Litigation Chamber

Decision on the merits 139/2021 of 10 December 2021

The appeal against this decision was declared inadmissible by judgment 2022/AR/42

File number: DOS-2020-04791

Subject: Complaint following the refusal to give a favorable response to the exercise

a right to erasure with regard to press articles available in the archives in

editor line

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

Hijmans, chairman, and Messrs Jelle Stassijns and Christophe 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 Law of 30 July 2018 relating to the protection of natural persons with regard to

processing of personal data (LTD);

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;

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made the following decision regarding:□

The complainant: Mr X,□

Hereinafter “the complainant”;□

Having as counsel Maître Jean-François HENROTTE and Maître Pauline LIMBREE,□

lawyers, whose firm is established at 4000 Liège, Boulevard d'Avroy, 280.□

Data controllers:□

Y1, hereinafter “the first defendant”;□

Y2, hereinafter "the second defendant";□

Hereinafter collectively referred to as “the defendants”;□

Having both as counsel Maître Etienne WERY, lawyer, whose firm□

is established at 1000 Brussels, avenue de la Couronne 214.□

I. Facts and after-effects of the procedure□

I.1.□

Facts□

1. The defendants are part of a Belgian French-speaking press and media group and□

respectively publish the titles “…..” for the first defendant and “…. »□

as regards the second defendant.□

2. The websites of these newspapers make their archives available to their subscribers under□

numerical format.□

3. In these archives, various articles dating from 2011 (article n°1 – see below), 2012 (article□

n°4 – see below), 2013 (article n°2 – see below) and 2014 (article n°3 – see below)□

relate facts – including personal data – relating to the complainant.□

1.□

2.

3.

4.

[…]

[…]

[…]

[…]

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4. More specifically, it relates information and personal data

in connection with facts in the complainant's professional life that led to convictions

criminal proceedings against him by the courts and tribunals in 2013 and 2014 as well as his striking off as

lawyer.

5. The plaintiff indicates that he was tried under criminal law […]. For these facts, the complainant specifies that he was

sentenced to a suspended prison sentence of (..) years and a sentence of

confiscation by a court of law.

6. The complainant adds that in 2014, the correctional court of (…), also sentenced him for

new facts granting him the suspension of the pronouncement. […].

7. The Complainant points out that none of these court decisions imposes a ban on

commerciality against him and that the terms of the sentence imposed (suspended sentence and suspension

of the pronouncement) are intended to promote his social reintegration, which is incompatible with the online maintenance of

contentious articles which constitute a veritable permanent virtual criminal record concerning him.

8. The complainant indicated that he continued his career as a lawyer with a consulting company, the company

Z. The defendants state that the website of this company notes the experience

of the plaintiff as a lawyer. This is not disputed by him.

9. The complainant produced a letter dated March 17, 2017, i.e. a letter prior to the entry into

application of the GDPR, signed by the second defendant under the terms of which the latter

indicates that it cannot respond favorably to the request addressed to it, putting in

highlights the specificity of the archives of press publishers in particular as well as the fact that the

conditions for the application of the right to judicial oblivion then invoked by the plaintiff were not

not met in this case.

10. The second defendant also insists on the fact that there can be no question for the

press to limit or restrict access to the press archives to anyone, even by the

search engine bias by de-indexing articles from search engines. April 8

2017, the plaintiff expressed his opposition to the arguments of the second defendant. In

response, the second defendant indicated on April 26, 2017 that it stood by its arguments

March 17, 2017.

11. On August 12, 2019 (i.e. a date after the entry into application of the GDPR this time), the

plaintiff, through his counsel, exercised “his rights to digital oblivion and

court" to the defendants giving them formal notice to proceed with

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the erasure or at the very least the anonymization of the litigious articles n° 1 to 3. In his letter,

in particular, the complainant develops a series of elements which demonstrate, in his view, that the

balance between the right to freedom of expression and information on the one hand and the right to

data protection on the other hand (more specifically the right to erasure that he invokes to

support of Article 17.1 c) combined with Article 21 of the GDPR), leans in favor of the latter right.

Given several elements related to his particular situation (he does not play a role in

public life, he suffers a prejudice), it must be concluded, according to him, that there is no interest of the

public to have access to their data which would take precedence over their right to data protection.

12. On October 28, 2019, the second defendant reacted to this formal notice by indicating

which she could only refer to previous emails relating to the position of the “Group…. »

on this subject (points 9-11).

I.2.

Feedback from the procedure

The filing of the complaint

13. On April 5, 2020, the complainant lodged a complaint with the Data Protection Authority

data (APD) against the defendants in particular.

Under the terms of this complaint, the exact wording of which is reproduced here, the complainant "addresses

a complaint against the “Group…” (read the defendants) and company A (engine

research) on the grounds that they oppose the exercise of the rights he enjoys under

of the General Data Protection Regulation”.

The complainant, through his counsel, goes on to state the following:

“First of all, the “Group…. (read the defendants) opposes his right of opposition

(read the complainant's right to object) in contradiction with the terms of Article 22 of the

General Data Protection Regulation. In this case, Mr X (read the

complainant) opposes the processing carried out on his data in the context of the publication

of the following items:

1.

[…]

2.

[…]

3.

[…]

Then, company A (search engine) opposes its right to erasure (read the right

erasure of the complainant) in contradiction with the terms of Article 17 of the Rules

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general on data protection and guidelines of 11 December 2019

(5/2019) of the European Data Protection Board. In this case, Mr X (read the

plaintiff) requests the deletion of the following hypertext links:

1.

2.

3.

[…]

[…]

[…]

14. Said complaint form details the prior steps taken by the complainant to

with regard to the defendants, in particular under the terms of which the latter refused

to comply with its requests (points 9-12 above).

15. Finally, under the heading "Identification of processing" of the complaint form, the complainant

mentions the following:

“the treatment concerned and double. First of all, it is operated by the “Group…” (read the

defendants), publisher of the 3 articles which identify Mr. X (read the plaintiff).

Then, it is operated by company A (search engine) which references the three links

hypertext which refer to the disputed articles and which appear following a

search carried out on the patronymic name of Mr. X (read the plaintiff)”.

The decision on the admissibility of the complaint

16. On April 8, 2020, the complaint was declared admissible by the Service de Première Ligne (SPL) of

the APD on the basis of articles 58 and 60 of the LCA and transmitted to the Litigation Chamber in

pursuant to Article 62, § 1 of the LCA.

The decision of the Litigation Chamber to deal with the merits of the case by splitting the two

parts of the complaint

17. On October 20, 2020, the plaintiff and the defendants were informed of the decision of the

Litigation Division to deal with the substance of the case pursuant to Article 95, § 1, 1° and

section 98 of the LCA. The Litigation Chamber explains in this regard that it has created two files

distinct against each of the parties implicated by the plaintiff, the defendants

on the one hand and company A (search engine) on the other hand, the examination of which will lead to two
separate decisions.

18. With regard to the part of the complaint directed against the defendants, the Litigation Chamber
specifies that the complaint is filed on the grounds that the defendants oppose the exercise of the
right of opposition from which the complainant benefits pursuant to Article 21 of the GDPR. She adds
that the processing of data carried out within the framework of the publications listed in point 13 below
above are those covered by this part of the complaint which leads to this decision.

19. Still by this same letter of October 20, 2020, the plaintiff and the defendants are
informed, pursuant to Article 99 of the LCA, of the deadlines for transmitting their conclusions. This
calendar was then modified and the following dates were retained: i.e. December 14
2020 and February 4, 2021 (response and reply submissions by the defendants) as well as
January 14, 2020 (complainant's submissions in reply). The parties are also invited to
enlighten the Litigation Chamber on the precise identity of the person responsible for processing
various publications questioned within the “Group…. referred to by the complainant.

20. On December 14, 2020, the Litigation Chamber receives the submissions in response from
of the defendants (points 27 et seq.).

The complainant's conclusions

21. On January 14, 2021, the Litigation Chamber received the complainant's submissions in reply.
According to his conclusions, the complainant asks the Litigation Chamber to
recalls that his complaint is admissible and declares it founded.

22. Principally, the plaintiff requests that the Litigation Chamber order the defendants
to take the necessary measures to proceed with the deletion, within a period of one
week from the pronouncement of the decision of the Litigation Chamber of the articles above
below preserved in their following digital archives. The complainant thus adds to his
asks for a 4th and 5th publication.

1. […] (article published on ..)

2.

[…] (article published on ..)

3. […] (article published on ..)

4. […] (article published on ..)

5.

[…] (article published in ..).

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The Litigation Chamber specifies here from the outset that during the hearing, the plaintiff withdrew his

request relating to this 5th publication which will therefore not be covered by this decision

(points 30 et seq.).

23. On the basis of Article 17.1.c) of the GDPR, the complainant is of the opinion that his request is well-founded. The

weighting to be applied pursuant to Article 17.3. of the GDPR between its interests (i.e. its right

to data protection) and those of press publishers (i.e. the right to freedom of expression

and information) leans in casu in its favour. The complainant invokes several arguments in this regard.

respect, similar to those invoked in 2017 and 2019 already (points 9-12). More specifically, he

pleads that he is not a public person and does not play any role in public life that

justify that the information published between 2011 and 2014 is still today

easily accessible to the public. The complainant also reports that the treatment of

given by the defendants causes him harm and exposes him to consequences

considerable negative effects (such as the loss of customers) disproportionate to the possible

prejudice linked to the withdrawal of old articles now and a fortiori with the possible prejudice linked to

the anonymization of these articles which he requests in the alternative. Section 17.3. of the GDPR

does not apply, the complainant considers that it is up to the data controller to

demonstrate what are the compelling legitimate grounds which justify the processing of the names and

first name of the complainant in the disputed articles (the press basing itself on article 6.1.f) of the GDPR

to base its treatments). The defendants remain, in the opinion of the plaintiff, in default

to do so, limiting itself to opposing in principle any modification of the disputed articles without

real-life examination. the complainant's situation

24. The Complainant requests in the alternative that

the Litigation Chamber orders the

defendants to take the necessary measures to proceed with the anonymization of the

items listed in point 22 above retained in their digital archives. This

anonymization of contentious articles would achieve the desired balance between the two

fundamental rights already cited in a less intrusive way than the nominative publication

online today, while preserving the accessibility of digital archives, of course

anonymized.

25. As an infinitely subsidiary matter, the plaintiff asks the Litigation Chamber to order

the defendants to take the necessary measures to proceed with the de-indexation of the

aforementioned articles, kept in their digital archives, in order to make them inaccessible

to search engines.

26. The plaintiff also requests that the Litigation Chamber order the defendants to

pay him a penalty payment of 1,000 euros per day of delay in the execution of any

measure imposed by the upcoming decision of the Litigation Chamber.

The conclusions of the defendants

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27. On February 3, 2021, the Litigation Chamber receives the submissions in reply from the

defendants. On the occasion of the communication of these conclusions, the defendants

express their wish to be heard in accordance with Article 98 of the LCA.

28. Under the terms of their submissions in response and in reply, the defendants request as to

to them of the Litigation Chamber that it declares the plaintiff's complaint inadmissible or at all

least unfounded:

has. As to the admissibility of the complaint, the defendants believe that, failing

identification of the processing in question under the terms of the complaint (Article 60

LCA), this is inadmissible.

b. As to the merits of the complaint, the defendants state that Article 21 of the

GDPR is inapplicable to the processing in question - as is therefore

Article 17.1.c) of the GDPR which presupposes the exercise of the right of opposition provided for in

article 21 of the GDPR - and this, taking into account article 24 of the law of July 30, 2018

(LTD) which excludes the application of Article 21 of the GDPR in the event of processing for

journalists.

Alternatively, if the Litigation Division were to consider that Article 21 of the

GDPR is applicable, the defendants are of the opinion that its conditions of application

are, in any event, not met in this case.

Infinitely in the alternative, the defendants consider that the law precludes

measures sought by the complainant. As for the measure mainly applied for, the

defendants consider that it is not clearly identified. As to

measures applied for in the alternative

(anonymization, deindexation)

them

defendants consider that since they are not included in the list

exhaustive list of the measures that the Litigation Chamber is empowered to adopt in

application of Article 100.1 LCA, the Litigation Chamber cannot grant it.

29. Finally, the defendants consider that the penalty payment is not justified and, moreover, is not

argued by the plaintiff.

The hearing of the parties

30. On July 13, 2021, the parties are informed that the hearing they have requested will take place

September 13, 2021.

31. On September 13, 2021, the parties are heard by the Litigation Chamber. During this hearing, the minutes of which were drawn up, the complainant, as already mentioned, clarified that link No. 5 (see point 22 above) should be removed from the subject of his complaint in that it relates another medium that he did not put to the cause. The complainant further specified that his argument relating to the right to judicial oblivion was developed as an element of context and that his complaint was based solely on the alleged breach of Article 17.1. c) GDPR further developed in conclusions (points 21 et seq.). The complainant also specified his argument relating to his request for anonymization in support of the Hurbain v. Belgium of the European Court of Human Rights (Eur. H. Court)1. Finally, he added a request to those already formulated in cascade (points 22-25), or to replace his identity with his initials. This request is made on an infinitely subsidiary basis, failing which for the Chamber Litigation to grant its request for anonymization (point 24), but before its request de-indexing of disputed articles via the placement of postulated de-indexing tags for its part as a last resort (point 25) . The defendants, for their part, notably explained the digital archive accessibility policy and the access settings implemented place by default.

32. On September 29, 2021, the minutes of the hearing are submitted to the parties. Few remarks submitted on October 4, 2021 and October 6, 2021 respectively by the Complainant and the defendants were joined thereto in accordance with the rules of procedure of the Litigation Chamber.

II. MOTIVATION

2.1.

As to the jurisdiction of the Litigation Chamber

33. The Litigation Chamber notes that the complainant invokes his right to be forgotten digitally, component of his right to the protection of personal data, referring to

Article 17.1.c) of the GDPR in support of its requests.

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

previous decisions2, that the competence of the DPA in general and of the Litigation Chamber

in particular is “limited to monitoring compliance with the regulations applicable to

1 European Court of Human Rights, judgment Hurbain v. Belgium of June 22, 2021.

2 See. for example decisions 03/2020 and 41/2020 of the Litigation Chamber available here:

https://www.autoriteprotectiondonnees.be/citoyen/chercher?q=&search_category%5B%5D=taxonomy%3Apu

blications&search_type%5B%5D=decision&search_subtype%5B%5D=taxonomy%3Adispute_chamber_substanc

e_decisions&s=recent&l=25

data processing, regardless of the sector of activity in which this data processing is

data intervene” its role not being to replace the labor courts or

others in the exercise of their skills.

35. In this case, the Litigation Chamber will therefore endeavor to examine whether, by refusing to grant

at the request of deletion, anonymization, replacement of his identity by his initials

and de-indexation of the plaintiff, the defendants committed or are guilty

a breach of the GDPR and/or, where applicable, other applicable legal provisions

to the processing of disputed personal data (in particular the LTD) including the APD - and

the Litigation Chamber in particular - must monitor compliance. The Litigation Chamber

is indisputably justified in checking whether a data controller has, in its

response to the exercise of their right to erasure by a data subject, correctly

applied Article 17 of the GDPR. This control also relates to whether or not the appeal is appropriate.

in Section 17.3. of the GDPR which imposes on the data controller (i.e. the defendants in

case) to operate a balance of interests to conclude or not the need for treatment

in the name of freedom of expression.

2.2.

As to the admissibility of the complaint

36. Article 60 of the LCA provides that the SPL examines whether the complaint is admissible; a complaint being

qualified as admissible when -:

it is written in one of the national languages;

it contains a statement of the facts and the information necessary to identify the processing

on which it relates;

it falls under the competence of the ODA.

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37. The SPL declared the complaint admissible on 8 April 2020 (point 16 above).

38. It is undisputed that the complaint is written in one of the national languages, in this case in

French and that it falls within the competence of the DPA in that the grievances against the terms

of the complaint are taken from the GDPR. The Litigation Chamber is of the opinion that the complaint contains a

statement of the facts as well as the indications necessary to identify the processing on

which she wears. From the wording of the complaint, notwithstanding the use of the terms

"double treatment" decried and deemed unclear by the defendants, it appears in fact

with sufficient clarity that the intention of the complainant is to target the data processing

operated by the defendants in their capacity as press publishers on the one hand and the processing

of data operated by company A in its capacity as a search engine on the other hand. If the

notion of "dual treatment" certainly does not refer to any concept of recognized law, the Chamber

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Litigation considers that the complaint in the wording recalled above contained sufficient

elements allowing the identification of the disputed processing via the referenced links and the

grievances raised by the complainant against each of the processing managers in question (points

13-15).

39. The Litigation Division also, from the first contact with

them

defendants, explained in its email of October 20, 2020 that it was creating a separate file

for each aspect of the complaint, inviting the defendants to present their arguments to

against the request addressed to him by the complainant on the basis of Article 21 of the

GDPR (items 17-19) .

40. In conclusion, in support of the foregoing, the Litigation Division considers that it is wrong that

the defendants qualify the complaint lodged as inadmissible in that the processing

disputed with regard to the defendants would not have been clearly identified.

41. Similarly, the Litigation Chamber considers that the defendants are wrong to claim

that their right to a fair trial would not have been respected in that they would have remained in

ignorance of what they were accused of until the complainant's conclusions in reply. The

Litigation Chamber demonstrated above that from the start of the procedure, the

defendants were informed of what the subject of the complaint lodged against them was

on their refusal to respond favorably to the exercise of the complainant's right to object to the

publication of disputed articles 1 to 3 (points 17-19 and 39).

42. It emerges from the preceding paragraphs (points 38-40) that the Litigation Division does not

does not share the defendants' argument in that they consider that the wording of Article

60 would preclude several distinct processing operations (operated by data controllers)

separate treatments) are referred to in a single complaint form. It is at the start of

criteria of article 60 that the examination of admissibility takes place (points 36-38) and not from

whether a single form or separate forms should or could have been

used. On the other hand, the decision of the Litigation Division to conduct two procedures

contradictory for each of the two aspects identified by the complainant himself in the complaint,

is a decision specific to the Litigation Chamber3.

43. In the present case, this decision echoes the distinction that must be made between the publishers of

press such as the defendants on the one hand and search engines such as company A on the other

3 Brussels Court of Appeal (section - Court of Markets), judgment of 7 July 2021, 2021/AR/320, available on the APD website (pages 17 and 18): https://www.autoriteprotectiondonnees.be/publications/arret-du-7-juillet-2021-de-la-cour-des-marches-ar-320-available-in-dutch.pdf

part (the latter being also called into question by the complaint as already mentioned but not covered by this decision) with regard to the data processing they carry out respectively and of the conditions under which the rights of the data subjects can be exercised against them.

44. Like both the Court of Justice of the European Union (CJEU) and the Eur.D.H. exposed it on several occasions in their judgments4, there is a distinction between these two actors. They each intervene as far as they are concerned as data controllers distinct. The initial processing of personal data results from the decision of the publishers of publish information containing this data and keep it available on their website, even without the intention of drawing public attention to them. Due to the activity of processing of search engines, the personal data made available by the publishers can be easily located, accessed by Internet users; the engines of research that amplifies the scope of the initial publication by promoting their accessibility.

45. In its Guidelines 5/2019 on the criteria for the right to be forgotten under the GDPR in the case of search engines5, the European Data Protection Board (EDPS) specifies in the same sense that:

"7.

Various considerations come into play when it comes to applying Article 17 [of the GDPR] to the processing of data carried out by a provider of (engine of research). In this regard, it should be noted that the processing of personal data personnel carried out within the framework of the activities of a supplier of (search engine)

differs from the publishers' treatment of third-party websites such as media

offering journalistic content online. (…)

9.

Requests for removal from search results lists do not give rise to

complete erasure of personal data. In fact, these data are not

erased neither from the website concerned, nor from the index and the cache memory of the provider of

search engine. For example, the data subject may request the withdrawal of

personal data from a media index of a search engine,

such as a newspaper article. In this case, the link to the personal data may

be removed from the search engine index. However, the article in question remains under

4 See. for example CJEU, 13 May 2014, C-131/12 , Google Spain and Google, ECLI:EU:C:2014:317 and Eur Court. D.H.

M.L. and W.W. v. Germany on June 28, 2018.

5 European Data Protection Board (EDPB), Guidelines 5/2019 on the criteria for the right to

oblivion under the GDPR in the context of search engines of July 7, 2020

https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_201905_rtbfsearchengines_afterpublicc

consultation_en.pdf

control of the media and may remain available and accessible to the public, even if it does not appear

more in the list of results displayed following a search including in principle the name

of the person concerned".

46. In summary, with regard to the processing of separate personal data, responding to

separate legal regimes operated by separate data controllers, the

Chambre Litigation opted for a split of the complaint, dealing separately

each of the sections she

identified. Each controller, including

them

defendants, has also, following this split, had the opportunity to defend itself before

DPA with regard to the processing which concerned him as recalled in the feedback from

the procedure.

47. In support of the preceding paragraphs, the Litigation Chamber concludes that it is wrong that

the defendants plead the inadmissibility of the complaint as well as an infringement of their right to a

fair trial.

2.3. As to the identification of the defendants

48. The defendants point out in terms of conclusions that the plaintiff lodged his complaint at

against the “Group…” which group has no legal personality, only persons

morals that compose it by having one. The defendants, however, draw no

consequence in terms of the admissibility of the complaint. Following the request made by the

Litigation Chamber in its letter of October 20, 2020 to clarify their respective roles in the

within the “Group…” (point 19, the defendants specify that they are both

controller for the data processing they operate respectively

via “…” for the first defendant and via “…. for the second defendant.

49. The Litigation Chamber has already had occasion to point out that it is often complex for the

complainant to identify in a correct and certain manner the data controller or the sub-

processing with regard to the processing(s) it denounces, these concepts being defined in a

legal under Articles 4.7 and 4.8 of the GDPR and may be difficult for a person to understand

not versed in matter6. De facto compel a complainant to accurately identify the

controller in support of the complaint that he lodges with a data protection authority.

data protection – by drawing harmful consequences on the admissibility of the

complaint where this identification is inaccurate - would defeat the purpose of the GDPR. In

Indeed, it intends to facilitate the exercise by the citizen of an appeal to the authority of

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

56/2021 of the Litigation Chamber, paras 48 s.

data protection designed as an alternative remedy to appeals before the

courts and tribunals of a more complex nature.

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50. In support of the definition of data controller in Article 4.7 of the GDPR, the Chambre

Litigation concludes that the defendants are indeed data controllers

each for the processing of personal data of the complainant that they operate

respectively via

the publications of the titles “…” and “…” put in

line, and more

particularly through articles n° 1 to 4 already quoted. They determine both the purposes

than the means of this processing by deciding to put them online as archives

as well as by determining, among other aspects, their methods of access, for example

(points 32 and 65).

2.4. As to the merits of the requests for erasure, anonymization and de-indexation

of the complainant

51. With regard to the content of the complaint, it is up to the Litigation Chamber to assess whether it is

quite rightly that the defendants refused to grant the request

deletion of disputed articles 1 to 3 made by the complainant in 2017, repeated request

in 2019.

52. The Litigation Division will also examine whether this refusal validly extends to link no. 4

added to the terms of the procedure before the DPA and whether, in this case, the requests can be granted

erasure, anonymization, replacement of the identity of the complainant by his initials and

of deindexation postulated in cascade by the complainant (points 20-25 and 31).

2.4.1. Regarding the request for erasure

53. The Litigation Chamber recalls that under the terms of Article 17.1.c) of the GDPR, the person

concerned has the right to obtain from the controller the erasure, as soon as possible

deadlines, of personal data concerning him when (…) c) the person concerned

objects to the processing pursuant to Article 21(1) and there are no legitimate grounds

overriding for the processing, or the data subject objects to the processing under

section 21.2. of the GDPR. The data controller has the obligation to erase these

personal data as soon as possible when this ground applies.

54. Section 17.3. a) of the GDPR adds that Article 17.1 will not apply insofar as this

processing is necessary for the exercise of the right to freedom of expression and information,

thus providing, in the very terms of Article 17 of the GDPR, for an exceptional regime which involves

a balance of interests between two fundamental rights (the right to freedom of expression and

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on the one hand and the right to the protection of personal data on the other

go). The Litigation Chamber recalls in this regard that in its "Google Spain" judgment of 13

May 2014, the CJEU states that, as a general rule, the rights of the data subject enshrined

by Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (EU) (i.e.

right to privacy and protection of personal data) prevail. However,

“this balance may however depend, in particular cases, on the nature of the information

in question and its sensitivity to the privacy of the data subject as well as the interest

of the public to have this information, which may vary, in particular, depending on the role

played by this person in public life” 7.

55. The Litigation Chamber also recalls that the importance of data processing

personal data for archival purposes in the public interest is recognized in the GDPR,

in particular in Article 89 thereof. Such processing is subject to appropriate safeguards for

the rights and freedoms of data subjects.

56. In accordance with the case law of the Eur. D.H. 8, Internet archives fall well under the

content protected by the right to freedom of expression and information (Article 10 of the

European Convention on Human Rights (ECHR) and Article 11 of the Charter of Rights

fundamentals of the EU).

57. The Eur. D.H. recognizes the important contribution made by the archives available on

Internet to preservation and access to information. She points out that such archives

are a valuable source for education and historical research, especially of the

fact of the speed of access to information and often, of their freeness. The said Court considers that

if the main function of the press in a democratic society is to play the role of

"watchdog" according to the established expression, it also fulfills a secondary role –

which now contributes to its mission – by maintaining accessible to the public a certain

number of archives concerning information already reported previously.

58. The Court adds that a wider latitude exists to strike a balance between the interests

competitors (point 54) when the information is archived and relates to events

past only when they relate to current, recent events (paragraph 45 of the judgment cited

in footnote 8).

7 CJEU Google and Google Spain judgment, cited above, para 81.

8 See. its Times Newspaper Limited v. United Kingdom of March 10, 2009 in particular

59. In this sense, the Litigation Division is of the opinion that, pursuant to Article 17.3. a) GDPR,

the result of the balance of interests to be operated between the right to data protection to

personal character on the one hand and the right to freedom of expression on the other hand must certainly

take into account the specific nature of the archives, as well as the guarantees for the

data subject, including, where appropriate, pseudonymization. Generally, a

any pseudonymization or anonymization would however not be admissible if it had

as a consequence of not doing right to public information.

60. As well as the Eur. D.H. has reminded many times, the wish of a person

(concerned) to erase his past is not sufficient to justify a measure to modify the

archives precisely because these archives participate, in the same way as the publication

initial, to the effectiveness of the freedom of expression and information as recalled below.

above. Digital archives are a valuable source of information whose

accessibility must be preserved. They participate in the formation of democratic opinion and

any measure limiting access by the public – who has the right to receive them – must be justified

for particularly compelling reasons.

61. In the present case, in support of all the evidence presented to it, the Chamber

Litigation argues that in the present case the result of the balance of interests to operate

between the right to data protection on the one hand and the right to freedom of expression on the other

part pursuant to Article 17.3. a) of the GDPR leans in favor of freedom of expression for

the following reasons.

62. At the outset of the relevant criteria to be taken into consideration according to the case law of the CJEU

and the eur court. D.H.to balance the two fundamental rights

concerned, the Litigation Chamber justifies its decision as follows.

63. The Litigation Chamber notes that the complainant's request for erasure is directed to

towards recognized press publishers, whose professionalism is not in question and whose

activity is at the heart of what freedom of expression seeks to protect. The public has indeed, by

principle, an interest in being informed of legal and ethical facts, more particularly

when these are of a certain seriousness and do not reflect an isolated case such as

this is the case here. The complainant was in fact the subject of two successive convictions

for criminally sanctioned acts, abusing his titles of lawyer and curator and the

9 See. for example eur court. D.H.n Timpul Info-Magazinet Anghel c. Moldova, 27 November 2007, M.L. and W.W.

vs. Germany , 28 June 2008 and the Times Newspaper judgment cited above.

confidence of third parties in these qualities. The contentious articles do not reflect any staging, do not

denote any sensationalism and it was not indicated to the Litigation Chamber that they

would have been challenged in one way or another at the time of their publication. Veracity

of the information they relay is not called into question either. The complainant had to

elsewhere reasonably expect, taking into account the nature of the facts, its quality and its

notoriety (even if it was local) at the time, that his convictions were the subject of an account-

rendered in the press as he would reasonably expect such publications

be archived without modification. The creation of archives and their maintenance online is in

Indeed, as has been recalled, a component of the right to freedom of expression, the right to

public information10 is not limited to the news of the day.

64. In this regard, the Litigation Chamber notes that the complainant invokes that the publications

some of them date back ten years or at least 7 or 8 years already. Considering

this passage of time and his change of professional activity (the complainant

invokes his current position as a lawyer in an SME), the complainant argues that the information

that these publications continue to disseminate are no longer relevant today. The

Litigation Chamber does not disagree that the anteriority of the facts is a criterion to be taken into account.

account and that depending on the concrete circumstances of each request, a period of 10 years may

or not be considered excessively long. In this case, even after 10 years, the relevance of

the accessibility of the information remains as long as the complainant no longer exercises the

function as a lawyer but pursues a career in the field of legal advice as well

based on a relationship of trust. The complainant's potential customers continue to have a

interest in having information about him accessible.

65. In its assessment, the Litigation Division takes into account that this accessibility to

archived contentious articles is reserved solely for subscribers of the newspapers concerned. She holds

also take into account that by default, only articles published for less than a year

appear during a search within the archives concerned. The author of the research

must manually modify the setting of the search criterion over time to

extend the search period and access articles dating, as in this case, from

more than a year, as the defendants explained at the hearing (point 32).

66. The Litigation Chamber argues that the implementation of such measures governing
the accessibility of archives (and recent publications) contributes to the establishment of
appropriate safeguards within the meaning of Article 89 of the GDPR by the defendants.
10 See in the same direction, the already cited Google Spain judgment of the CJEU.

67. The Litigation Division further notes that the plaintiff claims not to be a person
public nor to play a role in public life within the meaning of the Guidelines of the
Section 2911.
68. Under these, Group 29 states:
“It is not possible to establish with certainty the type of role in public life that a
natural person must act to justify public access to information on the said
person through an internet search.
However, as an example,
men and
women politicians,
the hights
civil servants, businessmen and women and members of the professions
liberal (regulated) organizations can generally be seen as playing a role in
public life. There are reasons for allowing the public to search for information
concerning the role and activities of these persons in public life.
In general, it is appropriate to ask whether the fact that the public has access to
particular information of a person by means of a search on the basis of his
name would prevent her from engaging in inappropriate public or professional behavior.
It is equally difficult to define the sub-group of “public persons”. In good standing
general, we can say that public persons are persons who, because of the
positions they occupy or commitments they have made, are more or less

exposed to the media.

Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right

respect for private life gives a possible definition of "public persons". She

states that “public persons are those who exercise public functions

and/or use public resources and, more generally, all those that

play a role in public life, be it political, economic, artistic, social, sporting

Or other ".

69. In support of these considerations, the Litigation Division is of the opinion that at the material time, the

complainant unquestionably played a role in (local) public life by virtue of his position

as a lawyer, given his notoriety in his professional environment and his role as curator

other companies that have received media attention regardless of the criminal facts

11 Article 29 Group, Guidelines on the execution of the judgment of the Court of Justice of the European Union

in the case of Google Spain and Inc./Agencia espanola de proteccion de datos (aepd) and Mario Consteja

Gonzalez (C-131/12, adopted on November 26, 2014.

will be charged later. Even admitting that the plaintiff is less exposed

today, this factor cannot, for the reasons set out above, justify the erasure of the

disputed items.

70. As to the measures of reprieve and suspension of the pronouncement granted by the courts and tribunals

of the judicial order invoked by the plaintiff, as well as the prohibition of commerciality that he

cites, they do not entail, in the opinion of the Litigation Chamber, a reduction in the seriousness

of the facts nor diminish the public interest in having access to this information even today.

71. Finally, as regards the damage also invoked by the complainant, both in his private life and

professional, the Litigation Chamber notes that the complainant limits himself to stating it.

72. In conclusion, the Litigation Division is of the opinion that the defendants are entitled to

refused and continue to refuse to comply with the complainant's request for erasure,

both with regard to links n°1 to 3 referred to already in 2017 and with regard to link n°4 invoked during
this procedure.

2.4.2. Regarding the request for anonymization and pseudonymization

73. These same arguments do not lead the Litigation Division to any other conclusion
regard to the request for anonymization made in the alternative by the complainant or to that of
replace his identity with initials as requested in the hearing (points 30-32).

74. Indeed, failing to reveal the identity of the complainant, the disputed articles lose their relevance.
in terms of information to the public, information to which, as demonstrated above,
they must still be able to access today.

75. As for the request for anonymization more specifically, the complainant, during the hearing of the
September 13, 2021, particularly relying on the judgment Hurbain c. Belgium of the eur court. D.H.
of June 22, 2021. Under the terms of this decision, the said Court concludes that by condemning the publisher
to anonymise a certain number of press articles, the Belgian courts had
properly balanced between the right to respect for the private life of the driver concerned and the
right to freedom of expression. This anonymization constituted, according to the Court, the most
effective among those that were possible in the present case, without however
disproportionate interference with freedom of expression; this measure sparing
in other words, with regard to the specific circumstances of the case, a fair balance
between the competing rights at stake.

76. The Litigation Chamber is of the opinion that the circumstances in support of which the Eur. D.
H. reasons for this decision Hurbain cannot be transposed to the present case. In effect,
while a convicted driver requested the anonymization of press articles relating to a
car accident, or a news item independent of his professional life, it is the integrity of the
complainant in his capacity as a lawyer who has been challenged by the courts in this case.
The plaintiff is also pursuing his career as a lawyer today. The complainant's situation is

in this respect different: his judicial past belongs to his professional life, which is

pursues and the public has in this perspective, notwithstanding the desire for legitimate reintegration of the

plaintiff, the right to know about this past. The Court also highlights that the interest of

the archived article concerning the convicted driver is statistical (traffic offences).

which, according to the Litigation Chamber, distinguishes it here also from the articles concerning the complainant

Finally, the Eur. D.H. also particularly highlights the age of the facts

(more than 20 years old) and the damage suffered by the convicted driver. In this case, it was

stated that the time factor and the damage did not call into question the need for the

maintaining the accessibility of information relating to the complainant (paragraphs 64-65 and 71)

2.4.3. As for the request for de-indexation

77. As to the request for de-indexation formulated on an infinitely subsidiary basis by the plaintiff, the

Litigation Chamber considers, in all cases and without prejudice to any other

legal argument as to whether this de-indexation actually comes under

the liability of the defendants, in support of the arguments already stated that this measure

would be too detrimental to the accessibility of the information contained in the disputed articles for

the same reasons.

78. As for the dereferencing which, if necessary, would be the responsibility of search engines, the CC

refers to the decision it will adopt with regard to the other part of this complaint (point 13) .

2.4.4. Additional Considerations

79. In addition to the foregoing, the Litigation Division is aware that the defendants have, at

in support of their refusal to erase, invoked Article 24.1. of the LTD, taken in execution of article

85.2. of the GDPR.

80. The Litigation Chamber recalls here that under the terms of this article 85.2. GDPR,

exemptions or derogations, in particular to the rights of data subjects (Chapter III

of the GDPR), may be provided for by the national legislator with regard to processing carried out at

for journalistic purposes or for purposes of academic, artistic or literary expression if these

these are necessary to reconcile the right to the protection of personal data and

freedom of expression and information. Recital 153 of the GDPR clarifies the objectives

of the European legislator in this respect, insisting on this condition of necessity in particular12.

Besides the fact that the text of Article 85.2. of the GDPR is very clear on this condition, the

recital mentions that these derogations could vary from one Member State to another, which

reinforces the very essence of this provision, namely that there can be no question of deleting

purely and simply any exercise of one or the other right of the data subject.

81. The Litigation Chamber therefore questions the compliance with the GDPR of Article 24.2 LTD

which provides that in the event of processing for journalistic purposes - the journalistic purpose being

admittedly defined more restrictively than the CJEU13 does - Articles 7 to 10, 11.2, 13 to

16, 18 to 20 and 21.1 of the GDPR do not apply, in any case, purely and simply

not. The Litigation Chamber doubts that this provision of national execution is

compliant with the GDPR which requires, as has just been recalled, that a weighting exercise,

balancing of the two fundamental rights takes place in concreto. The Litigation Chamber

12 Recital 153: “The law of member states should reconcile the rules governing freedom of expression and

information, including journalistic, academic, artistic or literary expression, and the right to protection

personal data under this Regulation. In the context of data processing

solely for journalistic purposes or for the purposes of academic, artistic or literary expression, it is necessary to

provide for derogations or exemptions from certain provisions of this Regulation if necessary

to reconcile the right to the protection of personal data and the right to freedom of expression and

of information, enshrined in Article 11 of the Charter. This should in particular be the case for the processing of

personal data in the audiovisual field and in news archive documents and

press libraries. Accordingly, Member States should adopt legislative provisions which

lay down the exemptions and derogations necessary for the purpose of ensuring a balance between these fundamental rights.

Member States should adopt such exemptions and derogations from the principles

general, the rights of the data subject, the controller and the processor, the transfer of

personal data to third countries or international organisations, supervisory authorities

independence, cooperation and consistency, as well as the particular situations of treatment of

data. Where these exemptions or derogations differ from one Member State to another, the law of the Member State

member responsible for the controller should apply. To take into account the importance

of the right to freedom of expression in any democratic society, a broad interpretation should be adopted

notions linked to this freedom, such as journalism".

13 In Article 24.1. LTD, the Belgian legislator has provided that the term "processing of personal data" is to be understood as

personnel for journalistic purposes" means the preparation, collection, editing, production, dissemination or

archiving for the purpose of informing the public, using any media and where the controller imposes

rules of journalistic ethics.

could in this regard, in support of the case law of the CJEU, decide to disregard Article 24.1 LTD

if it deemed it non-compliant with the GDPR14.

Decision on the merits 139/2021- 22/26

82. Notwithstanding the foregoing, the Litigation Chamber immediately notes that Article 17 of the GDPR

is not one of the rights of the data subject from which the Belgian legislator excludes

purely and simply the exercise in the event of processing for journalistic purposes in the said article

24.2 LTD.

83. Thus, Article 17.1.c) of the GDPR invoked by the complainant, even if it is consecutive to the exercise of a

right of opposition (article 21.1. of the GDPR) which is certainly included in the list of excluded rights)

would therefore fully apply, admittedly within the limits of Article 17.3. of the GDPR.

To consider, as argued by the defendants, that since Article 21.1 of the GDPR is

legally inapplicable because of article 24.2 LTD, article 17.1.c) of the GDPR could not

to apply would be contrary to the principle according to which it is necessary to postulate the coherence of the legislator

(which did not refer to Article 17 of the GDPR in Article 24.2. LTD). Article 17n of the GDPR not being

not covered by Article 24.2. LTD, it cannot be impacted by the fact that Article 21.1. is in

revenge. The defendants' argument would also amount to denying any possibility of exercising

the right to erasure when data processing for journalistic purposes within the meaning of

the LTD relies on article 6.1.e) or 6.1 f) of the GDPR which specifically bases the processing of

data from press publishers (the right of opposition can only be exercised when the

processing to which the person concerned wishes to oppose is based on these bases of lawfulness).

84. The foregoing considerations, however, remain superfluous since, in

In this case, the Litigation Chamber concluded that, pursuant to Article 17.3. of the GDPR15, the

right to freedom of expression and information should take precedence and that it is therefore right that

14 In recent guidelines, the European Data Protection Board (EDPB) has underlined the role

data protection authorities with regard to legislation that does not comply with the requirements of the GDPR.

In support of Article 58.5. of the GDPR, the European Data Protection Board has thus reminded, to its

referring to recital 50 of the judgment of the Court of Justice in case C-378/17 that “according to the

principle of supremacy of EU law, the duty to disapply national legislation that is contrary to EU law is owed not

only by national courts but also by all organs of the State – including administrative authorities – called upon,

within the exercise of their respective powers, to apply EU law” (EDPS, Guidelines 10/2020 on restrictions under

article 23 GDPR, adopted on October 13, 2021, point 73 - currently only available in English).

15 Even assuming that, pursuant to Article 24.2. LTD, the application of Article 17.1.c) is excluded, this

exclusion could only relate to Article 17.1.c) as a consequence of the fact that Article 21.1. visited

legally unenforceable due to Section 24.2. LTD. This exclusion would not apply to Article 17.3. from

GDPR.

the defendants refused (and continue to refuse) to respond favorably to the

complainant's demands.

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85. Without prejudice to this conclusion, the Litigation Chamber finally wishes to clarify the following.

86. Under Article 12.3. of the GDPR, the controller is required to provide the

data subject information on the measures taken following his request

to exercise the rights provided for in Articles 15 to 22, either including following a request

erasure based on Article 17 of the GDPR as in the present case and this, as soon as possible

and in any case within one month of receipt of the request. In

application of section 12.1. of the GDPR, this communication must be made in a concise manner,

transparent, understandable and easily accessible, using clear and simple terms.

87. In this case, it is not disputed that the second defendant to whom the plaintiff had

sent his request replied on March 17, 2017, i.e. on a date on which the GDPR was not

yet entered into force. Then, called upon again in 2019, the second defendant

referred the complainant to this response of March 17, 2017 even though the GDPR was in

the interval entered into application (points 9-12). The Litigation Chamber considers that it would have been

good practice to re-specify the content of the motivation with regard to Article 17 of the GDPR.

No grievance being based on any breach of either Article 12.1 or Article 12.3 of the GDPR

by the complainant, and this aspect not constituting the heart of the complaint, the Litigation Chamber

finds no breach on the part of the defendants with regard to these provisions.

III. Regarding corrective measures and sanctions

88. 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° propose a transaction;

(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, who informs it of the follow-up

data on file;

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

Datas.

89. The Litigation Chamber recalls that it is not up to the plaintiff to seek compensation

Litigation Chamber that it orders such or such corrective measure or sanction16. Whether,

notwithstanding the foregoing, the complainant should nevertheless ask the Chamber

Litigation that it pronounces one or the other measure and/or sanction, it is therefore not incumbent

it is up to the latter to justify why it would not accept one or the other request made

by the complainant. These considerations leave intact the obligation for the Chamber

Litigation to justify the choice of the measures and sanctions in which it deems (from the list

the measures and sanctions made available to it by articles 58 of the GDPR, as well as 95.1 and

100.1 of the ICA), appropriate to condemn the party(ies) involved.

90. Notwithstanding the foregoing, the Litigation Chamber wishes here to refute the argument of the

defendants according to which the Litigation Chamber would not, in any event, be

empowered to impose an anonymization order (if that were to be its decision, which is not the

case in this case, (see point 73), since this measure does not appear in the list of

corrective measures and sanctions listed in Article 100 LCA recalled above (point 88). The

Litigation Chamber is of the opinion that if certainly, the list of article 100 of the LCA is exhaustive,

it is nonetheless empowered, when it opts for an order to comply with the GDPR

or an order to follow up on the exercise of a right of the data subject, for example, to

specify how this order should be translated. Thus, the order of compliance

could consist of anonymization if this were to be in concreto the best way to

16 See. the note relating to the complainant's position in the proceedings within the Litigation Chamber:

https://www.autoriteprotectiondonnees.be/publications/note-relative-a-la-position-du-plaignant-dans-la-

procedure-within-the-litigation-chamber.pdf

comply with GDPR. As for the penalty requested by the complainant, the Litigation Chamber

therefore limits itself here to recalling its dedicated note17.

Decision on the merits 139/2021- 25/26

91. In the present case, with regard to the complaint lodged by the complainant, the Chamber was asked

Litigation to decide the question of whether it is rightly that the defendants

had refused to grant the request for erasure made by the complainant with regard to the

disputed items. It follows from the above analysis that it is indeed right that the

defendants, each for the disputed articles for which they are responsible for processing,

refused to comply with the complainant's request for erasure as is rightly

that they each continue to refuse it as well as to anonymize, pseudonymize and

de-index from search engines. No shortcoming can be found in this regard.

on their behalf by the Litigation Chamber. (points 53-78).

92. In the light of the foregoing and on the basis of the powers attributed to it by the

legislator under section 100.1. of the ACL, the Litigation Chamber therefore decides to

close the complaint without follow-up, in accordance with article 100.1., 1° of the LCA,

based on the motivation above.

93. In matters of dismissal, the Litigation Chamber must justify its decision by

step and:

- to pronounce a classification without technical continuation if the file does not contain or not

enough element likely to lead to a sanction or if it contains an obstacle

technique preventing him from rendering a decision;

- or pronounce a classification without continuation of opportunity, if in spite of the presence of elements

likely to lead to a sanction, the continuation of the examination of the file does not seem to him

timely given its priorities.

94 If the dismissal takes place on the basis of several reasons (respectively technical or

of opportunity),

the reasons for the dismissal must be dealt with in order

important.

95. In the present case, the Litigation Chamber therefore orders a dismissal

technical application in application of article 100.1., 1° of the LCA when, following the examination of the

complaint and the facts it reports, the Litigation Chamber concludes that it does not have

See.

17

Politics

https://www.autoriteprotectiondonnees.be/publications/politique-en-matiere-d-astreinte.pdf

Litigation

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of elements likely to lead to a finding of violation of the GDPR on the part of the

defendants.

IV. Publication of the decision

96. Given the importance of transparency with regard to the decision-making process

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

DPA by deleting the direct identification data of the parties and of the

persons cited, whether natural or legal.

FOR THESE REASONS,

The Litigation Chamber of the Data Protection Authority decides, after

deliberation:

- to close the present complaint without further action for technical reason in application of

Article 100.1., 1° of the LCA.

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

of the Court of Markets (Brussels Court of Appeal) within 30 days of

its notification, with the Data Protection Authority as defendant.

(se). Hielke Hijmans,

President of the Litigation Chamber