia to the questions

of the Litigation Chamber on the legal basis for the processing of data to

personal character that are not health data. After that, the debates are closed.□

14. On January 29, 2020, the minutes of the hearing are submitted to the parties.□

Decision on the merits 24/20201717□

15. On January 31, 2020, as requested during the hearing, the Respondent transmits□

the annual turnover for the last three financial years. For the years 2016-2018, this figure□

turnover always amounts to between 500 and 600 million euros.□

16. On February 6, 2020, the Litigation Chamber received from the Respondent some remarks relating□

in the minutes which it decides to include in its deliberation.□

17. On March 25, 2020, the Litigation Division informed the defendant of its intention to□

proceed with 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 effectively□

inflicted.□

18. On May 8, 2020, the Litigation Chamber received the defendant's reaction concerning the intention□

to impose an administrative fine and the amount thereof.□

19. Respondent submits that the alleged offenses as contained in the intent of□

the Litigation Chamber are completely new and that he was unable to defend himself in this regard.□

The Litigation Division notes, however, that it is undeniably apparent from the documents of the□

file that the defendant was able to fully exercise his rights of defence.□

20. The defendant declares that he does not agree with the imposition of a fine or with the amount□

consideration of the fine. However, he does not put forward any (new) argument to support this□

position. Therefore, in the eyes of the Litigation Chamber, the defendant's reaction does not give□

not give rise to an adaptation of the intention to impose an administrative fine, nor to a□

modification of the amount of the fine as envisaged.□

b) Legal basis□

- 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; ☐

Decision on the merits 24/20201717 ☐

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

treatment is submitted; ☐

[...] ☐

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. ☐

• ☐

Transparent Information ☐

Article 5.1 GDPR: ☐

Personal data must be: ☐

a) processed in a lawful, fair and transparent manner with regard to the data subject ("lawfulness, ☐

loyalty, transparency"); ☐

[...] ☐

Article 5.2 GDPR: ☐

2. The controller is responsible for compliance with paragraph 1 and is able to ☐

demonstrate that it is respected ("responsibility") ☐

Article 12.1 of the GDPR.□

1. The controller shall take appropriate measures to provide any information referred to□  
in Articles 13 and 14 as well as to carry out any communication under Articles 15 to 22 and□  
of article 34 with regard to the treatment to the data subject in a concise manner,□  
transparent, understandable and easily accessible, in clear and simple terms, in particular□  
for any information intended specifically for a child. Information is provided in writing□  
or by other means including, where appropriate, electronically. When the person□  
concerned so requests, the information may be provided orally, provided that□  
the identity of the data subject is demonstrated by other means.□

Decision on the merits 24/20201717□

Article 13.1 and 2. of the GDPR□

1. When personal data relating to a data subject is collected□  
with this person, the data controller provides him, at the time when the data in question□  
question are obtained, all of the following information:□

[...]□

c) the processing purposes for which the personal data are intended as well as□  
the legal basis for the processing;□

d) where the processing is based on Article 6(1)(f), the legitimate interests□  
sued by the controller or a third party;□

[...]□

2. In addition to the information referred to in paragraph 1, the controller shall provide the data subject□  
data subject, at the time the personal data is obtained, the information□  
following additional information that is necessary to ensure fair and transparent treatment□  
:□

[...]□

b) the existence of the right to request from the controller access to personal data□

personal information, rectification or erasure thereof, or limitation of processing relating to the

data subject, or the right to object to processing and the right to data portability;

[...]

e) Motivation

a) Purposes in point 4.3. of the privacy statement - Basis of the

processing (Art. 6.1 GDPR)

21. The Litigation Chamber finds that the problem presented by the complainant concerns

point 4.3 of the defendant's privacy statement, which mentions that data

of a personal nature are processed on the basis of the legitimate interest of the company

insurance for the following purposes:

- Performing computerized tests;
- Service quality control;
- Staff training;
- Monitoring and reporting;
- Prevention of abuse and fraud;
- The retention of video surveillance recordings during the legal period
- Establishment of coded data statistics, including big data;

Decision on the merits 24/20201717

• Dissemination of information, whatever the means of communication, on the actions

commercial, products and services of the insurance company and the group

to which she belongs. [Editor's note: The passages in italics have been freely translated by the

Secretariat of the Authority, in the absence of an official translation]

22. The complainant states in this regard that the client must have the choice to accept the treatment of

sensitive data concerning him and which he has provided to the defendant in the context of the enforcement

obligations relating to his hospitalization insurance, for the purposes listed in point

4.3. The Complainant asserts that the Respondent does not offer him this possibility of choice.

23. The defendant declares in this respect that the processing operations listed in point 4.3. of the statement of confidentiality do not require any consent, given that for the purposes which are mentioned therein, the defendant invokes the legitimate interest as the basis for the processing, in accordance with Article 6.1.f) of the GDPR. The Respondent asserts that it can rely on this basis legal, since only "ordinary" personal data is processed for these purposes and that no consent of the person concerned is required as in the case of health data as referred to in Article 9 of the GDPR.

24. The defendant argues that for the purposes mentioned in point 4.3 of the declaration of confidentiality, personal data is certainly processed, but not data health.

25. The Litigation Chamber notes that for the processing of personal data ☐

other than health data, the lawfulness of the processing must be analyzed in the light of ☐

Article 6.1 of the GDPR, which provides for six ancillary processing bases, including the legitimate interest ☐

(Art. 6.1.f) of the GDPR), which the defendant invokes in this case. ☐

26. In this respect, the Litigation Chamber nevertheless draws attention to the fact that when a person responsible for the processing relies on the legitimate interest to qualify a processing as lawful, the case law of the European Court of Justice provides "three cumulative conditions for that a processing of personal data is lawful, namely, firstly, the pursuit of a legitimate interest by the controller or by the third party or third parties to whom the data is communicated, secondly, the necessity of the data processing to the personal character for the achievement of the legitimate interest pursued and, thirdly, the

Decision on the merits 24/20201717

provided that the fundamental rights and freedoms of the person concerned by the data protection do not prevail."<sup>1</sup>

27. In this context, it is necessary to balance the interests or freedoms and rights of the data subject (Art. 6.1.f) of the GDPR) taking into account, during this



weighting, of the recitals of the GDPR related to Article 6.1.f) of the GDPR, in particular the recital 47..2

28. Thus, the Litigation Division considers that for each of the purposes mentioned in point

4.3. of the privacy statement, it should be checked to what extent the defendant

may invoke legitimate interest as the legal basis on which the processing is based.

Recital 47 of the GDPR emphasizes the need for careful assessment in order to

determine whether there is a legitimate interest and whether a data subject can reasonably

expect, at the time and in the context of the collection of personal data, to

that they are processed for a given purpose.

29. On the basis of the elements available to it, the Litigation Chamber considers that the defendant

may base the processing of data on the legitimate interest for the purpose "the prevention of

abuse and fraud", as mentioned in part 5 of point 4.3. of the declaration of

confidentiality. It is in fact established that the processing of personal data for

this purpose is necessary for the purposes of the legitimate interest of the defendant and that this interest

prevails over the complainant's interest in the protection of his personal data. In this

In this regard, the Litigation Chamber refers to recital 47 of the GDPR which states that the

processing of personal data strictly necessary for prevention purposes

fraud constitutes a legitimate interest of the data controller concerned.

1 Judgment of 4 May 2017, Rīgas satiksme, C-13/16, EU:C:2017:336, paragraph 28; judgment of 11 December 2019, C-708/19

Proprietari block M5A-ScaraA, ECLI:EU:C:2019:1064, point 40. These judgments were delivered on the basis of Article 7.1.f) of

Directive 95/46/EC, currently replaced by Article 6.1.f) of the GDPR.

2 (47) The legitimate interests of a controller, including those of a controller to whom the data

of a personal nature may be communicated, or of a third party may constitute a legal basis for the processing, to

unless the interests or fundamental rights and freedoms of the data subject prevail, taking into account the expectations

reasonable grounds of data subjects based on their relationship with the controller. Such legitimate interest

could, for example, exist where there is a relevant and appropriate relationship between the data subject and the controller

processing in situations such as where the data subject is a customer of the controller or is at his service. In any case, the existence of a legitimate interest should be carefully assessed, in particular in order to determine whether a data subject can reasonably expect, at the time and in the context of the collection of the personal data, that they are processed for a given purpose. Interests and rights fundamental rights of the data subject could, in particular, prevail over the interest of the controller when personal data is processed in circumstances where data subjects do not expect reasonably not to further processing. Since it is for the legislator to provide by law the legal basis for the processing of personal data by public authorities, this legal basis should not apply to processing carried out by public authorities in the performance of their duties. Data processing of a personal character strictly necessary for the purposes of fraud prevention also constitutes a legitimate interest of the data controller concerned. The processing of personal data for commercial prospecting purposes can be considered to be carried out to meet a legitimate interest.

Decision on the merits 24/20201717

30. The Litigation Chamber adds to this that despite the Respondent's assertion that no health data is only processed for the purposes listed in point 4.3. of the declaration of confidentiality, the purpose of which is "the prevention of abuse and fraud", it nevertheless emerges clearly from the consent form that express consent is requested for the processing of health data for the purposes, among others, of "the prevention, detection and search for insurance fraud". The Litigation Chamber notes here that there is an inconsistency between what the respondent asserts in his pleadings and what the form of consent stipulates, and returns to this point during the analysis of the obligation of transparency which is incumbent on the defendant.

31. The purpose listed in section 8 of point 4.3. of the privacy statement "The dissemination of information, whatever the means of communication, on the actions commercial, products and services of the insurance company and the group to which it belongs", which must be qualified as prospecting, is also possible on the basis of

legitimate interest<sup>3</sup>, but should be read in conjunction with Article 21.2 of the GDPR which provides that the data subject has the right to object at any time to the processing of the data of a personal nature concerning him for such prospecting purposes, including profiling insofar as it is related to such prospecting. The Litigation Chamber will return also on this point when analyzing the obligation of transparency on the part of the respondent.

32. For the other purposes listed in point 4.3. of the privacy statement, the Chamber Litigation considers that there is no question of a legitimate interest on the part of the defendant which would prevail over the interests and the fundamental rights of the plaintiff to the protection of his personal data.

33. Recital 47 of the GDPR, which provides that a legitimate interest may be present where there is a relevant and appropriate relationship between the data subject and the data controller processing in situations such as where the data subject is a customer, does not imply, according to the Litigation Division, that in the context of this relationship where the plaintiff acts as a client of the defendant, data processing is possible for any purpose. The defendant does not demonstrate in any way what would consist its legitimate interest and also fails to demonstrate to what extent its interest would prevail over the interests and fundamental rights of the complainant, although he is bound to do so by under its liability (Art. 5.2 GDPR).

<sup>3</sup> Recital 47 GDPR, last sentence.

Decision on the merits 24/20201717

34. The Litigation Chamber therefore considers that the violation of Article 6.1 of the GDPR is proven, given that without any demonstrated legitimate interest, the processing of data for purposes mentioned in sections 1, 2, 3, 4, 6 and 7 of point 4.3. of the declaration of confidentiality must be based on the complainant's consent, failing any other legal basis potentially applicable to Article 6.1 of the GDPR. The diversity of

purposes listed in point 4.3. of the privacy statement brings the Chamber

Litigation to conclude that the possibility must be offered to the plaintiff, and by extension to

any data subject who uses the service offered by the defendant, whether or not to consent

to the processing of his personal data for each of these purposes

distinctly. The Litigation Chamber refers in this respect to the Guidelines on the

consent within the meaning of Regulation 2016/6794, which state the following: A service may

involve multiple processing operations for different purposes. In such cases, the

data subjects should be free to choose which purposes they accept, rather

than having to consent to a set of processing purposes. Under the GDPR, many

Consents may be required before a service can be provided in a case

given.

b) Purposes in point 6 of the privacy statement - Basis of processing

(Art. 6.1 GDPR)

35. In addition to point 4.3. of the privacy statement, the complainant states that a problem arises

also arises with regard to point 6 of this privacy statement, which deals

the transfer of personal data to third parties, because there too, he is not offered

the choice of whether or not to consent to the transfer of their personal data to third parties. the

Complainant asserts that transfers to third parties are not permitted without consent, except

if there is a legal obligation to do so.

36. The Respondent argues that it is not only relying on consent as a legal ground

for the transfer of personal data to third parties, but also, depending on the case,

4 Article 29 Data Protection Working Party, Guidelines on consent under the Regulation

2016/679, p. 11:

Recital 43 clarifies that consent is presumed not to have been freely given if the process/procedure

obtaining consent does not allow data subjects to give separate consent to different

personal data processing operations (e.g. only for certain processing operations and

not for others) although it is appropriate in the present case. Recital 32 states that "The consent given should apply to all processing activities for the same purpose(s). When the processing has more than one purpose, consent should be given for all of them".

If the data controller has grouped together several processing purposes and has not sought to obtain consent separate for each purpose, freedom is limited. This need to detail the consent is closely linked to the need the consent is specific, as described in section 3.2 below. In order to comply with the conditions for obtaining of a valid consent when the data processing is carried out for different purposes, it is necessary to detail the consent, i.e. to differentiate its different purposes and to obtain consent for each of them.

Decision on the merits 24/20201717

the execution of the contract, the legitimate interest and the legal obligation and specifies systematically for each of the categories of third parties mentioned in point 6 of the privacy statement on legal basis on which the transfer is based.

37. Respondent makes it clear that insofar as this is a transfer of data from health, the explicit consent of the data subject is required. This is only the case for the transfer to "insurance intermediaries, for data relating to health, compensation statements and in the copy of the insurance contract with any exclusions and/or additional bonuses, if the person concerned has previously given their explicit and informed consent" (point 6, second part of the declaration of confidentiality). For the other transfers mentioned in point 6 of the declaration of confidentiality, the defendant asserts that these are other personal data that health data, so that for these the consent of the person concerned is not required.

38. The Litigation Chamber observes that health data is only processed in a only case and that the defendant obtains for this purpose the consent for the transfer mentioned in point 6, second section, so that no problem arises in this respect and that the defendant acts in accordance with Article 9.2.a) of the GDPR.

39. The defendant invokes the performance of the contract (Art. 6.1.b) of the GDPR) as a legal basis

for the transfer to the following third parties: "Mutualities, to allow reimbursements;

One or more insurance companies in the event of co-insurance, assistance and/or

recovery of costs in the event of liability of a third party when the damage occurs

; banking institutions; Postal, transport and delivery companies for

better send our mail" (6, third, fourth, eighth and ninth sections of the

Confidentiality declaration). The Litigation Chamber considers that these transfers are based

on a valid legal basis.

40. The same applies to transfers to third parties pursuant to a legal obligation (Art.

6.1.c) of the GDPR), namely transfers: "to the insurance mediator in the event of a dispute; to

tax and social security authorities, due to the legal obligations of the health care insurer

health ; to the public surveillance and control authorities, because of the obligations

statutes of the insurance company" (point 6, seventh, tenth, eleventh and twelfth

sections of the privacy statement).

41. For the transfer to "insurance intermediaries, for statistical purposes, of coded data

which they will explain and produce at the request of the data subject" (point 6, first

Decision on the merits 24/20201717

section of the privacy statement), the respondent argues that this would be

purely statistical information that does not contain personal data. The

The Litigation Chamber does not have any document attesting to the contrary.

42. The Litigation Division notes, however, that both for the transfer to "W companies

to which the insurance company belongs, for monitoring and reporting" and for the

transfer to "subcontractors in the European Union or outside, responsible for the activities of

treatment defined by the insurance company", the defendant invokes his legitimate interest

as the legal basis for the processing.

43. However, the defendant does not demonstrate in any way what his legitimate interest would consist of

and also fails to demonstrate to what extent its interest would prevail over the interests

and the fundamental rights of the plaintiff, although he is required to do so by virtue of his responsibility

(Art. 5.2 and 24 GDPR). The Litigation Chamber also once again draws attention to

this regard on the requirements for the use of the basis of processing "interest

legitimate", which derive from the above-mentioned case law of the European Court of Justice.<sup>5</sup>

44. The Litigation Chamber therefore considers that also with regard to the transfer

of personal data to third parties, the violation of Article 6.1 of the GDPR

is proven, since in the absence of any demonstrated legitimate interest, the processing of personal data

for transfers to third parties mentioned in sections 5 and 6 listed in point 6 of the

privacy statement must be based on the consent of the complainant, failing any

other potentially applicable legal basis in Article 6.1 of the GDPR.

c) Transparent information (art. 5.1.a), art. 12.1 and art. 13.1 and 13.2 GDPR)

Item 4.3. of the privacy statement

-

45. Under the GDPR, the controller is required to inform the data subject

in a concise, transparent, comprehensible and easily accessible manner, in terms

clear and simple" (art. 5.1.a), art. 12.1 and art. 13.1 of the GDPR).

notes that with regard to points 4.3. and 6 of the privacy statement, the

defendant fails to fulfill this obligation.

<sup>5</sup> See footnote 1, above.

Decision on the merits 24/20201717

46. First of all, the defendant fails to draw a clear distinction between the processing of data

on the one hand and the processing of other "ordinary" personal data

on the other hand, for each of the purposes of point 4.3. of the declaration of

confidentiality only for each of the transfers mentioned in point 6 of the declaration of

confidentiality. Such a distinction is nevertheless of fundamental importance for

determine the legal basis on which the processing can be based for a purpose□

determined or a transfer to a third party (Art. 13.1.c) of the GDPR).□

47. The defendant stipulates in point 4 of the privacy statement: "Data of a personal nature□

personal may be processed for the following purposes:" Health data is□

however also personal data, so that it can indeed be deduced from this,□

as the Complainant asserts, that Section 4.3. therefore concerns health data. the□

consent is indeed requested for the processing of health data and the defendant□

then invokes "legitimate interest" in point 4.3. of the privacy statement in order to□

process "personal data" for the purposes mentioned therein. In the□

section 4.3., the respondent makes no distinction between personal data□

"ordinary" and health data.□

48. The defendant further creates confusion by claiming that it does not process health data for□

the purpose referred to in section 4.3. "the prevention of abuse and fraud", while the□

consent form nevertheless mentions that explicit consent is□

requested to process health data for the purposes in particular of "the prevention, detection□

and investigation of insurance fraud".□

49. Furthermore, the privacy statement only mentions that for the purposes□

mentioned in point 4.3., personal data is processed on the basis of□

the legitimate interest of the defendant, without demonstrating what precisely this interest would consist of□

legitimate, whereas Article 13.1.d) of the GDPR does require that the data controller□

processing informs the data subject about his or her legitimate interests, if the processing□

is based on Article 6(1)(f).□

50. The Litigation Chamber also refers to the Guidelines on transparency in the□

meaning of Regulation (EU) 2016/679, which emphasize that the specific interest in question must□

be determined in the interest of the data subject.□

6 Guidelines on transparency within the meaning of Regulation (EU) 2016/679 of the Article 29 Working Party on the protection□



Data, Approved November 29, 2017, last reviewed and approved April 11, 2018, p. 43.□

Decision on the merits 24/20201717□

51. As a matter of good practice, the controller may also, prior to the collection of□

personal data of the data subject, provide the data subject with□

information on the weighting that should be done in order to be able to use Article 6,□

paragraph 1(f) as the legal basis for the processing. To avoid drowning□

information to the person concerned, this information may be included in□

opinions/statements on the protection of privacy<sup>7</sup> at different levels. Information□

provided to data subjects must demonstrate that they may receive□

weighting information on request. This is an essential aspect for a□

effective transparency when data subjects have doubts about the fairness of the□

weighting carried out or wish to lodge a complaint with a supervisory authority.□

52. The Litigation Division further notes that the confidentiality statement does not mention□

not the possibility for the data subject to exercise his right of opposition. That constitutes□

a breach of Article 12.1 of the GDPR which provides that the controller must□

take appropriate measures to inform the data subject, in particular of his□

right of opposition guaranteed in article 21.2 of the GDPR.□

53. For the purpose mentioned in section 8 of point 4.3. of the privacy statement "The□

dissemination of information, whatever the means of communication, on the actions□

commercial, products and services of the insurance company and the group to which□

it belongs", which must be qualified as prospecting, article 21.2 of the GDPR prescribes that the□

data subject has the right to object at any time to the processing of personal data.□

personal character concerning him for such prospecting purposes, including profiling in□

insofar as it is linked to such prospecting. It does not appear from any document that the plaintiff□

been informed of his right to object to the processing of his personal data to□

prospecting purposes. This constitutes a violation of Article 13.2.b) of the GDPR.□

-□

Point 6 of the privacy statement□

54. Point 6 of the privacy statement also does not always mention the□

legal basis for the transfer to each of the different categories of third parties. As□

legal basis, only consent is mentioned (Art. 6.1.a) GDPR) in point□

6, second section; reference is made to the legal obligations of the defendant in point 6, tenth and□

eleventh sections; we refer to the legal obligation to which the data subject is□

subject, where applicable, for the payment of international tax (Art. 6.1.c) of the GDPR) to the□

point 6, twelfth section.□

7 See paragraph 35 of the Guidelines referred to in footnote 6.□

Decision on the merits 24/20201717□

55. For other cases of transfers to third parties, point 6 of the privacy statement does not□

mentions no legal basis.□

56. On the other hand, this is the case in the submissions provided by the Respondent in the context of the□

procedure before the Litigation Chamber, where the basis of the processing is indicated for□

each transfer mentioned in point 6 of the privacy statement. In order to□

transparency, the basis for processing all transfers must be disclosed□

in the privacy statement in order for the respondent to comply with its obligation under□

of Article 13.1.c) of the GDPR. However, this is not the case, so the Chamber□

Litigation considers that there is a violation of Article 13.1.c) of the GDPR.□

57. Still with regard to point 6 of the privacy statement, the Respondent□

does not indicate in its argument what would be its legitimate interest, which it invokes, in processing□

the personal data of the complainant for the purpose of their transfer to "companies of□

W to which the insurance company belongs, for monitoring and reporting purposes" and□

to "subcontractors in the European Union or outside, responsible for the activities of□

treatment defined by the insurance company". Article 13.1.d) of the GDPR requires□

nevertheless that the data controller informs the data subject about his

legitimate interest if the processing is based on Article 6(1)(f). In this regard, the

Litigious Chamber refers again to the Guidelines on transparency within the meaning

of Regulation (EU) 2016/679 and the aforementioned elements in this regard.

58. All these findings lead the Litigation Chamber to consider that the defendant did not

not fulfilled its obligations under Article 13.1.c) and d) of the GDPR as well as Article

13.2.b) of the GDPR because he did not provide the required information to the complainant and he did not take

the adequate measures so that the complainant receives the information relating to the processing

referred to in Articles 13 and 21.2 of the GDPR, as prescribed by Article 12.1 of the GDPR.

59. It follows that the Respondent did not respect the basic principle that the data

personal data must be processed in a fair, lawful and transparent manner with regard to

of the data subject (article 5.1.a) of the GDPR). Furthermore, to the extent that the defendant

invokes its legitimate interest as the legal basis for the data processing

aforementioned, he does not satisfy his responsibility (art. 5.2 of the GDPR) and the legitimate interest cannot

therefore not be considered as a valid legal basis within the meaning of Article 6.1 of the

GDPR.

8 See footnote 6.

Decision on the merits 24/20201717

d) Data protection impact assessment

60. The complainant wishes to have access to the impact assessment relating to data protection (see

after DPIA) of the defendant. The complainant considers that a DPIA is mandatory for the

defendant, given that it is a question of processing involving a high risk for the rights and

freedoms of natural persons.

61. The Respondent emphasizes, however, that it is not required to carry out a DPIA, since it already deals with

health data as part of its processing activities for years and that for

already existing processing operations, a DPIA is in principle only required if the risks for the

rights and freedoms of natural persons change after May 25, 2018. The defendant  
asserts that no such change has taken place. The defendant relies in this respect on the  
Recommendation of the Data Protection Authority n° 01/2018 of February 28, 2018  
on data protection impact assessment and prior consultation<sup>9</sup>  
and the Guidelines on Data Protection Impact Assessment  
and how to determine whether the processing is "likely to pose a high risk" to  
purposes of Regulation (EU) 2016/679.<sup>10</sup>

62. The Litigation Chamber considers that insofar as the defendant processes personal data  
of health, it is indeed an existing treatment presenting a high risk, but which it  
there is no indication that the risks to the rights and freedoms of individuals  
have changed after May 25, 2018, taking into account the nature, scope,  
context and purposes of the processing, which would require a DPIA. No violation of  
article 35 and/or 36 of the GDPR cannot therefore be observed.

63. However, the Litigation Chamber adds to this that it also follows the Guidelines on this point.  
aforementioned guidelines on data protection impact assessment,  
which state that it is good practice to continually review and reassess  
regularly a data protection impact assessment. Even if a DPIA  
is not required as of 25 May 2018, it is therefore necessary that the controller  
performs a DPIA at the right time as part of its general responsibility.

64. Regarding the complainant's request to obtain the DPIA in question, the Litigation Chamber  
emphasizes that the GDPR does not provide for an obligation for the controller to publish

<sup>9</sup> [https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/recommandation\\_01\\_2018.pdf](https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/recommandation_01_2018.pdf).

<sup>10</sup> [https://ec.europa.eu/newsroom/article29/item-detail.cfm?item\\_id=611236](https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=611236).

Decision on the merits 24/20201717

a DPIA. The data controller decides independently whether or not to publish  
the DPIA, with a view to creating trust in the processing it carries out and to demonstrate

accountability and transparency without, however, publishing the entire DPIA for this purpose.□

The Litigation Chamber considers, however, that it is particularly good practice that□

controllers consider publishing at least parts of their DPIA,□

such as a summary or a conclusion.□

65. Given that there is no communication obligation of the DPIA on the part of the defendant and,□

therefore, that there is no right for the complainant to access a DPIA, the Chamber□

Litigation cannot therefore grant the complainant's request to obtain the DPIA.□

e) GDPR violations and penalties to be imposed□

66. Consequences of non-compliance with responsibilities as data controller□

pose a risk to the complainant's rights and freedoms. Recital 75 GDPR□

provides that any "social harm" resulting from the processing of personal data□

may be considered relevant under the GDPR.□

67. The Litigation Division finds that the violation of Articles 5.1.a), 5.2, 6.1, 12.1,□

13.1.c) and d) and 13.2.b) of the GDPR, is proven and that it is appropriate to order a□

compliance of the processing with these articles of the GDPR (art. 58.2.d) of the GDPR and art. 100, § 1,□

9° of the LCA), and to accompany these corrective measures with an administrative fine (art. 83.2□

GDPR; art. 100, § 1, 13° of the LCA and art. 101 ACL).□

68. The Litigation Division finds the following violations in particular:□

- Violation of Article 6.1 of the GDPR:□

oh□

oh□

the processing of data for the purposes mentioned in sections 1, 2, 3, 4, 6 and□

7 of point 4.3. of the privacy statement, without any legitimate interest□

demonstrated, is not based, wrongly, on the complainant's consent, in the absence of any□

other legal basis potentially applicable to Article 6.1 of the GDPR.□

data processing for transfers to third parties mentioned in sections 5 and□

6 times in point 6 of the privacy statement, without any legitimate interest□

11 Guidelines of the Article 29 Data Protection Working Party on the impact assessment relating to the□  
Data Protection (DPIA) and how to determine whether the processing is "likely to create a high risk" to□  
purposes of Regulation (EU) 2016/679□

Decision on the merits 24/20201717□

demonstrated, is not based, wrongly, on the complainant's consent in the absence of any□

other legal basis potentially applicable to Article 6.1 of the GDPR.□

- Violation of the liability established in Article 5.2 of the GDPR, insofar as the defendant□

invokes its legitimate interest as the legal basis for the data processing□

specified above.□

- Violation of Articles 12.1, 13.1.c) and d) of the GDPR as well as Article 13.2.b) of the GDPR, in□

the extent that the Respondent failed to provide the required information to the Complainant and failed to□

take the appropriate measures so that the complainant receives the information referred to in Article□

13 and the communication referred to in Article 21.2 of the GDPR relating to processing, in particular.□

items 4.3. and 6 of the privacy statement make no distinction□

clear between the processing of health data on the one hand and the processing of other□

"ordinary" personal data on the other hand.□

oh□

- o no information is provided to the data subject about his or her interests□

legitimate.□

- o no appropriate measure is taken to inform the data subject□

oh□

in particular the right to object guaranteed in article 21.2 of the GDPR.□

the privacy statement does not mention the basis of processing for all□

transfers.□

- Violation of the basic principle established in article 5.1.a) of the GDPR according to which the data□

personal character must be processed in a fair, lawful and transparent manner with regard to  
of the person concerned

69. In addition to the corrective measure to bring the processing into conformity with Article 5.1.a),

Article 5.2, Article 6.1, Article 12.1, Article 13.1.c) and d) and Article 13.2.b) of the GDPR, the

Litigation Chamber also decides to impose an administrative fine whose purpose

is not to put an end to an offense committed but to effectively enforce the

GDPR rules. As can be seen from recital 148, the GDPR wants sanctions,

including administrative fines, be imposed in the event of serious violations, in

complement or instead of the appropriate measures that are imposed.<sup>12</sup> The Chamber

Contentieux is acting in this way pursuant to Article 58.2.i) of the GDPR. The instrument of the fine

administrative action is therefore in no way intended to put an end to the violations. To this end, the GDPR

<sup>12</sup> Recital 148 provides the following: "In order to reinforce the application of the rules of this Regulation, penalties

including administrative fines should be imposed for any violation of this Regulation, in addition to or

instead of appropriate measures imposed by the supervisory authority under this Regulation. In the event of a minor violation

or if the fine that may be imposed constitutes a disproportionate burden for a natural person, a reminder to

the order can be addressed rather than a fine. However, due consideration should be given to the nature, seriousness and

the duration of the violation, the intentional nature of the violation and the measures taken to mitigate the damage suffered, the

degree of responsibility or any relevant violation committed previously, of the manner in which the supervisory authority had

knowledge of the breach, compliance with the measures ordered against the controller or processor,

the application of a code of conduct, and any other aggravating or mitigating circumstance. The application of sanctions

including administrative fines should be subject to appropriate procedural safeguards in accordance with the principles

general provisions of Union law and the Charter, including the right to effective judicial protection and to due process

regular.

Decision on the merits 24/20201717

and the LCA provide for several corrective measures, including the orders cited in Article 100, § 1,

8° and 9° of the ACL.

70. Having regard to Article 83 of the GDPR and the case law of the Markets Court<sup>13</sup>, the Litigation Chamber

motivates the imposition of an administrative sanction in a concrete way:

-

of

gravity

the offense

The

the reasoning set out above demonstrates the seriousness of the offence.

The duration of the infringement: it is not apparent from what the defendant has argued in the

proceedings before the Litigation Chamber that the infringement has ceased and it therefore

continued until January 25, 2020. In this regard, the Litigation Chamber does not take

into account the adjustments made after the closure of the debates concerning the

findings.

The necessary deterrent effect to prevent new offences.

:

-

-

71. With regard to the seriousness of the offense (Art. 83.2.a) of the GDPR), the Litigation Chamber

emphasizes that compliance with the principles established in Article 5 of the GDPR - in this case particularly

the principles of transparency and lawfulness as well as accountability - is essential because it

falls under the fundamental principles of data protection. The Litigation Chamber

therefore considers the defendant's violations of the principle of lawfulness which is specified in Article 6

of the GDPR and the principle of transparency which is established in Articles 12 and 13 of the GDPR as

serious violations.

72. Although no health data of data subjects is processed without the

express consent required for this purpose and although the defendant invokes another basis



legal basis for the processing of data which does not fall under a special regime of protection under the GDPR, the Litigation Chamber considers that the relative impact significant number of infringements observed, which concern all policyholders affiliated with the company insurance via hospitalization insurance, must be taken into consideration when determining the administrative fine.

73. All of 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 within the framework of this decision.

13 Brussels Court of Appeal (Market Court section), Judgment 2020/1471 of 19 February 2020.

Decision on the merits 24/20201717

f) Legislative framework: relationship between free consent and communication of data healthcare under hospitalization insurance

74. For the sake of completeness, the Litigation Chamber wishes to draw attention to the broader issue that must be analyzed in connection with the complaint, namely the collection of health data by insurers to potential policyholders via their explicit consent (Art. 9.2.a) of the GDPR) in connection with the subscription and performance of insurance hospitalization and the related question of to what extent the consent of these insured can be free. The question arises whether, in addition to express consent, there is there are other possible grounds for processing on the basis of which the health data can be dealt with by the defendant when executing the hospitalization insurance.

75. Article 9, paragraph 4 of the GDPR provides that Member States may introduce additional conditions with regard to the processing in particular of data concerning health. The law of July 30, 2018 on the protection of natural persons

with regard to the processing of personal data, which implements the GDPR, does not  
does not contain specific provisions governing in more detail the processing of data to  
sensitive personal nature in the context of insurance. The defendant points out  
that a national legislative framework in this area is lacking. Currently, the House  
Litigation can only agree with this position and note that the legislator should intervene  
in this respect in order to provide a legal basis specific to the insurance sector which allows  
the collection of health data within well-defined limits within the framework of the relationship  
(pre)contractual between the insurer and the insured.

g) 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 website of the Protection Authority  
Datas. However, it is not necessary for this purpose that the identification data of the  
parties are communicated directly.

FOR THESE REASONS,

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

- pursuant to Article 100, § 1, 9° of the LCA, to order the defendant to bring it into compliance  
processing with Articles 5.1.a), 5.2, 6.1, 12.1, 13.1.c) and d) and 13.2.b) of the GDPR.

Decision on the merits 24/20201717

- pursuant to Article 100, § 1, 13° of the LCA and Article 101 of the LCA to impose a fine  
administrative amount of 50,000 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