Litigation Chamber

Decision on the merits 163/2022 of 16 November 2022

File number: DOS-2020-06016

Subject: Complaint for unsolicited telemarketing calls

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

Hijmans, chairman, and Messrs. Christophe Boeraeve and Romain Robert, members;

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

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

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

data protection), hereinafter "GDPR";

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

ACL);

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

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

Considering the documents in the file;

Made the following decision regarding:

The complainant :

Mr. X, hereinafter "the plaintiff";

The defendant: Company Y, hereinafter: "the defendant".

I. Facts and procedure

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1.

On December 28, 2020, the complainant filed a complaint with the Protection Authority

data against the defendant.

The subject of the complaint concerns telephone calls made on the cell phone

of the complainant for

offer it energy supply contracts (activity of

telemarketing). Following these appeals, the plaintiff exercised his rights with the defendant

to request access to their data and request their deletion.

2.

On January 11, 2021, the complaint was declared admissible by the Front Line Service on the

basis of Articles 58 and 60 of the LCA and the complaint is forwarded to the Litigation Chamber

under article 62, § 1 of the LCA.

3.

On February 10, 2021, in accordance with Article 96, § 1 of the LCA, the Chamber's request

Litigation to proceed with an investigation is transmitted to the Inspection Service (hereinafter,

SI), as well as the complaint and the inventory of parts.

4.

On March 30, 2021, the IS investigation is closed, the report is attached to the file and the file is

forwarded by the Inspector General to the President of the Litigation Division (art. 91, § 1 and

§ 2 of the LCA).

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

1. A violation of Article 5, paragraph 1, a) and paragraph 2, of Article 6,

paragraph 1, Article 24, paragraph 1 and Article 25, paragraphs 1 and 2 of the

GDPR;

2. A violation of Article 12, paragraph 2, of Article 15, paragraphs 1 and 3, of

Article 17, paragraph 1, Article 24, paragraph 1 and Article 25, paragraph 1

GDPR

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

Inspection Service observes:

1. A violation of Article 12, paragraph 1, of Article 13, paragraphs 1 and 2 and of

Article 14, paragraphs 1 and 2 of the GDPR;

2. Absence of violation of Article 30, paragraphs 1 and 3 of the GDPR

5.

On April 28, 2021, the Litigation Chamber decides, pursuant to Article 95, § 1, 1° and article 98 of the LCA, that the case can be dealt with on the merits.

6.

On April 28, 2021, the parties concerned are informed by registered mail of the provisions as set out in article 95, § 2 as well as in article 98 of the LCA. They are also informed, pursuant to Article 99 of the LCA, of the deadlines for transmitting their conclusions.

7.

The deadline for receipt of the defendant's submissions in response has been set as of June 9, 2021, that for the complainant's reply submissions as of June 30, 2021 and finally that for the conclusions in reply of the defendant on July 21, 2021.

8.

On April 30, 2021, the defendant requests a copy of the file (art. 95, §2, 3° LCA), which is transmitted to him on May 4, 2021.

9.

On the same day, the defendant agrees to receive all communications relating to the case electronically and expresses its intention to make use of the possibility of being of course, this in accordance with article 98 of the LCA.

10.

On June 9, 2021, the Litigation Chamber receives the submissions in response from the defendant with regard to the findings relating to the subject-matter of the complaint.

11.

On July 20, 2021, the Litigation Chamber receives the submissions in reply from

the defendant.

12.

On June 3, 2022, the parties are informed that the hearing will take place on June 15, 2022.

13.

On June 4, 2022, the complainant communicated his intention not to participate in the hearing.

14.

On June 15, 2022, the defendant was heard by the Litigation Chamber.

15.

On July 14, 2022, the minutes of the hearing are submitted to the defendant.

16.

On July 19, 2022, the Litigation Chamber receives some remarks relating to the trial-

verbal which it decides to take up in its deliberation.

II. Motivation

II.1. The disputed treatment

17.

The complaint relates to telemarketing calls made by the defendant on the

complainant's cell phone.

The defendant is identified by the SI as Y, a company active in

the call center sector and advice on energy supply contracts.

She makes phone calls to potential customers (called prospects) for the

account of energy market players. Until December 4, 2021, Y was called Z.

18.

It appears from the exchanges between the complainant and the defendant, as well as from the conclusions of

the latter, that the latter buys the data of prospects from suppliers of

data. Recently, the defendant also used a company named

[...Center], based in Morocco. It appears from the various documents in the file that the data of the

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complainant were acquired from [...Center], together with other data from

leads.

19.

On the basis of the investigation report, the examination of the Litigation Chamber relates to the

processing of the data provided by the company [...Center] to the defendant, plus

particularly with regard to compliance with the principle of legality (point II.2). Bedroom

Litigation will also examine the respect of the complainant's rights as a person

concerned (point II.3), as well as compliance with the principle of transparency (II.4).

20. When

investigation,

the defendant provided further

information

background on treatment. She explained in particular that she is currently working

with three data brokers1 based in the European Union, which it considers to be

serious businesses. These are systematically able to demonstrate the achievement

consent when she asks for it. The consent of the persons concerned is

collected via actions on the internet. It is then resold to the three major suppliers.

The defendant adds that it was only exceptionally that it used the services

of [...Center]. As this company was not able to demonstrate that it had obtained the

consent of the persons concerned when the defendant requested it, this

latter ceased all commercial relations with it.

The defendant also details the measures in favor of data protection at

personal character that she has adopted in recent years, as well as the measures taken

following this case.

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II.2. Violation of Article 5, paragraph 1, a) and paragraph 2, of Article 6, paragraph 1, of

Article 24(1) and Article 25(1) and (2) GDPR

II.2.1. Finding of the IS

21. For the IS, the defendant must comply with Article 5.1 of the GDPR and be able to demonstrate this by

pursuant to Article 24.1 of the GDPR. Pursuant to Article 5.1.a of the GDPR, the defendant

must respect the principle of legality and have a legal basis based on Article 6

of the GDPR and must also be able to demonstrate this on the basis of Article 24 of the GDPR.

22. In this case, on the basis of documents and the answers provided by the defendant, the IS

considers that this does not specify the legal basis used for the processing of

data of the complainant and other data subjects. The defendant refers to

1 Two data providers are identified by name in the defendant's submissions. She mentions

however the figure of three suppliers during the hearing.

2 See point 25 below.

effect to due diligence and contractual agreements, which do not in themselves constitute

legal bases. The IS considers, however, that the reference to the contract concluded with [...Center] which

contains a clause referring to obtaining the consent of persons

concerned is not sufficient since it does not demonstrate that the complainant, in this case,

given his consent. The IS therefore finds a violation of Articles 5.1, a), 5.2, 6.1,

24.1, 25.1 and 25.2 GDPR.

II.2.2. Defendant's arguments

23. The defendant contests the finding of the SI on several points, both in these

conclusions than during the hearing. First, it believes that data providers

multinationals with

which she works, present

contractual guarantees

required. These contractual guarantees ensure that the data subject has consented

to be contacted for commercial purposes. This consent is collected online through

specific actions (competition, survey, etc.). The legal basis for the processing would therefore be

the consent of the data subject. The defendant adds in its pleadings

that it is practically impossible for him to verify that consent has indeed been obtained for

all persons concerned. During the hearing she explained that her suppliers

were, however, able to provide him with proof of obtaining consent to

his request. However, this turned out not to be the case for [... Center]. There

defendant therefore ceased to use the data provided by this company. At the time of

the hearing she also indicated that this data was still present in her

servers, but were no longer actively used. After the hearing, the defendant

wished to correct this statement by indicating that the data in question had been

removed.

The defendant indicates that following this incident, it strengthened its due diligence procedures

diligence.

II.2.3. Position of the Litigation Chamber

24. The Litigation Chamber recalls that any processing of personal data

must comply with the principle of lawfulness provided for in Articles 5.1.a) and 6 of the GDPR. This

last article is partially reproduced below:

“Clause 6

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Lawfulness of processing

1. Processing is only lawful if and insofar as at least one of the conditions

following is fulfilled:

a) the data subject has consented to the processing of his or her personal data

for one or more specific purposes;

[…](f) the processing is necessary for the purposes of the legitimate interests pursued by the

controller or by a third party, unless the interests or

fundamental rights and freedoms of the data subject which require protection

personal data, in particular when the data subject is a

child. »

25. With regard to the lawfulness of the processing of the complainant's data, several elements

emerge from the exhibit file. First, it is established that the data was

obtained by the defendant from [...Center]. The defendant argues that the

contract with [... Center] contains a clause specifying that the data has been

obtained from data subjects on the basis of consent, i.e. on

basis of Article 6.1.a) of the GDPR. On the one hand, the contract concluded with the source company of the

data does not make it possible to avoid the obligations of the GDPR, but obliges it at most

demonstrate due diligence in data acquisition. On the other hand, the

Litigation Chamber finds that the contract to which reference is made (entitled "Bon de

order") is dated January 1, 20213. However, the complainant's data was acquired

before this date. It can therefore only conclude when acquiring data from the

complainant, such a clause was also included in the purchase order. Moreover,

when the plaintiff exercised his rights with the defendant, on December 1, 2020,

the latter replied the same day, that: "[…Center] obtains the bases via

software that scans the digital web. Your data is there. The very source we

is unknown"4. This demonstrates on the one hand the absence of a consistent response on the part of

the defendant, and on the other hand suggests that the complainant's data would have been

obtained by "Web scraping" and not by obtaining consent. At the time of

the hearing, the defendant indicated that […Center] was unable to

3 See document 16 of the file, appendix 2.

4 Respondent's email sent on 1 December.

demonstrate obtaining the consent of the persons concerned and could not explain

the source of this data5.

26.

It therefore appears from the above information that the defendant relies on the consent

as the basis for the lawfulness of the processing, but that it has not been able to demonstrate that

such consent was obtained in the case of the complainant's personal data.

The Litigation Chamber recalls that Articles 7.1, 24.1, 25.1 and 25.2 of the GDPR

require the data controller to be able to demonstrate that the person

data subject has consented to the processing under the conditions set out in the GDPR6. Bedroom

Contentious therefore finds a violation of Articles 5.1.a), 6.1.a, 7.1, 24.1, 25.1 and 25.2

of the GDPR.

27. In addition, the Litigation Division deems it useful to recall certain principles relating to the

telemarketing given the intrusive and often opaque nature of this activity. There

Dispute Chamber emphasizes in particular the difficulty for a data subject to

understand the links between the multiple economic players who reuse their data

during the various processing operations. It recalls in this regard that transparency

is essential for obtaining informed and therefore valid consent from the

concerned person.

28. The present case and telemarketing in general have the particularity

to involve several stakeholders (company collecting consent, data broker,

telemarketing company) that reuse the data of the persons concerned. THE

compliance with the principles and obligations of the GDPR by all stakeholders is essential in

this case in order to guarantee the legality of the processing of data by each of them.

them.

29. The defendant relies on consent as the basis for the lawfulness of the processing. According to explanations of the defendant, this consent is collected by a company organizing promotional actions on the internet. This company would resell by following the personal data to a "databroker". The defendant obtains this data with two or three “data brokers” and makes telemarketing calls for the customer account. It is therefore important to establish the rules concerning compliance with the principle of legality, and the link with the obligation to inform, during this reuse of data

30. The Litigation Division recalls that the consent must meet the conditions set by articles 4.11 and 7 of the GDPR. Consent must therefore be free, specific and enlightened. Recital 42 of the GDPR specifies that for consent to be informed, “the

5 Minutes of the hearing of June 15, 2022, p. 4 and 7.

6 See in this regard, EDPB “Guidelines 5/2020 on consent within the meaning of Regulation (EU) 2016/679”, adopted May 4, 2020. Available at: https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_en.pdf

data subject should know at least the identity of the controller and the purposes of the processing for which the personal data are intended”. THE EDPB guidelines on consent complete this by specifying in particular that “if the requested consent is to serve as a basis for several (joint) managers of the processing or whether the data is to be transferred to, or processed by, other controllers who wish to rely on the original consent, these organizations should all be named. »7

31. In the present case, the defendant indicates base

treatment on

THE

consent. For such consent to be valid, it must therefore be informed and

specific. This implies that at the time of obtaining the consent of the person

concerned through the action on the internet, the person must be informed of the

partners to whom his data will be transmitted as well as the purposes of the processing.

32. With regard to information to data subjects. The Litigation Chamber

refers to point 64 below.

II.3. violation of Article 12, paragraph 2, of Article 15, paragraphs 1 and 3, of Article 17,

paragraph 1, article 24, paragraph 1 and article 25, paragraph 1 of the GDPR

II.3.1. IS Findings

33. The IS considers that the response to the complainant's request to exercise the rights

responsible for processing is incomplete, since several information provided for in

article 15 of the GDPR have not been communicated, that a copy of the data has not been

provided and that the RT has kept a record of the complainant's request in its log of

activities, which would be contrary to the right to erasure.

II.3.2. Defendant's arguments

34. The Respondent considers that it was not necessary to inform the Complainant of the elements

raised by the IS (which relate to information on the possibility for the complainant

to exercise his right of opposition and to lodge a complaint with the Authority of

data protection) when the complainant indicated that he was already aware of the existence of his

rights in his request email. As for the obligation to give a copy of the data,

the defendant considers that it fulfilled this condition. She considers that there is no violation

with regard to the register since it was not obliged to keep a but to

7 Guidelines 5/2020 on consent within the meaning of Regulation (EU) 2016/679, §65. This is the Litigation Chamber

which highlights. Available at: https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202005_consent_fr.pdf

nevertheless decided to do so and that it should allow him to list the complaints received

and learn from the past.

II.3.3. Position of the Litigation Chamber

35. The Litigation Chamber distinguishes three different questions in the investigation report.

The first concerns the quality of the respondent's response. The second concerns the

provision of a copy of the data. The third concerns the preservation of the name of the

complainant and his request in the register of processing activities of the defendant,

despite the erasure of the complainant's data.

36. On the first question, the Litigation Chamber finds that the plaintiff exercised his

right of access on the basis of article 15 of the GDPR, the exercise of which is also linked to article

12.2 GDPR. These two articles are partially reproduced below:

"Rule 12

Transparency of information and communications and procedures for exercising

data subject rights

[…]

2. The data controller facilitates the exercise of the rights conferred on the person

concerned under Articles 15 to 22. In the cases referred to in Article 11(2), the

controller does not refuse to respond to the request of the person

concerned to exercise the rights conferred on it by Articles 15 to 22, unless the

controller demonstrates that he is unable to identify the person

concerned. »

“Rule 15

Right of access of the data subject

1. The data subject has the right to obtain confirmation from the controller

that personal data relating to him are or are not being processed and,

when they are, access to said personal data as well as the

following information:

a) the purposes of the processing;

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(b) the categories of personal data concerned;

c) the recipients or categories of recipients to whom the personal data

personnel have been or will be communicated, in particular recipients who are established

in third countries or international organisations;

d) where possible, the retention period of the personal data

envisaged or, where this is not possible, the criteria used to determine this

duration;

e) the existence of the right to request from the controller the rectification or

the erasure of personal data, or a limitation of the processing of

personal data relating to the data subject, or the right to oppose

to this treatment;

f) the right to lodge a complaint with a supervisory authority;

g) when the personal data is not collected from the person

concerned, any available information as to their source;

h) the existence of automated decision-making, including profiling, referred to in Article

22, paragraphs 1 and 4, and, at least in such cases, useful information concerning the

underlying logic, as well as the significance and intended consequences of such processing

for the person concerned.

[…]»

37. The Litigation Chamber finds that the defendant responded to the request

access of the complainant on the same day. In this reply, sent on 1 December, the

defendant notably indicated to the complainant the purpose of the processing, the categories of

data, data recipients, retention period. About the rights

available to the plaintiff, the defendant provided him with the following information:

“Rights: right of modification, deletion or destruction.

[…]

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May I also ask you for an explicit order to destroy everything? (your data, your

email message and my reply on your email of course)”

38. Article 15.1.e) of the GDPR provides that the controller must communicate to the

data subject the existence of the following rights: rectification, erasure, limitation and

opposition. The response formulated by the data controller is in this respect

incomplete since it mentions neither the right of opposition nor that of limitation8. There

The respondent's response therefore does not comply with Article 15.1.e) of the GDPR.

On the basis of these elements, the Litigation Division considers that the party's response

defendant to the plaintiff, dated December 1, is not complete, for lack of details.

The defendant therefore violated Article 15.1.e) of the GDPR.

39. The Litigation Chamber notes, however, that the defendant twice in

his email to the complainant of December 1 mentioned that he could request the erasure

Datas. Moreover, when the complainant confirmed that he wanted the deletion of the

data, the defendant replied on the same day that it had deleted

Datas.

40. The defendant also added in its pleadings that it had adapted its response

standard to this type of request in order to provide the missing information. For these

reasons, the Litigation Chamber does not uphold the violation of Article 12.2 of the GDPR which

had been put forward by the IS in its investigation report and that it does not sufficiently consider

founded in this case.

41.

The Litigation Chamber also finds a violation of Article 15.1.g) of the GDPR. In
Indeed, the defendant was not able to give a correct explanation of the
source of the complainant's data. While she indicated in her first response that the
data had been obtained via "web scraping", she indicated, during the hearing, that
not have been able to obtain information on the source of the data (see point 25 above). There
defendant therefore violated Article 15.1.g of the GDPR.

42.
Article 15.1.f) also provides that the defendant must inform the person concerned
that it has the right to lodge a complaint with a supervisory authority. He
It emerges from the exchanges between the plaintiff and the defendant that the latter did not
communicated this information. The defendant does not dispute this, but considers that
this communication was unnecessary, given that in his request for access, the complainant
had already indicated that it reserved the right to contact the Data Protection Authority
data.

8 The Litigation Division understands by using the term “modification”, the defendant is actually referring to the right of rectification.

43. For the Litigation Division, a clear and standardized list of the mentions
listed in Article 15 of the GDPR is necessary to ensure complete information
and correct of the persons concerned. As such, it considers that the reference to Article 15.1.f)
must be systematically included, even when it may seem redundant. There
defendant therefore violated Article 15.1.f of the GDPR.

44. As to the second question, which relates to the copy of the data which was provided by the
defendant, the Litigation Chamber notes that in its response to the request
of access, the defendant indicated that it processed the name, address and telephone number
of the complainant and provided them. The SI investigation report does not indicate how the response

of the defendant would not comply with Article 15.3 of the GDPR. Bedroom
Litigation cannot therefore find a violation on this point.

45. The third issue relates to the retention of the complainant's name and information at the
subject of his request for erasure in the register of processing activities of the
defendant, after erasure. The IS considers that this information is not
not required by Article 30 of the GDPR and that keeping them constitutes a violation
of Article 17 of the GDPR. The defendant considers that it is not subject to the obligation to
maintain a log of activities, but has voluntarily decided to do so. She
considers that it would be disproportionate for her to be penalized for having demonstrated
more diligence than was legally required of him. She adds that the registry has
however, has been amended and the complainant's name has been removed.

46. For the Litigation Chamber, the inclusion of the name of the complainant and the existence of his
request for deletion in the register of processing activities, after
the erasure of this data does not ipso facto constitute a violation of Article 17 of the
GDPR.

47. Indeed, Article 24 of the GDPR establishes the principle of responsibility, which provides, inter alia,
that “the data controller implements technical measures and
organizational arrangements to ensure and be able to demonstrate that the
processing is carried out in accordance with this Regulation”9. This implies that the
data controller must be able to demonstrate that he has responded to the requests of the
data subjects to exercise their rights. This obviously raises questions for the right
erasure which implies that the data of the person concerned is deleted.

48. The Litigation Chamber recalls, however, that the right to erasure is not absolute
and that it must be based on one of the grounds provided for in Article 17.1 of the GDPR and that it may be refused
in the circumstances provided for in Article 17.3. of the GDPR. This article provides in particular that
the deletion of data may be refused in order to comply with a legal obligation (article

9 Highlighted by the Litigation Chamber.

17.3.c) or for reasons relating to the establishment, exercise or defense of rights
in court (Article 17.3.e).

49. These exceptions, read in conjunction with Article 24 of the GDPR, do not a priori preclude
that a data controller keeps track of the execution of requests
erasure, when this traceability is necessary for it to be able to demonstrate the
compliance with the obligations imposed on it under the GDPR. This treatment should
respect the principles of data minimization (article 5.1.c) of the GDPR), of the purpose of the
treatment (Article 5.1.b) and transparency (Article 5.1.a) in such a case10.

50. The Litigation Chamber adds, however, that Article 12.3 of the GDPR provides that “The
controller provides the data subject with information about the
measures taken following a request made pursuant to Articles 15 to 22, in
as soon as possible and in any case within one month from the
receipt of the request”. Pursuant to this article, the controller is
under the obligation to indicate the measures it has taken following a request for erasure.
This implies that the data controller who follows a request for erasure
must provide the data subject with clear information about the data that
will continue to be processed, as well as the legal basis justifying the continuation of the processing of
those data. The Litigation Chamber finds that this was not the case in this case and
that the defendant therefore violated Article 17.1 read in conjunction with Article 12.3 of the
GDPR.

51.

Based on the elements set out in points 38 to 50 above, which relate to the quality of the
response provided by the defendant, the Litigation Chamber finds a violation of the
Articles 15.1.e), 15.1.g), 15.1.f) and Article 17.1 read in conjunction with Article 12.3 of the

GDPR.

II.4. Violation of Article 12, paragraph 1, of Article 13, paragraphs 1 and 2 and of Article 14, paragraphs 1 and 2 GDPR

II.4.1. IS Findings

52. The IS notes that as of February 22, 2021, the Defendant's website did not have any privacy policy on its website, whereas this is required on the basis of the articles 12, 13 and 14 of the GDPR. The IS was able to ascertain that on March 9, 2021, the defendant had added a privacy policy to its website. The IS considers however, this policy is incomplete for the following reasons:

10 For an application of this principle to the right of opposition, see the CNIL guidelines “How to use a list foil to respect the opposition to commercial prospecting? », published on January 17, 2022. Available on: https://www.cnil.fr/fr/comment-utilisation-une-liste-repoussier-pour-respecter-lopposition-la-prospection-commerciale

- It is only available in French, whereas the defendant is based in the region of Dutch language ;
- The legal basis of the processing is not mentioned (articles 13.1.c) and 14.1.f) of the GDPR);
- Transfers to third countries as well as guarantees in this regard are not mentioned, whereas these transfers are mentioned in the register of activities processing (Article 13.1.f) of the GDPR;
- The rights of persons are enumerated, but not sufficiently detailed (articles 13.2.b) and 14.2.c) read together with Article 12.1 of the GDPR).

II.4.2. Defendant's arguments

53. First of all, the defendant admits that it did not have a policy of confidentiality at the time of the investigation. It specifies that the policy whose addition was recorded by the IS only concerns the data which would be provided by visitors to the

website. A second policy has since been added and concerns the persons covered

through phone calls.

Next, the defendant specifies that the company directs its services only with regard to a

French-speaking public, which justifies that only the French language is used for politics

confidentiality. She adds that she is under no obligation to publish a privacy policy

in Dutch, even though it is based in Flanders.

Furthermore, it considers that the basis for the lawfulness of the processing is sufficiently

clear in the privacy policy and that it is consent.

Regarding the transmission of data, the defendant indicates that the policy of

confidentiality analyzed by the IS only concerns the website and the cookies. The one who was

added later concerns the people targeted by the calls. She adds that the

policy analyzed by the IS does contain a paragraph on the transfer of data to

third.

Finally, the defendant considers that the rights of individuals are sufficiently

developed since there is no obligation to detail them further. She takes in

example several websites of federal public services on which the rights are also

little or even less developed than on its site.

II.4.3. Position of the Litigation Chamber

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54.

It appears from the investigation report and the conclusions of the defendant that the latter

did not have a privacy policy on its website prior to the IS investigation.

A first policy concerning the processing of data related to the website (hereinafter:

privacy policy regarding the website) was added after the start of the investigation

of the IS. However, this privacy policy does not target cookies or user data.

leads that are covered by other documents. Subsequently, according to the defendant, a

other privacy policy regarding prospect data and calls from

telemarketing would have been published (hereafter: confidentiality policy concerning

phone calls). The IS had noted a lack of a privacy policy

regarding the website.

55. The Litigation Chamber considers it necessary first to clarify the

provisions applicable to each of its privacy policies. The first one

Defendant's privacy policy relating solely to the processing of

data related to the use of its website, it follows that in this situation the data

are collected directly from the persons concerned. This policy of

confidentiality is therefore subject to the obligations of Article 13 of the GDPR. Conversely, the

data used to make telemarketing calls are, according to statements

of the defendant, obtained from data brokers. They were not collected from

of the data subject and are therefore subject to Article 14 of the GDPR.

56. Next, the Litigation Chamber recalls that the G29 in its guidelines on the

transparency indicates in particular that “Each company having a website

should post a privacy statement or notice on its site. A

direct link to this privacy statement or notice should be

clearly visible on each page of this website under a commonly used term

(such as "Privacy", "Privacy Policy" or "Protection of Life Notice

private”).”11

57. The Litigation Chamber deems this obligation all the more important with regard to

relates to telemarketing companies such as the defendant, which carry out

direct marketing by telephone. Indeed, the website will often be the only way for a

data subject to find information on their own about the company that provides them with

contact. This is the case in the present case, since it is in this way that the

plaintiff contacted the defendant and was able to obtain information

regarding the processing of their data.

11 Article 29 Working Party, “Guidelines on transparency within the meaning of Regulation (EU) 2016/679”, version revised and adopted on 11 April 2018 (Available at: https://ec.europa.eu/newsroom/article29/items/622227), point 11.

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58. In this case, the defendant had no confidentiality policy at the time

of the survey, both for website data and call data

telephone. The Litigation Chamber therefore finds a violation of Articles 12.1,

13.1, 13.2, 14.1, and 14.2 of the GDPR.

59. The ID also made four additional findings regarding the policy of

confidentiality concerning the website, which are set out in point 52 above. For these four

findings, the Litigation Chamber will only consider the privacy policy

regarding the website. Indeed, the privacy policy regarding calls

telephone calls was not published by the defendant until after the IS investigation

and was not added to the record. It could therefore not be considered by the Chamber.

Litigation.

60. With regard to the language of the privacy policy, the Litigation Chamber does not

does not have enough information to compel the defendant to publish its

privacy policies in both Dutch and French. Indeed, the mere fact that

the defendant, who only provides his services remotely and therefore does not have a store

or office accessible to the public, or based in a Dutch-speaking region does not constitute

sufficient reason to require him to translate the documents into Dutch. The G29

in its guidelines on transparency specifies that "a translation into one or more

multiple languages should be provided when the controller is targeting

persons concerned who speak these languages”12. Indeed, according to the defendant, its activities

only target French-speaking data subjects, which justifies, at first glance, that

the privacy policy is only written in French.

61. As for the SI's finding of a lack of mention of the basis of lawfulness in the policy of confidentiality, the Litigation Chamber notes, as indicated by the defendant, that the privacy policy of the website analyzed by the IS contains the following information:

“By using our website, you expressly consent to the processing of your data as described in this privacy statement”

And

“We only collect the data that you provide to us and for which you give us permission to process them”13.

For the Litigation Chamber, the confidentiality policy therefore contains a mention of the basis for the lawfulness of the processing. However, although this does not strictly sensu part of its referral, the Litigation Chamber understands from the formulation of the

12 Article 29 Working Party, “Guidelines on transparency within the meaning of Regulation (EU) 2016/679”, version revised and adopted on 11 April 2018 (Available at: https://ec.europa.eu/newsroom/article29/items/622227), point 13.

13 Investigation report, screenshots, p. 14-15.

excerpts quoted above that the defendant practices or practiced the technique of "further browsing”. However, it recalls that this practice does not comply with the GDPR, since "the fact of coupling the consent of the Internet user with his choice to pursue the use of the service does not allow separate and specific consent as required in Article 4.11 of the GDPR”14.

It therefore invites the defendant to ensure that it complies with the principle of legality both in practice and in the information provided in its policy of privacy. In this regard, it recalls the structural link which exists between the basis of lawfulness of the processing and the information to be provided to data subjects15.

62. The IS also criticizes the defendant for not having included information on the transfers to third countries. The observation of the IS is based on the privacy policy alone

available at the time of the investigation, but which turned out to be the privacy policy of the website. However, transfers to third countries only concern data used in in the context of telemarketing or possibly data linked to cookies. For the Litigation Chamber, it is therefore right that the privacy policy of the website does not mention transfers. These must, however, be mentioned in the Confidentiality policy relating to telemarketing and, where applicable, in that relating to on cookies.

63. Finally, on the finding of the IS of insufficient details provided on the rights of persons concerned, the Litigation Chamber finds that the policy of confidentiality informs data subjects that they have the following rights: access, rectification, erasure, restriction, opposition and portability. The policy of confidentiality also indicates that data subjects may withdraw their consent at any time and that they can lodge a complaint with the Data Protection Authority. Stricto sensu, the privacy policy of the defendant therefore fulfills the obligations of Article 13.2.b) of the GDPR. Bedroom Litigation considers, however, that the terminology "restrict processing", even if it may be understood as referring to the right to restriction of processing, may lend to confusion. For the Litigation Chamber, it is therefore appropriate to use the proper terminology to the GDPR by adding, if necessary, additional information which makes it possible to clarify these concepts.

64. Furthermore, with regard to data used for telemarketing (subject to Article 14 of the GDPR), the Litigation Chamber recalls that Article 14.3.b) specifies that the information provided for in Article 14.1 and 14.2 must be provided to the data subject

https://www.autoriteprotectiondonnees.be/publications/decision-quant-au-fond-n-103-2022.pdf

15 As regards the lawfulness of the processing, see point 24 et seq.

June 2022, point 135. Available at:

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“at the latest at the time of the first communication to the said person”. The manager

processing is therefore obliged to provide this information to persons

concerned before communicating with them or, at the latest, during the first

communication with them. For

the Litigation Division, this obligation

information can be done in a variety of ways, whether through SMS, scripts

imposed on operators, or by pressing a key on their telephone keypad16. These

different forms of information may also refer the data subject

to the privacy policy on the website. Under the principle of

responsibility of Article 24 of the GDPR, it is up to the data controller to

determine the most appropriate way to inform the persons concerned, being

understood that he must be able to demonstrate compliance with this requirement.

III. Penalties

65. Under the terms of Article 100, §1 LCA, the Litigation Chamber has the power to:

1° dismiss the complaint without follow-up;

2° order the dismissal;

3° order the suspension of the pronouncement;

4° propose a transaction;

5° issue warnings and reprimands;

6° order to comply with the data subject's requests to exercise these

rights;

7° order that the person concerned be informed of the security problem;

8° order the freezing, limitation or temporary or permanent prohibition of processing;

9° order compliance of the processing;

10° order the rectification, restriction or erasure of the data and the notification of

these to the recipients of the data;

11° order the withdrawal of accreditation from certification bodies;

12° to issue periodic penalty payments;

13° to impose administrative fines;

14° order the suspension of cross-border data flows to another State or a

international body;

15° forward the file to the public prosecutor's office in Brussels, which informs it of the

follow-up given to the file;

16 For a similar decision, see decision SAN-2021-010 of July 20, 2021 of the French supervisory authority

(“National Commission for Computing and Liberties”). Available on :

https://www.legifrance.gouv.fr/cnil/id/CNILTEXT000043829617?isSuggest=true

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

Data protection.

66. Based on its analysis of the various elements of the file, the Litigation Division

found a violation of the following articles of the GDPR:

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sections 5.1.a), 6.1.a, 7.1, 24.1, 25.1 and 25.2;

sections 12.1, 13.1, 13.2, 14.1, and 14.2;

- and Articles 15.1.e), 15.1.g), 15.1.f), and Article 17.1 read in conjunction with Article 12.3

of the GDPR.

67. On the basis of the powers conferred on it by Article 100, §1, 9° of the LCA, and in view

to the following elements:

- The violations found in this decision are numerous and relate to

fundamental principles of the GDPR, such as the principle of lawfulness, as well as the right to

information and the right of access;

- The defendant had already set up a due diligence program and carried out a

some attention to data protection in contractual guarantees. She

also strengthened its procedures following the complaint. The defendant is moreover

a company of very limited size;

- The defendant was not subject to sanctions by the Litigation Chamber

in the past ;

- The fact that the defendant has already remedied several findings of violations without

wait for the final decision of the Litigation Chamber and that it reacts quickly

to the complainant's requests. The defendant also adopted vis-à-vis the DPA

a constructive and cooperative approach;

the Litigation Division decided to impose a reprimand on the defendant.

IV. Publication of the decision

68. Given the importance of transparency regarding the decision-making process of the Chamber

Litigation, this decision is published on the website of the Authority of

Data protection. However, it is not necessary for this purpose that the data

identification of the parties are directly communicated.

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FOR THESE REASONS,

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

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pursuant to Article 100, §1, 9° of the LCA, to issue a reprimand against the

Defendant for violations of Articles 5.1.a), 6.1.a, 7.1, 24.1, 25.1 and 25.2; articles

12.1, 13.1, 13.2, 14.1, and 14.2; and Articles 15.1.e), 15.1.g), 15.1.f), and Article 17.1 lu

in conjunction with GDPR Article 12.3.

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under article 100, §1, 1° of the LCA, to close the file without further action for the findings

remaining.

In accordance with Article 108, § 1 of the LCA, an appeal against this decision may be lodged,

within thirty days of its notification, to the Court of Markets (court

d'appel de Bruxelles), with the Data Protection Authority as defendant.

Such an appeal may be introduced by means of an interlocutory request which must contain the

information listed in article 1034ter of the Judicial Code17. The interlocutory motion must be

filed with the registry of the Market Court in accordance with article 1034quinquies of C. jud.18, or

via the e-Deposit information system of the Ministry of Justice (article 32ter of the C. jud.).

(se). Hielke HIJMANS

President of the Litigation Chamber

17 The request contains on pain of nullity:

the indication of the day, month and year;

1°

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

number or

Business Number;

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

(4) the object and summary statement of the means of the request;

(5) the indication of the judge who is seized of the application;

6° the signature of the applicant or his lawyer.

18 The request, accompanied by its appendix, is sent, in as many copies as there are parties involved, by letter

recommended to the court clerk or filed with the court office.