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Dispute room□

Decision on the merits 134/2022 of 15 September 2022□

File number : DOS-2021-04509□

Subject : complaint regarding data processing in the context of a tax□

research□

The Dispute Chamber of the Data Protection Authority, composed of Mr Hielke□

Hijmans, chairman, and Messrs Frank De Smet and Dirk Van Der Kelen, members.□

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 revocation of□

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;□

In view of the regulations of□

internal order, as approved by the Chamber of□

Members of Parliament 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 complainant:□

Mr X, represented by Meester Erik Valgaeren, holding office□

at Loksumstraat 25, 1000 Brussels, hereinafter referred to as “the complainant”;□

The defendant:□

The Federal Public Service Finance, with registered office at 1030 Schaerbeek, Koning□

Albertlaan□

II-laan 33, bus 1,□

registered with the Crossroads Bank of□

Companies, under number 0308.357.159 hereinafter referred to as “the defendant”.□

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I. Facts and procedure□

1.□

On 8 June 2021, the complainant submits a complaint to the Data Protection Authority against□
defendant.□

In the context of a tax investigation, the competent services of the□

Defendant company visits conducted in April 2019 at various companies□

in which the complainant is directly or indirectly involved through a position. According to the complainant,□

numerous private data copied and included. On December 22, 2020□

identical notices regarding the extension of the tax investigation period□

on personal income tax towards the complainant and the various companies involved□

sent. These notices include, among other things, personal data with□

relating to private travel, such as names of the tour group, destinations,□

activities undertaken and the cost of those trips. The complainant argues that those□

personal data in question touches the core of the complainant's private life. Consequently□

the complainant alleges that the defendant has violated the GDPR by sharing this private data□

collect during the company review and then record it□

in the□

notifications to all companies involved.□

2. On August 31, 2021, the complaint will be declared admissible by the Frontline Service on□

pursuant to Articles 58 and 60 WOG and the complaint pursuant to Article 62, § 1 WOG□

submitted to the Disputes Chamber.□

3. On 30 September 2021, in accordance with Article 96, § 1 WOG, the request of the

Disputes Chamber to conduct an investigation submitted to the Inspectorate,

together with the complaint and the inventory of the documents.

4. The inspection will be completed by the Inspectorate on November 3, 2021

report attached to the file and the file is reviewed by the Inspector General

submitted to the Chairman of the Disputes Chamber (Article 91, § 1 and § 2 WOG).

It

report concludes that

the startup

from

an investigation

against the

controller would violate Article 57.1 f) GDPR read in conjunction

with Article 64 § 2 WOG for the following reasons:

- The identity of the controller is not clearly defined in the

complaint and after questioning the complainant's counsel, the identity of the

controller is also not defined.

- The complainant would not provide sufficient evidence to show that there is a

breach of the GDPR or data protection laws. The complainant also has no contact

discussed the objections with the data protection officer. This is

according to the Inspectorate this is problematic because the complainant is aware of the existence of sufficient

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must be able to demonstrate serious indications. After all, the Inspectorate cannot

initiate an investigation based on the complainant's interpretations of tax law and

the GDPR during an ongoing tax dispute. The position of the officer for

data protection can in that case provide a lot of additional information in the light

of the GDPR.□

- A tax investigation is still ongoing regarding the facts on which the present complaint□

relates. It follows from the duty to ensure a proportional investigation that the□

is not opportune for the Inspectorate to intervene in this specific□

ongoing investigations and disputes where the substance has not yet been decided□

formulated by the (administrative) court.□

- A further investigation is not opportune in view of the jurisdiction of the court to□

the tax investigation and any subordinate disputes about the GDPR□

judge.□

- The Inspectorate can determine the fiscal (ir)relevance of personal data and the “private” or□

“professional” nature of these specific personal data (travel data) is not□

investigations let alone qualify as a possible breach of the GDPR. In this respect□

after all, a tax assessment on the merits, for which the Inspectorate is not competent.□

- The Inspectorate establishes that a priori there does not appear to be a□

"Disclosure" within the meaning of Article 33 of the GDPR.□

5. On 6 December 2021, the Disputes Chamber will decide on the basis of Article 95, §1, 1° and Article 98□

WOG that the file is ready for treatment on the merits.□

6. On 6 December 2021, the concerned parties shall be notified of the provisions□

as stated in Article 95, § 2, as well as those in Article 98 WOG. They will also be□

pursuant to Section 99 WOG of the time limits to lodge their defenses□

serve.□

As regards the findings relating to the subject matter of the complaint, the□

deadline for receipt of the defendant's response□

laid down on January 17, 2022, this for the statement of the complainant's reply on February 7□

2022 and finally this for the statement of reply of the defendant on 28 February□

2022.□

7. On December 21, 2021, the time limits were extended at the request of the defendant□

and became the final date for receipt of response from the defendant□

laid down on 7 February 2022, this for the complainant's reply on 14 March□

2022 and finally those for the defendant's reply on 4 April 2022.□

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8. On 7 December 2021, the complainant requests a copy of the file (Article 95, §2, 3° WOG),□

which was sent to him on December 16, 2021.□

9. On December 7, 2021, the defendant requests a copy of the file (Article 95, §2, 3°□

WOG), which was sent to him on December 16, 2021.□

10. On December 7, 2021, the defendant electronically accepts all communications regarding the□

case and indicates that he wishes to make use of the opportunity to become□

heard, in accordance with article 98 WOG.□

11. On December 17, 2021, the complainant electronically accepts all communication regarding the case□

and expresses his wish to make use of the opportunity to be heard,□

in accordance with article 98 WOG.□

12. On February 7, 2022, the Disputes Chamber will receive the statement of defense from the□

defendant in which an overview is given of the concrete facts in the present case□

and the ongoing tax procedure regarding the complainant and the aforementioned concerned□

companies. The defendant argues that the processing on its behalf constitutes a reasonable□

and□

allowed data operation□

matters where□

the efficiency□

and□

proportionality principle are respected. The defendant further argues that he□

is authorized to carry out the tax assessment on the merits in accordance with the□

principles of good governance, consistent with the rights of defense of

the complainant and the companies and in accordance with the relevant legal provisions. Until

Finally, the defendant states that it complies with the information and transparency obligations from the articles

12, 13 and 14 GDPR.

13. On 14 March 2022, the Disputes Chamber receives the statement of reply from the complainant,

in which he explains that the lack of clarity about the

identity

of the

controller in the present case is the result of non-compliance with the

information and transparency obligations as set out in Articles 5, 13 and 14 GDPR.

The complainant then outlines the preliminary procedure that was conducted with regard to the

collected personal data. The complainant then argues that, contrary to the

determinations of the Inspectorate, the Disputes Chamber is authorized to supervise

processing by the defendant, despite the ongoing tax dispute. The complainant then

sets out how the defendant is bound by the principles of the GDPR and where neither a

broad basis for carrying out investigative acts, nor conducting tax appreciations

imply a legal authorization to deviate from these principles. In doing so, the complainant

that the processing is unlawful within the meaning of Articles 5, 6 and 32 GDPR. Here speaks the

defendant on three disputed processing operations:

a. The disproportionate collection of personal data;

b. Directing sensitive questions to both spouses;

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c. Unnecessarily detailing and disclosing sensitive personal data

concerning the complainant's journeys that were not deducted for tax purposes.

The complainant then refutes the Inspectorate's finding that the complainant

data protection officer has not caught up with the present complaint before

serve. Finally, the complainant puts forward elements demonstrating the seriousness of the infringement and aggravating circumstances to demonstrate. The complainant refers to the following elements: the disputed processing relates to personal data of a highly sensitive nature, despite repeated requests, no steps were taken to protect the confidentiality of the data, and the intentional nature of the breaches of the GDPR and the far-reaching harmful consequences of the disputed processing.

14. On April 4, 2022, the Disputes Chamber will receive the statement of rejoinder from the defendant in which he resumes his arguments from the statement of reply. Then the defendant insists that a clear administrative procedure is in place that has jurisdiction to adjudicate disputes related to the handling of the defence. In addition, the courts and tribunals have jurisdiction over the rights of the involved. The defendant therefore believes that the complainant does not demonstrate why the existing administrative and judicial procedures would not be sufficient to adequately protect the rights and freedoms of data subjects. Finally, the defendant formulates the defendant's arguments – subject to reservation – regarding the lawfulness of the above listed sensitive questions that were addressed to both spouses.

15. On 25 May 2022, the parties will be notified that the hearing will take place on June 24, 2022.

16. On June 24, 2022, the parties will be heard by the Disputes Chamber.

17. The minutes of the hearing will be submitted to the parties on June 28, 2022.

18. On July 5, 2022, the Disputes Chamber will receive some comments from the defendant with regard to the official report which it decides to include in its deliberations.

19. On 5 July 2022, the Disputes Chamber will receive some comments from the complainant with regard to the official report which it decides to include in its deliberations.

II. Justification

II.1. Identity of the controller

20. The Disputes Chamber establishes that in the complaint the General Administration of the Special Tax Inspectorate – Ghent Regional Directorate as controller in the sense of Article 4.7 GDPR has been identified. During the questioning of the complainant by the Inspection service, among other things, regarding the identity of the controller, Decision on the merits 134/2022 - 6/11 the complainant would have replied in hypotheses, without expressing a clear position to take. He also mentioned that the objections were only sent to the Ghent Regional Directorate, of which he is not sure is whether this one is the correct or only is the controller. The Inspectorate does not take a position on who the controller in the present case. The Inspection Report states in this regard: "[t]he previous elements indicate that starting an investigation would go against the FPS Finance and/or the BBI or another competent tax authority against [...]".

21. In accordance with Article 4.7 of the GDPR, the controller should be considered: the "natural or legal person, government agency, service or other body which, alone or jointly with others, has the purpose and means of the processing of personal data". The Disputes Chamber is aware of this that it is not always obvious to the complainant is to determine who exactly is as controller acts. It is therefore up to the Disputes Chamber to determine who should be qualified as a controller.

22. It Court from

Justice□

has□

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jurisdiction□

the □

concept□

“controller” several times□

roomy□

explained□

in order to□

a□

to ensure effective and complete protection of data subjects.1□

23. In accordance with Opinion 1/2010 of the Data Protection Working Party, the□

capacity of the data controller(s) concerned□

specifically to□

be assessed.2 The Court of Justice has also stated that when assessing the□

level of responsibility must take into account all relevant□

circumstances of the specific case.3□

24.□

In the present case, the Disputes Chamber first establishes that the defendant has□

of personal data performed□

within the meaning of Article 4.2 GDPR, in particular “a□

operation or set of operations relating to personal data or□

a set of personal data, whether or not carried out by automated means□

processes, such as collecting, recording, organizing, structuring, storing, updating□

or change, request,□

consult, use, provide by means of□

transmit, distribute or otherwise make available, align or□

combining, blocking, deleting or destroying data”. The Disputes Chamber points□

that the defendant de facto determined the aims and means of the□

1 See, inter alia, ECJ, 5 June 2018, C-210/16 - Wirtschaftsakademie Schleswig-Holstein, ECLI:EU:C:2018:388, recitals 27-29.□

2 See Group 29, Opinion 1/2010 on the concepts of “controller” and “processor”, 16 February 2010 (WP 169),□

as clarified by the DPA in a note “Overview of the terms controller/processor in the□

light 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 (GDPR) and some specific□

applications for liberal professions such as lawyers”.□

3 CJEU Judgment of 29 July 2019, Fashion ID, C-40/17, ECLI:EU:C:2019:629, para.70.□

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processing of personal data as it initiated the processing by the□

to collect the complainant's personal data through the conducted company visit, during□

these company visits also determined which personal data had to be collected,□

as well as to include the collected data in the notifications sent□

to the companies concerned.□

25. The defendant is also qualified de jure as the controller of□

the personal data concerned, in particular by Articles 2 and 3 of the law of 3□

August 2012 containing provisions regarding the processing of personal data□

by the Federal Public Service Finance in the context of its missions (hereinafter: the law□

of 3 August 2012).4 These articles read as follows:□

“The Federal Public Service Finance is responsible for the information in this chapter□

intended processing of personal data.”□

"The□

Federal□

Public service□

Finance□

collects□

and□

incorporated□

personal data to carry out its legal tasks. the collected□

data may not be used by the Federal Public Service Finance for other□

purposes other than for the performance of its legally defined assignments□

used".□

26. The Disputes Chamber finds that only the defendant is responsible for the various□

reviews□

and□

choices that□

he makes, with□

accompanying this□

data processing, in the context of tax investigations (the so-called tax□

appreciation).□

The□

defendant□

disputed□

Moreover□

to be□

capacity□

from□

controller for the personal data concerned.□

27. In view of the above, the Disputes Chamber therefore rules that the FPS Finance in the present case should be qualified as a controller in the sense of Article 4.7 GDPR.

II.2. Processing of personal data

28. Article 4.1 GDPR defines the term “personal data” as being “all information about an identified or identifiable natural person (“the data subject”); if identifiable is a natural person who can directly or indirectly be identified, in particular by means of an identifier such as a name, an identification number, location data, an online identifier or of one or more elements characteristic of the physical, physiological, genetic, psychological, economic, cultural or social identity of that natural person”. This definition 4 Law of 3 August 2012 containing provisions regarding the processing of personal data by the Federal Public Service Finance in the context of its missions, BS 24 August 2012. Decision on the merits 134/2022 - 8/11

thus includes four constitutive and cumulative elements: “all information”, “about”, “a identified or identifiable” and “natural person”.

29. The data processed both during the company audit and in the disputed notices, such as, for example, the names and destinations of the travel companion's personal data within the meaning of Article 4.1 of the GDPR.

30. On the basis of the above, it must be concluded that the disputed processing operations are well within the scope of the GDPR and, consequently, the competence of the Data Protection Authority - and in particular the Disputes Chamber.

31. After all, Article 4, §1, first paragraph of the WOG states:

“The Data Protection Authority is responsible for supervising the compliance with the basic principles of the protection of personal data, in

the framework of this law and of the laws containing provisions

regarding the

protection of personal data.”

32. The Disputes Chamber points out in this regard that, in accordance with Article 4, §1 WOG, the

Data Protection Authority is competent for “supervising compliance with the

basic principles of the protection of personal data, in the context of this

law and of the laws containing provisions

on the protection of the

processing of personal data” and that the supervision of the law of 3 August 2012

therefore also falls under its jurisdiction, as it relates in its entirety to

to the processing of personal data by the Federal Public Service Finance.

33. The controller must, when processing personal data,

comply with the principles of Article 5 GDPR and be able to demonstrate this. That follows from the

accountability within the meaning of Article 5, paragraph 2, in conjunction with Article 24, paragraph 1 of the GDPR. On the basis

Articles 24 and 25 GDPR, each controller must provide appropriate technical and

take organizational measures to ensure and to be able to demonstrate that the

processing takes place in accordance with the GDPR.

34. In further elaboration of this basic principle, Article 6(1) of the GDPR states that personal data

may only be processed under one of the

stipulated in that article

legal grounds. The defendant argues that it invokes Article 6(1)(e) GDPR as

legal basis for the disputed processing operations. This article reads as follows:

“Article 6

[...]

e) the processing is necessary for the performance of a task of general

interest or of a task in the exercise of public authority that

assigned to the controller;”□

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35. The Disputes Chamber finds that the defendant has broad investigative powers□

based on article 316 WIB. On the basis of this article, the defendant determines the purpose, the□

resources and the manner of the tax investigation. The decision to conduct a company audit□

and which personal data must be collected during this company visit□

therefore falls within the competence of the defendant. Based on, among other things,□

this information, the defendant classified the companies concerned as□

“affiliated companies”. The notifications to these companies concerned□

are therefore a legal consequence of this qualification. As already explained, the□

the complainant objects to the company visitations and the way in which (too much) personal data□

would have been processed. In addition, the complainant also opposes the classification as□

“affiliated companies” and subsequent notices.□

36. However, the Disputes Chamber follows the position of the Inspectorate. Corresponding□

its dismissal policy, the Disputes Chamber notes that it does not have as a priority to intervene□

are involved in an ongoing administrative procedure.⁵ It can assess the fiscal (ir)relevance of□

personal data processed during the company visits and the “private” or□

“professional” nature of these specific personal data (travel data) is not□

investigations, let alone qualify as a potential breach of the GDPR, nor can it□

decide on the classification of affiliated companies as done by□

the defendant. These decisions fall under the tax assessment on the merits that only□

accrues to the defendant. Although the assessment of whether the processed data is necessary□

are assigned to tax research (and thus for the task of general interest)□

the defendant) falls under the jurisdiction of the Disputes Chamber, it must□

extremely reticent. The Disputes Chamber monitors the application of the□

basic principles of the protection of personal data, in the context of the WOG□

and of the laws containing provisions on the protection of the processing of

personal data (Article 4, §1 WOG) and cannot take the place of the FPS

Finance that in the first instance must make an appreciation itself in the context of its assignments

provide what information is necessary to conduct a proper tax investigation.

The FPS Finance has a wide discretionary power in this regard, which is necessary to:

to perform its duties effectively. The tax procedure and the tax

reviews,

including the possible consequences in terms of the protection of

personal data, can also always be submitted for assessment to the

judge on the merits. The Disputes Chamber reminds that it is not its task to

to replace competent courts in the exercise of their powers

field of tax law.⁶

⁵ See point 3.2.2.B.2 of the Dispute Chamber's Dismissal Policy, published on 18 June 2021, available at

<https://www.dataprotectionauthority.be/publications/sepotbeleid-van-de-geschillenkamer.pdf>

⁶ See, among other things, with regard to labor law: decision on the merits 76/2021 of 9 July 2021.

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III. Publication of the decision

37. Given the importance of transparency in the decision-making of the

Litigation Chamber, this decision is published on the website of the

Data Protection Authority, stating the identification data of

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

unavoidable 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 WOG, 100, §1, 1° WOG, to dismiss the complaint□

On the basis of Article 108, § 1 of the WOG, against this decision, within a period of thirty□

days from the notification of this decision, an appeal may be lodged with the□

Marktenhof (Brussels Court of Appeal), with the Data Protection Authority as defendant.□

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Such an appeal may be lodged by means of an adversarial petition that the□

must contain the statements listed in Article 1034ter of the Judicial Code⁷. It□

adversarial petition must be submitted to the registry of the Marktenhof□

in accordance with article 1034quinquies of the Ger.W.⁸, or via the e-Deposit□

IT system of Justice (Article 32ter of the Ger.W.).□

(get). Hielke HIJMANS□

Chairman of the Disputes Chamber□

7 The petition states on pain of nullity:□

1° the day, month and year;□

2° the surname, first name, place of residence of the applicant and, where applicable, his capacity and his national register or□

3° the surname, first name, place of residence and, where applicable, the capacity of the person to be□

company number;□

summoned;□

4° the subject matter and the brief summary of the grounds of the claim;□

5° the court before which the claim is brought;□

6° the signature of the applicant or of his lawyer.□

8 The application with its annex, in as many copies as there are parties involved, is sent by registered letter□

sent to the clerk of the court or deposited at the registry.□