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Litigation Chamber

Decision on the merits 31/2020 of June 16, 2020

File number: DOS-2019-03499

Subject: Complaint for use of Smartschool to carry out an investigation

"well-being" with minor students without parental consent

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

Hijmans, chairman, and Messrs. Christophe Boeraeve 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;

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made the following decision regarding:

- Mr. X, hereinafter "the complainant"

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Y, hereinafter "the defendant".

1. Facts and procedure

1. On July 22, 2019, the complainant filed a complaint with the Data Protection Authority against

the defendant.

The subject of the complaint concerns the "well-being" survey which was submitted to the minor pupils of Z via the

smart school system. In this context, several provisions of the GDPR would have been violated. The complainant

asserts that there is a lack of information, that parental consent is required to carry out

the survey, that an information society service has been used and that the processing concerns more

data as necessary for the purposes for which they are processed. According to

complainant, a data protection impact assessment should also have been carried out

by the defendant but this was not done.

2. On August 6, 2019, the complaint is declared admissible on the basis of Articles 58 and 60 of the LCA, the complainant

is informed under article 61 of the LCA and the complaint is transmitted to the Litigation Chamber

under article 62, § 1 of the LCA.

3. On August 27, 2019, the Litigation Chamber decides, pursuant to Article 95, § 1, 1° and Article 98

of the ACL, that the case can be dealt with on the merits.

4. On August 28, 2019, the parties concerned are informed by registered letter of the provisions referred to

in article 95, § 2 as well as in article 98 of the LCA. Under Section 99 of the LCA, the parties

concerned were also informed of the deadlines for transmitting their conclusions. The final date

to receive the submissions in reply was therefore set for October 7, 2019 for the complainant and for

November 7, 2019 for the defendant.

5. On September 9, 2019, the Respondent informed the Litigation Chamber that he was aware of the

complaint, he requests a copy of the file (art. 95, § 2, 3° of the LCA) and he accepts all the

communications relating to the case by electronic means (art. 98, 1° of the LCA).

6. On September 11, 2019, a copy of the file is sent to the defendant.

7. On September 26, 2019, the Litigation Chamber received the defendant's submissions in response.

The defendant states in his submissions that for the investigation he bases himself on a legal obligation and

that no consent is required, implying also, according to him, that Article 8 of the GDPR would not be

applies. The defendant also denies that special categories of personal data

personal within the meaning of Article 9.1 of the GDPR would be processed on the basis of the survey. The defendant

also gives an explanation of how the data is processed after the survey (which has

access to the individual survey, storage of general data (anonymised) at the level of the

class, deletion of surveys completed at the end of the school year). The next survey would be

based on the "well-being questionnaire" used by the education inspectorate in order to respect the

principle of data minimization. Finally, a letter proposal is attached so that

that the school can in future better inform parents and pupils about the purpose of the survey.

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

He responds in detail to the Respondent's submissions in response and mentions several

new elements that were not yet included in the complaint:

 According to the complainant, Y is the organizing authority for school Z and the Center d'cadre des

students W, but given that a student support center must be able to intervene in

completely independent, the school and the center seem to act as joint managers

of the treatment.

The complainant gives a list of the provisions which, in his opinion, are the subject of a violation.

It also asks:

1. that a fine be imposed on the defendant,

2. that all persons concerned are informed of the facts committed (in 2016

and in 2018, and if necessary also for the 2017 survey) which would constitute

a personal data breach,

3.

and that the decision of the Litigation Chamber is communicated on the sites

Defendant's Internet and the Student Guidance Center as well as to all

parents through Smartschool.

9. On November 8, 2019, the Litigation Division received the defendant's submissions in reply, which

discuss in more detail the lawfulness of the processing, the designation of the controller, the requirement

of consent and the non-applicability of Article 8 of the GDPR, the principle of data minimization,

the controller's obligation to provide transparent information and

argument supporting the position that no impact assessment relating to the protection of

data is required.

10. On May 4, 2020, the Litigation Division notified the defendant of its intention to

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

opportunity to defend themselves before the penalty is actually imposed.

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11. On May 22, 2020, the Litigation Chamber received the defendant's reaction concerning the intention

to impose an administrative fine and the amount thereof.

The Respondent repeats the arguments set out in the pleadings by asserting that the processing is

lawful under the Flemish decree of 27 April 2018 relating to the supervision of pupils in

basic education, secondary education and in student supervision centers

and that Article 8.1 of the GDPR would not apply.

The Respondent also points out that it has already considered previous remarks.

Finally, the defendant also argues that the Litigation Chamber cannot impose a fine

administrative since being an educational establishment financed by the Flemish Community,

the defendant's objective is to provide education, which is a mission of public interest.

According to the defendant, it follows that it must be considered a "public authority" within the meaning of

article 5 of the law of 30 July 2018 on the protection of natural persons with regard to

processing of personal data and therefore that article 221, § 2 of this same law would be

of application.

2. Legal basis

 Lawfulness of processing

Article 6.1 GDPR

"1. The 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;

[…]

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

processing is submitted;"

[…]

 Conditions applicable to the consent of children in relation to

information society services

GDPR Article 8

"1. Where Article 6(1)(a) applies, as regards the direct offer of services

of the information society to children, the processing of personal data relating

to a child is lawful when the child is at least 16 years old. When the child is under the age of

16 years old, such processing is only lawful if and to the extent that consent is given or authorized

by the holder of parental responsibility for the child. Member States may provide

by law a lower age for these purposes provided that this lower age is not below

13 years old.

2. The controller shall make reasonable efforts to verify, in such cases, that the

consent is given or authorized by the holder of parental responsibility for the child,

taking into account the technological means available.□

3. Paragraph 1 shall be without prejudice to the general contract law of the Member States, in particular□

rules concerning the validity, formation or effects of a contract with respect to a child."□

□ Data minimization□

Article 5.1.c) GDPR□

"1. Personal data are:□

[…]□

c) adequate, relevant and limited to what is necessary in relation to the purposes for which□

they are processed (data minimization);"□

□□

Transparent Information□

Article 5.1.a) GDPR□

"1. Personal data are:□

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

transparency");□

[…]"□

Article 12.1 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."□

GDPR Article 13

"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:

a) the identity and contact details of the controller and, where applicable, of the

representative of the controller;

b) where applicable, the contact details of the data protection officer;

c) the processing purposes for which the personal data are intended

as well as the legal basis of the processing;

d) where the processing is based on Article 6(1)(f), the legitimate interests

sued by the controller or by a third party;

e) where applicable, the recipients or categories of recipients of the personal data

staff ;

f) where applicable, the fact that the controller intends to make a transfer

personal data to a third country or to an international organization,

and the existence or absence of an adequacy decision issued by the Commission or, in

in the case of transfers referred to in Article 46 or 47, or in Article 49(1),

second paragraph, the reference to the appropriate or adapted safeguards and the means of

obtain a copy or where they have been made available.

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 processing:

a) the period for which the personal data will be stored or, where

it is not possible, the criteria used to determine this duration;

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

personal character, the rectification or erasure of these, or a limitation of the

processing relating to the data subject, or the right to oppose the processing and□

right to data portability;□

c) where the processing is based on point (a) of Article 6(1) or on Article 9,□

paragraph 2(a), the existence of the right to withdraw consent at any time,□

without affecting the lawfulness of the processing based on the consent made before the□

withdrawal thereof;□

d) the right to lodge a complaint with a supervisory authority;□

e) information specifying whether the provision of personal data is a□

legal or contractual obligation or if it constitutes a necessary condition for the□

conclusion of a contract and whether the data subject is obliged to provide the data to□

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personal nature, as well as the possible consequences of the non-communication of□

those data ;□

f) the existence of automated decision-making, including profiling, referred to in Article 22,□

paragraphs 1 and 4, and, at least in such cases, useful information concerning the□

underlying logic, as well as the significance and intended consequences of such processing□

for the person concerned.□

3. When he intends to carry out further processing of personal data for□

a purpose other than that for which the personal data was collected, the□

responsible for processing provides the data subject with information in advance about□

this other purpose and any other relevant information referred to in paragraph 2. 4. Paragraphs 1,□

2 and 3 do not apply when, and insofar as, the data subject already has these□

information."□

3. Motivation□

a) Jurisdiction of the Litigation Chamber□

12. Since the Vlaamse Toezichtcommissie (Flemish Control Commission) is already□

intervened during a complaint having the same object, introduced previously by the plaintiff, and that in

pursuant to article 10/7 of the Flemish decree of July 18, 2008 on electronic data exchange

administrative, it took a position on June 17, 2019, the Litigation Chamber considers that it must

clarify the mutual relationship between the Flemish Control Commission on the one hand and on the other

the Data Protection Authority.

13. Although the Respondent in no way disputes the jurisdiction of the Litigation Chamber, which is part of

of the Data Protection Authority, it assumes that the decision of the Litigation Chamber

will be an extension of the response of the Flemish Control Commission. The defendant thinks

be able to start from this principle on the basis of article 10/1, § 2, paragraph 2 of the Flemish decree of

July 18, 2008 relating to the electronic exchange of administrative data which provides the following:

"The Flemish Supervisory Commission asks the Data Protection Authority referred to in

article 3 of the law of December 3, 2017 establishing the Data Protection Authority to delegate a

member to attend each deliberation of the Flemish Control Commission as

observer."

On the basis of this provision, the defendant assumes that the observer of the Protection Authority

of the data would have intervened if the Flemish Control Commission had drawn incorrect

conclusions.

14. In this respect, the Litigation Division considers it necessary to specify the role of the observer of

the Data Protection Authority, as well as how the Flemish Supervisory Commission

acts in relation to the Data Protection Authority.

15. It should be noted that the member of the Data Protection Authority who acts as

observer (currently: the President of the Data Protection Authority) is required to

limited to the role entrusted to it by the legislator, namely to attend each deliberation of the Commission

of Flemish control, but this in no way implies that this intervention in the process

decision-making and certainly not the observer can decisively influence the decision

of the Flemish Control Commission. The Data Protection Authority, including the Chamber

Litigation is part of, is therefore in no way bound by a decision of the Control Commission

Flemish.

16. The Litigation Division further asserts that the interpretation by the Legislation Section of the Conseil

of State and by the Constitutional Court of the constitutional competence in matters of protection of

privacy specifies that it is up to the federal legislator to define the general rules in this area1.

The Council of State specified that the federal comptroller for the protection of privacy "had a

general competence for all processing of personal data, even those which have

take place in areas for which the communities and regions are competent"2

[Editor's note: free translation made by the Secretariat of the Data Protection Authority, in the absence

official translation]. The Litigation Chamber refers to the competences of the Protection Authority

data as defined by the federal legislator under section 4 of the ACL3. For the

monitoring of compliance with the directly applicable provisions of the GDPR - as general rules -,

the Data Protection Authority is therefore the competent body.

b) Controller

17. The complainant lodged a complaint against Z, whose organizing authority is Y. During the procedure, he

argues that Y would be the organizing power for Z and the Student Support Center W.

1 Cour const., n° 50/2003, 30 April 2003, B.8.10; no. 51/2003, April 30, 2003, B.4.12. ; Opinion of the Council of State no. 37.28

July 15, 2004, Doc. Speak. Speak. Fl. 2005-2006, n° 531/1: "[…] communities and regions are competent [...] only

to authorize and regulate specific limitations of the right to respect for private life insofar as they adapt or

supplement the basic standards defined at federal level in this context, but they are not competent [...]

violate basic federal standards".

data, in the absence of an official translation].

2 Opinion of the Council of State no. 61.267/2 of 27 June 2017 on a draft law "reforming the Commission for the protection of

privacy", 36, point 5, referring to Opinion of the Council of State no. 37.288/3 of July 15, 2004 on a preliminary draft decree

"relating to the Health information system", Doc. Parl., Parl. Fl. 2005-06, n° 531/1, 153 e.s.

3 Along the same lines: Decision No. 15/2020 of the Litigation Chamber of April 15, 2020, 14-17, points 66-86.

18. The Respondent refutes this allegation by asserting that Y is certainly the organizing power for Z but that the W pupil support center comes under a separate organizing authority, namely the Center supervision of students U.

19. The Litigation Chamber addresses its decision to Y as the organizing power. Also, Y, the school authority of Z, is the data controller who alone determines the purposes and means with regard to student supervision. The data controller may of course have recourse to the student guidance center for practical support but that does not make the center supervision of students a data controller, together with Y.

c) Lawfulness of processing (Art. 6.1 GDPR)

20. For the realization of the "well-being" survey, the defendant invokes the Flemish decree of April 27, 2018 relating to the supervision of pupils in basic education, secondary education and in pupil guidance centres, which requires schools to have a policy on supervision of students. By student supervision, article 3, 17°/1/1 of the education code secondary4 means a set of prevention and supervision measures. The supervision of students falls into four domains: academic career, learning and study, psychological and social functioning and preventive health care. Measurements always leave an integrated and holistic approach for the four areas of supervision, based on a continuum of enhanced supervision;". This leads the respondent to assert that the "well-being" investigation finds its basis in Article 6.1.c) of the GDPR, namely that the processing of data on the basis of of the investigation would be necessary for compliance with a legal obligation to which the controller is submitted.

21. The Complainant contests this legal basis invoked by the Respondent and asserts that it is not Article 6.1.c) of the GDPR which constitutes the legal basis for the data processing that takes place using the "well-being" survey but article 6.1.a) of the GDPR.

22. The Litigation Division finds that there is indeed a statutory obligation in terms of
supervision of the pupils on the part of the defendant, but this does not imply any obligation on the part of the
students to answer the questions asked in the "well-being" survey and in no way justifies the way
which the defendant tries to fulfill its obligation, namely by means of an investigation which allows
the identification of the person concerned. It is an autonomous decision of the school to respect its
own obligation by means of an inquiry and to have recourse to the collaboration of the pupils for this purpose.
4 Codification relating to secondary education, coordinated on December 17, 2010.
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23. However, contrary to what the defendant claims, the collaboration of the pupils by means of a
participation in such an investigation cannot be justified on the basis of the obligation on the part of the
defendant to provide supervision for the pupils. The obligation in terms of student supervision
does not in fact imply any obligation for the defendant to organize an investigation in the form in
which it was submitted to the pupil concerned under the age of 13.
24. The Respondent itself asserts in this regard that the Secondary Education Code defines the purposes
but does not dictate which personal data of the student must or may be processed.
The Litigation Chamber adds to this that the Secondary Education Code does not establish either
more than the collection of data for the purpose of "supervising students" must be done using a
investigation that would require the cooperation and identification of all students. According to the Chamber
Litigation, the processing of data by means of the "well-being" survey such as that proposed to the
time of the facts to the pupil concerned aged under 13 is therefore lawful only if the consent
is given for the processing of personal data of the student concerned and the processing
is only lawful under Article 6.1(a) of the GDPR.
25. However, for the personal data obtained using the "well-being" survey, the
defendant relies only on Article 6.1.c) of the GDPR and not on Article 6.1.a) of the GDPR.
The Litigation Chamber therefore considers that the violation of article 6.1 of the GDPR is proven,
given that the processing of data by means of the "well-being" survey must be based on the

consent in the absence of any other potentially applicable legal basis listed in Article 6.1

of the GDPR. of the GDPR.

d) Conditions applicable to the consent of children in relation to

information society services (Art. 8 GDPR)

26. According to the complainant, Article 8 of the GDPR applies to the "well-being" survey which is offered to pupils

minors via Smartschool.

27. On the other hand, the defendant disputes that Article 8 of the GDPR would apply, arguing that

Smartschool has not itself offered these services directly to the student.

28. In order to be able to assess whether or not Article 8 of the GDPR applies in the present case, the Chambre

Litigation verifies whether or not the conditions such as those defined in this provision are

fulfilled.

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 Consent as legal basis

29. GDPR Article 8 can only be invoked if GDPR Article 6.1(a) applies. It emerges from

the statement above relating to the legality of the processing that the Litigation Chamber considers that the

Consent is the only valid legal basis for the processing of data via the survey

"well-being". This condition is therefore met.

Age limit of 13 years

30. First of all, account must be taken of Article 7 of the law of 30 July 2018 on the protection of

natural persons with regard to the processing of personal data who disposes of what

follows:

"In execution of Article 8.1 of the Regulation, the processing of personal data relating

to children with regard to the direct offer of information society services to children,

is lawful where consent has been given by children aged 13 or over.

When this processing relates to the personal data of a child under the age of 13,

it is lawful only if consent is given by the legal representative of that child."

31. Applied to the present complaint, it is about a minor student who, at the time when the "well-being" investigation was submitted, was 12 years old. It therefore appears that the consent of his legal representative is required provided that the other conditions of Article 8 of the GDPR are met.

 Information society department

32. Next, it is essential to check whether sending a survey to a pupil under the age of 13 using of Smartschool constitutes an "information society service" or not. For the definition of this concept, the Litigation Chamber refers to Article 4.25) of the GDPR which provides that a "department of the information society" is a service within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council.

33. Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of September 9, 2015 providing for an information procedure in the field of regulations techniques and rules relating to information society services affirms that it is necessary to understand by "service": "any service normally provided for remuneration, remotely, electronically and at the individual request of a service recipient.

For the purposes of this definition, the following terms mean:

i)

ii)

"remotely", a service provided without the parties being simultaneously present;

"electronically" means a service sent to origin and received at destination by means of electronic processing equipment (including digital compression) and of data storage, and which is entirely transmitted, conveyed and received by wires, by radio, optical or other electromagnetic means;

iii)

"at the individual request of a recipient of services", a service provided by

transmission of data on individual request."

34. An indicative list of services not covered by this definition is set out in Annex I5 of Directive (EU)

2015/1535 mentioned above. This is certainly an indicative and non-exhaustive list but this list gives,

according to the Litigation Chamber, a clear indication of the scope that the European legislator intended

give to the notion of "information society service"6.

35. The application of these three criteria to the proposal, via Smartschool, of the survey in question leads the

Litigation Chamber to find that:

5 "Indicative list of services not covered by Article 1(1)(b), second subparagraph

1. Services not provided "remotely"

Services provided in the physical presence of the provider and the recipient, even if they involve the use of devices

electronic:

a) examination or treatment in a doctor's office using electronic equipment, but in the physical presence of the

patient;

b) consultation of an electronic catalog in a store in the physical presence of the customer;

c) reservation of a plane ticket via a network of computers in a travel agency in the physical presence of the customer;

d) provision of electronic games in a gallery in the physical presence of the user.

2. Services Not Provided "Electronically"

— Services whose content is material even if they involve the use of electronic devices:

a) automatic ticket distribution (banknotes, train tickets);

b) access to road networks, car parks, etc., paying even if at the entrance and/or exit of electronic devices

intervene to control access and/or ensure correct payment.

— "Off-line" services: distribution of CD-ROM or software on diskette.

— Services which are not provided by means of electronic data storage and processing systems:

a) voice telephony services;

b) facsimile/telex services;

c) services provided by voice telephony or fax;

d) medical consultation by telephone/fax;

e) consultation with a lawyer by telephone/fax;

f) direct marketing by telephone/fax.

3. Services not provided "at the individual request of a recipient of services"

Services provided by sending data without an individual call and intended for the simultaneous reception of an unlimited number

recipients ("point-to-multipoint" transmission):

(a) television broadcasting services (including quasi-video on demand) referred to in point (e) of Article 1(1) of

Directive 2010/13/EU;

b) sound broadcasting services;

(c) teletext (television)."

6 See also the judgment of the European Court of Justice of December 19, 2019 in Case C390/18, Airbnb Ireland.

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1. no physical presence of a provider and a recipient is associated with the proposal

of the survey via Smartschool,

2.

it is established that the survey is offered electronically, since Smartschool

is a digital school platform with tools for administration, reporting and

communication between management, teachers, student support staff, students and

parents. It is offered as a service, i.e. software that is offered as

online service ("Software as a Service") and can be used via the browser or via

ancillary applications,

3.

it is a service which is provided by transmission of data on individual request, given

that the individual student is expected to log into the Smartschool platform in order to be able to

participate in the "well-being" survey. Thus, the service is directly offered to each student

individual and viewing the inquiry takes place by the individual student. It is therefore not

certainly not of a sending of data intended to be received simultaneously by a number□

unlimited number of recipients (point-to-multipoint-communication) as referred to in Annex I of the□

Directive (EU) 2015/1535 mentioned above.□

36. Article 1(1)(b) of Directive (EU) 2015/1535 also provides that it is□

any service normally provided for remuneration. The defendant only asserts that a contract□

of subcontracting was concluded with Smartschool and does not dispute that this took place against□

remuneration.□

37. The meeting of these three cumulative conditions leads the Litigation Chamber to affirm that the tool□

Smartschool must indeed be considered as an information society service.□

38. The Litigation Chamber concludes that all the conditions for the application of Article 8 of the GDPR□

are met. Due to the ignorance of the applicability of this provision by the defendant□

and consequently the absence of obtaining the consent of the person holding the□

parental responsibility for the student under 13 to carry out the "well-being" survey, the□

Litigation Chamber finds that the violation of article 8 of the GDPR is proven.□

e) Data minimization (Art. 5.1.c) GDPR)□

39. The Complainant draws attention to the fact that through the questionnaire in the survey7, the Respondent□

processes data relating to other pupils, concerning bullying, the family situation of□

the pupil concerned and that such processing is not linked to the purpose of "supervision of pupils".□

7 The investigation that is the subject of the complaint is set out in Appendix 4 to the Respondent's Reply pleadings.□

The defendant asserts that the Secondary Education Code does indeed define the purposes but□

does not dictate which student's personal data must or may be processed.□

The defendant would have sought an appropriate way to obtain sufficient information in the□

aim of supervising the student as best as possible. In the submissions in response, the Respondent claims to have□

opted for a number of open-ended questions, also concerning harassment, but the□

students were not required to answer these questions. In appendix 5 of the pleadings in reply,□

which provides explanations on the 2018 "well-being" survey, it is however mentioned: "Students

must answer all questions. This is a digital version, you can only upgrade to

next question only if you answered the previous one."

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

Nevertheless, the defendant indicates that it has already adapted the investigation in the sense that it will present itself

henceforth in an anonymous form so that it is therefore no longer necessary to fulfill all the obligations of the

GDPR.

40. When assessing whether the data obtained through the survey is

adequate, relevant and limited to what is necessary for the "student supervision" purpose,

the Litigation Division finds that this purpose could have been achieved8 in another way -

know anonymously - than that used for the investigation at the time of the facts, namely by means of

processing of identification data. The defendant indeed indicates himself that the purpose

can also be achieved by offering the survey in an anonymous form.

41. The Litigation Chamber already points out that with regard to the future organization of

the survey, the requirement is that it be anonymous9 within the meaning of the GDPR. It must indeed be data

not relating to an identified or identifiable natural person, or personal data

personal anonymized in such a way that the data subject is not or no longer

identifiable. In this context, account must be taken of all the means reasonably likely to be

used to directly or indirectly identify the student concerned. To establish whether means are

reasonably capable of being used to identify a natural person, it should be

8 Recital 39 GDPR: "Personal data should be adequate, relevant and limited to what is

necessary for the purposes for which they are processed. […] Personal data should only be processed

only if the purpose of the processing cannot reasonably be achieved by other means. [...]"

9 Recital 26 GDPR: “Data protection principles should apply to any information

relating to an identified or identifiable natural person. Personal data which has been subject to

pseudonymization and which could be attributed to a natural person through the use of additional information

should be regarded as information relating to an identifiable natural person. To determine if a
natural person is identifiable, it is necessary to take into consideration all the means reasonably likely
to be used by the controller or any other person to identify the natural person directly
or indirectly, such as targeting. To establish whether means are reasonably likely to be used to identify
a natural person, all objective factors should be taken into consideration, such as the cost of
identification and the time necessary for it, taking into account the technologies available at the time of processing and
the evolution of these. It is therefore not appropriate to apply the principles relating to data protection to information
anonymous, i.e. information which does not relate to an identified or identifiable natural person, nor to data to
personal character rendered anonymous in such a way that the data subject is not or no longer identifiable. The present
Regulation does not therefore apply to the processing of such anonymous information, including for statistical purposes
or research."
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take into account all the objective factors, such as the cost of identification and the
time required for it, taking into account the technologies available at the time of processing
and their evolution. It is particularly important to check to what extent the organization
of an anonymous survey via Smartschool makes it possible or not to still identify the student concerned.
42. It is clear that at the time of the facts, it was not a question of processing of anonymous data because
identification data of the student who completed the survey as well as the names of other students
mentioned, where applicable, in the survey by the student concerned were collected as part of
some questions. It appears from the documents that the processing did not respect the principle of minimization
Datas. This leads the Litigation Division to find that the violation of Article 5.1.c)
of the GDPR is proven.
f) Transparent information (art. 5.1.a), art. 12.1 and art. 13.1 and 13.2 GDPR)
43. The Complainant claims that the Respondent should have previously informed the parents that an investigation
non-anonymous would be organized for students under the age of 13. He claims that he has only
been informed of the investigation by his son, a student under 13, when he believes that the parent must

be informed of the purpose, the people who have access to the survey, the consequences, all the

rights, consequences of not completing the survey, etc. by the defendant himself.

44. The Litigation Chamber points out that, although it provides for the provision of consent on behalf of a

child below a specific age, Article 8 of the GDPR does not provide for transparency measures

intended for the holder of parental responsibility who gives such consent.

45. Accordingly, the Respondent has an obligation under the provisions specific to the measures of

transparency aimed at children provided for in Article 12(1) (and supported by the

recitals 3810 and 5811), to ensure that, when targeting children, this information and

10 Recital 38 GDPR:

“Children deserve specific protection of their personal data because they may be less aware of the

risks, consequences, guarantees and their rights related to the processing of their data. This specific protection

should, in particular, apply to the use of personal data relating to children for marketing purposes

or the creation of personality or user profiles and the collection of personal data relating to children

when using services offered directly to a child. The consent of the holder of parental responsibility does not

should not be necessary in the context of preventive or counseling services offered directly to a child.

11 Recital 58 GDPR:

"The principle of transparency requires that any information addressed to the public or to the data subject be concise, easily

accessible and easy to understand, and stated in clear and simple terms and, in addition, where appropriate, illustrated with

visual elements. This information could be provided in electronic form, for example via a website

when addressing the public. This is particularly true in situations where the multiplication of actors and the

complexity of the technologies used make it difficult for the data subject to know and understand whether

personal data concerning him are collected, by whom and for what purpose, as in the case of advertising in

line. Children deserving specific protection, any information and communication, when the processing concerns them,

should be written in clear and simple terms that the child can easily understand."

communications are transmitted in clear and simple terms or provided by a means easily

understandable by children.

46. In general, this information should be given in writing, but it can be provided

verbally at the request of the person concerned. The Respondent asserts13 that in each class

of the first year, explanations were provided as to the purpose of the survey and the people who

have access to it and clarifications have been made concerning the questions asked in the survey.

Information relating to the purposes of the survey and the persons who may take it

knowledge were also communicated in a letter that the students received containing

also a step-by-step plan for completing the survey. However, this letter does not contain any

case all the elements required by Article 13 of the GDPR, so that it is not demonstrated that the

written information has been provided in a correct manner. Although the information may

also be provided verbally, this is only possible at the request of the person

concerned, which is not the case here.

47. In addition, Respondent also further refers to its Privacy Policy as well as to the

school regulations which would contain the information required by Article 13 of the GDPR. The defendant

therefore assumed that the complainant was aware and that the mail to the students should not

explicitly mention all this information. To this end, he invokes Article 13.4 of the GDPR.

Here too, the Litigation Chamber emphasizes that a child under the age of 13 does not lose his right to

transparency as a data subject in a situation to which Article 8 of the

GDPR. The Litigation Chamber considers that the point of view adopted by the defendant according to which

the student is assumed to already be aware of the privacy statement and school rules

in order to justify that this information should no longer be communicated to him in the context of the investigation

does not comply with the objective of the GDPR to offer minors special protection implying that

information and communications to the minor should be drafted in clear and simple terms

that the child can easily understand. According to the Litigation Chamber, one cannot start from the

principle that when the request for participation in the investigation, sent by the defendant to the student,

the relevant student under the age of 13 establishes the link to the privacy statement himself and

school rules. In the letter addressed to the pupils, the defendant should at least have referred

to the applicable provisions of the privacy statement and academic regulations. Section 13

12 Guidelines of the Article 29 Working Party of 29 November 2017 on transparency within the meaning of Regulation (EU)

2106/679, point 15:

“It is important to point out that, although it provides for the provision of consent on behalf of a child under an age

specifically, Article 8 does not provide for transparency measures aimed at the holder of parental responsibility who gives

such consent. Consequently, data controllers have an obligation, under the specific provisions

the transparency measures aimed at children provided for in Article 12(1) (and supported by recitals 38

and 58), to ensure that, where they target children or are aware that their goods or services are particularly used

by children of an age to know how to read and write, this information and communications are transmitted in clear and

simple or provided in a way easily understood by children."

13 See appendix 5 of the pleadings in reply which contains explanations relating to the "well-being" survey.

of the GDPR indeed requires the respondent to provide the information to the student concerned and to take

concrete measures to provide the information in question to the data subject or to direct

actively the data subject to the location of such information14, in particular given the

target group consisting of pupils under 13 years of age.

48. The Respondent fails to demonstrate that the student concerned was effectively informed, in accordance with

Article 12.1 and Article 13 of the GDPR.

49. By virtue of the controller's obligation to inform the data subject in a way

concise, transparent, understandable and easily accessible, in clear and simple terms, the

Litigation Chamber affirms that the defendant fails in this obligation and that the violation of

Article 5.1 a), Article 12.1 and Article 13 of the GDPR is proven.

Conclusions regarding the sanction to be imposed

50. The Litigation Chamber therefore considers that a violation of Article 5.1.a), Article 5.1.c),

article 6.1, article 8, article 12.1 and article 13 of the GDPR is also proven and

that it is appropriate to order the processing to comply with these articles of the GDPR

(Art. 58.2.d) GDPR and Art. 100, § 1, 9° of the LCA) and to impose an administrative fine in

addition to this corrective measure (art. 83.2 of the GDPR; art. 100, § 1, 13° of the LCA and art. 101

of the ACL). The defendant may be subject to an administrative fine, despite the fact that he claims

be a public authority within the meaning of article 5 of the law of July 30, 2018 on the protection of

natural persons with regard to the processing of personal data and that thus,

Article 221, § 2 of this same law would apply.

51. The Litigation Chamber notes that Article 83.7 of the GDPR provides the following: "Without prejudice

the powers that supervisory authorities have to adopt corrective measures

under Article 58(2), each Member State may lay down the rules determining whether and

to what extent administrative fines can be imposed on public authorities and

to public bodies established in its territory." Although the GDPR does not further specify the

14 Guidelines of the Article 29 Working Party of 29 November 2017 on transparency within the meaning of Regulation (EU)

2016/679, paragraph 33:

"Articles 13 and 14 refer to the obligation imposed on the controller to "[provide] all information

following...". The word "provide" is crucial here. It means that the data controller must take measures

concrete to provide the information in question to the data subject or to actively direct the data subject

to the location of said information (e.g. by means of a direct link, QR code, etc.). The person concerned

should not have to actively search for the information covered by these articles among other information such as

terms of use of a website or an application. The example given in paragraph 11 is explicit in this regard.

As indicated in point 17, the G29 recommends that all information sent to data subjects be

can also be consulted in a single place or in the same document (in digital form on a website or at the

paper format) which would be easily accessible should they wish to consult all the information."

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scope of what is to be understood by "public authorities and public bodies", it is clear that

this exceptional provision must be interpreted strictly.

52. According to the Litigation Chamber, a private law organization such as Y is not part of it, even
if this organization carries out missions of public interest in the field of education.
53. The Court of Justice has in fact ruled specifically with regard to the European rules of
data protection "in so far as they render inapplicable the data protection regime
of a personal nature provided for by Directive 95/46 [now the Regulation] and thus deviate from
the objective underlying it, consisting in ensuring the protection of the freedoms and rights
fundamental rights of natural persons with regard to the processing of personal data,
such as the right to respect for private and family life and the right to data protection
of a personal nature, guaranteed by Articles 7 and 8 of the Charter of Fundamental Rights of the Union
European (...), the exceptions provided for in European legislation must be the subject of a
strict interpretation"15. The sanction of the administrative fine offers an effective means of pressure
and therefore an additional guarantee for the citizen that the rules on the protection of
data will be respected, which justifies a restrictive interpretation of Article 83.7 of the GDPR.
54. Regarding the nature and seriousness of the violation (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 the principle of data minimization - is essential
because this falls under the fundamental principles of data protection. The Litigation Chamber
therefore considers the defendant's breaches of the principle of lawfulness which is specified in Article 6 of the GDPR
and the principle of transparency which is concretely established in Articles 12 and 13 of the GDPR as
serious violations. In addition, there is a violation of a provision (Art. 8 GDPR) which aims to offer a
special protection for young people.
55. Although the Complainant argues that despite his previous complaint lodged in 2016 with the
Privacy Commission at the time regarding the same investigation, the respondent
nevertheless repeated the investigation in 2018 and that according to the complainant, it is a recurrence, the Chamber
Litigation, however, does not take into account the 2016 complaint to set the administrative fine.
First of all, no follow-up was associated with the 2016 complaint by the Protection Commission

of privacy and at that time, the GDPR was not yet applicable.

To set the administrative fine, the Litigation Chamber nevertheless takes into account the fact that the

Respondent declares its readiness to provide for an investigation which may in the future be organized in a form

anonymous and has already made efforts in this direction, provided that the defendant takes the necessary measures

15 See e.g. CJEU, C-73/16, Puškár, 27 September 2017; EU:C:2017:725, § 38; C-25/17, Jehovan todistajat, 10 July 2018,

EU:C:2018:551, § 37; C-345/17, Buivids, 14 February 2019, EU:C:2019:122, § 41.

necessary to ensure the anonymity of the investigation (as already pointed out by the Chamber

Disputed above under the heading "d) Data minimization"). In addition, when defining

the amount of the fine, the Litigation Chamber also takes into account the fact that this is a

school, non-profit.

56. All the elements set out above justify an effective, proportionate and dissuasive sanction,

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

The Litigation Chamber draws attention to the fact that the other criteria of article 83.2 of the GDPR

are not, in this case, likely to lead to an administrative fine other than that defined

by the Litigation Division in the context of this decision.

g) Data protection impact assessment

57. The Complainant considers that the Respondent should carry out an impact assessment relating to the protection of

data (hereinafter AIPD), given that it would be a treatment involving a high risk for the rights

and freedoms of natural persons. For this purpose, it refers in particular to Article 35.3.b) of the GDPR which

provides that a data protection impact assessment is required in the event of processing

on a large scale of special categories of data referred to in Article 9(1), or

personal data relating to criminal convictions and offenses referred to in

item 10.

58. The Respondent emphasizes, however, that it is not required to carry out a DPIA, given that the investigation is already

carried out for years - mention is made of 15 years - and that for the treatments that already exist,

a DPIA is in principle only required if the risks for the rights and freedoms of natural persons

change after May 25, 2018. Respondent asserts that no such change has occurred.

The defendant relies in this respect on the Recommendation of the Data Protection Authority

n° 01/2018 of February 28, 2018 concerning the impact analysis relating to data protection and

prior consultation16 and on the AIPD Guide of the Data Protection Authority published in

April 201917.

59. Respondent also asserts that the sensitive data it processes would not fall within the scope of

article 9.1 of the GDPR18. The Litigation Chamber points out in this regard that according to the Code of

secondary education, the supervision of pupils involves in particular: the operation

psychological and social and preventive health care. In the privacy statement, to which

the defendant himself makes reference concerning the obligation of transparency, it is mentioned that the

16 https://www.autoriteprotectiondonnees.be/publications/recommandation-n-01-2018.pdf.

17 https://www.autoriteprotectiondonnees.be/publications/guide-analyse-d-impact-relative-a-la-protection-des-donnees.pdf.

18 See submissions in response.

student data that is processed also concerns health data: physical,

psychic, risky situations and behaviors (with a view to supervision). The data concerning

health are considered a special category of personal data.

Some questions in the survey relate to information relating to health data such as

as defined in the privacy statement of the respondent, so that Article 9.1 of the GDPR

applies. However, this is not large-scale processing within the meaning of recital 91 of the

GDPR19. The Litigation Division finds that these are only the personal data of the

first-year students of the defendant and that it can therefore hardly be maintained that it is a

processing of a considerable amount of personal data at regional, national level

or supranational, from which a large number of data subjects could suffer consequences.

60. The Litigation Division further considers that insofar as the defendant processes personal data

of health, it is indeed an existing treatment presenting a high risk, but that there is no

no indication that the risks to the rights and freedoms of natural persons have changed

after May 25, 2018, taking into account the nature, scope, context and purposes of the

treatment, which would require DPIA. No violation of Article 35 of the GDPR can therefore be

observed.

h) Publication of the decision

61. Given the importance of transparency regarding the decision-making process of the Litigation Chamber,

this decision is published on the website of the Data Protection Authority. However, he

it is not necessary for this purpose that the identification data of the parties be directly

communicated.

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), 12.1 and 13.1.c) and d) and 13.2.b) of the GDPR;

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

administration of 2000 euros.

19 This should apply in particular to large-scale processing operations which aim to process a considerable volume

of personal data at regional, national or supranational level, which may affect a significant number of

data subjects and which are likely to create a high risk, for example, due to their sensitive nature,

when, in accordance with the state of technological knowledge, a new technique is applied on a large scale,

as well as other processing operations that create a high risk for the rights and freedoms of data subjects,

in particular when, as a result of these operations, it is more difficult for these persons to exercise their rights.

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

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given as defendant.

(Sr.) Hielke Hijmans

President of the Litigation Chamber