

Litigation Chamber

Decision on the merits 147/2022 of 17 October 2022

File number: DOS-2019-04465

Subject: Digital membership card used as access card at a reduced rate

The Litigation Chamber of the Data Protection Authority, composed of Mr Hielke

Hijmans, chairman, and Messrs. Dirk Van Der Kelen and Christophe Boeraeve, members;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and

to the free movement of such data, and repealing Directive 95/46/EC (General Regulation on the data protection), hereinafter "GDPR";

Considering the law of December 3, 2017 establishing the Data Protection Authority, hereinafter "LCA";

Having regard to the internal regulations as approved by the House of Representatives on December 20, 2018 and published in the Belgian Official Gazette on January 15, 2019;

Considering the documents in the file;

Made the following decision regarding:

The complainant :

Mr. X, hereinafter "the complainant"

The defendant :

Y, hereinafter "the defendant".

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I. Facts and procedure

1.

On September 3, 2019, the complainant lodged a complaint with the Protection Authority data against the defendant.

2.

The subject of the complaint concerns the production of a digital membership card by the defendant for the owners of a holiday home and their family members, up to a certain degree of kinship, in order to give them access to the swimming pool at a rate advantageous for a total of 96 aquafun sessions per holiday home. For this purpose, no only the name of the applicant, who is also the owner of the holiday home, must be communicated but for each user of the card, a photo must also be loaded into a data file and the relationship (1st or 2nd degree) must also be mention. The complainant who owns accommodation in the holiday park wishes to access the swimming pool at the advantageous rate, without however providing photos and without mention the degree of kinship.

3.

On January 7, 2020, the complaint was declared admissible by the Front Line Service on the basis of Articles 58 and 60 of the LCA and the complaint is forwarded to the Litigation Chamber under article 62, § 1 of the LCA.

4.

On August 11, 2020, the Litigation Chamber 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 August 11, 2020, the parties concerned are informed of the provisions as set out in article 95, § 2 as well as in article 98 of the LCA. They are also informed, by virtue of Article 99 of the LCA, deadlines for transmitting their conclusions.

The deadline for receipt of the respondent's submissions in response has been set September 25, 2020, that for the complainant's reply submissions to October 16, 2020 and that for the Respondent's Reply to November 6, 2020.

6.

In the absence of a reaction from the defendant to the invitation to submit conclusions and with a view to guarantee the rights of the defence, the Litigation Chamber decides, on June 24, 2022, in accordance with article 52 of the internal rules, to hold a hearing, set to July 4, 2022.

7.

On June 28, 2022, the defendant requests a copy of the file (art. 95, § 2, 3° of the LCA), which was sent to him the same day.

8. At the Respondent's request, the hearing date is moved to September 5, 2022.

9.

On August 29, 2022, the Litigation Chamber receives the submissions in response from the respondent. He specifies that the membership card constitutes a commercial offer exceptional for private owners and that the unauthorized use of it has gave rise to the collection of personal data including photos of the

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card recipients. In law, the defendant asserts that the principles of protection of the privacy as set out in article 5.1.a) - d) and f) of the GDPR are respected, as well as the principle of responsibility defined in article 5.2 of the GDPR. Finally, the defendant states that the photos cannot be considered as biometric data within the meaning of GDPR Article 9.

10. On September 5, 2022, the parties are heard by the Litigation Chamber.

11. On September 7, 2022, the minutes of the hearing are submitted to the parties.

12. On September 13, 2022, the Litigation Chamber received some remarks from the defendant relating to the minutes that it decides to include in its deliberation.

13. On September 15, 2022, the Litigation Chamber also received from the complainant some remarks relating to the minutes which are included in the deliberation.

II. Motivation

a) Legal basis

14. The defendant submits that the processing of personal data using the card of digital member, namely the first and last name, as well as the photo as well of the private owner that of each member of his family, limited to the 1st and 2nd degrees, finds its basis in Article 6.1.b) of the GDPR. The Respondent further invokes, as subsidiary, its legitimate interest (article 6.1.f) of the GDPR) to qualify as lawful the processing of data produced on the basis of the digital map.

15. The Litigation Division deals further with the legal bases invoked by the respondent. In accordance with Article 13.1.c) of the GDPR, before starting the activities of processing, the controller must determine the legal basis which thus applies than the specific purpose sought¹, with the obligation for the defendant to inform the plaintiff.

16. Concretely applied to this case, the Litigation Chamber finds that the annex to the basic act² relating to the holiday area specifies in article 193 that the respondent shall issue regulations for family members or visiting guests

¹ See in this regard Guidelines 5/2020 on consent within the meaning of Regulation (EU) 2016/679 (points 121-123); https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf (note that this version in FR has not yet been officially approved).

² In the basic deed designated as: "appendix to the Rules of Co-ownership and Internal Order".

³ Article 19 of the basic act is worded as follows: "Each owner may stay on the estate whenever it suits him. agrees with his family members. It can also receive guests provided they are not too numerous, nor too noisy. The owner of the plot is responsible for damage caused by his guests. Comparing issue appropriate regulations for family members or visiting guests or claim compensation for the use in particular of the swimming pool, the sports pond or even for access to the area. The owner is personally responsible for the registration of the people he hosts under his roof. Other external visitors to the domain will be subject to the same provisions."

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

appropriate or will claim compensation for the use of the swimming pool in particular.

The Litigation Chamber finds that according to the aforementioned provision, the defendant contractually has the possibility of regulating access to the swimming pool, as it has done in practice by providing an advantageous tariff for the owner and his parents of the 1st and 2nd degree. The complainant acknowledges in his conclusions as well as during the hearing that this system allowing access to the bathing area at an advantageous rate already exists since many years. The Litigation Chamber considers that the basis of this system is found in the basic act and the data processing is therefore based on Article 6.1.b) of the GDPR in order to be able to allow the owner of a holiday home and members of his family up to the 1st and 2nd degrees to benefit, via an access card, the advantage consisting of access to the swimming pool at an advantageous rate.

17. The question of the extent to which the treatment of personal data by means of the digital membership card such as this is currently envisaged, namely the processing of photos of card users and the mention of the degree of kinship with the owner of the holiday home, respects the principle of data minimization.

18. For the sake of completeness, the Litigation Chamber also points out that the legal basis 'legitimate interest' (article 6.1.f) of the GDPR) on which the defendant relies to subsidiary title is invoked by the defendant after the fact and the latter indicates that this basis legal has recently been added to the privacy statement. Bedroom Contentitieuze reminds that due to the obligation to provide, at the time of the collection of personal data, the legal basis invoked by the controller (article 13.1.c) of the GDPR), the defendant must decide, before starting the collection, what is the legal basis thereof. The addition of the legal basis 'legitimate interest' after the collection of the data has taken place, as in the present case, does not comply with the requirement that the

legal basis must be determined and communicated to the person concerned, namely the complainant, before the collection of photos and information relating to the degree of kinship. However, only one valid legal basis is sufficient, which in this case is the contract to the origin of the data collection.

19.

It emerges from the foregoing that the Litigation Division finds that the legal basis invoked primarily by the defendant is the performance of a contract (Article 6.1.b) of the GDPR), which constitutes a valid legal basis that can justify the processing by the defendant of personal data using the digital membership card.

It is thus established that the defendant has not committed a violation of Article 6.1 of the GDPR juncto article 13.1.c) of the GDPR.

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b) Data minimization principle

20. The presence of a legal basis allowing the respondent to process the data in the light of the purpose it pursues, namely, in this case, to attribute an advantage owners and a limited number of parents by giving them access to the swimming pool at a advantageous rate, does not prevent the defendant from being bound by the principle of data minimization. This means that the defendant must check how the purpose can be achieved using data that is adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (article 5.1.c) of the GDPR).

21. Applied to the present complaint, it should be checked whether the defendant can claim the photos and the degree of kinship of the intended users of the membership card and then process them in a data file for controlled access to the swimming pool at an advantageous rate in order to avoid misuse of the card by third parties. In the past, it has indeed been found that third parties have used the card without permission because some owners put the card in, generally in paper format at the time, available to the tenants of their accommodation

holiday as part of a private rental. In view of the purpose of preventing possible misuse of the card, it should be checked whether the processing of the photos in question and the degree of kinship is required for this purpose.

22. Personal data should only be processed if the purpose of the processing cannot reasonably be achieved by other means. It appears from the facts of the file that an identification of the card users who come to the swimming pool is necessary so as to be able to verify whether the users are indeed those authorized to access the swimming pool at the advantageous rate and therefore to be able to exclude abuse. It's about a 4 Recital 39 GDPR.

"Any processing of personal data should be lawful and fair. The fact that personal data concerning natural persons is collected, used, accessed or otherwise processed and the extent in which that data is or will be processed should be transparent to natural persons concerned. The principle of transparency requires that any information and communication relating to the processing of these personal data are easily accessible, easy to understand, and formulated in clear and simple. This principle applies, in particular, to the information communicated to the data subjects on the identity of the responsible for the processing and on the purposes of the processing as well as for other information aimed at ensuring a fair and transparent processing vis-à-vis the natural persons concerned and their right to obtain confirmation and communication of personal data concerning them which are the subject of processing. natural persons should be informed of the risks, rules, safeguards and rights related to the processing of personal data and procedures for exercising their rights with regard to this processing. In particular, the specific purposes of the processing personal data should be explicit and legitimate, and determined when collecting the data to personal character. Personal data 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 duration of retention of data is kept to a 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 does not are not kept for longer than necessary, time limits should be set by the controller for

erasure or for periodic review. All reasonable steps should be taken to ensure that personal data that is inaccurate is rectified or deleted. Personal data should be treated in a way that ensures appropriate security and confidentiality, including to prevent access unauthorized access to such data and to the equipment used for its processing as well as the unauthorized use of such data and this equipment." [own underline]

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specific, explicit and legitimate purpose within the meaning of Article 5.1.b) of the GDPR⁵. It is established that the affected owners, including the complainant, were contacted by the defendant through a letter explaining to them that following abuse of the paper card, we were going to switch to a digital card, specifying that from now on, the photos of the beneficiaries with indication of the degree of kinship would be necessary for this purpose.

23. Specifically regarding the need to provide photos mentioning the degree of relationship and the processing of these in a data file for the use of the digital card as part of the fight against abuse, the defendant indicates when the hearing to have considered using the identity card as a means of controlling access but that reading this card would in no way constitute a lesser violation of privacy, since the identity card contains more data than those required for access control.

24. In this regard, the Litigation Chamber underlines that the purpose as pursued by the defendant can indeed be achieved by processing only the names of the beneficiaries of the tariff advantageous in a data file that is coupled to a digital map. In fact, it suffices that the beneficiary of the card presents himself at the access desk of the swimming pool where the price advantageous can be applied to him by presenting his membership card digital and his identity card. It is by no means necessary on this occasion that the plaintiff's identity card is "read" as the defendant claims, which implies a automated data processing in accordance with Article 2.1 of the GDPR. Reading the

identity card would indeed have the consequence that by means of the identity card reader electronically, more data is processed than necessary for the purpose, being given that the card contains much more information than the defendant believes he has need.

25. The Litigation Chamber affirms that it suffices that the names of the beneficiaries be treated by means of the membership card and can be consulted by the receptionist. In order to check if the person presenting the membership card is indeed a beneficiary of the rate advantageous, a simple visual check of the identity card on which appear in a visible both the name and the photo of the person concerned offers the guarantee of a correct identification. The processing of photos of beneficiaries can therefore under no circumstances be qualified as relevant or necessary for the achievement of the purpose pursued.

The combination on the one hand of the processing of the names of the beneficiaries of the advantageous tariff means of the membership card which is coupled to a data file, which constitutes a data processing within the meaning of Article 4.2) of the GDPR, and on the other hand the visual control of the identity card on which the name of the beneficiary also appears, as well as the photo to be

5 See also in this respect recital 39 of the GDPR which specifies: "[...] In particular, the specific purposes of the processing personal data should be explicit and legitimate, and determined when collecting the data to personal character. [...]".

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the help of which one can check if the person who presents himself at the reception desk is actually the one to which these name and photo belong and is therefore authorized to use the membership card is sufficient to fight against abuse. A simple visual check to verify the physical similarities of the person who wishes to access the place with the photo on the identity card does not fall within the scope of the GDPR, being given that such monitoring is not accompanied by any form of processing within the meaning of GDPR article 2.1. Verification of visual identity does not imply

automated processing in whole or in part, or processing of personal data

personnel contained or required to be contained in a file. This method therefore allows to achieve the intended purpose in a way that is less invasive of privacy than that used currently by the defendant.

26. This also applies to the processing of the degree of relatedness, the processing of which is not no longer relevant or necessary in light of the purpose. Communication of the degree of relationship for each beneficiary, as requested by the defendant, is based on the simple "declaration on honor" of the owner of the holiday home. Bedroom Litigation considers that it is sufficient for the owner of the holiday home to indicate only the names of his parents in the 1st and 2nd degrees without having to mention for each of them the precise degree. The indication of the degree of kinship offers no added value, since this data cannot be subject to any control since it is a unverified information that must be provided by the owner himself, information that does not cannot be objectively established by the defendant by means of any document.

As a result, the Litigation Chamber considers that with regard to the degree of kinship as well, the only treatment of the names of the beneficiaries is sufficient, without further specification of the degree of kinship.

27. Given the fact that the defendant's purpose can be achieved without processing the photos of the beneficiaries of the membership card and their degree of kinship, it must be established that the defendant has breached GDPR Article 5.1(c).

III. Publication of the decision

28. Given the importance of transparency regarding the decision-making process of the Chamber Litigation, this decision is published on the website of the Protection Authority Datas. However, it is not necessary for this purpose that the identification data of the parties are communicated directly.

FOR THESE REASONS,

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

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

in accordance with Article 5.1.c) of the GDPR within two months and to inform

the Data Protection Authority within the same period.

Pursuant to Article 108, § 1 of the LCA, this decision may be appealed to the

Court of Markets (Brussels Court of Appeal) within thirty days of its

notification, with the Data Protection Authority as defendant.

Such an appeal may be lodged by means of a contradictory request which must include the

particulars listed in article 1034ter of the Judicial Code⁶. The contradictory request must be

filed with the registry of the Markets Court in accordance with article 1034quinquies of the Code

court⁷, or via the e-Deposit computer system of Justice (article 32ter of the Judicial Code).

(Sr.) Hielke HIJMANS

President of the Litigation Chamber

6 "The request contains on pain of nullity:

the indication of the day, month and year;

1°

2° the surname, first name, domicile of the applicant, as well as, where applicable, his qualities and his national register number or

Business Number ;

3° the surname, first name, domicile and, where applicable, the capacity of the person to be summoned;

4° the object and the summary statement of the means of the request;

5° the indication of the judge who is seized of the application;

6° the signature of the applicant or his lawyer."

7 "The request, accompanied by its appendix, is sent, in as many copies as there are parties involved, by letter

recommended to the clerk of the court or filed with the registry."