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Dispute room

Decision on the merits 71/2022 of 4 May 2022

File number: DOS-2020-04750

Subject : Newsletter Hello Belgium Railpass NMBS

The Disputes Chamber of the Data Protection Authority, composed of Mr Hielke Hijmans,

chairman and Messrs. Yves Poullet and Frank De Smet;

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

on the free movement of such data and repealing Directive 95/46/EC (General

Data Protection Regulation), hereinafter GDPR;

In view of the law of 3 December 2017 establishing the Data Protection Authority, hereinafter WOG;

Having regard to the internal rules of procedure, as approved by the House of Representatives

on December 20, 2018 and published in the Belgian Official Gazette on January 15, 2019;

Having regard to the documents in the file;

has made the following decision regarding:

The defendant:

NATIONAL COMPANY OF BELGIAN RAILWAYS (“NMBS”), nv

of public law, with registered office at Rue France 56, 1060

Brussels, registered with the Crossroads Bank for Enterprises (CBE) in Brussels,

under number 0203.430.576, hereinafter referred to as “the defendant”

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I. Facts and procedure

1. On October 14, 2020, the GBA received a notification from a Twitter user about a newsletter they

had received from NMBS about the Hello Belgium Railpass. The Hello Belgium Railpass is a

ticket with a number of free train rides that are free of charge to Belgian residents on request

was provided. According to the person who made the report, the newsletter did not contain any possibility to

deregistration thereof.

2. On October 19, 2020, the Inspectorate decided to bring the case before

pursuant to Article 63, 6° WOG because serious indications could be established about the existence

of a practice which could give rise to a breach of the fundamental principles of protection

of personal data.

3. The inspection will be completed by the Inspectorate on 9 November 2020, the report will be submitted to the

file and the file is transferred by the Inspector General to the President of

the Disputes Chamber (art. 91, § 1 and § 2 WOG).

4. The report contains the following findings:

• The newsletter sent by e-mail was not necessary for the execution of the agreement

(by requesting the Hello Belgium Railpass) between the defendant and the travelers involved. er

a different way of publishing the newsletter could have been chosen. There was

moreover, there is no legal basis for the processing of the personal data, since

the sending of the newsletter by e-mail did not implement the agreement between

defendant and the passengers. There are no appropriate technical and organizational measures

taken to ensure and demonstrate that the processing took place in accordance with the GDPR.

According to the Inspectorate, this leads to a violation of Articles 5.1, a) and c) and 5.2 of the GDPR,

Article 6.1 of the GDPR, Article 24.1 of the GDPR and Articles 25.1 and 25.2 of the GDPR;

• The right to object was not facilitated by the defendant while the targeted emails

can be regarded as “direct marketing” which constitutes infringements of Article 12. 2

of the GDPR and Articles 21. 2, 21.3 and 21.4 of the GDPR.

The report also contains findings regarding the data protection officer:

• The DPO did not report to senior management

body within the defendant's organization.

• The job description, number of working hours per week, and access to resources by the

data protection officer were found to be sufficient by the Inspectorate. The

advice provided by the officer in the context of the targeted e-mails sent was

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according to the Inspectorate, also sufficient to assume that the legal obligation

the level of advice was met.

Therefore, the Inspectorate establishes an infringement of Article 38.3 of the GDPR, but no infringement

on Article 38. 1, 38.2 and 38.6 of the GDPR and no infringement of Article 39 of the GDPR.

5. On February 19, 2021, the Disputes Chamber will decide on the basis of art. 95, § 1, 1° and art. 98 WOG that it

file is ready for processing on the merits.

6. On February 19, 2021, the defendant will be notified of the provisions as stated in Article 95,

§ 2, as well as those in art. 98 WOG. It is also on the basis of art. 99 WOG notified

the time limit for submitting its defences.

7. The latest date for receipt of the defendant's statement of defense set at 2

Apr 2021.

8. On March 4, 2021, the defendant requests a copy of the file, the defendant accepts electronically

all communication regarding the case and indicates that he wishes to make use of the possibility

to be heard, in accordance with article 98 WOG. (art. 95, §2, 3° WOG) the file was

transferred on March 17, 2021.

Conclusion of the defendant's answer

9. On April 2, 2021, the Disputes Chamber will receive the statement of defense from the defendant.

10. According to the defendant, she received the e-mail containing the newsletter about the Hello Belgium Railpass

sent lawfully. Defendant argues that the e-mails were sent in the context of the

execution of the agreement between applicants/users of the Hello Belgium Railpass and

defendant. The intended processing of personal data was therefore, according to the defendant,

necessary for the performance of the agreement pursuant to Article 6.1 sub b GDPR and to

to ensure passenger safety. The conditions for using the Hello Belgium

rail pass

together with the General Conditions of Carriage are part of the

transport contract with the passengers. Moreover, according to the defendant, it was necessary that the

emails were sent given the precarious situation at the time, with a second wave in the

Covid-19 epidemic in Belgium was coming and everyone therefore had to be extra alert in order to prevent the

to ensure safety on the trains. In order to reach the travelers in time, NMBS was therefore

forced to send applicants the newsletter by e-mail. The disclaimer of the email

According to the defendant, it contained clear information about the intended purpose of the e-mail, namely the

informing travelers about the way in which the Railpass is used as correctly and optimally as possible

had to be. er

according to the defendant, the principle of minimum

data processing in accordance with article 5.1 sub c, as there is no realistic and less intrusive

alternatives were available to implement the agreement.

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11. Moreover, according to the defendant, the targeted e-mail did not constitute direct marketing within the meaning of Article

21.2 GDPR because the email was not intended to directly or indirectly promote goods,

services or the image of SNCB. The e-mail was part of the implementation of the government tasks of

SNCB and these tasks are excluded from the term 'direct marketing'. Now that there is no direct

marketing and processing took place on the basis of Article 6.1, b (performance of the agreement),

According to the respondent, this means that the right of objection as laid down in Article 21.1 AVG does not

applies to. In addition, the disclaimer of the e-mail regarding the Hello Belgium Railpass

according to the defendant, clearly a hyperlink to the privacy statement of NMBS. The involved

were therefore informed of the rights available to them.

12. The defendant further submits that the determination of the Inspectorate, according to which the officer for

data protection would not report directly to the highest management body

within NMBS, is incorrect. Defendant makes it clear that the data protection officer

reports to the CEO of SNCB, both periodically and ad hoc. The CEO is chairman of the
Executive Committee as well as of the Executive Committee. Therefore, the officer reports for
data protection fully in accordance with Article 38.3 to the highest body within SNCB and there is
according to the defendant, there is no violation of this article.

13. On 14 February 2022, the parties are notified that the hearing will take place on
February 28, 2022.

14. On February 28, 2022, the parties will be heard by the Disputes Chamber.

15. The minutes of the hearing will be submitted to the parties on March 16, 2022.

16. On March 23, 2022, the Disputes Chamber will receive comments from the defendant regarding
to the official report. Defendant notes the following with regard to the representation in the proceedings-
verbal: the communication that is the subject of these proceedings is not a newsletter
but communication aimed at the holders of the Hello Belgium Railpass. Defendant is from
believes that the emphasis in the official report is placed on the first part of the
communication containing the message “rediscover more than 500 destinations in Belgium”.
According to the defendant, the foregoing is not consistent with what was submitted at the hearing by
defendant. According to the defendant, all elements in the communication must be regarded as equivalent
considered. The representation of what was explained by the defendant during the hearing is according to
defendant is also incomplete. Each of the components of the communication was aimed at spreading
of travelers, encouraging them to use the Move Safe App and correctly pre-
completing the Railpass to avoid aggression against personnel and to facilitate control. The
Disputes Chamber emphasizes that the response to the trial story does not reopen the debates,
but that the representation of this reaction is useful in this case, for a better understanding of the position of the
defendant.



17. On March 16, 2022, the Disputes Chamber notified the defendant of its intention to
to proceed with the imposition of an administrative fine, as well as the amount thereof

in order to give the defendant an opportunity to defend himself before the sanction becomes effective

imposed.

18. On April 8, 2022, the Disputes Chamber will receive the defendant's response to the intention to

imposing an administrative fine, as well as the amount thereof.1

II. Justification

II.1. Compliance with the principles governing the processing of personal data (Articles 5.1 and

5.2 GDPR) and the lawfulness of the processing (Article 6.1 GDPR)

19. The processing of personal data is only lawful if it is based on one of the conditions set out in Article

6.1 GDPR listed legal bases.2

The Inspectorate has established that the processing of personal data of travelers who

e-mail, containing a newsletter about the Hello Belgium Railpass, happened without a valid

legal basis. In contrast to the defendant who believes that he can legally invoke

Article 6.1.b GDPR, namely the execution of an agreement, the Inspection Service is of the opinion that

that is not the case. According to the Inspectorate, the processing of personal data of

train passengers by sending a communication via e-mail not necessarily for implementation or

preparation of the contract between the defendant and the applicants/travellers of the Hello

Belgium Railpass. In addition, the processing was not necessary since the defendant had

may choose to distribute the information through other channels such as its website. The

according to the Inspectorate, processing was therefore not based on one of the criteria set out in Article 6.1 of the GDPR

listed legal grounds and, according to the Inspectorate, was in violation of Article 6.1 of the GDPR.

1 See paragraph 68 of this decision.

2 Article 6.1 sub b GDPR: “The processing is only lawful if and insofar as it meets at least one of the conditions below

is completed:

purposes;

a)

a) the data subject has consented to the processing of his/her personal data for one or more specific

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

to take measures of the data subject before the conclusion of a contract;

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

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

e)

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

to protect;

exercise of official authority vested in the controller;

the processing is necessary for the representation of the legitimate interests of the controller

or of a third party, except where the interests or fundamental rights and freedoms of the data subject

require the protection of personal data outweigh those interests, in particular where the data subject has a

child."

f)

f)

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20. Defendant invokes the performance of the agreement (Article 6.1 (b) GDPR) that SNCB has with the

the person concerned has. According to the defendant, the reliance on this legal ground is lawful since the

legal conditions on the part of SNCB are fulfilled: there is a valid agreement with the

data subject and the processing is objectively necessary for the performance of the agreement.

21. Defendant makes it clear that the decision to provide a free Hello Belgium Railpass to

Belgian residents was a decision taken by Royal Decree "with a view to the

recovery of the Belgian economy and the promotion of rail as public transport". 3

22. The Hello Belgium Rail Passes could be used from October 5, 2020. This moment coincided

with the "second wave" of the Covid-19 epidemic becoming increasingly critical. There was a large number

rail passes requested and issued, as a result of which SNCB could expect problems (again) on

certain stations. The defendant also submits a number of newspaper articles in its conclusion from which

it appears that there was already concern among its management when the Hello Belgium Railpass was announced

on the impact of the initiative on the sanitary safety of staff and travellers. To

for the aforementioned reasons, the start of the validity period of the Hello Belgium Railpass was

defendant postponed twice.

23. In view of the situation described, according to the defendant, there was a need to do everything possible

to ensure that this runs smoothly and where possible to avoid crowds. According to the defendant,

therefore decides that: “(i) sending a communication to the holders (and thus to the expected

users) of the Hello Belgium Railpass was necessary to support the existing initiatives of SNCB

to avoid crowds and to draw attention to the conditions for using the ticket

and (ii) that this was the only possible way to reach the travelers (on time).

24. In its conclusion, the defendant explains that the conditions for the use of the Hello Belgium Railpass

together with the General Conditions of Carriage of SNCB, the contract of carriage with the

applicant/traveler. According to the defendant, these General Conditions of Carriage are

available on the SNCB website and are listed in the footnote on every page of the website

displayed. In view of the foregoing, according to the defendant, there is therefore a legally valid

agreement between SNCB and the applicant for the Hello Belgium Railpass.

25. The endorsed e-mail that the defendant sent to the applicants of the Hello Belgium Railpass

contains the following text:

(i) “Rediscover more than 500 destinations in Belgium” accompanied by a button “Find inspiration”;

3 Royal Decree of 28 July 2020 amending the Royal Decree of 21 December 2013 establishing the provisional

rules that apply as management contract of Infrabel and NMBS, Belgian Official Gazette 31 July 2020: “In the Royal Decree of 2

adoption of the provisional rules that apply to the management contract of Infrabel and SNCB, as last amended by the decision

April 2020, an article 4/5 will be inserted, which reads as follows: "Art. 4/5. § 1. As a result of the COVID-19 crisis, the federal St

promote the use of rail transport and the tourist, recreational, cultural and economic sectors by, on the one hand,

to ask NMBS/SNCB to distribute a new free ticket for domestic passenger transport, i.e. the 12-TRAJECTEN-PASS,

and, on the other hand, by temporarily allowing the bicycle to be taken on the train for free ».

(ii) “MoveSafe app: your safety” accompanied by a button “Download the app”

(iii) “Ready for your first trip?”;

(iv) “Any questions? Consult our FAQ on how to use your Hello Belgium Railpass”, accompanied

of a button 'View the conditions';

(v) The message “We wish you pleasant journeys with your Hello Belgium Railpass!”

(vi) Disclaimer

“With the above communication, NMBS wants to inform you about how you can use your Hello

Belgium Railpass correctly and as optimally as possible. NMBS/SNCB processes your personal data

data to implement the agreement based on the Hello Belgium Railpass

consists. You will find more details about how SNCB processes your personal data and about your rights

on www.nmbs.be/privacy”4

26. In Article 4.1 of the GDPR, personal data is defined as: “Any information about an identified

or identifiable natural person.” In the present case, most of the applicants for the Hello

Belgium Railpass provided their name and e-mail address. This is personal data within the meaning of

article 4.1 GDPR. Article 4.2 contains the definition of a processing, which reads: 'processing': a

operation or set of operations on personal data or set of

personal data, whether or not carried out through automated processes, such as collection,

record, organize, structure, store, update or modify, retrieve, consult, use,

provide by transmission, distribution or otherwise make available,

align or combine, shield, erase or destroy data. The applicants

personal data provided were (initially) collected and used by the defendant for the

processing the Railpass application. Therefore, there is a processing of

personal data within the meaning of Article 4.2 GDPR.

27. According to the defendant, the targeted e-mail from NMBS should be regarded as "an official"

reminder of some of the essential terms of the contract of carriage with the traveler,

in particular the obligation to use the ticket correctly and to always

to monitor their own safety. Both obligations cannot be fulfilled by all

simultaneously to the obvious (coastal) destinations. “

28. First of all, the Disputes Chamber points out that for a successful appeal to Article 6.1.b GDPR

it is necessary that there is an agreement to which the person concerned is a party and that the

processing is a necessary consequence of the agreement. In this case it should therefore be

assessed whether the targeted e-mail can be regarded as a necessary corollary of the

contract of carriage between the applicants for the railpass and the defendant.

4 See Appendix 1 to this decision for the targeted e-mail in its entirety



29. For the Disputes Chamber there is no doubt that guaranteeing the sanitary safety of the

train herons is a necessary element for the performance of the agreement in question.

However, the e-mail also contains general information (which is rather promotional in nature) which does not only

and specifically communicates about the sanitary situation at that time and the

precautions to be taken to ensure safety. Becomes

reported the large number of applications for a Hello Belgium Railpass. However, this is -

as described above - not the only information given in the email. The text below

For example, the section “Rediscover more than 500 destinations in Belgium” reads:

Nearly 3.6 million Belgians have applied for a Hello Belgium Railpass. They are right! je

must of course be able to explore our country in complete safety. Get inspired

through our blogs that are overflowing with ideas to go on a city trip, to go out in the

nature, with family or with friends… You will find something for everyone in Belgium!

30. The Disputes Chamber rules - in accordance with the findings of the Inspectorate - that

the e-mail therefore also contains general promotional information that does not relate to the specific

sanitary situation. Therefore, according to the Disputes Chamber, the e-mail can be sent, other than by the defendant

argued, should not be classified as “An official reminder of some of the essential

conditions of the contract of carriage with the passenger, in particular the obligation to

to use the transport ticket correctly and to always monitor his own safety as a passenger ...". The

After all, the newsletter contains, in addition to a reference to the Move Safe app and announcements about the correct

use of the Hello Belgium Railpass, also blogs to get inspiration to visit certain places

to discover.

31. The Disputes Chamber also rules that the information contained in the e-mail can equally well be

processing of the personal data of applicants for the Hello Belgium Railpass could have been done

to happen. The Inspectorate has established that the defendant also provided the aforementioned information

had published his website https://www.belgiantrain.be.5 According to the

The Disputes Chamber is not of such an urgent nature, because it would suffice in this specific case

to publish on the website and/or the SNCB application, given its content.

5 https://www.belgiantrain.be/nl of the VV which were taken on 27/10/2020 by the Inspectorate.

See the screenshots of the website on the next page

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In this regard, the Disputes Chamber refers to the Guidelines of the European Committee for

Data Protection (EDPB) on Article 6.1. b which states: "What the

data protection legislation, data controllers should

take into account that the foreseen processing activities must have an appropriate legal basis

to have. When the agreement consists of several separate services or parts of

a service that can in fact reasonably be provided independently of each other, the question arises

to what extent Article 6(1)(b) can serve as a legal basis. In accordance with the

proportionality principle, the applicability of Article 6(1)(b) should be assessed in the

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context of each of those services individually, looking at what is objectively needed to

of the individual services that the data subject has actively requested or

reported. This assessment may show that certain processing activities are not necessary

are necessary for the individual services requested by the data subject, but rather are necessary for the broader business model of the controller. In that case, Article 6(1)(b) are not a legal basis for those activities. However, there may be other legal bases for those processing are available, such as Article 6(1)(a) or (f), provided that the relevant criteria are met."6

32. The EDPB further points out that an agreement defines the categories of personal data or the type of processing operations necessary for the performance of the agreement whereby the data subject is not allowed to artificially expand. It is also pointed out that what is covered by an agreement depends not only on the perspective of the controller, but also the reasonable expectations of the data subject. A very strict application is therefore appropriate in view of the high degree of precision of this legal basis.

33. Although not strictly necessary, since SNCB invokes Article 6.1.b, the Disputes Chamber ex officio and superfluously whether the defendant possibly has a successful appeal accrues to the legal bases of Article 6. 1 c, e and f of the GDPR. The Disputes Chamber notes that for the intended processing, the defendant invoked Article 6.1 b, (the implementation of the agreement ) but on the other hand also stated the following : "Secondly, the e-mail regarding the Hello Belgium Railpass within the implementation of the government tasks of SNCB. NMBS has a public service obligation for domestic passenger transport by rail. Like higher mentioned, NMBS was commissioned by the Royal Decree on 28 July 2020 to issue the Hello Belgium Rail Passes to make available to the Belgian population and to provide the train rides for which this title could be used." Defendant was instructed by the King to make the Rail Passes available and had to process personal data for this to process the requests for Rail Passes to handle correctly. However, the Royal Decree did not contain any clearly defined provisions about the further processing of the personal data after the applications have been processed. A any appeal to article 6.1 sub c cannot succeed for this reason alone.

34. Article 6. 1e contains the legal basis task of general interest or a task for the implementation of the

public authority. As stated above, this legal ground also applies that there is

must be necessary for the processing. The Disputes Chamber does not consider it plausible that the

(content of the) e-mail was necessary to carry out the task of general interest (making available

of the Hello Belgium Rail Passes).

35. The Disputes Chamber points out in this regard that in accordance with Article 6.3 of the GDPR, read in

coherence with Article 22 of the Constitution and in the light of Articles 7 and 8 of the European

6 EDPB, Guidelines 2/2019 on the processing of personal data pursuant to Article 6(1)(b) of the GDPR in

in the context of the provision of online services to data subjects, 8 October 2019.



Charter of Fundamental Rights, a legislative standard the essential features of a data processing operation

must establish what is necessary for the performance of a task in the public interest or for the

exercise of official authority entrusted to the controller.7 The

The Disputes Chamber emphasizes that the processing in question must be framed by a standard that

is sufficiently clear and precise, the application of which is foreseeable to the persons concerned

is. In accordance with Article 6.3 GDPR, the precise purpose(s) of the processing must be legally

standard itself. The foregoing was not the case in this case. In addition, do not come

to establish that the e-mails sent were necessary for the implementation of the Royal Decree.

This stipulates that the defendant can do the necessary and limit the use of the Railpass or

stop in case of force majeure. The Covid-19 epidemic and its consequences are not in sight

discussion. However, according to the Disputes Chamber, the e-mails sent were - as already stated in the

decision - not necessary for the mere provision of the Hello Belgium

Rail passes, as a result of which a possible appeal to Article 6.1 e cannot succeed.

36. The legal basis is laid down in Article 6. 1 f GDPR. The Disputes Chamber investigates

or the further processing of the personal data of the railpass applicants in this case

may have been lawful under the aforementioned provision. To determine this, the

controller in accordance with the case law of the Court of Justice

Which:

1) the interests they pursue with the processing can be justified as legitimate

recognized (the “target test”)

2) the intended processing is necessary for the realization of those interests

(the “necessity test”)

3) balancing those interests against the interests, fundamental freedoms and

fundamental rights

from

involved

weighs in

in

the

benefit

from

the

controllers or a third party (the “balancing test”).

37. First of all, the question is what interest and purpose the controller with the further

processing of the personal data (target test). Due to the personal data of the

to use those involved to send them an email mainly promoting the railpass,

According to the Disputes Chamber, the defendant's aim was, inter alia, to

to encourage the railpass to travel. The promotion of the railpass by becoming a defendant

regarded as a (commercial) legitimate interest.

38. In order to satisfy the second condition, it must be demonstrated that the processing

was necessary

in front of

the

achievement

from

the

pursued

purposes

7 See also the advice of the Knowledge Center of the GBA 36/2020, 42/2020, 44/2020, 46/2020, 52/2020 and

64/2020(https://www.dataprotectionauthority.be/burger/zoeken?q=&search_category%5B%5D=taxonomy%3Apublicati

us&search_type%5B%5D=advice&s=recent&l=2

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(necessity test). This means that the question must be asked whether

means the same result can be achieved without processing personal data or

without unnecessarily intrusive processing for the data subjects. The Disputes Chamber determines

that it was by no means necessary to further process the personal data of the travelers

to send them the targeted e-mails. After all, the Disputes Chamber came to the decision earlier

believe that the message announced in the e-mail is also in a different way

could have been made known. The second condition is therefore not met.

39. The third condition concerns

the

“balancing test”

between the interests of the

controller on the one hand, and the fundamental freedoms and rights of

person concerned, on the other. In accordance with Recital 47 GDPR, when determining this,

verify whether the “data subject at the time and in the context of the collection of the

personal data can reasonably expect that processing for that purpose can take place”

The Disputes Chamber establishes that those involved could not have expected that the

personal data provided in the context of a transport contract

be used for purposes other than processing the request for a rail pass,

in particular promotional activities. Therefore, any recourse to Article 6.1, f would not

to succeed.

40. In view of the above, the Disputes Chamber is of the opinion that the processing of the

personal data by sending e-mails happened without the choice (and even the

presence) for a lawful basis. Defendant's appeal on the legal basis

execution of the agreement of Article 6.1b, cannot be invoked in this case, since the e-mail

mail is not a necessary corollary of the contract of carriage between the parties. That's why there is

also not met the principle of necessity as laid down in Article 5.1c of the GDPR. The

The Disputes Chamber therefore establishes infringements of Articles 5.1 a and c, 5 . 2 and 6 . 1 GDPR.

Right to object and direct marketing

41. The Inspectorate has come to the conclusion that there was direct marketing by the

dispatch of the newsletters by the defendant and that there is no effective right to object

was awarded to those concerned. Therefore, according to the Inspectorate, there was an infringement

on Articles 21. 2 and 21.4 GDPR.

42. On the basis of Article 12 of the GDPR, the controller must inform the data subjects

transparent information. In doing so, the controller must, among other things:

exercise of the data subject's rights on the basis of Articles 15 to 22 of the

to facilitate GDPR. Article 21 of the GDPR sets out the right of objection of the data subjects vis-à-vis

by the controller. Article 21. 2 provides that when

personal data are processed for direct marketing purposes, the data subject at all times

has the right to object to the processing of the data concerning him at any time

personal data. If the data subject exercises that right against processing for direct



marketing, the personal data may no longer be processed for that purpose by

the controller. According to Article 21. 4, the right of objection must be submitted at the latest at the

first contact with the data subject to be brought to the attention of the data subject and

clearly and distinctly from the other information.

43. The defendant disputes the findings of the Inspectorate and argues that there was no

direct marketing, as: ”(i) the email was not intended for direct or indirect promotion

of goods, services or the image of SNCB and (ii) the e-mail is part of the implementation of the

government tasks of SNCB that are excluded from the concept of 'direct marketing'.

44. The GDPR does not define what is meant by “direct marketing”. Nor

there is to date an official, legal, or generally accepted definition of this term on

European level. The GBA clarified its interpretation of this legal concept in recommendation

1/2020 as follows :

“Any communication, in whatever form, solicited or unsolicited, from a

organization or person and aimed at the promotion or sale of services, products (whether or not

fee), as well as brands or ideas addressed by an organization or person who

acts in a commercial or non-commercial context, which is addressed directly to one or

more natural persons in a private or professional context and who

personal data”. Thus, under “direct marketing” various

forms of promotion, such as email newsletters, commercial telephone calls or

text messages or e-mails, or online advertising and this, whether or not in a commercial context.”8

45. According to the above interpretation, the promotion or sale of services or products which

does not have to be paid for can also be regarded as direct marketing. The defendant

stated, however, that emails regarding the Hello Belgium Railpass - among other things - cannot

be regarded as direct marketing because the railpass was awarded completely free of charge to the

applicants thereof. The Disputes Chamber is of the opinion that this view is incorrect based on the

the above interpretation of the term direct marketing.

46. In addition, according to the defendant, the e-mail regarding the Hello Belgium Railpass falls within the scope of the

implementation of SNCB's government tasks. It states in its conclusion: ”NMBS has a

public service obligation for domestic passenger transport by rail. She received at KB

July 28, 2020 from the King the order to distribute the Hello Belgium Rail passes to the Belgian population

and to provide the train journeys for which this title could be used.

Consequently, the e-mail cannot be regarded as "direct marketing" for this reason either. This will be

after all, expressly confirmed by the Direct Marketing Recommendation of the GBA itself."

8 GBA, Recommendation no. 01/2020 of 17 January 2020 on the processing of personal data for direct

marketing purposes", p. 9

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47. The defendant also quotes the following from the Direct Marketing recommendation of the

GBA:

"This definition includes all forms of communication, whether or not they are promotional"

of goods or services, the promotion of ideas suggested or supported by any person

or organization, but also the promotion of that person or organization itself, including its

brand image or the brands owned or used by it, with the exception of

the promotion carried out at the initiative of public authorities acting strictly in the

under their legal obligations or public service tasks for services for which

they alone are responsible."

Finally, communications from government services conducting certain campaigns (eg.

vaccination campaigns) or services (e.g. telephone centers for assistance to persons in difficulty)

promote what they are legally responsible for or offer as a public service,

not considered direct marketing communications unless they simultaneously provide specific services or

promote products offered by private service providers."9

48. It is apparent from the above and from what was stated at the hearing that the defendant argues a duty to

have to promote the Hello Belgium Railpass because they have a legal

had responsibility. The emails should therefore be classified as a

"public service announcement" or a "promotion at the initiative of public authorities". The

However, the recommendation of the GBA emphasizes that there must be a promotion that is

carried out at the initiative of public authorities acting strictly within the framework of their legal

obligations or public service tasks.

49. Moreover, the defendant cannot simply be regarded as a “public service”, as

defined above. After all, the defendant is an autonomous public company. Characteristic of

the status of an autonomous public company is the express possibility that

these companies are allowed to perform, in addition to their statutory public service missions

develop other activities as well.10 A restrictive view of the concept

According to the Disputes Chamber, government service is in place in view of the foregoing. The

The Disputes Chamber also wishes to point out that, according to Article 221 § 2 of the Act

protection of personal data is a legal person under public law that offers services on

the market which makes it unlike "the government and their appointees or agents"

an administrative fine within the meaning of 83 GDPR may be imposed. This is according to the

The Disputes Chamber also provides an indication that the defendant cannot be

considered "classic" government.

9 Citation and marking by defendant from recommendation Direct marketing GBA 01/2020

10 Article 7 of the Law on the Reform of Certain Economic Public Enterprises



50. The Disputes Chamber is of the opinion that the email sent (which also contains general information that

does not relate to the specific sanitary situation or is not specifically valid when used

of the Hello Belgium Railpass but could also be applicable when using other

tickets) cannot be regarded as promotion strictly limited to the

carrying out the legal obligation imposed on SNCB in the context of offering

the Hello Belgium Railpass or which was limited to the provision of a public service. The

The Disputes Chamber also points out that the e-mail sent may also contain the

(possibly indirectly) promoting services or products provided by private service providers

offered, which is an additional indication that the email was not exclusively related

on a public service.

51. Even if it were assumed that it was a communication originating from a

government agency, the content of that communication cannot be unlimited. The defense that the email

that was sent would not be direct marketing because SNCB had the task as a public service to

informing the travelers does not serve any purpose according to the Disputes Chamber. It would free the defendant

have stood in the context of its statutory task / task of general interest, the travelers

to notify and inform with regard to the special sanitary situation due to the

pandemic. Therefore, the defendant could have included in the e-mail that the stations were crowded

expected and that this crowding could pose a danger. In doing so, she should have

limited to informing travelers of this danger.

52. In the opinion of the Disputes Chamber, however, the content of the e-mail cannot be interpreted

as merely factual information about the sanitary situation at the time in which travelers were

warned and asked to exercise caution and to spread out as much as possible.

On the contrary, the e-mail had little to do with referrals and content that sometimes had little to do with

the sanitary situation, (also) acquired a commendable character, in order to ensure that

as many people as possible would use the Railpass (and other services or

products, or (indirectly) even from other tickets).

53. Accordingly, it has not been demonstrated by the defendant that the e-mails were strictly for the purpose of

encourage travelers to choose less crowded cities. Although there are tips

given to visit certain cities, the main message of the email is according to the

Dispute chamber does indeed promote the Hello Belgium Railpass or even others

tickets and services or products (although not always explicitly mentioned). In addition, it is not

important that SNCB would not derive any financial advantage from this. After all, when shipping

of the e-mails referred to the special services provided by SNCB, which

corporate image. The Disputes Chamber therefore agrees with the Inspectorate, where

this states that there is promotion: after all, the message is that the services of the VV□

allow train passengers to (1) rediscover more than 500 Belgian destinations, (2)□

travel comfortably and safely and (3) easily use their Railpass." Defendant had□

can choose to send a notification that immediately and clearly conveys the message□

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it could be deduced that there was a fear that certain cities would be too crowded and□

travelers should take this into account. In addition, the communication□

between the data protection officer and various employees of the defendant□

that one is aware of the fact that the mailing could be classified as direct□

marketing and that for these reasons a correct balance and description was sought so that the e-mail□

emails would be regarded as part of the execution of the agreement. That's how it falls□

among other things to read in this communication: "Provided that we have the direct link to the blogs□

be able to extract it and replace it with a text that points more to our planning module□

on the site we can bring this information under the justification ground "execution of a"□

contract" which is a stronger argument to say that people cannot afford this□

unsubscribe."11□

54. The Disputes Chamber is therefore of the opinion that the targeted e-mails should be regarded as□

direct marketing.□

55. Article 21.1 provides that the right to object should be facilitated in the event that□

data is processed on the basis of Article 6.1(e) or f) GDPR. In accordance with article 21. 2 of the□

GDPR has the data subject whose personal data is used for direct marketing purposes□

also processes the right to object to the processing concerning him at any time□

personal data, including profiling related to direct marketing□

56. Defendant relied on the processing of the personal data for the transmission□

of the e-mails to the applicants (wrongly, by the way, cf. supra) on the legal basis of the□

execution of an agreement article 6.1, b, arguing that the targeted e-mails□

were necessary to comply with that agreement and to ensure the safety of the travelers and the

employees as a result of which art 21.1 GDPR would not apply. from direct

marketing would also be out of the question since the defendant in the context of its assignment from the

government has sent these e-mails, so that art 21.2 GDPR would also not apply.

As discussed above, according to the Disputes Chamber, the e-mails can

be regarded as direct marketing whereby the defendant had the obligation to

art. 21.2 and art. 12.2 GDPR to provide and facilitate the right to object.

57. The defendant points out that the disclaimer of the e-mail regarding the Hello Belgium Railpass contains a

contained a clear hyperlink to the SNCB privacy statement. Via this hyperlink,

data subjects informed about other rights such as the right to erasure about which they

possessed. Therefore, according to the defendant, the persons concerned had invoked the right to

having their data erased can have the same effect as the right to object.

58. The Disputes Chamber rules that the right of objection has not been facilitated in this case. Defendant

points out that data subjects could have other rights such as the right to erasure

11 Document 11 to the defendant's claim: e-mail from DPO dated 6 October 2020



exercise. This had to be done by sending an e-mail to NMBS together with a copy

of the identity card. The Disputes Chamber emphasizes that the right of objection is a right that

is expressly assigned to data subjects according to Article 21. 2 GDPR. This right is according to

Article 21.4 in addition, during the first contact and clearly separated from other any other

information to be displayed. With regard to information about the right to object

(Article 14.2 b) GDPR) in particular, Article 21.4 GDPR12 expressly states that this possibility,

separately from the other information, already in the first message to the data subject,

Hospitalized. However, the e-mail that is the subject of these proceedings does not

in no way expresses the right of objection. What's more, it doesn't contain any reference to this

right of objection. Recital 70 GDPR provides, however, that this right expressly, in clear

manner and separately from other information, should be brought to the attention of the data subject

brought. In the absence of notice of this right of objection in the emails targeted, the

controller also acted in violation of Article 21.4 of the GDPR.

59. In Recommendation 1/2020 on direct marketing, the DPA also states that the data subject has his right to

objection to direct marketing must be easy to exercise, taking into account the

means by which the controller communicates with the data subject: “if the

mandatory information is provided digitally or if you contact the person through digital channels,

a single click should suffice”13

60. In view of the above, the Disputes Chamber finds infringements of Articles 12. 2, 21.2, 21.

3 and 21.4 of the GDPR as the defendant does not have the right to object for data subjects

facilitated while the targeted e-mails can be regarded as direct marketing.

The Data Protection Officer

61. Article 38. 3 provides that the data protection officer shall report directly

to the highest management level of the controller. In the guidelines of

the Working Group 29 on the Data Protection Officer becomes the following explanation

given to reporting to the most senior manager as referred to in Article

38.3: ”If the controller or processor makes decisions that are not in line

subject to the General Data Protection Regulation and the opinion of the officer

data protection, the latter should be given the opportunity to express his/her dissenting opinion clearly

to top executives and those who make the decisions. In this respect

Article 38.3 provides that the data protection officer "directly

report to the senior manager of the controller or the

processor". 14 Such reporting ensures that senior management (e.g. the

12 Article 21.4 GDPR. The right referred to in paragraphs 1 and 2 shall be exercised at the latest at the time of the first contact w

expressly brought to the attention of the data subject and presented clearly and separately from any other information.

13 GBA, Recommendation No.01/2020 of 17

marketing purposes, marginal number 162, p. 54

14 Guidelines for the Data Protection Officer of the Working Group 29, WP 243 rev.01, p.19, adopted by the

EDPB.

January 2020 regarding the processing of personal data for direct

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board of directors) is aware of the advice and recommendations that the officer

data protection provided in the context of its mission to the controller

or to inform and advise the processor.

62. The Inspectorate has established that the defendant does not comply with this provision, as

explained by the Working Group 29. From the respondent's answer to questions from the

Inspection service about the exact position of the official within the organization chart, according to

the Inspectorate that the officer does not report directly to the highest level,

in this case the CEO.

63. The defendant disagrees with the Inspectorate's finding. To demonstrate this,

defendant in the claim various documents about, including e-mail correspondence between

the data protection officer and the assistant to the CEO regarding privacy

issues. A PowerPoint prepared by the data protection officer is also available

presentation to the executive committee entitled: “GDPR points for attention and interim update

audit” added. A “Governance Charter for the Protection of Personal Data” was issued

also inserted therein it reads:

- That the Data Protection Officer together with the Chief Information Security

develop a policy for the protection of personal data and submit it to the

executive committee.

- He advises the Executive Committee and all parts of SNCB on the protection of

personal data and on setting up a structure and processes to ensure compliance with the

ensure rules for the protection of personal data

- The DPO reports important shortcomings in the processing of personal data, the□

comply with the rules or policies for the protection of personal data directly□

to the Executive Committee□

- The executive committee ratifies the policy for the protection of personal data and the□

information security policy and makes the necessary resources available to the Data Protection□

Officer to indicate the direction desired by SNCB for the management of personal data□

to the entire organization.□

64. The Disputes Chamber is of the opinion that, on the basis of the documents submitted□

and has made sufficiently plausible what was stated by the official at the hearing□

that the data protection officer reports or can report directly□

to the highest management level within the organization. The officer is in session□

declared not to have experienced any opposition and was encouraged by the board□

is to comply with its legal obligations. According to the Disputes Chamber, the e-mail also shows□

mail correspondence between the data protection officer and the CEO as well as from the□

“Governance Charter” that can be reported directly to the CEO who is also□

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is permanent chairman of the Executive Committee as well as the Executive Committee of SNCB. The□

The Disputes Chamber is therefore of the opinion - unlike the Inspectorate - that the defendant has□

Article 38. 3 GDPR and there is therefore no infringement of that Article.□

III. Sanction□

65. The Disputes Chamber prioritizes the following points when determining the sanction. It's about e-□

emails sent to customers in connection with the use of the Hello Belgium Railpass. It□

it has been established before the Disputes Chamber that the NMBS/SNCB/NMBS is responsible for the sanitary and commerci

mixes. Where it is justifiable in connection with the Covid-19 crisis that the NMBS are□

inform customers about health risks associated with the use of the train, this does not apply to□

incentives to use the train as much as possible, including for tourist□

field trips.

66. Another point concerns the power to impose a fine on SNCB. The

SNCB is a legal person under public law that offers services on a market. With that, the

SNCB does not fall under the exception with regard to the imposition of administrative fines,

as provided for in art. 221 § 2 of the Law on the Protection of Natural Persons with

with regard to the processing of personal data from 30 July 2018.

67. The Disputes Chamber decides to impose an administrative fine that does not matter

serves to end an offense committed, but with a view to a powerful

enforcement of the rules of the GDPR. As is clear from recital 148 GDPR, the GDPR states

after all, it is important to note that for every infringement – so also when an infringement is first established – penalties,

including administrative fines, in addition to or instead of appropriate measures

imposed.15

68. Next, the Disputes Chamber shows that the infringements committed by the defendant of the

Articles GDPR does not in any way concern minor infringements, nor that the fine would be a disproportionate burden

to a natural person as referred to in Recital 148 GDPR, where in any of

in both cases a fine can be waived. The fact that it is a first finding of

concerns a breach of the GDPR committed by the defendant, does not prejudice in any way

15 Recital 148 states: “In order to strengthen the enforcement of the rules of this Regulation, penalties, including

including administrative fines, to be imposed for any breach of the Regulation, in addition to or in lieu of appropriate

measures imposed by the supervisory authorities pursuant to this Regulation. If it is a small

infringement or if the foreseeable fine would impose a disproportionate burden on a natural person,

fine are chosen for a reprimand. However, the nature, severity and duration of the

the infringement, with the intentional nature of the infringement, with damage-limiting measures, with the degree of responsibility

or with previous relevant infringements, with the manner in which the infringement came to the attention of the supervisory autho

compliance with the measures taken against the controller or processor, with affiliation with

a code of conduct and any other aggravating or mitigating factors. The imposition of penalties, including

administrative fines, should be subject to appropriate procedural safeguards in accordance with the general principles
of Union law and the Charter, including an effective remedy and a fair administration of justice. [own
underline]
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to the possibility for the Disputes Chamber to impose an administrative fine. The
The Disputes Chamber imposes the administrative fine in accordance with Article 58.2 i) GDPR. It
The administrative fine is in no way intended to end infringements. To that end
the GDPR and the WOG provide for a number of corrective measures, including the orders
mentioned in article 100, § 1, 8° and 9° WOG.
69. Taking into account Article 83 AVG and the case law16 of the Marktenhof, the motivation
Dispute chamber imposing an administrative sanction in concrete terms:
- The gravity of the infringement: It is established that the defendant has committed several infringements of
the principles of Articles 5 and 6 of the GDPR and the rights of data subjects in
Articles 12 and 21 of the GDPR. Such infringements constitute a significant infringement of
the objectives of the Regulation, namely to protect fundamental rights and
fundamental freedoms of natural persons and in particular their right to the protection of
personal data. In addition, Article 83.5 prescribes that the highest administrative fines
may be imposed for violations of the aforementioned articles. The NMBS has
cooperated during the investigation.
- The duration of the infringement: sending the newsletter to the applicants of the Hello
Belgium Railpass happened in October 2020. It is therefore a one-off violation,
which justifies the relatively low amount of the fine.
- The size : As can be seen from the sent targeted newsletter itself, there are 3.6 million Hello
Belgium Rail passes requested. This therefore concerns almost a third of the entire
Belgian population, making the scope of the infringement exceptionally large.
- The necessary deterrent effect to prevent further infringements.

This file shows that insufficient

took into account the

personal data protection of data subjects, which should actually be central

are based on the defendant's business model. Processing personal data

is an important part of the defendant's activity. It is crucial

that such companies comply with data protection rules. The facts

and established infringements therefore require a fine that meets the need to

have a sufficient deterrent effect, whereby the defendant becomes sufficiently strong

sanctioned, so that practices involving such violations would not be repeated, and

so that

the

defendant

from now on more

attention

would

spend

at

personal data protection.

70. On March 18, 2022, a sanction form ("form for response against intended

sanction") addressed to the defendant. Respondent responded in summary as follows:

16 Brussels Court of Appeal (Market Court section), Judgment 2020/1471 of 19 February 2020.

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According to the defendant, the Disputes Chamber did not take sufficient account of the special

situation and context in which the defendant was at the time of sending the newsletter. The

communication happened during the second wave of the epidemic and served as much as possible

to spread travelers. Defendant was obliged by the government to issue the Railpass and

received a flat-rate compensation for this, regardless of whether the card was used or not. Defendant
was only trying to properly implement the contractual obligation that it was
entered into with Railpass users. Referring to other destinations in the
newsletter was only a limited part of the communication. There is no mention of it
knowingly mixing commercial and sanitary considerations through such as by the
Dispute chamber is stated in the sanction form. The defendant argues that there is also political
no initiative has been taken to spread travelers across different destinations,
as a result of which the defendant has done this in order to properly implement the contractual
relationship with Railpass users. According to the defendant, the Disputes Chamber
furthermore, disregarding the fact that the defendant has indeed taken into account
taking into account the rights of data subjects. According to the defendant, the aforementioned was done by a
analyze the legal basis used, seek advice from the officer and
facilitating the rights of data subjects.

71. The defendant is of the opinion that the sanctions are unacceptable. Especially now that the Railpass was framed
within the public service obligation of the defendant to offer the Railpass free of charge.
In other words, the defendant would be sanctioned for failing to take the measures it
imposed by the government.

72. The Disputes Chamber is of the opinion that all arguments put forward by the defendant in the
sanction form have already been dealt with in this decision and were taken into account
taken when determining the administrative fine in accordance with Article 83.2 of the GDPR. The
Defendant's assertion that it was trying to properly implement the
agreement between her and the travelers cannot succeed, according to the Disputes Chamber, since
the processing was not necessary in this case for the execution of the agreement (see above
marginal 29 ff.) The reference to other destinations in the e-mail was according to
defendant only a limited part of the communication and there is no question of the
knowingly mixing commercial and sanitary considerations. It's the Disputes Room too

disagree with this. According to the Disputes Chamber, the targeted e-mail does contain earlier

commercially oriented content. Therefore, the sanitary purposes which according to the defendant

the actual purpose in sending the email was deliberate and commercial considerations

mixed. Finally, the Disputes Chamber points out that it is not under any obligation, nor on the basis

of the AVG or the WOG, nor on the basis of case law of the Marktenhof, to explain the motivation of

the present decision prior to the taking of the decision concerned to the

to submit contradictions of the defendants, the sanction form serves only

the possibility of opposing the intended sanction.

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73. On the basis of all the elements set out above, the Disputes Chamber decides the

to maintain the intended penalty of € 10,000. The established infringements justify a

effective, proportionate and dissuasive sanction as referred to in art. 83 GDPR, taking into account

with the assessment criteria specified therein. The Disputes Chamber points out that the other criteria

of art. 83.2. GDPR in this case are not of a nature that they lead to a different administrative

fine than that which the Disputes Chamber has set in the context of this decision.

IV. Publication of the decision

74. In view of the importance of transparency with regard to the decision-making of the

Dispute room, becomes

this one

decision

published

on

the website

from

the

Data protection authority with indication of the identification data of the defendant

having regard to the public interest of the present decision, on the one hand, and the inevitable

possibility of re-identification of the defendant in case of pseudonymization, on the other hand.

FOR THESE REASONS,

the Disputes Chamber of the Data Protection Authority decides, after deliberation, to:

- Pursuant to article 100, §1, 13° WOG and art. 101 WOG to impose an administrative fine

of € 10,000 for infringements of Articles 5.1 sub a and c, 5. 2 , 6. 1, 12. 2, 21. 2, 3 and

4 GDPR.

Against this decision, pursuant to art. 108, § 1 WOG, appeal to be lodged

within a period of thirty days, from the notification, to the Marktenhof, with the

Data Protection Authority as Defendant

Against this decision, pursuant to art. 108, § 1 WOG, appeals must be lodged within a

period of thirty days, from the notification, to the Marktenhof, with the

Data Protection Authority as Defendant.

(trans.) Hielke Hijmans

Chairman of the Disputes Chamber

Attachment: The targeted e-mail in Dutch and French together with the website where people go

comes after clicking the link in the email

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NL

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Via the link "rediscover more than 500 destinations in Belgium" you recently (2 May 2022)

on the website with the following: