

Litigation Chamber

Decision on the settlement fund 168/2022

from November 22, 2022

File number: DOS-2020-03126

Subject: Use of cookies on the RTBF website

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

Hijmans, chairman;

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 internal regulations 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;

Having regard to the settlement proposal submitted to the party on September 14, 2022, as annexed and

forming an integral part of this decision;

Made the following decision regarding:

The part :

The Belgian Radio Television of

the French Community

("RTBF

Represented by Mr. Peter Craddock,

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I. Procedure prior to the decision:

1.

In the context of this case involving RTBF, a transaction proposal was submitted to this party on September 14, 2022. The full content of the letter containing this transaction proposal is appended to this decision.

2.

On September 30, 2022, the party submitted a letter to the registry of the Litigation Chamber requesting clarification of the terms proposed in the proposed transaction.

3.

On October 7, 2022, a response was given to this request for modification of the terms. In addition, an extension of the deadline for responding to the transaction proposal of 14 days was granted to the party, given the late response from the Litigation Chamber.

4. Also on October 7, 2022, the party submitted a letter to the registry of the Litigation Chamber, replying to the email received the same day, asking for clarification on the consequences of the transaction for other files concerning cookies at the party.

5.

On October 11, 2022, the party submitted a letter to the registry of the Litigation Chamber, for remind the registry of the Litigation Chamber of the previous message that it had sent on October 7, 2022.

6. Also on October 11, 2022, the Litigation Chamber asked the party to specify any comments more specifically in writing.

7.

On October 12, 2022, the party submitted a letter to the registry of the Litigation Chamber requesting clarification on the temporal and material scope of the transaction and the impact in this sense vis-à-vis other cases in progress before the Litigation Chamber about the game.

8.

On October 18, 2022, the party submitted a letter to the registry of the Litigation Chamber, for remind the registry of the Litigation Chamber of the previous message that it had sent on October 12, 2022.

9.

On October 21, 2022, a response to the party's requests for clarification is provided. In this answer, some additions that could serve to clarify the transaction proposal – in the present decision formalizing the transaction – are suggested.

10. Also on October 21, 2022, the party submitted a letter to the registry of the Litigation Chamber, in which the party makes a number of additional requests for clarification regarding the proposed transaction.

11. On October 24, 2022, a response to the party's requests for clarification is provided. In this answer, some formulations which could serve to clarify the proposal of transaction – in this decision formalizing the transaction – are suggested.

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12. Also on October 24, 2022, the party submitted a letter to the registry of the Litigation Chamber, in which it asks whether an amended settlement proposal in connection with the clarifications could have been reached.

13. On October 27, 2022, a response is provided to the part in which it is clarified that it is the original transaction proposal (dated September 14, 2022) which will be published in full, attached to (this) formal settlement decision. Additionally, a few new formulations that could serve to clarify the settlement proposal – in the this decision formalizing the transaction – are suggested. On October 28, 2022, a additional response is provided to the part, in which new formulations are presented to the party, notwithstanding the considerations provided on October 27, 2022.

14. On October 28, 2022, the party confirms that it agrees to the transaction, which means

that the party accepts the settlement proposal, with the clarifications provided in the

(this) transaction decision formalizing this transaction.

15. Given the express acceptance of the party, a transaction is then established on the 28

October 2022. This decision formalizes this transaction.

II. Terms of the transaction

16. The conditions of the transaction are identical to those contained in the letter of

settlement proposal of September 14, 2022. For this reason, the appendix containing

this proposal forms an integral part of this Decision.

17. However, following the requests of the party, in addition to what was indicated in the proposal

settlement of September 14, 2022, the Litigation Chamber provides the details

following regarding the terms of the transaction. In case of ambiguity in the

wording of the formal settlement decision, the wording of the text of the decision takes precedence over that

of the settlement proposal attached to the decision.

18.

First of all, it is specified that the transaction was not preceded by a deliberation on the

bottom of the file; therefore, the arguments put forward by the party in its defense have not

were not examined during the transaction decision, and no hearing of the parties took place

place. It is further confirmed that accepting a proposed transaction does not

does not constitute an admission on the part of the defendant. The transaction does not establish

guilt.

19. This settlement decision extends to potential infringements under the law of June 13

2005 (in force at the time of the findings of the APD Inspection Service in the

file), as well as potential breaches of the General Data Protection Regulation.

data (GDPR), with regard to cookies and, more generally, the storage and

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consent to the placement and further processing of information on the device of

the user as a data subject. The transaction decision relates to the sites web involved and mentioned in the file and relates to the party to which the proposal transaction is addressed.

20. The transaction relates only to a specific period: the period from 25 May 2018 to 11 November 2020, i.e. the date of submission of the additional report of the Inspection Service.

21. The transaction exhausts the powers of the Litigation Chamber to take measures corrective action against potential violations within the boundaries of the elements and legal provisions described above and in the proposed transaction, as well as in the period referred to above. The Litigation Chamber emphasizes that the transaction does not affect the powers of the courts and tribunals or those of other authorities to examine offenses if applicable. The transaction in this case only binds the Litigation Chamber of the Belgian Data Protection Authority.

III. Publication of the decision

22. Given the importance of transparency regarding the decision-making process of the Chamber Litigation, this decision is published on the website of the Protection Authority Datas.

FOR THESE REASONS,

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

- Under Article 100, §1, 4 of the LCA, to validate the transaction accepted by the party on October 28, 2022, under the conditions contained in this decision and its appendix.

In accordance with Article 108, § 1 of the LCA, an appeal against this decision may be lodged, within thirty days of its notification, to the Court of Markets (court d'appel de Bruxelles), with the Data Protection Authority as defendant.

Such an appeal may be introduced by means of an interlocutory request which must contain the information listed in article 1034ter of the Judicial Code¹. The interlocutory motion must be

¹ The request contains on pain of nullity:

the indication of the day, month and year;

1°

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

Business Number;

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

(4) the object and summary statement of the means of the request;

filed with the registry of the Market Court in accordance with article 1034quinquies of C. jud.2, or

via the e-Deposit information system of the Ministry of Justice (article 32ter of the C. jud.).

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(se). Hielke HIJMANS

President of the Litigation Chamber

(5) the indication of the judge who is seized of the application;

6° the signature of the applicant or his lawyer.

2 The request, accompanied by its appendix, is sent, in as many copies as there are parties involved, by letter recommended to the court clerk or filed with the court office.

Litigation Chamber

RECOMMENDED

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The Belgian Radio Television of

the community

French ("RTBF")

Represented by Mr. Peter Craddock,

Secretariat

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Respondent

Your references

[...]

Our references

DOS-2020-03126

Appendix(es)

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Date

09/14/2022

Subject: transaction proposal in the file "Use of cookies on the website of the

RTBF »

Dear,

In the context of the large number of files awaiting examination by the Chamber

Litigation, which leads to long processing times for all cases, the Chamber

Litigation has decided, pursuant to Article 100, § 1, 4° of the law creating the Authority of

data protection ("LCA")³, to explore through this letter a proposal for

transaction in the file referred to under the heading ("transaction proposal").

The transaction proposal falls within a context where two of the ten files related to this

file (the ten files called "cookies on press sites") have already been the subject of a decision

on the merits in which the Litigation Division found violations giving rise to two

repeated the imposition of an administrative fine of EUR 50,000.⁴

Decision 85/2022 of 25 May 2022 of

3 MB, January 10, 2018.

⁴ See

<https://www.auditoriteprotectiondonnees.be/publications/decision-quant-au-fond-n-85-2022.pdf>

103/2022

<https://www.autoriteprotectiondonnees.be/publications/decision-quant-au-fond-n-103-2022.pdf>.

uniquely

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This transaction proposal is made without any detrimental acknowledgment and does not bind

not the Litigation Chamber as to a position it could adopt in the event that the

this proposal would be refused.

If the party to whom the settlement proposal is addressed expressly refuses this

proposal, the Litigation Chamber will continue the procedure on the merits and will deal with the case

other than by transaction. If it finds that violations have been committed, it

may make use of the powers of sanction conferred on it by European law⁵ and Belgian law⁶.

a) Procedural status of the settlement proposal

The transaction proposal presented here precedes the deliberation phase relating to the

violations that may have been committed in this case. In this sense, the Chamber

Litigation only takes into account, in its settlement proposal, the findings that were mentioned in the report of the Inspection Service of the Authority for the protection of data, without having yet examined the accuracy of these findings.

Given that the procedure before the Litigation Chamber of the Data Protection Authority does not cannot be assimilated to the procedure of criminal law, "the transaction" as provided for by the Belgian legislator under article 100, § 1, 4° of the LCA cannot be assimilated to "the transaction" provided for in criminal law. The transaction within the meaning of the LCA is indeed of the following character. generis.

First of all, the Litigation Chamber does not pronounce *hic et nunc* on the existence possible violations, even if the procedure is already in the examination phase "as to the merits" in accordance with Articles 98 and 99 of the LCA. The Litigation Chamber makes use of the competence which is explicitly attributed to it to formulate a transaction proposal, the image of what is also possible in the case of a "transaction" in criminal matters.

In addition, the Litigation Division mentions the precise facts, situating them in time and in space, on the basis of which the transaction proposal is made (*infra*). Although, as specified above, the Litigation Division does not pronounce *hic et nunc* on the existence of violations, it must however formulate the settlement proposal on the facts set out in the case. The amount that the Litigation Chamber proposes to the party to pay must indeed be proportional to the nature of the possible violations. The settlement proposal therefore relates to

5 See Article 58 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), hereinafter "GDPR";

6 See also Article 100 of the LCA.

the facts, the period and the (technical) context, as described in the report of the Inspectorate; the facts that are not covered by this period and this context not being covered by the transaction.⁷

b) Findings by the Inspection Department in connection with the transaction proposal

In this case, the findings made by the Inspection Service of the Authority for the Protection of data that the Litigation Chamber takes into account - without however ruling on the merits

- when proposing the concrete conditions for the transaction are as follows:⁸

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"Finding 1: audience measurement cookies without consent"⁹

"Finding 2: possibility of continuing to browse with the addition of cookies linked to features requested by the user"¹⁰

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"Finding 3: social network cookies 'pre-checked' in the management tool consent"¹¹

"Finding 4: unjustified cookie retention periods"¹²

"Finding 5: withdrawal of consent not respected"¹³

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c) Substantive conditions

As part of the settlement proposal, the conditions accepted by the party to the procedure are the following :

- RTBF undertakes to pay the sum of EUR 10,000 to the Belgian Treasury, in accordance with the terms defined by the Federal Public Service Finance.¹⁴ The RTBF renounces any action civil or other in connection with the transaction, such as, but not limited to, unfavorable communication relating to this transaction;
- The Litigation Chamber finds no violation on the part of RTBF and closes formalize the procedure by its transaction decision, provided that the RTBF accepts

the transaction and comply with its terms;

- For the Litigation Chamber, the fact of accepting a transaction proposal does not
does not constitute an admission on the part of the defendant. This acceptance of

7 In this sense, the ne bis in idem principle does not apply to facts that do not fall within this scope.

8 The Litigation Chamber takes full account of the additional investigation report of the Inspection Service of
November 30, 2020 in DOS-2020-03126.

9 Report of the Inspection Service of the Data Protection Authority of October 7, 2020 in the file DOS-2020-
03126 ("Inspection report"), p. 12-3.

10 Inspection report, p. 13-4.

11 Inspection report, p. 14-5.

12 Inspection report, p. 15.

13 Inspection report, p. 16-7.

14 Cfr. Art. 107 ACL.

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in particular, the transaction proposal cannot be used as a circumstance
aggravating when establishing sanctions in possible future proceedings
before the Litigation Chamber;¹⁵

- In the event of explicit acceptance or in the absence of a response from the party to which the
transaction proposal is sent within the period specified below, this proposal
of transaction takes the form of a formal decision which is published on the website of
the Data Protection Authority, indicating the name of the party.

In the event of non-compliance with the terms of the accepted transaction, the Litigation Chamber reserves the right
the right to withdraw the settlement decision and deal with this matter in another way.

d) Deadline

The RTBF must indicate within 30 days of receipt of this proposal for

transaction whether it accepts it or not. In the absence of a response, the transaction proposal will be

considered accepted under the conditions set out above.

e) Existence of other controllers and/or processors

This transaction proposal is addressed solely to RTBF. She doesn't take a stand on whether and to what extent other actors could be responsible for the potential breaches that gave rise to this Proposed Settlement.

f) Validation of the transaction

If the settlement proposal degenerates into a formal settlement decision due to the explicit acceptance or lack of response from the party to which the proposal of transaction is sent within the aforementioned period, an appeal may be lodged by the "party aggrieved".¹⁶

The final transaction does not affect the rights of any individuals (in this case, it is not of a complaint file) having suffered damage to claim damages before a civil court on the basis in particular of Article 82 of the GDPR.

¹⁵ See in particular Article 83, paragraph 2, point e) of the GDPR in the context of the imposition of administrative fines when of the finding of violations following "any relevant violation previously committed by the person in charge of the processing or the processor".

¹⁶ In accordance with Article 108, § 1 of the LCA, an appeal against this decision may be lodged within thirty days from the explicit acceptance or the absence of response, within the aforementioned period, to the Court of Markets (court d'appel de Bruxelles), with the Data Protection Authority as defendant.

Such an appeal may be introduced by means of an interlocutory request which must contain the information listed in Article 1034ter of the Judicial Code. The interlocutory request must be filed with the registry of the Court of Markets in accordance with article

1034quinquies of the C. jud., or via the e-Deposit information system of the Ministry of Justice (article 32ter of the C. jud.).

Please accept, Madam, Sir, the assurance of my highest consideration.

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(se). Hielke Hijmans

