Litigation Chamber

Decision on the merits 76/2021 of 9 July 2021

File number: DOS-2020-01053

Subject: Communication of personal data by a health insurance fund within the framework of a

professional reintegration project – lack of adequate basis of lawfulness

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

Hijmans, chairman, and Messrs. Y. Poullet and C. Boeraeve, members, taking up the case in

this composition;

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;

Having regard to the Law of 3 December 2017 establishing the Data Protection Authority (hereinafter

ACL);

Having regard to the Rules of Procedure as approved by the House of Representatives on 20

December 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 data controller:

Y1; Y2; Hereinafter referred to together as “the defendant”

or Y1 and Y2

Having as counsel Maître T. De Cordier and Maître T.

Dubuisson, lawyers at the Brussels Bar, whose firm

is established at 1170 Brussels, Chaussée de la Hulpe 178.

I. Feedback from the procedure

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Having regard to the complaint filed on February 26, 2020 by the complainant with the Authority for the Protection of

data (ODA);

Having regard to the decision of 9 March 2020 of the Front Line Service (SPL) of the APD declaring the complaint

admissible and the transmission thereof to the Litigation Chamber;

Having regard to the letter of April 8, 2020 from the Litigation Chamber informing the parties of its decision

to consider the file as being ready for substantive processing on the basis of Article 98

LCA and communicating to them a timetable for the exchange of conclusions1;

Having regard to the plaintiff's arguments communicated to the Litigation Chamber by letter dated April 8

2020;

Having regard to the main conclusions filed on May 20, 2020 by the defendant;

Having regard to the plaintiff's arguments of May 20, 2020;

Having regard to the defendant's reply submissions of July 1, 2020;

Having regard to the invitation to the hearing - requested by the defendant on April 29, 2020 - sent

by the Litigation Chamber to the parties on October 22, 2020;

Having regard to the hearing during the session of the Litigation Chamber of December 3, 2020 in the presence

representatives of the defendant (Mr. Z, medical director at Y1 and Mr. V,

medical adviser coordinator at Y1) as well as their counsel, Maitre T. Dubuisson;

Having regard to the minutes of the hearing and the observations made thereon by counsel for the

defendant which were attached to these minutes;

1 In terms of conclusions, the defendant indicates that this letter was not sent to it by registered

as set out in sections 98 and 95.2. ACL. As the LCA does not provide for any sanction in this respect, the

defendant draws no conclusions from this. The Litigation Chamber notes in this respect that the said letter

actually sent by email taking into account the application measures aimed at curbing the spread of the

covid-19 virus and that, moreover, the defendant complied with the schedule communicated without any

damage does not exist because of this method of sending.

II.

The facts and the subject of the request

Preliminary remark

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1. The facts giving rise to the complaint took place between February 17, 2020 and the 26

February 2020. They are part of the examination of the reintegration file

employment in the complainant's labor market. More specifically, the review of

this plaintiff's file is part of his approach entitled "Trajet de

reintegration aiming

the

socio-professional reintegration »

(hereafter

"journey of

reinstatement").

2. For

proper understanding of the facts and

this decision,

bedroom

Litigation summarizes below the main stages of this reintegration process and the

different actors involved in it:

- For people unable to work without an employment contract, there is a route

reintegration centered on the socio-professional reintegration carried out by the

medical adviser of the mutual alongside the social insured, and during which the said

medical adviser collaborates a.o. (if applicable) with the regional bodies to

employment such as FOREM (Walloon Public Service for Employment and Training) and

AVIQ (Agency for a Quality Life).

- The first step in this process is when the insured person makes contact with

the medical adviser of his mutual insurance company.

- The second step consists of determining a concrete training project

aimed at reintegration. The medical adviser may refer the insured to a

partner to examine possible career paths and clarify its

training course. If the insured already has a concrete training plan, the

medical advisor can provide him with the necessary information and help him to complete

the required documents.

- The medical advisor then assesses, during the third stage, whether the proposal

of training and employment which interest the insured person are compatible with his

health.

- The medical advisor finally submits, as the fourth step, the proposal for

training at the Higher Commission of the Disability Medical Council (hereinafter the

CS CMI) of the National Institute for Health and Disability Insurance (hereafter INAMI). If the

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decision of the INAMI is positive, the costs related to the training and the premiums are taken

covered by the mutuality.

3. Since 2017, the plaintiff has been followed by the defendant's medical adviser M in the

in the context of his incapacity for work and his invalidity.

4. As part of his desire to return to the job market, the complainant in January

2020, submits a request for socio-professional rehabilitation via the “Form

introduction to FOREM and AVIQ” (hereinafter the FIF) with FOREM, the objective of its

approach being to define with

FOREM a course of socio-rehabilitation

professional.

The FIF form completed by the complainant contained the following clause:

“The insured authorizes INAMI, the insurers, AVIQ and FOREM to exchange the

information necessary for reorientation and support towards employment, with

consent

prior

through

writing

of

the insured

for

each

data

personal information/document/medical opinion/other document requested. This is done in accordance

to the General Data Protection Regulation (GDPR). INAMI, via rehabilitation

offered to the insured, aims to support the latter in the development of

skills or in upgrading skills with a view to their reintegration into the

the job market. The exchange of information is done on written request and with the

prior consent of the insured for each personal data/document/notice

medical/other document requested” (emphasis added by the Litigation Chamber).

The said form used by the complainant is at the top of Y2 (top right and bottom

page) but also displays the logos of the following institutions in the header: FOREM,

the INAMI, the National Intermutualist College and the AVIQ, i.e. the institutions intervening

each at a distinct stage in the execution of their respective competences within the framework

of a request for socio-professional rehabilitation of this type.

5. As part of the follow-up to this request, the health relay agent advisor INAMI AVIQ

Complainant's FOREM, by email of February 17, 2020, sent the request for training of the

plaintiff to the defendant, more particularly to the medical adviser M to the latter.

The adviser thus asked the medical adviser M to complete the section “Opinion of the

medical adviser” of the RP1 form, or the vocational rehabilitation form

for the introduction of a request for financial assistance for the planned training

by the complainant to the CS CMI of INAMI.

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6. More specifically, the defendant's medical adviser was asked to respond to the

following questions from section 4 of the RP1 form: “Opinion of the medical officer”:

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Is the medical adviser in favor of the rehabilitation project and the targeted profession?

Does the professional project and the profession concerned present a risk of aggravating

the state of health of the insured?

Are the professional project and the profession compatible with the state of health of the

the insured?

7. On February 18, 2020, the medical advisor M confirmed to the FOREM advisor that she

would complete the document the same day and forward it to the CSCMI . On this same date, the

medical adviser M spoke by telephone with the complainant in order to take stock

at his request, evaluating his request for training to be able to complete at

better form RP1.

8. On the same day, i.e. February 18, 2020, the complainant made direct contact with the CS CMI of

the INAMI, confirming to him that the professional rehabilitation project "will be sent to him

officially today afternoon or tomorrow by doctor [M] of Y2”.

9. On February 19, 2020, an administrative employee of the defendant confirmed to the plaintiff

that “Doctor [M] [i.e. the medical advisor M] sent your file to INAMI this
Wednesday 02/19/20 morning”. In the appendix to point 4 "opinion of the medical officer" of the form,
the medical adviser describes the medical reasons for which the complainant is on sick leave
job. Medical Adviser M notes improvements while indicating that the possibility
concrete and real reintegration after the requested training arises as well as that of the cost
of this training in particular.

10. By return email of the same day, the complainant thanked the medical adviser M
for his support in his professional reintegration project, in these terms "I
would also like to thank Doctor [M] for his support in my rehabilitation project
coherent, fair and just socio-professional society, which reads us a copy". He formulates by
elsewhere, via this same email, a request for access to his personal data (article 15
GDPR) as part of its file.

11. By email of February 20, 2020, the complainant confirmed to the FOREM adviser that his
file was transmitted to the CS CMI, the defendant's medical adviser M having
sent according to him instead of FOREM.



12. On February 21, 2020, medical adviser M responded to the complainant's request for access by
transmitting the completed RP1 form, including its opinion of February 19, 2020
contained in section 4 of the said form and its annex.

13. On February 21, 2020, after receiving the documents mentioned in point 12 above, the
complainant writes to the CS CMI of INAMI to support his request. In particular, he criticizes the
work carried out by his medical adviser M. The complainant mentions in this respect the
direct communication of the RP1 form to the defendant already denounced (point 11 below
above) but also that the medical opinion of the medical adviser M as such
would be biased and unauthorized, because contrary to statistics, adopted without physical encounter
with himself and without taking into account the opinion of his medical specialist.

14. On February 26, 2020, the complainant lodged a complaint with the DPA.

15. According to his complaint, the plaintiff raises three shortcomings on the part of the doctor-

advice M:

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transmission by the medical adviser M of his medical opinion to the CS CMI without his

prior written agreement, and therefore, in violation of the agreement signed in

as part of the socio-professional rehabilitation project (FIF). The complainant considers

in this respect that it was up to his FOREM adviser to transmit the said

INAMI form;

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a lack of transparency from

when he would not have been

informed of

the

disputed communication;

a lack of respect for the obligation of confidentiality due to the data

sensitive/medical in respect of which the complainant reiterates that the

defendant could not transmit the data concerning him to INAMI.

16. In its submissions in reply and reply, the defendant asks the

Litigation Chamber:

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Principally, to declare the complaint unfounded and consequently to reject it

including any administrative fine;

In the alternative, in the event that the plaintiff's action is declared justified

in whole or in part, to pronounce against the defendant a simple

reprimand on the basis of article 100.1.5°LCA;

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The defendant also requests that in the event of publication of the decision on the site

Internet of the DPA, the direct identification data of the parties and the persons cited,

whether physical or moral, are deleted.

III.

The hearing of December 3, 2020

17. During the hearing, the minutes of which were drawn up, the defendant presented the

arguments that it had developed by way of conclusions.

18. She particularly highlighted the Complainant's "change of attitude" and the

highly regulated legal context within the framework of which it carries out its various missions, including

that of socio-professional reintegration. Finally, she highlighted the measures implemented

place to comply with the GDPR and the role played by the medical advisor.

IV.

PLACE

IV.1. As to the jurisdiction of the Litigation Chamber

19. The Litigation Chamber notes that both in the terms of its complaint and in the arguments

communicated subsequently, the complainant points to the fact that the medical adviser M de

the defendant did not keep his medical file up to date and sent a medical opinion

biased, allowing himself an opinion contrary to the statistics, without direct contact with him. the

complainant also denounces a medical opinion based on obsolete data and the sending

an incomplete file (see in particular point 13 above).

20. The Litigation Chamber recalls, as it has already had occasion to do under the terms

previous decisions, that the competence of the DPA in general and of the Chamber

Litigation in particular is "limited to monitoring compliance with the regulations

applicable to data processing, regardless of the sector of activity in which these□

data processing takes place. Its role is not to replace the courts□

work in the exercise of their skills". 2□

21. In other words, it is not for the Litigation Division to rule on the□

quality of the work carried out by the defendant's medical adviser nor to conclude that any□

or other failure on the part of the latter which would not constitute a□

breach of applicable personal data protection rules. As□

2 See. for example Decisions 03/2020 and 41/2021 (point 13) of the Litigation Chamber.□



example, it is not for the Litigation Chamber to consider that the doctor-□

counsel should or should not have met with the complainant as part of the drafting of his opinion to□

the attention of the INAMI nor to call into question the medical assessment of the medical adviser□

or even his evaluation of the weight to be given to the statistics of the chances of reintegration of the□

plaintiff, for example.□

IV.2. Regarding the identification of the data controller□

22. The Litigation Chamber notes that according to its complaint form, the complainant□

seems to be directing his complaint directly to□

against the medical adviser M of□

the□

defendant. He nevertheless mentions that the latter belonged to Y2.□

23. The Litigation Division has already had the opportunity to point out that it is often complex for□

the complainant to correctly identify the controller or data processor□

processor with regard to the processing(s) it denounces, these notions being defined in Articles□

4.7 and 4.8 of the GDPR, in a legal way and probably difficult to understand by a□

person not versed in the subject 3.□

24. Accordingly, the Litigation Chamber, upon the invitation to conclude addressed both to the complainant□

only to the defendant on April 8, 2020 (see Title 1 above “Reports of the proceedings”),

in particular asked the latter to clarify the role played both by itself and, where

where appropriate, by the medical adviser M, with regard to the concept of "controller"

(Article 4.7 of the GDPR).

25. The Litigation Division agrees with the defendant's analysis that the doctor-

Conseil is neither a data controller, nor a joint data controller, nor a

defendant's subcontractor. The Litigation Chamber concludes that the

medical adviser is “a person acting under the authority of the data controller”

within the meaning of Article 29 or even 32.4 of the GDPR, admittedly with independence

professional which is not incompatible with this quality (see below points).

26. A data controller is defined as “the natural or legal person or any

other entity which alone or jointly with others determines the purposes and means

the processing of personal data” (article 4.7 of the GDPR). It's about a

autonomous concept, specific to data protection regulations, of which

the assessment must be based on the criteria it sets out: the determination of the

3 See. for example point 16 of Decision 69/2021 of the Litigation Chamber. See also Decision

56/2021 of the Litigation Chamber, points 48 et seq.



purposes of the data processing concerned as well as that of the means thereof.

The functional independence of certain professions in

the exercise of

their

skills does not necessarily make them data controllers at the

sense of the GDPR.

27. It is the defendant who acts as data controller with regard to the

offending treatment. This quality of data controller stems from the mission which

entrusted to him by law. Indeed, it is undisputed that the Insurance Law

mandatory health care and allowances of July 14, 1994 entrusted to the insurers

the reintegration mission via several channels. With regard to the reintegration process aimed at

socio-professional reintegration, the royal decree of 3 July 1996 regulates the

different aspects 5. Admittedly, these legal texts do not explicitly mention that the

insurers (such as the defendant) are data controllers within the meaning of

GDPR. However, it follows from the legal missions entrusted to them that they are the ones who

decide on the purposes and means of the processing necessary to carry out these

assignments. Accordingly, the Litigation Chamber concludes that the person responsible for

treatment of the defendant 6.

28. To carry out these missions, a certain number of data processing operations are necessary,

some of which are operated by medical advisors.

29. The mission of the medical adviser is defined by the Law of 14 July 1994 relating to the insurance

mandatory health care and allowances already mentioned (articles 153 and 164) and by the royal decree

4 As for the relationship between Y1 and Y2; see the law of 6 August 1990 relating to mutual societies and national unions

mutualities.

5 Royal Decree of 3 July 1996 implementing the Law on compulsory health care insurance and

allowances, coordinated on July 14, 1994 (Section VI quater), M.B., July 31, 1996.

6 See. in this regard the Guidelines 07/2020 of the European Data Protection Board (EDPS-

EDPB) on the concepts of controller and processor (Guidelines 07/2020 on the concepts

of Controller and processor in the GDPR, point 22): “However, more commonly, rather than directly

appointing the controller or setting out the criteria for its appointment, the law will establish a task or impose

a duty on someone to collect and process certain data. In those cases, the purpose of the processing is often

determined by the law. The controller will normally be the one designated by law for the realization of this

purpose, this public task. For example, this would be the case where an entity which is entrusted with certain

public tasks (e.g., social security) which cannot be fulfilled without collecting at least some personal data, sets

up a database or register in order to fulfill those public tasks. In that case, the law, albeit indirectly, sets out who
is the controller. More generally, the law may also impose an obligation on either public or private entities to
retain or provide certain data. These entities would then normally be considered as controllers with respect to
the processing that is necessary to execute this obligation " This text is not yet available in English:
https://edpb.europa.eu/our-work-tools/documents/public-consultations/2020/guidelines-072020-
concepts-controller-and_en
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n° 357. The medical adviser is hired by the insurer, either in this case by the
defendant. This commitment is the subject of a written agreement subject to the Law of 3
July 1978 on employment contracts. As part of their mission, doctors
councils ensure, in particular, the vocational rehabilitation of those insured by
incapacity of work. To this end, they shall take all useful measures including the establishment
and the follow-up of a reintegration plan as in the case of the complainant. In the exercise of his
mission, the medical adviser has decision-making competence; he retains freedom
and professional independence notwithstanding the contractual relationship in which he
is committed to
with regard to
the insurer. Her
freedom and its
independence
professional do not, however, carry his qualification as responsible for
data processing when the medical advisor does not have this power to
decision with regard to the purposes and means of data processing.
30. The medical advisor is also not co-responsible for treatment with the
defendant. Co-responsibility indeed requires a joint determination of both the
ends than means. It has been demonstrated above that the medical advisor does not determine

in no way neither the purposes nor the means of the data processing carried out within the framework of the

professional reintegration paths (including the reintegration path). It is therefore not co-

responsible for such processing with the defendant.8

31. Finally, the Medical Adviser is not the defendant's subcontractor either. The sub-

data processor is defined in article 4.8 of the GDPR as being the natural or legal person,

the public authority, service or other body which processes personal data

staff on behalf of the controller. It follows from this definition

that being in a hierarchical relationship with the data controller is incompatible

7 Royal Decree No. 35 of July 20, 1967 on the status and schedule of medical advisers responsible for ensuring

with organizations that provide medical control of the primary incapacity and health benefits in

under the Law on compulsory health care and compensation insurance, consolidated on July 14, 1994,

MB, July 29, 1967.

8 See. in this regard, Guidelines 07/2020 of the European Data Protection Board (EDPS-

EDPB) on the concepts of controller and processor (Guidelines 07/2020 on the concepts

of Controller and processor in the GDPR) page 3 and ooint 50 “The overarching criterion for joint controllership

to exist is the joint participation of two or more entities in the determination of the purposes and means of a

processing operation. Joint participation can take the form of a common decision taken by two or more entities

or result from converging decisions by two or more entities, where the decisions complement each other and

are necessary for the processing to take place in such a manner that they have a tangible impact on the

determination of the purposes and means of the processing. An important criterion is that the processing

would not be possible without both parties’ participation in the sense that the processing by each party is

inseparable, i.e. inextricably linked. The joint participation needs to include the determination of purposes on

the one hand and the determination of means on the other hand.”



with the definition of subcontractor9. However, it has been stated above (point 29) that the doctor-

council is precisely, given his status as an employee, in a hierarchical relationship

with the defendant. Whoever is a processor must also process data to

personal character on behalf of the controller. The relationship between the sub-

processing and the data controller is characterized for this purpose by a contract or

other specific legal act, distinct from any employment contract, for example, which aims, at

departure from the requirements contained in Article 28.3. of the GDPR, to regulate the way in which the

subcontractor will process the data on behalf of the controller. In others

terms, the person who acts under the authority of the controller within the meaning of Article

29 or 32.4 of the GDPR such as the medical adviser in this case (see point 25) is not and

cannot be a subcontractor. These two qualities are to be distinguished and they are

incompatible. Therefore, the Litigation Chamber rejects any qualification of sub-

dealing with the defendant in respect of the medical adviser Mr.

32. In support of the foregoing, the Litigation Chamber excludes the quality of (co)-responsible

of treatment and subcontractor on the part of the medical adviser M of the defendant and

concludes that the defendant is the data controller. The questioning of

Medical Adviser M by the Complainant in the terms of his complaint, is in fact, in the opinion of the

Litigation Chamber, a questioning of the defendant for breaches

possible GDPR. At no time did the defendant contest its quality

of data controller with regard to the disputed communication.

IV.3. As for the shortcomings

IV.3.1 As regards the legal basis for the communication of the (health) data of the

complainant by the defendant to INAMI

The need for an identified basis of lawfulness

33. Any processing of personal data must be based on one of the databases

lawfulness provided for in Article 6.1 of the GDPR. Regarding the processing of categories

specific data, the condition of lawfulness referred to in Article 6.1 of the GDPR does not apply

that if Article 9.2 of the GDPR provides for a specific derogation from the general prohibition of

process the special categories of data provided for in Article 9.1. In other words,

where data within the meaning of Article 9 of the GDPR is processed, its processing must

find basis in Article 9.2, read in conjunction with Article 6.1. of the GDPR.

9 J. Herveg and J-M Van Gyseghem, “Title 16 – the impact of the General Data Protection Regulation

in the health sector” in The General Data Protection Regulation (RGPD/GDPR), Brussels,

Larcier, 2018, pp.703.

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34. It is not disputed that during the communication of data by the defendant to INAMI

data relating to the complainant's health were transmitted.

35. The opinion given by the defendant's medical adviser M in the context of form RIP1

transmitted to INAMI indeed contains personal data relating to health

of the complainant. For example, the medical adviser mentioned (…) [the reasons

causes of the complainant's work stoppage] (appendix to the request form for

professional reintegration RP1 of the plaintiff – opinion of the medical advisor) (see point 9).

36. The Litigation Chamber recalls in this regard that the GDPR has opted for a broad definition

health data. Article 4.15 of the GDPR defines it as being “the

personal data relating to a person's physical or mental health

physical activity, including the provision of health care services, which reveal

information about that person's state of health. Recital 35 which sheds light

this definition confirms the choice of a broad and non-restrictive concept10.

37. Since the defendant processes data relating to health, the processing of such data

data must, as mentioned above, find a basis in Article 9.2 of the GDPR,

read in conjunction with Article 6.1. of the GDPR. This basis of lawfulness must be identified by the

controller before the start of it. Pursuant to Articles 13.1.c) and

14.1.c) GDPR, the data subject must additionally be informed of the legal basis

of the treatment.

Defendant's position

38. In its submissions, the defendant relies primarily on several bases of lawfulness

on which it believes it can rely, considering that the sharing of data

10 Recital (35): Personal data relating to health should include all

data relating to the state of health of a data subject which reveals information about the state

past, present or future physical or mental health of the data subject. This includes

information about the natural person collected during the registration of this natural person with a view to

receiving healthcare services or when providing such services within the meaning of Directive

2011/24/EU of the European Parliament and of the Council1 for the benefit of that natural person; a number, a

symbol or specific element assigned to a natural person to uniquely identify him or her for

health purposes; information obtained during the testing or examination of a body part or substance

body, including from genetic data and biological samples; and any information

regarding, for example, illness, disability, risk of illness, medical history,

clinical treatment or the physiological or biomedical state of the data subject, regardless of his or her

source, whether it comes from, for example, a doctor or other healthcare professional, a hospital, a

medical device or an in vitro diagnostic test.

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concerning the health of a socially insured person with the INAMI can be justified with regard to article

9.2 g)11 as well as with regard to article 9.2 h) of the GDPR12.

39. The defendant adds that as regards Article 6 of the GDPR, it can just as well rely

on its legal obligations pursuant to Article 6.1 c) of the GDPR and on its mission

in the public interest or in the exercise of the official authority vested in it as

as referred to in Article 6.1 e) of the GDPR. The defendant lists a series of laws to

support. In this regard, the Litigation Division recalls the condition of necessity which

conditions the applicability of both Article 6.1.c) and Article 6.1.e) of the GDPR13 as well as in

fine, of any other basis of lawfulness which would include this condition of necessity.

40. The defendant also refers, as a basis of subsidiary legality, to the clause

authorization signed by the complainant under the terms of the FIF form on January 17, 2020 (point

4). It specifies with regard to this clause that it was modified at the beginning of 2020 and that it

now provides, contrary to the version signed by the complainant (even in January

2020), which the insured person authorizes once and for all the exchange instead of a

authorization to be given to each communication as signed by the complainant.

41. In other words, the Respondent makes it clear by way of submissions that it does not consider

not, principally at the very least, that the consent given through this clause

(whether in its version prior to January 1, 2020 as in the case of the complainant

or after 1 January 2020), constitutes the basis for the lawfulness of the processing.

42. It is only in the alternative that the defendant invokes the consent of the plaintiff

as a basis for the lawfulness of the processing: either only if the Litigation Chamber

had to consider that none of the bases of lawfulness relied on as a main title (and which were

recalled in points 38 and 39 above) cannot be accepted14.

11 Article 9.2 g) GDPR: Paragraph 1 does not apply if one of the following conditions is met (…):

(g) the processing is necessary for reasons of important public interest, on the basis of Union law or

right of a Member State which must be proportionate to the objective pursued, respect the essence of the right to

data protection and provide appropriate and specific measures to safeguard the rights

fundamentals and interests of the data subject;

12 Article 9.2 h) of the GDPR: Paragraph 1 does not apply if one of the following conditions is met (…):

h) the processing is necessary for the purposes of preventive medicine or occupational medicine,

the assessment of the worker's work capacity, medical diagnoses, health care

or social, or the management of health care or social protection systems and services based on

under Union law, the law of a Member State or under a contract concluded with a healthcare professional

and subject to the conditions and warranties referred to in paragraph 3.

13 See. points 48 et seq. of Decision 38/2021 of the Litigation Chamber.

14 The defendant thus indicates in terms of conclusions (point 89) that “although the FIF form
mention of consent, it turns out that in this case consent was not required to process this data
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43. Finally, as regards the plaintiff's consent (although this was invoked in the alternative), the
defendant considers that he meets the qualifications required by articles 4.11 and 9.2. a) from
GDPR when it results from the exchanges of correspondence between the complainant and both
the INAMI that the FOREM that the complainant not only did not oppose this
communication but that he, on the contrary, explicitly relayed the information according to which
the defendant [read the communication by the defendant] would intervene or was
intervened (item 8) .
Position of the Litigation Chamber
44. The Litigation Division does not rule out that one or other of the bases of lawfulness, provided for in
section 9.2. of the GDPR and read in conjunction with Article 6.1. of the GDPR may be
mobilized with regard to data processing as part of the sharing of information
between the defendant and its partners (including INAMI) in the context of the journey of
reinstatement15. However, this basis of lawfulness must, as recalled above in point 37
above, be identified by the defendant.
45. The Litigation Chamber recalls in this respect that it is the responsibility of the data controller
to identify a basis of lawfulness on which it bases its processing16. This requirement
also participates in the principles of loyalty and transparency that it is responsible for
(article 5.1.a) of the GDPR – explained in recital 39 of the GDPR). Consequences
different arising from one or the other basis of lawfulness, in particular in terms of rights
for the data subjects, it is not allowed for the data controller to invoke
one or the other depending on the circumstances. As already mentioned, Articles 13.1.c) and
14.1.c) of the GDPR also require the communication of the legal basis to the person
concerned.

health. Article 9(2) of the GDPR provides for other bases of processing than that of the
consent in which health data can be processed (page 35 of the conclusions
in reply).

15 As for the conditions under which processing can be based on Article 6.1.e) of the GDPR, cf.
in particular Decisions 24/2021 (https://www.autoriteprotectiondonnees.be/publications/decision-quant-
au-fond-n-24-2021.pdf), 55/2021 (https://www.autoriteprotectiondonnees.be/publications/decision-quant-
au-fond-n-72-2021.pdf) and 72/2021 (https://www.autoriteprotectiondonnees.be/publications/decision-quant-
au-fond-n-55-2021.pdf) of the Litigation Chamber.
As for the conditions under which processing can be based on Article 6.1.c), see. especially the
Decisions 37/2021 (https://www.autoriteprotectiondonnees.be/publications/decision-quant-au-fond-n-37-
2021.pdf and 38/2021 (https://www.autoriteprotectiondonnees.be/publications/decision-quant-au-fond-n-
38-2021.pdf of the Litigation Chamber.

16 See. point 44 of Decision 38/2021 of the Litigation Chamber.



46. This need for clarification is all the greater since the Litigation Division finds
that insured persons such as the complainant must, when applying via the FIF form,
sign a clause by which they authorize - according to the specific terms of the form - both
the defendant that INAMI and their regional reintegration partners such as FOREM or
again the AVIQ, to exchange data insofar as they are necessary for the project
professional reintegration of the insured (see point 4 of the statement of facts).

47. As to this authorization clause, the Litigation Division is of the opinion that it cannot,
even invoked in support of consent as a basis of subsidiary lawfulness,
constitute consent in accordance with the requirements of the GDPR, nor in its version
prior to January 20, 2020 or in its version subsequent to that date. Indeed, the
elements required by Article 4.11. and 9.2. a) of the GDPR so that a consent can
validly be invoked as a basis of lawfulness are not met, in particular the

free nature of this consent. It is indeed necessary to distinguish the choice of the plaintiff

to be part of a process of professional reintegration on the one hand of the freedom of

consent to the processing of data that the fact of enrolling in this process induces,

certainly necessarily, on the other hand. The data subject is not in a position to

to oppose it, these being part, as the defendant also maintains, in

the exercise of the legal missions entrusted to it (points 38 and 39 and 44).

48. The Litigation Chamber is in this respect of the opinion that the insured person is "misled" on the role

of the consent he gives under this form. The wording “the insured

authorizes” indeed suggests that consent, within the meaning of the GDPR, is thus given.

In fact, any withdrawal from it, which is part of the rights conferred on it by the GDPR in

execution of its article 7.3., is without effect.

49. Finally, it remains for the Litigation Chamber to assess whether, as the defendant maintains,

the complainant would have indicated his consent by relaying the information to the INAMI

that his medical adviser M was going to send the disputed form (paragraphs 43 and 8).

The Litigation Chamber is of the opinion that such confirmation does not constitute a

unambiguous consent within the meaning of Article 4.11 of the GDPR. The Litigation Chamber is not

not insensitive to the change in attitude of the complainant who, while announcing this dispatch –

certainly without opposing it - contests its legality in a second step. However, this

element is not such as to allow the Litigation Chamber to conclude that in

In this case, there was therefore free and unambiguous consent within the meaning of Article 4.11. from

GDPR nor, a fortiori, explicit consent as required by Article 9.2.a) of the GDPR -

this explicit nature reflecting a reinforced requirement with regard to the consent of

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Article 6.1.a) of the GDPR. This condition requires that the data subject

accepts, by a declaration or by a clear positive act, that personal data

personal data relating to it are subject to processing and in a context where this

consent can also be expressed freely which, as demonstrated below,

above, was not the case.

50. In support of the foregoing, without concluding that there is no basis of lawfulness which could

generally legitimize the communication of data (relating to health) by the

respondent to INAMI, the Litigation Chamber concludes that certainly, in this case, it

there is a certain vagueness, even a certain confusion as to the basis of legality

mobilized for the processing of disputed data. The defendant could not, according to the

Litigation Division, validly base said processing on the authorization clause of the

form and deduce consent to the processing of their data, even in the

part of the project that the complainant had certainly chosen to undertake. Even presented in

terms of conclusions as a subsidiary lawfulness basis, the Litigation Chamber is

of the opinion that in the facts of the case, it is this basis of lawfulness of the processing which has been

wrongly presented to the complainant. Therefore, the Litigation Chamber finds a

breach of Article 9.2. a), read in conjunction with Article 6.1.a) of the GDPR in the

head of the defendant.

51. The Litigation Division takes note of the context in

which register

the

disputed communication and the breach invoked by the complainant, namely that of the management

compulsory health insurance, in which mutual funds such as the defendant

indicate that they only make the link between the insured person and the INAMI. More specifically, the

Litigation Chamber notes that the defendant specifies that it does not enact,

for example, the FIF form which contains the disputed authorization clause. Bedroom

Contentious is not insensitive to this and refers on this point to the corrective measures that it

decides to take on points 70-71 (title 6).

52. Notwithstanding this last point, the fact remains that, in his capacity as responsible for

treatment, the respondent could not rely on Article 9.2.a), read in conjunction with

section 6.1. a) of the GDPR in this case. The fact that it does not enact the form - which it uses

however in its header (see the top and bottom of the pages of the form - point 4) - is not

of such a nature as to remove any obligation on its part in view of this quality.

53. The Litigation Division recalls in this regard, as it has already pointed out in its

Decision 54/2021, that

the objective of the principle of accountability, or “principle of

responsibility” in its French translation (article 5.2. of the GDPR), is to empower

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data controllers - whether private companies, authorities or

public bodies -, and to allow the authorities responsible for supervising the protection of

data such as the APD to verify the effectiveness of the measures taken by applying it. The

risks must be identified through the implementation of action plans and procedures for

control and these organizations must be able to prove without difficulty that they have carried out

identification, assessment and management of protection risks

of personal data with regard to the processing they carry out. This principle would be

largely undermined, even emptied of all substance if it was enough for a manager to

treatment to invoke, once confronted with a complaint brought before the supervisory authority,

the fact, for example, that the computer application that she is obliged to use17 does not allow her

not to comply with the GDPR or as in this case, that the use of a form at the

formulation of which it did not participate would be imposed on it.

IV.3.2 Regarding the complainant's information

54. The complainant also complained about transparency, considering that he had not been informed

of the disputed communication.

55. In its capacity as data controller, the defendant is, barring exceptions, required to

implement articles 12, 13 and 14 of the GDPR and to be able to demonstrate this implementation

actual work (articles 5.2. and 24 of the GDPR).

56. Under Article 12.1 of the GDPR, the onus is on the Respondent to take steps

appropriate to provide the persons concerned by the processing of data that it

operates any information referred to in Articles 13 and 14 of the GDPR in a concise manner,

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

in writing or by other means, including electronically.

57. As to the content of this information, as the Litigation Chamber has already pointed out

in previous decisions, the elements listed both in § 1 and in § 2 of Articles 13 and

14 (all information not being collected directly from him) had to

be communicated.18

17 Decision 54/2021 of the Litigation Chamber, points 63 et seq.

18 Article 29 Group, Guidelines on Transparency within the meaning of Regulation (EU) 2016/679, WP 260,

revised version of April 11, 2018 (taken over by the European Data Protection Board):

https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=622227 (item 23).



58. The Litigation Chamber is of the opinion that, in light of the number of missions carried out by

the defendant, of the amount of data processing that it operates and therefore, of the

amount of information to be provided to data subjects in relation to this processing

or, more precisely with regard to the processing which concerns them more specifically, a

controller such as the defendant must adopt a multi-layered approach

levels19.

-

On the one hand, the person concerned must have clear information from the outset

and accessible on the fact that information about the processing of his data to

personal character (privacy policy) exist and from the place where it can

find them in their entirety.

-

On the other hand, without prejudice to the easy accessibility of the privacy policy

in its entirety, the person concerned must, from the first communication of the

controller with it, to be informed of the details of the purpose of the

processing concerned, the identity of the controller and the rights

she disposes.

59. The importance of providing this information upstream stems in particular from recital

39 GDPR. Any additional information necessary to enable the person

concerned to understand, based on the information provided at this first level, what

will be for her the consequences of the processing in question must be added20.

60. The defendant considers that the information it disseminates in particular to its policyholders

social services meets the requirements of Articles 12, 13 and 14 of the GDPR. In this regard, she refers to

its privacy policy.

61. The Litigation Chamber is of the opinion that this privacy policy contains the

elements required by articles 13 and 14 of the GDPR in their two paragraphs. Bedroom

Litigation is also of the opinion that as required by Article 12.1. of the GDPR, the

defendant took care to use simple, clear language in its privacy policy

and direct to inform the insured persons of the data processing that it operates in

a complex legal environment.

19 Along the same lines see. Decision 81/2020 of the Litigation Chamber (points 53 et seq.).

20 Idem note 15 above, points 35-38.



62. Regarding the processing of data that takes place in the context of the journey of

reinstatement (including

communication to

the INAMI referred to by

the complaint),

bedroom

Litigation notes the following elements contained in the privacy policy of

the defendant:

-

The defendant specifies that in the context of compulsory health care insurance

and compensation, it processes the necessary personal data, in particular,

the management of socio-professional reintegration path files (See the

section relating to the purposes of the processing of personal data in

the framework of compulsory insurance and social security);

-

Under the bases of legality, various articles of the GDPR are invoked, the

articles 6.1.c) and 6.1.e) as well as 9.2.g) and 9.2.h) . These are the same items as those

invoked in the defendant's pleadings as the basis for the lawfulness of

its processing and in particular the sharing of data with its partners,

the exclusion, however, of consent that is not mentioned in the privacy policy.

confidentiality as a basis for lawfulness. The Compulsory Insurance Act

health care and compensation of 14 July 1994 is mentioned as well as the royal decree

implementing this law of 3 July 1996 which, as indicated in point 27 above,

specifically regulates

the mission of

social reintegration

professional ;

-

-

The section devoted to processed data includes data

relating to health;

Finally, in the section relating to possible recipients, the bodies of the

social security (INAMI, ONEM, etc.) are mentioned, as well as any institution

with a view to granting the data subject an advantage.

63. The Litigation Chamber notes that while this global confidentiality policy appears on

the defendant's site and tends to cover all the processing carried out (including those

targeted by the exchanges as part of a reintegration programme), its accessibility and the

quality of the information must be supplemented by an express mention on the form

such as the one used by the plaintiff to initiate his request, This mention will aim, in addition to the

reference to the privacy policy as a whole, in particular the processing of

data (relating to health) following the start of such a reintegration process

thus including the exchanges of data between the various partners involved

in this route. The Litigation Chamber concludes, in support of the foregoing, to a

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breach of Articles 13 and 14, combined with Article 12.1 of the GDPR on the grounds of

defendant in that it did not inform the complainant in a targeted manner with regard to the

disputed treatment. The Litigation Chamber refers in this respect to the application for

conformity that it addresses to the defendant in title 6

IV.3.3 Regarding confidentiality

64. The complainant also alleges a breach of confidentiality due to the data

relating to health by the defendant. The plaintiff denounces here again the fact that the

the defendant's medical adviser M transmitted sensitive data to INAMI without his

consent considering that, in addition to the absence of a basis of lawfulness (complaint examined above in

title 5.1.), there was also a breach on the part of the defendant of its obligation to

confidentiality.

65. The Litigation Chamber took note of the many measures put in place by the

defendant, in particular the obligation of confidentiality to which any employee of

the defendant – including the medical adviser M – is liable.

66. The Litigation Division is of the opinion that the mere fact that the defendant did not, within

facts, not supported by a basis of adequate lawfulness – misrepresenting consent

as the basis of lawfulness authorizing the sharing of data (including data relating to the

health) with INAMI – does not affect the treatment as a whole. Bedroom

Contentious does not exclude, as it points out in points 44 and 50, that the

processing can rely on either basis of lawfulness (excluding Article 9.1.

a) read in conjunction with Article 6.1.a) of the GDPR) that it is for the defendant to

to clarify. The Litigation Chamber does not conclude that the INAMI was not authorized to

receive this data. In this sense, there was therefore no breach by the defendant of

its obligation of confidentiality.

V. Regarding corrective measures and sanctions

67. Under Article 100 LCA, the Litigation Chamber has the power to:

1° dismiss the complaint without follow-up;

2° order the dismissal;

3° order a suspension of the pronouncement;

4° to propose a transaction;

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5° issue warnings or reprimands;

6° order to comply with requests from the data subject to exercise these rights;

(7) order that the person concerned be informed of the security problem;

8° order the freezing, limitation or temporary or permanent prohibition of processing;

9° order the processing to be brought into conformity;

10° order the rectification, restriction or erasure of the data and the notification of

these to the recipients of the data;

11° order the withdrawal of accreditation from certification bodies;

12° to issue periodic penalty payments;

13° to impose administrative fines;

14° order the suspension of cross-border data flows to another State or a

international body;

15° forward the file to the public prosecutor's office in Brussels, which informs it of the

follow-up given to the file;

16° decide on a case-by-case basis to publish its decisions on the website of the Authority of

Data protection.

68. It is important to contextualize the breaches of which the defendant admitted

responsible in order to identify the most appropriate corrective measures and sanctions.

69. Given the violation found in Article 9.2.a) read in conjunction with Article 6.1.

a) of the GDPR (point 50) on the one hand as well as Articles 13 and 14 combined with Article 12.1 of the

GDPR on the other hand (point 63), the Litigation Chamber is of the opinion that the measures

remedies and adequate sanctions consist of sending the defendant a

reprimand as well as:

-

to ask the defendant to bring itself into compliance by clarifying what is

the legal basis it identifies for sharing data between itself and its

partners (including INAMI) as part of the exercise of its mission of

professional reintegration, in particular the reintegration process;

-

to ask the defendant to comply by providing for a

adequate information to communicate to the person concerned at the time when

she decides to begin her reintegration process by completing the

dedicated form. The Litigation Chamber is of the opinion that the DPO of the

defendant could be usefully associated with the drafting of this clause of the

form.

70. As it indicated in point 51 above, the Litigation Division is not insensitive

to the information given by the defendant according to which it does not itself enact the

forms, including the FIF form which includes the disputed clause. Bedroom

Contentious therefore invites the defendant to contact its partners in the

framework of its compliance, the Litigation Chamber will send them a

copy of this decision.

71. Finally, the Litigation Chamber will draw the attention of the APD Management Committee to

this issue. Where appropriate, the DPA could, through its various bodies

and in application of the powers attributed to them respectively by the LCA, decide to

establish a dialogue with all the authorities concerned and/or conduct an investigation

in-depth with them on the basic issues of legality and information having

arose in connection with the complaint leading to this decision.

VI. As for transparency

72. Given the importance of transparency with regard to the process

decision-making and the decisions of the Litigation Chamber, this decision will be published on the

website of the DPA by deleting the direct identification data of the

plaintiff and defendant. On the other hand, the Litigation Division considers that it has not

other possibility, for the proper understanding of this decision, than to

namely mention the NAMI, the National Intermutualist College, the FOREM and the AVIQ.

FOR THESE REASONS

the Litigation Chamber

After deliberation, decides to:

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pronounce against the defendant a reprimand on the basis of article 100.1, 5°

LCA given the findings of breaches of Article 9.2.a) read in conjunction with

Article 6.1.a) of the GDPR as well as Articles 13 and 14, combined with Article 12.1 of the GDPR;

-

issue a compliance order against the defendant on the basis of

article 100.1.9° LCA, consisting in identifying the adequate basis of lawfulness within the framework of the

sharing of data (relating to health) with its partners in the context of the

reinstatement. The supporting documents in support of this compliance are at

communicate to the Litigation Chamber via the address litigationchamber@apd-gba.be in

a period of 3 months from the notification of this decision.

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issue a compliance order against the defendant on the basis of

Article 100.1.9° LCA, consisting in providing adequate and targeted information to the person

concerned with regard to the data processing carried out (including the sharing of data

- relating to health - with its partners) as part of the reintegration process and this, at the

minimum, at the time when the socially insured person (person concerned) registers for this process

towards her. The supporting documents in support of this compliance are at

communicate to the Litigation Chamber via the address litigationchamber@apd-gba.be in

a period of 3 months from the notification of this decision.

Under Article 108.1 LCA, this decision may be appealed to the Court of

contracts (Brussels Court of Appeal) within 30 days of its notification, with

the Data Protection Authority as defendant.

(Sr.) Hielke Hijmans

President of the Litigation Chamber