Decision on the merits 04/2021 - 1/49

Litigation Chamber

Decision on the merits 04/2021 of 20 January 2021

File number: DOS-2019-04798

Subject: Complaint for transmission of personal data by an organization

making offers to (future) mothers

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

Hijmans, chairman, and Messrs Jelle Stassijns and Dirk Van Der Kelen, members;

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

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

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

data), hereinafter "GDPR";

Having regard to the law of 3 December 2017 establishing the Data Protection Authority, hereinafter "LCA";

Seen

the rules of order

interior as approved by

representatives room

the

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

Considering the documents in the file;

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made the following decision regarding:

- Mrs. X, hereinafter "the complainant",

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The company/the

Service

national

of

promotion

of items

for

children

HER

(hereinafter: SA S.N.P.M.E.), hereinafter "the defendant", represented by Maître Jean-François

Henrotte and Master Fanny Coton.

1. Facts and procedure

The complaint

1. The circumstances and subject matter of the complaint can be summarized as follows. The defendant

is a private company, more specifically an advertising agency that provides media

media. The defendant offers so-called "Gift Boxes" for the benefit of

(future) mothers, containing offers and samples of products and services.

These boxes are distributed by a network of partners. The defendant offers

also to (future) mothers information relating to pregnancy, birth,

etc In addition, it grants discounts temporarily offered to members

recorded. The data of (future) mothers are passed on to third parties (which we

calls structural partners) in exchange for the aforementioned offers and samples

and for the trading of personal data and marketing actions

directly by these third parties. The complaint essentially draws attention to the fact that the

respondent is a provider of personal data.

2. At the time - when receiving a box from the defendant - the plaintiff

registered with the defendant and gave consent to the processing of

some of his personal data. The complainant, however, decided by the

subsequent to filing an opposition with the defendant because she no longer wished to be

contacted by third parties/partners of the defendant. However, after the introduction of a

objection to the defendant, the plaintiff still received telephone calls

third-party partners of the defendant regarding certain promotions.

3. On September 19, 2019, the complainant filed a complaint with the Protection Authority

data (hereinafter also referred to as DPA) against the defendant.

4. The subject of the complaint relates to the rental or sale of personal data

for direct marketing purposes, without the express consent of the persons concerned

and at least after its withdrawal, which resulted in the sending of

unwanted advertising. The complainant was contacted by telephone by a company

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Dutch for advertising purposes. The Dutch company is said to have indicated that it had obtained

the complainant's data to the defendant. The complainant claims that the

data transmission took place in a non-transparent manner. At the same time, she

indicates that at the time, she completed a form from the defendant but that she did not

does not recall having given his consent to the transmission of his data.

5. On September 23, 2019, the complaint is declared admissible on the basis of Articles 58 and 60

of the LCA and the complaint is forwarded to the Litigation Chamber under Article 62,

§ 1 of the LCA.

The report of the Inspection Service

6. On October 8, 2019, the Litigation Chamber decides to request an investigation from the
Inspection Service, pursuant to articles 63, 2° and 94, 1° of the LCA. Bedroom
Litigation considered that certain points lacked precision to proceed with the
substantive treatment.
7. On 28 January 2020, the Inspection Service submitted its report to the Chamber
Litigation, in accordance with Article 91, § 2 of the LCA.
8. The report specifies that certain personal data are leased to
third-party companies by the defendant: the surname of the mother, the first name of the mother, the date of
baby's birth, baby's gender, baby's name, email address, street and number
name, postal code and domicile.
9. The Inspection Service asserts that it is not competent to carry out the acts of investigation
information regarding the Dutch company which contacted the complainant by telephone on
September 17, 2019 in order to offer him children's books. Dutch society
does not have an establishment in Belgium. The Inspection Service therefore limited itself to
an investigation in respect of the respondent as controller.
10. According to the Inspection Service, the Dutch company rented the data from the
respondent. The complainant would have subscribed for the first time to the "gift box" of the
defendant during her pregnancy via a form "reservation card for my boxes
gifts". According to the complainant, the first box was delivered on April 12, 2019 via a
store specializing in baby products.

11. According to the complainant, an employee of this store invited her to complete the form
if she also wanted to receive the other boxes from the defendant. The Complainant
indicates that he has indeed completed the form and sent it to the defendant.
The plaintiff also received a "purple box" from her gynecologist which contained
a QR code inviting them to register online. When she was admitted to the maternity ward, she

received a third gift box without being asked to complete a form.

12. On May 21, 2019, the Complainant received an email thanking her for registering and inviting him to sign up for a welcome gift. The complainant then expressed her objection to the defendant who confirmed receipt on September 19, 2019.

Despite everything, the complainant continued to receive frequent emails from a partner of the defendant during the period between September 26 and on November 12, 2019, while under the terms of the defendant, the data received could not be used more than once by this type of partner (an 'occasional partner', see below).

13. The defendant has several kinds of partners:

- Structural partners to whom the personal data is transmitted.

- Occasional partners: For a single type of occasional partner, the defendant himself sends e-mails on their behalf. Another type of partner occasional users receives single-use personal data in order to be able to send letters or be able to try to contact people by telephone concerned.

14. Respondent's first activity, as set forth in the Service's report d'Inspection, is the distribution of gift boxes via its partners. According to Service of Inspection, the distribution of gift boxes supports a trade activity of personal data of mother and child for direct marketing purposes by partners of the defendant who are not cited exhaustively. There are different partners depending on the type of gift box:

- the "my pregnancy" and "birth of a baby" gift boxes have partners with maternities and gynecologists;

- the "my first months" gift box has as partners a supermarket (Y1), crèches and childminders;

- the "my first birthday" gift box is partnered with a company

clothing (Y2), participating crèches and childminders;

- the gift box "my beginnings at school" has a clothing company as a partner

(Y2).

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15. With regard to compliance with Article 5, paragraph 1, point a) of the GDPR (lawfulness, fairness and

transparency), the defendant replies that "in respect of his personal use",

it "does not collect" any data "for direct marketing purposes". The Inspection Service

could not establish that the defendant was sending direct marketing messages for the

promoting its own services or products to mothers and/or their minor children.

But the Inspection Service finds that:

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the exhibits show that the purpose is to rent the personal data of

mothers for the purposes of direct marketing actions undertaken by customers of the

defendant;

in the period around 2014, the defendant associated his name with the slogan

"No. 1 in young family marketing";

the respondent is active in the profiling of data subjects. The mothers are

classified according to the age of their child;

it should be noted that in its communications with the persons concerned and

the Data Protection Authority, the defendant insists only on part of

its activities (distribution of gift boxes) and does not explicitly describe the

communications relating to the other activity (trade/rental of data to

personal character) in normal language but only in terms

waves. This method gives rise to possible confusion and is contrary to the principle

of loyalty. The communication is not clear that if one registers for the

gift box, one may receive advertising from third parties which (with respect to the

category) are described sufficiently clearly;

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repeated concealment (not using explicit terms such as 'profiling',

‘advertising’, ‘marketing’ in external communications) or play on words in

communicating "half-truths" - such as stating that one does not collect

not itself data for direct marketing purposes and only point out

the benefits - is evidence that the risks and consequences for people

concerned are deliberately concealed or underestimated by the defendant;

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the principle of transparency and the principle of loyalty are not respected.

16. Respondent's second activity as set forth in the Service's report

of Inspection concerns the trading of personal data (for the purposes of

Direct marketing). Under Articles 12 and 13 of the GDPR, there is an obligation

information and a responsibility to meet the requirement for transparent processing.

17. As controller, the respondent must take steps

appropriate so that the data subject receives the information referred to in

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articles 13 and 14 of the GDPR. Information relating to the rights of persons

concerned in accordance with Articles 12 to 22 inclusive and Article 34 of the GDPR with regard to

relates to the processing must also be formulated in a concise manner,

transparent, understandable and easily accessible, in clear and simple terms.

18. Pursuant to the responsibility set out in Article 5(2) of the GDPR, the controller

of the processing must be able to demonstrate that the activity of the trade in personal data

personnel by the partners is formulated clearly enough for the people

concerned.

19. According to the Inspection Service, the defendant conceals the purpose "trading of data

of a personal nature and profiling" by not communicating on its activities of

trade the same (clearly) as receiving "free" benefits through

gift boxes. The information on the profiling of the mothers concerned and the

trade in personal data is communicated in terms

legal and in small print in the margins of the paper reply cards and on the site

Defendant's Internet.

20. The Inspection Service finds that the main business activities of the defendant

(i.e. advertising, media, trade in personal data

personnel) are not communicated in a sufficiently transparent manner to

(future) mothers as required by Articles 5(1)(a) and 12,

paragraph 1 of the GDPR.

21. Regarding the lawfulness of the processing (Article 6 of the GDPR), the defendant relies on

Article 6, paragraph 1, points a) and f) of the GDPR, depending on whether the collection of data

personal character was respectively carried out before or after May 25, 2018.

22. Article 6, paragraph 1, a) of the GDPR deals with the consent of the data subject

as the legal basis for the processing of personal data.

The defendant uses an online registration procedure. Online registration for a

gift box is always associated with the obligatory "agreement" for at least one shape

transmission for direct marketing purposes. However, no choice is left to the

data subject to determine which trade in personal data

and what profiling can take place in what context. The data subject cannot

not continue with the registration if a box is not checked. It is not possible to receive

benefits without consent. The Inspection Service concludes that it cannot

this is "free consent" within the meaning of the GDPR.

23. The right of withdrawal, which is inseparably linked to the granting of consent, is

only mentioned in the online privacy policy. Furthermore, the law is not

facilitated by the wording in small print. The Inspection Service therefore notes

that the withdrawal does not proceed as simply as the granting of the consent, which

is contrary to Article 7(3) GDPR. If consent is withdrawn by a

data subject, the personal data are not deleted or

erased from the defendant but only "deactivated".

24. Moreover, consent is not detailed. All purposes are

always grouped within the framework of the communication by the respondent. This limits the

control of data subjects over their personal data.

The categories of recipients of personal data are also not

clearly defined. Data subjects cannot assess

the impact or the nature of the transmission of their data, thus compromising their free

choice.

25. The Inspection Service deduces from the combination of the above findings that it

is not a question of a valid consent within the meaning of the GDPR on the part of the

data subjects for themselves (mother) or as legal representative of

the child (minor).

26. Article 6(1)(f) of the GDPR deals with the legitimate interest of the data controller

processing as the legal basis for the processing of personal data.

When assessing whether legitimate interest is adequate as a basis

legal, consideration must be given to the reasonable expectations, interests and rights of

people involved (mother and child). According to the Inspection Service, the reaction of

the plaintiff illustrates the fact that the legitimate interest of the defendant does not correspond to the reasonable expectations of those affected. The defendant uses conditions abstract and does not use any explicit terms such as 'advertising', 'direct marketing' or 'trade in personal data'. It is impossible for people concerned to estimate how many other companies subsequently use their data to personal character.

27. The Inspection Service asserts that the Respondent does not give sufficient explanations of the type of processing that may take place after the sale of the data of a personal nature. Hospitals and gynecologists are involved in the distribution of gift boxes, which, according to the Inspection Service, may lead to erroneous perception among the persons concerned that the defendant would be

a non-profit organization or an initiative of public authorities, rather than a private company that sells personal data.

28. In order to demonstrate that it has considered and considered the relevant and effective safeguards under this legal basis, the defendant drafted a document setting out a risk-based approach. The Inspection Service does not really see clearly how this document serves to concretely protect data subjects in the convenient. According to the Inspection Service, the defendant cannot sufficiently demonstrate which concrete technical or organizational measures offer a adequate protection. The Inspection Service concludes that the defendant does not demonstrate that this document is also effectively applied in practice.

29. Respondent further submits that there is a limitation on the number of times the data are used through the use of control addresses. The Inspection Service observes however, the limitation of use and the receipt of an opposition do not work. not (always) in practice. According to the Inspection Service, the absence of proof of

effective technical and organizational measures to safeguard the interests of

persons concerned implies that the defendant is acting contrary to the principle

accountability/responsibility.

30. According to the Inspection Service, the defendant's partners are respecting their obligation

of information with regard to data subjects (Article 14, paragraph 2, point f) of the

GDPR). Thus, between the defendant and his partners, nothing is contractually stipulated

regarding the communication of the source of personal data to

data subjects pursuant to Article 14(2)(f) GDPR.

31. Based on the above findings and considerations, the Service

of Inspection finds that the defendant could not invoke Article 6, paragraph 1,

point f) of the GDPR, given the lack of effective guarantees that it provides in order to comply with the

interests and rights of data subjects under the GDPR. Additionally, the Service

d'Inspection concludes that a double legal basis for the same processing cannot

legitimize fair processing. More generally, according to the Inspection Service,

it cannot be established that the defendant has a sufficient legal basis to

legitimize the processing of personal data under Article 6,

paragraph 1, point a) (consent) or Article 6, paragraph 1, point f)

(legitimate interest), given that the conditions imposed for this purpose by the GDPR do not

are not fulfilled.

32. Regarding the principles of proportionality and data protection from the

design, in accordance with Article 5 and Article 25, paragraph 1 of the GDPR, the Service

Inspection finds that the purposes of the processing are not differentiated.

Registration for an additional gift box implies an agreement as to trade

of personal data. According to the Inspection Service, the defendant does not

nor does it demonstrate that an opposition received against direct marketing is always

communicated to its partners.

33. Regarding the conclusion of the subcontract, in accordance with Article 28,

paragraph 3 of the GDPR, the Inspection Service finds that a store specializing in

baby items receives fill-in-the-blank cards and acts as a 'mailbox'

keeping these cards until an employee of the defendant comes to collect them.

This activity must, according to the Inspection Service, be considered as processing

of personal data. A subcontract therefore had to be

concluded. The Inspection Service considers that there is sufficient evidence that the defendant

has violated Article 28, paragraph 3 of the GDPR.

34. Regarding compliance with the obligation to cooperate under Article 31 of the GDPR, the

Inspection Service notes that no exhaustive list of partners has been provided

and therefore that there is no effective compliance with this obligation.

35. The Inspection Service then decides to transmit its report as part of

of the file to the President of the Litigation Division, in accordance with Article 91, § 2

of the ACL.

The procedure before the Litigation Chamber

36. On April 20, 2020, the Litigation Division decided, pursuant to Article 95, § 1, 1° and

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

37. The plaintiff and the defendant are informed of the decision of the Litigation Chamber

on April 20, 2020. In the notification letter of this decision, the parties are

also informed of the deadlines for transmitting their conclusions, in accordance with the

sections 98 and 99 of the LCA.

38. On May 8, 2020, the Secretariat of the Litigation Chamber received an e-mail from the lawyers

of the defendant informing him that certain parts of the report of the Inspection Service are

fault. The defendant asks to receive these documents and that the deadlines for

transmit the conclusions are appropriate. In addition, the defendant requested that the

case is now handled in French, given that the main contacts and

managers within the defendant are French-speaking.

39. On May 20, 2020, the Litigation Chamber responded to this communication by confirming

that it was actually found that some documents were missing during the transfer of the file

from the Inspection Service to the Litigation Chamber and as soon as an incomplete inventory

had been established. These include but are not limited to duplicates. Therefore, the deadlines

to transmit the conclusions were interrupted and the complete file with a

correct inventory has been transmitted to the parties.

40. Regarding the request for the case to be handled in French, the Litigation Chamber

refers to Article 57 of the LCA which establishes the discretion of the Data Protection Authority

data (and of the Litigation Chamber as a body forming part thereof) with regard to

concerns the language of the proceedings. Consequently, the Litigation Chamber is free

to use a procedural language that takes into account the concrete circumstances of

the case.

41. In this case, the investigation by the Inspection Service of the Authority for the Protection of

data was conducted entirely in Dutch. Moreover, during the phases

preceding proceedings, no objections have been lodged concerning the use

from Dutch. For these reasons, the Litigation Chamber considers that there is no need to

continue the procedure in French. Given the adaptation of the deadlines for transmitting the

conclusions, the Litigation Chamber considers that there is sufficient time and

margin for the defendant to take the necessary organizational measures

to seriously prepare his defence. The Litigation Chamber emphasizes that the

complainant is Dutch-speaking, as are a large number of people

data subjects whose personal data are processed by the respondent and to

in respect of which the defendant maintains communication in Dutch.

Defendant's submissions

42. On July 8, 2020, the Respondent filed its first submissions. On August 19, 2020, the respondent files submissions in reply. The summary of the content of these conclusions is reproduced below.

43. The introductory remarks deal above all with respect for the rights of the defence. Respondent finds that the number of potential GDPR breaches raised is larger than those investigated by the Inspection Service. According to Decision on the merits 04/2021 - 11/49 defendant, the violations have not been sufficiently proven, for lack of details and documentary evidence supporting these violations. The defendant thus claims that he cannot exercise their rights of defense as prescribed in Article 6 of the Convention European human rights. According to the defendant, the Litigation Chamber does not does not specify sufficiently in its decision of April 20, 2020 in what concretely consist of the violations, which have nevertheless been the subject of an investigation by the Inspection Service. Thus, the defendant claims not to be able to prepare enough his defence.

44. Secondly, the incomplete nature of the documents received is mentioned. The defendant claims that certain parts were not added to the report of the Inspection Service. According to the defendant, the exhibits were also not numbered correctly and were incomplete. The defendant therefore found the file to appear disorganized and fragmentary. The Respondent claims that only the incriminating evidence is included in the case. The defendant requests that these exhibits be excluded from the proceedings because of their incompleteness.

45. Third, the irrelevant nature of the prior material put forward by the Service of Inspection. According to the defendant, these are systematically previous grievances to which the Commission for the Protection of Privacy (predecessor in law of the DPA, also

hereinafter referred to as CPVP) did not respond. According to the defendant, the exhibits

not demonstrate that he would not have complied with the requests of the former OPC.

According to the Respondent, therefore, these cases cannot be considered as

previous ones.

46. Fourth, the Respondent addresses the need to sever the lawsuits.

The defendant proposes to split the case according to the following model:

• a case on the subject matter of the complaint, namely the question of whether actions of

direct marketing are carried out without legally valid consent to this

effect (complaint about a possible violation of Articles 6 and 7 of the GDPR) and;

• a case relating to the other bases, following the findings established by

the Inspection Service outside the scope of the complaint, in particular violations

possible under Articles 5, 6, 12, 13, 14, 25, 28, 31, 37 and 38 of the GDPR.

47. In describing the facts, the Respondent specifies several elements, including the

operation of its service and the steps taken to bring itself into compliance.

The defendant claims to address only (future) mothers and not their

children. He affirms that his activity revolves around four main axes:

“1. It offers free gift boxes with offers and samples of

products and services for future mothers and mothers, gift sets that are

distributed by a network of partners;

2. It informs future mothers and mothers.

3. It offers the possibility of benefiting from reductions offered temporarily to

members who have registered on its website, by means of printable coupons;

4. It allows you to directly receive offers from partner companies for products

and services for mothers-to-be and mothers."

quoted in the file are free translations made by the General Secretariat of

the Data Protection Authority, in the absence of an official translation]□

48. Next, the defendant explains how the data of (expecting) mothers is shared□

with third parties:□

1. First type of partners: structural (or long-term) partners.□

"As for the e-mail addresses, the defendant transmits them only to its□

long-term partners. Thanks to this long-term collaboration, when obtaining□

with the consent of the future mothers and mothers, the defendant may inform them of the□

communication to these recipients, specifying their names. It then belongs to□

recipients of this data to comply with the GDPR in their capacity as responsible for the□

processing.□

2. Second type of partners: occasional partners. There are two subtypes□

occasional partners.□

For the first subtype, the defendant makes available to other companies that offer□

products and services to future mothers and mothers the data of those who□

have given their consent to this effect, on a temporary basis and for use□

unique.□

Due to the fact that these are single claims, it is not possible for the defendant□

name all potential partners when seeking consent□

future mothers and mothers. Only fields of activity can be indicated.□

In this context, for companies of interest to future mothers and□

mothers who have given their consent to receive these offers, it is not only□

respect the information provided when requesting consent from the mothers□

but also to be able to maintain the affiliation of the mother members from a point of view□

business for the defendant."□

49. Respondent further states:□

“The second subtype of occasional partners are other companies that□

are also addressed to the defendant only once but for which:

• e-mail addresses are not communicated to them. They are the ones who

determine the criteria according to which they wish the e-mail to be addressed

to such and such future mothers or mothers and this e-mail is sent by the

defendant with his letterhead. This allows the defendant to ensure

the unique use of the data and the fact that they are not kept after

the promotional campaign in question;

• for postal addresses and telephone numbers, the defendant sends

a list of single-use data to the recipient company (after having

checked if it is not on the "Do not call me again!" for numbers

phone).

The defendant does not have the necessary infrastructure to process the claims itself.

paper communications or telephone interviews. However, it was agreed

contractually with the recipients of the data that these cannot be

used only once.

It is then up to the recipient companies, not only to respect their

contractual obligations but also to respect the applicable legal framework, in particular

the GDPR, and to check, if necessary, the "Do not call me again!" list.

50. Regarding the compliance steps, the Respondent asserts that its compliance has

was carried out with the help of his previous lawyer. Data protection policy

and the general and specific conditions have been reviewed, as well as the process

registration via the website. The right to rectification and the right to erasure

data can be exercised directly by the persons concerned via the page

"my account", as set out in the "FAQ" web page. In addition,

contracts have been concluded with subcontractors which, according to the defendant, meet the

requirements of Article 28 of the GDPR.

51. Following the exchange of e-mails with the Complainant, the Respondent indicated that it undertook

spontaneously to re-examine internal processes and try to improve them.

Since the end of October 2019, the registration process has been modified on the website

and the data protection policy was also completed in March 2020.

Furthermore, the defendant reminded the recipients of the data of the importance of

comply with their own legal obligations in terms of data protection to

personal character.

52. Regarding membership via postcards, the Respondent communicates that the

partner in question no longer retains

reply cards from

the

mid-November 2019.

53. The Respondent also appointed a Data Protection Officer, although he

claims not to be obliged to do so under the terms set out in the GDPR.

54. With respect to the Complainant's claims, the Respondent advances several

means.

55. As a first plea, the Respondent asserts that the complaint is unfounded. The complaint

concerns a possible violation of Article 6(1)(a) juncto Article 7 of the

GDPR. The defendant claims that he would have already corrected the registration process before the

receipt of the report of the Inspection Service, so that the grievance concerning the

non-free nature of the consent was no longer relevant at the time of the processing

of the case in substance by the Litigation Chamber.

56. The respondent refers to the judgment of the Cour des Marches1. In this judgment, the Court of

markets claims that the fact that a customer is not able to create a card of

fidelity because he refused the processing of the data appearing on the identity card

("eID") required for this cannot be considered a "harm". According to

Court of the markets, it is only a potential additional advantage which is lost,

not a legal or contractual right.

57. The Respondent concludes that the consent given by the Complainant constitutes a basis

valid legal basis for the communication of its data to the recipients. Moreover, the

respondent claims that at the time of giving consent, the data subject

has been informed of the recipients of the personal data (therefore it is a

“informed consent”). The defendant considers that a single consent for the

communication of data to third parties in order to receive commercial offers is

valid consent, given that it is for one and the same purpose, regardless of

does not matter if one or more third party companies receive the personal data.

58. Regarding the remark of the Inspection Service that the right to withdraw the

consent is not mentioned on the screen when consent is obtained, the

Respondent says it adapted this process. However, he specifies that the GDPR does not provide

no formal requirement to mention this withdrawal separately.

59. Finally, the Respondent asserts that its website offers no practical possibility of

withdraw consent immediately. According to the defendant, the withdrawal of consent

1 Judgment of the Brussels Court of Appeal (Chamber 19 A, Court of Markets) of February 19, 2020, 2019/AR/1600.

is in any case as easy as granting this consent, given that the

data subjects can withdraw their consent to the different types of

communications in the "my account" section of the website. The consent

can also be withdrawn by sending an e-mail, post or by means of a call

telephone to the defendant.

60. Respondent asserts that the fact that the online unsubscribe page only existed in

English and French has meanwhile been corrected.

61. As to the finding of the Inspection Service that a large part of the

personal data concerns minor children, making recital 38

of the applicable GDPR, the defendant claims that only the data of the mothers, with the

date of birth of a child, are required. There is no obligation to provide the

child's name or gender. Therefore, the defendant claims that it does not process any data

minors; only the fact that the mother has a child under the age of 18 months matters.

According to the defendant, recital 38 of the GDPR does not apply because it concerns the

services that are directly offered to a child, while the defendant does not address

its gift boxes and communications only to mothers.

62. Next, the Respondent discusses the other alleged breaches of the GDPR: Articles 5.1.a),

12.1, 13, 14, 6, 7, 5.1.c) juncto article 25, 5.2, 28.3, 31, 37 and 38 of the GDPR.

63. Regarding Article 5(1)(a) of the GDPR, the Respondent submits that it

does not use gift boxes as a "pretext" to obtain data from

(future) mothers. The use of this data by third parties is only part of

his activities. Data is also needed to invite mothers to come

look for their next gift box, close to their home. In this way, the

defendant knows approximately how many gift boxes each distributor has

need. This objective is clearly mentioned in the data protection policy

of the defendant and reflects, according to the defendant, the reality. We cannot therefore speak of a

violation of the duty of loyalty. Next, the defendant explains that the name

"Business" is not used to "give the impression of family services", being

given that it uses this name in its B2B relations.

64. The Respondent asserts that no vague wording is used regarding the activity of the

data sharing. It simply does not use the term "direct marketing" but describes

however, what this objective implies, namely: "in order to send products,

offers and information". According to him, it is sufficiently transparent in this context.

There is therefore no violation of the GDPR on this point.

65. Further, the Respondent is not clear how the terminology and a difference

claimed in language level and typeface between the presentation of the

distribution service of gift boxes and the request for consent for the

receipt of communications from partners of the defendant would constitute a violation

of the GDPR. According to the defendant, Article 5(1)(a) of the GDPR does not provide

that it is forbidden to use a certain level of language, nor that it is forbidden to insist on

the benefits of a service. Only the accuracy of the information provided to people

concerned should be taken into account.

66. The Respondent points out that he did not collect any personal data for his

own use for direct marketing purposes, given that he does not use them for

promote its own activities. The defendant claims that he does not conceal the nature

of its activities for the benefit of the beneficiaries. According to him, it indicates the purpose of marketing

in its data protection policy and provides a list of its partners as well

a list of potential categories of recipients.

67. Regarding Article 12(1) and Article 13 of the GDPR, the Respondent submits

that he cannot be criticized for having mentioned categories of recipients, being

given that this is explicitly provided for in Article 13(1)(e) GDPR.

The defendant claims that a detailed and complete publication of the list of partners

would constitute a violation of its trade secrets. According to the defendant, there is a

contradiction between two equivalent rights: the right to data protection and the

right to the protection of trade secrets, in accordance with Directive (EU) 2016/9432.

Be that as it may, the defendant has completed its data protection policy and the

formulation (already before receiving the report from the Inspection Service). The defendant

also undertakes to provide more details to the beneficiaries.

68. Respondent clarifies that Article 13 of the GDPR only requires that information

are provided on the categories of data recipients, not on the operation

legal basis which supports the communication of the data (i.e. the "rental" or the "sale"

of data). Under Article 14 of the GDPR, the defendant goes on to claim that it

it is up to the third party receiving the data to inform the data subjects

what data it processes, when it has received the personal data from the

2 Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of know-how and info

undisclosed commercial property (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157/1.

from the defendant. The respondent claims that the GDPR does not require it to specify how much

time or how business partners store this data. In addition,

the defendant specifies that there is also no legal obligation to mention in

the registration confirmation email the fields that the data subject had

completed as this can be viewed through "my account".

69. According to the defendant, it is therefore not a breach of responsibility and his activity

is communicated in a sufficiently transparent manner to the persons concerned,

given that it complies with the requirements of Article 13 of the GDPR.

70. According to the Respondent, the UK precedent cited by the Inspection Service, at

namely the "Bounty UK" case3, is based on the legislation in force formerly in

UK and not on GDPR. According to the defendant, the violation is not comparable.

We cannot therefore draw a precedent from it.

71. The Respondent finds that this is not a violation of Article 12, paragraph 1, nor

of Article 13 of the GDPR.

72. Regarding Article 14 of the GDPR, the Respondent submits that since the

(future) mothers register for the gift box, he obtains the personal data

personnel directly with them and therefore that Article 14 of the GDPR is not

application. The defendant considers that he is accused of breaches which would be

attributable to third parties. Be that as it may, the defendant is busy adapting its

contractual documents in order to recall the obligations of the GDPR for its customers and thus

take into account the concerns of the Inspection Service.

73. According to the Respondent, the fact that one of his partners did not inform the Complainant of the

source from which he obtained his personal data is a

action of a data controller which cannot be attributed to the defendant.

This also applies to the erasure of personal data from the

complainant by a partner. Furthermore, the fact that the Complainant is still receiving

communications from partners results from the fact that it has registered elsewhere.

74. Regarding Articles 6 and 7 of the GDPR: for arguments relating to consent

(Art. 6 (1) (a) GDPR), the defendant refers to what has already been

3 Reference to the administrative fine that the Information Commissioner's Office (Editor's note: English counterpart of the

data protection) imposed on Bounty. To be precise, the Litigation Chamber adds an Internet link to the

press release relating to this decision in the United Kingdom: https://ico.org.uk/about-the-ico/news-and-events/news-and-

blogs/2019/04/bounty-uk-fined-400-000-for-sharing-personal-data-unlawfully/.

specified to the Inspection Service. As regards the legitimate interests of the controller

processing or a third party (Article 6(1)(f) GDPR), the defendant claims

that the actions of a third-party controller cannot be relied upon for

find a failure on its own, nor to assess the balance between its

legitimate interests and those of the data subjects.

75. The Respondent emphasizes that it does not give the impression that it would be an entity

public or subsidized or an asbl. He also argues that members

subscribe to the gift box because of the offers and therefore cannot be said

that they would be surprised in their consent, since the transfer of their data has

place to send them other offers.

76. With respect to reasonable expectations of children's data, Respondent

repeats that it does not process children's data, only the data of

mothers, including the date of birth of the child to determine the needs of mothers.

77. Regarding appropriate and effective safeguards for the correct treatment of

personal data, the respondent claims that (as has already been

mentioned) the recipients of the personal data must comply with the

GDPR and that it is not legally necessary for the defendant to remind them of this in

the contractual documents. According to the Respondent, it does not matter that the limitation of

the use (single use) is part of his offer and that he also controls it

commercial application. According to him, he cannot be blamed for having

designed its offer in accordance with articles 5 and 25 of the GDPR.

78. Concerning the contract which binds it to its subcontractor Y3, the defendant specifies that it ensured

that the information required by Article 28, paragraph 3 of the GDPR is included therein.

This contract is supplemented by specific technical annexes which, according to the defendant,

go beyond the requirements of Article 28(3) GDPR.

79. Regarding the dual legal basis, the Respondent disputes that it is based on two

different legal grounds. He declares that he is based on a single legal basis

by location. It is based on Article 6(1)(a) GDPR for mothers

who have given their consent since May 25, 2018 (date of entry into force of the

GDPR) and on Article 6, paragraph 1, point f) of the GDPR for mothers who have given

their consent before May 25, 2018 and whose consent expressed

previously does not therefore meet the requirements of the GDPR. Anyway, the

defendant claims that even the use of two legal grounds cannot

justify an administrative penalty. The defendant concludes that he does not commit any
breach of Article 6 by providing two different legal bases for the processing
of data from different data subjects.

80. With regard to Article 5(1)(c) and Article 25 of the GDPR, the
defendant claims that the data is erased before the child reaches the age of
18 years old, if the mother wishes. This retention period has been set in this way because a
large number of children find themselves in working life after reaching the age of
compulsory education and are no longer part of the parental household. All data from the
mother are deleted when she no longer has a child under 18. The defendant in
concludes that it satisfies the principle of data minimization.

81. Regarding the possibility of making a (detailed) choice between the purposes of the processing, the
defendant asserts that it has not been demonstrated that the data were not adequate,
relevant and limited to what is necessary for the purposes for which they are
processed. According to the defendant, no breach has been demonstrated with regard to the implementation
implementation of appropriate technical and organizational measures. The defendant claims
that only the personal data necessary for each specific purpose
of processing are processed.

82. Furthermore, the Respondent again asserts that it cannot be held responsible for the
behavior of third party recipients. The Respondent concludes that there is no violation of
Article 5(1)(c) or Article 25 GDPR.

83. Regarding Article 5, paragraph 2 of the GDPR: the defendant did not keep any
registration of the number of rectification requests and it is not possible to
prove that an effective erasure has taken place. The Respondent asserts that no provision
of the GDPR obliges it to keep such a record. The only obligation that exists is
the processing of the rectification request itself. The defendant, however,
been able to prove that the complainant was no longer on his mailing list database.

After careful consideration, the defendant was also able to obtain proof of

data erasure.

84. Respondent mentions that it keeps the e-mail addresses of mothers who requested the

deletion of their data but only to ensure that no new

account cannot be created later with

the same email address.

Regarding this question, there is, according to the Respondent, no clear answer either in

the GDPR, nor in case law or doctrine. Therefore, we could not

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reproach for not having been able to immediately prove the act of erasing the data

of the complainant.

85. Regarding Article 28, paragraph 3 of the GDPR, the respondent does not consider that it

should have entered into a contract with Y4 because there is no relationship with a subcontractor

data within the meaning of the GDPR. According to the defendant, no classification is established by

this partner before he hands him the postcards. The defendant further asserts

that before encoding the data written by hand by the (future) mothers, it is not a question

of a file. This phase therefore does not fall within the material scope of the GDPR.

According to the defendant, this partner is therefore not a processor within the meaning of Article 4.8)

of the GDPR. Therefore, Article 28(3) GDPR does not apply.

86. Regarding Article 31 of the GDPR, the Respondent indicates that it cooperated well with the

Inspection Service and having provided this service with detailed information on its

network of gift box distributors. According to the defendant, the reason why

one of its partners was not mentioned is based on the limited activity that this

partner realizes for him. The Respondent asserts that it confirmed in good faith that the list

was exhaustive, since he was not aware that he had forgotten a distributor.

According to the Respondent, no breach of the obligation to cooperate could have been

committed since the cooperation with this partner is not subject to the GDPR

(see above). Further, the defendant does not understand the alleged breaches

regarding the customer list (the "partners" who receive the personal data

staff). Respondent claims to have responded appropriately to questions from the Service

of Inspection. The defendant concludes that no violation of Article 31 of the GDPR was

demonstrated.

87. Regarding Articles 37 and 38 of the GDPR, the Respondent asserts that it is not obliged

to appoint a data protection officer on the basis of Article 37.1 of the GDPR.

It is indeed not a public authority. Moreover, according to his defence, the main activity

of the defendant is not the follow-up of (future) mothers on a regular, systematic basis

and on a large scale. The defendant claims that there is no evidence that he would meet the

conditions which require the appointment of a data protection officer.

88. The alleged profiling referred to by the Inspection Service has also not been demonstrated

according to the defendant. The defendant concludes that he is not carrying out any processing within the meaning of a

of the cases cited in Article 37, paragraph 1 of the GDPR. Moreover, according to him, he cannot

no longer be a violation of Article 37, paragraphs 5 and 7 of the GDPR because there is no

has no indication that it falls within the scope of Article 37,

paragraph 1, point b) or c) of the GDPR. Regarding Article 38 of the GDPR, the defendant

affirms that the Inspection Service did not identify the failure which would be

reproach. Be that as it may, the Respondent voluntarily appointed a delegate to the

Data protection.

89. The Respondent asks:

- Principally: violation of the rights of the defence, implying that the defendant cannot

not be sanctioned for the presumed violation of one of the articles cited in the decision of the

April 20, 2020.

- In the alternative: no violation and no penalty. According to the respondent, the Service

of Inspection has not established any violation referred to in the aforementioned decision.

- On a more subsidiary note: no fine should be imposed. The defendant

undertakes to make the adaptations deemed necessary by the Litigation Chamber in

three months after the decision and to provide a report.

- On an even more subsidiary basis: if an administrative fine were imposed:

possibility for the defendant to comment on the amount thereof.

The defendant wants to be able to defend himself regarding the amount of the fine sought.

- Finally: no need to publish the decision; if a publication nevertheless occurs,

any reference to its activities should be deleted.

The complainant's conclusions

90. Pursuant to Section 98 of the ICA, the Complainant also files pleadings.

91. The Complainant asserts that she primarily wants the Respondent to adapt its method

so that it is clear to everyone that they are reselling/renting data and

retains certain data for 18 years. According to the complainant, the communication

(also via the website) of the defendant must be more transparent so that

that a data subject knows all the parameters before registering.

92. In addition, the complainant pleads for the communication and publication of this file,

as this is "necessary" because the tactics applied on the website

are an example of what not to do [...].”

93. The Complainant alleges that the Respondent's website was not secured against

leaks of existing email addresses through the registration form.

94. The complainant specified that the cards that could be obtained from one of the partners

of the defendant are cards to be completed and not postcards as claimed

the defendant. Currently, this partner no longer receives any document/card,

which is logical given that a contract must be drawn up for this purpose because data

are processed and stored. The complainant further requests that the reply cards

be completely deleted since these have not been developed according to the

GDPR guidelines.

95. The plaintiff clarified that in the event of the death of the mother and/or the child, the defendant is not

not informed and that this data continues to be sold/rented.

96. Complainant concludes that Respondent is still committing violations of several

legal provisions of the GDPR.

The hearing

97. In accordance with Article 51 of the Internal Rules of the Protection Authority

data, as approved by the House of Representatives, the parties are

summoned to the hearing requested by the defendant (under Article 98 of the LCA).

98. The complainant was not present at the hearing.

99. The defendant attended the hearing and was represented by his two lawyers, as well as a

representative of its executive committee.

100. The hearing took place on November 25, 2020.

101. A record of the hearing was drawn up, the sole purpose of which is to provide

additional information and clarifications concerning the submissions filed

previously. As always, the parties also had the opportunity to formulate

factual remarks on the minutes, without implying a reopening of the

debates. The Respondent transmitted such remarks which were added to the file in

appendix to the minutes.

The fine form of December 9, 2020

102. On December 9, 2020, the Litigation Chamber sent a fine form to the

defendant, indicating that the Litigation Division was considering imposing a fine of

EUR 50,000 to the defendant following violations of several provisions of the GDPR in the

present case (the same violations that were upheld in the previous decision

for the imposition of an administrative financial penalty under Article 83 of the

GDPR).

103. In its reaction to the fine form on December 29, 2020, the Respondent points out

several elements put forward by the Litigation Chamber in its deliberation and the

The following elements are particularly important in this context to determine the

penalty in this decision:

oh

concerning the duration of the breach: Y4 ceased in mid-November 2019 the

collecting cards to complete;

oh

concerning the number of persons concerned: the defendant asserts that

in

the

reality, alone

the personal data of

1,140,725 adults are treated and that the Inspection Service wrongly attributes

children's information (according to the defendant, a "characteristic of the

mother" and not personal data) to these children as

people concerned and thus arrives at the much larger number of

2,439,492. Furthermore, the respondent indicates that there are overlaps in

due to double registration, which has the consequence that the number

real number of people concerned would be "well below 1,000,000";

oh

the defendant asserts that the Litigation Chamber is only

competent for the collection of personal data between the

May 25, 2018 and mid-October 2019;

oh

concerning the financial means of the company, the defendant points out that in

due to the COVID-19 crisis, he is facing a loss of income, which

which will lead him "surely to end the year with a (big) loss".

The defendant draws attention to the fact that the imposition of a fine

high endangers the company and its staff;

oh

regarding the size of the fine, the defendant considers that one cannot

take into account only the income earned by the transfer of data

(39% of activities during the 2019 financial year) and that, in accordance with the

previous case law of the Litigation Chamber, it is necessary to apply a

percentage, the result of which would be a fine of EUR 2,500.

2. Motivation

2.1. Procedural aspects

104. In its submissions, the Respondent raises several alleged issues regarding

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the procedure.

The material scope of the file

105. First of all, the Respondent asserts that the rights of the defense would not be

respected, given that it is unclear against which violations he must stand.

defend.

106. However, in its letter of April 20, 2020, the Litigation Chamber informed the parties

of the legal provisions against which the defendant must defend himself and of the violations

possible that could be observed; for findings in this regard, it refers

the report of the Inspection Service drawn up in the context of the complaint.

107. All legal provisions enumerated in this letter by the Chamber

Litigation were taken up by the Inspection Department in its report. It is correct

that, for example, Articles 37 and 38 of the GDPR are not mentioned per se in the

findings of the report, but it is indeed noted by the Inspection Service

that no data protection officer has been notified to the Data Protection Authority

data by the defendant4. This is the reason why the defendant also has the

opportunity to speak on this subject in his defence.

108. The defendant was able to read the complete file, and in particular the report

integral part of the Inspection Service. The Litigation Chamber obviously does not have

more exhibits than the defendant in this case. When the Litigation Chamber

reads in the report of the Inspection Service that there is a possible confusion concerning the

notification of the data protection officer, the defendant may also

defend in detail in this regard, and more specifically on the basis of

all (exceptional) provisions in the cited legal provisions, not only

provisions that might be implicitly burdensome to the defendant.

109. In this context, it can be observed that the procedure before the Litigation Chamber of

the Data Protection Authority does not provide for any kind of Public Prosecutor or

Parquet, and even less that this role be entrusted to the Inspection Service. The service

of Inspection knows only the competences that have been attributed to it by virtue of the

ACL. The procedure before the Data Protection Authority cannot therefore be

compared to that in legal proceedings, although there are obviously safeguards

to ensure the rights of the defense in the light of Article 6 of the ECHR.

4 Report of the Inspection Service, p. 14.

110. The Litigation Division cannot appear biased either, indicating a priori

concretely, in its decision to invite the parties to introduce their submissions and
be heard pursuant to section 98 of the ACL, a violation which she would read in the
case. On the contrary, the Litigation Division has precisely indicated the provisions
law for which a problem(s) may arise (on the basis of the
complaint and investigation as well as the subsequent report of the Inspection Service),
precisely in order to guarantee the rights of the defense and not to appear biased.
Incomplete nature of the documents received and presumed irrelevant nature of these documents
111. It is true that in the first place, the file that the parties received did not correspond
to the parts as indicated by the Inspection Service in its report. He has however
This situation has been remedied and the parties have received a new inventory and a new
file (which included in full all the exhibits known to the Chamber
Litigation) and the deadlines for submitting conclusions have been extended. Rights
of defense were therefore fully guaranteed.
112. In addition, the Respondent also asserts that certain documents added by the Service
of Inspection on file are not relevant and cannot be taken into account in
pursuant to sections 104 and 105 of the LCA. Furthermore, the defendant refers to
the incompetence in the matter of the Data Protection Authority concerning
violations dating from before May 25, 2018.
113. It is true that the exhibits to which the Respondent refers in its pleadings are
documents on which the Litigation Chamber cannot or can no longer
pronounce for one or more reasons. The investigation by the Inspection Service has, however,
attempted to gather (factual) information that might be relevant to the
file, pursuant to section 72 of the ACL. This does not mean that the House
Litigation takes into account such elements - within the meaning of Article 104 of the LCA as
only “dependent element” in the legal sense - if it eventually proceeds to take
penalties. These facts may, however, be relevant for the preparation of the file of the

Inspection Service. The Inspection Service cannot be limited in its discretion

in this regard. The Litigation Chamber is responsible for ruling on the relevance

elements put forward by the Inspection Service.

Need to split "the prosecutions"

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114. The Respondent submits that a distinction must be made between findings relating to the

complaint on the one hand and the other findings of the Inspection Service outside the framework

of the complaint on the other hand.

115. Once the Inspection Service was seized of the case by the Litigation Chamber

in accordance with article 63, 2° of the LCA, it has the power to analyze

further processing related to the subject of the complaint. The Litigation Chamber emphasizes

in this respect that the investigative powers of the Inspection Service (Articles 64 to 90

included in the ACL) are not limited to a simple statement of the accuracy of the content

of the complaint. Investigative skills must indeed be used to examine compliance

provisions for the protection of personal data. For this

reason, the investigation must at least also be able to relate to elements which are

incidental to the subject of the complaint.

116. The Litigation Division also points out that when the Inspection Service

becomes aware during an investigation of a complaint that there are serious indications of

the existence of a practice that may give rise to a violation of the principles

fundamentals of the protection of personal data, the Service

of Inspection may examine new elements on its own initiative, in accordance with

in article 63, 6° of the LCA. The Litigation Chamber emphasizes, however, that in the

present case, all the findings of the Inspection Service are directly or

indirectly related to the subject of the complaint. All findings are part of a single

and same file, which was transmitted to the Inspection Service on the basis of article 63,

2° of the ACL.

117. Furthermore, all legal aspects of the case are relevant to the Complainant and

their minor child, given that their personal data have been or are being processed

by the defendant. It is these treatments that have been thoroughly investigated.

All the findings of the Inspection Service are therefore closely linked to the subject

of the complaint.

118. Nor can it be said in this case that the scope of the case was unclear

for the defendant, since the decision of the Litigation Chamber of April 20, 2020

inviting both parties to submit their submissions in accordance with Articles 98

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and 99 of the ACL, clearly refers to the complaint as well as to the findings of the Service

of inspection.

119. The request of the Litigation Division with regard to the Inspection Service does not limit

therefore in no way the extent of the investigation nor the investigation possibilities of this service.

This is clear from the text of the law. This is why the request for

defendant to "split the proceedings" cannot be accepted. Furthermore, it is

interesting to note that according to article 77, paragraph 2 of the GDPR, the

complainant has the right to be involved in the follow-up of his complaint and in the file

subsequent right, which the national legislator has also given effect to

detailed in the procedure by setting out in detail the role of the

plaintiff in the procedure, in accordance with the European provision in this regard.

The magnitude of the number of people affected

120. In its response to the fine form, the Respondent clarifies that the Chamber

Contentitieuse is only responsible for the collection of personal data

staff between May 25, 2018 and the end of October 2019. The Litigation Chamber emphasizes

that it is indisputably competent to decide on all the processing of

personal data that took place after May 25, 2018. It is not limited

therefore not to processing relating to personal data which have been

collected after May 25, 2018 but it is also competent for the processing

personal data that was collected before May 25, 2018.

2.2. Consent and lawfulness of processing (Article 4, point 11, Article 6,

paragraph 1 juncto article 7 of the GDPR)

121. Regarding the lawfulness of the processing (Article 6 of the GDPR), the defendant relies on

Article 6, paragraph 1, points a) and f) of the GDPR, respectively for the processing

carried out on the basis of the collection of personal data having been carried out

before or after May 25, 2018.

122. Article 6, paragraph 1, a) of the GDPR concerns the consent of the person

concerned as the legal basis for the processing of personal data

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staff. The definition of "consent" of the data subject in the GDPR is

the following5:

"any manifestation of will, free, specific, enlightened and unambiguous by which the

data subject accepts, by a declaration or by a clear positive act, that

personal data concerning him are processed".

123. Regarding this legal provision, recital 42 in fine of the GDPR specifies what

follows:

“Consent should not be considered to have been freely given if the

data subject does not have genuine freedom of choice or is not in

able to refuse or withdraw consent without prejudice.”

(underlining of the Litigation Chamber)

2.2.1. The free nature of consent

124. The Respondent claims that the objections in the record relating to the free character of the

consent are unfounded because only a potential additional benefit would be

lost6. The defendant refers to a judgment of February 19, 2019 of the Court of Markets7 in

matter. The defendant mentions a few elements:

o According to the Court of Markets, the fact that a customer cannot create a card

of loyalty because he refused the processing of the data appearing on his

identity card, essential for the loyalty card, cannot be

considered a "disadvantage".

o According to the Market Court, this is only an additional advantage

potential that is lost, not a legal or contractual right.

o According to the Court of Markets, it is therefore not specifically a

disadvantage due to the loss - but the loss of a limited advantage -

when a person refuses to give consent for processing

of his personal data.

125. In fact, the cited case cannot be compared to the present case.

In this case, it is a different situation because the advantages that people

concerned can obtain (in particular the receipt of gift boxes and

5 Article 4, 11) GDPR.

6 Judgment of the Court of Markets 2009/AR/1600.

7 Judgment of the Court of Markets 2009/AR/1600.

benefits) are also not actually obtained if no consent is given.

given. The defendant uses an online registration procedure in which

registration for benefits is always linked to the obligation to give one's "agreement" to

at least one form of transmission for direct marketing purposes. In this context, it

this is the essence of the service offered by the defendant, not a benefit

extra, like a loyalty card.

126. In addition, the Litigation Chamber points out that there is indisputably a causal link to

effect between the breach and the loss of a benefit to a data subject

resulting from a violation of a provision of the GDPR (such as the absence of information)

by a data controller, advantage that the data subject would have obtained

without this violation8. This must be taken into account when evaluating the 'free' character of the

Consent within the meaning of Art. 4 No. 11 GDPR.

127. No choice is left to the person concerned to determine which trade in

personal data may take place in what context. The person

concerned (in this case the complainant) cannot continue with her registration if the

box is not checked. The question is therefore whether the consent in this matter

is a sufficiently "free" consent within the meaning of the GDPR.

128. According to the European Data Protection Board (hereafter referred to as

the English abbreviation EDPB), the consent is only valid if the person

concerned can make a real choice and have control of their own personal data

staff9. In accordance with Article 70(1)(e) GDPR, the EDPB is

empowered to issue guidelines to promote consistent application of the GDPR.

These guidelines bind the Data Protection Authority as a member of

the EDPB. While the EDPB sets guidelines, its members can be expected to

adhere to these guidelines.

129. In the consent guidelines, the EDPB points out that a

consent cannot be free on the basis of 'prejudice', if there are

8 In addition, the question could be raised as to whether, when a data subject claims (before a judge) a

compensation, in accordance with Article 82 of the GDPR, for the loss of the aforementioned benefit, this could not be considere

as prejudicial damage to the data subject for which the data subject - on the basis of the

European provision mentioned above - could obtain redress; for an in-depth discussion of the concepts, read

J. HERBOTS, “Why It Is Ill-Advised to Translate Consequential Damage by Dommage Indirect” in European Review of Private

Law, 2011, Vol. 19(6), 9.1-949.

9 EDPB, Guidelines 5/2020 on consent within the meaning of Regulation (EU) 2016-679 (v.1.1.), 4 May 2020, available via

the following link: https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_202005_consent_fr.pdf (hereinafter Guidelir

Guidelines 5/2020), point 13.

10 Cf. AG Bobek reasoning in case C-16/16 P, Belgium v Commission, ECLI:EU:C:2017:959, paragraphs 89-90.

"significant negative consequences" for the data subject11. The consent

must involve an autonomous act of the individual, free from external manipulations12. According to

GDPR, consent cannot be considered to be freely given if the

data subject has no real choice or is unable to refuse his or her

consent without negative consequences.

130. Respondent offers not only products and discount coupons but also

an information service for data subjects. The defendant proposes to

(future) mothers information sheets about pregnancy and beyond.

The person concerned could not benefit from the products and other advantages, nor from the

information sheets if it does not transmit personal data and does not

does not consent to dozens of further transmissions and other processing, which

clearly represents harm to the data subject.

131. The EDPB has also given examples of this in its Guidelines 5/2020.

By way of example, it is specified that there is no prejudice if the advantages can

also be obtained in another way. Conversely, the advantages

cannot be obtained in any other way and the refusal to give consent

involves harm to the persons concerned, including the complainant.

132. Furthermore, consent is not detailed. All purposes

for further processing are grouped together when granting consent by the

persons concerned vis-à-vis the defendant. The categories of recipients of

personal data is also not defined clearly enough

and the persons concerned cannot fully trace the partners of the

respondent. The persons concerned cannot therefore assess the impact or the nature

of the transmission of their data. Therefore, the persons concerned are

deprived of control of their personal data.

133. In recital 43, the GDPR specifies that consent "is presumed not to

have been freely given if separate consent cannot be given to

different personal data processing operations although this

is appropriate in the particular case, or if the performance of a contract, including the provision

of a service, is subject to consent even though this is not

11 Guidelines 5/2020, pages 14-15.

12 See KOSTA, E., Consent in European Data Protection Law, Leiden, Martinus Nijhoff Publishers, 2013, p. 169.

13 Recital 42 GDPR.

14 Guidelines 5/2020, pages 14-15.

necessary for such execution." Thus, it is possible that a data subject

wishes only to receive the gift boxes offered by the defendant and wants

therefore send him his contact details but this is not possible because the defendant has

inseparably also other purposes for the personal data at the

means of consent (the sale and rental of personal data to

commercial purposes).

134. When the controller pursues several purposes (and also several

processing) in the context of the collection of the same personal data,

according to the EDPB, "data subjects should be free to choose which purposes

they accept, rather than having to consent to a set of purposes of

treatment"15.

135. If only for the non-free nature of the consent, it is not valid

in law, in accordance with Article 6, paragraph 1, point a) juncto Article 7 of the GDPR.

2.2.2. The "informed" nature of consent

136. Exercising positive pressure (such as offering discounts on products) does not

does not render the consent invalid insofar as the data subject has received

all the necessary information relating to the processing of his personal data

personal and that she had a real choice to decide. In this case, the person

concerned has not, however, received all the necessary information. It is precisely

the subject of the complaint.

137. Moreover, it appears from the record and from the Respondent's arguments in the proceedings

as to the substance that all the partners could not even be known to the

data subjects on the basis of the information made available to them at the time

of consent, since the defendant does not make known all of his

partners for reasons based on Directive 2016/943 on secrets

business16.

138. In its Consent Guidelines, the EDPD literally writes that “if

the requested consent must serve as a basis for several (spouse) persons responsible for the

processing or whether the data is to be transferred to, or processed by, other

15 Guidelines 5/2020, point 42.

16 Quoted in footnote 2.

controllers who wish to rely on the original consent, these organizations

should all be named."17

139. The Complaint focuses on non-transparent information, which creates a

misperception with the complainant and others involved. Thus, the

complainant asserts that the gift boxes initiative seems more related to an initiative

public authorities.

140. If a company wants to invoke the legal basis of consent, the persons concerned must clearly know all the parameters when giving this consent. Informed consent means that it must be based on an appreciation, an idea of the facts and the implications of an act. This implies that the person concerned must receive accurate and complete information in a clear and understandable on all relevant issues such as the nature of the data processed, the purposes of the processing, the recipients of any transfers and the rights of the data subject. In this case, consent is neither sufficiently enlightened, nor sufficiently specific.

141. Two further aspects are important if we want to speak of a valid consent. Above all, the quality of the information must be sufficient. The way the information provided by the defendant is not adequate. The Inspection Service noted that the Communication on the activity of trading in personal data personal was not defined explicitly in a normal language but only in vague formulations such as "for the purpose of sending products, offers and of information" The defendant thus conceals the activity of trading in data personal nature by not communicating in the same clear way as for the receipt of "free" benefits.

142. Information relating to the trade in personal data is also provided in legal terms. External communication, for example, avoids explicit terms like 'advertising' and 'marketing'. The defendant must be clear and comprehensible in its communication to the attention of the persons concerned, "for the man in the street and not only for lawyers"19. The method of the defendant however, sows confusion and does not take sufficient account of the impact on (rights of) data subjects.

17 Guidelines 5/2020, point 65.

18 Guidelines 5/2020, point 64.

19 Guidelines 5/2020, page 18, point 67.

143. Second, the accessibility and visibility of information is important.

Information should be given directly to individuals. It is not enough to

make “available” elsewhere (for example via a privacy policy on the site

Internet)20. In the online reality, it is not uncommon for information to be

provided to data subjects by means of a privacy policy 21, but

however, these must be clear enough to be understandable to

data subjects in order to be able to give informed consent. The referral must

be visible on the form/response card on which the consent is

given and not in small print in the margin, as is the case with the defendant.

144. Also on the basis of the insufficiently "informed" nature of the consent, it is not

not valid in law, in accordance with Article 6, paragraph 1, point a) juncto Article 7

of the GDPR. This failure is already sufficient to establish a violation of Article 6,

paragraph 1, point a) juncto article 7 of the GDPR.

2.2.3. The conditions of "specificity" and "univocity" for valid consent

place

145. Informed consent is linked to specific consent. When the activities of

processing of data, for which consent must be given, is not

specific and therefore unclear, the data subject cannot decide on these

activities in an informed way. Here too, the lack of actual detail already indicates

lack of specificity of consent.

146. It can also be pointed out that the gradual blurring of the purposes for which

personal data is processed creates a risk that materializes for the

persons concerned in this specific file. In the description of the purposes by

the defendant, it is a question of the phenomenon of "function creep" ("diversion

of use"), which leads to the unintended use for the complainant and others

data subjects of personal data for purposes which were not or were not

clear enough for them, and by partners they did not know or

not enough.

20 Guidelines 5/2020, pages 18-19, points 66 et seq.

21 KOSTA, E., Consent in European Data Protection Law, Leiden, Martinus Nijhoff Publishers, 2013, p. 215.

22 SCHERMER, CUSTERS, VAN DER HOF, Ethics Inf Technol, 2014/16.

23 Guidelines 5/2020, pages 15-16.

24 Guidelines 5/2020, point 56.

147. In order to be specific, the consent must refer very precisely both to the

scope only to the consequences of the data processing25. In addition, consent

is therefore not unequivocal because the persons concerned do not know what they

consent.

2.2.4. Additional conditions for obtaining legally valid consent

148. Pursuant to Article 7(3) of the GDPR, the withdrawal of consent is

inseparably linked to the granting of consent. The defendant asserts that there are several

possibilities to withdraw consent. At the time of filing the complaint, he was not

however, clearly not as simple to withdraw consent as to give it.

149. Withdrawal was not sufficiently facilitated due to the fact that it was only

mentioned in the defendant's online privacy policy and which moreover

is, only in fine print. The right to withdraw consent was therefore not

mentioned on the screen when the consent was given. Moreover, at the time of

complaint, the unsubscribe page was only available in English or French. In the

case of using consent as a legal basis, it is essential to indicate

clearly that consent can always be withdrawn, and this simply (at the time of

granting consent). The withdrawal is therefore not as simple as the granting of the

consent, contrary to Article 7(3) GDPR.

150. An additional problematic element resides in the fact that when the

consent is effectively withdrawn by a data subject, the data to be

personal character with the defendant are not deleted or erased but

only "disabled". However, a controller must - as soon as the

consent has been withdrawn - ensure the data is erased, unless it is

there is another legal basis for processing the data26.

151. The Litigation Division therefore also finds a violation concerning the

other conditions relating to legally valid consent, more specifically those

listed in Article 7, paragraph 3 of the GDPR.

2.2.5. The legality of the processing of the personal data of the minor child

25 Guidelines 5/2020, points 55 et seq., p. 15-16.

see

26

processing-data/grounds-processing/what-if-somebody-withdraws-their-consent_en.

https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/legal-grounds-

:

152. The Litigation Chamber also notes that at the very least, the date of birth

of the child is collected and further processed by the defendant. The defendant offers

also the possibility of communicating other personal data to third parties

of

the child, as also mentioned in

the declaration of

confidentiality27.

153. Recital 38 of the GDPR provides that:

"Children deserve specific protection of their personal data because

that they may be less aware of the risks, consequences, safeguards and

their rights related to the processing of their data. This specific protection should,

in particular, apply to the use of personal data relating to

children for marketing purposes or to create personality or user profiles

and the collection of personal data relating to children when using

of services offered directly to a child. The consent of the holder of the

parental responsibility should not be necessary in the context of services of

prevention or advice offered directly to a child."

154. Although the date of birth of the child is linked to the identity of the parent, the date of

birth must also be attributed specifically to

the child

individual.

This is all the more the case for the name and first name of the child. It's not because

the personal data is attributed to the parent (the date of birth of their

child') that it does not (also) belong to the minor child. It is therefore indeed a question of

personal data as referred to in Article 4, point 7 of the GDPR which are

processed concerning the minor child. This child is a data subject whose

personal data must be processed in accordance with the provisions of the

GDPR.

155. According to the Respondent, this processing takes place in order to send a certain gift box to the

parent as soon as the child has reached a specified age. As part of the processing of these

personal data, the defendant, as controller,

must therefore indeed indicate a legal basis, which it does not28.

156. Although in this case the mother of the child gave her consent, it is possible,

in theory, that she does not hold parental authority over her child and therefore that she does not

27 https://www.[...].be/vie-privee#3.

28 GDPR Article 5(2) and Article 24 oblige the controller to organize and be able to demonstrate the

compliance with the provisions of the GDPR.

cannot give consent for the processing of personal data

staff of this child. Besides, there are still other reasons why a parent

would consent to the processing of their own personal data but not to

those of his or her child(ren). The person exercising parental authority must therefore also

consent to the processing of the child's personal data.

157. The Litigation Chamber concludes that in any event, there is no processing

lawful personal data of the minor child, since the defendant omits

to designate a basis, which constitutes a violation of Article 6, paragraph 1 of the

GDPR.

2.3. Lawfulness of the processing of personal data collected before

May 25, 2018 on the basis of legitimate interests (Article 6(1)(f))

GDPR)

158. Article 6(1)(f) of the GDPR deals with the legitimate interest of the data controller

processing as the legal basis for the processing of personal data.

The question is whether the further processing of personal data

collected before May 25, 2018 are lawful under the legal provision

above GDPR.

159. In accordance with the case law of the Court of Justice (EU), those responsible for

processing must demonstrate that:

1)

the interests they pursue with the processing may be recognized as

legitimate (the “purpose test”);

2)

the envisaged processing is necessary to achieve these interests (the “test of

need") ; and

3)

the weighing of these interests against the interests, freedoms and rights

fundamentals of the data subjects weighs in favor of those responsible for the

processing or a third party (the "weighting test")29.

160. It can first be noted that the subsequent processing of personal data

which were collected before May 25, 2018 can be deemed to be in the interests

of the defendant and therefore in itself passes the finality test. In the situation

current law, the commercial interest of the defendant turns out to be a potential interest

legitimate under the GDPR. However, it should be considered whether the treatments

also pass the necessity test and the weighting test.

161. First of all, the Litigation Chamber notes that, although a commercial interest

can therefore effectively be considered a legitimate interest in the minds of the

GDPR, there is however no need to process certain personal data

staff when there are still other possibilities for the processing to take place.

take place in a lawful manner and thus ensure legitimate interests. It does not belong to the

Litigation Chamber to define the defendant's economic process strategy

or to give any opinion on the matter. The Litigation Chamber notes however

29 CJEU, Judgment of 4 May 2017, Rigas satiksme, C-13/16, ECLI:EU:C:2017:336, point 28.

that it does not appear from the defense that the defendant sufficiently considered whether and for

why there were no other possibilities to ensure the lawfulness of the processing,

necessitating processing on the basis of legitimate interest. Therefore, the

above-mentioned treatments of the defendant do not pass the test of necessity.

162. In accordance with the balancing test, the general interest of the defendant must be weighed

with the reasonable expectations, interests and rights of data subjects.

The defendant uses terms that are too abstract and does not use any explicit terms

such as 'advertising', 'direct marketing' or 'trading in personal data'.

It is impossible for the persons concerned to estimate how many other companies

subsequently use their personal data.

163. Furthermore, the Respondent does not provide sufficient explanation of the kinds of

processing that may follow the trade in personal data.

Hospitals and gynecologists are involved in the distribution of the boxes

gifts. This can lead to misperception among people

concerned that the defendant would be an association or an initiative of the public authorities and

not a private company that trades in personal data.

The Litigation Chamber finds that the defendant is not sufficiently transparent

concerning the advantages offered in connection with the transmission of personal data

staff. There is a clear disparity between the promised benefits and the activities

which are not clearly stated, i.e. renting/selling the data to

personal character that he has received from third parties. As such, data subjects may

may still be expected that in the event of transmission of personal data

personnel to a company and receiving certain benefits in return, this

company can approach them later for marketing reasons. As it happens,

the problem however lies in the fact that it is a transmission of the data to

personal character by the defendant to third parties. It's not part of the expectation

reasonableness of the persons concerned.

164. In order to prove that the defendant took into account and thought about the relevant safeguards and effective within the framework of Article 6, paragraph 1, f) of the GDPR, a single document has been drafted, taking a risk-based approach. The defendant cannot sufficiently demonstrate which concrete technical or organizational measures provide adequate protection. This document has not been shown to be also actually applied in practice. As long as there is no proof complementary to the actual application in practice, such documents cannot not be taken as evidence of effective and relevant safeguards.

The respondent further argues that there is a limitation on the number of times the data are used through the use of control addresses. The Inspection Service observes however, the limitation of use and the receipt of an opposition do not work. not (always) in practice. Based on the above considerations and the lack of evidence of effective technical and organizational measures to guarantee the interests of the persons concerned, the Litigation Chamber finds a violation of Article 6, paragraph 1, f) of the GDPR.

165. The Litigation Chamber finds a violation of Article 6, paragraph 1, point f) because it cannot establish that the defendant has a legal basis sufficient to legitimize the processing of personal data under Article 6(1)(f) GDPR (legitimate interest). The conditions imposed on this effect by the GDPR are not fulfilled. This is in accordance with case law which affirms that a processing activity can only be authorized if it takes place in accordance with the rules on lawfulness of processing30.

2.4. Regarding the obligation of transparency (Article 5, paragraph 1, point a) juncto articles 12 and 13 of the GDPR)

166. The Litigation Division rejects the Respondent's assertion that the requirements

requirements under Article 5(1)(a) GDPR would be satisfied.

167. Transparency is crucial to give data subjects control over their

personal data and to ensure effective protection of personal data

personal character. The transparency obligation in the GDPR requires that any

information or communication relating to the processing of personal data

concerned are easily accessible and easy to understand32. The objective is to create

thus for the persons concerned an environment of trust for the processing

of data33. This issue is linked to the opinion of the Litigation Chamber on the

validity of consent. The complainant and other affected persons are not

sufficiently clearly informed of what the specific activities of the

respondent. The fact that the plaintiff thinks that the defendant is an association or an initiative

30 CJEU, cases C-465/00, C-138/01 and C-139/01, Rechnungshof c. Osterreichischer Rundfunk and others; Neukomm and Lau

vs. Osterreichischer Rundfunk, paragraph 65; CJEU, C-524/06, Huber v. Germany, 16 December 2008, paragraph 48.

31 Communication from the European Commission, "A comprehensive approach to the protection of personal data in

European Union", COM(2010) 609 def, p. 6

32 Recital 39 GDPR.

33 DE HERT, PAPAKONSTANTINOU, Computer Law & Security Review 2016, p. 134.

public authorities illustrates this assertion. Transparent information should

be provided to the persons concerned, for example on the fact that the persons

concerned receive certain advantages only if they communicate in exchange

their personal data.

168. Respondent clarifies that Article 13 of the GDPR only requires that information

are provided on the categories of data recipients, not on the operation

which supports the communication of personal data (i.e. the

"rental" or "sale" of data). The Litigation Chamber rejects this assertion

due to the fact that pursuant to Article 13, paragraph 1, c) of the GDPR, the purposes of the

treatment for which the personal data are intended must be

mentioned. This means that the defendant should indeed have indicated that these

personal data would be rented/sold to third parties.

169. The Respondent further suggests that a detailed and complete publication of the list of

partners would constitute a violation of its business secrets. According to the defendant, two

equivalent rights are opposed: on the one hand the right to data protection and on the other

part the right to the protection of trade secrets, in accordance with Directive 2016/943

already cited. This reasoning cannot be accepted, given that the right to

protection of personal data is a right protected in the conventions

European Unions and the GDPR, a right which can only be limited in the cases provided for by the

legislator. Neither the European legislation nor the Belgian legislation implementing

Article 23 of the GDPR does not provide for a limitation of the publication of the names of

recipients of personal data.

170. In addition, the Litigation Chamber finds that the essence of the activities in the present

file concerns the transmission of personal data and the policy of the

defendant in this regard. We cannot decide, to the detriment of the persons concerned,

that the commercial interests of the defendant or its partners sometimes prevail and

sometimes not on the rights of these data subjects. Moreover, by adding without

stops more partners, the list still does not seem exhaustive. In any case, at

time of the report of the Inspection Service, the complainant revealed that boxes

gifts and cards to complete were distributed by a partner who was not

mentioned at the time.

171. Respondent's activities touch on the essence of the GDPR. It is fundamental that the

data subjects know which partners can contact them34. It would be

different if the partners simply provided goods without asking for anything

thing back. In reality, however, personal data is sold.

In such situations, under Article 5 juncto Article 13 of the GDPR, the defendant

is obliged to communicate/mention the partners.

172. The Litigation Chamber concludes that the commercial activities of the defendant centered

on advertising, media and trade in personal data

personnel were not communicated sufficiently transparently to the

persons concerned. The Litigation Chamber considers that a violation of Articles 5,

paragraph 1, point a), 12 and 13 of the GDPR is proven.

2.5. Regarding the retention period under Article 5(1),

point c) juncto article 25 of the GDPR

173. The Respondent did not implement the technical and organizational measures

appropriate to ensure that only personal data that is

necessary with regard to each specific purpose of the processing are processed.

This practice, however, is part of the essence of the defendant's liability which is

become all the more important with the introduction of the GDPR35.

174. The defendant does not clearly distinguish the purposes of the processing. If a person

concerned subscribes to an additional gift box, this implies for the defendant

an agreement to trade in personal data. Moreover, the defendant

does not demonstrate that an opposition received against direct marketing is always

communicated to its partners. The retention period of 18 years is also

disproportionate to the initial consent and the reasonable expectations of the

complainant and other persons concerned. The products initially offered

(benefits) relate mainly to articles for babies. Finally, the defendant

claims that its website does not offer any practical possibility of withdrawing immediately

the consent. All of the above elements run counter to the principles of

proportionality and data protection by design.

34 This view was also adopted by the Information Commissioner's Office in Bounty UK case

(https://ico.org.uk/media/action-weve-taken/mpns/2614757/bounty-mpn-20190412.pdf). It was also in this case

very similar information. Here too, data of the mother as a parent and of her newborn child were collected.

Furthermore, this similar case indicates that the aforementioned practice is not a unique case in Europe. He is actually

necessary to enforce the GDPR in order to protect a vulnerable population.

35 QUELLE C., Privacy, Proceduralism and Self-Regulation in Data Protection Law 2017, p. 6.

175. During the hearing, the defendant compared the situation with that of a subscription to a

journal which must also be explicitly terminated. These situations, however, are not

comparable. In the context of a newspaper subscription, the person concerned knows,

by obtaining this log and the systematic payment for this purpose, that his relationship

with the log continues. In the present situation, this is not the case. The defendant

must at least explicitly state that the personal data is

kept for 18 years and remind the person concerned regularly, while

as the possibility of terminating this relationship.

176. The Litigation Division concludes from the above considerations that Article 5,

paragraph 1, c) juncto article 25 of the GDPR have been violated.

2.6. Regarding liability under Article 5.2 juncto Article 24 of the

GDPR

177. Taking into account the nature, scope, context and purposes of the processing as well as

as risks, the degree of likelihood and severity of which vary, for the rights and freedoms

natural persons, the defendant does not implement the technical measures and

organizational arrangements to ensure and be able to demonstrate that the

processing is carried out in accordance with the GDPR. There is no clear evidence of measurements

effective technical and organizational measures to guarantee the interests of the people□

concerned within the scope of Article 6, paragraph 1, f) of the GDPR.□

178. Pursuant to Article 5(2) and Article 24 of the GDPR, the liability□

requires the controller to take steps to comply with the principles□

and data protection obligations and demonstrate, on request, that they have been□

respected36. However, the defendant has not demonstrated that the activity of the trade in□

personal data by the partners was sufficiently clear for the□

persons concerned. Furthermore, there is also no conservation of a□

registration of requests for rectification and the defendant was unable to prove□

(from the outset) that an effective erasure of the personal data had taken place.□

Moreover, the defendant asserts that it still keeps the e-mail addresses of the□

data subjects who have requested the erasure of their personal data□

staff to ensure that no new accounts can be created□

36 Article 29 Working Party, Opinion 3/2010 on the principle of accountability, p. 3, https://ec.europa.eu/justice/article-□

29/documentation/opinion-recommendation/files/2010/wp173_fr.pdf.□

later via the same e-mail address. However, this absolutely does not hold□

account of the spirit and the letter of the right to erasure of data.□

179. The Litigation Division concludes from the above considerations that Article 5,□

paragraph 2 juncto article 24 of the GDPR have been violated.□

2.7. Regarding Article 14 of the GDPR□

180. The Litigation Chamber finds no violation of Article 14 of the GDPR, given that□

the defendant obtains the personal data directly from the□

data subjects and that Article 14 of the GDPR is therefore not applicable. Those are□

the defendant's partners who must comply with the requirements of Article 14 of the GDPR,□

given that they obtain the personal data from the respondent and□

not directly with the people concerned.

2.8. Regarding Article 28, paragraph 3 of the GDPR

181. The defendant did not enter into a subcontract between itself and one of its

partners who, at the time of the complaint, kept cards to be completed for the

respondent. This is a processing of personal data within the meaning of

Article 4, 1) and 2) of the GDPR.

182. According to the Respondent, this storage by Y4 did not fall within the scope

material of the GDPR, since the simple conservation of the cards to be completed does not

would not constitute processing of personal data within the meaning of Article 2

of the GDPR.

183. Article 2, paragraph 1 of the GDPR provides that the GDPR applies "to the processing of

personal data, automated in whole or in part, as well as to the processing

non-automated personal data contained or intended to appear in

a file". (underlining proper of the Litigation Chamber)

184. Since the cards to be completed are ab initio intended to appear in a file

(of the defendant), the retention of the cards to be completed by Y4 does constitute a

processing within the meaning of the GDPR.

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185. The Litigation Chamber therefore finds a violation of Article 28, paragraph 3 of the

GDPR on the part of the defendant, since the latter should have concluded a contract of

subcontracted with Y4, which he did not do.

2.9. Regarding Articles 37 and 38 of the GDPR

186. The Respondent asserts that it is not obliged to appoint a Data Protection Officer

data on the basis of Article 37.1 of the GDPR because it is not a public authority.

Moreover, according to him, his main activity is not the regular and systematic follow-up at

large scale of (future) mothers. The defendant claims that there is no evidence that he

would meet these conditions. Be that as it may, in the meantime, the defendant has appointed a

delegate.

187. The Litigation Chamber does not address the question of the extent to which the

defendant was obliged to appoint a data protection officer, given the fact

that in the meantime a data protection officer has been appointed and that the essence

violations in this case is not related to the position of the Commissioner for

Data protection. Generally speaking, the Litigation Chamber nevertheless emphasizes

that it attaches great importance to compliance with the obligations relating to the delegate

to data protection.

3. GDPR Violations and Complainant's Claims

188. The Litigation Chamber considers that violations of the following provisions by the

defendant are proven:

at. Article 5, paragraph 1, a) of the GDPR, given the lack of transparent information, this

which creates a false perception vis-à-vis the persons concerned, including the complainant.

In the perception of those concerned, the gift box initiative is rather

associated with a non-profit organization or an initiative of the public authorities and it is not clear,

in particular for the complainant, that it is a private company which also has the

trading in personal data. There is a clear disparity

between promised benefits and activities that are not clearly stated;

b. article 5, paragraph 1, c) juncto article 25 of the GDPR, since the defendant has not

not implemented the appropriate technical and organizational measures to

guarantee that only the personal data which is necessary with regard to

of each specific purpose of the processing are processed. The retention period of

18 is disproportionate to initial consent and expectations

reasonableness of the complainant and other affected persons. Products

initially proposed (benefits) concern in fact mainly articles for babies;

vs. Article 6 of the GDPR, in particular Article 6, paragraph 1, points a) and f) of the

GDPR, since it cannot be a free, specific, informed and

of the complainant (see Article 4(11) GDPR). In fact, the plaintiff

did not know all the parameters when giving consent.

Consent was therefore given in an uninformed manner. In addition, the treatments

subsequent processing of personal data that was collected before May 25, 2018

are not necessary to defend the legitimate interests of the defendant - moreover,

these legitimate interests do not override the fundamental interests, freedoms and rights

data subjects;

d. Article 7, paragraph 3 of the GDPR, given that at the time of the complaint, the consent

could not be taken away as easily as it could be given;

e. article 13 of the GDPR, given the absence of information and the information not

transparent;

f. Article 24 of the GDPR, given that taking into account the nature, scope, context and

the purposes of the processing as well as the risks, including the degree of probability and

gravity varies, for the rights and freedoms of natural persons, the defendant has not

implemented the appropriate technical and organizational measures;

g. Article 28, paragraph 3 of the GDPR, given the absence of a subcontract between

the defendant and one of his partners who, at the time of the complaint, kept

cards to be completed for the defendant, which constitutes data processing to

personal character within the meaning of Article 4, 2) of the GDPR.

189. The Litigation Division considers it appropriate to order that the processing be

compliance with the provisions of the GDPR, in particular Article 5, paragraph 1,

Article 24 and Article 28 of the GDPR, pursuant to Article 58.2, d) of the GDPR and

Article 100, § 1, 9° of the LCA, within six months after the notification of this

decision and to inform the Litigation Division within the same period. This delay

relatively long is set, knowing that this decision is likely to

require, on the part of the defendant, a significant adaptation of its management.

190. Next, in addition to this corrective measure, the Litigation Division considers it appropriate

impose an administrative fine (Article 83(2) GDPR, Article 100,

§ 1, 13° of the LCA and article 101 of the LCA). The Litigation Chamber points out that a

administrative fine constitutes in many cases - including the present case - the measure

which is sufficiently effective, proportionate and dissuasive. The application of

Union law by the Member States must meet these requirements, in execution of

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the obligation of sincere cooperation (Article 4, paragraph 3 of the Treaty on European Union

European Union, signed on 13 December 2007). These requirements are therefore not only valid

when imposing a fine in accordance with Article 83(1) GDPR

but also when choosing between the different types of sanctions that are provided for in

Article 58(2) GDPR and Article 100 LCA. In cases where the House

Litigation considers it appropriate to sanction an act that has already taken place, the GDPR and the

LCA only offer very limited alternatives which in many cases are additionally

still insufficiently effective, proportionate and dissuasive.

191. Taking into account Article 83 of the GDPR and the case law37 of the Court of Markets,

the Litigation Chamber justifies the imposition of an administrative fine in a manner

concrete :

at. The seriousness of the violation:

Violations of Articles 5, 6 and 7 of the GDPR attract the highest fines

of Article 83, paragraph 5 of the GDPR.

It appears from the combined violations of Articles 13, 24, 25 and 28 of the GDPR that the

controller has not brought its processing operations into compliance with the legislation

with regard to the protection of personal data, although the processing of

such personal data is part of the essence of its activities

commercial.

It appears from all the elements of the file that it was not sufficiently kept

account of the expectations of the citizen and the implications for data protection at

personal character.

b. The duration of the breach:

The defendant has already been in business for many, many years and has not

succeeded, over all these years, in adapting its business model to the legislation

relating to the protection of personal data.

37 Court of Appeal of Brussels (Cour des Marchés section), X c. DPA, Judgment 2020/1471 of February 19, 2020.

vs. The extent of the violation:

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The number of data subjects affected is considerable. According to the findings

of the Inspection Service at the time of its investigation, these are indeed data to be

personal character coming from 21.10% of the Belgian population and anyway

of a considerable number of people concerned.

The Litigation Chamber took note of the respondent's objection to this

regard in its reaction to the fine form (see points 101 and 102 above).

First of all, the Litigation Chamber notes from the outset that the data of children

minors who are considered by the defendant only as data to be

personal character of the parent ("characteristic of the mother") must also be

attributed to children as data subjects. It is indeed about

processing of personal data of these children.

Then, the Litigation Chamber finds that the defendant himself cannot

indicate the correct number of data subjects whose data it processes at

personal character ("well below 1,000,000"), which in itself is already

surprising, in light of the technical and organizational measures that the defendant

must take to ensure that the personal data meets the

principles regarding the processing of personal data, including the accuracy

personal data, the obligation to limit the

conservation and the obligation of data minimization.

The Litigation Chamber considers that the estimate of the Inspection Service is the most

reliable and finds that the defendant does not provide any additional information that can

contradict this figure as an estimate.

d. The necessary deterrent effect to prevent further violations:

It appears from this file that insufficient account was taken of the protection of

personal data of data subjects, which should in fact occupy

a central place given the business model of the defendant. Data processing

of a personal nature indeed constitutes a principal activity of the defendant.

Moreover, the defendant sells this personal data to partners

third. It is therefore crucial that such data brokers/companies

operate in accordance with the provisions of the GDPR.

The facts, the circumstances and the violations observed therefore call for a fine which

responds to the need to have a sufficiently deterrent effect, the defendant being

sanctioned with sufficient severity so that practices involving such

violations do not recur and so that the defendant henceforth devotes more

attention to the protection of personal data.

192. The Litigation Chamber draws attention to the fact that the other criteria for

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.

193. The Litigation Division takes note of the information provided by the defendant in

the reaction to the fine form and takes particular account of the

precarious economic circumstances for the company and the possible impact of a

high administrative fine on the company and the members of its personnel.

However, the Litigation Chamber stresses that ensuring economic management

sound business can never be done to the detriment of fundamental rights

citizens, as set out in Article 8 of the Charter of Fundamental Rights of the Union

European Union and as specified by the GDPR. It is also for the defendant, as

responsible for the processing, to assume its responsibility to ensure that measures are taken

sufficient technical and organizational measures to guarantee that its processing is

take place in accordance with the GDPR, which is not the case in this case and which testifies

defendant's negligence.

194. The Litigation Division considers that, given the exceptional circumstances of the crisis

health of COVID-19, in certain sectors of the economy, it is justified to reduce

to a certain extent the administrative fine without prejudice to the effect

necessary deterrent to the fine. For the activities of the defendant, the receipts of which are

especially related to the trade of personal data, there is however no

specific reason for this. Given the foregoing, the Litigation Chamber does not diminish

not the amount of the fine proposed in the fine form and sets the fine at

50,000 euros.

4 Publication of this decision

195. It is in the public interest to publish this decision, given the nature of the violations

and the large number of people concerned in Belgian society.

196. Given the importance of transparency regarding the decision-making process of the Chamber

Litigation, in accordance with Article 100, § 1, 16° of the LCA, this decision

is published on the website of the Data Protection Authority mentioning

the identification data of the defendant, due to the specificity of his activities

and its general notoriety, which do not really allow a rational omission

identification data, and the public interest of this decision, but in

omitting the identification data of the complainant, since these are neither

necessary or relevant to the publication of this decision.

The identification data of the defendant's partners are also not

mentioned.

FOR THESE REASONS,

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

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pursuant to Article 58.2, d) of the GDPR and Article 100, § 1, 9° of the LCA,

to order the defendant to bring the processing into conformity with the provisions

of the GDPR, in particular Article 5(1), Article 24 and Article 28 of the GDPR,

within six months after notification of this decision and to inform the

Litigation Chamber within the same period;

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pursuant to Article 83 of the GDPR and Articles 100, § 1, 13° and 101 of the

LCA, to impose on the defendant an administrative fine of 50,000 euros for

violation of Articles 5, 6, 7, 13, 24, 25 and 28 of the GDPR.

Under article 108, § 1 of the LCA, this decision may be appealed within a period of

thirty days, from the notification, to the Court of Markets, with the Authority for the Protection of

given as defendant.

(Sr.) Hielke Hijmans

President of the Litigation Chamber