

Litigation Chamber

Decision on the merits 06/2019 of

September 17, 2019

File number: DOS-2018-04470

Subject: complaint for use of the identity card for the creation of a loyalty card

The Litigation Chamber of the Data Protection Authority, made up of Mr. H. Hijmans,

Chairman, and Messrs. Y. Pouillet and F. De Smet, members;

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

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

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

data protection) (hereinafter the "GDPR");

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

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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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1. Facts and procedure

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On August 28, 2018, the complainant filed a complaint with the Data Protection Authority against
the defendant.

The subject of the complaint concerns the loyalty card offered by the defendant to its customers. According to
complainant, the loyalty card is created by reading the identity card
electronics and the use of the data thereof. The defendant refuses to issue the card of
loyalty if the customer does not want us to use his electronic identity card but
only its written data. According to the complainant, the facts date from June 8 and 30, 2018.
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On September 26, 2018, 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 forwarded to the Chamber
Litigation under article 62, § 1 of the LCA.
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On October 23, 2018, the Litigation Chamber decides to request an investigation from the Service
of Inspection, pursuant to articles 63, 2° and 94, 1° of the LCA.
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On October 29, 2018, in accordance with Article 96, § 1 of the LCA, the Chamber's request
Litigation to proceed with an investigation is transmitted to the Inspection Department, as well as the
complaint and the minutes of this decision.
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On May 10, 2019, the investigation by the Inspection Service is closed, the report is attached to the file and
this is forwarded by the Inspector General to the President of the Litigation Chamber (article 91,
§ 1 and § 2 of the LCA).
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On May 28, 2019, the Litigation Division decides, pursuant to Article 95, § 1, 1° and Article 98
of the ACL, that the case can be dealt with on the merits.
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On June 3, 2019, the parties concerned are informed by registered letter of the provisions such as
as set out in article 95, § 2 as well as in article 98 of the LCA. They are also informed,
under Article 99 of the LCA, time limits for transmitting their conclusions.

The deadline for receipt of the complainant's submissions in response was set for June 28, 2019,
that for the defendant's reply conclusions on July 29, 2019.

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On June 18, 2019, the defendant requests a copy of the file (article 95, § 2, 3° of the LCA).

The defendant further declares that he agrees to receive electronically any communication
relating to the case (article 98, 1° of the LCA).

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On June 24, a copy of the file is sent to the defendant.

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The complainant does not submit any submissions in response to the Litigation Chamber.

However, the complainant is still transmitting additional information to the Chamber

Litigation, and this however outside the deadline for the conclusions, so that the documents received
of the complainant on July 8 and 29, 2019 were excluded from the proceedings.

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On July 30, 2019, the Litigation Chamber receives the submissions in reply from the
respondent.

2. Legal basis

- Article 5.1.c) of the 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);

[...]

- Article 6.1 GDPR

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

is fulfilled:

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

one or more specific purposes;

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

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

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

treatment is submitted;

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

of another natural person;

e) processing is necessary for the performance of a task carried out in the public interest or falling within the

the exercise of official authority vested in the controller;

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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 freedoms and rights

fundamentals of the data subject which require protection of personal data

personal, in particular when the person concerned 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.

- Article 13.1 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 are obtained, all of the following information:

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

the controller;□

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

c) the purposes of the processing 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 by a third party;□

e) the recipients or categories of recipients of the personal data, if they□

exist; and□

f) where applicable, the fact that the data controller intends to carry out a transfer of□

personal data to a third country or to an international organisation, and□

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

transfers referred to in Article 46 or 47, or in the second subparagraph of Article 49(1), the□

reference to the appropriate or adapted warranties and the means of obtaining a copy thereof or the location□

where they were made available.□

- Article 13.2.a) of the GDPR□

2. In addition to the information referred to in paragraph 1, the controller shall provide the□

data subject, at the time the personal data is obtained, the□

following additional information that is necessary to ensure processing□

fair and transparent:□

a) the retention period of the personal data or, where this is not possible,□

the criteria used to determine this duration;□

[...]□

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3. Motivation□

The Litigation Chamber bases its opinion mainly on the findings made by the Service□

of inspection.□

The Inspection Service finds that the defendant bases the processing of personal data

for the creation of a loyalty card only on the data available via the identity card

electronic.

The Inspection Service therefore confirms the complaint in the sense that no alternative is offered to the

customers who do want a loyalty card but who do not want the defendant to use

for this their electronic identity card, and this while according to the Inspection Service, obtaining

of consent and the proposal of an alternative are indeed required.

In this respect, the Inspection Service also refers to article 6, § 4 of the law of July 19, 1991

relating to population registers, identity cards, foreigners' cards and

residence documents, as applicable from 23 December 2018, which provides that the card

electronic identity can only be read or used with the free, specific and informed consent

of its holder. When a benefit or service is offered to a citizen using their card

identity in the context of a computer application, an alternative that does not require the use

to the electronic identity card must also be offered. The Inspection Service refers

also in this regard to Recommendation No. 03/2011 in order to support the requirement of consent

and the proposal of an alternative.

The Litigation Chamber considers that in this case, it is a question of violations of articles 5.1.c)

(data minimization), 6 (basis of processing) and 13 (information of the person

concerned) of the GDPR:

□ Data minimization

The Litigation Chamber emphasizes that the minimization of data must be considered

as an essential principle which data processing must comply with and which is included

as such in Article 5 of the GDPR, reflecting the essence of this regulation. It is not only

the case within the framework of the application of the GDPR, but it was also within the framework of the law

of 8 December 1992 on the protection of privacy with regard to the processing of

personal data. The reference of the Inspection Service to the Recommendation

1 Recommendation of initiative n° 03/2011 of 25 May 2011 relating to the taking of copies of identity cards as well as their use and their electronic reading, issued by the Commission for the Protection of Privacy.

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03/2011 is therefore justified and must be understood from this angle, namely that a

Data minimization should always come first.

The modification of article 6 of the law of July 19, 1991 as mentioned above constitutes

also an application of the general principle of data minimization, as enshrined

in Article 5.1.c) of the GDPR. The defendant's argument that the facts to which the complaint relates

complaint date from before the entry into force of the amendment to article 6 of the law of

19 July 1991 is therefore not relevant.

The inspection report also indicates that the customer data that is processed is the

following: surname, first names, address, date of birth, gender, time from which the

person concerned is a customer and amount of purchases. ID card barcode

electronic file containing the National Register number is linked by the defendant to the data

client.

For the Litigation Chamber, the following is essential. Data processing involves

the use of the National Register number, included in the barcode of the identity card

electronic, which is irrelevant. In this regard, the Litigation Chamber considers

important that special rules apply to the use of the Registry number

national (already applicable before December 23, 2018), which prescribe a very

cautious of this National Register number. Given that according to the findings of the Service

Inspection, the barcode is used to find the customer in the customer file, the

Litigation Chamber assumes that the National Register number - or in any case a part

of the identity card number - is used in violation of the principle of minimization.

The Litigation Chamber also points out that the processing of customer data (name,

first names, address, date of birth, sex, time from which the data subject

is a customer and amount of purchases) does not comply with the principle of minimization, given that the

data "sex and date of birth" are also irrelevant. In this regard, the House

Litigation assumes that the loyalty card is not used to check age

minimum for the purchase of alcohol.

Given that the method used by the defendant to create loyalty cards does not respect

principle of data minimization, the Litigation Chamber therefore considers that

the violation of Article 5.1.c) of the GDPR is proven.

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Legality of processing

According to the Litigation Division, contrary to what the defendant claims, the

consent cannot be invoked as a legal basis for the processing since in

defendant's current method, consent cannot be considered at all

as free consent within the meaning of Article 4.11. of the GDPR, for lack of an alternative system

allowing the creation of a loyalty card without using the electronic identity card,

also giving the possibility in this case to the person concerned to benefit from

discounts. The Litigation Chamber also refers in this respect to the Guidelines

of Group 29 on consent within the meaning of Regulation 2016/6792, stipulating that the adjective

"free" implies real choice and control for those involved. Generally,

the GDPR provides that if the data subject is not genuinely able to exercise

a choice, feels pressured to consent, or will suffer significant negative consequences

if he does not give his consent, the consent is not valid. If the consent

is presented as a non-negotiable part of the general conditions, it is considered that it

was not freely given. Consent will therefore not be considered as

given freely if the data subject is unable to refuse or withdraw

consent without prejudice. Considering that in the present case, the plaintiff, and by

extension all customers, can only benefit from discounts through

their electronic identity card and that the defendant does not offer any alternative for the

creation of a loyalty card in order to be able to enjoy this advantage, it is clear that it is not

matter of free consent.

Although the defendant does not invoke it, the Litigation Division examined in what

extent the processing could be based on Article 6.1.f) of the GDPR and to what extent the

processing may prove necessary for the defense of its legitimate interests. Bedroom

Litigation observes that for this purpose, it is necessary to proceed to a weighting with the interest

of the data subject in order to assess which interest is preponderant. For this basis

also legal, the Litigation Chamber declares that such a balancing of interests

leads in this case to the conclusion that the interest of the plaintiff, and by extension of the whole

customers, premium.

The Litigation Chamber decides that the breach of Article 6.1. of the GDPR is proven.

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

on April 10, 2018.

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Given that the violation of Article 5.1.c) of the GDPR concerns a fundamental principle in

regarding data processing and that the violation of article 6.1. of the GDPR is of such a nature

that there is therefore no valid legal basis on which to base the processing of

data, the Litigation Chamber

imposes an administrative fine of 10,000 euros.

Having regard to Article 83.2. of the GDPR, in particular the nature and gravity of the two breaches, the Chamber

Litigation considers that this sanction is justified. Non-compliance with the provisions in question

of the GDPR should be considered as gross negligence having a considerable impact not

only on the processing of the complainant's data, but also on that of all customers

of the defendant, in the absence of an alternative for the creation of the customer file on the basis of the card

of electronic identity, in the absence of valid consent and in view of the excessive processing of data.

Information of the data subject

With regard to the other findings of the Inspection Service, namely:

a)

the contradiction between the defendant's assertion that there is no communication

of data to third parties while the privacy statement indicates that transfers

are possible within the European Economic Area to affiliated companies.

b)

the lack of clear information for the person concerned, in particular at the basic level

legal and retention period

the Litigation Chamber takes note of the fact that the defendant acknowledges that these may be

rightly considered as breaches of the GDPR and declares that measures

will be taken in the short term to bring data processing into compliance

with the GDPR.

The Litigation Chamber declares on the basis of the foregoing that the violation of the

articles 13.1.c), 13.1 e) and 13.2. a) of the GDPR must be considered as proven following the

findings of the Inspection Service and that it is appropriate to order compliance of the

processing with these articles of the GDPR.

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FOR THESE REASONS,

the Litigation Chamber of the Data Protection Authority decides, after deliberation, to impose

sanctions regarding the violation of articles 5.1. vs) ; 6.1. ; 13.1. vs) ; 13.1. e) and 13.2. a) from

GDPR:

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pursuant to Article 100, § 1, 9° of the LCA, to order the defendant to put the

processing in accordance with Article 5.1. c), Article 6.1., Article 13.1. vs),

section 13.1. e) and section 13.2. a) GDPR

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under Article 101 of the LCA, to impose an administrative fine of 10,000 euros

as a result of breach of article 5.1. c) and Article 6.1. of the GDPR.

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to publish this decision on the website of the Authority for the protection of

data, pursuant to Article 100, § 1, 16° of the LCA, albeit after anonymization.

Under article 108, § 1 of the law of December 3, 2017, this decision may be appealed

within thirty days of the notification, to the Court of Markets, with the Authority of

data protection as defendant.

(Sr.) Hielke Hijmans

President of the Litigation Chamber