

Litigation Chamber

Decision on the merits 188/2022 of 21 December 2022

File number: DOS-2022-00944

Subject: Publication of license plate number without consent

The Litigation Chamber of

the Data Protection Authority, composed of

Mr Hielke Hijmans, Chairman, and Messrs Dirk Van Der Kelen and Jelle Stassijns,

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

to the free movement of such data, and repealing Directive 95/46/EC (General Regulation on the

data protection), hereinafter "GDPR";

Considering the law of December 3, 2017 establishing the Data Protection Authority, hereinafter

"LCA";

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 :

Mr. X, represented by Mr. Hans Leyssen, whose office is located at 2000

Antwerp, Frankrijklei 104, hereinafter "the complainant"

The defendant: Y, represented by Me Bob Laes, Me Joris Raport and Me Elisabeth Van Nerum,

whose office is located at 3000 Leuven, Sint-Maartenstraat 61 box 2, below

"the defendant"

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## I. Facts and procedure

1.

On February 22, 2022, the complainant filed a complaint with the Authority for the Protection of given against the defendant.

The complainant owns a car with a license plate personalized by the through his company, of which he is the sole manager. In an audiovisual production by the defendant, a similar car with the same personalized license plate is presented as being the car of a criminal organization of drug trafficking.

According to the complainant, the license plate is clearly legible, recognizable and appears several minutes into the sequence. The plaintiff is questioned very regularly on this subject, both through professional and private relations. However, the complainant states being a carpenter and not wanting to be associated with the criminal world. He also did not allow the defendant to use his license plate. The complainant asked there defendant to remove the license plate from the montage, but the latter refused by invoking his right to artistic expression.

2.

On March 10, 2022, the complaint was declared admissible by the Front Line Service on the basis of Articles 58 and 60 of the LCA and the complaint is forwarded to the Litigation Chamber under article 62, § 1 of the LCA.

3.

On March 22, 2022, in accordance with Article 96, § 1 of the LCA, the Chamber's request Litigation to proceed with an investigation is forwarded to the Inspection Service, as well as the complaint and the inventory of parts.

4.

On April 26, 2022, the investigation by the Inspection Service is closed, the report is attached to the

file and it is transmitted by the Inspector General to the President of the Chamber

Litigation (article 91, § 1 and § 2 of the LCA).

The report contains findings relating to the subject of the complaint and concludes:

1. that there is a violation of Article 5, Article 24, paragraph 1 and Article 25, paragraphs 1 and 2 of the GDPR; And
2. that there is a violation of Article 12, paragraph 1 and paragraph 4, of Article 17, of Article 24(1) and Art. 25(1) GDPR.

The report also contains findings that go beyond the scope of the complaint.

The Inspection Service also observes, in general terms:

3. a violation of Article 38(1) and Article 39 GDPR.
- 5.

On April 29, 2022, the Litigation Chamber decides, pursuant to Article 95, § 1, 1° and article 98 of the LCA, that the case can be dealt with on the merits.

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- 6.

On April 29, 2022, the parties concerned are informed by registered mail of the provisions as set out in article 95, § 2 as well as in article 98 of the LCA. The parties concerned are also informed, pursuant to Article 99 of the LCA, of the deadlines for report their findings.

For findings relating to the subject of the complaint, the deadline for receipt of conclusions in response of the defendant was set for June 10, 2022, that for the conclusions in reply of the complainant on July 1, 2022 and finally that for the conclusions in respondent's reply dated July 22, 2022.

For findings going beyond the subject of the complaint, the deadline for receipt submissions in response from the defendant was set for June 10, 2022.

- 7.

On June 10, 2022, the Litigation Chamber receives the submissions in response from the defendant regarding the findings relating to the subject-matter of the complaint. These findings also include the defendant's reaction to the findings carried out by the Inspection Service outside the framework of the complaint. As it concerns the first violation, the defendant argues that in this case the license plate fictitious does not constitute personal data since it refers to a club of very well-known Turkish football, so that it can at most be a question of a resemblance accidentally with the complainant's license plate, without this constituting treatment of one of his personal data. If it were nevertheless a question of a treatment of the complainant's personal data, the defendant considers that it had not to accede to the complainant's data erasure request, since the license plate registration plate used on the car in the fictional series was created from the own artistic choices of the defendant, in accordance with Article 17, paragraph 3, a) of the GDPR. As to the second finding, the defendant argues that the complainant did not actually did not receive a privacy policy since the defendant did not know that the plaintiff had a car with the same license plate, and therefore did not know not that it would process the complainant's personal data. Finally, the defendant argues that Article 37, paragraph 1 of the GDPR does not apply to him, so that no delegate to data protection has been appointed. On the other hand, five controllers (one per department) have been appointed.

8.

On July 4, 2022, the Litigation Chamber receives the complainant's submissions in reply, with regard to the findings relating to the subject matter of the complaint. The plaintiff submits that the use of the personalized license plate in the fictional series constitutes processing of personal data within the meaning of the GDPR and that this processing took place unlawfully without the defendant being able to invoke the exception

in favor of the right to freedom of expression and information, including artistic expression.

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9.

On July 22, 2022, the Litigation Chamber receives the submissions in response from the defendant with regard to the findings relating to the subject-matter of the complaint, in which she reiterates its arguments of the first conclusions in answer.

The defendant also formulates responses to the complainant's arguments. Thus, the defendant asserts that the means proposed by the plaintiff to identify him is complex and would therefore constitute a violation of the GDPR. The defendant then develops how the exception of Article 17, paragraph 3, a) of the GDPR applies to it.

## II. Motivation

### II.1. Definition of "personal data"

Findings in the inspection report

10. During the inspection, the defendant pointed out that in the plaintiff's situation, there is no was no processing of personal data of the latter. The Inspection Service concludes, however, that in the present case, it is indeed a question of data processing at personal character. In this respect, the Inspection Service refers to one of the documents of the defendant in which it asserts itself that "a license plate constitutes personal data". In addition, the DPA explicitly mentions the following on its website: "any information that does not directly identify a person (e.g. a name) but well indirectly (e.g. a number of

number plate) constitutes personal data." On the basis of these elements, the Inspection Service concludes that the defendant did indeed process the data to personal character of the complainant. The defendant contests these conclusions.

#### Defendant's point of view

11. The defendant disputes the finding of the Inspection Service that it allegedly recognized that the license plate constitutes personal data.

The defendant asserts that this finding is incorrect. If she certainly does deny not that a license plate can constitute personal data, it argues that this is not the case here. The defendant argues that the plate of registration in question was created on the basis of artistic choices made in the framework of the audiovisual production in question. The fictional character to which the license plate is a member of a family of ardent supporters of a large Turkish football team. The license plate was created by the defendant itself on the basis of the data of this football team (namely its name and the year where it was founded). The fact that this fictitious license plate corresponds to the plaintiff's license plate is pure coincidence, according to the defendant.

Indeed, she could not have known that this license plate already existed and to whom it was assigned. For the sake of completeness, the defendant points out that the clause of

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following disclaimer appears at the end of each episode: "This program is totally fictional. Any resemblance to persons, companies or events existing is purely coincidental". [Free translation]

#### Complainant's position

12. The Complainant argues that the license plate in question is indeed a personal data concerning him, because it is far from being fictitious, self-invented or specially designed by the defendant.

The license plate was assigned to the complainant by the management for vehicle registration. Furthermore, the complainant argues that his car and the car of audiovisual production are similar.

13. The complainant refers to the definition of "personal data" and "processing" in Article 4 of the GDPR and maintains that these definitions do not require the existence of any intentional element on the part of the controller.

The plaintiff argues that the license plate of a vehicle is information essential to indirectly identify the natural person who is still driving the vehicle. This is all the more the case when the personalization of this plate registration is based on the ethnicity and the favorite football club of the person concerned.

According to the complainant, this point of view is confirmed by the Service de Première Ligne and the Service ODA Inspection.

14. Contrary to what the Respondent asserts, the Complainant considers that it is very simple to identify it by its license plate. The complainant argues that it is necessary to use the publicly accessible online application of the Belgian Common Guarantee Fund, where, after having entered a specific license plate number, it is possible to find the insurance data (such as liability insurer and policy number) of a vehicle that bore the license plate in question on a given date. You can then contact the liability insurer in question to know the identity of the insured, namely SARL Arisol BV, in giving the policy number and date of a trumped up accident or any other pretext. It is then possible to check, via the Crossroads Bank for Enterprises, who is the manager of this SARL. As Arisol BV is a one-man business, the defendant can easily discover the identity of the plaintiff. The plaintiff submits as soon as when the defendant could and should have carried out this preliminary investigation to find the identity of the complainant.

Assessment by the Litigation Chamber

15. The Litigation Chamber recalls that the GDPR does not apply to the processing of all types of data, but only to the processing of personal data.

Article 4, 1) of the GDPR defines personal data as being: "any information relating to an identified or identifiable natural person (hereinafter referred to as the "data subject"); is deemed to be an "identifiable natural person" a natural person who can be identified, directly or indirectly, in particular by reference to an identifier, such as a name, an identification number, data of location, an online identifier, or to one or more specific elements specific to its physical, physiological, genetic, psychic, economic, cultural or social identity".

16. The definition of personal data comprises 4 elements which should be distinguish :

- 1) pertaining to
- 2) identified or
- 3) identifiable
- 4) natural person.

17. In order to qualify as personal data, the data must in principle relate to a natural person. The data does not relate to a person physical only when they are identified or identifiable. A person is identified when it can be uniquely distinguished from all other persons within of a group. A person is identifiable when they have not yet been identified, but this is possible without disproportionate effort.

18. To establish the identity of a person, we generally use data that has a link unique and personal with that person, called "identifiers". IDs can include data such as name, address and date of birth. When they



are combined, that data is so unique to a particular person that it identify a person with certainty or a high probability. Those data are called direct identifiers. People can also be identified on the basis of other less direct identification elements, such as appearance,

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social and economic characteristics and online identifiers. Although these data generally do not allow a person to be identified on their own, they can nevertheless lead to them because of their interrelation or by coupling them with other data. These data are called indirect identifiers.

19. In summary, the question of whether data is also personal data personal within the meaning of Article 4(1) GDPR for a controller therefore depends on whether the data or data processed by the controller allows him(her) to directly or indirectly identify a person. When the Decision on the merits 188/2022 - 7/29 person is not yet identified (if no directly identifying data is processed), the controller must determine whether the person is not yet identifiable.

20. As already mentioned, the data in question concerns a license plate, which which may constitute an indirect identifier. To assess whether there is a question of identifiability in this case, the Litigation Chamber refers to recital 26 of the GDPR.

21. Recital 26 of the GDPR provides that in order to determine whether a natural person is identifiable, it should be taken into consideration all the means reasonably likely to be used by the controller or by any

other person (a third party) to identify the natural person directly or indirectly.

To establish whether means are reasonably likely to be used to identify

a natural person, it is necessary to take into account all the factors

objectives, such as the cost of identification and the time required for it, taking

account of the technologies available at the time of the processing and of their evolution.

22. In its Opinion 4/2007 on the concept of personal data<sup>1</sup>, the Working Party

Article 29 on data protection states the following in this respect: "If, in view of

"all the means likely to be reasonably implemented, either by the

responsible

of

treatment,

either

by

a

other

person",

this

possibility does not exist or is negligible, the person cannot be considered

as "identifiable" and the information would not be "personal data

personnel". The criterion of "all the means likely to be reasonably

implemented, either by the controller or by another person" must

in particular take into account all the factors involved. The costs generated by

identification is one factor, but not the only one. The intended purpose, the way in which

the processing is structured, the interest expected by the controller, (...) the

risks of organizational malfunctions and technical failures are as much

aspects that should be taken into consideration.

23. The registration and allocation of the license plate is carried out by the Management

for the registration of vehicles of the Federal Public Service Mobility. Bedroom

Litigation observes that the website<sup>2</sup> of the Federal Public Service Mobility makes it possible to

check the availability of a personalized license plate. If the defendant

had consulted this website, she would have been able to see that the license plate

envisaged was already in use, without however knowing the identity of its holder. For the

family, neighbors and acquaintances, this personalized license plate is

however, a means that can be used to identify the complainant (for a

<sup>1</sup> Article 29 Data Protection Working Party, Opinion 4/2007 on the concept of personal data, 20 June 2007.

<sup>2</sup> [https://www.mobilit.fgov.be/WebdivPub\\_FR/wmvpstv1\\_fr?SUBSESSIONID=2436725](https://www.mobilit.fgov.be/WebdivPub_FR/wmvpstv1_fr?SUBSESSIONID=2436725).

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more detailed motivation, see points 24 and 25 below). The Litigation Chamber

recalls that, as explained by the Article 29 Working Party, to establish whether data

also constitutes personal data, account should be taken of the

intended purpose and how the processing is structured. Due to the purpose of

treatment in question (appearance in the foreground in an audiovisual production

known) and how this processing took place (a known audiovisual production,

broadcasting on one of the largest Flemish television channels as well as the

availability of this production on streaming services), the Litigation Chamber

concludes that the complainant is identifiable.

24. As for the fourth element ("natural person"), it means that the data relating to the

corporations, partnerships and other corporate/legal persons are not

protected as such by the GDPR. The Court of Justice of the European Union has

nevertheless considered that legal persons may avail themselves of the protection of

Articles 73 and 84 of the Charter of Fundamental Rights of the European Union with regard to

data concerning them "to the extent that the legal name of the legal person identifies a

or more natural persons".<sup>5</sup> Since the GDPR is a development of the general guarantees set out in these provisions of the Charter, such protection of legal persons may also derive from the GDPR, although this protection does not does not concern the legal person as such, but the natural person(s) who constitutes it, and is likely to occur mainly in cases where the person corporation is actually a sole proprietorship or a small family business with a "veil corporate" transparent.<sup>6</sup>

25. The Litigation Chamber finds that the car and the license plate are registered in the name of SARL Arisol BV as a legal entity, and not in the name of the plaintiff as a natural person. This SARL is however a company individual who does not have a fleet of vehicles, which therefore makes it possible to establish a link directly between the license plate and the complainant. Given that the complainant uses the vehicle with this particular license plate as a natural person, he is associated with this car with license plate by its entourage without the latter

3 Article 7: Everyone has the right to respect for his private and family life, his home and his communications.

4 Clause 8:

1. Everyone has the right to the protection of personal data concerning him or her.
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.

5 See in this regard CJEU, case C-92/09 and 93/09, *Schecke*, § 53, case C-419/14, *WebMindLicenses*, § 79; T case 670/16, *Digital Rights Ireland*, § 25.

6 L.A. BYGRAVE and L. TOSONI, "Article 4(1) Personal Data" in C. KUNER et.al. "EU General Data Protection Regulation, a commentary, Oxford University Press, 2020, p. 111.

whether the vehicle is registered in the name of his sole proprietorship or in the name of the plaintiff as an individual. In view of the foregoing, the Litigation Chamber concludes that in the specific circumstances of this case, the plaque registration constitutes personal data.

II.2. Article 5, Article 24, paragraph 1 and Article 25, paragraphs 1 and 2 of the GDPR

Article 5, paragraph 2, article 24, paragraph 1 and article 25, paragraphs 1 and 2 of the GDPR

26. Given that the Litigation Chamber concluded that in the circumstances of the case, the plate registration constitutes personal data, this means that the display of this personal data in the audiovisual production constitutes a treatment. The defendant maintains that it was unaware that it was processing personal data staff. The Litigation Chamber draws attention to the fact that the presence or not of an intention does not constitute a criterion for the processing of personal data personal within the meaning of Article 4. 2) of the GDPR.<sup>7</sup> Irrespective of whether the defendant's intention was to process the personal data, the mere fact that the license plate was actually shown in the audiovisual production sufficient to characterize this processing, which must be carried out in accordance with the principles fundamentals of data protection within the meaning of Article 5 of the GDPR.

27. In its capacity as data controller, the defendant is required to comply with the data protection principles and must be able to demonstrate that these are complied with (principle of responsibility – Article 5, paragraph 2 of the GDPR).

28. It must also, also in its capacity as controller, take all necessary measures necessary to ensure and be able to demonstrate that the processing is carried out in accordance with the GDPR (Articles 24 and 25 of the GDPR).

29. As part of its inquiry into responsibility, the Inspection Service asked

the defendant to send him the following documents:

“A copy of the documents [of the defendant] on the measures and decisions taken to guarantee compliance with the principles relating to the processing of personal data against the complainant pursuant to Article 5, Article 24(1) and Article 25 of the GDPR.

7 Article 4 of the GDPR: "For the purposes of this Regulation, the following terms mean:

[...]

2) "processing" any operation or set of operations whether or not carried out using automated processes and applied to personal data or sets of personal data, such as the collection, recording, organization, structuring, storage, adaptation or modification, extraction, consultation, use, communication by transmission, dissemination or any other form of making available, aggregation or interconnection, limitation, erasure or destruction"

30. The defendant responded but, according to the Inspection Service, it did not provide any

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documents showing what actions and decisions have been taken to ensure compliance

principles relating to the processing of personal data with regard to

specifically the complainant on the basis of Articles 5, 24, paragraph 1 and 25, paragraph 1

and 2 GDPR. The Inspection Service notes in its report that the documents

transmitted concern the principle of transparency of Article 5, paragraph 1, a) of the GDPR,

but that the defendant does not explain how the other principles of Article 5,

paragraph 1 of the GDPR are complied with. The Inspection Service further concludes that certain

elements are not concretely explained by the defendant, such as the fact of

whether the complainant, whose personal data has been processed by the

defendant, did receive a copy of its general privacy policy.

During the investigation, the defendant maintains that it did not process any data of a

staff. The Inspection Service does not share this vision and affirms that

there

defendant is indeed processing personal data. In this regard, the Service

d'Inspection refers to the website of the Data Protection Authority

(<https://www.autoriteprotectiondonnees.be/citoyen/vie-privee/lexique>) where it is indicated that

"any information that does not directly identify a person (e.g. a name)

but indirectly (e.g. a license plate number) constitutes a

personal data." The Inspection Service therefore comes to the conclusion that there is

violation of Art. 5, Art. 24(1) and Art. 25(1) GDPR.

31. In its pleadings, the defendant refutes this finding. The defendant explains that it

considered not to have processed personal data in this case. Furthermore, the

defendant shows what measures it takes in the case of similar processing of

personal data, namely the processing of license plates in

other audiovisual productions, when it considers that it is processing personal data

personal.<sup>8</sup>

32. The Litigation Chamber declares that the Inspection Service, as an investigative body

of the APD, is responsible for examining complaints and serious indications of violations of the

European and Belgian legislation on personal data, including the GDPR.

One of the ways to carry out the investigation is to have all the information

and useful documents. This possibility allows data controllers and/or

subcontractors to explain and demonstrate what measures have been taken to comply with

the applicable legislation.<sup>9</sup>

<sup>8</sup> See below.

<sup>9</sup>

available

<https://www.autoriteprotectiondonnees.be/publications/charte-du-service-d-inspection.pdf>.

inspection,

Service

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To

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33. As part of the assessment of compliance with fundamental principles and accountability within the meaning of Article 5 of the GDPR, the Inspection Department sent a general request to the controller, to send him the following:

“A copy of the documents [of the defendant] on the measures and decisions taken to guarantee compliance with the principles relating to the processing of personal data against the complainant pursuant to Article 5, Article 24(1) and Article 25 of the GDPR.”

34. The Litigation Chamber finds that the request of the Inspection Service relates to the processing of the complainant's personal data, namely the publication of a plaque registration in an audiovisual production. The defendant argues that in

In this case, it did not forward such documents to the plaintiff beforehand, given that it considered that no personal data was being processed and that, moreover, she was unaware of that this license plate was assigned to a person and even less to whom.

For the rest, the defendant makes available the documents that it uses when it processes - knowingly - the personal data of the persons concerned.

As explained above, the Inspection Service considers in this case that certain



information, essential for a proper assessment by the Inspection Service, is missing. The Inspection Service therefore considered that there was a violation of Article 5, of Article 24(1) and Article 25(1) and (2) GDPR.

35. The Litigation Chamber recalls, however, that an investigation by the Inspection Service must do it fairly. If the controller's response is not sufficient for the Inspection Service, it is up to the latter to specify the points on which more information is requested. This can be done, for example, by asking questions more specific about a specific subject or by requesting documents or concrete information. Indeed, it is not always easy for the data controller to formulate a complete answer to such a general and broad question or to provide the specific documents that the Inspection Service wishes to examine. If the Inspection Service asked more specific questions or requested specific documents and that the controller could not provide the requested information, it is up to the Inspection Service to note the violation of the principle of liability within the meaning of Article 5(2) and Article 24(1) GDPR. The Litigation Chamber points out in this respect that the Inspection Service did not ask any questions additional information about certain subjects and that no specific document has been claimed to arrive at a proper assessment of the case. The Litigation Chamber finds therefore that the inspection investigation was not carried out sufficiently specific to this finding. The Litigation Chamber therefore concludes that in this case it is disproportionate to establish a violation of Articles 5, 24, paragraph Decision on the merits 188/2022 - 12/29 1 and 25, paragraphs 1 and 2 of the GDPR on the basis of a general question within the framework of the liability, which was the subject of a response from the defendant, without further follow-up questions from the Inspection Service. It is the responsibility of the Inspection Service to demonstrate a possible violation of article 5, article 24, paragraph 1 and article 25, paragraphs

1 and 2 of the GDPR by the defendant on the basis of a fair investigation.

#### Article 5(1) GDPR

36. The Litigation Division finds that, on the basis of the response provided by the defendant in the context of the investigation, the Inspection Service concludes that there has been a breach of all the fundamental principles relating to the protection of personal data, as set out in Article 5(1) GDPR. Although paragraphs 1 and 2 of the article 5 GDPR are closely related, a possible breach of liability under Art. 5, paragraph 2 of the GDPR does not automatically mean a violation of article 5, paragraph 1 of the GDPR. Responsibility is in fact the concrete expression of demonstration, by means of documents, of compliance with the material fundamental principles of the GDPR. The two elements must therefore be assessed separately.

37. The Litigation Chamber notes that the inspection report contains only findings relating to the principle of transparency as referred to in Article 5(1), To). The Litigation Chamber will therefore examine this finding. As already stated above, the Inspection Service noted that certain elements are not explained concretely by the defendant, such as whether the plaintiff, whose personal data were processed by the defendant, actually received a copy of its general privacy policy.

38. In its conclusions, the defendant refutes the findings of the inspection report. She states that within her organization, various privacy officers were nominated by department, including the fiction department. When the defendant received the plaintiff's letter via the info address (therefore not via a specific e-mail address intended for privacy issues), she has endeavored to respond accurately and in a timely manner. Furthermore, the defendant repeats that it does not does not deny that a license plate can constitute personal data but that is not the case here. The defendant then explains the measures

appropriate technical and organizational measures it takes to ensure that with regard to concerns audiovisual productions, the personal data of persons concerned are processed in accordance with the GDPR. It ensures, for example, that in the cases where there may be a question of processing personal data in its audiovisual productions by filming and then displaying a license plate existing of a data subject who has not given his consent, these scenes relevant are removed, cropped or the license plate made illegible

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(for example by means of blurring). Furthermore, in other cases where personal data personal data subjects are processed in the context of a production audiovisual (and this is mainly the case for non-fiction productions), the practice practice within the defendant's organization is that either, for people concerned who play a greater role in the production, the necessary arrangements in terms of data protection are included in the contracts concluded with them, or, for data subjects who play a less important role or whose participation in the production is short-lived, an abbreviated waiver or "quit claim" is signed. Both the aforementioned contracts and the "quit claims" contain clauses relating to the processing of personal data. These documents are provided and explained to data subjects prior to cooperation between the defendant and the person concerned, together with the general policy of privacy. In the plaintiff's case, there is no signed contract or "quit claim" because at no time did the defendant assume that personal data was being processed, and because she had absolutely no idea who this personal data belonged to. It is also true that even after the letter from the plaintiff's lawyer, the policy general confidentiality was not transmitted to him by the defendant. She didn't get this reflex, given his prior conviction that this case did not involve the treatment of

personal data. The defendant argues that, in the event that the

The Litigation Chamber would nevertheless conclude that there was data processing at

personal nature of the complainant, it wishes to emphasize that this situation, in which

an alleged processing of personal data has taken place without the person

concerned is informed and without having received the general privacy policy,

constitutes a unique and isolated case which does not correspond to the usual working method of

the defendant in matters of personal data protection policy.

39. The Litigation Chamber finds that during the creation of the audiovisual production, the

defendant was not aware of the identity of the plaintiff as holder

personalized license plate.

40. The inspection report then notes that the defendant failed to communicate the

general privacy policy to the complainant after the complainant contacted her to

request that his license plate be removed from

the production.

The defendant argues that it did not have this reflex because it considered that there was no

processing of personal data. The Litigation Chamber finds that this

courier only repeated the request to erase the data. The defendant does not

could not reasonably have expected that the complainant would also wish to receive

general privacy policy while the complainant's letter

requesting the erasure of the data did not contain any request or mention of the

general privacy policy.

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41. In view of the foregoing, the Litigation Chamber considers that there is no violation

of the principle of transparency within the meaning of Article 5, paragraph 1, a) of the GDPR with regard to

concerns the non-transmission of the general privacy policy.

42. The Litigation Chamber notes that the inspection report finds a violation of all

the basic principles of Article 5. This violation stems from the alleged failure to comply with the aforementioned liability. The Litigation Chamber emphasizes that the finding of a alleged breach of all fundamental data protection principles on the basis of an alleged violation of liability is disproportionate.

As a result,

the Litigation Chamber concludes that

the finding of the Service

of Inspection concerning these principles is not sufficiently supported by evidence<sup>10</sup>, this

which makes any in-depth examination of these findings impossible. Considering what

foregoing, the Litigation Chamber considers that there is no violation of Articles 5, 24,

paragraph 1 and 25, paragraphs 1 and 2 of the GDPR.

### II.3. Article 5(1)(a) and Article 6 GDPR on lawfulness

43. In his submissions, the complainant points out that the disputed processing was carried out without consent and is therefore unlawful within the meaning of Article 5(1)(a) GDPR.

The plaintiff declares that he did not give his consent to the defendant for

displaying his personalized license plate globally, so that

this processing of his personal data is unlawful within the meaning of Article 6 of the GDPR.

44. The Complainant argues that a balancing of interests between the Complainant's right to

protection of his personal data, on the one hand, and the legitimate interest of the

defendant, namely the freedom of expression and information (including the freedom

of artistic expression), on the other hand, also leads to an assessment against

the latter.

The Litigation Chamber recalls that to invoke this legal basis of Article 6,

paragraph 1, f) of the GDPR for the processing of personal data, the interest

legitimate interests of the controller or third parties must be weighed against the interests or the fundamental rights and freedoms of data subjects. The legitimate interest is closely related to - but different from - the concept of the purpose of the processing, which under Article 5, paragraph 1, b) of the GDPR, must be specific. While "finality" is about reason specific for which the data is processed, i.e. the purpose or intention of the processing of data, the notion of "interest" refers to the broader interest of a controller may have in the processing, or for the benefit that the controller

10 See Section A.1 of the Dismissal policy of the Litigation Chamber.

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of the processing - or a third party, who is not necessarily qualified as joint controller - draws processing.<sup>11</sup>

45. In accordance with Article 6, paragraph 1, f) of the GDPR and the case law of the Court of

Justice,

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third

to whom the data is communicated, secondly, the necessity of the processing

personal data for the achievement of the legitimate interest pursued and,

third, the condition that fundamental human rights and freedoms

concerned

by

there

protection

of the

data

born

prevail

not"

("Rigas" stop)<sup>12</sup>.

46. In other words, in order to be able to invoke the basis of lawfulness of "legitimate interest"

in accordance with Article 6(1)(f) GDPR, the controller must

demonstrate that :

1) the interests it pursues with the processing can be recognized as legitimate

(the "finality test");<sup>13</sup>

2)

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(the "necessity test"); And

3)

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fundamental rights and freedoms of data subjects weighs in favor of the controller or a third party (the "weighting test").

47. In the present case, the Litigation Chamber finds that the defendant's interest is to create audiovisual productions as an exercise of his artistic expression, which falls under the freedom of expression protected by the Constitution. It is to this end that the personal data of the complainant will be processed.

48. Artistic expression includes, among other things, the creation of fictional characters and their universe. In this context, the defendant can use public data, as is the case here. The license plate is that of the fictional character, whose son is a fan of the Turkish football club Galatasaray S.K., founded in 1905. Therefore, the use of this license plate as part of the shaping of a fictional character is a purely artistic form of expression. According to the Litigation Chamber, he makes no

11 CJEU judgment of December 11, 2019, TK c. Asociația de Proprietari block M5A-ScaraA, C-708/18, ECLI:EU:C:2019:1064, § 44. See also in this sense decision 21/2022 of February 2, 2022.

12 CJEU, Judgment of 4 May 2017, Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde c. Rīgas pašvaldības SIA

„Rīgas satiksme”, C-13/16; ECLI: EU:C:2017:336, § 28/31. See also CJEU Judgment of December 11, 2019, TK v/ Asociația de Proprietari block M5A-ScaraA, C-708/18, ECLI:EU:C:2019:1064, § 40.

13 Where the notion of "purpose" must be read in the light of the preceding points of this decision.

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doubts that the purpose criterion of the case law of the Court of Justice is met. Account given the artistic purpose of emphasizing the link with the football club and the freedom for the defendant, in this context, to choose an appropriate means to reach, the Litigation Chamber considers that the criterion of necessity is also met.

49. As for the weighting test, the complainant's interest lies in the protection of his data of a personal nature and the related fact of being questioned about the similarity between his license plate and the fictitious license plate.

50. With regard to the interests of the plaintiff, the Litigation Chamber states that there is little. Complainant is likely to be very embarrassed by this similarity. Indeed, only his contacts personal and/or professional can detect the similarity between the two plates of registration and confront the complainant with it. The audiovisual production is fictional and, in Furthermore, there is no other connection between the complainant and the fictional character. Furthermore, it is pointed out to each episode that this is a fictional production and that any resemblance to people is purely coincidental. In this regard, the Litigation Chamber notes that in despite matching license plates, there is no other resemblance, correspondence or other connection between the fictional character and the complainant. In this context, the Litigation Division also recalls that the defendant had not unaware of the existence of the complainant's license plate, so that it was not inspired by it either. Therefore, the creation was carried out in a way independently by the defendant.

51. Consequently, the Litigation Chamber concludes that it should be clear for these contacts personal or professional that the complainant has no connection whatsoever with the circles frequented by the fictional character in audiovisual productions.

52. The Litigation Chamber also notes that the plaintiff chose to request a license plate consisting of public data related to a known football club in the whole world. The complainant could therefore have foreseen that this data could be

used for artistic purposes. The fact that the defendant, as director of programs, could not necessarily have used this license plate does not imply that the disputed processing would be unlawful under Article 6, paragraph 1, f) of the GDPR. The choice to shape a character using a particular cultural context with a reference to an emblematic football club in this culture is free of artistic expression.

53. In view of the foregoing, the Litigation Division concludes in this case that the interest of the defendant's artistic expression prevails over the right to data protection personal nature of the complainant. Accordingly, the defendant satisfies the test of weighting. The data could therefore be processed. The extent to which the impact Decision on the merits 188/2022 - 17/29 potential negative for the complainant could have been limited by exercising the right to erasure data is discussed below in Section II.4.

54. The Litigation Division therefore finds that there is no question of a violation of Article 5, paragraph 1, a) and Article 6, paragraph 1, f) of the GDPR.

II.4. Violation of Article 12, paragraphs 1 and 4, of Article 17, of Article 24, paragraph 1 and Article 25(1) GDPR

55. The Inspection Service finds that the defendant has not complied with the obligations imposed by Article 12, paragraphs 1 and 4, Article 17, Article 24, paragraph 1 and Article 25, paragraph 1 GDPR. In this regard, the Inspection Service notes first of all the fact that the plaintiff's request to erase his personalized license plate from the audiovisual production was rejected because of the "right to artistic expression", without specify which provision of Article 17(3) of the GDPR was invoked. Then the Inspection Service considers that this explanation is not transparent within the meaning of Article 12, paragraphs 1 and 4 of the GDPR because it is not clear for the complainant to know about what exact basis his request was denied and furthermore there is no mention of the

possibility of filing a complaint with the DPA. The Litigation Chamber will examine first the refusal to proceed with the erasure of the data and then the obligations in regarding transparency arising from Article 12 of the GDPR.

II.4.1. Article 17, Article 24, paragraph 1 and Article 25, paragraph 1 of the GDPR

56. The Litigation Division points out that the plaintiff sent his request for erasure data on January 5, 2022 to the defendant, who refused this request on the basis of his freedom of artistic expression.

57. The Inspection Service notes in its inspection report that the erasure of data was unlawfully refused by the defendant. The Inspection Service refers in this respect to the law of 30 July 2018 on the protection of natural persons

To

with regard to the processing of personal data<sup>14</sup> (hereinafter

there

law of

July 30, 2018). This law provides for exceptions to the rights of data subjects for

processing of personal data, in particular for "purposes of expression

artistic". The Inspection Service stresses, however, that these exceptions do not apply

not to Articles 12, 17, 24 and 25 of the GDPR. In addition, these exceptions should be read in conjunction

light of Article 85, paragraph 2 of the GDPR and therefore be "necessary to reconcile the

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

of information". The complainant agrees with this point of view in his conclusions.

<sup>14</sup> Law of 2018 July 2018 on the protection of individuals with regard to the processing of personal data

staff, M.B., September 5, 2018.

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58. The defendant refutes this finding of the Inspection Service. She supports in her

conclusions that the law of July 30, 2018 indeed provides in its article 24 that a certain

many provisions of the GDPR do not apply "to the processing of personal data of a personal character made for journalistic purposes and for purposes of expression of an academic, artistic or literary". The defendant agrees first of all with the finding of the Inspection Service according to which article 17 of the GDPR is not in fact included in the list of articles of the GDPR to which the exceptions of the law apply.

59. In this regard, the defendant refers to the explanatory memorandum to the bill of the law of July 30, 2018 which specifies the following: "The bill does not exempt the person responsible for processing for journalistic, academic, artistic or literary purposes of the obligation to give the data subject a right to be forgotten (Article 17 of the Regulation). In fact the article 17.3 of the GDPR itself provides that the right to be forgotten is not applicable to processing at for the purposes of freedom of expression and information. The regulation being directly applicable, there is therefore no need for the law to recreate this exemption."<sup>15</sup>

60. The Council of State also agreed with this position, stating that:

"it is wise that the bill does not declare article 17 inapplicable to the processing carried out for journalistic purposes when this exclusion is already provided for by the paragraph 3. a) itself of this article 17."<sup>16</sup>

61. The Litigation Chamber refers to the intention of Article 85 of the GDPR which formulates the general mission of the (national) legislator to ensure that the relationship between freedom of expression and protection of personal data. The Belgian legislator has regulated this relationship in the law of July 30, 2018. Article 24 of this law provides that for processing for journalistic, academic, artistic or literary purposes, certain data subject rights do not apply. The law refers in this regard in Articles 7 to 10, in Article 11, paragraph 2, in Articles 13 to 16, 18 to 20 and 21, paragraph 1 GDPR. The GDPR does not provide for these articles such exceptions for processing of personal data for journalistic purposes, expression of an academic, artistic or literary. Article 24 of the law of July 30, 2018 does not exempt

however not explicitly the controller for journalistic purposes,  
of academic, artistic or literary expression of the obligation to grant the right to  
erasure of data ("right to be forgotten") to the data subject (Article 17 GDPR).

Moreover, such an explicit exemption is not necessary given that, as the fact  
15 Bill of 11 July 2018 on the protection of individuals with regard to the processing of personal data  
personal character, Doc. Speak. Chamber no. 54-3126/001, 54.

16 Opinion of the Council of State, Legislation Section, of 19 April 2018 on a draft bill 'relating to the protection of persons  
with regard to the processing of personal data', Doc. Speak. Senate, no. 63.192/2, 80, no. 4.4; Project of  
law of 11 June 2018 on the protection of individuals with regard to the processing of personal data  
staff, Doc. Speak. Chamber no. 54-3126/001, 54.

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the defendant rightly points out, Article 17(3) GDPR is directly  
applicable under Belgian law.

62. On the basis of the foregoing, the Litigation Division agrees with the position of the  
defendant and considers that Article 17(3) of the GDPR itself provides for the  
possible grounds for exceptions to the right to erasure of data, without these having to  
be included in the law of July 30, 2018.

63. The Litigation Chamber refers to Article 17, paragraph 1 of the GDPR which provides that the  
data subject has the right to obtain from the controller the erasure, within the  
as soon as possible, personal data concerning him. Based on this same  
Article, point c), the controller has the obligation to erase the personal data  
as soon as possible, in particular when the person concerned opposes the  
processing pursuant to Article 22(1) GDPR and there are no grounds  
compelling legitimate reason for the processing. As explained above, the complainant sent a  
request the defendant pursuant to Article 17(1)(c) GDPR.

64. Article 17(3)(a) GDPR however provides that Article 17(1) GDPR

GDPR does not apply when such processing is necessary for the exercise of the right to freedom of expression and information. This article thus provides for an exceptional regime with a balancing of interests between two fundamental rights, namely the balance between the right to freedom of expression and information on the one hand and the right to the protection of personal data on the other hand.<sup>17</sup> It is on this basis that the defendant has refused to execute the request to erase the complainant's data.

65. In the context of this case, the Litigation Division will therefore verify whether the request erasure of data pursuant to Article 17(1)(c) GDPR has been rightly refused by the defendant in accordance with Article 17, paragraph 3, a) of the GDPR and in particular if the right to freedom of expression and information, on the one hand, and the right to the protection of personal data, on the other hand, have been weighed against appropriate way.

66. The Litigation Division points out that in the present case, the complaint was lodged at against the defendant as a production company which, among other things, produces audiovisual fiction productions. The Litigation Chamber recalls first of all that the right to freedom of expression and information is protected by Article 10, paragraph 1 of the European Convention on Human Rights (hereinafter the "ECHR"). "This right includes the freedom

of opinion

And

there

freedom

of

receive

Or

of

communicate information or ideas without interference from authorities

[...]" and the similar Article 11 of the Charter of Fundamental Rights of the European Union

17 See the CJEU judgment of 24 September 2019, G.C e.a. c CNIL, ECLI:EU:C:2019:773, § 56 e.s.

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European Union (hereinafter "the Charter"), the second paragraph of which further guarantees, in particular, respect for the freedom and pluralism of the media.

67. As the defendant also points out, the right to freedom of expression, to which refers to article 17, paragraph 3, a) of the GDPR, does not only apply to certain types of information, ideas or forms of expression, such as those of a political nature, but also includes artistic expression.<sup>18</sup> The European Court of Human Rights (ECHR) also stated: "If need be, the correctness of this interpretation would find confirmation in the second sentence of paragraph 1 of Article 10 (art. 10-1) because the activities "radio, film or television undertakings" extend to the field of

art. For its part, article 19, § 2 of the International Covenant on Civil and Political Rights, which explicitly designates as an element of freedom of expression information and ideas taking "an artistic (...) form", shows that the notion of freedom of expression is broad enough to include artistic expression.<sup>19</sup> Therefore, the expressions of arts fall under the protection of Article 10 of the ECHR and Article 11 of the Charter.

68. As already mentioned, the central issue in the present case is the balancing of the defendant's right to freedom of expression and information, and in particular to the freedom of artistic expression (Article 10 of the ECHR and Article 11 of the Charter) and the right of the complainant to the protection of his personal data (Article 8 of the Charter).

It is therefore a balancing act between fundamental rights.

69.

The Litigation Chamber refers in this respect to the case law of the Court of Justice in the context of requests for delisting from search engines, more



recently the Google judgment, C-460/20.<sup>20</sup> The Court there stated the following: "The fact that Article 17(3)(a) of the GDPR expressly provides that the right to erasure of the data subject is excluded when the processing is necessary for the exercise of the right relating, in particular, to freedom of information, guaranteed in Article 11 of the Charter, constitutes a expression of the fact that the right to the protection of personal data is not an absolute right, but must, as pointed out in recital 4 of this regulation, be considered in relation to its function in society and be weighed against other fundamental rights, in accordance with the principle of proportionality. [...] GDPR, and in particular Article 17(3)(a) thereof, thus explicitly enshrines the requirement a balance between, on the one hand, the fundamental rights to respect for private life and the protection of personal data, enshrined in Articles 7 and 8 of the Charter, and, on the other hand, the fundamental right to freedom of information, guaranteed in Article 11 of the chart."

18 ECHR, 25 May 1988, 10737/83, Müller and others v. Switzerland, § 27.

19 ECHR, 25 May 1988, 10737/83, Müller and others v. Switzerland, § 27. See also CJEU, C-460/20, § 62.

20 CJEU, 8 December 2022, ECLI:EU:C:2022:962, §§ 60-62.

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70. The answer to the question of which of these two rights is preponderant in the case concrete must be found by weighing all the relevant circumstances of the case.<sup>21</sup>

This control must be done only once, the assessment according to which one of the two rights prevails over the other in light of all the relevant circumstances implying that the violation of the other right meets the necessity test of paragraph 2 in question of Article 8 and Article 10 of the ECHR, as specified in Article 52 of the Charter.

71. In this regard, the Karatas v. Türkiye of the ECHR states that freedom of expression artistic encompasses the following: "particularly in the freedom to receive and impart information and ideas – which allows participation in the public exchange of information and

cultural, political and social ideas of all kinds. Those who create, perform, disseminate or exhibit a work of art contribute to the exchange of ideas and opinions essential to a democratic society. Hence the obligation for the State not to encroach unduly on their freedom of expression.” 22

72. The defendant argues that the choices made to shape the characters of the audiovisual production fall within the freedom of artistic expression. The defendant did the creative choice to give some of its characters a Turkish origin, with a family who is a strong supporter of the Galatasaray football club and a car whose license plate personalized registration refers to this club. In this regard, the defendant specifies that the letters and numbers on the registration plate refer in the name of the club itself and the year of foundation 1905.

73. On the other hand, the complainant maintains that this license plate was attributed to him, which actually personal data. Due to the publication of this plate of registration, he is challenged by his relations (both private and professional) on possible links with a criminal organization, since the fictitious character who holds the this license plate would have links with the criminal world.

74. The Litigation Chamber finds that the conception of the character in question, with its car and its license plate, constitutes an expression of the artistic freedom of the defendant. Galatasaray is a very well known club with a very large number of supporters, especially in the Turkish community. Therefore, when creating a fictional Turkish character, his history and his universe, it is not inconceivable to include references to one of the biggest and most popular Turkish football clubs.

The defendant has opted here, in particular because of the limited space on a plate of registration, for public data immediately highlighting the reference to this football team, namely the abbreviation of the name and

the year of foundation.

21 CJEU, VGT Verein gegen Tierfabriken c. Switzerland, 28 June 2001, § 68.

22 ECHR, Karatas v. Türkiye, 8 July 1999, § 49.

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This is data that the Turkish community associates directly with the football team in question.

75.

It is therefore plausible that, by chance and by similar reasoning, a plate identical registration was chosen by the complainant. In this context, the House of Litigation notes that apart from the correspondence of the license plate, it there is no connection between the plaintiff and the defendant. Personal data was not collected or obtained from the complainant nor is there any other link between the plaintiff and the fictional character and the environments in which they evolve.

76. According to the Litigation Division, the fact that the combination of these data took on a personal character for the complainant by the allocation of the license plate by the Direction for vehicle registration does not detract from the public character of the club and the artistic reflection on the basis of which the character with his car and his plate registration was created.

77. The Litigation Division notes in this regard that the information relating to the allocation of license plates are also not freely available. The website aforementioned from the Directorate for Vehicle Registration allows to verify the availability of a certain personalized license plate number. Moreover, he was impossible for the defendant to know the identity of the holder of this plate particular registration.

78. The complainant argues that the publication of the license plate is not necessary

in a democratic society. To assess the criterion of necessity, the ECHR adopts a global approach. It is worth examining the area of tension between the two rights in the overall context of the case. The Litigation Chamber finds that the defendant would have been able to check if this personalized license plate was still available via the site aforementioned Internet of the Directorate for the Registration of Vehicles. The circumstance that the defendant, as a program producer, could not necessarily have use this license plate, but could have chosen another, does not prevent that this creative choice is covered by the artistic expression as protected by Article 10 of the ECHR.

79. With regard to the complainant's grievances that he was questioned on this subject by his family, his friends and associates, the Litigation Chamber notes that only persons of the complainant's entourage can make the link between the car and the person of the complainant, by assuming that these people have seen the audiovisual production in question and noticed the similarity between the license plates. In addition, it is explicitly pointed out to each episode that any resemblance to any person or organization is purely fortuitous. Besides the use of the corresponding plate number in the fictional series, to at no time is a connection established with the person of the complainant or attention drawn

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about him, nor any element is quoted referring to his person or his private life.

This is also explained by the fact that the defendant did not have, or could not have, knowledge of the complainant's identity at the time the production was created audiovisual. Finally, the Litigation Chamber finds that the plaintiff chose to mention on a license plate public data of a well-known club.

He could therefore reasonably expect that other people could also think about this data.

80. The Litigation Chamber therefore concludes that

the similarity between

the two plates

of registration was found to be based on a similar thought process of the complainant and of the defendant, namely the expression of an identity as a fervent supporter of Galatasaray.

In this process, both parties used the club's name and founding year, which are known public data with a direct link to the club. Considering what precedes, the circumstances on the complainant's side do not weigh sufficiently heavily to limit or deprive the defendant of the right to freedom of expression, including the right to artistic expression, as guaranteed by Article 10 of the ECHR. The Litigation Chamber concludes that there is no violation of Article 17 of the GDPR.

#### II.4.2. Article 12, paragraphs 1 and 4 GDPR

81. On the basis of Article 12 of the GDPR, the controller must inform data subjects concerned in a transparent manner in principle within 1 month and respond free to their requests. In this context, it is essential that the information provided are understandable and easily accessible for the persons concerned. Finally, he is important that the data controller facilitates the exercise of the rights of data subjects concerned on the basis of Articles 15 to 22 inclusive of the GDPR. Finally, when he refuses their request, the controller must inform the data subjects of the reasons of this refusal and the possibility of lodging a complaint with a supervisory authority as well as than to take legal action.

82. Respondent argues that, although in its letter of response to complainant from 21 January 2022, it did not expressly refer to the specific legal basis of Article 17, paragraph 3, a) of the GDPR, she made it very clear in this letter on the basis of what reasons it had decided not to have to comply with the request for erasure of the disputed license plate of the fictional series, and therefore if the Chamber Litigation nevertheless had to consider that a processing of data of a

complainant's personnel took place, it would still comply with its obligation pursuant to Article 12(4) of the GDPR, which requires the controller to in the event that it does not comply with the request of the person concerned, that it "informs without delay and at the latest within one month of receipt of the asks for reasons for its inaction".

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83. The Litigation Chamber observes that in the aforementioned letter of January 21, 2022, the defendant explained that it considered that it did not have to respond to the request erasure of the data because it considered that there was no data processing to personal character. In the alternative, if it were nevertheless to be a question of the treatment of personal data, she invokes her right to artistic expression, which is part of the right to freedom of expression, not to erase the license plate.

In this context, the Litigation Division points out that the defendant explained the reasons for the refusal of erasure, without mentioning the relevant articles of law in this respect. The Litigation Chamber considers that in this case, the explanation for the refusal to erase of the data could have been formulated more clearly with regard to the complainant. Mention in more articles of law and give a more detailed explanation could also have contribute to the clarity of the refusal.

84. Furthermore, the defendant submits that the plaintiff was represented by a lawyer who knew the applicable legislation and therefore the possibility of filing a complaint with the DPA, since it had already informed the complainant that it would eventually file a complaint from the ODA. The Litigation Chamber takes note of this explanation but don't find it convincing. As far as necessary, the Litigation Chamber recalls that these transparency principles of Article 12(4) GDPR apply regardless of whether the complainant or his counsel is aware of the procedure for complaint to the DPA.

85. In view of the foregoing, the Litigation Chamber considers that the defendant would have been able to discharge the obligation of transparency more conscientiously. Discussed of a violation of Article 12(1) of the GDPR, but this violation is not of a seriousness which requires the imposition of a sanction. It suffices to notify the defendant to the future than the transparency principles of Article 12(4) GDPR apply regardless of whether the complainant or his counsel has any awareness.

## II.5. Article 38(1) and Article 39 GDPR

86. The Inspection Service finds that the defendant has not complied with the obligations imposed by Article 38, paragraph 1 and by Article 39, paragraph 1 of the GDPR. In this regard, the Inspection Service refers to the following elements:

87. "In order to inform and raise the awareness of the personnel concerned by the processing of data personal nature by (the collaborators of) [the defendant], the consultations necessary have been organized by the client between its employees and its advisers in order to prepare and implement the necessary documentation to comply with its obligations under the GDPR, and the necessary information sessions have

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been organized internally to explain this. In addition, a "Privacy Policy and respect for privacy" has been developed and implemented for the employees of the defendant, which the collaborators of [the defendant] are required to respect and which explains the policy for handling confidential information, including data of a personal nature, by these collaborators. You will find a copy of this policy in appendix 3".

88. The Inspection Service considers, however, that the defendant does not demonstrate:

- what the "necessary consultations" and the "necessary information sessions" above represent in practice (indeed, no evidence has been provided for these

aspects) ;

- whether and, if applicable, how its data protection officer is and/or has been involved in the implementation and monitoring of the above;

- whether and, if applicable, how its data protection officer is and/or has been involved in the development and monitoring of the "privacy and privacy policy private" (for example, through supporting documents such as internal emails);

- how compliance with the "privacy and confidentiality policy" is guaranteed in practice. Indeed, imposing guidelines for the protection of data is in itself insufficient if compliance with these guidelines is not effectively guaranteed by the defendant in collaboration with its data protection officer.

89. The GDPR recognizes that the Data Protection Officer is a key figure in relation to concerns the protection of personal data, including the designation, position and missions are subject to rules. These rules help the controller to fulfill its obligations under the GDPR but also help the data protection officer data to carry out its tasks correctly.

90. The Litigation Chamber recalls that Article 38, paragraph 1 of the GDPR requires that the controller ensures that the data protection officer is involved, in an appropriate and timely manner, to all questions relating to the protection personal data. On the basis of article 39, paragraph 1 of the GDPR, the data protection officer shall (a) inform and advise the data controller processing on its obligations under the GDPR or other provisions

Union law or the law of the Member States relating to data protection and

(b) monitoring compliance with the GDPR, other provisions of Union law or the law of Member States with regard to the protection of personal data, including with regard to the distribution of responsibilities, awareness and training of the personnel involved in processing operations, and related audits.



91. In its conclusions, the defendant points out that at the time of the entry into force of the GDPR, in mid-2018, however, it had made an informed decision not to designate of data protection officer. It refers in this respect to Article 37(1) of the GDPR which makes the appointment of a data protection officer mandatory in three cases:

"1. The controller and the processor designate in any event a data protection officer when:

a) the processing is carried out by a public authority or a public body, with the exception courts acting in the exercise of their judicial function;

(b) the core activities of the controller or processor consist of processing operations which, by virtue of their nature, their scope and/or their purposes, require regular and systematic large-scale monitoring of data subjects; Or

(c) the core activities of the controller or processor consist of a large-scale processing of special categories of data referred to in Article 9 and of personal data relating to criminal convictions and offenses referred to in Article 10."

92. The defendant maintains that none of these three cases apply to it. She is not a public authority or a public body nor, as a producer of works audiovisual companies, a large-scale processor of special categories of data, or personal data relating to criminal convictions and offences.

93. The main activity of the defendant is the production of audiovisual works. Since the defendant admittedly processed (and does) regularly personal data within the framework of (part of) its activities (i.e. for a part of its activities not fictional works), but that its main activity is not centered on treatments

which require "regular and systematic monitoring on a large scale of people concerned", Article 37(1) of the GDPR was deemed not applicable and it was therefore decided not to appoint a data protection officer. On the contrary, the defendant considered it more useful and more practical - as is still the case today - to collaborate with several privacy officers (five to be precise), or one per department. The considerations and the decision mentioned above - not to appoint a data protection officer, but rather privacy officers by department - were explicitly listed in 2018 in the statement of all the measures taken at the time by the defendant to put its professional activities in compliance with the GDPR.

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94. As noted by the controller, Article 37(1) GDPR makes the appointment of a data protection officer is mandatory in three cases (see the item 92). The Litigation Chamber agrees with the position of the defendant and notes that none of these three cases of Article 37 of the GDPR apply to the controller, so that the defendant is not required to appoint a delegate for the protection of data. Therefore, the obligations for the Data Protection Officer such as defined in Articles 38 and 39 of the GDPR are also not applicable in this affair.

95. However, this does not mean that the Respondent did not take steps to deal with the personal data in accordance with the GDPR. Using specific examples in his conclusions, the defendant refutes the findings of the Inspection Service. In what concerns the finding of the Inspection Service that the defendant does not would not demonstrate what the "aforementioned consultations" represent in practice and the "necessary information sessions", the defendant sends a statement of the

main concrete measures and approaches that it has implemented since the entry into GDPR comes into force. To this end, the defendant sends e-mails concerning the sessions information that was given, as well as attendance lists with signatures. In this regarding the process of compliance with the GDPR, the defendant communicates several exchanges by e-mail which show a direct and close cooperation between the attorneys for the defendant and several privacy officers of the defendant. The defendant also sends e-mails showing that the advisers, on the one hand, and privacy officers, on the other hand, consult closely on the privacy policy and the protection of life private. As regards subsequent follow-up, the defendant refers to its documents, including one on the procedure to follow in the event of a data leak. New employees are also systematically informed about the privacy policy and respect for privacy and must approve it as part of their contract with the defendant.

96. Finally, the Inspection Service argues that the defendant does not demonstrate how the compliance with the confidentiality and privacy protection policy is ensured in the convenient. First of all, it can be pointed out that the defendant foresees numerous technical and organizational measures, among other things to secure access by unauthorized persons and/or unintentional or unintentional dissemination. In this regard, one can first refer to the list of the most important IT security measures important.

In its pleadings, the defendant also explains its procedures with regard to concerns data leaks. The defendant also mentions the use of quits claims (see section II.2). Production staff know that they also have to

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always bring enough copies of the consent forms

necessary concerning the processing of personal data on the premises of  
filming (and that's what they do), so that the candidate-participants can confirm their  
consent or their refusal of consent with the processing of their data  
personal information in a sufficiently informed manner. Sufficient information is  
also provided when concluding contracts with new employees  
(permanent or independent). They also systematically receive explanations  
necessary - including by providing the text of the "Privacy and Respect Policy"  
of privacy" - before accepting the confidentiality rules by signing their contract.  
Finally, the defendant refers again to the complaint which gave rise to this  
procedure. Upon receipt of the letter from counsel for the plaintiff by the defendant, the complaint  
was promptly transferred to the Privacy Officer for the  
fiction department as well as to the defendant's lawyers with a request to assist  
the defendant in this regard. The Privacy Officer then assured  
the follow-up of the case with the defendant's lawyer, from which it appears again that this  
latest takes its privacy policy seriously and does not limit it to mere  
"imposition of guidelines" through the necessary texts, as the  
Inspection Service.

97. The Litigation Chamber considers that in the present case, it is disproportionate to find a  
violation of Articles 38(1) and 39 GDPR. Since the defendant is not  
obliged to appoint a data protection officer, the obligations arising from the  
Articles 38 and 39 of the GDPR do not apply to it. In view of these elements, the Chamber  
Litigation considers that the defendant has not committed a violation of articles 38,  
paragraph 1 and 39 of the GDPR.

### III. Publication of the decision

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

Datas. However, it is not necessary for this purpose that the identification data

of the parties are communicated directly.

Decision on the merits 188/2022 - 29/29

FOR THESE REASONS,

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

- pursuant to Article 100, § 1, 1° of the LCA, to close the case without further action as regards

concerns violations:

o Articles 5, 24, paragraph 1 and 25, paragraph 2 of the GDPR;

o Articles 5, paragraph 1, a) and 6 of the GDPR;

o Articles 17, 24, paragraph 1 and 25, paragraph 1 of the GDPR; And

o Articles 38, paragraph 1 and 39 of the GDPR.

- to order, pursuant to Article 100, § 1, 2° of the LCA, a dismissal of the case with regard to the

violation of Article 12(1) GDPR.

- pursuant to Article 100, § 1, 5° of the LCA, to warn the defendant for the future that the

transparency obligations provided for in Article 12, paragraph 4 of the GDPR must be

respected.

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

Court of Markets (Brussels Court of Appeal) within thirty days of its

notification, with the Data Protection Authority as defendant.

Such an appeal may be lodged by means of a contradictory request which must include the

particulars listed in article 1034ter of the Judicial Code<sup>23</sup>. The contradictory request must be

filed with the registry of the Markets Court in accordance with article 1034quinquies of the

Judicial Code<sup>24</sup>, or via the e-Deposit computer system of Justice (article 32ter of the

Judicial Code).

(Sr.) Hielke HIJMANS

President of the Litigation Chamber

23 The request contains on pain of nullity:

the indication of the day, month and year;

1°

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

Business Number ;

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

4° the object and the summary statement of the means of the request;

5° the indication of the judge who is seized of the application;

6° the signature of the applicant or his lawyer.

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