

Litigation Chamber

Decision on the merits 10/2019 of 25/11/2019

File number: DOS-2018-06068

Subject: Complaint against a candidate in the municipal elections for non-compliance with the principle of finality in the context of the sending of electoral propaganda letters

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

Hijmans, chairman, and Messrs. Y. Pouillet and C. Boeraeve, members, who takes up the case in its present 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 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 LCA);

Having regard to the internal rules of the Data Protection Authority as approved by the

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

Considering the documents in the file;

Made the following decision:

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I.

Feedback from the procedure

Having regard to the complaint filed on October 21, 2018 by X with the Data Protection Authority;

Given the additional information communicated by X to the Data Protection Authority received by the latter on November 21, 2018;

Having regard to the decision of December 10, 2018 of the Frontline Service of the Authority for the Protection of data declaring the complaint admissible and its transmission to the Litigation Chamber at this

same date;□

Having regard to the decision taken by the Litigation Chamber during its session of December 19, 2018 to request□
an investigation by the inspection service pursuant to Articles 63.2° and 94, 1° LCA;□

Having regard to the referral from the Inspector General on the same date;□

Having regard to the report and minutes of the Inspector General's investigation sent to the Chamber on April 4, 2019□
Litigation, whose findings are reproduced in this decision (see point III);□

Having regard to the decision taken by the Litigation Chamber during its meeting of May 15, 2019 to consider that□
the case was ready for substantive processing under Articles 95 § 1, 1° and 98 LCA;□

Having regard to the communication, on May 20, 2019, of the report and minutes of the investigation by the Inspector General□
to the parties and the invitation of the Litigation Chamber to the parties to put forward their arguments according to□
an established schedule;□

Having regard to the email of June 6, 2019 from Maître W, under which he informs the Litigation Chamber of□
his intervention as counsel for the candidate in the municipal elections Y and under the terms of which□
he already specifies that at the end of the exchange of conclusions, his client wishes to be heard in□
application of Article 51 of the Internal Rules of the Data Protection Authority;□

Having regard to the conclusions of X received on June 12, 2019;□

Having regard to the conclusions filed on July 17, 2019 by Maître W, counsel for the candidate for the elections□
communal Y;□

...□

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Having regard to the hearing during the session of November 5, 2019 during which the complainant appeared in□
person and was assisted by Master Z and during which the electoral candidate Y was□
represented by his counsel, Maître W;□

Having regard to the minutes of the hearing of November 5, 2019, the content of which is summarized in point IV of the□
this decision.□

II.□

The facts and the subject of the complaint□

The complainant is a resident of the municipality of ... and a candidate for the October municipal elections□

2018 in this municipality on a list competing with that of the candidate for the municipal elections Y,□

respondent.□

Mr. Y has been the mayor of ... since 2006, re-elected in this function following the elections□

municipalities of October 2018.□

In his complaint, X states that he received an electoral propaganda letter dated October 9, 2018□

from Mr. Y - letter on the header of the municipality of ... office of the Mayor and under□

envelope from the office of the Mayor -, in which the latter, signing in his capacity as mayor,□

wrote to him the following:□

“Dear X,□

Six years ago, the citizens of ... renewed their confidence in me as Mayor.□

As such, I had the opportunity to meet you during a citizen meeting or to receive□

a letter from you in which you were able to explain to me the questions, expectations or□

the problems you were having.□

As you have seen, I have always made myself available (...).□

Next Sunday you are called to vote (...).□

Also, I allow myself to ask for your support in order to allow me to continue□

to invest myself with so much enthusiasm and motivation as Mayor of all□

the ...□

(...)□

Your Mayor□

...□

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(Signature)□

Y”.□

Mr. X denounces the fact that Mr. Y has set up a database and collected his personal data□
personal without informing him, database which additionally includes the data of all other□
citizens of the municipality who requested the intervention of Mr. Y in his capacity as Mayor. At the time of□
the hearing of November 5, 2019, he specifies in this respect that he did not, on a personal basis, request□
the intervention of Mr. Y but well accompanied by a neighbor who had made this approach to him□
du c on his date.□

He also denounces the fact that his data was reused in the context of the electoral campaign.□
of October 2018 to send him the aforementioned letter.□

III.□

The Inspector General's investigation report and minutes□

According to his investigation report and minutes, the Inspector General makes the following observations:□

“In his letter in response [read in response to the request for information sent to him□
the Inspector General], Mr. Y explains that the additional list [i.e. the list of persons having□
solicited as mayor] was formed between 2012 and 2018 as part of his function□
Mayor of the municipality of It contains the contact details of citizens who have requested a□
appointment or have written to him in order to present their grievances with the aim of obtaining information,□
help or advice in a case that concerns them. It is on the basis of the electoral list, crossed with the□
data from the supplementary list, that he sent his electoral mail”.□

The said report of the Inspector General also notes that this additional list includes the□
following data: first name, last name, address, telephone number of the people who contacted□
Mr. Y in his capacity as Mayor as well as the subject of the contact.□

IV.□

The minutes of the hearing of November 5, 2019□

During the hearing on November 5, 2019, counsel for the complainant orally developed the arguments□
filed in writing by the latter during the procedure. The complainant particularly insisted –□
as already mentioned in point II - on the fact that he had not personally requested the intervention of□

Mr. Y but accompanied a neighbor who had taken such a step. His counsel insisted□

the fact that the initial collection of data had not been the subject of information to the complainant.□

As for Mr. Y, his counsel also developed orally the written arguments that he had□

previously filed. He insisted on the fact that if certainly Mr. Y had operated a crossing□

between the list of contacts requesting him in his capacity as Mayor on the one hand and the list of voters□

...□

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on the other hand, he would have, at least in part, also been able to remember a certain number of□

fellow citizens who requested it during his term of office by going through the list of voters and writing to them.□

He also noted that only this list was cross-referenced with that of voters and not any other□

list of another municipal service / department to which the inhabitants would have called.□

v.□

As for the competence of the APD, in particular of the Litigation Chamber□

As to the competence of the Data Protection Authority, in particular the□

Litigation Chamber□

Pursuant to Article 4 § 1 of the LCA, the Data Protection Authority is responsible for the□

control of compliance with the fundamental principles of the protection of personal data,□

under the Law of 3 December 2017 creating the Data Protection Authority□

(LCA) and laws containing provisions relating to the protection of the processing of personal data.□

personal character.□

Pursuant to Article 33 §1 of the LCA, the Litigation Chamber is the litigation body□

administration of the Authority. It is seized of the complaints that the Service de première ligne forwards to it in□

application of Article 62 § 1 LCA, i.e. admissible complaints provided that in accordance with Article□

60 paragraph 2 LCA, these complaints are written in one of the national languages, contain a statement□

of the facts and the indications necessary to identify the processing of personal data□

to which they relate and fall within the jurisdiction of the Data Protection Authority.□

In a judgment of October 23, 2019¹, the Court of Markets confirms in this respect that:□

“De bevoegdheid van de GBA strekt zich enkel uit tot het oordelen over een correct naleving van de□

AVG en de Belgische privacywetgeving zoals duidelijk omschreven in de GBA-wet”.□

[Translation: The competence of the DPA is limited only to pronouncing on the correct compliance with the□

GDPR and Belgian privacy legislation, as clearly specified in the APD law]².□

Consequently, the Data Protection Authority is not competent to rule on□

a possible violation of the internal regulations of the Municipal Council of ... (article 75-17) which does not□

would not constitute a breach of data protection rules or the validity of a□

decision of inadmissibility of a request for citizen interpellation submitted by the complainant, two□

grievances invoked by the complainant under the conclusions he filed which do not relate to the□

compliance with the fundamental principles of the protection of personal data with regard to□

¹ Hof van beroep Brussel, sectie Marktenhof, 19de kamer A, kamer voor marktzaken, arrest dd. October 23, 2019.□

² Free translation carried out by the Secretariat of the Data Protection Authority in the absence of an official translation.□

...□

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processing of personal data identified and as defined in Article 4 1) and 2) of the Regulation□

general on data protection (GDPR).□

VI.□

On the reasons for the decision□

On the breach of the obligation to process the data in a manner compatible with the□

purposes for which they were collected□

In his capacity as data controller, Mr. Y is required to respect the principles of□

data protection and must be able to demonstrate that these are respected (principle of□

liability – section 5.2. GDPR). He must also implement all the measures□

necessary for this purpose (Article 24 of the GDPR).□

The purpose principle is a cornerstone of data protection. Dedicated since 1981 to□

Article 5 b) of the Convention for the protection of individuals with regard to automatic processing of personal data of the Council of Europe (ETS 108), it is set out in Article 6 § 1 b) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons with regard to the processing of personal data and to the free circulation of this data as well as Article 4 § 1, 2° of the Law of 8 December 1992 relating to the protection of privacy with regard to the processing of personal data. When the consecration of the right to data protection as a fundamental right by article 8 of the Charter of Fundamental Rights of the European Union in 2000, the principle of finality was set out as a key element of this right³. This principle has, logically, been included in Article 5.1.b) of the GDPR under the Principles relating to the processing of personal data (Chapter II).

Article 5 § 1 b) of the GDPR thus provides that:

“1. Personal data must be: (...) b) collected for the purposes determined, explicit and legitimate, and not to be further processed in a manner incompatible with these purposes; further processing for archival purposes in the interest public, for scientific or historical research purposes or for statistical purposes is not

3 Article 8 of the Charter of Fundamental Rights of the European Union: 1. Everyone has the right to the protection of personal data concerning him.

2. These data must be processed fairly, for specific purposes and on the basis of the consent of the person concerned or under another legitimate basis provided for by law. Everyone has the right to access data collected concerning it and to obtain its rectification.

3. Compliance with these rules is subject to control by an independent authority.

...

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considered in accordance with Article 89 paragraph 1, as incompatible with the purposes initials” (limitation of purposes).

In other words, this principle requires that data be collected for specific purposes,

explicit and legitimate, and not further processed in a manner inconsistent with these purposes. Further processing of personal data for purposes other than the one(s) for which this data was initially collected is only permitted if this further processing is compatible with the purposes for which the personal data were initially collected, taking into account the link between the purposes for which they were collected and the purposes of the subsequent processing envisaged, the framework in which the personal data have been collected, of the possible consequences of the further processing envisaged for the data subject and the existence of appropriate safeguards. A compatible purpose is by example a purpose which the data subject can foresee or which can be considered as compatible under a legal provision (see article 6.4. of the GDPR).

In its "Elections" note published in the early 2000s on its website and updated following the entry into force of the GDPR⁴, the Data Protection Authority mentions that:

"With this in mind, it is therefore not permitted to reuse personal data recorded in the aforementioned files [either both public and professional files by example] for the purpose of electoral propaganda. Such processing is incompatible with the purposes for which these data were initially collected, which is punishable in pursuant to Article 83.5 of the GDPR".

The note goes on to state that:

"For example, the personal data of citizens which have been obtained in the framework of the exercise of an aldermen's mandate cannot be reused for the organization of an election campaign. This is then an abusive use of information obtained from lawfully in the exercise of an aldermen's mandate. Such use of personal data is not only prohibited due to the principle of limitation purposes but breaks the equality between the political parties and the equality between the candidates. The legislation aims to treat all candidates on an equal footing by giving them access to same data, namely those appearing on the voters' lists".

4 Processing of personal data for the purpose of personalized mailings of electoral propaganda and respect for life

privacy of citizens: fundamental principles,

https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/Note_elections_RGPD.pdf

...

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Any further incompatible use is prohibited except for two exceptions provided for in Article 6.4. from

GDPR. Where the data subject has given consent to further processing for a

distinct purpose or where the processing is based on a legal provision which constitutes a measure

necessary and proportionate in a democratic society, in particular for the guarantee of purposes

important in the public interest, the controller still has the possibility of processing

subsequently such personal data for other purposes, whether compatible

or not with the initial purposes.

The Litigation Chamber specifies in this respect that the consent of the person concerned must

relate to further processing for a distinct purpose and not constitute, where applicable, the basis

legitimacy of the first treatment. In other words, it matters little in this regard whether the processing of

initial data is itself based on consent. Either way, care must be taken that the

data subject is informed of such other purposes and of his or her rights.⁵

Both in his answers provided by letter of March 25, 2019 to the questions asked by the Inspector

General that in the conclusions he filed before the Litigation Chamber, Mr. Y does not

does not dispute having crossed the personal data of a significant number of people having it

solicited from 2012 to 2018 (list of 476 people in total) with those of the list of voters for

send the former a letter inviting them to remember the service rendered and to vote for it at the

local elections in October. The Inspector General's report of April 4, 2019 also makes

state. During the hearing of November 5, 2019, Mr. Y insists on the fact that the said letter does not

status of the service rendered and is only addressed to the persons who have requested it and not to all those who

of his mandate as mayor, would have called on one or the other municipal service.

As the Litigation Chamber decided in its decision 04/2019 of May 28, 2019⁶, this use of the data for subsequent processing of personal data is incompatible with the primary purpose of the processing and is not permitted by GDPR. The argument that the data subjects on this list would have given their consent is dismissed by the Litigation Chamber. Indeed, unlike what the defendant alleges, consent – which should otherwise satisfy all the conditions of Article 7 of the GDPR – which would be the basis of the initial processing is not such as to qualify said processing subsequently admissible under Articles 5 § 1b) and 6.4. of the GDPR.

5 Processing of personal data for the purpose of personalized mailings of electoral propaganda and respect for life privacy of citizens: fundamental principles:

https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/Note_elections_RGPD.pdf

6 This decision is published: https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/BETG04-2019ANO_FR.pdf

...

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In conclusion, it follows from the above that by using a file constituted from the data of people who requested him as Mayor under the previous mandate in their sending a letter – on the header of the Municipality of ..., office of the Mayor and signed as mayor - in the context of the municipal elections of October 2018 intended to invite them to vote for him, Mr. Y has processed said personal data in an incompatible way with the initial purpose of collecting such data - even if it was lawful - and this, in disregard of Articles 5 § 1 b) and 6.4. of the GDPR.

The Litigation Chamber generally recalls that any processing of personal data personal – including the initial collection but also the storage of the data collected in particular – must be based on one of the bases of lawfulness provided for in Article 6 of the GDPR. Rights, information, in particular, of the data subject as provided for in Chapter III of the GDPR must also be respected.

In addition, the data cannot, pursuant to Article 5 § 1 e) of the GDPR, be stored under
a form allowing the identification of the persons concerned for a period not exceeding
that necessary with regard to the purposes for which they are processed.

VII.

On corrective measures and sanctions

Under the terms of 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° to 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 thereof

data recipients;

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 an organization

international;

15° forward the file to the public prosecutor's office in Brussels, who informs it of the follow-up

data on file;

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16° decide on a case-by-case basis to publish its decisions on the website of the Authority for the protection of data.

As for the administrative fine that may be imposed pursuant to Articles 83 of the GDPR and the articles 100, 13° and 101 LCA, article 83 of the GDPR provides:

“Article 83 GDPR

Each supervisory authority shall ensure that the administrative fines imposed in

1.

under this article for breaches of this Regulation, referred to in paragraphs 4,

5 and 6 are, in each case, effective, proportionate and dissuasive.

2.

Depending on the specific characteristics of each case, the administrative fines are imposed in addition to or instead of the measures referred to in point (2) of Article 58

a) to h), and j). To decide whether to impose an administrative fine and to decide

of the amount of the administrative fine, due account shall be taken, in each case,

of the following elements:

(a) the nature, gravity and duration of the breach, taking into account the nature, scope or the purpose of the processing concerned, as well as the number of data subjects affected and the level of damage they suffered;

b) whether the breach was committed willfully or negligently;

c) any action taken by the controller or processor to mitigate the damage suffered by the persons concerned;

d) the degree of responsibility of the controller or processor, taking into account the technical and organizational measures they have implemented pursuant to Articles 25 and 32;

e) any relevant breach previously committed by the controller or the subcontracting;

f) the degree of cooperation established with the supervisory authority with a view to remedying the breach□
and to mitigate any negative effects;□
(g) the categories of personal data affected by the breach;□
h) how the supervisory authority became aware of the breach, including whether, and□
the extent to which the controller or processor notified the breach;□
(i) where measures referred to in Article 58(2) have previously been ordered□
against the controller or processor concerned for the same purpose,□
compliance with these measures;□
(j) the application of codes of conduct approved under Article 40 or mechanisms□
certificates approved under section 42; and□
...□

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k) any other aggravating or mitigating circumstance applicable to the circumstances of□
the species, such as the financial advantages obtained or the losses avoided, directly or□
indirectly, as a result of the violation.□

As for the nature of the violation (article 83.2.a) of the GDPR), the Litigation Chamber recalled that the□
compliance with the purpose principle is an essential and founding principle of data protection. This□
principle, enshrined in Article 5 of the GDPR (Chapter II – Principles; Article 5 - principles relating to the□
processing of personal data) applies not only from the entry□
in application of the GDPR on May 24, 2018 but since the entry into force in 1993 of the Law of□
8 December 1992 relating to the processing of personal data which preceded it. The no-□
compliance with this fundamental principle is, according to the Litigation Chamber, constituting a breach□
serious.□

The argument that Mr. Y did not master all the contours of this regulation□
described as “new”, therefore does not stand up to analysis. This lack of control takes nothing away from the□
the fact that at the material time, compliance with the purpose principle had been in force for more than□

25 years already.□

As for the intention on the part of Mr. Y, this is proven. He did not act negligently but□
deliberately used the list of people who had approached him during his previous term as□
mayor to contact them in the context of the municipal elections of October 2018□
at ...□

As for the purpose of the processing (art. 83.2.a) of the GDPR), the Litigation Chamber notes that it□
is to encourage mail recipients to vote for a particular candidate. If this is good□
given the purpose of any election campaign, respect for the laws in the context of it is□
particularly important, especially since in his capacity as outgoing mayor, he benefits from□
facto notoriety among voters. In this regard, the European Committee for the Protection of□
(EDPS) recently recalled the importance of data protection rules in the□
electoral context in these terms: "compliance with data protection rules, including□
in the context of electoral activities and campaigns, is essential to the protection of democracy.□
It is also a means of preserving the confidence of citizens and the integrity of elections"7.□

7 See. European Data Protection Board (EDPB), Statement 2/2019 on the use of personal data in the course of political□
campaigns (13 March 2019): "Compliance with data protection rules, including in the context of electoral activities and political□
campaigns, is essential to protect democracy. It is also a means to preserve the trust and confidence of citizens and the integrity□
of elections".□

...□

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The quality of mayor of Mr. Y since 2006 would have, as the Chamber underlined□
Litigation in its decision 04/2019 of May 28, 2019 already cited8, moreover had to be accompanied□
exemplary behavior with regard to compliance with the law, including that of the□
data protection, especially in the electoral context. This capacity of agent□
public already at the time of the facts is retained by the Litigation Chamber in the assessment of the□
seriousness of the breach. Mr. Y having also been re-elected since October 2018 in his function□

mayor, the Litigation Chamber also takes this element into account in the assessment□

the effectiveness of any sanction pursuant to Article 83 of the GDPR.□

The Litigation Chamber also notes that with regard to the data processed (Article 83.2.□

a) of the GDPR), Mr Y used only the identification data of the citizens having□

previously contacted (surname, first name, address), the latter pointing out that the data processed in□

part of the mailing referred to in the complaint are also available to him via the Register of Electors□

to which it may legitimately have recourse for purposes of electoral propaganda – and of which, for a□

part at least, he could have remembered by going through said list of voters. Bedroom□

Litigation believes that if the categories of personal data processed (surname, first name and□

postal address) are not of such a nature as to irreparably harm the privacy and protection□

of the data of the recipients of said letters, on the other hand, in the electoral context and in view□

to the purpose of the processing already mentioned, the number of data subjects (476) - a fortiori had□

given the number of potential voters in a municipality like that of ...- is not negligible. He□

it is also established that there was indeed cross-checking of the lists.□

The Litigation Chamber specifies that the other criteria listed in Article 83.2. of the GDPR are, in□

this case, not likely to lead to an administrative fine of an amount other than that□

which it fixes under the terms of this decision.□

In conclusion, in view of the elements developed above specific to this case, the Chamber□

Litigation considers that the facts found and the breach of Articles 5 § 1 b) and 6.4. GDPR,□

justify that as an effective, proportionate and dissuasive sanction as provided for in Article 83□

8 Decision of the Disputes Chamber 04/2019 of 28 May 2019 states in this regard the following: “This [read respect for□

rules set by the GDPR] applies to any data controller and a fortiori to the holder of a public office such as a□

mayor. The citizen must have the certainty that the data which he entrusts to the holder of a public mandate in the exercise of□

its functions will not be used for other purposes, in violation of the law. What is more, this is a use for□

personal purposes of the holder of this mandate. We must be able to expect a mayor to be aware of the obligations□

arising from the GDPR or that he properly informs himself about it. The fact that the media are very attentive to the application o

GDPR also matters. The Litigation Chamber considers that a mayor must lead by example when it comes to
to obey the law".

...

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of the GDPR and taking into account the assessment factors listed in Article 83.2. of the GDPR, a reprimand
(article 100 § 1, 5° LCA), accompanied by an administrative fine of 5000 euros (article
100 § 1, 13 and 101 LCA) be pronounced against Mr Y.

For all the aforementioned reasons, and in order to remind all public officials, the right
applicable to the protection of personal data and the prohibition on the use of data files

citizens for purposes other and incompatible with the purposes for which they were

initially collected, the Litigation Chamber considers it essential to make its decision public

on the basis of article 100 § 1, 16° LCA by omitting all the data which allow the identification

directly from the parties. In doing so, the Data Protection Authority acts in accordance with the wish of the

legislator provided for in Article 7, 2° of the Law of 5 May 2019 amending the Code of Criminal Investigation and
the Judicial Code with regard to the publication of judgments and judgments, thus anticipating the entry
of this provision (M.B., May 16, 2019).

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FOR THESE REASONS,

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

Issue a reprimand to Mr. Y on the basis of Article 100 § 1, 5°

ACL;

Impose against Mr. Y an administrative fine in the amount of 5000

euros pursuant to Articles 100 § 1, 13° and 101 LCA;

- Make its decision public on the basis of Article 100 § 1, 16° LCA by publishing it on its

-

website <https://www.autoriteprotectiondonnees.be/> omitting however any element

allowing the direct identification of the parties.□

Under Article 108, § 1 LCA, this decision may be appealed to the Court of□

markets within 30 days of its notification, with the Authority for the protection of□

given as a defendant.□

Hielke Hijmans□

President of the Litigation Chamber□