

Fysical

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Our date:
12.05.2020

Our case:
20/6987 - 2

Your date:

Your case:

Concerning Fysical collection of personal data through the app Perfect365

Dear madam/sir,

We would like to address a number of issues related to Fysical collecting personal data through the app Perfect365, as detailed in chapter 6.1.1 of our report “Out of Control”.¹ We find the data collection that we observed Fysical engaging in to be alarming from a data protection and consumer rights perspective.

As far as we are aware, Fysical has not responded to the findings of the report. Therefore, we want to take this opportunity to outline several problematic practices that we have observed through our work.

We would like to start by saying that throughout our report and this letter, we refer to “personal data” as set forth in GDPR Article 4(1). This includes any information relating to an identified or identifiable natural person, including identifiers such as Android Advertising IDs and IP addresses. As described in chapter 6.1 of our report, location data can be used to identify individuals, and is therefore considered personal data.

We would also like to emphasize that the Norwegian Consumer Council is not a regulatory body or supervisory authority. We are a governmentally funded interest organization working for consumer rights.

When the report was published on January 14th 2020, the Norwegian Consumer Council did not formally file complaints to data protection authorities against the data collection we observed from Fysical. However, as far as we understand, the data collection that we observed Fysical engaging in lacks a valid legal basis for processing, and consequently does not comply with the GDPR.

On the same day, the Norwegian Consumer Council and other consumer organisations asked data protection authorities to take action regarding all processing activities and sharing of personal data

¹ “Out of Control” <https://www.forbrukerradet.no/out-of-control/>



described in the report.² Additionally, on March 4th 2020, eleven digital and human rights organizations sent letters to their national data protection authorities, voicing concern about the data collection practices from a human rights perspective.³ This call for investigation includes our findings regarding Fysical.

As described in chapter 6.1.1 of 'Out of Control', during our testing of the app Perfect365, we observed transmissions of personal data such as the Android Advertising ID and GPS coordinates to Fysical. These transmissions were happening up to several times per minute.⁴ This creates a very detailed picture of the consumers using the app.

We acknowledge that third party service providers may need to collect some data in order to provide various in-app functionalities. However, as far as we can understand, Fysical reserves the right to use the data collected from Perfect365 for a variety of its own purposes, with a retention period of 7 years.

We may collect, analyze and use End User Data and data that is derived from the End User Data, for the purposes of:

(i) providing or improving our Services;

(ii) enabling us to assist retailers and other venues in better serving and understanding the end users at a summary level; and

(iii) facilitating or enabling the delivery of content, ads, offers or other marketing solutions that may be of interest to end users.

(iv) analytics purposes and facilitating the analysis of this data

Information we collect will be deleted or made de-identified after 7 years from the date of collection.⁵

We are also concerned that Fysical appears to regard using an app as consent to Fysical transferring and processing personal data outside of Europe, and that Fysical seems to claim that this exempts data subjects from the protections of the GDPR.

Your information may be stored and processed in the United States or any other country in which Fysical or its subsidiaries, affiliates or service providers maintain facilities. If you are located in the European Union or other regions with laws governing data collection and use that may differ from U.S. law, please note that we may transfer information, including personal information, to a country and jurisdiction that does not have the same data protection laws as your jurisdiction, and you consent to the transfer of information to the U.S. or any other country in which we or our parent, subsidiaries, affiliates or service providers maintain facilities and the use and disclosure of information about you as described in this End User Privacy Statement and the Privacy Policy.

² "Consumer organisations call to stop online advertising companies' massive surveillance practices infringing EU laws" https://www.beuc.eu/publications/beuc-x-2020-002_letter_to_executive_vice-president_vestager.pdf

³ "Rights Organizations Warn about Unlawful Data Exploitation in Popular Apps" <https://www.liberties.eu/en/news/7-eu-countries-warn-about-unlawful-data-exploitation-of-popular-apps/18864>

⁴ Mnemonic technical report, chapter 3.3.2 <https://fil.forbrukerradet.no/wp-content/uploads/2020/01/mnemonic-security-test-report-v1.0.pdf>

⁵ Fysical privacy policy [accessed 05.05.2020] <https://fysical.com/privacy-policy.html>



The consumer is not in a position to know how this information may be used or shared, and how to meaningfully be in control. As described in the report, consumers have no way to understand how their personal data is shared with third parties for commercial purposes. In short, consumers expect that personal data stays between them and the apps that they use.

According to the Fysical privacy policy, consumers may opt out of Fysical tracking their location by uninstalling apps or using device-level settings.⁶ However, this would entail both that the consumer is aware that Fysical is collecting and using personal data.

Under the GDPR, the processing of personal data requires a valid legal basis. As described in the legal analysis in chapter 8 of 'Out of Control', the collection, compilation and use of personal data for advertising and other commercial purposes is often impossible for consumers to understand, and therefore data controllers such as Fysical cannot rely on consent for this processing.

Furthermore, the extent of tracking that we observed constitutes a major breach of the rights and freedoms of the individual data subject, which outweighs any legitimate interest Fysical may claim to have to process this data for commercial purposes.

Therefore, we cannot see that Fysical fulfils any of the relevant legal bases for the processing of personal data that we observed. We expect that Fysical changes its practices to bring it into compliance with the GDPR, and delete any data that has been collected without a valid legal basis.

Please do not hesitate to get back to us if we have misunderstood anything about the practices of Fysical.

This letter will also be forwarded to Datatilsynet, which is the relevant data protection authority investigating the issues highlighted in our report.

Best regards

The Norwegian Consumer Council

Inger Lise Blyverket

Director General

Gro Mette Moen

Acting Director of Digital Services

⁶ Ibid.



CC: Datatilsynet

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This document is digitally validated and therefore has no signature.