

Litigation Chamber

Decision on the merits 80/2021 of 19 July 2021

File number: DOS-2020-00559

Subject: Direct marketing – decision on the merits following the non-execution of a

“light” decision on the basis of article 95.1.5° LCA – reprimand and orders to follow up on

requests to exercise the complainant's rights (objection, erasure and notification to third parties)

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

Chairman, and Messrs. Romain Robert and Dirk Van Der Kelen, members, taking over the business in this

composing;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 relating to the protection

of natural persons with regard to the processing of personal data and to the free movement

of this data, and repealing Directive 95/46/EC (General Data Protection Regulation),

hereinafter “GDPR”;

Having regard to the Law of 3 December 2017 establishing the Data Protection Authority (hereinafter the APD law);

Having regard to the internal regulations as approved by the House 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 regarding:

The complainant :

X (hereinafter "the complainant");

The defendant:

Y (hereinafter "the defendant")

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I. Facts and procedural background□

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1. According to his complaint of January 31, the complainant indicates that on several occasions he reported to the□
defendant that he did not wish to receive emails from him, emails addressed to him□

to his e-mail address [...]. These emails relay promotions offered by□

the□

defendant, active in the second-hand vehicle market in particular.□

2.□

It appears from the documents sent by the complainant that on December 11, 2019, a promotional email□

unsolicited was sent to him on his address [...].□

3. On December 12, 2019, the next day, the complainant sent the message STOP to the email address□

[...], thereby following the procedure mentioned by the defendant for unsubscribing from the□

“newsletter” received. This immediate reaction of the complainant had been preceded on July 4, 2019 and□

November 5, 2019 similar “STOP” messages.□

4.□

It also appears from the documents filed by the complainant that on January 31, 2020, the latter□

again objected to the sending of an unsolicited email from the defendant by sending the□

STOP message by return e-mail to the sender.□

5. On February 28, 2020, the Complainant filed a complaint with the DPA.□

6. On March 10, 2020, the complaint was declared admissible on the basis of Articles 58 and 60 LCA by the□

First Line Service (SPL) of the APD. The complainant was informed of this pursuant to Article□

61 LCA and the complaint was transmitted on the same date to the Litigation Chamber pursuant to□

Article 62.1 LCA.□

7. On April 14, 2020, the Litigation Chamber, pursuant to Articles 58.2.c) of the GDPR and 95.1, 5° LCA, adopted Decision 12/2020 against the Respondent (Annex 1) and decided to order the defendant, prior to any decision on the merits, to comply, within one month at the complainant's request to exercise the rights of opposition and erasure (Art. 21.2 and 17.1 c) of the GDPR) and therefore to cease all processing of the complainant's personal data for prospecting purposes (article 21.3 of the GDPR) as well as to delete data concerning him (article 17.1 c) of the GDPR). A compliance order has, by the same decision, was also sent to the defendant pursuant to Article 19 of the GDPR, either of notify the deletion made to any potential recipient of the personal data of the complainant. The follow-up given to this decision should be notified, supporting documents to be support, to the Litigation Division within one month of notification of the decision.

8. Given the lack of execution of this decision 12/2020 within the time limit of one month, the Litigation Chamber has, as announced under the terms of the operative part of the said decision, decided to deal with the substance of the case on the basis of Article 98 LCA.

9. On May 25, 2020, the Litigation Chamber informed the parties and invited them to submit their arguments according to a timetable for the exchange of conclusions. The Litigation Chamber finds that neither party has entered into.

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II. Place

II.1. From the "light" procedure (article 95.1. LCA) to the substantive procedure (article 98 et seq. LCA)

10. As set out in its "Dismissal policy" note¹, the Chamber Litigation recalls that if the facts illustrated in the complaint are sufficiently clear to establish a violation of the GDPR, the Litigation Chamber can take a decision without soliciting the arguments of the defendant party against whom the complaint is brought, and this within the framework a so-called "light" decision as provided for in Article 95 LCA. In this case, the LCA has indeed not provided for the obligation to seek the point of view of the data controller/subcontractor with a view to

allow the DPA to offer a faster response to the needs of the citizen at the end of a procedure□

simplified.□

11. The Litigation Division then takes a so-called “light” decision (for example a warning or□
an order to respond to the complainant's request to exercise his rights) on the basis of the facts as they□
are reported to him, without obtaining the point of view of the party in question beforehand.□

12. Decision 12/2020 adopted on April 14, 2020 by the Litigation Chamber was a decision of this□
type (see point 7 above).□

13. Rendering a decision without having heard the arguments of the party in question (the party□
defendant) nevertheless carries the risk of not taking account of factual circumstances or□
significant legal issues (e.g. force majeure, technical reality) that could have led to the□
Litigation Chamber to qualify its decision. In accordance with the principle of good administration,□
it is important to hear the arguments of any party before making a decision in their regard□
which affects him. The decisions of an administrative authority such as the Litigation Chamber are□
must be founded both in law and in fact, as well as be impartial, i.e. in particular without□
prejudice and without either party being favored because one of them□
would not have been heard. Therefore, the Litigation Chamber renders its “light” decisions “prima□
facie” i.e. on the basis of an “appearance of right”, without prejudice to the substance (see in this respect the□
terms of the operative part of Decision 12/2020).□

1 <https://autoriteprotectiondonnees.be/publications/politique-de-classement-sans-suite-de-la-chambre-contentieuse.pdf>□

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14. If the defendant decides to comply with the decision rendered, the dispute is thus closed and a□
solution acceptable to both parties was obtained in a simplified and faster way on foot□
of the procedure provided for in Article 95 LCA.□

15. If the data controller/subcontractor fails to comply with said decision (or in□
case of dispute), a procedure on the merits is launched.□

16. In the present case, as mentioned in points 8 and 9 above, the defendant did not give□

following the light decision 12/2020 and none of the parties concluded following the invitation that was given to them
made in this direction.

II.2. As for the background

17. In view of the foregoing, the Litigation Division considers that in this case, on the basis of the
information available to it, in particular the documents filed by the complainant, it is based
to address a reprimand to the defendant on the basis of article 100.1., 5° LCA, accompanied by a
order to follow up on the plaintiff's request to exercise his rights (article 100.1. 6° LCA)
for the reasons and in the manner set out below.

18. The GDPR does not define what is meant by “processing for marketing purposes” or for
purposes of "direct marketing" according to the English terminology. In its Recommendation 01/2020 of
January 17, 2020 relating to the processing of personal data for marketing purposes
direct, the APD indicates that “direct marketing” should be understood as “any communication,
solicited or unsolicited, aimed at promoting an organization or a person, services,
of products, whether paid or free, as well as brands or ideas, addressed by
an organization or person acting in a commercial or non-commercial context,
directly to one or more natural persons in a private or professional context, by
any means, involving the processing of personal data” (page 8 of the
Recommendation – definition).

19. The processing of an e-mail address² such as that of the complainant (data subject within the meaning of Article
4.1. (second part) of the GDPR) is, under this definition, personal data
(article 4.1. of the GDPR) processed for prospecting purposes (direct marketing) within the meaning of article 21. 2 of the
GDPR. In this case, the data subject is entitled to exercise his right of opposition by
application of article 21.2 of the GDPR.

20. Consequently, the data controller is required to provide the complainant with information on
the measures taken following the exercise of his right of opposition within a period of one month from
of receipt of his request as provided for in Article 12.3. of the GDPR. Pursuant to Article 21.3.

2 See. in this regard Decision 64/2020 of the Litigation Chamber (point 23): <https://autoriteprotectiondonnees.be/publications/decision-n-64-2020.pdf>

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of the GDPR, when the data subject opposes the processing for prospecting purposes, the personal data are no longer processed for these purposes.

21. As a result of the exercise of the right of opposition based on Article 21.2 of the GDPR by the person concerned, the data controller is also under the obligation, pursuant to Article 17.1 c) of the GDPR, to erase the personal data of the data subject as soon as possible, ideally within one month³. Only if he treats these same data for another purpose and in support of a specific basis of lawfulness that the data controller processing is authorized to keep this data.

22. Pursuant to Article 19 of the GDPR, the controller is also required to notify any erasure of personal data carried out (in accordance with Article 17.1 c) of the GDPR – see. above) to each recipient to whom the personal data would have been communicated.

23. In the present case, the complaint and the documents submitted in support thereof reveal that the defendant sends promotional emails to the complainant's email address and that the processing of this address continued for the same prospecting purposes despite the opposition of the latter. In Indeed, the complainant exercised his right of opposition on several occasions, from July 2019, following the procedure put in place by the defendant. The complainant indicated that he continued to receive emails of the same type to which he, following a new sending on December 11, 2019, opposed again on December 12, 2019 and once again on January 31, 2020 as evidenced by the documents that he communicated to the Litigation Chamber.

24. Accordingly, the Litigation Chamber concludes that there were breaches of Article 21.2 of the GDPR as well as than in Article 17.1 c) of the GDPR - since the complainant has not asserted any other basis of lawfulness for in support of which the processing of the complainant's data could have continued for a purpose

distinct from that of direct marketing -, combined with Article 12.3. of the GDPR. In support of these breaches, it sends the defendant, as already mentioned in point 17 above, a reprimand accompanied by a compliance order as described in the operative part below.

III. Publication of the decision

25. 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 Authority's website of data protection by deleting the direct identification data of the parties and persons cited, whether natural or legal.

See.

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<https://dataprotectionauthority.be/publications/advisory-62-2021.pdf>

Decision

62/2021

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FOR THESE REASONS,□

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

- To address a reprimand to the defendant on the basis of article 100.1., 5° LCA together, in□
application of articles 58.2.c) of the GDPR and 100.1 6° LCA, of the compliance orders below□

after ;□

- Orders the defendant to comply, within one month from the notification of the□
this decision, at the request of the complainant to exercise the right of opposition (art. 21.2□

of the GDPR) and therefore to cease all processing of the personal data of the□

complainant for prospecting purposes (article 21.3 of the GDPR);□

- Orders the defendant to proceed within one month of notification of this□

decision, to the erasure of the complainant's personal data (Article 17.1 c) of the□

GDPR), except to be able to rely on a separate basis of lawfulness authorizing the processing□

complainant's data for another purpose;□

- Orders the defendant to comply, within one month from the date of the□

notification of this decision, to its notification obligation as provided for in□

Article 19 of the GDPR, or to notify the deletion made to any potential recipient□

personal data of the complainant;□

- To order the defendant to inform, with supporting documents, the Authority of□

data protection (Litigation Chamber) of the follow-up to this decision□

and this at the latest in the month of its notification. This communication can be done by e-mail□

Addressed to□

the next address□

(contact address of□

the Litigation Chamber):□

litigationchamber@apd-gba.be.□

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

Court of Markets within thirty days of its notification, with the Authority of

data protection as defendant.

(Sr.) Hielke Hijmans

President of the Litigation Chamber

Annex: Decision 12/2020 of the Litigation Chamber

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Litigation Chamber

Decision 12/2020 of April 14, 2020

File number: DOS-2020-00559

Subject: Complaint against a company for unsolicited and unsolicited promotional emails

respect of the right of opposition

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

Hijmans, President, serving as sole member;

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 the law

ACL);

Having regard to the Rules of Procedure as approved by the House of Representatives on

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

Considering the documents in the file;

Made the following decision regarding:

the complainant: X (hereinafter the complainant)

the data controller: Y (hereinafter the defendant)

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1. Facts and procedural history□

According to his complaint, the plaintiff indicates that on several occasions he informed the defendant□

that he did not wish to receive e-mails from him, e-mails addressed to him at his address□

electronic [...]. These e-mails relayed promotions offered by the defendant within the framework□

of its business activities.□

It appears from the documents in the file that on December 11, 2019, an unsolicited promotional email was□

sent to the complainant on his address [...].□

On December 12, 2019, the complainant sent the message STOP to the email address [...], following in this□

the procedure mentioned by the defendant to unsubscribe from the "newsletter" received. This□

The complainant's immediate reaction had been preceded on July 4, 2019 and November 5, 2019 by messages□

"STOP" similar.□

It also appears from the documents in the file that on January 31, 2020, the complainant again objected□

to the sending of an unsolicited email from the defendant by sending the message STOP by□

return email to sender.□

On February 28, 2020, the complainant filed a complaint with the Data Protection Authority (APD).□

On March 10, 2020, the complaint was declared admissible on the basis of articles 58 and 60 of the LCA law by□

the Front Line Service (SPL) of the APD. The complainant was informed of this pursuant to Article□

61 of the LCA law and the complaint was transmitted on the same date to the Litigation Chamber pursuant to□

of Article 62.1 LCA.□

Pursuant to Article 95.2 LCA, the Litigation Chamber hereby informs the parties□

that following this complaint, a case is pending.□

Pursuant to Article 95.2, 3° LCA, a copy of the file may be requested by the parties. In□

response, the documents in the file will be sent to them electronically via the address□

litigationchamber@apd-gba.be 1.□

1 Given the current exceptional circumstances and the organizational measures taken to combat the spread of the COVID-19 virus, the file cannot be collected on site. For the same reasons, a consultation of the file nor is it possible to take a copy of it on site (article 95. 2, 3° LCA). All communication in this file will also be done electronically for the same reasons.

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2. Legal bases

Article 21.2 and 21.3 of the General Data Protection Regulation (GDPR) – Law of opposition

2.

When personal data is processed for prospecting purposes, the person data subject has the right to object at any time to the processing of personal data concerning for such prospecting purposes, including profiling insofar as it relates to a such prospecting.

3.

When the person objects to processing for prospecting purposes, the personal data personal are no longer processed for these purposes.

Article 17 of the General Data Protection Regulation (GDPR) – Right to erasure (“right to be forgotten”)

The data subject has the right to obtain from the data controller the erasure, within the as soon as possible, of personal data concerning him and the data controller has the obligation to erase this personal data as soon as possible, when one of the reasons following applies:

(...)

c) the person objects to the processing pursuant to Article 21(1) and there are no grounds overriding legitimate grounds for the processing, or the data subject objects to the processing under Article 21(2).

□ Article 19 of the General Data Protection Regulation (GDPR) – Obligation to □

notification regarding the rectification or erasure of personal data □

personal or restriction of processing □

The controller notifies each recipient to whom the personal data □

have been communicated any rectification or erasure of personal data or □

any restriction of the processing carried out in accordance with Article 16, Article 17, paragraph 1, and □

Article 18, unless such communication proves impossible or requires efforts □

disproportionate. The controller provides the data subject with information about □

these recipients if the latter so requests. □

□ Article 12.3 of the General Data Protection Regulation (GDPR) – Transparency □

information and communications and procedures for exercising the rights of the □

concerned person □

The controller provides the data subject with information on the measures taken □

following a request made pursuant to Articles 15 to 22, as soon as possible and in □

any event within one month of receipt of the request. If necessary this □

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deadline may be extended by two months, taking into account the complexity and the number of requests. the □

controller informs the data subject of this extension and the reasons for the □

postponement within one month of receipt of the request. When the person □

concerned submits its request in electronic form, the information is provided by □

electronically where possible, unless the data subject requests that it be □

other. □

3. Motivation □

The GDPR does not define what is meant by “processing for marketing purposes” or for □

purposes of "direct marketing" according to the English terminology. In its Recommendation 01/2020 of 17 □

January 2020 relating to the processing of personal data for direct marketing purposes, □

the APD indicates that “direct marketing” should be understood as “any communication, solicited or unsolicited, aimed at promoting an organization or a person, services, products, whether paid for or free, as well as brands or ideas, addressed by a organization or person acting in a commercial or non-commercial context, directly to one or more natural persons in a private or professional context, by any means, involving the processing of personal data” (page 8 of the Recommendation – definition).

The processing of the complainant's e-mail address by the defendant is, under this definition, personal data (article 4.1. of the GDPR) processed for prospecting purposes (direct marketing) within the meaning of Article 21.2 of the GDPR. The latter was therefore entitled to exercise his right of objection pursuant to Article 21.2 of the GDPR.

It appears from the documents in the file that the defendant did not provide the complainant with information on the measures taken following the exercise of his right of opposition within a period of one month from receipt of his request as provided for in Article 12.3. of the GDPR.

It also appears from the documents in the file that the processing of the complainant's e-mail address continued beyond the expiration of this month, still for the same prospecting purposes. Indeed, the complainant exercised his right on several occasions, starting in July 2019, following the procedure place by the defendant. He indicates that he continues to receive the same type of emails despite everything which he opposed again on December 12, 2019 and once again on January 31, 2020 as the documents in the file attest to this.

Therefore, the defendant did not comply with Article 21.3, combined with Article 12.3. of the GDPR.

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As a result of the exercise of its right to object based on Article 21.2 of the GDPR, the defendant was also under an obligation, pursuant to Article 17.1 c) of the GDPR, to erase the data to personal nature of the complainant as soon as possible and at the latest within the period of one month referred to in Section 12.3. of the GDPR. It appears from the documents in the file that this erasure did not take place.

Pursuant to Article 19 of the GDPR, the controller is also required to notify the

each recipient to whom the personal data would have been communicated while

erasure of personal data carried out in accordance with Article 17.1 c) of the GDPR.

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 DPA website

by deleting the direct identification data of the parties and the persons cited,

whether physical or moral.

FOR THESE REASONS,

THE LITIGATION CHAMBER

Decides, after deliberation:

- To order the defendant, prior to any decision on the merits, to comply,

within one month² from the date of notification of this decision³, at the request

exercise of the complainant's rights of opposition and erasure (Art. 21.2 and 17.1 c) of the

GDPR) and therefore to cease all processing of the complainant's personal data

for prospecting purposes (article 21.3 of the GDPR) as well as to erase the

personal data concerning him (article 17.1 c) of the GDPR) and this, in application of article

58.2.c) of the GDPR and article 95.1, 5° LCA;

- To order the defendant, prior to any decision on the merits, to comply,

within one month⁴ from the date of notification of this decision⁵, to its

notification obligation as provided for in Article 19 of the GDPR, either to notify

the deletion made to any potential recipient of the personal data of the

complainant;

² This compliance period is longer than that which the Litigation Division has granted in the past in cases

comparable to take into account the current exceptional circumstances (Ministerial Order of March 23, 2020 on

emergency measures to limit the spread of the coronavirus COVID-19, M.B., 23 March 2020).

³ The sending of this decision by the registry of the Litigation Chamber constitutes notification.

4 Same as footnote 2.□

5 Same as footnote 3.□

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- To order the defendant to inform the DPA (Litigation Chamber) of the follow-up□

reserved for this decision and this at the latest in the month of its notification⁶. This□

communication can be made by e-mail sent to the following address (contact address of the□

Litigation Chamber): litigationchamber@apd-gba.be.□

- To deal with the case on the merits in the event that the defendant abstains□

to execute this decision within the time limit, pursuant to Articles 98 and□

following⁷ of the ACL.□

This decision may be appealed to the Court of Markets within 30 days of□

from its notification (art. 108.11 of the law of December 3, 2017 creating the Authority of□

data protection) with the Data Protection Authority as defendant.□

(Sr.) Hielke Hijmans□

President of the Litigation Chamber□

⁶ This period for notifying the Litigation Chamber of its compliance by the defendant is longer than that□

the Litigation Chamber has granted in the past in comparable cases to take into account the circumstances□

current exceptional conditions (Ministerial Order of March 23, 2020 on emergency measures to limit the spread of□

coronavirus COVID-19, M.B., 23 March 2020).□

⁷ Pursuant to Article 100 of the LCA, the Litigation Chamber is notably authorized to impose a fine□

administration.□