

Litigation Chamber

Decision on the merits 169/2022 of 22 November 2022

File number: DOS-2018-03810

Subject: Complaint relating to the use of cookies on the RTBF website

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

Hijmans, chairman, and Messrs. Dirk Van Der Kelen and Christophe Boeraeve, 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;

Having regard to decision 168/2022 of November 22, 2022 of the Litigation Chamber;

Made the following decision regarding:

The complainant :

Mr. X, Hereinafter "the plaintiff";

The defendant: The Belgian Radio Television of the French Community (RTBF), a company autonomous public of a cultural nature,

Hereinafter "the RTBF" or "the defendant";

Counsel Peter Craddock,

Decision on the merits 169/2022 - 2/7

I. Facts and procedure

1.

On July 5, 2018, the complainant lodged a complaint with the Data Protection Authority.

data (APD) against the defendant.

2.

According to his complaint, the plaintiff alleges the irregularity of the processing (collection and

further processing(s) of its data by the defendant via cookies taking into account

lack of consent on his part. Beyond his personal situation, the complainant

generally denounces the unlawfulness of such processing.

3.

On July 25, 2018, the complaint is declared admissible on the basis of articles 58 and 60 of the LCA

and the complaint is forwarded to the Litigation Chamber under Article 62, § 1 of the LCA.

The complainant was informed of this on July 26, 2018.

4.

On November 14, 2018, the Litigation Chamber decides to request an investigation from the

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

5.

On November 21, 2018, in accordance with Article 96, § 1 of the LCA, the Chamber's request

Litigation to proceed with an investigation is forwarded to the Inspection Service (IS). THE

complainant is informed on the same date.

6.

On June 26, 2019, 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

(art. 91, § 1 and § 2 of the LCA).

7.

According to its report, the IS finds that cookies, in particular from third parties,

are deposited before the user has given his consent and only if the user

wishes to refuse commercial cookies, he must do so by means of an opt-in mechanism.

out on a third-party site. The IS concludes that the technical analysis shows only cookies non-essential are placed at the launch of the home page of the website <https://www.rtbef.be> when no consent has yet been given by the user. These cookies contain including advertising targeting and social network cookies.

8.

On July 3, 2019, the Litigation Division decided, pursuant to Article 95, § 1, 1° and article 98 of the LCA, that the case can be dealt with on the merits.

9.

On July 24, 2019, 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, i.e. September 6, 2019 for the complainant and October 7, 2019 for the defendant.

10. Respectively on July 29 and August 14, 2019, the Respondent and the Complainant request a copy of the file (art. 95, §2, 3° LCA), which is sent to them respectively on 30 July and August 22, 2019.

11. On August 27, 2019, the Litigation Chamber received the complainant's submissions in response.

12. On October 7, 2019, the Litigation Chamber receives the submissions in response from the
Decision on the merits 169/2022 - 3/7
defendant.

II. Motivation

13. Under Article 100 LCA, the Litigation Chamber has the power to:

1° dismiss the complaint without follow-up;

2° order the dismissal;

3° order a suspension of the pronouncement;

4° propose a transaction;

(5) issue warnings or reprimands;

6° order to comply with requests from the data subject 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 the processing to be brought into conformity;

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, who informs it of the follow-up

data on file;

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

Datas

14. When a complaint is forwarded to it by the First Line Service (SPL) which declared it

admissible, or by the IS after an investigation report as in the present case, the Chamber

Litigation will first examine whether it is technically possible for it to render a decision

with regard to said complaint. Otherwise, this complaint will necessarily be closed.

not followed up for technical reason¹.

the classification policy note without follow-up

¹ See.

<https://www.autoriteprotectiondonnees.be/publications/politique-de-classement-sans-suite-de-la-chambre-litigation.pdf>

the Litigation Chamber, point 3.1.

Decision on the merits 169/2022 - 4/7

15. In support of the arguments which follow and on the basis of the powers conferred on him granted by the legislator under section 100.1. of the LCA, the Litigation Chamber decides to close the complaint without further action in accordance with article 100.1., 1° of the ACL.

16. In matters of dismissal, the Litigation Chamber must justify its decision by step and:

- to pronounce a classification without technical continuation if the file does not contain or not enough elements likely to lead to a sanction or if it includes a technical obstacle preventing him from rendering a decision;
- or pronounce a classification without continuation of opportunity, if in spite of the presence of elements likely to lead to a sanction, the continuation of the examination of the file does not seem to him timely given its priorities.

17. If the dismissal takes place on the basis of several reasons (respectively technical or of opportunity), the reasons for the dismissal must be dealt with in order important.

18. In the present case, the Litigation Division orders a classification without technical follow-up in application of Article 100.1., 1° of the LCA on the basis of the reasoning which follows (points 19 to 27).

19. On November 22, 2022, the Litigation Chamber took decision 168/2022 with regard to the defendant. Pursuant to this decision, the Litigation Chamber adopted, with regard to facts identical to those denounced by the complainant, one of the measures listed in Article 100.1 of the LCA mentioned above, i.e. a transaction (article 100.1.4° LCA).

20. Said settlement decision 168/2022 extends “to potential infringements under the law of 13 June 2005 (in force at the time of the findings of the APD Inspection Service in the

file2), as well as potential breaches of the General Data Protection Regulation.

data (GDPR), with regard to cookies and, more generally, the storage and consent to the placement and further processing of information on the device of the user as a data subject. The transaction decision relates to the websites involved and mentioned in the file and concerns the party to which the proposal of transaction is addressed”³.

2 The settlement decision comes in the context of an own-initiative investigation carried out by the Inspection Service on the problem of data processing via cookies in the Belgian media sector, including those operated by the defendant.

3 Point 19 of decision 168/2022 of the Litigation Chamber.

Decision on the merits 169/2022 - 5/7

21. This settlement decision 168/2022 is addressed to the same party as the defendant of the this decision, or to RTBF.

22. The object of the transaction also relates, as just mentioned, to “the offenses potential GDPR, with regard to cookies and, more generally, the storage and consent to the placement and further processing of information on the device of the user as a data subject”. The settlement thus covers the grievances raised by the complainant under the terms of his complaint as recalled in point 2 above.

23. Finally, Decision 168/2022 specifies that “the transaction relates only to a specific period: the period from May 25, 2018 to November 11, 2020”⁴, i.e. the date of submission of the last IS report in said file.

24. Within the limits of this decision 168/2022, the Litigation Chamber has thus exhausted its referral as to the facts denounced by the complainant and as to the corresponding grievances. Bedroom Litigation therefore classifies the plaintiff's complaint for technical reasons without further action, in the same material and temporal limits.

25. Decision 168/2022 specifies in the same way that “the transaction exhausts the powers of the

Litigation Chamber to take corrective measures in respect of infractions

potential within the limits of the elements and legal provisions described above and in the transaction proposal, as well as within the period [read the period] referred to above. There
Chambre Litieuse stresses that the transaction does not affect the powers of the courts and courts nor those of other authorities to examine infringements where appropriate. There
transaction in this case binds only the Litigation Chamber of the Authority of
Belgian data protection”⁵.

26. As mentioned above, the object of the transaction formalized in the decision
168/2022 is limited to the period from May 25, 2018 to November 20, 2020, the date on which the SI has
closed its findings in the said file, which exceed the date of June 26, 2019 on which the
SI has closed its investigation initiated following the complainant's complaint (point 6).

27. For the period from November 20, 2020 to date, the Litigation Chamber therefore does not have
findings that support the grievances invoked by the complainant. For this reason, the Chamber
Contentious is therefore not in a position to find any breach on the part of
of the defendant and classifies the complaint without follow-up as regards this technical reason also to
support of criterion A.1. of its classification policy note without follow-up⁶.

4 Point 20 of decision 168/2022 of the Litigation Chamber.

5 Point 21 of decision 168/2022 of the Litigation Chamber.

6 In this sense, Decision 168/2022, like the present decision to dismiss, leaves intact the competence of
the DPA to decide for the period after November 20, 2020, if it were to be newly seized of it, on
any shortcomings that would persist to this day with regard to the facts denounced by the complaint.

Decision on the merits 169/2022 - 6/7

28. With regard to the settlement decision (168/2022) for which it opted as
decision to close the present complaint without follow-up, the Litigation Chamber recalls that it
belongs sovereignly as an independent administrative authority - with due respect
relevant articles of the GDPR and the LCA - to determine the corrective measure(s) and

appropriate sanction(s).

29. Thus, it is not for the plaintiff to ask the Litigation Chamber to order such or such corrective measure or sanction. If, notwithstanding the foregoing, the Complainant nevertheless had to ask the Litigation Chamber to pronounce one or the other measure and/or sanction, it is therefore not for the latter to justify why it does not would not accept one or the other request made by the complainant. These considerations leave intact the obligation for the Litigation Chamber to justify the choice of measures and sanction in which it deems, (among the list of measures and sanctions made available to it by articles 58 of the GDPR and 95.1 and 100.1 of the ACL) appropriate to condemn the complaining party cause⁷. In this case, the Litigation Chamber refers to points 19-27 above concerning its decision to close the complainant's complaint on a technical ground.

30. In any case, the Litigation Division is not competent to grant any damages claimed by the plaintiff. This measure is not not provided for by articles 95 and 100 of the LCA under corrective measures and sanctions which it is empowered to impose. This prerogative is reserved for the courts and tribunals of the order judicial.

III. Publication of the decision

31. Given the importance of transparency with regard to the decision-making process and the decisions of the Litigation Chamber, this decision will be published on the website of the DPA by deleting the direct identification data of the complainant and the named persons, whether natural or legal, excluding the defendant.

32. The Litigation Chamber judges that the identification of the defendant is necessary since that this Decision refers to Decision 168/2022 adopted by the Chamber Litigation against the defendant and whose operative part (transaction) is the basis of this

⁷ Litigation Chamber, Decision on the merits 81/2020. See also the note from the Litigation Chamber relating to the complainant's position (point D. page 4 in fine). <https://www.autoriteprotectiondonnees.be/publications/note-relative-a-la->

position-of-the-complainant-in-the-procedure-within-the-litigation-chamber.pdf: “The conclusions of the complainant must deal with the content of the complaint and not, for example, the nature of the sanction that the Litigation Chamber must impose according to the complainant. The complainant is of course free to give an opinion on the sanction to be imposed, but the Chamber

Litigation is not obliged to adopt this opinion, nor to refute the arguments of the plaintiff concerning the imposition of the sanction”.

Decision on the merits 169/2022 - 7/7

classification decision without technical follow-up. The identity of the defendant having been published under this decision 168/2022, the omission of the identity of the same defendant in the terms of

this decision would make no sense. Its explicit mention allows overwhelmingly the better understanding and coherence of these two decisions of the Litigation Chamber.

FOR THESE REASONS,

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

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to close the complaint without further action under article 100.1.1° of the LCA.

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 (DPA) as a party 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 Code⁸.

The interlocutory request must be filed with the registry of the Market Court in accordance with article 1034quinquies of C. jud.⁹, 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

8 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.

9 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.