

Litigation Chamber

Decision on the merits 35/2020 of 30 June 2020

File number: DOS-2019-01240

Subject: Reuse of the profile picture available on Facebook

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

ACL;

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 first defendant"□

and□

Mr. Z; hereinafter "the second defendant".□

1. Facts and procedure□

1. On February 25, 2019, the complainant filed a complaint with the Data Protection Authority□

against the defendants.□

2. The subject of the complaint relates to the distribution by e-mail addressed to third parties, namely W as well as□

volunteers and employees of Y, a screenshot of a profile picture of the complainant□

available on Facebook, without his consent. According to the complainant, this profile picture would not be□

not freely accessible, given that it enjoys the highest protection through its□

settings. The photo would also have been reworked by the second defendant so as to□

that only the complainant's face is visible.□

3. On July 8, 2019, the complaint is declared admissible on the basis of articles 58 and 60 of the LCA, the□

complainant is notified under Article 61 of the LCA and the complaint is forwarded to the Chamber□

Litigation 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. They are also informed□

under Article 99 of the LCA, deadlines for transmitting their conclusions. The deadline□

for the receipt of the submissions in response from the defendants had been set for September 6, 2019,□

that for the complainant's reply submissions on October 7, 2019.□

6. On August 6, 2019, the defendants requested a copy of the file (article 95, § 2, 3° of the LCA).□

7. On August 7, 2019, a copy of the file is sent to the defendants.□

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8. On August 14, 2019, the defendants announced that they would file submissions (article 98, 2° of□

the LCA) and ask for an adaptation of the timetable for the conclusions.□

9. On August 23, 2019, the parties were informed by the Litigation Chamber of the adjusted deadlines for□
make conclusions. The latest date for receiving the submissions in response from the defendants was□
thus set for September 6, 2019, that for the complainant's reply submissions to the□
October 7, 2019 and that for the defendants on November 7, 2019.□

10. On September 4, 2019, the Litigation Chamber receives the submissions in response from the defendants.□
The defendants state that the second defendant intervened in his capacity as an employee□
acting in the name and on behalf of the first defendant. The defendants then demonstrate to the□
means of a finding by a bailiff that the photo that is the subject of the complaint is□
publicly accessible to everyone and was therefore in no way protected. First of all,□
according to the defendants, there would be no treatment because the plaintiff did not demonstrate that the photo□
was structured according to determined criteria. In this regard, the defendants refer to the□
recital 15 GDPR. Insofar as it would indeed be a treatment, the defendants□
invoke legitimate interest as a legal basis (Article 6.1.f) of the GDPR) and refer to this□
effect of the judgment of the Court of Sport which imposed on the complainant a ban on attending during□
1 year in training, championships or any other competition of any kind□
whatever, organized under the sporting authority of the first defendant.□

11. In the conclusions, the respondents also address the complainant's request to give□
following his right to the erasure of data, a request to which the defendants did not react□
in accordance with the requirements of Article 12 of the GDPR. The defendants advance as reason□
that it does not appear from the plaintiff's request that any reaction was requested. In this□
regard, the Litigation Chamber can only note that the lack of reaction from the defendants□
to this request is not part of the complaint.□

12. On October 8, 2019, the Litigation Chamber receives the submissions in reply from the□
complainant. The plaintiff indicates that his complaint was initially against the second defendant but□
that he may have got the facts wrong, given that the first defendant asserts□

formally that the second defendant acted on his instructions and in no way as a person in his own capacity. The complainant then asserts that he never contested the fact that the photo was freely accessible and could therefore be viewed and copied by anyone. The object of the complaint is the distribution of the photo as an appendix to an e-mail. The complainant argues that it is indeed of data processing by asserting that recital 15 of the GDPR is not included in regulations. According to the plaintiff, the defendants cannot invoke the legitimate interest as a legal basis for processing the photo as an attachment to an e-mail because the recipients Decision on the merits 35/2020 - 4/11 of the email could have found the photo themselves by surfing the social networking site Facebook.

13. On October 30, 2019, the Litigation Division received the submissions in reply from the defendants. They express their wish to have recourse to the possibility of being heard (article 98, 2° of the LCA). The defendants repeat the elements of the submissions in response and add that the plaintiff violated article 124 of the law of June 13, 2005 relating to communications emails because he intentionally became aware of an email that was not addressed to him.

14. On April 29, 2020, the parties are informed that the hearing will take place on May 20, 2020.

15. On May 27, 2020, the parties are heard by the Litigation Chamber.

2. Legal basis

□ Data controller

Article 4.7) GDPR

For the purposes of these rules, the following terms mean:

[...]

7) "controller": the natural or legal person, public authority, service or other body which, alone or jointly with others, determines the purposes and means of the processing ; where the purposes and means of such processing are determined by Union law or the law of a Member State, the controller may be designated or the specific criteria

applicable to its designation may be provided for by Union law or by the law of a State

member;

□ 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:

[...]

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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 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.

3. Motivation

3.1. Data controller

16. The Complainant explicitly directs his complaint only to the second Respondent and considers that

the first defendant is not responsible for the use of the photo without his consent or

of sharing it with third parties, given that the first defendant would not have been at the

running.

17. The first defendant denies this assertion and demonstrates that the second defendant, in its

as an employee, acted perfectly in the name and on behalf of the first defendant.

The second defendant, as an employee of the first defendant, is responsible for the administration

of its disciplinary and judicial bodies and is therefore designated as "clerk of the Tribunal

Sport".

18. The Litigation Division finds that following a judgment by the Sports Court, the plaintiff

was sentenced to “a general ban on attending training, championships or
in any other competition of any nature whatsoever, organized under the sporting authority of Y, and
this for a period of 1 year. This prohibition extends to every place where the competition takes place,
including - but not limited to - [...]”.

19. With a view to the execution of this ban imposed on the complainant, an e-mail was
sent by the second defendant, on behalf of the first defendant, to the commissioners
athletes of an imminent event determined in W, as well as in "carbon copy" (cc) to the organization
organizer. The first defendant confirms that a photograph of the plaintiff has been attached
in order to allow the recipients of the e-mail to recognize it if the complainant showed up when
even despite the ban on attendance.

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20. All of these findings lead the Litigation Chamber to conclude that the first
defendant has determined the purposes and means for the execution of the judgment of the Court of
sport since the e-mail containing the attached photo was sent in his name and on his behalf
by the second defendant who only intervened in his capacity as an employee of the first
defendant and, as such, is bound to perform the tasks entrusted to him. The first
defendant must therefore qualify as a controller within the meaning of Article 4(7) of the GDPR.

3.2. Processing

21. Insofar as the defendant argues that the reuse of the profile picture which is freely
available on Facebook would not constitute processing within the meaning of Article 4(2) of the GDPR in
because the complainant did not demonstrate that the photo was structured according to criteria
determined, the Litigation Chamber notes in this regard that Article 2.1 of the GDPR, read
together with recital 15 of the GDPR, provides for an exclusion from the scope
application of the GDPR for files or sets of files as well as their covers,
that are not structured according to specific criteria, but this exception applies
only to manual treatments¹. In the present case, however, it is a question of the reuse of a

photo accessible online which is transmitted to specific third parties by means of an e-mail.□

22. The Litigation Chamber considers that this is therefore indeed processing within the meaning of Article□

4.2) of the GDPR², given that the photo was consulted in an automated way using□

certain technologies to then be used and transmitted to third parties.□

3.3. Lawfulness of processing□

23. Although the Complainant claims that the photograph complained of enjoyed the highest□

protection via its parameters, the defendant demonstrates by means of a report by a bailiff□

justice that the photo in question is publicly accessible on the complainant's Facebook page□

and that the profile photo is accessible and can be copied without any obstacle. Then the□

1 Recital 15 GDPR. In order to avoid creating a serious risk of circumvention, the protection of natural persons□

should be technologically neutral and should not depend on the techniques used. It should apply to□

processing of personal data using automated processes as well as manual processing, if the data□

of a personal nature are contained or intended to be contained in a file. The folders or sets of folders of□

as well as their covers, which are not structured according to determined criteria, should not fall within the scope□

application of this Regulation.□

2 Article 4.2) of the GDPR: For the purposes of this regulation, the following terms mean: "processing": any operation or any set

operations carried out or not using automated processes and applied to data or sets of data to be□

personal character, such as the collection, recording, organization, structuring, storage, adaptation or□

modification, extraction, consultation, use, communication by transmission, dissemination or any other form of□

provision, reconciliation or interconnection, limitation, erasure or destruction;□

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complainant asserts in this regard in his rejoinder that "everyone knows that a□

profile photo is freely accessible", thus confirming that the photo is in the□

public part of Facebook.□

24. The Litigation Chamber specifies that both the consultation and the use of a photo constitute□

processing within the meaning of the GDPR and that this processing is only permitted on the basis of a□

of the processing set out in article 6.1 of the GDPR. The fact that the photo has been made freely accessible by the person concerned does not authorize the free reuse of the photo by third parties who consult it.

25. The GDPR contains a considerable limitation of the possibility of reusing data to personal character which can be consulted publicly. The Litigation Chamber emphasizes as well as the principle in force is the following: the fact that a profile photo of a person is freely available to the public does not mean that others can use it freely. Use of this photo is only possible if a legal basis exists for this. The defendant invokes for this purpose its legitimate interest (article 6.1.f) of the GDPR).

26. In accordance with Article 6.1.f) of the GDPR and the case law of the Court of Justice of the Union European Union (hereinafter "the Court"), three cumulative conditions must be met for a responsible for the processing can validly invoke this basis of lawfulness, "namely, firstly, the pursuit of a legitimate interest by the controller or by the third parties to whom the data are communicated, secondly, the necessity of the processing of the personal data for the fulfillment of the legitimate interest pursued and, thirdly, the condition that the fundamental rights and freedoms of the person concerned by the protection data do not prevail" (judgment "Rigas"3).

27. In other words, in order to be able to invoke the basis of lawfulness of "legitimate interest" in accordance with Article 6.1.f) of the GDPR, the controller must demonstrate that:

- the interests it pursues with the processing can be recognized as legitimate (the "test purpose"); the intended processing is necessary to achieve those interests (the "necessity test"); and the weighing of these interests against the interests, freedoms and fundamental rights of data subjects weighs in favor of the controller (the "weighting test").

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3 CJEU, 4 May 2017, C-13/16, Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA „Rīgas satiksme”, recital 28. See also CJEU, 11 December 2019, C-708/18, TK v/ Asociația de Proprietari bloc M5A-ScaraA, recital 40.□

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28. With regard to the first condition (the so-called "finality test"), the Litigation Chamber considers□
that the purpose of executing the judgment of the Sports Court can be considered□
as a purpose for a legitimate interest. In accordance with recital 47 of the GDPR,□
the interest that the defendant was pursuing as controller may in itself be□
considered legitimate. The first condition set out in Article 6.1.f) of the GDPR is therefore□
filled.□

29. In order to fulfill the second condition, it must be demonstrated that the processing is necessary for the□
achievement of the aims pursued. More specifically, this means asking whether the□
same result cannot be achieved with other means, without data processing to□
personal nature or without unnecessary substantial processing for the data subjects.□

30. In this respect, the complainant asserts that it was completely unnecessary to attach the profile photo as an annex□
of the e-mail to notify the Sports Court's judgment to the stewards, given□
that the latter could also have found the image themselves by consulting the site of□
Facebook social network. On the basis of these elements, the Litigation Division finds that the□
complainant does not dispute that the stewards do indeed need a photo as□
means of identification in order to enable them and the organizer to enforce□
the ban imposed on him. The complainant does not object either.□

The complainant only disputes that it was useless to attach the profile photo as an appendix to the e-mail.□
email sent to the stewards and the organizer and that it has also been reworked□
afterwards.□

31. The Litigation Chamber points out that the operation that the profile photo underwent consisted of□

that the other person in the profile picture is no longer visible, so that

only the complainant's image is still visible in the photo. The defendants thus complied with the

principle of data minimization (Article 5.1.c) of the GDPR), given that the image of the other

no one was required for the purpose pursued, that is to say to enforce

ban on attendance.

32. In addition, the Litigation Chamber finds that the photo of the complainant was necessary for his

identification, given that the purpose of enforcing the ban on frequentation

imposed on the Complainant cannot reasonably be achieved⁴ in any way other than by the

⁴Recital 39 GDPR. Any processing of personal data should be lawful and fair. The fact that data

personal data relating to natural persons is collected, used, accessed or otherwise processed

and the extent to which that data is or will be processed should be transparent to individuals

concerned. The principle of transparency requires that any information and communication relating to the processing of this data

of a personal nature are easily accessible, easy to understand, and formulated in clear and simple terms.

This principle applies, in particular, to the information communicated to the persons concerned on the identity of the person responsible

processing and on the purposes of the processing as well as for other information aimed at ensuring fair and

transparent vis-à-vis the natural persons concerned and their right to obtain confirmation and communication of

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photo processing. The way in which the photo is made available, either via an appendix to

the e-mail in question, either by means of a direct consultation of the complainant's Facebook page,

does not matter in this context. The principle of data minimization (article 5.1.c) of the GDPR) has

which was also respected on this point.

33. In order to check whether the third condition of Article 6.1.f) of the GDPR - the so-called "test of

balancing" between the interests of the controller on the one hand and the freedoms and rights

fundamentals of the data subject on the other hand - can be fulfilled, in accordance with the

recital 47 of the GDPR, the reasonable expectations of the person must first be taken into account

concerned. In particular, it must be assessed whether "the data subject can reasonably

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

that they are processed for a given purpose”⁵.

34. This aspect is also emphasized by the Court in its judgment "TK v. Asociația de Proprietari bloc

M5A-ScaraA" of December 11, 2019⁶, which states the following:

"Also relevant for the purposes of this balancing are the reasonable expectations of the

data subject that his or her personal data will not be processed when,

in the circumstances of the case, that person cannot reasonably expect a

further processing thereof.

35. Since the Complainant himself published the photo in such a way that it is freely accessible

to everyone, the Litigation Chamber considers that this is part of the reasonable expectations

of the complainant that third parties access and use the publicly shared information. Collection

and the use by these third parties of the personal data made public is however

lawful only to the extent that the processing of such personal data is based on a

legal basis as defined in Article 6.1 of the GDPR. The Litigation Chamber finds that the

personal data concerning them which are the subject of processing. Individuals should be informed

the risks, rules, guarantees and rights related to the processing of personal data and the methods of exercising their

rights in relation to such processing. In particular, the specific purposes of the processing of personal data

should be explicit and lawful, and determined when collecting the personal data. The data to

personal character should be adequate, relevant and limited to what is necessary for the purposes for which

they are processed. This requires, in particular, ensuring that the data retention period is limited to the strict minimum.

Personal data should only be processed if the purpose of the processing cannot reasonably be

achieved by other means. In order to ensure that the data is not kept longer than necessary,

time limits should be set by the controller for their erasure or for periodic review. It is necessary to

take all reasonable steps to ensure that personal data that is inaccurate is rectified

or deleted. Personal data should be processed in such a way as to ensure security and

appropriate confidentiality, including to prevent unauthorized access to such data and to the equipment used to

processing and unauthorized use of such data and equipment. [proper underlining].

5 Recital 47 GDPR.

6 CJEU, 11 December 2019, C-708/18, TK v Asociația de Proprietari block M5A-ScaraA, recital 58.

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defendants rightly invoke Article 6.1.f) of the GDPR⁷, given that the judgment of the

Court of Sport, in addition to the ban imposed on the plaintiff, also stipulates

that the clerk of the secretariat of the first defendant is requested to inform of this prohibition of

attendance at all competition organizers on Belgian territory. Although the judgment

does not require you to also attach a photo to this notification of the ban on attendance,

it is however necessary, with a view to monitoring compliance with this prohibition on the part of the

complainant, that the organizers of competitions on Belgian territory have a means,

i.e. the photo of the complainant, to be able to identify him, if necessary - in the event of non-compliance

of the ban.

36. The Litigation Chamber considers that the defendants rightly invoke Article 6.1.f) of the GDPR

and that no element is adduced showing that the defendants would have acted in violation

GDPR requirements.

3.4. Publication of the decision

37. Given the importance of transparency regarding the decision-making process of the Chamber

Litigation, this decision is published on the website of the Authority for the protection of

data. However, it is not necessary for this purpose that the identification data of the parties

are communicated directly.

7 Recital 47 GDPR. The legitimate interests of a controller, including those of a controller

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

processing, unless the interests or fundamental rights and freedoms of the data subject prevail,

taking into account the reasonable expectations 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 in situations such as where the data subject is a customer of the controller.□
treatment or is in its service. In any event, the existence of a legitimate interest should be assessed□
carefully, in particular to determine whether a data subject can reasonably expect, at the time and in the□
framework of the collection of personal data, that these are subject to processing for a given purpose. The□
interests and fundamental rights of the data subject could, in particular, prevail over the interest of the data controller.□
processing when personal data is processed in circumstances where the data subjects do not□
reasonably expect further treatment. Since it is up to the legislator to provide by law the□
legal basis for the processing of personal data by public authorities, this legal basis should only□
not apply to processing carried out by public authorities in the performance of their tasks. The treatment□
of personal data strictly necessary for the purposes of fraud prevention also constitutes an interest□
legitimacy of the data controller concerned. The processing of personal data for prospecting purposes□
commercial can be considered to be carried out to meet a legitimate interest. [proper underlining].□

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FOR THESE REASONS,□

the Litigation Chamber of the Data Protection Authority decides, after deliberation, pursuant to□
of article 100, § 1, 1° of the LCA, to close the present complaint without further action. On the basis of□
information currently available to the Litigation Division, it does not consider it possible at this□
day to follow up.□

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□