

Litigation Chamber

Decision on the merits 01/2022 of 3 January 2022

File number: DOS-2020-01182

Subject: **Complaint against a private employment agency for unlawful further processing of personal data after a request for erasure**

The Litigation Chamber of the Data Protection Authority, made up of Mr. Hielke Hijmans,  
Chairman, and Messrs. Dirk Van Der Kelen and Jelle Stassijns;

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 relating to the protection of natural persons with regard to the processing of personal data and to the free movement of this data, and repealing Directive 95/46/EC (General Data Protection Regulation),  
hereinafter "GDPR";

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

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

Considering the documents in the file;  
made the following decision regarding:

the complainant :

X, hereinafter "the plaintiff";

the defendant :

Y, represented by Maître Maarten Stassen, hereinafter the "defendant".

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## I. Facts and procedure

1. On March 3, 2020, the complainant filed a complaint with the Data Protection Authority against the defendant. The subject of the complaint concerns the unlawful further processing of personal data of complainant's staff, after he had asked the defendant to erase the personal data

personal.□

2. The Complainant states that in the fall of 2019, he went to a job interview at the□

defendant but that he was not engaged and then requested the erasure of his data.□

However, on March 2, 2020, the complainant received an email from the respondent, informing him that the latter□

created an account. The complainant replies the same day that he does not want an account and asks the□

defendant to erase all his personal data. Although the defendant confirms to him□

on the morning of March 3, 2020 that the personal data has been deleted, the□

complainant again in the afternoon receives an e-mail with a job offer from a local office□

of the defendant.□

3. On April 29, 2020, the Front Line Service contacts the complainant to check whether he has□

received new e-mails since the introduction of the complaint and for him to provide proof of□

the exercise of his rights against the defendant.□

4. On April 29, 2020, the Complainant confirms that he received a second email with a job offer,□

sent by another office of the Respondent on April 15, 2020. The Complainant also claims to have□

requested erasure at the time by telephone to an office of the defendant, believing that□

the entire organization would accede to his request.□

5. On July 2, 2020, the complaint was declared admissible by the Front Line Service on the basis of the□

articles 58 and 60 of the LCA and the complaint is forwarded to the Litigation Chamber under article□

62, § 1 of the LCA.□

6. On July 22, 2020, the Litigation Chamber decides to request an investigation from the Service□

of Inspection, pursuant to articles 63, 2° and 94, 1° of the LCA.□

7. On July 22, 2020, in accordance with Article 96, § 1 of the LCA, the Chamber's request□

Litigation to proceed with an investigation is transmitted to the Inspection Department, as well as the□

complaint and parts inventory.□

8. On 21 April 2021, the investigation by the Inspection Service is closed, the report is attached to the file and□

this is forwarded by the Inspector General to the President of the Litigation Chamber pursuant to□

Article 91, § 1 and § 2 of the LCA. The investigation report includes findings relating to the subject

of the complaint and distinguishes between two treatments<sup>1</sup>. The first processing concerns the registration of the

1 The Litigation Chamber points out for the sake of good order that the investigation report erroneously refers to the dates of Ma

respectively for e-mails communicating the activation of the account on the Y portal and for e-mails concerning the request

of erasure and the e-mails of job offers which the complainant nevertheless received afterwards. These exchanges took place in

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complainant on Y's mailing lists "for job offers". The second treatment concerns the

creation of an account, in the complainant's name, on the Y portal.

9. Treatment 1 — The respondent declares in its response to the Inspection Service that the complainant

registered as an interim candidate on April 29, 2019 at 12:01 p.m., via an Internet page of Y which is not

more used (...). As regards the lawfulness of the complainant's inclusion on Y's mailing list

"for the sending of job offers", the DPO of Y refers to different legal bases depending on the type of

treatment.

10. Y asserts in particular that the performance of a contract (Article 6.1.b of the GDPR) constitutes the basis

legal basis for the processing of personal data in the context of the services which fall

of Y's mission as a private employment agency, including the sending of job offers. Services

which are on the other hand "auxiliary" to the mission of private placement agency in the strict sense

on the legitimate interest of the defendant. These services may consist in particular of offering a

training in order to promote employment opportunities, so that the skills available among

workers can best match employers' demand for skills. Finally,

the respondent uses the consent of the persons concerned for the communication which does not

does not fall within Y's remit as a private employment agency and which is considered

marketing communications.

11. On the basis of these elements, the Inspection Service finds that the first processing of data

of a personal nature disputed, namely the complainant's registration on the mailing list of Y

"for sending job offers", is part of Y's mission as a

private placement and is therefore based on the performance of a contract with the person concerned.□

The Inspection Service therefore concludes that this processing does not constitute a violation of the□  
articles 6 and 7 of the GDPR.□

12. With respect to the Respondent's handling of the Complainant's request for erasure, the□  
Inspection Service considers that this is not compatible with the obligation of the person responsible for the□  
processing to facilitate the exercise of the rights of data subjects nor with its responsibility to□  
take appropriate technical and organizational measures in this regard.□

13. In responses to questions from the Inspection Service concerning the processing of requests□  
of the right to erasure, the defendant specifies above all that the personal data of□  
interim candidates are kept in a central database for Belgium.□

The internal procedure for handling requests from data subjects provides that the□  
requests for the deletion of data are transmitted by default to the Quality department of Y,□  
for manual processing. This service examines the request and performs a check□  
before specifying the scope of the request and managing it appropriately. In the case□  
of a deletion request, the service will more precisely check from the database□

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central which data can be deleted and if necessary, it will manually adapt the□  
data. Once the request has been closed, the data subject is finally informed.□

14. Notwithstanding the foregoing, the Respondent also confirms that the collaborator who received the□  
complainant's request at the time allegedly failed to forward the erasure request to the service□  
concerned, so that no request for erasure has been recorded and even less processed□  
and therefore that the plaintiff ultimately remained in the central database as□  
interim candidate.□

15. The Respondent states in its response to the Inspection Service that Y is also trying to limit□  
somewhat manual processing of erasure requests and to deal with such□  
automated requests. According to the Inspection Service, this "willingness" to treat□

automatically deletion requests seems not only incompatible with the wording used in Article 12.2 of the GDPR according to which the controller must facilitate the exercise of the data subject's rights, but it appears that the defendant had to take appropriate technical and organizational measures pursuant to Article 24 of the GDPR in order to guarantee and be able to demonstrate that the processing is carried out in accordance with the GDPR, including automated processing of erasure requests. The Inspection Service finds therefore that the defendant has violated Articles 12.2, 17 and 24 of the GDPR.

#### 16. Processing 2 — Regarding the second processing of personal data

contested, namely the creation of an account on the Y portal, the defendant explains that at the beginning of In 2020, Y moved from a central registration page to a self-service portal, which serves as support for personal data already registered with the defendant and which gives also the possibility for temporary candidates to manage their personal data themselves staff, to rectify them and, if necessary, to apply using them. Since then, news registrations with the defendant involve the creation of an account on the portal of Y. The candidates temporary workers who were already registered after Y at the time of the "activation" of the Y portal in self-service were, on the other hand, informed by e-mail at the time and on the occasion of the introduction of this system.

17. In response to the Inspection Service's request for information, the Respondent specifies also that Y does not rely on consent as a legal basis for creating a account on the Y portal, but on the execution of a contract between the temporary candidate as job seeker and Y as a private placement agency.

18. In view of the foregoing, the Inspection Service notes that the creation of an account on the Y portal for the complainant was made in a lawful manner and therefore does not constitute an infringement of Articles 6 and 7 of the GDPR.

#### 19. With regard to informing the complainant prior to creating an account on the portal

d'Y, the Inspection Department finds, on the basis of the documents submitted by the complainant as well as by

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the defendant, that the complainant was not informed by e-mail until March 2, 2020 that his account had□  
been activated. During the investigation by the Inspection Service, the DPO of Y confirms that Mr X had□  
registered with Y as an interim candidate, that Y's self-service portal did not exist□  
yet at the time of its registration, and that Y activated it for the complainant when it was put into service,□  
of which it was informed via two e-mails on March 2, 2020. In addition, the Inspection Service notes□  
that these e-mails only indicate that an account on the Y portal has been created for the complainant,□  
with the complainant's email address as the identifier.□

20. Since the complainant was therefore not informed of the introduction of the Y portal beforehand□  
to the creation and activation of this account, the Inspection Service affirms that this second□  
disputed processing of personal data sows confusion and therefore constitutes a□  
violation of article 5.1.a of the GDPR.□

21. On May 20, 2021, the Litigation Chamber decides, pursuant to Article 95, § 1, 1° and Article 98□  
of the ACL, that the case can be dealt with on the merits.□

22. On May 28, 2021, the parties concerned are informed by registered letter of the provisions□  
as set out in article 95, § 2 as well as in article 98 of the LCA. They are also informed□  
under Article 99 of the LCA, deadlines for transmitting their conclusions.□

23. The deadline for receipt of the Respondent's submissions in response was set at□  
July 9, 2021, that for the plaintiff's reply submissions as of July 30, 2021 and that for the□  
Respondent's submissions of August 20, 2021.□

24. The 11th□

June 2021,□

the Litigation Chamber is□

informed that Y will be represented by□

Master Maarten Stassen. The Respondent requests that all communications with the Chamber□

Litigation, and if possible with□

the other party,□

do it electronically.□

Furthermore, the defendant requests a copy of the file (art. 95, § 2, 3° of the LCA), which was sent to him□  
transmitted on June 16, 2021.□

25. On July 9, 2021, the Litigation Chamber receives the submissions in response from the□  
respondent.□

26. Respondent first states that the Complaint is an isolated instance of inadvertent non-compliance with the□  
prescribed procedure for erasing data. Although the defendant could not verify□  
why the procedure was not followed or why the employee concerned confirmed that the□  
complainant's data had been deleted from the defendant's database while this□  
was not the case, because the employee in question has not worked for the defendant since□  
July 2020, namely before the first letter from the Inspection Service, the defendant declares that he did not□  
found no indication that it was an intentional act by the former collaborator and that it□  
it was certainly not an intentional act of the defendant, as responsible for the□  
treatment.□

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27. With regard to the second finding of the Inspection Service, the Respondent asserts that a□  
erasure request cannot be fully automated when the "execution of a□  
contract" is the legal basis for processing, given that Article 17.1.a of the GDPR provides that□  
the controller is only obliged, in such a case, to erase the personal data□  
personal when "the personal data are no longer necessary with regard to the□  
purposes for which they were collected or otherwise processed".□

28. The Respondent asserts that in the present case it is also unclear which allegations□  
facts lead the Inspection Service to conclude that there is a violation of Articles 17, 12.2 and□  
24 of the GDPR, and in particular if the finding of the Inspection Service concerns non-compliance□  
unique to the existing procedure or on the procedure itself.□

29. Furthermore, the Respondent refutes the conclusion of the Inspection Service that the processing of automated erasure request is necessary or at least appropriate to facilitate the exercise of the rights of data subjects. According to the defendant, automated processing is not indeed not possible because this processing and the legal basis of Article 6.1.b GDPR inherently imply that not all data can simply be erased automatically. Manual intervention by the section responsible for processing applications will therefore always be necessary, according to the defendant.

30. The Respondent also specifies that requests to exercise rights related to the GDPR arrive in different ways, such as physically in one of its offices, by telephone, by e-mail to an office e-mail address, by e-mail directly to a collaborator, by e-mail to the relevant section (as indicated in the privacy policy), by e-mail to another department, etc. Through this approach, the defendant attempts to make accessible the exercise of the rights of data subjects and all requests are processed, regardless of the channel through which they arrive.

31. The defendant then refers to investments in a privacy management system to further optimize existing GDPR-related processes, including processes concerning the processing of requests from data subjects. The Respondent submits that in view of current technical and organizational measures and investments in software for privacy management aimed at effectively facilitating the exercise of rights, it is difficult to assert that there is a violation of Articles 17, 12.2 and 24 of the GDPR.

32. With respect to the violation of Article 5.1.a of the GDPR, the Respondent states that the Complainant knew although the defendant could process his personal data to facilitate the process application for new functions and that the complainant had been informed in advance of the introduction of the Y portal. It follows, according to the defendant, that the processing was carried out in a transparent manner towards the complainant, in accordance with Article 5.1.a of the GDPR.



33. The Respondent refutes the Inspection Service's assertion that the Complainant was not informed of the introduction of the Y portal only after the creation of his account, by means of an e-mail of activation of March 2, 2020. The defendant more specifically states that the declaration of confidentiality for candidates, which was available via the website on which the complainant registered on April 22, 2019 as an interim candidate, clearly mentions that the personal data is used to facilitate the application process for new functions, which is the exact purpose of the Y portal, according to the defendant.

34. The Respondent also argues that this improvement, and the specific objective of facilitating the application process for new functions, was explained a second time in a e-mail sent to all data subjects whose data was in the database of defendant's data, a few days before the e-mail of March 2, 2020 addressed to the plaintiff regarding the activation of his account with Y. The defendant therefore considers that Y made the necessary to be transparent about the processing in question, so that one can difficult to assert that there is a violation of Article 5.1.a of the GDPR.

35. The Respondent also refers to the policy of the Litigation Chamber relating to the publication of decisions on the website of the Data Protection Authority, as well as to the fact that the cause of the complaint is a human error, before asking the Litigation Chamber not to render any public information in the decision, allowing the identification of the defendant. Nor in the facts of this case, nor in its own attitude, does the Respondent see any reason to apply as a sanction the identification of the parties concerned in this case.

36. Finally, the Respondent requests that the Litigation Chamber find that the non-erasure of the data of the complainant after a request on his part to this effect is an isolated case without wrongful act intentional intention of the defendant and to take note of the efforts that the defendant makes and has made to optimally facilitate the exercise of rights, including the right to erasure, and on this basis, of judge that it is not necessary to pronounce one of the measures provided for in article 100, § 1 of the LCA.

37. Also principally, the Respondent requests that the Litigation Chamber find that it is

established, on the basis of the investigation report of the Inspection Service and the means put forward in this framework, that the defendant has not violated any of the provisions of the GDPR, and that it thus orders the dismissal under article 100, § 1, 2° of the LCA.

38. Still principally, the Respondent asks not to be identified in the publication of the decision since he proves, by his positive and cooperative attitude, that his "pillorying" is not necessary for them to take their GDPR obligations seriously, because they already do even in the absence of punishment.

39. In the alternative, if the Litigation Chamber nevertheless considers, on the basis of the findings of the Inspection Service that the defendant has violated the provisions of the GDPR, the defendant requests the Decision on the merits 01/2022 - 8/12

Litigation Chamber to rule that these violations are not of such a nature as to inflict a penalty and thus order the dismissal of the case under Article 100, § 1, 2° of the LCA.

40. The plaintiff did not submit any submissions in reply to the Litigation Chamber.

41. On August 16, 2021, the Litigation Chamber receives the summary conclusions from the respondent.

## II. Motivation

42. The Litigation Chamber finds that the complaint relates to the lack of follow-up given to a request for erasure, on the one hand, and on an alleged violation of the principles of lawfulness, loyalty and transparency, on the other.

II.1. Subscription to Y mailing lists for job offers (process 1) and application erasure of the complainant

43. On the basis of the investigation report of the Inspection Service as well as the supporting documents provided by the defendant, the Litigation Division considers above all that the defendant informed correctly the complainant, at the time of his registration as an interim candidate, as to the services that Y offers as a private employment agency, through the declaration of confidentiality for candidates.

44. The Litigation Chamber concludes that the complainant's registration on the mailing lists of Y concerning job offers took place in a lawful manner and therefore does not constitute a violation of Articles 6 and 7 of the GDPR. This part of the complaint must therefore be dismissed.

45. As for the request for erasure, the Litigation Chamber understands that in the context of a telephone conversation with an employee of the office of Y [...], the complainant would have asked for the deletion of his data, when he learned that he had not been hired. In addition, following the double communication indicating that an account on the Y portal had been created for him, the complainant would have sent an e-mail to Y on March 2, 2020 [...] in order to have his data deleted of a personal nature, to which an employee of the same office replied in writing on March 3, 2020 that his personal data had been deleted from the databases of data.

46. However, it appears from the subject of the complaint and the plaintiff's supporting documents that the defendant did not respond to the complainant's request. However, Article 17.1 of the GDPR provides the right for data subjects to obtain from the controller the erasure of their personal data as soon as possible. If the personal data are no longer necessary for the purposes for which they were collected or otherwise processed

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otherwise, the controller is in principle obliged to delete this data at personal character as soon as possible.

47. In the present case, the defendant even continued the processing of the personal data of the complainant, seen that on the same day and again on April 15, 2020, Y continued to send emails job offers to the complainant's home address.

48. According to the Respondent, this was due to a unique human error of the collaborator at the time who would have omitted to communicate the request for erasure to the competent department, as provided for however, the internal procedures for handling data subject requests for exercise their rights under the GDPR.

49. Notwithstanding the foregoing, the Litigation Chamber considers that by virtue of the above analysis, it agrees to conclude that the Respondent thereby breached Articles 12.22 and 17.13 of the GDPR and also did not no longer respected the principle of responsibility incumbent upon it in accordance with Articles 5.2 and 24 of the GDPR.

50. The Litigation Chamber however takes note of the fact that the defendant presented his apologies to the complainant and pointed out that his personal data had in the meantime been erased from the defendant's database<sup>4</sup>. The Litigation Chamber also concludes that it does not does not have any indicia that the procedures established by the Respondent are not such to effectively ensure that the rights of data subjects are safeguarded in accordance with the GDPR.

2 Article 12 of the GDPR - Transparency of information and communications and methods of exercising personal rights concerned

[...]

2. The controller shall facilitate the exercise of the rights conferred on the data subject under Articles 15 to 22. In the cases referred to in Article 11(2), the controller does not refuse to comply with the data subject's request concerned to exercise the rights conferred on him by Articles 15 to 22, unless the controller demonstrates that he is not not able to identify the person concerned.

[...]

3 Article 17 GDPR - Right to erasure ("right to be forgotten")

1. The data subject has the right to obtain from the controller the erasure, as soon as possible, of data to personal data concerning him and the data controller has the obligation to erase this personal data within the as soon as possible, when one of the following reasons applies:

a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

b) the data subject withdraws the consent on which the processing is based, in accordance with Article 6, paragraph 1, point a), or Article 9(2)(a) and there is no other legal basis for the processing;

c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds□

for the processing, or the data subject objects to the processing pursuant to Article 21(2);□

d) the personal data has been unlawfully processed;□

e) the personal data must be erased to comply with a legal obligation which is provided for by Union law□

or by the law of the Member State to which the controller is subject;□

f) the personal data have been collected in connection with the offer of information society services referred to in Article□

8, paragraph 1.□

[...]□

4 With the exception of personal data which are necessary, according to the defendant, for the present proceedings.□

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51. The Litigation Division also notes that the Inspection Service did not find□

elements indicating an intentional violation, and that after the intervention of the Inspection Service,□

the respondent immediately granted the plaintiff's request. The complainant's case seems□

(so far) to be an isolated case<sup>5</sup>, and the defendant sufficiently proves that following the investigation of the□

Inspection Service, the necessary measures have been taken to avoid such incidents in the future.□

52. Furthermore, the Litigation Chamber emphasizes that the plaintiff is making no progress in his□

complaint that he suffered any damage as a result of the incident.□

53. Finally, it should be noted that during the investigation, the complainant did not answer the questions of the□

Inspection Service and did not submit any conclusions either during the procedure before the□

Litigation Chamber.□

54. Given the foregoing, the Litigation Division considers that the violation of Articles 12.2,□

17.1 and 24 of the GDPR is proven. In particular, since it appears to be a single offence,□

which is unintentional and also has no consequences for several people□

concerned, the Litigation Division decides, pursuant to Article 100, § 1, 5° of the LCA, to□

issue a reprimand to the defendant for not complying with a request□

erasure.□

II.2. Creation of an account on the Y portal (processing 2) and compliance with the principles of lawfulness,  
loyalty and transparency towards the complainant

55. The second part of the complaint relates to the activation of an account on the Y portal in the name of the complainant, despite his earlier request for erasure. The plaintiff states that he did not, moreover, not been informed of the creation of his account prior to its activation on March 2, 2020.

56. The Inspection Service agrees with the complainant's point of view in establishing the violation of Article 5.1.a of the GDPR, without concluding that the defendant carried out the data processing at personal character of the complainant unlawfully for the creation of an account on the Y portal.

57. In this regard, the Litigation Chamber notes that the Respondent refutes this point of view in its conclusions and declares that the e-mail informing about the deployment of the Y portal was sent to all data subjects who appeared in the defendant's database and for which an account with Y has been created.

58. However, there is no evidence from the supporting documents submitted by the Respondent that this prior e-mail has actually been sent. Unlike the two dated activation emails, the Litigation Chamber does not find the date of sending or the recipient of this e-mail prior, so that it considers that it is not sufficiently proven that the defendant informed

5 Decision on the merits 67/2021 of 4 June 2021, available at: <https://www.autoriteprotectiondonnees.be>  
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actually and correctly the complainant of the further processing of his personal data staff as part of their account on the new Y portal.

59. Nevertheless, the Respondent asserts that a portal such as that of Y constitutes a service to which the complainant could expect in a modern online environment. The defendant refers to particular to the privacy statement for candidates, which was available via the website Internet on which the complainant had registered and which clearly informed him of the use of his personal data to facilitate the application process for new functions, which is also the specific purpose of Y's portal, according to the defendant.

60. Furthermore, the Litigation Division finds that the plaintiff does not provide any proof of his

first request for erasure, although the privacy statement explicitly refers

to the self-service portal or two functional email addresses to exercise their rights.

The defendant also declares that no proof of such a request was found in the

internal systems. Therefore, the Litigation Division cannot find that the plaintiff has

requested the erasure of his personal data prior to receipt of the

activation emails.

61. Based on the foregoing analysis, the Litigation Chamber concludes that, in the absence of erasure

before March 2, 2020, the complainant remained in the databases of interim candidates

in accordance with the retention periods prescribed internally, resulting in the transfer of its

personal data to the new portal of Y.

62. Given that this last treatment is part of the service of the defendant in his capacity

private employment agency and that the complainant has been informed via the privacy statement

(which he became aware of when registering) of any data processing related to this

service, the Litigation Chamber considers that in this case, no violation can be found

of article 5.1.a of the GDPR.

63. All of the elements set out above justify, according to the Litigation Chamber, taking into

this case a decision under Article 100, § 1, 1° of the LCA. The Litigation Chamber decides

more specifically to dismiss the complaint, with regard to the aspect of the potential

violation of the principle of legality and the principle of transparency in the context of the creation of a

account on the Y portal.

III. Publication of the decision

64. Seen

the importance of

transparency regarding

the decision-making process of

bedroom□

Litigation, this decision is published on the website of the Authority for the protection of□

data. However, it is not necessary for this purpose that the identification data of the parties□

are communicated directly.□

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FOR THESE REASONS,□

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

- pursuant to Article 100, § 1, 1° of the LCA, to dismiss the complaint relating to□

the plaintiff's subscription to the defendant's employment newsletters;□

- pursuant to Article 100, § 1, 5° of the LCA, to formulate a reprimand with regard to the defendant□

for not having acceded to a request for erasure;□

- pursuant to Article 100, § 1, 1° of the LCA, to dismiss the complaint relating to the violation□

the principle of legality and the principle of transparency in the context of the creation of an account□

on the portal of Y.□

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

Court of Markets within thirty days of its notification, with the Authority of□

data protection as defendant.□

(sé) Hielke HIJMANS□

President of the Litigation Chamber□