Litigation Chamber

Decision on the merits 103/2022 of 16 June 2022

File number: DOS-2020-02998

Subject: Inspection report concerning the use of cookies on the website

www.lesoir.be, www.sudinfo.be, www.sudpressedigital.be of the Rossel group

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

Hijmans, chairman, and Messrs. Christophe Boeraeve and Frank De Smet;

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

protection of natural persons with regard to the processing of personal data and

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

data protection), hereinafter "GDPR";

Having regard to the Law of 3 December 2017 establishing the Data Protection Authority (hereinafter

ACL);

Having regard to the internal regulations as approved by the House of Representatives on 20

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

Considering the documents in the file;

made the following decision regarding:

The defendant:

SA Rossel & Cie, whose registered office is located at rue royale, 100, 1000 Brussels,

registered under business number 0403.537.816, hereinafter: “the defendant”.

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I. Facts and procedure

I.1. Investigation by the Inspection Service

1. On January 16, 2019, the Management Committee decided to refer the matter to the Inspection Department

subject of “the issue of the use of cookies on media websites, on

basis of article 63, 1° of the APD law. On the proposal of the Management Committee, the Service

d’Inspection carried out several inquiries directed at the news media

most consulted Belgians online.1

HLN

DPG Media nv

http://hln.be/

Het Nieuwsblad

mediahuis

http://nieuwsblad.be/

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TRV

Sudinfo

The DH□

From Standaard□

RTBF□

TRV□

http://deredactie.be/□

Rossel Group□

http://sudinfo.be/□

IPM Group SA□

http://dhnet.be/□

mediahuis□

RTBF□

http://standaard.be/□

http://rtbf.be□

http://gva.be/□

http://RTL.be□

http://hbvl.be/□

Gazet van Antwerpen□

mediahuis□

RTL□

RTL Group□

10 Het Belang van Limburg Mediahuis□

11□

The evening□

12 7 out of 7□

13 The Free□

Rossel Group□

http://lesoir.be/□

DPG Media nv□

http://7sur7.be/□

IPM Group SA□

http://lalibre.be/□

14 DeMorgen□

DPG Media nv□

http://demorgen.be/□

15 De Tijd□

16□

the future□

17 VTM□

MEDIAFIN NV□

http://tijd.be/□

Nethys.sa□

http://lavenir.net/□

DPG Media nv□

http://vtm.be□

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18 Sudpresse□

Editions□

Rossel Group□

http://www.sudpressedigital.be/ EN□

Foxgloves□

19 Knack□

Roularta Media□

http://knack.be/□

group□

20 The Snitch□

Roularta Media□

http://levif.be/□

group□

NL□

FR□

1 This is the second decision following this decision of the Management Committee. See also Decision 85/2002 of the□

Litigation Chamber of May 25, 2022..□

2. On 7 October 2020, the investigation by the Inspection Service is closed, the report is attached to the file and this is transmitted by the Inspector General to the President of the Chamber Litigation (art. 91, § 1 and § 2 of the LCA).

3. The Inspection report refers to the “thematic dossier on cookies” published on the ODA website2. The technical analysis accompanying the report refers to the principles compliant use of cookies according to the GDPR and the ePrivacy3 directive, and summarized as follows by the Inspection Service:

▪ Obtain the consent of the person concerned before any use of cookies with the exception of strictly necessary cookies;

▪ Provide accurate and specific information on the data tracked by each cookie and their purpose in plain language before consent is received;

▪ Document and store the consents of the persons concerned;

▪

Allow data subjects to access the service even if they refuse to authorize the use of certain cookies;

▪ Make it as easy for data subjects to withdraw their consent than to give their consent.

4. In this respect, the Inspection report specifies that particular account should be taken of the following aspects:

▪ “Further browsing” is no longer accepted because it is contrary to the GDPR;

▪ In order to meet the requirement of consent, which implies freedom of choice, it is necessary to have the possibility of setting cookies and clear information on the purposes of the categories of cookies;

▪ For websites that currently use a setting, you must check with the technical level the effectiveness of this setting.

5. The findings of the Inspection Service relating to the use of cookies on the sites

defendant's website include the following findings:

2 https://www.autoriteprotectiondonnees.be/citoyen/themes/internet/cookies .

3 https://gdpr.eu/cookies. "GDPR.EU is a website operated by Proton Technologies AG, which is co-funded by Project REP-

791727-1 of the Horizon 2020 Framework Program of the European Union. "

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"Finding 1": "the deposit of cookies not strictly necessary

before obtaining consent" (violation of article 6.1.a of the GDPR)

o From a combined reading of article 6.1.a of the GDPR and article 129 of the law

electronic communications which supplements and clarifies the provisions of the GDPR4,

placing and/or reading cookies requires the consent of the

person concerned, unless they are strictly necessary to carry out the sending

communication via an electronic communications network or for

provide a service expressly requested by the user.

o Technical analyzes show that cookies (47 for Sudinfo, 104 for Le

Soir, 23 for Sudpresse Editions Digitales) are installed before the person has

could give consent. These include third-party cookies (27

for Sudinfo, 104 for Le Soir, 23 for Sudpresse Editions Digitales), while in

In principle, strictly necessary cookies are first-party cookies5.

o The statement of cookies present on each site clearly shows cookies

behaviour6 (Outbrain and Rubicon for Sudinfo and Le Soir, Doubleclick for

Sudpresse Editions Digitales), social networks (Facebook) and statistics

(Google Analytics, Gemius).

o Only 3 cookies for the Sudinfo site, 2 cookies for the Le Soir site and 1 cookie

for the Sudpresse Editions Digitales site could be identified as

strictly necessary.□

▪□

“Finding 2”: “use of ‘further browsing’” (harm to□

articles 4.11 and 6.1.a , and 7.1 of the GDPR)□

o Technical analyzes show that the Sudinfo, Le Soir and Sudpresse websites□

Editions Digitales uses the “further browsing” technique by means of a□

volatile banner relating to cookies which disappears if the user continues□

browsing without taking any action.□

o Continuation of navigation cannot be considered as giving rise to a□

valid consent within the meaning of Article 4.11 GDPR for installation and playback□

cookies that are not strictly necessary. According to this provision,□

the□

consent must indeed consist of “a statement or a clear positive act”,□

from□

bottom□

12/2019□

4 See the Litigation Chamber's analysis of the DPA's jurisdiction over cookies in its decision on□

to□

website□

https://www.dataprotectionauthority.be/professional/publications/decisions.□

5 See “Understanding what a cookie is” in□

https://www.dataprotectionauthority.be/professional/themes/cookies.□

6 See the terminology used in the cookie policy of the “lesoir.be” site.□

the “cookies” thematic folder of the website of□

december□

available□

17-20,

ODA,

2019,

page

p.p.

via

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the

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which cannot be deduced from the simple fact that the Internet user continues his

navigation. The silence or inactivity of the person concerned, as well as the simple

fact that it continues to use a service, cannot be considered as a

active indication of choice 7.

o The data controller is also at odds with the obligation

of article 7.1 of the GDPR which requires him to demonstrate that the data subject has

given consent to the placement of cookies that are not strictly necessary.

▪

“Finding 3”: “social network and audience measurement cookie

without consent” (violation of Article 6.1.a of the GDPR)

o The cookie settings screen for the Sudinfo and Le Soir sites does not resume

social network cookies preventing the user from being able to consent to their

use.

o The Rossel Group cookie policy also mentions that cookies

audience analysis and performance cookies are cookies of

operation that are essential and therefore cannot be disabled. They don't

do not require the user's consent and cannot be deactivated as such

as shown on the Sudinfo and Le Soir cookie settings screen. The screen

for setting cookies on the Sudinfo and Le Soir sites offer

to deactivate them.

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It follows from Article 6.1.a of the GDPR and Article 129 of the Communications Act

electronic documents which supplement and specify the provisions of the GDPR, the placement

and/or the reading of cookies require the consent of the person concerned,

unless they are strictly necessary to send a communication

via electronic communications network or to provide a service

expressly requested by the user.

o In the current state of the legislation, there is no exemption from the obligation to obtain the

consent of the persons concerned for audience measurement cookies,

even when it comes to “first party” cookies. Data processing at

personal character in the context of the installation and reading of cookies

statistics cannot be based on the legitimate interest of the site owner

Internet or app8.

7 CJEU, 1 October 2019, Planet49, C-673/17, ECLI:EU:C:2019:801, § 61 and 62.

v.

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https://www.dataprotectionauthority.be/professional/themes/cookies.

" Questions "

thematic

case

in

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the

" Cookies "

from

website

of

ODA,

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o In its decision on the merits 12/2019 of 17 December 20199, the Chamber

Litigation believes that “first party” statistical cookies do not fall under

not the “strictly necessary cookies” exception of article 5.3, paragraph 2

of the ePrivacy Directive, an exception which could be based on the legal basis

of the “legitimate interest” of the GDPR insofar as the ePrivacy Directive specifies and

complements the GDPR on this point10. The Litigation Division does not rule out that in

certain conditions, certain statistical cookies are indeed necessary

to provide a service (e.g. informational) requested by the person

concerned, for example to detect navigation problems. It is not

however, not in question here.

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“Finding 4”: “pre-checked boxes for types of cookies not

strictly necessary for the partners” (4.11, 6.1.a and 7.1 of the GDPR)

o Since the GDPR requires a "clear affirmative statement or act" (Article 4.11),

all presumed consents based on a more implicit form of action of

the part of the data subject (e.g. a box checked by default), will not be

compliant with GDPR11 consent standards.

o According to the Court of Justice of the European Union12, Article 2.f) (definition of

consent) and article 5.313 (consent to cookies) of the Directive

ePrivacy, read in conjunction with Article 4.11 and Article 6.1.a of the GDPR must be

interpreted as meaning that the consent referred to in these provisions is not

validly given

when

storage of information or

access to

information already stored in the terminal equipment of the user of a site

Internet, through cookies, is allowed by means of a checked box

by default that this user must uncheck to refuse to give his

consent.

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It appears from the technical analyzes that the cookie setting screen provides

the activation by default of the different types of cookies that are not strictly necessary.

Similarly, the partner selection screen is in "Authorize" mode by default.

for some 500 listed partners.

9 Available via the web page https://www.autoriteprotectiondonnees.be/professionnel/publications/decisions.

10 V. the Litigation Chamber's analysis of the DPA's jurisdiction over cookies in its decision on the

bottom 12/2019 of December 17, 2019, pp. 17-20, available on

the web page https://www.autoriteprotection

data.be/professional/publications/decisions.

11 See the “Guidelines on consent within the meaning of Regulation 2016/679” of the Working Group on the protection of

data, p. 36, https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=623051, and the “Guidelines

05/2020

166,

https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_fr.pdf.

12 CJEU, 1 October 2019, Planet49, C-673/17, ECLI:EU:C:2019:801.

13 Provision transposed into Belgian law in article 129 of the law on electronic communications of 13 June 2005,

MB 20.06.2005.□

(EU) 2016/679"□

the EDPB, period□

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sense of□

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o Through this practice, the Inspection Service also notes that the person in charge□

of the processing also goes against the obligation of article 7.1 of the□

GDPR which requires him to demonstrate that the person concerned has given his□

consent to the placement of cookies not strictly necessary.□

▪□

“Finding 5”: “deficient cookie policy and□

information in English” (article 4.11, 12.1, 13 and 14 of the GDPR)□

o Article 12.1 of the GDPR provides that the controller must take steps□

appropriate measures to provide the data subject with any information referred to□

to Articles 13 and 14 of the GDPR in a concise, transparent, understandable way□

and easily accessible, in clear and simple terms. Among the information to□

provide, the controller must in particular communicate the categories□

personal data processed and any recipients or□

categories of recipients of personal data.□

o We note that the banner and the various screens relating to cookies on the sites□

of Sudinfo and Le Soir are in English, which does not facilitate understanding□

when it comes to French-speaking media.□

o With regard to the categories of personal data processed, it is difficult□

to reconcile the information contained in the cookie policy and in□

the cookie setting screen – the cookie setting tool not being□

not even mentioned in the cookie policy. Cookies from□

social networks are not included in the cookie settings screen. We□

also notes that advertising cookies which are a type of□

cookies following the cookie policy are subject to no less than four□

choice in the cookie settings screen according to a gradation in the degree□

accepted advertising profiling. Cookies are not documented□

individually preventing the user from being able to control what is done with his□

data.□

o With regard to recipients, the Inspection Department notes that only 13□

partners using behavioral cookies are mentioned in the policy□

relating to cookies. However, the partner selection screen which is accessible□

only via the volatile cookie banner references some 500□

such partners.□

o With regard to the retention period, the cookie policy is limited to□

to give a definition of session cookies and permanent cookies without□

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provide concrete information on the retention periods of the cookies placed□

by visiting the sites concerned.□

o The information provided therefore does not meet the requirements of Articles 12.1, 13 and□

14 GDPR. Therefore, the person concerned is not able to give□

truly informed consent within the meaning of Article 4.11 of the GDPR.□

▪□

“Finding 6”: “withdrawal of consent not respected” (violation of

GDPR article 7.3)

o Article 7.3 of the GDPR provides that the data subject has the right to withdraw his

consent at any time.

o Technical analyzes show that the withdrawal of consent is not

effective. Many cookies are still present, including third-party cookies of the

behavioral and social, nor does it preclude the addition of new

Cookies.

6. In addition to the Inspection report summarized above, 3 technical reports are

provided by the Inspection Service as separate documents relating to the sites

“lesoir.be”; “sudinfo.be” and “sudpressedigital.be”, as well as three forms of

"traceability of the processing chain" each listing more than 100 parts (names of

files) collected by the Inspection Service and produced in the files14. Bedroom

Litigation reflects below the findings made on the "lesoir.be" site, and refers

to the parts with regard to the observations made on the sites "sudinfo.be" and

“sudpressedigital.be”, which findings are similar.

▪ First technical observation: "number of cookies placed before the collection of the

consent of the person concerned”:

o The Inspection Service observes the loading of 104 cookies before the

data subject has given their consent, with more than 76% of cookies

from third parties.

o The technical report then provides the list of cookies identified and indicates the name

of the only two cookies considered strictly necessary which have been

spotted on

the “lesoir.be” website.

It is "dc_gtm_UA-49487766-1"

and "Euconsent"□

(cookie used by□

IAB Europe Transparency & Consent□

14 Exhibits 6-7-8-9-10-11 of the APD file.□

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Framework for storing user consent)15. The fact that the□

consent is sought after placing cookies and how to collect□

this consent, and the fact that this consent does not influence the number of□

cookies placed on the site is illustrated by the print-screens below extracted from□

technical report “lesoir.be”.□

15 On the qualification of the "euconsent" cookie, see Decision on the merits 21/2022 of 2 February 2022 of the□

Litigation, § 409-423, from which it appears that the Litigation Chamber does not consider that such a cookie, as set□

implemented by IAB Europe, was strictly necessary or justified by a legitimate interest within the meaning of Article 6.1.f of the G

taking into account the particular circumstances of the specific case examined in the context of this decision.□

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▪ Second technical observation: “determination of cookies strictly□

necessary among those placed before obtaining consent and□

percentage of undocumented cookies »□

▪ Third technical observation: “techniques used for the request for□

consent"□

“This finding shows that the “further browsing” technique is used and that□

Consent Management Platforms are not satisfactory. The banner□

volatile is an integral part of the "further browsing" technique and disappears□

in general as soon as the navigation is started. Consent management□

platforms do not give satisfaction […] . This is seen by the number of□

partners to whom the authorizations are given there by default […]”16 In

supplement to the technical report, the legal report of the Inspection Service

describes as follows the deployment mechanism of the technique of "further

browsing”:

16 Technical analysis report on the “Lesoir.be” site, p. 18.

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Decision on the merits 103/2022 - 14/76

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▪ Fourth technical observation: "the clarity of cookie policies"

o Extracts from the report on the “lesoir.be” site:

“We are now analyzing another essential element that allows information

transparent and clear for the benefit of those concerned. These are the policies

of use and management of cookies. To assess this element, we will base ourselves on the

ease of access to information, the structure of information and the accuracy of

information. To assess ease of access, we consider the gap between the ideal,

know the presentation of the cookie policy at the entrance to the site, and the situation

real to access it. In terms of clarity, the fact that the structure is clear,

logical and organized, will allow the person concerned to have the possibility of

easily locate the information he needs to help him determine

knowingly whether or not it allows the use of this or that other

given. With regard to the correctness of the information, an analysis of the content

information is produced, based on our technical knowledge of the

domain. »

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o The Inspection Service then provides the following explanations with regard to

concerns the transparency of the information provided with regard to the clarity

(structure) and accessibility of the cookie policy:

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"[...] We return to the home page with the warning banner on

the use of cookies which has disappeared and by scrolling the page to the end,

we obtain at the bottom of the page the link “Cookie policy”. With respect to content,

first of all the structure, it is considered acceptable. On the other hand the

content leaves something to be desired. “As the policy is not included in a file, we

find below the copy of the content in French. A version in 3 languages

national languages is therefore available as well as an English version.

Information on the purpose of cookies:

Reading the policy, we learn that globally, cookies are

used either:

For operational purposes,

For behavioral analysis purposes,

For social media sharing purposes.

It should be noted that the description of these purposes is brief and that in

reality an unjustified and unjustifiable grouping is made.

Indeed, under the term operation, the following are referred to here:

Cookies necessary for easy connection

Cookies necessary for a secure connection

Audience analysis cookies

Performance analysis cookies

Behavioral analysis cookies to improve the user experience

the user.

These cookies are considered strictly essential by the Rossel group,

and therefore cannot be disabled and therefore does not require

the

user consent. Under the term of behavioral analysis,

are referred to here:

Personal advertising cookies (targeting)

Behavioral analysis cookies to improve the user experience

the user.

It can be seen that behavioral analysis cookies for improving

user experience are found and in analytics cookies

behavioral but also in operating cookies, which is not

not the clearest.

Another point which does not contribute at all to the clarity of the content of this

cookies policy is the fact of putting the links to the cookies policies

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partners. If I follow the link to the first of these, Outbrain, I find myself on

facing the following screen:

Or rather than having outbrain's cookie policy, the data subject

finds herself with new cookies placed without having given her consent, where she

must go to give or not his consent for the use of cookies for his

navigation on the Outbrain site which will also redirect it to the policies of

cookies from its partners and so on, a real never-ending story.

This mechanism is quite simply contrary to the protection of personal data.

personal character of the data subject.

The policy presents 13 partners whereas if we unfold the CMP tool of

DIDOMI, we realize that it refers to about 500 companies

partners which are selected by default.

Through the CMP, it is also possible to access the cookie policies of

each partner (506) individually, making the list of the 13 partners

totally incomplete, useless and misleading.

Below is the list of partners selected by default with the

partners included in the policy (red box with the arrow). »

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“The Inspection Service then provides a list of selected partners

by default, some of which are circled in red (Twitter, Teads, Sharethrough,

Outbrain UK, Ligatus GmbH, Facebook, Digiteka Technology, Dailymotion,

AppNexus,)”

"The last point noted is the fact that cookies and their real and

precise, not global, are not documented. The choice is to be made on the

generic purposes and partner companies and not cookies. The only way

acceptable to do is to name each cookie and explain its or

its real purposes. “The Inspection Service provides a copy of the Police

"cookie" in force on the date of the report. »

o The legal report of the Inspection Service specifies in this respect that it

“does not dwell” on “the accessibility of the cookie policy” which is amply

described in the technical report17.

17 Legal report of the Inspection Service, document 13 of the administrative file, p. 4.

▪ Fifth technical observation: “access to basic services if refusal of

consent "

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▪ Sixth technical observation: "result of the possibility of modifying its

consent once it has been given, and in a way as simple as the

mechanism used to give it »

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▪ Seventh technical observation: “use of cognitive biases in the

non-neutral presentation of choices”.

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"The last control which tends to demonstrate the loyalty of the publisher will be

the use of cognitive biases in the non-neutral presentation of the choices that

the data subject must do to indicate their consent […].18”

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The findings included in the technical analysis reports relating to the site

Sudinfo19, and in

the

analysis report

website technical

www.sudpressedigital.be20 are similar and just as extensive.

o The Inspection report specifies that

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“contrary to the technical analysis reports (exhibits 6, 7 and 8),” the

investigation report “does not address the problem of cognitive biases

intended to trick the user into unknowingly allowing cookies”

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the Inspection report “is not interested either in the choice and

the information offered to the data subject for each cookie

but for each type of cookie depending on the purpose

continued" and

-

the Inspection report “does not dwell further on the accessibility of

the cookie policy, the consent collection tool and the

viewing videos for a user who would have prevented all

deposits of cookies and

the display of banners and windows

contextual through the configuration of browsers" because "some

cookies may be strictly necessary to provide these

functionalities and not require the prior consent of

the user ".

7. On November 18, 2020, the Litigation Chamber sends a request for a report

additional information to the Inspection Department regarding exhibits 9, 10 and 11 which contain the

list of all the files of documents collected by the Inspection Service at the base

of his various observations and screenshots. The request of the Litigation Chamber

is formulated as follows:

18 Article 25 GDPR.

19 Exhibit 7 of the DPA administrative file.

20 Exhibit 8 of the DPA administrative file.

8. On 20 November 2020, the Inspection Service sends its additional report to the

Litigation Chamber. This report includes an explanation of the methodology

of the "traceability form" document and a description of the traceability form.

9. The Litigation Chamber reproduced below

(1) the beginning of the report relating to the methodology of the “reporting form” document

traceability”:

10. The Inspection Service specifies that this document concerns the preservation process

of the chain of custody, and aims to ensure that the chain of custody of the evidence is

preserved, and that it is with this in mind that 3 “Chain traceability forms

of treatment” have been established.

(2) An extract from the additional report of the Inspection Service:

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11. Subsequently, in the context of the note submitted prior to his speech to

the hearing on the basis of Article 48 of the Internal Rules, the Inspection Service

there specifies that “The duty of additional investigation requested by

bedroom

litigation aimed to understand what the traceability forms of the

chain of processing of the websites serve. This has no influence on the findings.

technical since these forms are essentially used to guarantee that the

evidence files used for the findings remain intact. ".

12. The Litigation Chamber decides on December 23, 2020, pursuant to Article 95, § 1, 1°

and article 98 of the LCA, that the case can be dealt with on the merits.

13. On December 22, the defendant is informed by registered mail of the

provisions as set out in article 95, § 2 as well as in article 98 of the LCA. She is

also informed, pursuant to Article 99 of the LCA, of the deadlines for transmitting its

conclusions.

14. The deadline for receipt of the defendant's submissions in response is fixed

to February 9, 2021.

15. On January 14, 2021, the defendant accepts the principle of subsequent communication

by e-mail and requests a copy of the file (art. 95, §2, 3° LCA), which

sent to him on January 19, 2021. On the same date, the complainant expressed his intention

to have recourse to the possibility of being heard, in accordance with Article 98 of the LCA.

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16. On January 21, the defendant requests an additional period of two months to

deliver its findings.

17. The 26th

January 2021,

the Litigation Division grants a period of one month

supplement, bringing the conclusion deadline to February 29, 2021.

18. On February 23, the Litigation Division received the defendant's submissions.

19. On January 20, 2022, the Respondent is informed that the hearing will take place on January 24, 2022.

February 2022. The hearing must then be postponed for internal organizational reasons

of ODA.

20. On February 23, 2022, the Litigation Chamber notifies a new hearing date to the

respondent, namely March 31, 2022. On March 8, the Litigation Chamber informed the

defendant because it invited the Inspection Service to be present at the hearing,

that a copy of the defendant's conclusions was sent to this Service with

invitation to respond before the following March 15.

21. On March 14, 2022, the Litigation Chamber receives the additional note from the Service

of Inspection, and sends it on March 16, 2022 to the defendant.

22. On March 31, 2022, the defendant was heard by the Litigation Chamber.

23. On May 13, 2022, the minutes of the hearing are submitted to the parties for comment

within one week of receipt of the document.

24. On May 27, 2022, the Litigation Chamber received the comments of the

defendant, which it annexed to the minutes.

II. Motivation

II.1. On the competence of the DPA in terms of cookies

25. Pursuant to Article 4 § 1 LCA, the DPA is responsible for monitoring compliance with the

fundamental principles of data protection, as affirmed by the GDPR and

other laws containing provisions relating to the protection of the processing of

personal data.

26. Pursuant to Article 33 § 1 LCA, the Litigation Chamber is the body of

ODA administrative litigation. It is, among other things, seized of the complaints that are brought to it

transmitted via the IMI system, on the basis of Article 56 of the GDPR.

27. Pursuant to articles 51 and s. of the GDPR and Article 4.1 LCA, it is up to the Chamber

Litigation as an administrative litigation body of the DPA, to exercise a

effective control of

the application of the GDPR, protect

them

freedoms and rights

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fundamental rights of natural persons with regard to processing and to facilitate the free flow

personal data within the Union.

28. In this case, with regard to the applicable legislation and the competence of the DPA in

Regarding cookies, the Litigation Chamber refers to the explanations provided in

its decisions below: decision nr. 11/2022 of January 21, 2022; decision no. 12/2019 from

December 17, 2019, decision no. 24/2021 of February 19, 2021, decision no. 19/2021 from 12

February 2021, and in particular decision nr. 11/2022 of January 21, 2022.

29. For educational purposes, the Litigation Chamber specifies that it is competent to

adjudicate in cases concerning the processing of personal data, in

pursuant to Article 4, § 1 of the LCA, Article 55 of the GDPR and in compliance with Article 8

of the Charter of Fundamental Rights of the European Union.

30. Furthermore, under Belgian law, the Belgian Institute for Postal Services and

telecommunications

(BIPT) was

the designated controller for

the law on

them

Electronic Communications (ECL below), including for article 129 of the ECL which

executes article 5.3 of Directive 2002/581 (hereinafter, the "e-privacy Directive"),

in accordance with article 14, § 1 of the law of 17/01/2003 relating to the status of the regulator

Belgian postal and telecommunications sectors.

31. In addition, the legal predecessor of the EDPB (the Article 29 Working Party on

data protection, hereinafter: Group 29) also clarified that the requirements of the

GDPR for Obtaining Meaningful Consent applies to situations that

fall within the scope of the e-Privacy Directive21.

32. In the “Planet49” judgment, the Court of Justice of the European Union notably

confirmed that the collection of data through cookies could be qualified as

processing of personal data22. Therefore, the Court interpreted Article 5.3

of the Privacy and Electronic Communications Directive using the GDPR23, plus

particularly on the basis of Article 4.11, Article 6.1.a of the GDPR (requirement of

consent) and Article 13 of the GDPR (information to be provided).

33. In its Opinion 5/2019 on the interaction between the ePrivacy Directive and the GDPR24, the

European Data Protection Board (hereinafter "EDPB") has confirmed that the

data protection authorities are competent to apply the GDPR to

data processing, also in the context where other authorities would be

21 Data Protection Working Party Article 29, Guidelines on Consent within the meaning of the Regulation

2016/679, WP259, p. 4.

22 CJEU, 1 October 2019, Planet49, C-673/17, ECLI:EU:C:2019:801, § 45.

23 As well as with the help of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the prote

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

24 EDPB, Opinion 5/2019 on the interactions between the Privacy and Electronic Communications Directive and the GDPR, in

in particular with regard to the competence, tasks and powers of data protection authorities, § 69.

authorities, under the national transposition of the e-Privacy Directive, for

control “certain elements of the processing of personal data”.

34. As indicated above, BIPT's competence to supervise certain elements of the

processing – such as the placement of cookies on the terminal equipment of

the Internet user – does not prejudice the general competence of the DPA. As precised

by the EDPB, the data protection authorities remain competent for matters

processing (or elements of processing) for which the e-Privacy Directive does not provide

no specific rules. There is indeed a complementarity of skills between

BIPT and the DPA in the specific case, insofar as on the basis of article 4 of the LCA,

the DPA is responsible for monitoring compliance with the fundamental principles of the

data protection (as affirmed by the GDPR and in other laws containing

provisions relating to the protection of personal data), and that the

Consent is indeed a fundamental principle in this area.

35. Furthermore, Opinion 5/2019 on the interaction between the e-Privacy Directive26 and the GDPR

aforementioned of the EDPB also indicates that national procedural law determines what

must happen when a data subject lodges a complaint with the authority of

data protection relating to the processing of personal data (such as by

example the collection of data by means of cookies), without also complaining about

(potential) breaches of the GDPR. This corresponds well to the present case.

36. It is also clear from the EDPB's ePrivacy Opinion 5/2019 that the e-Privacy Directive aims to

“specify and supplement” the provisions of the GDPR with regard to the processing of

personal data in the electronic communications sector, and this

ensuring compliance with Articles 7 and 8 of the Charter of Fundamental Rights of

the EU.

37. The Litigation Chamber notes, in this regard, that Article 8.3 of the Charter provides that the

processing of personal data is subject to the control of an authority

independent, responsible for data protection.

38. In this respect, the Court of First Instance of Brussels has clearly indicated that the

legal predecessor of the DPA was competent to submit a requisition to a

court "to the extent that it relates to alleged violations of the privacy law of the

8 December 1992, to which article 129 of the LCE, which clarifies and completes it, refers

25 EDPB, Opinion 5/2019 on the interactions between the Privacy and Electronic Communications Directive and the GDPR, in

in particular with regard to the competence, tasks and powers of data protection authorities, § 69.

26 EDPB, Opinion 5/2019 on the interactions between the Privacy and Electronic Communications Directive and the GDPR, in

in particular with regard to the competence, tasks and powers of data protection authorities,

03/12/2019,

§ 70.

moreover expressly"27. As indicated below, Article 129 LCE is the implementation

in Belgian law of article 5.3 of the privacy directive.

39. The DPA is thus competent to verify whether the requirement of the fundamental principle that

constitutes consent around the disputed cookie whether or not it complies with the

GDPR consent terms.

40. The DPA is also competent to verify compliance with all the other conditions

made mandatory by the GDPR – such as transparency of processing (Article 12 of the

GDPR) or the information to be communicated (article 13 of the GDPR).

41. As confirmed by the Court of Justice in the Facebook and Others judgment, only the recording

and the reading of personal data by means of cookies falls within the scope

application of Directive 2002/58/EC, while “all previous operations

and subsequent processing activities of such personal data by means of

other technologies do fall within the scope of the [GDPR]"28.

42. In the meantime, the DPA has seen its powers in terms of controlling the placement of

"cookies" confirmed through the law of December 21, 2021 transposing the Code

electronic communications European29. At a time when the findings of this

investigation have been carried out, the competence of the DPA with regard to the placement of

"cookies" involving personal data was not yet anchored in

Belgian law.

43. Without any possible dispute, the DPA is competent for the control of

data processing carried out from personal data collected through

cookies, such as the transfer of such data to third countries. There's

it is necessary to distinguish the legal framework and the rules of jurisdiction for the placement of

cookies on terminal equipment, as set out above, on the one hand, and the framework

law applicable to the processing of data collected by cookies, namely, the GDPR and the

national legal framework relating to the processing of data, as is clear from the judgment of the

Court of Justice "Fashion ID".30

27 Brussels Court, 24th Civil Affairs Chamber, 16 February 2018, case file no. 2016/153/A, point 26, p. 51, available at

address:

https://www.autoriteprotectiondonnees.be/news/lautorite-de-protection-des-donnees-defend-son-argumentation-

before-

the court-of-appeal-of-brussels.

28 CJEU, 15 June 2021, C-645/19, ECLI:EU:C:2021:483, § 74.

29 Articles 10/2 of the law of 21 December 2021 transposing the European electronic communications code

and modification of various electronic communications provisions, MB. December 31, 2021.

30 CJEU, 29 July 2019, C-40/17, ECLI:EU:C:2019:629, § 87 et seq.

II.2. Reminder of the basic principle and applicable legislation concerning the use of tools

tracking and cookies

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44. Before examining the corresponding shortcomings identified by the IS report, the

Litigation Chamber considers it useful, for educational purposes, to conduct a short

introduction to cookies and a reminder of the basic legal principles

regarding internet user tracking tools, including cookies.31

45. The term tracers includes cookies and HTTP variables, which may in particular

pass through invisible pixels or "web beacons", "flash" cookies, access

terminal information from APIs (LocalStorage, IndexedDB, identifiers

advertising such as IDFA or Android ID, GPS access, etc.), or any other identifier

generated by software or an operating system (serial number, MAC address,

unique terminal identifier (IDFV), or any set of data used to calculate

a unique fingerprint of the terminal (for example via fingerprinting).

46. These cookies and other tracers can be distinguished according to different criteria, such as

the purpose they pursue, the field that places them or their lifespan. The

cookies can thus be used for many different purposes (among others,

to support communication on the network - "connection cookie" -, to measure

the audience of a website - “audience measurement cookies, analytical cookies or cookies

statistics”-, for marketing and/or behavioral advertising purposes, for

authentication...).

47. Cookies can also be distinguished according to the domain that places them, they are thus “

first party" or "third party". “First party” cookies are placed

directly by the owner of the website visited, unlike "third-party cookies", set

placed by a domain different from the one visited (for example when the site incorporates

elements from other sites like images, social media plug ins - the button "

Likes” from Facebook for example – or advertisements). When these elements are extracted

by the browser or by other software from other sites, these may

also place cookies that can then be read by the sites that have them

placed. These "third-party cookies" allow these third parties to monitor the behavior of

Internet users over time and across many sites and to create, from these

data, user profiles.

48. Cookies can also be distinguished according to their period of validity, depending on whether they are

“session” cookies or “persistent” cookies. “Session cookies” are

automatically erased when the browser is closed while "cookies

31 The Litigation Chamber reproduces in this part the explanations provided in its decision 85/2022 of May 25

2022.

persistent" remain stored on the device used until their expiration date (which may

expressed in minutes, days or years).

49. From a legal point of view, a distinction should be made between tracers that must be subject to

consent by the user, of those who should not be subject to it.

50. Trackers that do not require consent are those strictly

necessary for the provision of an online communication service expressly

requested by the user, or the tracers which aim to allow the transmission of the

communication by electronic means. These trackers do not require consent

users. The processing of personal data by them

tracers is generally based on the legitimate interest of the data controller

(Article 6.1.f) of the GDPR).

51. Among the cookies that do not require consent before being placed on

the user's equipment, we find those retaining the choice expressed by the

users on the deposit of tracers, those intended for authentication with a

service, those allowing to keep the contents of a shopping cart, or those

personalizing the user interface (for example, for the choice of language or the
presentation of a service), when such personalization constitutes an element
intrinsic and expected from the service.
52. The placement of other tracers and cookies must be subject to consent
prior. Processing on the basis of legitimate interest is also prohibited for these
Cookies. All cookies not having the exclusive purpose of allowing or facilitating a
communication by electronic means or not strictly necessary for the
provision of an online communication service at the express request of the user,
therefore require prior consent. These can for example be related to
the display of personalized or non-personalized advertising (when tracers
are used to measure the audience of the advertising displayed in the latter case). This guy
cookie may also be linked to sharing features on networks
social. In the absence of consent (therefore in the event of a refusal by the user),
these tracers cannot be deposited and/or read on his terminal.
53. As regards more specifically the rules of law applicable to the placement of
cookies on the terminal equipment of a subject of law, article 6.1 of the GDPR must be read in
combination with article 129 of the Law of 13 June 2005 relating to Communications
(hereinafter LCE32) applicable at the time of the facts and which constitutes a
32 Law of 13 June 2005 on electronic communications, M.B. 20.06.2005.

clarification and specification of Article 6 of the GDPR.33 Article 6.1 of the GDPR provides that a
data processing is only lawful if and insofar as it is based on one of the bases
lawfulness of the processing provided for in this article. Article 129 of the LCE provides that the
consent of the data subject is required for the placement and/or
reading cookies, except when these cookies are strictly necessary to ensure
sending a communication via an electronic communications network or providing

an information society service expressly requested by the subscriber34.

54. In its “Planet49” judgment, the Court of Justice ruled that the term “consent” used

in article 5.3 of the ePrivacy Directive 2002/58 (transposed into Belgian law via article 129

LEC) should be understood as the “consent of the data subject” as

defined in Directive 95/46 (predecessor in law of the GDPR).35

55. The Litigation Division provides details below regarding the rules

applicable to “analytical” purpose cookies, also referred to as cookies

“statistics”, when the findings of the Inspection Service call on these

Notions.

II.3. The IAB “Transparency and Consent Framework” (“IAB TCF”)

56. The Litigation Chamber refers to the explanations provided in its decision on the merits

21/2022 of February 2, 2022:

“IAB Europe is a federation representing the advertising and

digital marketing at European level. It includes companies

members as well as national associations, with their own companies

members. Indirectly, IAB Europe represents approximately 5,000 companies, including

large companies and national members14”

33 See Electronic Communications Bill, Doc. Speak. Chamber, DOC 51 1425/001, p. 73. The Present

article 129 is repeated in article 138 of the bill; see also EDPB opinion 5/2019 on the interactions between the

ePrivacy Directive and the General Data Protection Regulation, in particular, with regard to the tasks and

powers of data protection authorities, 12 March 2019, nr. 38.

34 Article 129 LCE provides as follows: “The use of electronic communications networks for the storage of

information or to access information stored in the terminal equipment of a subscriber or user

final is permitted only on condition that:

1° the subscriber or end user concerned receives, in accordance with the conditions laid down in the law of 8 December 1992

relating to the protection of privacy and with regard to the processing of personal data, information

clear and precise concerning the purposes of the processing and its rights on the basis of the law of December 8, 1992;□

2° the data controller gives, prior to the processing, in a clearly legible and unequivocal manner, the□

possibility for the subscriber or the end user concerned to refuse the planned treatment.□

Paragraph 1 applies without prejudice to the technical recording of information or access to information□

stored in a subscriber's or end-user's terminal equipment for the sole purpose of performing or facilitating□

sending a communication via an electronic communications network or providing a service of the company of□

information expressly requested by the subscriber.□

The absence of refusal within the meaning of the first paragraph or the application of the second paragraph does not exempt the

obligations of the law of December 8, 1992 relating to the protection of privacy with regard to the processing of personal data□

personal character which are not imposed by this article. »□

35 CJEU, 1 October 2019, Planet 49, C-673/17, ECLI:EU:C:2019:801, § 50.□

57. IAB Europe describes the TCF as follows:□

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"In its current form,□

cross-industry that facilitates the compliance of the advertising sector□

the TCF is a best practice standard□

digital with certain EU privacy and protection rules□

data and which aims to provide individuals with transparency and control□

increased on their personal data. More specifically, it is a "□

framework" within which companies operate independently and which□

helps them meet the requirement to have a GDPR legal basis for everything□

processing of personal data and the obligation to obtain the□

user consent for storing and accessing information on a□

user's device under the Privacy and Communications Directive□

electronics”36.□

58. For the TCF, there are also companies that offer “management platforms□

consent”

(hereinafter “Consent Management Platforms” or “CMP”).

Concretely, a CMP takes the form of a pop-up which appears during the first

connection to a website to collect, among other things, the consent of the Internet user to the

placement of cookies and other identifying information37.

II.4. On the procedure

59. The defendant has raised procedural objections, the main ones relating to the language

used in the Inspection report, the absence of serious indications (arbitrary referral),

the lack of motivation for the referral, the methodology of the Inspection Service, the

uncertainties of the legal framework. For these reasons, the defendant claims the nullity of the

procedure, the dismissal of the grievances raised, the dismissal of the documents and reports of the Services

of Inspection, as well as the dismissal for lack of legal basis, incompetence and excess of

power to the extent that the requirements of the Litigation Chamber would exceed the

legal cookie requirements.

 Language used

60. The defendant notes that the Inspection Service was seized on the basis of Article 63.1 of

the LCA, by means of a decision of the Management Committee written in Dutch. The

defendant considers that this document contravenes article 57 of the law of December 3

2017 according to which: “the Data Protection Authority uses the language in which the

36 Litigation Chamber, Decision on the merits 21/2022 of February 2, 2022, p. 14.

37 Ibid., p. 15.

procedure is conducted according to the specific needs of the case”. The defendant invokes

in addition to criminal law and in this case calls for a bilingual decision.

61. The Litigation Division points out that the defendant does not demonstrate how its

rights of the defense would have been disregarded by this referral decision drafted in

Dutch, insofar as the DPA has interacted with the subjects of law in French, and has not
used Dutch only in the context of the preparation of the survey targeting sites both
French-speaking than Dutch-speaking. Dutch is also one of the languages
available on the three websites investigated by the defendant. Article 57 LCA
constitutes, according to the understanding of the Litigation Chamber, a lex specialis
with respect to applicable language laws and should be applied in a flexible manner
in order not to unduly obstruct the procedures carried out by the DPA with a view to
to ensure the protection of personal data, as long as the defendants have the opportunity
to defend themselves in a language they are supposed to understand given the language
in which they provide their products and services. The content of the referral document
of the Management Committee drafted in Dutch, was reflected in French in the report
of the Inspection Service.

62. The Cour des Marches has already ruled in a similar context that there was no breach of
rights of defense provided that the defendant has had the opportunity to
defend in his own language, which is the case here38. Communications between the DPA and
the defendant took place exclusively in French through the Chambre
Litigation which sent in French its invitations to conclude on the Inspection report
to the defendant.

Serious clues and motivation for the referral

63. The respondent refers to the decision taken by the ODA Steering Committee,
transferring the “cookieproblematiek van mediawebsites” file to the Inspection Service,
which provides that the Inspection Service will submit a proposal for an investigation to
the Inspector General, on the basis of which the latter may decide whether or not to launch a
thematic survey39. The APD Inspection Service motivated the investigation as follows:
“Why media websites: lots of visitors/popular websites […]”40.

The great frequentation of websites was therefore chosen as the first serious indication of

the existence of a practice likely to give rise to the fundamental principles of

protection of personal data within the meaning of Article 63.1 of the LCA (hereinafter,

“serious indications” or “serious indications of harm”).

38 Brussels (Cour des Marches), 7 July 2021, 2021/AR/320, p. 19.

39 Exhibit 1 of the APD file.

40 Exhibit 5 of the APD file.

64. The GDPR grants DPAs investigative powers (Art. 58.1). Article 63 imposes

serious clues in a very broad (vague) way and should be read in a flexible and

pragmatic in the light of the GDPR in order to guarantee the effectiveness of missions and powers

DPA, provided for in the GDPR for the supervisory authorities in the Member States. In

under Articles 51.1, 51.2 and 52.1 of the GDPR, Member States are required to

entrust one or more independent public authorities with monitoring the application

of the GDPR in order to protect the fundamental rights and freedoms of natural persons to

with regard to processing, and to facilitate the free flow of personal data within

The union.

These supervisory authorities must exercise their powers with a view to implementing

effective implementation of European data protection law, including the GDPR.

Ensuring the effectiveness of European law is one of the main duties of the authorities of the Member States

members under the law of the European Union41.

65. In addition, the Management Committee, in its note to the Inspection Service42 refers to a

formal complaint received by the Litigation Chamber relating to the use of cookies on the

RTBF website, and analysis reports produced by a security advisor from

information that “highlights other problems including the placement of

non-essential cookies before collecting the consent of Internet users, or even

the absence of the (easy) possibility of setting cookies". The Management Committee

specifies that "other files have shown problems relating to the use of cookies

on other Belgian media". The Management Committee proposes to "delimit

investigation to the most consulted Belgian news media online". The Committee of

Direction also refers to the websites of the Mediahuis group (Nieuwsblad, Standaard,

Gazet van Antwerpen, Het Belang van Limburg) only offer titles with a summary

if cookies are not accepted, which differs from a paywall system ("system that

is used to block all or part of the access to a website using a payment system").

In view of the foregoing, the Management Committee has therefore well justified

the existence of indications of harm in his note for the attention of the Inspection Service,

in accordance with the requirement of Article 63.1 of the ACL.

66. The defendant wrongly considers that referral to the Inspection Service would not be

sufficiently supported by the reference to such serious indications within the meaning of Article 63.1 of the

ACL.

41 See Koen Lenaerts, Piet Van Nuffel, Europees recht (6th edition), Intersentia, 2017, pp 95-100, and, more specifically on

them

data protection authorities, Hielke Hijmans, The European Union as Guardian of Internet Privacy, Springer

2016,

Chapter 7.

42 Exhibit 2 of the APD file.

67. The Litigation Chamber also notes that the volume of website visitors is

sufficiently indicative of signs of harm insofar as these sites, according to their own

cookie policies, use third-party cookies that may profile Internet users.

These two characteristics publicly available on the chosen sites are indicative

high-risk processing as referred to in Article 35 (a) of the GDPR, in that they involve

a large volume of data processed and a risk of profiling.

68. In the alternative, the Litigation Chamber further considers that the legal report of the Inspection Service is sufficiently motivated, in addition to the clues noted by the Management Committee, in that it indicates why the presence of third-party cookies on the sites constitutes an indication of harm in itself: “third-party cookies allow these third parties to follow the behavior of Internet users over time and across numerous Internet sites, and to create, from this data, profiles of people (profiling), in particular in the purpose of being able to set up more precise and targeted marketing when browsing future of these Internet users thus traced". The Inspection Service refers in this respect to the APD cookie thematic site43. The Inspection Service could therefore deduce clues serious harm based on information publicly available on websites investigated their attendance data together. The Inspection report therefore contains sufficient evidence to establish that the high traffic of websites on which third-party cookies are present constitutes in itself a sufficient indication of harm to the meaning of section 63.1 of the LCA.

69. The decision of the ODA Steering Committee is sufficiently reasoned, in that that it refers to GDPR compliance issues identified on media sites in terms of cookies, through (i) the reports of an information security advisor ODA (ii) issues raised in the press. The Committee's decision to Directorate of APD also refers to the assessment and the future decision of the Inspector general as to the serious indications of a breach of the principles of data protection. These grounds existed at the time of the Management Committee's decision, which was taken, based on first clues (high traffic, cookie placement problems non-essential before obtaining consent, lack of easy possibility of setting of cookies), and provided that these indices are confirmed or completed by the Inspection Service during its investigation. The presence of such clues

seriously could therefore be reasoned in a complementary manner and with good reason in the report
of Inspection itself.

43 V. “Understanding what a cookie is” in the thematic file “cookies” on the DPA website, see page
https://www.autoriteprotectiondonnees.be/professionnel/themes/cookies.

44 On the requirements for the motivation of administrative decisions, see Brussels (Cour des marchés), 7 July 2021,
2021/AR/320, p. 37.

70. The defendant wrongly compares referral to the Litigation Chamber to “the equivalent of a
charge notified to a defendant by an investigating judge”45. The Market Court has
clearly underlined in its judgment of July 7, 2021 that the Litigation Chamber is a body
of an administrative authority whose procedure cannot be compared with the procedure
criminal46.

71. The Litigation Chamber considers that the referral was sufficiently reasoned in the
decision of the Management Committee itself. In the alternative, the defendant does not demonstrate
not how the definition of referral to the Inspection Service, as formulated in the
decision of the ODA Steering Committee, in conjunction with the Inspection report itself, would have
undermines his rights of defense due to a lack of motivation for the referral in the
initial decision of the ODA Steering Committee formulated under a condition precedent. The
defendant was able to take cognizance of the indications of infringement in sufficient time to
develop their own arguments about these indices when they have been submitted to them
for contradiction.

72. The Litigation Chamber also recalls that it is specifically provided for in the law
Organic DPA that “the Data Protection Authority may carry out an investigation
or a broad public consultation or a more targeted survey or consultation of
representatives of the sectors concerned” (art. 52 § 2 LCA). So for example the Service
d’Inspection announces future sector inquiries on “cookies” in its

2022 strategic plan “After publishing an initial thematic report on the

cookies on the websites of the most popular media, the Inspection Service

would like to take a closer look at a few other industries and their websites in

regarding cookies”.47

73. Ultimately, the identification of the presence of serious evidence of the existence of a practice

likely to give rise to an infringement of the fundamental principles of protection of

data, spring of

the discretionary competence of

ODA, whether it

does not belong to

the Markets Court to assess, except in the presence of a

flagrant disregard of the principles of good administration in this area or error

manifesto of appreciation, quod non in this case. The jurisdiction of the Market Court is

indeed limited to a control of regularity and legality. ODA has a lot of power

discretionary provided that the facts giving rise to the decision taken are stated. More the

discretion is broad, the more the reasoning must be detailed: in this case, the

45 Defendant's submissions, p. 3-4.

46 Ibid, p. 13.

47

ODA,

https://www.autoriteprotectiondonnees.be/publications/plan-de-gestion-2022.pdf.

48 Brussels Court of Appeal (Market Court), 28 October 2020 (2020/AR/721), p. 16; Court of Appeal of Brussels (Court

markets), February 17, 2021 (2020/AR/1111), p. 24.

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justification of the serious indications of the existence of an infringing practice prior to the□

Inspection report constitutes sufficient justification.□

□ Methodology of the survey carried out by the Inspection Service□

74. The defendant requests the exclusion of certain documents, in particular the reports□

additional investigations, as well as the investigation reports and technical reports of the□

Inspection Service on the grounds that the technical findings are not reliable or□

understandable, or that human observations would also not be□

reliable or insufficient. The defendant also invokes the fact that the findings and the□

investigation report would have been sent to him late. For these reasons, the defendant□

requests the dismissal for lack of evidence.□

75. The Inspection Service responded point by point to the defendant's arguments□

to be discarded□

the parts, taking□

the findings in his note for the hearing□

"ICT clarifications following the conclusions of SA Rossel & Cie" of March 14, 2022 which□

he presented at the hearing of March 31, 2022 (hereinafter the additional report):

▪ Title 1.2 of the additional report of the Inspection Service: on the software

of analysis used

o Arguments of the defendant:

76. The defendant criticizes the Inspection Service for having used to carry out its

findings a particular software without having mentioned which one. The defendant deplores

must have itself deduced the methodology used on the basis of the results of the survey.

“From the presentation of the results, it appears to be the WEC software (website

evidence collector) published by the EDPS. The defendant criticizes the choice of this software

reason that it would be a “beta2 version (version 0.3.1) which by definition does not offer the

same guarantees as a version considered final by the publisher. The final version of

software (1.0.0.) will be published on January 7, 2021, i.e. one year after the findings. »

77. During the hearing, Rossel's digital director was surprised by the complaint made about a

information presented erroneously in English on the site, and specifies that the has ensured the

fact that all the chaining [of information] in French was correct. He is pointing out that

when Rossel understood what the methodology used was, and redid the tests with the

WEC in English, the results were different. He therefore explains that the appearance

information in English on its site, according to Inspection reports, is due to the use

English WEC software. He further claims that he was unable to reproduce the

items noted in the inspection report using this software.

o Response from the Inspection Service:

78. According to Article 64 §2 of the law of 3 December 2017 creating the Authority for

data protection, in the exercise of the powers referred to in this chapter,

the Inspector General and the inspectors ensure that the means they use are

appropriate and necessary. Regarding the version of the WEC software used, the Service

of Inspection specifies the reasons for which it considers that the use of a Beta version

of the WEC software was, in his view, appropriate for making the findings:

▪

“Beta Version means the Version of the Product written by or for the Developer,

which is a complete software containing all the functionalities of the Product of

final quality, as specified in Specification49, plus the incorporation of

improvements, corrections and any other errors identified during the tests of

the Alpha Version of the Product.

▪ The Beta Version is a Version which is ready to be tested by the Publisher in the

framework of its quality assurance and the Developer is ready to correct the Errors which

could be found by the Publisher during its "QA" tests. She understands

also information and instructions for use that the publisher can

reasonably require to complete the production of a user manual within

the original language. Changes made between versions 0.3.1 and 1.0.0

are feature additions and bugfixes. »

▪ In the context of an analysis and detection tool, a malfunction would be

nature of not detecting and highlighting what is sought, namely the

deposit of cookies in this case. This would automatically benefit

conclusive since the cookie placed would not be detected and not the reverse, i.e. a

non-existing cookie detected. Which is the case here, whether the means used is

an ad hoc software or not, a beta version or not. »

79. During the hearing, the technical expert from the Inspection Service further specified that

the use of one or the other language to produce the findings has no impact on the

result of the investigation and the findings made regarding the deposit of cookies on the

user's machine.

▪ Title 3 of the supplementary report: on the reliability of human findings

carried out

49 See definition of a beta version from

https://www.lawinsider.com/dictionary/beta-version.

the source provided by

the IS in its audience note:

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o Arguments of the defendant:

80. The defendant alleges that the human observations would not be reliable, on the ground

that “the inspector doubled his technical findings with human checks, but without

specify the date of these, nor the environment used (the type and language of the browser, the

version of the OS, the software installed, the details of the machine and its connection, the

presence or not of a proxy, the method followed to empty the cookies) before the observation in order to

make sure there is no interference, etc. »

o Response from the Inspection Service:

81. The technical findings were made by certified inspectors:

-

-

-

-

in Audit of information systems since March 2010 (CISA)

in risk control and information systems since

June

2011(CRISC)

in information security management since October 2012 (CISM)

in engineering solutions respectful of data privacy

since February 2021 (CDPSE).

82. The dates of the findings are metadata of the files generated, including the fingerprints

SHA256 can be compared to ensure the integrity of the evidence.

▪ Title 4 of the additional report: on the number of findings made

o Arguments of the defendant:

83. The defendant considers that a single finding is insufficient: “Given the subject matter and

the questions asked, it was elementary to proceed by multiple successive observations

spread over a sufficiently long period of time to be representative. It's only

through observations repeated over time on the basis of different environments

that a relevant analysis can be carried out. »

o Response from the Inspection Service:

84. “A finding was made with an automated tool (the Web Evidence Collector) on a

Linux machine by an inspector dated 08/01/2020 for Le Soir, Sudinfo and

Sudpressedigital and the finding on a manual basis was carried out by a second inspector

on a Windows10 machine on 01/20/2020 for Le Soir, Sudinfo and Sudpressedigital for

the analysis part of the cookies deposited. The other manual observations were made between

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01/14/2020 and 02/14/2020 for Le Soir, 01/14/2020 and 02/03/2020 for Sudinfo

and between 01/14/2020 and 03/10/2020 for Sudpressedigital. »

85. In the hearing, the technical expert from the Inspection Service specified that the Inspection Service

used an automated methodology on a station, combined with an approach

manual in a second step, on another workstation, in order to eliminate bias. The fact of

say that the findings are made at a certain time and that the report comes several months

afterwards, ignores the fact that the findings were made in battery, with reports

written afterwards. This is why the files containing the findings have been signed,

which provides a sufficient guarantee as to the quality of the findings, according to the Service

of Inspection.

▪ Title 5.2 of the supplementary report: on

the verifiable nature of

findings

o Arguments of the defending party

86. “Conclusives are […] deprived of the basic right to be able to verify the findings

carried out which serve as the basis for the investigation report and the prosecution, in violation of

outright their right to a fair trial. »

o Response from the Inspection Service

87. “If the concluding parties followed good IT management practices, such as ITIL V3 for example, the

change management process

would allow them to be able to reconstitute

the environment to carry out their own tests and bring the factual elements (findings) to

object to those mentioned by the Inspection Service. The inspection service cannot be

held responsible for the inability of the concluding parties to manage their changes and their

inability to be able to reproduce the environment on the date of the findings. »

88. In the hearing, the technical expert from the Inspection Service clarified, given the fact that the

information about the environment is not specified in the reports, whether the

Inspection Service has chosen to rely on the information contained in the

raw information observed, and not to take the risk or the time to resume

this information in the summary of findings (technical report).

o Decision of the Litigation Chamber

89. The Litigation Division cannot agree with the defendant in invoking the nullity of

the procedure for reasons related to the language used and/or the reason for the referral and/or

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the uncertainties of the legal framework relating to cookies and/or the methodology used by

the Inspection Service for findings.

90. With regard to the request for dismissal of documents, on the grounds that the Service's investigation inspection was not carried out according to the rules of the art, the Litigation Chamber clarifies that it is not its responsibility to assess the quality of the investigative acts beyond a marginal discretion, which consists of a control of the character normally prudent and reasonable investigations by the Inspection Service50. As an organ of resolution of administrative disputes, the Litigation Chamber may examine, within the framework of its discretionary powers, if the administration, through the Inspection Service, has exercised the power attributed to him within the limits of legality, and in particular, has not made a manifest error of assessment.

91. In this regard, the Litigation Chamber refers to article 72 LCA, according to which the inspector-general and the inspectors “may carry out any investigation, any control and any hearing, as well as collecting any information they deem useful in order to ensure that the fundamental principles of the protection of personal data, within the framework of this law and of the laws containing provisions relating to the protection of the processing of personal data, are effectively respected”.

92. Article 67 LCA provides in particular that “investigative measures may give rise to a statement of offense which has probative force until proven otherwise. ".

93. Acts carried out by the Inspection Service under the LCA constitute acts administration. The defendant argues that the manner in which the Inspection reports are formulated does not allow him to defend himself properly within the framework of the procedure taking place before the Litigation Chamber. The defendant invokes the quality insufficient investigative acts carried out by the Inspectorate, in particular the use of beta version of software that detects the placement of cookies on the sites of the defendant, or the unreliability of the manual surveys carried out by the Inspection Service because of their uniqueness, and because of the lack of details as to the technical environment of these findings (type and language of the browser, version

of the OS, installed software, details of the machine and the connection, presence or not of a proxy,

method followed to empty the cookies before the observation in order to ensure that there is no

interference).

94. In this regard, the Litigation Chamber specifies that it is necessary to distinguish between the obligation

material and formal motivation of administrative acts, the obligation to motivate

material constituting a principle of good administration, while the obligation to

50 Brussels Court of Appeal (Market Court), 7 July 2021 (2021/AR/320), p. 18.

formal motivation derives from the law and does not constitute a principle of good

management51. No legal obligation imposes on the Inspection Service such

details regarding the technical environment of the findings made. It is therefore incumbent on the

Litigation Chamber to verify whether the obligation to provide material reasons has been fulfilled in

as a whole, namely, whether the defendant can find in the acts of the Service

of Inspection, the grounds on which the material findings of the Inspection Service

are founded, in order to allow him to prepare his defence. It is then up to the House

Litigation to justify its own decision, which results from the findings of the Service

of Inspection, in compliance with the obligations of formal and material motivation. the

Belgian legislator has explicitly limited this control to a marginal examination since it leaves

to the Inspector General and his inspectors the care of ensuring that “the means they

employ are appropriate and necessary” (article 65, § 2 LCA). In this regard, it is important

that the findings are supported by verifiable reasons in law and in fact52, without this

does not imply the obligation to explain the methodology followed in detail.

95. For the rest, with regard to the parts whose separation is requested for non-

compliance with the technical rules of the art, the Litigation Chamber refers to the explanations

provided by the Inspection Service in its note for the hearing, which is based on Article

48 of the Internal Rules and has been communicated in advance to the party

defendant in order to enable it to express its defense arguments in this regard. He
appears from the minutes of the hearing that the defendant was able to take cognizance of this
note and prepare his reply on this subject before the hearing.
96. Finally, with regard to the burden of proof that the cookies placed by the defendant
are strictly necessary or accepted cookies, the Litigation Chamber
reminds the defendant of its duty of “responsibility” under Article 24 of the GDPR:
“taking into account the nature, scope, context and purposes of the processing as well as
risks”, the data controller must implement the technical measures
and organizational measures to “ensure and be able to demonstrate that the
processing is carried out in accordance with this Regulation”.
97. During the hearing, the defendant insisted on the fact that its duty to inventory and
own website's cookie documentation is not as granular as
that of a transactional or banking site53. The Litigation Chamber is ready to hold
account of the specificities of media sites in this respect but notes that at no time in the
procedure the defendant did not produce a listing of the cookies used at the time of
investigation. The defendant also emphasizes the time elapsed between the findings
51 I. Opdebeek & S. De Somer, Algemeen Bestuursrecht (2nd edition), 2019, p. 436, § 949.
52 I. Opdebeek and A. Colsaet, Formal justification of administrative acts, 2013, p. 435, § 944.
53 See hearing report, p. 6.

of Inspection reporting the placement of cookies on the terminal equipment of the
users and requests for justification as to the necessary nature of these cookies
by the Litigation Chamber within the framework of an invitation to conclude. Bedroom
Litigation also takes note of the clarifications provided by the Inspection Department
in this regard in its pre-hearing note: “If the conclusives followed the right
IT management practices, such as ITIL V3 for example, the change management process

would allow them to be able to reconstruct the environment to do their own tests and

bring the factual elements (findings) to oppose those mentioned by the service

inspection. The inspection service cannot be held responsible for the inability of

conclusive in managing their changes and their inability to reproduce

the environment on the date of the findings. »

98. It is not for the Litigation Chamber to question the assessment

technical service of the Inspection Service as to the state of the art required by the GDPR in terms of

inventory and documentation of cookies used by websites, taking into account the

limits of its marginal control of the investigative acts of the Inspection Service.

99. The Litigation Chamber notes that under the legal framework of the LCA, the Service

of Inspection is free to choose its methods of investigation. Only a marginal verification,

as to the possible non-respect of the principles of good administration (e.g. lack of

misuse of power), quod non in this case, can be made by the Chamber

contentious.

Uncertainties of the legal framework

100. Finally, the defendant invokes the uncertainty of the legal framework with regard to the

following postulates taken by the Inspection Department as indicators of achievement, and requests the

dismissal for lack of legal basis on these points:

o No third-party cookie would be likely to be exempt from consent;

o “Further browsing” would not make it possible to ensure the consent of the

visitor;

o Social network and audience measurement cookies could not be

be based on legitimate interest and would therefore always be subject to consent.

101. The Litigation Chamber refers in this respect to the sections below where it the legal framework

applicable is explained in detail. The Litigation Chamber also points out that in

under the liability principle (Article 24 of the GDPR), it is the responsibility of the party□

defendant to ensure and be able to demonstrate that the data processing□

collected via cookies is carried out in accordance with the GDPR, regardless of the□

possible uncertainties related to certain aspects of the implementation of the GDPR.□

II.5. On the background□

▪ Observation 1: deposit of cookies not strictly necessary before collection□

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consent□

o Inspection report:□

102. The Inspection Service observes the placement of cookies before people□

concerned have not been able to give their consent, including third-party cookies□

part.□

103. Placing and/or reading cookies requires the consent of the person□

concerned except to demonstrate that they would be strictly necessary cookies (article 6.1.a□

GDPR juncto article 129 LEC. The Inspection Service refers in this respect to□

the interpretation of the concept of consent taken up in the "Planet 49" judgment of the Court of□

Justice54.□

104. The Inspection Service refers to the following definition of cookies “strictly□

necessary” provided on the website www.gdpr.eu subsidized by the European Union in□

under the Horizon 2020 Programme:□

"Strictly necessary cookies - These cookies are essential for you to browse the□

website and use its features, such as accessing secure areas of the site. Cookies□

that allow web shops to hold your items in your cart while you are shopping online□

are an example of strictly necessary cookies. These cookies will generally be first-□

party session cookies. While it is not required to obtain consent for these cookies,□

what they do and why they are necessary should be explained to the user.55’”□

105. The Inspection report notes that among the cookies present are “cookies

behavioral” and refers in this respect in terms of definition to the terminology

used in the cookies policy of the sites themselves: "the cookies included in this

category allow us to provide ads that are relevant and related to the

interests of our users. They aim to improve and personalize

their browsing experience.”56 These cookies include Outbrain and Rubicon for Sudinfo

and Le Soir, Doubleclick for Sudpresse Editions Digitales, as well as network cookies

social (Facebook) and statistics (Google Analytics, Gemius).

54 CJEU, 1 October 2019, Planet49, C-673/17, ECLI:EU:C:2019:801.

55 The Litigation Chamber notes that there is no official definition of the different types of cookies in the legislation

Belgian or European and takes note of the explanation provided by the Inspection Service on the basis of available sources.

56 Inspection Report, p. 16.

106. These cookies placed before consent on the sites concerned are cookies:

▪

“third party” in that they are “set up by a different domain from the one being visited

by the user”;

▪ and “not necessary” in that such cookies allow “typically”, “to track

the behavior of Internet users through numerous Internet sites and to create,

from this data, profiles of people (profiling), in particular for the purpose of

be able to implement more precise and targeted marketing during navigation

future of these Internet users thus traced”, in particular when it comes to media cookies

social media or advertisements placed from other websites.

107. The Inspection Service finds that the defendant has not provided proof of the

necessary nature of each cookie concerned by the findings, and concludes with a

violation of articles 6.1.a of the GDPR and article 129 LEC57.

o Defendant's point of view:

108. The defendant does not dispute that among the cookies identified by the Service

of Inspection, some imply consent, but believe that the failure

has not been established, due to the methodology used for the survey (an observation in

actual situation would have given a different result, according to the defendant).

109. The defendant disputes that “a cookie that escapes consent [is] necessarily

a first-party cookie: no third-party cookie is likely to be targeted by

exemption”. This presumption is not sufficient to establish that the cookies concerned

do indeed carry out such processing purposes outside of any necessity in connection with

with the service provided by the site, according to the defendant.

110. The defendant argues that some of the cookies placed prior to consent are

statistical cookies, which the defendant believes should not be submitted

with consent (The defendant produces in this regard a letter sent by the sector

to the President of the Data Protection Authority of November 26, 2020 in

which of the sector representatives of the Belgian digital companies active

in particular in online advertising, ask for clarifications with regard to

the rules applicable to analytical cookies 58).

57 The Inspection Service refers to the analysis of the Litigation Chamber as to the competence of the DPA in terms of

cookies in its decision on the merits 12/2019 of December 17, 2019, p. 17-20, available through

the webpage

https://autoriteprotectiondonnees.be/professional/publications/decisions. .

58 Exhibit 9 of the defendant (letter from ACC, BAM, BeCommerce, etc. to the APD, 26 November 2020.

o Decision of the Litigation Chamber

111. With regard to the presence of cookies that are not necessary before consent, the

Litigation Chamber notes the prejudicial recognition of the defendant according to

which some unnecessary cookies are placed before the consent of

the Internet user on the websites investigated.

112. With regard to the defendant's argument that statistical cookies

should be subject to consent, and procedural rebuttals of relatively

to the findings of the Inspection Service, the Litigation Chamber refers to its

developments above in support of the findings made.

 Clarification regarding first-party/third-party cookies

113. With regard to the consequences attached to the origin of the cookies concerned, the

Litigation Chamber specifies that the qualification of a cookie as a "third party" cookie or

of “first party” does not in principle imply a direct causal link with the

whether the cookie is necessary or not. The Litigation Chamber supports the Service

of the Inspection in its assessment insofar as it is probable that

many third-party cookies cannot be qualified as necessary because they could

allow the tracking of people for the purposes of third-party legal entities.

114. As indicated in its first cookie decision, the Litigation Chamber clarifies that at

its esteem, the qualification of a cookie as "third party" or "first

party" requires "a precise analysis of the website in question as well as

the underlying IT and legal environment”59.

115. In this regard, the Litigation Chamber recalls that from the point of view of its jurisdiction,

namely, the control of personal data processing, and as set out by the

Group 29 through Opinion 04/2012 of June 7, 2012 on the exemption of consent

to cookies, the notion of “third-party cookie” or “first party” is only relevant in the

insofar as it refers to the legal distinction between cookies placed by a

data controller identical to the data controller of the site visited (cookies

first party) versus cookies placed by a separate data controller

(third-party cookie)60. In particular, it must be determined whether the personal data is or

59 Litigation Chamber, decision 12/2019 of December 17, 2019, p. 34.

60 WP29, Opinion 04/2012 on the exemption of consent to cookies, adopted on June 7, 2012, p. 4: “The expression “third-party cookie” can be misleading: In the context of data protection in the European Union, the Directive 95/46/EC defines a third party as “the natural or legal person, public authority, service or any other body other than the data subject, the controller, the processor and the persons who, under the direct authority of the controller or the processor, are authorized to process the data”. A “Third-party cookie” would therefore refer to a cookie set by a controller different from that which operates the website visited by the user (as defi ned by the URL appearing in the address bar of the Navigator). On the other hand, from the point of view of browsers, the notion of "third party" is only defined by the

not processed by entities acting as "subcontractors" for the site for purposes strictly necessary for the service provided by the site, or as responsible for processing for own purposes. In itself, the technical distinction between cookie placed by the site owner and cookie placed by a third-party domain, is not indicative of the role of the various stakeholders in the processing of cookies.

116. The legal distinction between “third party” and “first party” cookies may however, constitute a parameter in the evaluation of the strictly necessary character a cookie for the purpose of providing a service62: first-party cookies are actually much more likely to be necessary and exempt from consent than third-party cookies. In this regard, the Litigation Chamber follows the point of view of the Inspection Service in that third-party cookies are not “generally” not strictly necessary for the visit of the site by the user, since they are usually tied to a separate service from the one that was explicitly required by the user63.

117. The Litigation Division also endorses the conclusion of Group 29: beyond

the question of the entity responsible for placing cookies, the purpose of processing

data collected by cookie is the preponderant element in this exercise of

qualification as to whether or not a cookie is considered "strictly

necessary" for the provision of a service.

118. Regardless of the origin of each cookie concerned by the findings, namely, first

or third party, it is up to the defendant to demonstrate the nature

necessary. Since this evidence was not provided, the Litigation Chamber concluded that a

infringement of articles 6.1.a of the GDPR and article 129 LEC.

119.As stated in its first cookie decision 12/2019 of 17 December 201965, in

As the law currently stands, there is no legal exception to consent for

not

not

are

they

structure of the URL appearing in the address bar of the browser. In this case, "third-party cookies" are the

cookies set by websites belonging to a domain separate from the domain to which the website belongs

accessed by the user as it appears in the address bar of the browser, regardless of whether

that entity is a separate controller or not. Although these two conceptions overlap

often,

equivalent.

For the purposes of this notice, we will adopt the former and use the term "third-party cookie" to

designate the cookies set up by the data controllers who do not operate the website consulted by

the user. Conversely, the term "original cookie" will designate the cookie set up by the person responsible for the

processing (or by one of its subcontractors) operating the website visited by the user, as defined by

the URL address usually displayed in the address bar of the browser. »

61 Litigation Chamber, decision 12/2019 of December 17, 2019, p. 34.

62 Data Protection Working Party article 29, Opinion 04/2012 on the exemption of consent to cookies,

adopted June 7, 2012, p. 5.

63 Ibid.

64 Ibid.

65 Litigation Chamber, decision 12/2019 of December 17, 2019.

still

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"first party analytics cookies", so that prior consent for the

placement of such cookies is indeed required. The Litigation Chamber refers to

this regard to a notice published by the Commission for the Protection of Privacy which affirmed

in its cookie guidelines that “it is up to the legislator to provide

a clarification of the problem posed by the non-exemption of the consent of

users

relationship with the original analytics cookies."66

in

120. In its aforementioned first cookie decision 12/2019, the Litigation Chamber

had not ruled out that first or third party statistical cookies could be

“necessary to provide a service (for example

informative) requested by

the

data subject, for example to detect browsing problems”. the

Inspection Service reiterated this principle in its report67. The Inspection Service

considers that there is no question of such a situation in the present case and the defendant does not

does not provide the demonstration of such a necessity of the statistical cookies placed on its

site without consent. The absence of guidelines in Belgium on this subject is irrelevant.

legal consequence given the duty of responsibility that rests on those responsible for

processing under Article 24 of the GDPR with regard to the demonstration of lawfulness

and merits of the data processing they carry out. So for example, the

defendant does not invoke the need to place analytical cookies to

meet legal or contractual obligations, such as a management contract

concluded with a public authority in charge of the media obliging the media to carry out

audience analysis. To the extent that an audience cookie would be strictly

necessary to comply with a legal obligation (of audience measurement), compliance with

this obligation would be necessary for the provision of the service requested by the user (to

condition of demonstrating that the cookie does not process the data beyond what is necessary

to fulfill this obligation). In such a case, subject to examination of the conditions

requirements imposed by Belgian law on the media69, the use of analytical cookies

audience could be considered necessary for the provision of the public service,

burden on the media concerned to demonstrate that, given the circumstances

specific to the processing (e.g. the conditions of its management contract), cookies

placed are indeed necessary and proportionate in order to meet the obligation to place

such cookies in order to meet a legal requirement weighing on the service requested by

66 CPVP, Recommendation of initiative n°01/2015 of February 4, 2015 concerning the use of cookies, Ibid, point 311, p. 64,

https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/recommandation_01_2015.

67 Inspection Report, exhibit 13 of the APD file, p. 21.

68 See, for example, the explanations provided by RTBF on its website regarding the commercial advertisements organized in

the management contract concluded with the public control authority according to a decree of the Government of the Community

published in the Belgian Official Gazette of December 12, 2018 (https://www.rtbf.be/article/comment-fonctionne-la-publicite-a-

la-rtbf-10910493).

69 Ibid.

the user of the technology concerned. Such a demonstration was not provided in

the species.

121. Some data protection authorities have developed conditions according to

which audience measurement trackers may be exempt from consent.

The Litigation Chamber refers to it in full transparency in its decisions

without however being bound by the point of view of a European counterpart (see in particular the

practical sheet developed by the CNIL on this subject70, to which it is made in particular

reference in decision 11/2022 of January 21, 2022 of the Litigation Chamber)71.

122. The Litigation Chamber is indeed obliged to provide independent interpretation,

provided that no harmonized standard is imposed at European level with regard to

relates to one or another type of cookie such as statistical or analytical cookies.

123. The Group 29 has certainly already taken a nuanced position in 2012 with regard to

the consent obligation applicable to first-party statistical cookies. the

Groupe 29 is clearly of the opinion that “first party analytical cookies” do not

are not exempt from the obligation of consent, considering that they are not

strictly necessary to provide strictly necessary functionality or

expressly requested by the user of the computer terminal equipment. the

Group 29 even specifies that this user can access all the

functionality of the website, even though such cookies would be disabled.72 The

Groupe 29 considers that it is “unlikely that the original analysis cookies present

a

risk for

the

life

private

when they

are

strictly

limits

at

compiling aggregate statistics regarding origin and when used

by websites that already provide clear information about these cookies in their

provisions relating to the protection of privacy, as well as adequate safeguards

in the matter. »

124. On this occasion, Group 29 also clarified that “In this respect, if Article 5,

paragraph

3,

of

the

guideline

2002/58/EC

had to

be

revised

at

In the future, the European legislator could add, in an appropriate way, a third

criterion for exemption from the obligation of consent for strictly limited cookies

the establishment of anonymized and aggregated statistics concerning the domain

of origin. Origin analytics should be clearly distinguished from third-party analytics,

which uses an ordinary third-party cookie to collect browsing information related to

70 https://www.cnil.fr/fr/cookies-et-traceurs-comment-mesure-mon-site-web-en-conformite.

71 Litigation Chamber, decision 11/2022 of January 21, 2022, footnote nr. 10.

72 Article 29 Data Protection Working Party, Opinion 04/2012 on the exemption from the consent requirement

for certain cookies, 7 June 2012, WP194, p. 11.

users on separate websites, and which poses a much higher risk

high for privacy. 73

125. In this respect, the Litigation Division cannot anticipate the outcome of the debates on a

possible future modification and possible relaxation at European level of the

rules set out in the ePrivacy Directive. However, the Litigation Chamber took good

knowledge of the requests for clarifications sent by various actors in the sector of

online advertising to the APD Management Committee. The Litigation Chamber, through

this decision, draws the attention of the ODA Management Committee to

the

problem of analytical cookies, not yet benefiting from an approach

harmonized at the level of the EDPB, it is up to the Management Committee to solicit the

necessary explanations and clarifications through the EDPB working groups, in

with a view to providing guidelines that are well understood and well accepted by all actors

concerned with tracking technologies for analytical purposes. In the future, the

Litigation Chamber does not rule out submitting such decisions to the mechanisms

EDPB consistency. In the current state of European and Belgian legislation on

placement of cookies, which the DPA is now explicitly responsible for controlling and

interpret, consent is still always required for the placement of cookies

of analysis, so that the lack of consent constitutes a violation of Article 6

and Article 7 juncto Article 4.11 of the GDPR, read in conjunction with Article 129 of the LCE.

126. In this case, the file submitted to the Litigation Division does not contain any evidence

tending to demonstrate that the consent of the users of the site has been obtained

before placing analytical cookies.

127. The Litigation Chamber therefore finds an infringement of Article 6.1.a of the GDPR on the grounds

of the defendant, due to the deposit of unnecessary cookies, including cookies

analytics, before obtaining consent.

128. The Litigation Chamber will take into account, when determining the sanction,

the fact that the defendant declares that it has meanwhile developed a solution of

consent to ensure a legal basis for the placement of statistical cookies

without prior consent on its sites74.

73 Article 29 Data Protection Working Party, Opinion 04/2012 on the exemption from the consent requirement

for certain cookies, 7 June 2012, WP194, p. 12.

74 Defendant's submissions, p. 25.

▪ Observation 2: use of 'further browsing'

o The Inspection report

129. The technical analysis report indicates that the Sudinfo, Le Soir and Sudpresse websites

Editions Digitales use for the purpose of obtaining prior consent to the placement

of cookies, the technique of "further browsing" (continuation of navigation) by means of a

volatile banner relative to cookies%

130. This barrier disappears if the user continues browsing without taking any action. A

screenshot of the "Sudinfo.be" site is provided for illustration purposes.

131. The Inspection report itself specifies that the continuation of navigation cannot be

considered to give rise to valid consent within the meaning of Article 4.11 of the

GDPR for the installation and reading of cookies not strictly necessary. Next

this provision, the consent must indeed consist of "a statement or act

clear positive", which cannot be deduced from the simple fact that the Internet user continues his

navigation. The silence or inactivity of the person concerned, as well as the simple fact

that she continues to use a service, cannot be considered as an indication

active of choice, according to the Inspection Service, which refers in this case to Lines

guidelines on consent within the meaning of Group Regulation 2016/679 2975, and the

EDPB Guidelines 05/2020 on Consent76. The Inspection Service

recalls in this respect that the "Planet49" judgment of the Court of Justice of the European Union

clarified the consent requirement for the placement of cookies and prescribed “a

active consent" in the sense that

recital 32 of the regulation excludes

expressly that there is consent in the event of silence or boxes checked by default

or in case of inactivity.

132. The Inspection Service also notes that the data controller, by the

practice of "further browsing", goes against the obligation of article 7.1

of the GDPR which

required to demonstrate that

the person concerned has given his

consent, in this case, to the placement of cookies that are not strictly necessary.

o Defendant's point of view

133. The defendant disputes that it misused a “further browsing” technique

to obtain prior consent to the placement of cookies, for the reasons

technical and legal:

75 Article 29 Working Party, Guidelines on consent under Regulation 2016/679, 28 November 2017,

p. 18.

76 EDPB, Guidelines 05/2020 on consent within the meaning of Regulation 2016/679, point 79 (English version).

- technical argument: the use of a "WEC" tool for the findings would have

been interpreted by the system as an expression of consent, with the

corollary, cookies subject to “opt-out” (refusal a posteriori) and no longer to “opt-in”

(prior acceptance);

- legal argument: the Court of Justice, in its judgment “Planet 49”77 requires a

“active behavior” which excludes collecting it by means of pre-ticked boxes,

but does not exclude that such consent is given “by means of another

statement or other conduct that clearly indicates in this context that the

data subject agrees to the proposed processing of their personal data

staff”78.

134. According to the defendant, the “Planet 49” judgment does not imply that the fact of continuing

to surf on a site cannot be considered as an active behavior marking the

consent, for the following reasons: “Insofar as the Planet49 decision places the

active behavior and the objectification of consent at the center of the assessment, we

cannot exclude that further browsing is admitted because it implies – contrary to the box

pre-ticked – objectifiable active behavior

: notified by

the headband

legal consequences of his behavior, the visitor decides to pursue

passing from link to link or by scrolling the page on which it is active, throughout its

navigation on the site. In such a situation, depending on the size of the headband, the

display length and text content, it cannot be excluded that the behavior of the

visitor is considered valid consent. The situation is similar to

consent obtained by posting a sign at the entrance to a business, that the

jurisprudence regularly confirms. »

o Decision of the Litigation Chamber

135. On the question of the applicable principles, the Litigation Chamber recalls that according to

the EDPB guidelines on consent, “further browsing” does not constitute

not an adequate manifestation of consent within the meaning of the GDPR on the grounds that it

could be considered a

active indication of choice.79. Bedroom

Litigation observes that

the requirement of the sufficiently “active” nature of the

consent alone does not exclude “further browsing” as a form

acceptable consent within the meaning of the GDPR and mainly refers to the second

criterion developed by the EPDB in its guidelines, namely the requirement of a clear positive act

77 CJEU, 1 October 2019, Planet49, C-673/17, ECLI:EU:C:2019:801.

78 Ibid, § 11..

79 Guidelines 5/2020 on consent within the meaning of Regulation 2016/679, § 79.

(unambiguous) allowing free consent to be expressed within the meaning of Article 7.1 of the

GDPR.

136. In this respect, the Litigation Division shares the defendant's doubts concerning

the possibility or not of manifesting an active choice by continuing to browse on a site.

The Litigation Division does not exclude, as an exception to the line of conduct

interpretation given by the EDPB, whether or not the active nature of the “further

browsing" cannot be influenced by the layout of the information (e.g. size of the banner and

mode of presentation of the information provided in order to obtain the consent by the

continuation of navigation), and the way in which the refusal of cookies can be expressed by

somewhere else.

137. The Litigation Chamber cannot further exclude that the fact of continuing to surf on

a site cannot be considered as an active behavior taking into account also

the way in which “further browsing” is expressed: for example, where to scroll

the wheel of a mouse would not constitute a sufficiently clear and

undoubtedly voluntary on the part of the user, the fact that this "further browsing"

would involve at least one computer action (mouse click) could influence

the assessment of the active nature or not of the consent.

138. The file of exhibits provided to the Litigation Chamber does not, however, make it possible to establish

that the consent requested by the defendant by means of a "further browsing"

would be “active” for reasons related to the presentation of information in concreto.

139. In all cases, the Litigation Chamber refers to the principle according to which the

consent must be "given by a clear positive act by which the data subject

expresses in a free, specific, informed and unequivocal manner its agreement to the processing of

personal data concerning him” (see recital 32 of the GDPR) so that

the continuation of the use of a site by simple scrolling of a web page does not constitute

not a sufficiently clear act that can be distinguished from an act of consent:

“Data controllers should develop consent mechanisms

clear to those involved. They must avoid any ambiguity and ensure that

the act by which consent is given can be distinguished from any other act.

Therefore, the mere continuation of the ordinary use of a website is not a

behavior that suggests a manifestation of will on the part of the

data subject seeking to consent to a processing operation

considered. »80.

140. This second criterion linked to the need for specific consent applied to the “further

browsing” excludes the possibility of expressing consent by this technique. The

80 Ibid., § 84.

the need to express “specific” consent is indeed part of the conditions

of the consent according to article 4.11 of the GDPR.

141. It should be recalled that consent is defined in art 4.11 of the GDPR as “any

manifestation of will, free, specific, enlightened and unequivocal by which the person

concerned accepts, by a declaration or by a clear positive act, that data to be

personal character concerning him or her are the subject of processing". . In his stop

"Planet 49" of October 1, 2019, the Court of Justice specified that "the manifestation of

will" referred to in Article 2.h of Directive 95/46 must be "specific" in this sense

that it "must relate precisely to the processing of data concerned and cannot be

deduced from a manifestation of will having a distinct object.

142. In this case, as the Litigation Division noted previously in its

decision 19/2021 of February 12, 202182, the fact of continuing to surf on a branded site at the

both the desire to benefit from the information (or other) services offered by the site,

on the one hand, and, where applicable, the acceptance of conditions related to the placement of cookies.

Such consent is not specific, since the user, by means of a single act,

gives consent for the use of information or services offered on the

website and for their personal data to be processed via

Cookies.

143. In this case, the Litigation Division considers that this technique of accepting

cookies, as initially unfolded on the defendants' site and reflected in the

Inspection report, did not allow the user of the site to express consent

"specific" as prescribed in Article 4.11 of the GDPR.

144. In summary, the fact of coupling the consent of the Internet user with his choice of

continuing to use the service does not allow separate and specific consent

as required in article 4.11 of the GDPR. For this reason, the Litigation Chamber

finds an infringement of articles 4.11) juncto 6.1.a and 7.1 of the GDPR.

▪ Finding 3: social network and audience measurement cookies without

consent

o Social media cookies

145. The Inspection Service noted the absence of prior consent on the sites of

the defendant before the placement of social network cookies. Screenshots

carried out by the Inspection Service in its technical reports are clear in this regard.

respect: for example, on the Sudpresse site, the home page invites the Internet user to

81 CJEU, 1 October 2019, C-673/17, ECLI:EU:C:2019:801.

82 Litigation Chamber, decision 19/2021 of February 12, 2021, § 103-109.

change settings or click to learn more. By selecting the option “click here”

From the initial screen, the user arrives at a window "Manage your cookies here" where he

is proposed to disable social cookies (“disabling these cookies degrades the

sharing on social networks”). The same path is offered on the site in terms of

concerns behavioral cookies (“disabling these cookies does not allow us to

to offer you ad personalization”. Finally, similar findings are

made on the other two sites investigated with regard to the lack of consent

prior to placing cookies described as “social network cookies” or

“behavioral cookies”.

146. The Litigation Chamber notes that the defendant does not develop a defense

explicit on this point in the alternative, in addition to the main arguments related to the

methodology used by the Inspection Service. The Litigation Chamber considers

therefore be able to rely on a prejudicial admission by the defendant, and

finds a violation of Article 6.1.a of the GDPR. The grounds for nullity raised by the

defendant with regard to the procedure do not taint the very clear findings of the

Inspection Service on this point, not expressly contradicted in the

defendant's submissions.

147. The defendant generally alleges that the processing of personal data

by social network cookies may be based on a legitimate interest. In support of this

argument, she invokes the judgment “Fashion

ID” of the Court of Justice of the Union

European Union of 29 July 201983, in which the Court of Justice does not exclude that the interest□

legitimate may suffice as a legal basis for the processing of personal data by□

social network cookies, while specifying that it decides in the event□

where the social network cookie concerned aims to enable the social network to display□

content on the partner site. The defendant itself observes in its submissions□

that this hypothesis is “unrelated to the present case and unrelated to the□

audience measurement cookie”84.□

148. In this regard, the Litigation Chamber wishes to specify that the invocation of the interest□

legitimate as a legal basis by the Court of Justice in the “Fashion ID” case framework in□

the context of the transfer of personal data collected by means of cookies: such□

processing is actually subject to the requirements of a legal basis under Article□

6 GDPR. However, the Court of Justice explicitly states in this same judgment that the□

question of the legal basis for the further processing of data collected via cookies□

is relevant only on the condition that the consent required by Article 5.3 of the□

ePrivacy Directive 2002/58 was collected, which was not demonstrated in this case.□

83 CJEU, 29 July 2019, Fashion ID, C-40/17, ECLI:EU:C:2019:629.□

84 Defendant's submissions, p. 8.□

149. For pedagogical purposes,□

the Litigation Chamber reproduced below□

the□

reasoning developed by the Court of Justice in the Fashion ID judgment, and from which it follows□

that the data controllers remain in charge of ensuring that they obtain a□

consent for the placement of cookies, in accordance with the ePrivacy Directive,□

while data mining extraction of personal data collected through□

cookies and their transfer to third parties could be covered by the legal basis of interest□

legitimate, where applicable:

'By its fourth question, the referring court essentially asks whether,

in a situation such as that at issue in the main proceedings, in which the manager

of an Internet site inserts on said site a social module allowing the browser to

visitor to this site to request content from the provider of said module and to

for this purpose transmit to this supplier personal data of the

visitor, account should be taken, for the purposes of applying Article 7, under

f), of Directive 95/46, the legitimate interest pursued by that manager or the interest

lawfully pursued by said supplier.

As a preliminary point, it should be noted that, according to the Commission, this question is not

not relevant to the resolution of the dispute in the main proceedings, insofar as the

consent of the persons concerned, required by Article 5, paragraph 3, of the

directive 2002/58, was not collected.

In this regard, it should be noted that Article 5(3) of the latter

directive provides that

Member States ensure that

storage

information, or obtaining access to information already stored, in

terminal equipment of a subscriber or user is permitted only on condition

that the subscriber or user has given his consent, after having received, in compliance

of Directive 95/46, clear and complete information, among other things on the

purposes of the processing.

It is for the referring court to ascertain whether, in a situation such as that

at issue in the main proceedings, the provider of a social plug-in, such as Facebook Ireland,

accesses, as the Commission maintains, information stored in

terminal equipment, within the meaning of Article 5(3) of Directive 2002/58,

of the visitor to the website of the manager of this site. »85

150. The Litigation Chamber recalls that the Inspection reports focus on

the occurrence on the placement of cookies in the terminal equipment of users,

85 Ibid, § 87 et seq.

which in principle requires prior consent under Article 5.3 of the

ePrivacy Directive.

151. The Litigation Division therefore considers the defendant's argument irrelevant

based on the Fashion ID judgment of the Court of Justice of the European Union, to the extent

where the defendant does not demonstrate that it has obtained the consent of Internet users

concerned for the placement of social network cookies whose presence has been

detected by the APD Inspection Service. The Litigation Chamber considers that the

defendant, from the point of view of its duty of responsibility on the basis of Article 24 of the

GDPR, is required to provide such proof in order to enable the Chamber

Litigation to assess the merits of the invocation of a legitimate interest for the

processing of data collected by cookies, after obtaining consent

adequate for the placement of such cookies. No such proof is provided.

152. The Litigation Chamber will take into account, when determining the sanction,

the fact that the defendant declares that it has meanwhile developed a solution of

consent to ensure a legal basis for the placement of network cookies

without prior consent on its sites86.

o Analytical cookies

153. According to the Inspection report, so-called “analytical” cookies are deposited by default

on the user's terminal before obtaining consent.

154. According to the defendant, analytical cookies should be able to be placed on the basis of

the legitimate interest and not subject to prior consent (cf. point of view reflected under the

title II.5, Observation 1 "deposit of cookies not strictly necessary before the collection

consent”).

155. The Litigation Chamber refers to its developments and its decision concerning the

analytical cookies under title II.5 3.1 “deposit of cookies not strictly necessary

before obtaining consent. On this basis, the Litigation Chamber retains

a breach of Article 6.1.a of the GDPR on the part of the defendant, due to the filing of

unnecessary cookies, including analytical cookies, on the person's device

concerned, before obtaining their consent.

86 Defendant's submissions, p. 25.

87 See title Clarification regarding the placement of statistical cookies without consent, Pt. 119 et seq.

▪ Finding 4 (boxes pre-ticked for partners) and finding 5

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(information relating to these partners)

o The Inspection report

156. As part of its finding 4, the Inspection Service notes in its report that

"the partner selection screen is by default in 'allow' mode for the few

500 partners listed”.88 For example, on the Le Soir website, the selection screen

appears as follows:

157. The technical report on the Le Soir site also indicates that the “Consent

Management Platforms” are not satisfactory “since the principle is that of

Transparency and consent framework of IAB Europe and is therefore geared towards publisher interests

and advertising but not at all for the benefit of the protection of data subjects.

This can be seen by the number of partners to whom the authorizations are given by

default […] ". The technical reports relating to the other inspected websites report

similar findings.

158. On this basis, the Inspection Service finds a breach of the consent rules

and a violation of articles 4.11, 6.1.a and 7.1 of the GDPR on the part of the defendants,

88 Inspection Report, p. 22.

insofar as the pre-ticked boxes are not a valid way of collecting the

consent according to the definition of consent set out in article 4.11 of the GDPR

(definition of consent) juncto the interpretation developed by the Court of Justice

in its “Planet 49” decision clarifying the consent required for cookies (article 5.3

of the ePrivacy Directive) on the basis of the consent rules provided for in the Directive

95/46/EC, predecessor of GDPR89.

159. The Inspection Service recalls that the GDPR imposes a “declaration” or “a positive act

clear” (article 4.11 of the GDPR), so that it is not possible to obtain consent

of the person concerned for sending to all intended recipients by a simple

implicit and passive acceptance (pre-checked boxes). The Inspection Service reminds

also that the Court of Justice, in its judgment “Planet 49”90, confirmed that the

Consent was only validly given if it was solicited by means of

pre-ticked boxes that the Internet user should deselect to mark his refusal to

consent to the collection of their personal data. In addition, the Inspection Service

specifies that this way of obtaining consent places the defendant in

indelicacy with regard to the obligation made in article 7.1 of the GDPR imposing on him to be able

demonstrate that the person concerned has given his consent to the processing of his

data, in this case, in order to place cookies that are not strictly necessary.

160. On the basis of these elements, the Inspection Service finds that the provisions of articles

4.11 juncto 6.1.a and 7.1 of the GDPR are not respected.

161. In the context of its finding 5, the Inspection Service also points to a violation

to articles 4.11 juncto 12.1, 13 and 14 of the GDPR on the basis of the finding that only 13 of these

500 partners are mentioned in the cookie policy, while the screen of

selection of partners accessible via the volatile cookie banner

references some 500 partners of this type. The technical report specifies

“the policy has 13 partners, whereas if you run the DIDOMI CMP tool, you

realizes that there is reference to approximately 500 partner companies who are

selected by default. Via the CMP, it is also possible to access the policies

of cookies from each partner individually, making the list of the 13 partners

totally incomplete, useless and misleading”.

89CJEU, 1 October 2019, Planet49, C-673/17, ECLI:EU:C:2019:801.

90 Ibid.

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o The point of view of the defendant

162. On the breach of Articles 4.11, 12.1, 13 and 14 of the GDPR, the defendant states that the

investigation report does not reflect the reality of the consent system developed by

BFI:

has. The figure of 500 partners is a maximum and

noted

the maximum

advertisers likely to advertise on the defendant's sites because they

are affiliated with IAB Europe and participate in its TCF network;

b. When a visitor comes to the defendant's site, it does not know what

partner the system will choose to display an ad so that it is their

impossible to give this information to visitors;

vs. The system is constantly evolving and no longer corresponds to the

description during the findings.

d. The defendant invites the Litigation Chamber to provide clarification as to the

legality of the IAB consent collection system.

163. According to the defendant, the grievance here examined, namely, the obtaining of consent for
the transfer of data to third parties, cannot be examined separately from the whole
consent collection mechanisms provided by IAB upstream of the page by
which the defendant offers the Internet user the possibility of selecting third parties
recipients of personal data, and these mechanisms are constantly evolving.
164. On the infringement of Articles 4.11 juncto 12.1, 13 and 14 of the GDPR, the defendant does not develop
no specific defence91.
o Decision of the Litigation Chamber
165. On the breach of Articles 4.11 juncto 12.1, 13 and 14 of the GDPR, the Litigation Chamber
agrees with the findings of the Inspection Service and retains an infringement of duty
information because the privacy policy does not correctly reflect the number of
potential partners who are likely to process the data of the Internet user for
their own purposes (for example, by placing their cookies on the site concerned).
.
166. On the infringement of Articles 4.11, 12.1, 13 and 14 of the GDPR, the Litigation Division took
note of defendant's rebuttal that consent would not be
collected by means of pre-ticked boxes but indeed by means of the system of collection of
91 Defendant's submissions, p. 25.

consent IAB upstream of the page informing the defendant of the partners
recipients of their data, by means of pre-ticked boxes.
167. The Litigation Division duly noted the defendant's argument that the
mechanism for obtaining consent for the processing of data captured on the
defendant's site by partners, cannot be examined separately from
all the consent collection mechanisms provided by IAB upstream of the
page through which the defendant offers the Internet user the possibility of selecting

third parties likely to process their data for their own purposes. Moreover, these

mechanisms for obtaining consent are constantly evolving, depending on

the

defendant.

168. The Litigation Chamber recalls that its assessment is limited to a marginal control

the means of investigation implemented by the Inspection Service (see section II.4 On the

procedure, point 94 and following). In this case, the Inspection Service observed

breaches relating to the processing of personal data carried out by

third-party partners on the defendant's site, without deeming it useful to examine the mechanism

of consent of this data as provided by the IAB upstream of this relative page

to third parties. The Litigation Chamber therefore refers to the technical assessment of the Service

of Inspection according to which the mechanism of consent to the processing of data

collected on the site by third parties could not be assessed separately from the

upstream consent mechanism. To this extent, the transfer mechanism

of data to third parties through pre-ticked boxes, constitutes an infringement of the

articles 4.11, 12.1, 13 and 14 of the GDPR.

169. In response to questions from the defendant on this subject, which invited him by way of

conclusions to provide clarifications as to the legality of the data collection system

IAB consent, the Litigation Chamber draws the attention of the defendant to its

decision 21/2022 of February 2, 2022, which has taken place in the meantime, which sanctions certain

data processing carried out by IAB Europe from data collected by

Consent Management Platforms using the TCF system (Transparency and

Consent Framework).

 Legality of the TCF and OpenRTB system

170. The Litigation Chamber refers to the following assessments concerning the legality

of the IAB's consent collection system, namely, the consent solution

“Transparency & Consent Framework” or “TCF”, it being understood that this TCF collects a

signal of consent, of possible choices of preference or exclusion expressed by the

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users of the site, to then allow a real-time bidding system (“Open

Real-time bidding” or “Open RTB”)92:

“the Litigation Chamber judges that none of the bases proposed and implemented

implemented by the TCF cannot be legally invoked by the participants of the TCF. All

first, the Litigation Chamber considers that the consent of the persons

concerned

obtained through the CMP is not valid (i) and that the (pre)contractual necessity

is not

not applicable (ii). In addition, the Litigation Chamber considers that the legitimate interest does not

does not meet the CJEU's triple test (iii). Article 6 of the GDPR is therefore infringed. »93

171. The Litigation Chamber points out that the IAB was asked to develop a solution for

adequate consent (“Transparency & Consent Framework”) within six months

after validation of an action plan by the Data Protection Authority.

172. Insofar as

(i)

the defendant, according to its own arguments, relies on the mechanism

IAB Consent;

(ii) it was found after the facts of the case that the TCF system

version 2 of IAB does not offer an adequate consent solution for

processing in the “OpenRTB”;

(iii) the TCF system used by Rossel is of the same version as that

examined by the Inspection Department in the context of its IAB decision of 2

february 202294,

173. the Litigation Chamber considers that there is a great risk that the consent system

implemented by the defendant at the time of the facts noted in the report,

does not meet the consent requirements set out in Articles 4.11, 6.1.a and 7.1 of the

GDPR.

 Responsibility of the defendant

174. The Litigation Chamber draws the defendant's attention to the fact that he brings the

responsibility to provide an adequate consent system. In this regard, the

responsibility of IAB Europe for the consent system it has designed and

92 For a definition of the “Open RTB” real-time auction system, see point B.4.1 (b) of Decision 21/2022 of 2

February 2022 of the Litigation Chamber.

93 Decision 21/2022 of February 2, 2022 of the Litigation Chamber, point B.4.1 (a) and (b), in particular § 428.

94 “IAB Europe, in partnership with IAB Tech Lab, announced on 21 August 2019 the launch of the second iteration of

Transparency and Consent Framework” (TCF) v2.0. (https://iabeurope.eu/tcf-2-0/). It is this version that was the subject of the

investigation report in the IAB decision (https://iabeurope.eu/tcf-2-0/).

marketed does not exclude the liability of other parties responsible for

processing within the TCF system.95 Based on the general lessons learned from

the review of the TCF system carried out as part of the IAB decision of February 2, 2022, it

is likely that (i) the defendant is offered by the system the possibility of

determine which advertisers can offer data-based advertising

personal data within the framework of a website or an application as well as the choice of

whether or not to work with a “Consent Management Platform”96, therefore, it is also

likely that (ii) the defendant should be considered responsible for

processing within the framework of the TCF and the Open RTB.

175. The Litigation Division draws the respondent's attention to the judgment

Wirtschaftsakademie of the Court of Justice of the European Union97 in which he was

decided that the owner of a site is responsible for data processing

personal data collected on its site from cookies installed on or read by their site,

insofar as the owner of the site takes part in the determination of the purposes and

means of processing data from its site (for example, by defining, using

filters made available by Facebook, the categories of people who will be the subject

of the use of their data).

176. To this extent, the defendant is likely to bear liability for the

the use of the TCF system to obtain the necessary consent from

processing of personal data via the websites investigated, including the use

pre-ticked boxes according to the definition of consent provided in article 4.11 of the GDPR

juncto the interpretation developed by the Court of Justice in its judgment “Planet 49”98.

177. In response to the questions formulated by the defendant on this subject in its pleadings,

the Litigation Chamber therefore clarifies that there is, in its opinion, a great risk that the system

of consent implemented by the defendant at the time of the facts found

in the report, does not meet the consent requirements set out in Articles

4.11, 6.1.a and 7.1 GDPR.

▪ Observation 5: deficient cookie policy and information in

English

95 Litigation Division, Decision no. 21/2022 of February 2, 2022, p. 84, no. 363 and following.

96 For a definition of “CMP”, see Litigation Chamber, Decision no. 21/2022 of February 2, 2022, p. 15 and following.

97 CJEU, 5 June 2018, C-210/16, ECLI:EU:C:2018:388.

98 See finding 4 of the Inspection report, under heading I.1 above.

o The Inspection report

178. According to the Inspection report, the defendant failed in its duty to inform as

as defined in Articles 12.1, 13 and 14 of the GDPR by providing the information in English

mandatory relating to cookies.

179. The Inspection Service also makes several complaints regarding transparency:

-

Gaps in the information relating to the categories of personal data

personal data processed (social network cookies not included in

the screen of

cookie settings; advertising cookies which are a type of

cookie following the cookie policy and are subject to no less than four

choice in the cookie settings screen according to a gradation in the degree

acceptance of advertising profiling), the absence of individual documentation of

cookies and the difficulty of accessing the cookie policy.

Thus, for example, with regard to the difficulty of accessing the policy of

cookies, the Technical Inspection report relating to the Le Soir site mentions the

following findings: “With regard to the ease of access to the policy of

cookies, normally it should be accessible immediately, so in 1 click. In

With regard to this case, it is necessary to resort to 11 operations. The first is

to click in the “Learn More” of the warning banner. So appears

the consent collection screen on which I must click once on “View our

partner” to see who I give my consent for the features

presented. On the “Select partners for Le Soir” screen, I see that all the

partners are active by default. There is a way to disable them all using

the “Block” button to the right of “All partners”. Then click on the button "

Save” at the bottom right of the screen. We arrive on the “Welcome to Le Soir!” screen. " Where

it is possible to select the 5 objectives individually by clicking 5 times on “

Disagree” to refuse the options and once to save the choice via the

"Save" button at the bottom right of the page.

We return to the home page with the warning banner on the use of

cookies that has disappeared and by scrolling the page to the end, we get to the bottom

page the Cookies Policy link".

180. The technical report concludes that these access routes to the cookie policy bear

violation of the information and transparency obligations provided for in Articles 12.1, 13 and

14 GDPR. However, the Inspection report specifies that it does not maintain the grievance relating

access to the cookie policy and the information obligation relating to each cookie

individual, documentation by category of cookies being considered sufficient according to the

Inspection report.

181. With regard to the retention period, the cookie policy only states

give a definition of session cookies and permanent cookies without providing

concrete information on the retention periods of cookies placed by visiting the

concerned sites.

o The point of view of the defendant

182. The defendant does not develop any specific defense concerning the

breaches of the duties of information and transparency set out in the report

of Inspection and technical reports, and focuses on the issue of language:

the appearance of information in English would be the result of an unsuitable methodology

monitored by the Inspection Service, and its website would have displayed information in

French under normal conditions of use, according to the defendant, who did not

explained both in his written arguments and in court.

183. During the hearing, the defendant's Digital Director specified in particular

that if his organization had submitted to all users an interface in

English, he would have received a significant number of complaints, which was not the case. the

Digital Director also stated that in no case did information in English have
been published in terms of cookies, that the defendant did not test English during the
deployment phase of the “CMP” (consent management platform), which it has ensured
that all the chaining of information in French was correct. The director
digital of the defendant further stated that it carried out tests with the WEC in English
when he understood that this methodology had been used by the Inspection Service,
and that the result obtained was different depending on the language used. He later regretted having
been unable to reproduce and test the elements included in the report
of Inspection.

184. In its additional report, the Inspection Service explains in this regard that “The
language setting can trigger a language cookie (= strictly necessary) and
will influence the language of the proposed text. There is nothing that would make the language setting
"EN" more restrictive than "FR" or "NL" in terms of cookie mechanism and
consent mechanism. A difference between a "normal" environment and a
"research" environment cannot invalidate evidence. ". In hearing, the expert
technical department of the Inspection Service also insisted on the fact that the use of one or more
the other language had no impact on the observation that cookies are or are not deposited
on the user's machine.

The Inspection Service reiterated the view that the inability of the
defendant to reproduce the environment on the date of the findings results from the failure to
implementation of good IT management practices “such as ITIL V3”.

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o Decision of the Litigation Chamber

185. Article 12.1 of the GDPR provides that the controller must adopt measures
appropriate to enable data subjects to obtain the information required
by Articles 13 and 14 of the GDPR in a concise, transparent, comprehensible and

easy, in clear and simple language.

186. Given its marginal appreciation of the technical elements provided by the Inspection Service, the Litigation Chamber considers that the defendant does not bring not proof that the mandatory information has been provided sufficiently accessible and/or in the language of the persons concerned at the time of the findings carried out by the Inspection Service. The Litigation Chamber therefore notes a violation of Articles 12.1, 13 and 14 of the GDPR due to lack of information and transparency noted above.

187. The other grievances raised by the Inspection Service in terms of transparency and the defendant's arguments on this subject are not such as to modify the assessment final and overall outcome of the Litigation Chamber, which concludes that there is a deficiency in information and transparency regarding cookies on the defendant's sites.

188. With regard to the difficulties encountered by the defendant in replying to the findings of the Inspection Service, the Litigation Division must in this respect refer to the assessment by the Inspection Department of the state of the art in terms of load the proof/reproducibility of the technical environment that it is reasonable to require of a media site, again taking into account its competence of marginal appreciation of the findings made by the Inspection Service.

▪ Finding 6: withdrawal of consent not respected

o The Inspection report

189. It appears from the technical analysis report that the consent withdrawal mechanism offered on the defendants' sites is inefficient. The methodology used for obtaining consent takes place as follows in the technical report relating to the site of the newspaper Le Soir: "we delete the consents authorized by the means put available by the sites to obtain them and we check the return to the initial state with regard to concerns the presence of cookies. Cookies placed after having "accepted all" do not

are not deleted from the terminal; Other cookies are placed while browsing the site.

Indeed, in the first case, we note the presence of 104 cookies (file

Inspection.json), if we authorize everything through the cookie management tool, we

notes the presence of 131 cookies (allowinitialcookies.json) and if we remove all

authorizations, we arrive at 129 cookies (disagreeinitialcookies.json). The site being

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dynamic, the number may vary from one moment to another, but it is clear that

the withdrawal of consent does not in any way delete the cookies present and does not prevent

nor the addition of new cookies. We would expect to have a number of cookies close

zero or the number of cookies strictly necessary if consent is not

given and that this consent is respected, which does not seem to be the case”99.

190. The Inspection Service finds a violation of the right available to the person

data subject to withdraw consent at any time from Article 7.3 of the GDPR for

following reasons:

“The technical analysis notes the presence of 85 cookies by authorizing all cookies

using the cookie management tool. It notes the presence of no less than 117

cookies after the withdrawal of all authorizations by means of the management tool

cookies. In addition, new cookies are added as you browse.

Decision: on the basis of these elements, the Inspection Service finds that the

Article 7.3 of the GDPR is not respected”100.

191. The Inspection Service makes similar findings and conclusions for the two

other sites inspected.

o The point of view of the defendant

192. Respondent points out that there is currently no technology

to ensure total and automatic deletion of cookies: “After removal

consent, the targeted cookies are no longer used but their deletion within the meaning

strict still implies an approach by the visitor. ODA is well aware of this since its own

site proceeds in the same way and returns the user to the browser settings

used »101.

193. The defendant specifies that the alleged breach is not so much due to the presence of

cookies after withdrawal of consent, according to it unavoidable in the state of the art,

but “is actually due to the fact that the conclusive sites do not contain

information referring the visitor to the settings of the browser used allowing

to purely and simply delete the cookies”.

194. According to the defendant, this lack of information amounts to adding information to the

obligations provided for in Articles 13 and 14 of the GDPR, which exceeds the obligations

legal in this regard.

99 Inspection Report, p. 19.

100 Technical report, p. 21.

101 Inspection report, p. 27.

o Decision of the Litigation Chamber

195. The Litigation Division takes note of the findings of the Inspection Service according to

which the presence of cookies after withdrawal of consent is indicative of the fact that

this consent has not been implemented in accordance with the requirements of the GDPR. The

Litigation Chamber also takes note of the clarifications provided by

the

defendant seeking to reclassify the breach noted as a lack of information on

foot of Articles 13 and 14 of the GDPR instead of a breach of the obligation

to execute the right to withdraw consent under Article 7.3 of the GDPR.

196. The Litigation Chamber considers that the defendant's file does not contain

no element that leads it to deviate from the conclusions of the Service's report

of Inspection, in particular, no justification of the fact that the presence of new

cookies has been observed after the withdrawal of consent. The Litigation Chamber

notes that this specific finding of the Inspection Service is not disputed outside of

the methodological challenge in principle expressed by the defendant as to the

validity and reproducibility of the findings of the Inspection Service. Again, the Chamber

Litigation refers to its marginal duty to assess the Inspection findings.

In this context, the Litigation Chamber considers that the addition of new cookies after

withdrawal of consent by the defendant is sufficient to demonstrate an infringement of Article

7.3 GDPR.

III. Violations and Penalties

197. In summary, the Litigation Chamber finds in casu the following violations in the

head of the defendant:

 Violation of article 6.1.a of the GDPR juncto article 129 of the LCE, by filing of

cookies not strictly necessary before

collection of consent,

in particular cookies placed by third-party domains which have not been proven to be

are strictly necessary within the meaning of Article 129 of the LCE;

 Violation of articles 4.11 juncto 6.1.a and 7.1 of the GDPR for the collection of

consent by the “further browsing” technique, namely, coupling of

the expression of consent to receive cookies to the choice to continue

the use of the service;

 Violation of articles 6.1.a of the GDPR due to the deposit of unnecessary cookies,

in this case, social network and audience measurement cookies, before

collection of consent;

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 Violation of Articles 4.11 juncto 6.1.a and 7.1 of the GDPR due to the fact that the screen of

selection of partners to whom personal data is sent is by□

default presented in "authorize" mode for the 500 or so partners listed;□

□ Violation of articles 4.11 juncto 12.1, 13 and 14 of the GDPR due to the fact that only 13□

partners are mentioned in the cookie policy, while the screen of□

selection of partners accessible via the volatile cookie banner□

references some 500 partners of this type;□

□ Violation of articles 12.1, 13 and 14 of the GDPR fault for the defendant□

to provide proof that the mandatory information has been provided in a manner□

sufficiently accessible and/or in the language of the persons concerned at□

time of the findings made by the Inspection Service.□

□ Violation of article 7.3 of the GDPR given the addition of new cookies on the sites of the□

defendant after withdrawal of consent without justification deemed relevant by□

the Inspection Service.□

198. The Litigation Chamber therefore decides, on the basis of Article 58.2 d) of the GDPR and□

article 100, § 1, 90 LCA, to enjoin the defendant to put the salaries of□

personal data covered by this decision in accordance with the provisions□

of the GDPR whose violation has been established, and this, within a period of 3 months from the date of the□

receipt of this decision. The Litigation Chamber also enjoins the□

defendant to provide proof of this compliance within the same period.□

199. The Litigation Chamber also decides to impose a fine of EUR 50,000 on the□

defendant.□

200. It should be noted that the purpose of such a fine is not to put an end to an infringement□

committed but to effectively apply the rules of the GDPR. As it appears□

clearly from recital 148, the GDPR indeed provides that sanctions, including□

administrative fines, be imposed for any serious violation - thus including□

at the first finding of a violation -, in addition to or instead of the□

appropriate measures that are imposed.102□

102 Recital 148 of the GDPR states: "In order to strengthen the application of the rules of this Regulation,□

Sanctions including administrative fines should be imposed for any violation of this Regulation, in□

in addition to or instead of the appropriate measures imposed by the supervisory authority under this Regulation. In□

case of a minor violation or if the fine that may be imposed constitutes a disproportionate burden on a□

natural person, a call to order may be sent rather than a fine. However, due consideration should be given□

the nature, gravity and duration of the violation, the intentional nature of the violation and the measures taken to□

mitigate the damage suffered, the degree of liability or any relevant breach previously committed, the□

manner in which the supervisory authority became aware of the violation, compliance with the measures ordered against the□

controller or processor, the application of a code of conduct, and any other circumstances□

aggravating or mitigating. The application of sanctions, including administrative fines, should be subject to safeguards□

appropriate procedural procedures in accordance with the general principles of Union law and the Charter, including the right to

effective judicial protection and due process. [the Litigation Chamber underlines]"□

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201. The Litigation Chamber demonstrates below that the violations of the GDPR committed by□

the defendant are in no way minor violations and that the fine does not□

would not constitute a disproportionate burden within the meaning of recital 148 of the GDPR,□

two hypotheses in which the Litigation Chamber could waive inflicting□

a fine. The fact that this is a first finding of violation of the GDPR□

committed by□

the defendant in no way affects□

the possibility for□

bedroom□

Litigation to impose an administrative fine, as is apparent from recital 148□

of the GDPR. The Litigation Chamber in fact imposes an administrative fine in□

application of Article 58.2 i) of the GDPR. The instrument of the administrative fine has no□

elsewhere in no way intended to put an end to the violations. To this end, the GDPR and the LCA
provide for several corrective measures, including the injunctions referred to in Article 100, § 1,
8° and 9° of the ACL.
202. Taking into account Article 83 of the GDPR and the case law103 of the Court of Markets, the
Litigation Chamber justifies the imposition of an administrative sanction in a
specific as follows:
a) the nature, gravity and duration of the infringement (Art. 83.2 a) GDPR): infringements
noted relate in particular to a lack of knowledge of the provisions of the
GDPR relating to the very principles of protection of personal data (art.
5 GDPR) and proportionality of the processing (Art. 6.1 GDPR) as well as infringements
the principles of transparency (Art. 12 GDPR). A breach of these provisions gives
result in the highest fines according to Article 83.5 of the GDPR. There is also place
to point out the extent of the data processing concerned from the point of view of the
number of people affected whose data is potentially processed.
The affected websites belong, according to figures from the Information Center
on the Media (CIM) to the 10 most visited sites in Belgium. The defendant
declares that it has meanwhile developed a consent solution aimed at
ensure a legal basis for the placement of unnecessary cookies (including
analytical cookies) on its sites, but the Litigation Chamber cannot hold
account given the legal risks of such a consent technique
and refers to his developments above concerning the mechanisms of
consent offered by the IAB (Finding 4).
b) breaches previously committed by the data controller (art.
83.2 e) GDPR): the defendant was never the subject of a finding of infringement
sanctioned by the Litigation Chamber.
103 Brussels Court of Appeal (Market Court section), X. N.V. t. GBA, judgment 2020/1471 of February 19, 2020.

c) the manner in which the DPA became aware of the breach (Art. 83.2 h) GDPR): the

breaches have been noted in the context of an initiative investigation by the Service

on the initiative of the ODA Management Committee.

203. On May 27, 2022, the Respondent communicated its reaction to the Complaint Form dated

of 13 May 2022, inviting it to comment on the amount of the fine

considered.

204. Regarding the particular circumstances of the case, the defendant asserts that a fine

is not justified and that only a warning without publication should be retained if. in

the worst case scenario, the lawsuits had to be declared admissible and that a breach

had to be retained (quod non in both cases), taking into account in particular, the elements

following:

“1) The legally uncertain context: the authority has changed its mind on the question of

cookies wall and the position it defends today via certain communications

public and recent decisions is not shared by all European authorities, has not

given rise to any explicit judgment of the Court of Justice and is not the subject of provisions

specified in the directive and the transposition law; and

2) The modification decided on the initiative of Rossel at the time, for the sake of improvement

constant and when she did not even know that she was being sued by

of ODA. Rossel therefore did not wait for the lawsuits to, despite the legal uncertainty

noted above, voluntarily adopt the most protective interpretation for visitors

when it wasn't in his interest.

205. In this regard, the Litigation Chamber reiterates its position:

(1) it is not bound by decisions made by foreign authorities in matters of

cookie, deplores the lack of harmonization in this area and expresses its willingness to

attempt to obtain a consensus at European level on this subject (cf. intention to alert the Committee

direction in this regard);

(2) the Litigation Chamber cannot take into account the modification decided by Rossel

insofar as it is based on a consent mechanism whose legality has been

called into question in a subsequent decision, and insofar as the responsibility of the

defendants in the implementation of this system is potentially engaged, as

previously stated

(see point 174 and following,

title "responsibility for

the

defendant").

206. Wrongly, the defendant also considers that any sanction beyond the warning

would have a censoring effect on its activities, because it is not demonstrated that the rules in

cookie material

impact in some way

the content of the publications

journalists of the defendants.

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207. With regard to the sanctions envisaged, the defendant considers that the envisaged fine of

50,000 EUR is disproportionate as such (exceeds a warning) and by virtue of its

amount: “the absence of complaint – and damage – from the person concerned, the brevity of

the duration of the infringement, the legal uncertainty that prevailed, the duration of the investigation and

procedure, the voluntary decision to modify the system while Rossel was unaware of

lawsuits, … are elements that authorize nothing more than a purely

symbolic”.

208. The Litigation Chamber does not see how the duration of the investigation and the proceedings

may influence the proportionality of the fine envisaged. The Litigation Chamber

further notes that the infringements detected are for the most part unresolved and
justify a compliance order within 3 months. As for the changes
made by the defendant to its cookie management mechanism, the Chamber
Litigation reiterates that it cannot take into account the new IAB system implemented at
as a mitigating circumstance insofar as the legality of this management system
cookies was later challenged.

209. Regarding the annual figures submitted, the Respondent contests the fact that the Chamber
On its own initiative, Litigation obtained the annual accounts of “Rossel & Cie” from the website of
the National Bank. The Litigation Chamber considers that this initiative in no way harms
the rights of the defense given that the fine form is specifically intended to allow him to
provide their point of view on the figures taken into account. The search for initiative
carried out by the Litigation Chamber in public sources does not in addition entail
no new incrimination or grievance on which the defendant could not have responded
on the background.

210. As regards the amount of turnover, Rossel wrongly disputes the turnover
taken into account by the Litigation Chamber, and refers only to the figure
turnover for all the “web” activities concerned, namely, 11,954,047.76 EUR for the
Evening Web activities and EUR 9,321,377.39 for Sudmedia web activities. The
Litigation Chamber emphasizes that it can impose fines on the basis of the figure
of business for an entire company, which unquestionably corresponds to the figure
of the entire group as a legal entity.104

Overwhelmingly, the
Litigation Chamber emphasizes that it has, as a supervisory authority, the power
to impose
of the
fines

up to

20,000,000

USD,

regardless of the size or turnover of the company and taking into account the type of attack.

211. In the present case, the Litigation Chamber considers that an assessment

based on the type of damage is more relevant than an assessment based on

104 Section 83, para. 4, 5 and 6 GDPR.

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the amount of turnover. The Litigation Chamber therefore maintains the amount of

the fine envisaged initially, on a fixed basis, namely 50,000 EUR. The lines

EDPS guidelines on fines, currently subject to consultation,

allow the authorities to apply an appropriate lump sum with a view to

pursue the effectiveness and dissuasive nature of the sanction105. The Litigation Chamber

only produced the amounts of the turnover in order to assess whether the fine was not

manifestly disproportionate taking into account the means of operation of the

company (and for example would not have imposed a fine of this amount on a

company on the verge of bankruptcy). The Litigation Chamber considers that the defendant is not

not obviously in

the impossibility of paying

the fixed fine

determined, taking into account the seriousness of the breaches noted by the Inspection Service

and confirmed by the Litigation Chamber.

212. All of the elements set out above justify an effective, proportionate sanction

and dissuasive, as referred to in Article 83 of the GDPR, taking into account the assessment criteria

that it contains. The Litigation Chamber draws attention to the fact that the other criteria

of Article 83.2 of the GDPR are not, in this case, likely to lead to another fine

administrative than that defined by the Litigation Chamber within the framework of this

decision.

213. Moreover, insofar as the reaction to the fine form calls into question the objectivity

or the impartiality of the DPA and more specifically of the Litigation Chamber vis-à-vis the

defendant and the journalists who work there, the Litigation Chamber argues that

these arguments are not based on any evidence and, moreover, are of an irrelevant nature.

IV. Publication of the decision

Given the importance of transparency regarding the decision-making process of the Chamber

litigation, this decision is published in accordance with article 95, §1, 8° LCA on the website

of the Data Protection Authority with mention of the identification data of the

defendant and this because of the specificity of this decision - which entails a risk of

re-identification even in the event of deletion of the identification data – including the interest

general of this decision.

105 EDPB, Guidelines 04/2022 on the calculation of administrative fines under the GDPR, 12 May 2022, title 6.1.2

“dynamic maximum amounts”.

FOR THESE REASONS,

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

 Based on article 58.2, point i) juncto article 83 of the GDPR and article 100, §1, 13°

LCA, to impose an administrative fine of EUR 50,000 for the violations

noted in articles 6.1.a of the GDPR; 4.11 juncto 6.1.a and 7.1 of the GDPR; 4.11 juncto

12.1, 13 and 14 GDPR;

 Based on article 58.2, al. 2, point d) of the GDPR and Article 100, § 1, 9° LCA,

order the defendant to put the processing of personal data referred to

by this decision in accordance with the provisions of the GDPR, the

violation has been noted in the first paragraph of this provision, and this, in a

3 months from receipt of this decision; provide proof of

this compliance;

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.

(Sé). Hielke Hijmans

President of the Litigation Chamber