

Litigation Chamber

Decision on the merits 154/2022 of 4 November 2022

File number: DOS-2020-03536

Subject: transaction in the "Use of cookies on media websites of

Het Nieuwsblad, De Standaard, Gazet van Antwerpen and Het Belang van Limburg

(Mediahuis group)"

The Litigation Chamber of

the Data Protection Authority, composed of

Mr. Hielke Hijmans, President;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and

to the free movement of such data, and repealing Directive 95/46/EC (General Regulation on the data protection), hereinafter "GDPR";

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

Having regard to the internal regulations as approved by the House of Representatives on December 20, 2018 and published in the Belgian Official Gazette on January 15, 2019;

Considering the documents in the file;

Having regard to the settlement proposal submitted to the party on September 14, 2022, as annexed to the this Decision and forming an integral part thereof;

Made the following decision regarding:

The part :

Mediahuis NV,

represented by Me Jan CLINCK and Me Gerrit VANDENDRIESSCHE,

I. Procedure prior to the transaction:

Click or tap to enter a date.

1.

In the context of this file concerning Mediahuis NV, a proposed transaction was submitted to the party on September 14, 2022. The full contents of this proposal for transaction is annexed to this decision.

2.

On September 30, 2022, the party sends a number of requests for clarification regarding the aforementioned proposed transaction.

3.

4.

On October 3, 2022, a response was given to these requests for clarification from the party.

On October 7, 2022, the party requests an extension of the deadline for responding to the proposal for transaction, given that the party still wishes to respond in more detail to the content of the transaction proposal.

5.

On October 11, 2022, an extension of the deadline for responding to the transaction proposal by 14 days is granted.

6.

On October 20, 2022, the party sends a number of requests for clarification regarding the proposed transaction.

7.

On October 24, 2022, a response is given to these requests for clarification from the party.

In this answer, several wordings are proposed that can be used to clarify the proposal settlement in this final settlement decision.

8.

On October 27, 2022, the party submits additional requests for clarification regarding the proposed transaction.

9.

Due to additional requests on October 27, 2022 and the late response to these requests (below), an extension of the deadline for responding to the transaction proposal by 5 days is granted on October 28, 2022.

10. On October 28, 2022, clarifications are made regarding the wording as well as the application of the clarifications in the settlement decision.

11. On October 31, 2022, the Litigation Chamber receives a response from the party that it accepts the transaction proposal as well as some of the clarifications provided to it submitted, but not all.

12. Following the express acceptance of the party, a transaction was therefore established on October 31, 2022. This decision formalizes this transaction.

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II. Terms of the transaction

13. The conditions of the transaction are in principle identical to those contained in the transaction proposal of September 14, 2022. For this reason, this transaction proposal transaction forms an integral part of this decision.

14. Following the requests in this regard made by the party, the following clarifications are provided, however, in addition to the conditions set out in the transaction proposal of September 14, 2022. In the event of any ambiguity resulting from the following formulations in the formal settlement decision, the wording of the text of the decision takes precedence over that of the settlement proposal attached to the decision.

15. The Litigation Chamber specifies that the transaction was not preceded by a deliberation on the merits concerning the facts of the file: the arguments advanced by the party in its defense were therefore not considered when establishing the transaction; There's no

no longer had an audition. Acceptance of the transaction by the party does not imply any acknowledgment by that party that it would be guilty of a violation of the law in vigor.

III. Publication of the decision

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

FOR THESE REASONS,

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

- under article 100, § 1, 4° of the LCA, to validate the transaction as accepted by the party on November 31, 2022, under the conditions set out in this decision and its Annex.

Pursuant to Article 108, § 1 of the LCA, this decision may be appealed to the Court of Markets (Brussels Court of Appeal) within thirty days of its notification, with the Data Protection Authority as defendant.

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Such an appeal may be lodged by means of a contradictory request which must include the particulars listed in article 1034ter of the Judicial Code¹. The contradictory request must be filed with the registry of the Markets Court in accordance with article 1034quinquies of the Judicial Code², or via the e-Deposit computer system of Justice (article 32ter of the Judicial Code).

(Sr.) Hielke HIJMANS

President of the Litigation Chamber

1 The request contains, under penalty of nullity:
the indication of the day, month and year;

1°

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

Business Number ;

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

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

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

6° the signature of the applicant or his lawyer.

2 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.

Litigation Chamber

RECOMMENDED

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Secretariat

T: +32 (0)2 274 48 56

Email: litigationchamber@apd-gba.be

To the attention of Mediahuis NV,

represented by Me Jan CLINCK and Me Gerrit

VANDENDRIESSCHE,

Respondent

Your references

20200001093

Our references

DOS-2020-03536

Appendix(es)

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Date

09/14/2022

Subject: proposed transaction in the "Cookies at Mediahuis" file (websites of

De Standaard, Het Nieuwsblad, Gazet van Antwerpen and Het Belang van Limburg)

Dear,

In the context of the large number of files awaiting examination by the Chamber

Litigation, which leads to long processing times for all cases, the Chamber

Litigation has decided, pursuant to Article 100, § 1, 4° of the law creating the Authority of

Data Protection ("LCA")³, to submit by this letter a proposal for

transaction in the file referred to under the heading ("transaction proposal").

The transaction proposal falls within a context where two of the ten files related to this

folder (the ten folders called "cookies on press sites") have already led to a

decision on the merits in which the Litigation Division found violations giving rise to

twice led to the imposition of an administrative fine of EUR 50,000⁴.

This transaction proposal is made without any detrimental acknowledgment and does not bind

in any way the Litigation Chamber as to a possible position in the event of refusal

of the transaction proposal. The Litigation Chamber refers in particular in this case

Decision 85/2022 of 25 May 2022 of

3 MB, January 10, 2018.

⁴ See

<https://www.autoriteprotectiondonnees.be/publications/decision-quant-au-fond-n-85-2022.pdf>

103/2022

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

uniquely

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the Litigation Chamber, available

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its powers to ascertain whether or not violations have been committed and, if necessary, to

use of the powers of sanction conferred on it by European law⁵ and Belgian law⁶.

If the party to whom the settlement proposal is addressed expressly refuses this

proposal, the Litigation Chamber will continue the procedure on the merits and will deal with the case

other than by transaction.

a) Procedural status of the settlement proposal and the settlement

The transaction proposal submitted here precedes the deliberation phase relating to the

finding of potential violations in this case. In this sense, the Chamber

Litigation only takes into account, in its settlement proposal, the findings that

were mentioned in the report of the Inspection Service of the Authority for the protection of

data, without verifying the accuracy of these findings.

Given that the procedure before the Litigation Chamber of the Data Protection Authority does not

cannot be assimilated to the procedure of criminal law, "the transaction" as provided for by the

Belgian legislator under Article 100, § 1, 4° of the LCA cannot be assimilated to the

"transaction" provided for in criminal law. The transaction within the meaning of the ACL has indeed a characterui

generis.

First of all, the Litigation Chamber does not pronounce *hic et nunc* on the existence possible violations, even if the procedure is already in the examination phase "as to the merits" in accordance with Articles 98 and 99 of the LCA. In this context, the Litigation Division makes use of the possibility at its disposal and of its explicit competence to formulate a proposal of transaction, similar to what is also possible in the case of a "transaction" in criminal matter.

In addition, the Litigation Division mentions the precise facts, situating them in time and space, following which the transaction proposal intervenes (*infra*). Although, as stated above, the Litigation Chamber does not pronounce *hic et nunc* on the existence of violations, it must nevertheless be based on the facts presented in the file to formulate the proposal for transaction. The amount that the Litigation Chamber proposes to the party to pay must indeed be proportionate to the nature of the possible violations. The settlement proposal therefore bears on certain facts in a given period and (technical) context, as described in the

5 See Article 58 of 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 Data Protection Regulation), hereinafter "GDPR";

6 See also Article 100 of the LCA.

report of the Inspection Service, the facts which do not fall within this period and this context not covered by the transaction⁷.

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b) Finding by the Inspection Department in connection with the transaction proposal

In this case, the findings made by the Inspection Service of the Authority for the Protection of data that the Litigation Chamber takes into account - without however ruling on the merits - when proposing the conditions for the transaction are as follows⁸:

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"Finding 1: placement of cookies not strictly necessary before the collection of the consent"⁹

"Finding 2: pre-ticked boxes for partners"¹⁰

"Finding 3: use of third-party cookies without consent"¹¹

"Finding 4: incomplete information"¹²

"Finding 5: unjustified cookie retention periods"¹³

"Finding 6: withdrawal of consent not respected"¹⁴

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c) Substantive conditions

As part of the settlement proposal, the conditions accepted by the party to the procedure are the following :

- Mediahuis undertakes to pay the sum of EUR 10,000 to the Belgian Treasury, in accordance with the procedures defined by the Federal Public Service Finance¹⁵. Mediahuis waives all civil and other action related to the transaction, for example, but not limited to, the case of a any unfavorable communication relating to this transaction;

- The Litigation Chamber does not make any finding of possible violations and formally closes the procedure with the transaction resulting from this proposal, if Mediahuis accepts the transaction and respects it;

- The Litigation Chamber does not consider the acceptance of a transaction proposal as a confession which could in particular be used as an aggravating circumstance when

⁷ In this sense, the ne bis in idem principle does not apply to facts that do not fall within this scope.

⁸ When taking into account the findings of the Inspection Service, the Litigation Chamber also takes

full consideration of the supplemental investigation report of November 30, 2020 in DOS-2020-03536.

9 Report of the Inspection Service of the Data Protection Authority of 7 October 2020 in the file

DOS-2020-03536 ("Inspection Report"), p. 28-9.

10 Inspection report, p. 29-30.

11 Inspection report, p. 30.

12 Inspection report, p. 30-1.

13 Inspection report, p. 31-2.

14 Inspection report, p. 32.

15 In accordance with Article 107 of the LCA, "the penalty payments, fines and settlements imposed pursuant to this law shall be paid or collected for the benefit of the Treasury by the general administration of Collection and Collection." (proper underlining)

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the establishment of the sanction in future proceedings before the Chamber

Litigation¹⁶;

- In the event of explicit acceptance or in the absence of reaction from the party to which the transaction proposal is sent within the period specified below, this proposal of transaction will take the form of a formal decision which will be published on the website Internet of the Data Protection Authority, without omitting the identification data direct.

If the conditions of the transaction are not respected, the Litigation Chamber reserves the right to right to cancel the settlement decision and to continue the procedure in this file for another way, or to end it.

d) Deadline

Mediahuis must react within 30 days of receipt of this proposal for transaction. In the absence of a reaction, the transaction proposal will be considered as accepted under the conditions set out above.

e) Existence of other controllers and/or processors

This transaction proposal is addressed solely to Mediahuis. She doesn't take position on whether and to what extent other actors are responsible for potential breaches that gave rise to this Proposed Settlement.

f) Validation of the transaction

If the settlement proposal gives rise to a formal decision to settle due to the explicit acceptance or lack of reaction, within the aforementioned period, of the party to which the settlement proposal is addressed, an appeal may be lodged by the "party causing grievance"¹⁷.

¹⁶ See in particular Article 83, paragraph 2, point e) of the GDPR in the context of the imposition of administrative fines when of the finding of violations following "any relevant violation previously committed by the person in charge of the processing or the processor".

¹⁷ Under Article 108, § 1 of the LCA, this decision may be appealed to the Court of Markets (Brussels Court of Appeal) within thirty days of its notification, with the Data Protection Authority given as a defendant.

This appeal can be introduced by means of a contradictory request which must include the information listed in Article 1034ter of the Judicial Code. The contradictory request must be filed with the registry of the Market Court in accordance with article 1034quinquies of the Judicial Code, or via the e-Deposit computer system of Justice (article 32ter of the Judicial Code).

The final transaction does not affect the rights of any individuals (in this case, it is not of a complaint file) having suffered damage to claim damages before a civil court on the basis in particular of Article 82 of the GDPR.

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Please accept, Madam, Sir, the assurance of my highest consideration.

(Sr.) Hielke Hijmans

President of the Litigation Chamber