Litigation chamber

Decision on the merits 12/2019

from December 17, 2019

File number: DOS-2019-01356

Subject: Fine for violations committed by a website to its transparency obligations

and cookie consent

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

Hijmans, chairman, and Messrs. Dirk Van Der Kelen and Frank De Smet, members;

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

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

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

data protection, hereinafter "GDPR");

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

"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;

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made the following decision regarding:

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the data controller: X, acting under the name "Y"; counseled by Mr. Z, lawyer

office W;

1. Facts and procedure

Investigation by the Inspection Service

On February 27, 2019, the Management Board of the Data Protection Authority (hereinafter "DPA")

decided to refer the matter to the APD Inspection Service on the basis of Article 63, 1° of the LCA.

This seizure of the Inspection Service was motivated by the confidentiality policy (among others the

privacy statement and the related information banners) and the management of cookies from the

website operated by the defendant ("Y", hereinafter the "website"). This website specializes in

legal news from, for and about legal professionals, with a monthly reach

self-proclaimed 35,000 readers.

The Inspection Department of the APD informed the defendant of this decision of the Management Committee of

the APD by letter dated March 26, 2019.

The Inspection Service then investigated the website and visited a

first version of the website on March 12, 2019 ("first version"), a second version

("Second Version") on April 29, 2019 and a third version ("Third Version") on May 29, 2019.

The Inspection Service sent the defendant two letters, on March 26, 2019 and April 29, 2019,

containing the findings of alleged violations of the GDPR, read in conjunction with the law of June 13, 2005

relating to electronic communications (hereinafter the "ECL").

In the final report of 29 May 2019 (hereinafter the "Inspection Report"), the Inspection Service

noted that between the first contact on March 26, 2019 and the findings of May 29, 2019,

the defendant had made adaptations, leading – on the third version of the website –

greater (albeit partial) compliance with its privacy policy and management of

cookies with GDPR.

During the investigation by the Inspection Service, various breaches of the GDPR were found, including

the main ones – including the violations resolved in the meantime – are set out below:

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o Observations concerning the transparency of information and communications and the

procedures for exercising the rights of the data subject (article 12 of the GDPR):

on March 12, 2019, the Inspection Service noted that the declaration of

confidentiality on the website was only available in English, while the

website was aimed at a French-speaking and Dutch-speaking public; the

information was not easily accessible to people

concerned and reference was made to "US privacy law". In addition, the mention

that "your IP address" does not constitute personal data

personal was contrary to Article 12 of the GDPR, because this statement is

contrary to the definition of personal data in Article 4.1 and

in recital 30 of the GDPR. These shortcomings have been resolved step by

step by the defendant1.

on March 12, 2019, the Inspection Service noted that the policy of

privacy and cookie management were not easily accessible

for the persons concerned;

on April 29, 2019, the Inspection Service found that the homepage of the

website contained a "Privacy Policy" hyperlink and that the reference to the

"US privacy law" (and the "California Online Privacy Protection Act") had been

deleted.

o Findings concerning the information to be provided when personal data

personal data are collected from the person concerned (article 13 of the GDPR):

□□

the privacy statement of the first version of the website does not□

did not mention the identity or contact details of the data controller.□

It was only on May 29, 2019 that the defendant explicitly mentioned in□

the privacy statement that "X" was the data controller, in□

adding their contact details, after the Inspection Service has specified by□

mail that the first adaptation of the privacy statement of the□

April 29, 2019 was in his view not sufficiently clear (it mentioned "X"□

as well as its contact details, without explicitly mentioning that this company□

was the data controller);□

□□

the privacy statement of the first version of the website does not□

mentioned neither the rights that data subjects can invoke, nor□

the legal basis for the processing, nor the purposes of the processing, nor the right□

data subjects to file a complaint with the Protection Authority□

1 Inspection report, p. 5.□

data, or even a retention period for personal data□

personal data collected by cookies.2□

o Findings relating to the obligation of consent (Article 6 of the GDPR,□

Articles 4, 11 juncto 7 GDPR and Recital 32 GDPR, read together with□

Article 129 of the LCE), comprising the following elements:□

□ in the first two versions of the website, the declaration of□

confidentiality did not include any request for consent to□

the use of cookies, neither for the cookies of the data controller,□

or for Google cookies;□

□ in the latest version of the website analyzed by the Inspection Service□

before his first report, the preferences for the use of cookies were□

admittedly requested from the user of the website, but the consent was□

obtained through pre-ticked boxes, which cannot constitute a□

valid consent according to recital 32 of the GDPR.□

On April 29, 2019, the Inspection Service found that the privacy policy and the management of□

cookies did not yet comply with Article 13 of the GDPR, as can be seen from column 2 of□

the list given below:□

- the information mentioned does not explicitly specify who is responsible for the□

processing ;□

- to lodge a complaint, reference is made to the Dutch Data Protection Authority□

which is not competent in Belgium.□

May 29, 2019, according to the Inspection Service, privacy policy and cookie management□

were justified in light of Article 13 of the GDPR on the page https://Y/privacy-policy/. The service□

of Inspection refers in this respect to column 3 of the table below.3□

Column 1□

Column 2□

Column 3□

Privacy Policy□

Privacy Policy□

Privacy Policy and□

and management of cookies on□

and management of cookies on□

management of cookies on the□

the webpage□

the webpage□

page

https://Y/privacy-policy

https://Y/privacy-policy

Internethttps://Y/privacy-

policy/

2 Findings of the Inspection Service of March 12, 2019.

3 Inspection report, p. 7.

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on 12/3/2019 (exhibits 4 and

on 29/4/2019 (exhibits 8 and

on 29/5/2019 (exhibits 13 and

7)

9)

14)

at. Identity

responsible

from

from

at. We

mention

at. We

mention

"X", without indicating

explicitly that "X"

treatment and its

explicitly that he

is responsible for□

contact details□

born□

is responsible□

processing□

from□

are□

not□

treatment;□

character data□

mentioned;□

b. The□

purposes of□

staff ;□

b. The□

purposes of□

treatment and□

the□

b. The□

purposes□

from□

processing□

to which□

data□

character□

the□

at□

foundation□

processing□

and□

the□

legal□

are□

foundations□

mentioned, but□

legal□

are□

with□

little□

clearly explained.□

staff□

are□

of explanations. We□

destinies as well as□

thus refers to□

the legal basis□

"our service" and□

of the treatment□

to an "obligation□

are□

not□

legal",□

without

mentioned;

specify which

services or

what legislation

is

concretely.

vs. Mention is made of

time limit

of

preservation,

but with little

vs. The

duration

of

of explanations. We

preservation of

thus refers to

data

at

from

"obligations

character

administrative

staff or

of application",

criteria

used

without specifying

for

determine

what obligations

this duration are not

he

is

not mentioned;

concretely.

vs. The deadlines for

preservation are

clearly connected to

activities of

processing.

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d. We mention

the

people's rights

concerned

in

different

paragraphs that are

each time provided

of a proper title.

e. It is mentioned the□

rights of persons□

concerned to wear□

complaint to□

the Authority of□

protection of□

data ("APD"),□

with a hyperlink□

to the page□

concerned of the site□

ODA internet.□

d. Mention is made of the□

rights□

from□

people□

involved in□

d. The rights that□

different□

people□

concerned□

paragraphs that□

are every time□

can□

invoke□

provided with a title□

born□

are

not

own.

mentioned;

e. It is mentioned the

e. the

right

from

people

concerned

of

carry

complaint

with the Authority

protection of

data is not

noted.

right

from

people

concerned

of

carry

complaint

with

of

L'

"Authority

Personsgege-

come".

This

denomination

is not correct,

because it is the Authority

protection of

data which is

competent

in

Belgium.

On May 29, 2019, the privacy policy and cookie management of the website was, according to

the Inspection Service, "not yet in compliance with article 4, 11) juncto 7 of the GDPR nor with

Article 129 of the LCE", as can be seen from column 3 of the table below and from the comments

of the Inspection Service “4:

- "we refer to "our legitimate interest" as the legal basis for

cookies used "to simplify your use of the website and to collect

statistical data relating to the use of the website" (Exhibits 13 and 14),

while consent is required in this regard as these cookies are not

required.

4 Inspection report, p. 9, in the title "finding relating to the obligation in terms of consent (articles 4,11), 6 and 7 of the

GDPR and Article 129 of the LCE".

This is apparent from the explanation on page 11, under "4.3 Analytics

of origin", of Opinion 04/2012 on the exemption from the obligation of consent for

certain cookies from the Article 29 Data Protection Working Party,

available

at

the address

https://ec.europa.eu/justice/article-

29/documentation/opinion-recommendation/files/2012/wp194_fr.pdf and text

of

From

the article

129

of

the

during,

for

the

processing

LCE.

of

personal data in this specific context, no

valid legal basis as imposed by Article 6 of the GDPR is not

foreseen ;

- in violation of Article 4, 11) and Article 7 of the GDPR, the cookie window on

the website https://Y/ (as well as the French version https://Y/fr/)

contains boxes that are already checked (which, according to recital 32 of the GDPR, does not

does not constitute consent) and does not include a button to refuse cookies;

- the text of the aforementioned French version is written in Dutch". ”□

Column 1□

Column 2□

Column 3□

Privacy Policy□

Privacy Policy□

Privacy Policy□

and management of cookies on□

and management of cookies on□

and management of cookies on□

the□

page□

Internet□

the□

page□

Internet□

the□

page□

Internet□

https://Y/privacy-policy□

https://Y/privacy-policy□

https://Y/privacy-policy□

on 12/3/2019 (exhibits 4 and□

on 29/4/2019 (exhibits 8 and□

on 29/5/2019 (exhibits 13 and□

7)□

9)□

15)□

at. The consent□

at. The consent□

at. In politics□

for□

use□

for□

use□

confidentiality□

of cookies by the□

of cookies by the□

and the management of□

responsible□

from□

responsible□

from□

Cookies□

on□

the□

treatment or by□

treatment or by□

page□

Internet□

Google is not□

Google is not□

https://Y/privacy-□

request□

to□

request□

to□

policy/,□

we□

people□

concerned;□

people□

concerned;□

rightly mentions□

title□

than□

the□

consent is□

request□

for□

use□

of□

cookies that do□

are□

not□

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strictly□

required. We□

refers, however, to

wrong

to our

legitimate interest"

like

foundation

legal for

cookies that are

used "with a view to

to simplify your

use of the site

internet and

collect

from

data

statistics

relative

at

use of the site

Internet" (parts

13 and 14).

One

other

default

concerning

the

cookie window

which appears at

bottom of

the screen

when we open

for the first

time

the

site

Internet

https://Y/ or

the

version

french

https://Y/fr/

(Exhibit 15):

- Boxes

already

checked for

the

preferences

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in terms of

Cookies

(this

which, according to

considering

32 GDPR,

not worth

consent

);

-

there is a

"OK" button

to accept

the

Cookies,

but there is

no button

for

refuse

cookies ;

-

the text of the

window

of

cookies on the

version

french

https://Y/fr/

is written in

Dutch.

b. We do not mention□

b. We do not mention□

b. We□

mention□

not how□

not how□

How? 'Or' What□

the□

people□

concerned□

people□

concerned□

people□

concerned□

can withdraw a□

can withdraw a□

can withdraw a□

consent□

consent□

consent□

given□

for□

given□

for□

given under a□

use□

of

use

of

separate title from

cookies by

the

cookies by

the

text.

responsible

from

responsible

from

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treatment or by

treatment or by

Google.

Google.

(Inspection report, p. 9)

In the Inspection Report, the Inspection Service defends the position that the defendant has

an example function with regard to compliance with the GDPR, given the legal expertise that is disseminated

by the website.

The Inspection Department sent its report of June 3, 2019 to the Litigation Chamber, pursuant to

Article 92, 3° of the LCA.

Proceedings before the Litigation Chamber

In the session of June 26, 2019, the Litigation Chamber decided, pursuant to Article 98 of the LCA, that

the case could be dealt with on the merits.

On June 28, 2019, the defendant was informed by registered mail of this decision as well as the Inspection report and inventory of the documents in the file which was sent to the Chamber Litigation by the Inspection Service. Similarly, the Respondent was informed of the provisions of Article 98 of the LCA and, pursuant to Article 99 of the LCA, he was informed of the deadlines for introducing its findings. The deadline for receipt of the respondent's submissions in response has been set to July 29, 2019.

On July 29, 2019, the Litigation Chamber received the submissions in response from the defendant.

The defendant acknowledged that certain mandatory particulars were not included in one or more several of the successive versions of the website's privacy statement which have been analyzed by the Inspection Service. The defendant explained that these missing entries had been added in the meantime (in the course of the first investigation or after the closure of the first Inspection report) to the Privacy statement (fourth version of the website – July 2019).

In his pleadings, the defendant questioned the findings of the Inspection Service in regarding the actual conduct of the consent process on the website. the defendant asserted that the cookies for the collection of statistical data were only collected "only after the consent of the persons concerned", and this despite the contrary mention in this respect

in the previous version of the Privacy Statement (May 2019). The defendant asserts that the Privacy Statement of the website had in the meantime been adapted to reality.

Furthermore, the Respondent's submissions state the following, in so far as it is relevant for the decision of the Litigation Chamber:

(1)

with regard to the findings of the Inspection Service according to which no consent was not requested prior to the placement of certain cookies, namely those

of "Google Analytics", "Google Tag manager" and "Google Adsense"":5 “Before the adaptation of the

website, visitors were only informed that the website used

Cookies. The cookie window that [sic] on the website could only be closed.

The cookies used at that time were identical to the cookies that are still used

currently on the website (see statement in the cookie declaration). These cookies

therefore had the sole purpose of (1) enabling the operation of the website, (2)

allow certain services (playing videos, sharing articles on Linkedin, etc.)

and (3) to analyze the use of the website and to generate statistics)". [All

passages quoted in this decision have been freely translated by the Secretariat of

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

The defendant gives a statement of the cookies that were present on the website on July 6

2019. This list was compiled by the defendant using the "Cookiebot" application which provides

a scan of cookies on the website6. The Respondent asserts that this listing reflects

cookies that were used before the adaptation of the website, i.e. before the closure

of the first Inspection Report ("The cookies that were in use at that time were

identical to the cookies that are still currently used on the website")7.

(2) with regard to the recent adaptations of the website: the defendant requests

determine the possible sanction taking into account the fact that additional measures

have each time been taken for the website, following the findings of the Inspection Service.

It emphasizes "the intention to strictly comply with its obligations under the GDPR (and the

national legislation)" and that "the adaptations that [the website] has implemented (and in

particular the consequences induced by these adaptations) testify to this intention".

The case was discussed in substance for the first time by the Litigation Chamber during its

session of October 15, 2019.

5 Exhibit 2 to the Inspection Report.

6 See the Cookiebot services as offered on the following web page: https://www.cookiebot.com/en/functions/.

7 Respondent's submissions, p. 8.

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The Litigation Chamber noted that the list under 1) did not include certain cookies, including the

Inspection Service noted the presence on the website, namely cookies from "Google

Analytics", "Google Tag Manager" and "Google Adsense".

Considering the disparity, at first sight, between the inspection report and the conclusions on the one hand, and considering the

new facts invoked by the defendant (the adaptation of the website to comply with the GDPR)

on the other hand, the Litigation Chamber decided in session that to deal with this case,

additional information was needed regarding (a) the cookies that were/are used

by the website and (b) how the most recent version of the website has complied with the

GDPR obligations regarding consent (including its withdrawal) as well as its obligations

information on cookies.

The Litigation Chamber also decided to draw the defendant's attention to the "Planet49" judgment.

of the Court of Justice of the European Union of 1 October 20198, which relates in particular to the manner

whose consent must be obtained for the use of cookies under Article 7 of the GDPR and

which gives a clear interpretation as to the extent of the information obligations under Article

13 GDPR (including how long cookies remain active and whether third parties can

whether or not to access the personal data collected by cookies). Bedroom

Litigation informed the defendant that it would take this new judgment into account in its decision and

gave the defendant the opportunity to convey his opinion on this matter.

Given the possibility for the Litigation Chamber to submit certain violations of the GDPR

(such as violations of the basic principles of treatment, including the conditions for

consent in accordance with Articles 5, 6, 7 and 9) to an administrative fine corresponding

to a percentage of the annual turnover of the previous financial year, the Litigation Chamber has

also decided to take over the defendant's three most recent annual accounts as

exhibit in the proceedings and in this case to give the defendant the opportunity to obtain information if necessary

as to the accuracy of the data contained therein, more particularly with regard to the number

business.

Finally, the Litigation Chamber decided, under articles 98 and 99 of the LCA, to invite the defendant

at a hearing. By letter dated October 17, 2019, the Litigation Chamber informed the defendant of

the date and time of the hearing (November 6, 2019).

8 CJEU, 1 October 2019, C-673/17, Bundesverband der Verbraucherzentralen und Verbraucherverbande – Verbraucherzentrale

Bundesverband v. Planet49 GmbH, ECLI:EU:C:2019:801 ("Planet49").).

In this letter, the Litigation Chamber asked the defendant to prepare questions with a view to

of the hearing, with the possibility, if necessary, of filing additional documents before or

during the hearing.

This letter also informed the defendant of the fact that the Inspection Service still had the

possibility, for one or more of these questions, of drafting an additional report on their own initiative

in accordance with Article 63, 6° of the LCA, and that this report would, if necessary, be sent by e-mail

at least five working days before the meeting.

The Litigation Division sent a copy of this letter to the Inspection Service.

On October 24, 2019, the Inspection Service sent its additional report to the Chamber

Litigation. This Inspection Report was communicated to the Respondent by email on October 29, 2019.

This report provides the following information regarding the issues that the Litigation Chamber

asked the defendant:

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The Inspection Service provided a screenshot of the "Cookiebot" information it was able to

observe on the website on October 17 and 20, 2019, with the following explanation: "In the

facts, all cookies that were used on July 29, 2019 are no longer used at the time

current. In fact, to see this, simply compare the cookies mentioned in the

Consent Management Page of Cookiebot on 06/10/2019 and 20/10/2019, observed

respectively on 17/10/2019 and 20/10/2019 by the Inspection Service on the website

and a copy of which is given above. If we examine the table mentioned in the

response below from the Inspection Service to question 2 from the Litigation Chamber, we

find that there are more cookies than advertised. 50 cookies are mentioned in the table.

Many of them are not declared;

In response to the second question from the Litigation Chamber to know "which cookies of

first party/third party are used by the current website", the Service

d'Inspection finds "that there are 9 first-party cookies and 41 third-party cookies,

i.e. more than 80% split between "Youtube.com, Google.com, Linkedin.com, Twitter.com,

doubleclick.net., etc.".

- With regard to the third question from the Litigation Division concerning the

consent obligations on the current website (Articles 4.11 and 7 GDPR

read in conjunction with Article 129 of the LCE) and the way in which the Internet user receives

information on the right to withdraw consent afterwards (Article 7.3 of the GDPR), the

Inspection Service provides the following information:

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“"The consent of users of the website […] for the placement and consultation of

cookies on his device is requested via a menu of options for cookies which appears as soon as

that this website is visited for the first time. […]

The home page presents a pop-up window (CMP) that gives the user the choice

either to accept all cookies, or to accept only the necessary cookies which are

active by default. Two problems arise in this regard:

 the user cannot express himself on an individual choice, cookie by cookie. Therefore, the

consent does not meet the consent requirements as imposed by

Article 4, point 11 of the GDPR as it is not specific. The Inspection Service

refers in this respect to recitals 61 and 62 of the judgment of the Court of Justice of the European Union

European Union of 1 October 2019 in case C-673/179. Finally, the Inspection Service

refer in this regard to the Guidelines on Consent within the meaning of the Regulation

2016/679 of the European Data Protection Board10. It is emphasized, on pages

13 and 14, that to be legally valid within the meaning of the GDPR, the consent must be

specific; the other conditions that must be satisfied by a valid consent to the

meaning of the GDPR are explained in the aforementioned Guidelines.

 Even if the user leaves the website immediately because he does not want any

cookies are placed, 4 cookies are placed on the first load, before

the user is informed and expressed when leaving the website. Cookies are

therefore placed without his consent. […]

-

With regard to the fourth question from the Litigation Chamber to the defendant

"How is the Internet user informed by the […] website of the duration during which the

cookies remain active and may or may not third parties have access to the personal data

personnel collected by cookies", the Inspection Department provides the information

following:

9 Recitals 61 and 62 of the Planet judgment49 are stated as follows:

"61 Indeed, as the Advocate General noted, in essence, in point 70 of his Opinion, the wording

of Article 4, point 11, of Regulation 2016/679, which defines “consent of the data subject”, to

purposes of that regulation and, in particular, of Article 6(1)(a) thereof, referred to in the first question, under

c), appears even stricter than that of Article 2(h) of Directive 95/46, in that it requires a

manifestation of the "free, specific, informed and unambiguous" will of the person concerned, taking the form

a declaration or "a clear positive act" indicating its acceptance of the processing of personal data

personal about it.

“Active consent is thus now expressly provided for in Regulation 2016/679. It is important to note

in this respect that, according to recital 32 of this regulation, the expression of consent could be made

in particular by checking a box when consulting a website. That recital, on the other hand, excludes

expressly that there is consent “in the event of silence, boxes checked by default or inactivity”.

10 Data Protection Working Party, Guidelines on Consent within the meaning of Regulation 2016/679,

WP259.

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"[…] After clicking on the aforementioned link "our cookie policy", the person

concerned

come

on

the

page

Internet

https://Y/cookies/.

We give explanations on cookies only in English, we find the link

"Change your consent" and we mention in a table different cookies under the headings

"Name", "Provider", "Purpose", "Expiry", and "Type […]".

The Inspection Service then provides a printed version of the list of cookies which is updated

provision by the website ("Cookie declaration last updated on 06/10/2019 by Cookiebot").

Cookies

are

presented

through

category

:

"necessary", "statistics", "marketing", "unclassified").

On October 31, 2019, the defendant requested – pursuant to section 95 of the ACL – to consult

the Litigation Chamber's file and to take a copy of it. On October 31, 2019, the House
Litigation sent a copy of the file by e-mail to the defendant.
By letter dated November 4, 2019, the Litigation Chamber informed the defendant of the fact that
the hearing scheduled for November 6, 2019 had to be postponed for organizational reasons.
On November 7, 2019, the Litigation Chamber informed the defendant of a new hearing date:
on November 25, 2019.
The hearing
On November 25, 2019, the case was resumed and the hearing took place.
The following persons were present at the hearing to represent the defendant:
- Ms. V, manager;
- Mr. Z, lawyer;
- Ms. U, staff member;
- Mr. T, staff member.

The hearing is recorded - with the agreement of the defendant -, in order to write a report.
The recording is destroyed as soon as there is agreement as to the content of the report.
The data controller submits an "additional note following questions from the Chamber
Litigation", a set of documents including in particular impressions of the website, as well as
a table of findings of violations by the Inspection Service and the date on which it was
remedied.

The defendant explains the creation and operation of his business and declares
that following the inspection reports, it has invested in ordering the cookies on the website. He
adapted the website until the previous Saturday. Many cookies have been removed from the site
Internet. Buttons with direct links to social networking sites have been removed from the
website, and this as a precaution, because it does not want to be a relay for third parties who could misuse
data that they potentially collect.

According to the table, consent for the use of cookies that are not strictly

necessary was only requested from May 2019 on the website, while in the version of the

March and April 2019 website, no consent was requested for the use of cookies

by the controller or by Google.

The data controller explains, referring to the documentation he has submitted, that the

data processing by "Google Analytics" cookies takes place "completely anonymously"

by assigning each unique visitor a randomly chosen identification number. Following a

question of the Litigation Chamber, it is recognized that the designation of "anonymous" is an error

material and should be deleted from the text. The defendant also claims to want to be very careful

with regard to the qualification of cookies as "first party" or "third party" cookies

“Google Analytics”. This is why the defendant refers, for the sake of completeness, to the "privacy policy"

from Google.

The defendant presents the successive adaptations of its "privacy policy" and explains that

the way to withdraw consent can be found in the cookie statement and that this

statement received more prominence on the website. At the bottom of each page, a

"Cookie management" window now appears. The retention period is always mentioned

as well as whether or not cookies share information with third parties and whether cookies are

placed by the website or by third parties.

The defendant explains that the problems regarding updating the list of cookies present

are due to the "Cookiebot" application, and that it has in the meantime changed technology to remedy this. He

declares that in the future the monitoring of cookies will always be taken into account.

According to the defendant, the website specifies in a window of cookies that certain media (for example

example videos) are not available if marketing cookies are not accepted. All

marketing cookies (and not only the cookies necessary for each determined video)

must be accepted, because the system is thus simplified and the playback of videos would be

more complicated if the visitor only had to accept a few cookies.

Regarding cookies still placed without prior consent on the latest version

(October) of the website, the data controller explains that these are essential cookies.

The data controller declares that the turnover of the website is negligible. The

Litigation Chamber then asks the controller to communicate his figure

business for the past 3 years.

On 29 November 2019, the controller sent an accounting document which indicates the

turnover as follows:

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financial year 2018: 1,710,319.69;

financial year 2017: 1,175,066.83;

financial year 2016: 1,144,830.17.

The Litigation Chamber sent the draft to the defendant on November 29, 2019.

On December 4, 2019, the data controller indicated by e-mail that he had no remarks

substantive as to the content of the draft minutes. The controller has sent a

new document attached to this last e-mail: a copy of the adapted cookie declaration.

According to the defendant, "the material error concerning the anonymization of certain data was

rectified".

2. Motivation

2.1 Competence of the Data Protection Authority

As the defendant acknowledges, the website collects personal data through the

using cookie technology11 and therefore processes this personal data.

The Litigation Chamber is competent to rule in cases concerning the processing of

personal data, pursuant to Article 4, § 1 of the LCA12, Article 55 of the GDPR13 and

in accordance with Article 8 of the Charter of Fundamental Rights of the European Union14.

11 According to Opinion 04/2012 of the Data Protection Working Party on the exemption from the obligation of consent for some cookies, WP208, the concept of "cookie" includes a range of technologies, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp208_en.pdf. Recital 30 of the GDPR explains that persons individuals may be associated with online identifiers such as "cookies".

12 Article 4, § 1 of the LCA: The Data Protection Authority is responsible for monitoring compliance with the principles fundamentals of the protection of personal data, within the framework of this law and the laws containing provisions relating to the protection of the processing of personal data".

13 Article 55 of the GDPR: "Each supervisory authority is competent to exercise the tasks and powers entrusted to it invested in accordance with this Regulation in the territory of the Member State to which it belongs.".

14 Article 8 of the Charter of Fundamental Rights of the Union (the "Charter") 1. Everyone has the right to the protection of personal data concerning him. These data must be processed fairly, for the purposes determined and based on the data subject's consent or on another legitimate basis

The fact remains that under Belgian law, BIPT is the recommended controller for the LCE, including for article 129 of the LCE which executes article 5.3 of Directive 2002/5815 (hereinafter, the "Privacy and Electronic Communications Directive"), in accordance with article 14, § 1 of the law of 17/01/2003 relating to the status of the regulator of the Belgian postal and telecommunications sectors.

In its Opinion 5/2019 on the interaction between the Privacy and Communications Directive electronic devices and the GDPR (which was enacted under Article 64.2 of the GDPR), the European Committee of Data Protection (hereinafter: "EDPB") has confirmed that the data protection authorities data are competent to apply the GDPR to data processing, also in the context where other authorities would be competent, by virtue of the national transposition of the Privacy and Electronic Communications Directive, to monitor certain elements of processing of personal data16. In addition, the Dutch-speaking court of first instance in Brussels has already considered, in a judgment of 16 February 201817, that the legal predecessor of the DPA

was competent to submit a requisition to a court "in so far as it relates to

alleged breaches of the privacy law of December 8, 1992, to which article 129 of the LCE, which

specifies and completes it, moreover expressly refers to ""18.

The competence of BIPT to monitor certain elements of the processing – such as the placement of

cookies on the Internet user's terminal equipment - does not prejudice the competence

general ODA. The DPA is thus competent to verify whether the requirement of consent for the

placement of cookies (if applicable) is or is not in line with the GDPR consent terms.

In addition, the DPA is competent to check whether all the other conditions made

mandatory by the GDPR – such as transparency of processing (Article 12 of the GDPR) or

information to be communicated (Article 13 GDPR) – when placing cookies and when processing

data thus collected.

provided for by law. Everyone has the right to access the data collected concerning them and to obtain

correction. 3. Compliance with these rules is subject to the control of an independent authority".

15 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal d

personal character and the protection of privacy in the electronic communications sector (Directive on privacy and

electronic communications, as amended by Directive 2009/136/EC of the European Parliament and of the Council of

November 25, 2009, hereinafter the “Privacy and Electronic Communications Directive”).

16 EDPB, Opinion 5/2019 on the interaction between the Privacy and Electronic Communications Directive and the GDPR, in pa

with regard to the competences and tasks of the data protection authorities: "When the processing of personal

data triggers the material scope of both the GDPR and the ePrivacy Directive, data protection authorities are competent to

scrutinize subsets of the processing which are governed by national rules transposing the ePrivacy Directive only if national law

confer this skill on them. However, the competence of data protection authorities under the GDPR in any event remains

unabridged as regards processing operations which are not subject to special rules contained in the ePrivacy Directive. This

demarcation line may not be modified by national law transposing the ePrivacy Directive (e.g. by broadening the material scope

beyond what is required by the ePrivacy Directive and granting exclusive jurisdiction for that provision to the national regulatory

authority)".

17 In the case of Facebook Ireland Limited, Facebook Inc. and Facebook Belgium sprl, v Commission de la protection de la

private life.

18 Brussels Court, 24th Civil Affairs Chamber, 16 February 2018, case file no. 2016/153/A, point 26, p. 51, available at:

https://www.autoriteprotectiondonnees.be/news/lautorite-de-protection-des-donnees-defend-son-argumentation-devant-la-

court-of-appeal-of-brussels.

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The legal predecessor of the EDPB (the Article 29 Data Protection Working Party,

after: Data Protection Working Party) also clarified that the requirements of the

GDPR for obtaining meaningful consent apply to situations that fall within the scope

application of the privacy and electronic communications directive19.

In the Planet49 judgment, the Court of Justice of the European Union confirmed in particular that the collection

of data through cookies could be qualified as processing of personal data

personal20. Therefore, the Court interpreted Article 5.3 of the Privacy and Communications Directive

electronics using the GDPR21, more specifically on the basis of Article 4.11, Article 6.1.a

of the GDPR (consent requirement) and Article 13 of the GDPR (information to be provided).

As explained below, the DPA is also competent to check whether the exceptions to the requirement

of consent for the placement of cookies are applied in accordance or not with the right to

Data protection.

The relationship between the GDPR and Article 5.3 of the Privacy and Electronic Communications Directive has

explained above, in cases where Article 5.3 requires consent, which must respect

GDPR requirements. Article 5.3 of the Privacy and Electronic Communications Directive (and

article 129 of the LCE) however has exceptions and allows cookies to be saved

on the terminal equipment of a user of a communications network without consent

prior, when these cookies have "the sole purpose" (a) "to send a communication via a

electronic communications network" or (b) "to provide a service expressly requested by

the subscriber or end user when strictly necessary for this purpose."

The exceptions to the consent requirement set out in article 5.3 of the Privacy Directive and

electronic communications should be read in conjunction with Article 6 of the GDPR (e.g.

the legitimate interest of the data controller and/or the end user of the

19 Data Protection Working Party, Guidelines on Consent within the meaning of Regulation 2016/679,

WP259, p. 4: "With regard to the existing "privacy and electronic communications" directive, the G29 notes that the references

made to Directive 95/46/EC repealed shall be understood as made to the GDPR. This also applies to references made to

consent in the current Directive 2002/58/EC, since the “privacy and electronic communications” regulation does not

will not (yet) enter into force on 25 May 2018. According to Article 95 of the GDPR, no additional obligations regarding the

processing of data in the context of the provision of electronic communications services accessible to the public on the

public communications networks will not be imposed insofar as the “privacy and communications” directive

Electronic” imposes specific obligations with the same objective. The G29 notes that the requirements for

consent imposed by the GDPR are not considered “additional obligations”, but rather as

essential prerequisites for lawful processing. Also the conditions for obtaining a valid consent established

by the GDPR apply in situations falling within the scope of the Privacy and Security Directive?

electronic communications’.”

20 Planet49 judgment, point 45.

21 As well as with the help of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the prote

of natural persons with regard to the processing of personal data and on the free movement of such data.

communications22), in the context in which the provisions of the Privacy and

electronic communications constitute a precision and a complement to the GDPR23. If on the other hand

it is assumed that certain rules of the Privacy and Electronic Communications Directive deviate

of the GDPR and do not include the legal basis of "legitimate interest"24, the exceptions of "storage

technical” or “service requested […] by the subscriber” of Article 5.3 of the Privacy Directive and

electronic communications must then be considered as a separate legal basis

whole. The Privacy and Electronic Communications Directive therefore constitutes for these provisions

a "lex specialis" which derogates from the GDPR.□

Anyway, with regard to the exception for the supply of a "requested service□

expressly by the subscriber or end user when strictly necessary for this purpose", it□

should be noted that the "necessary" criterion is interpreted in accordance with the protection objectives□

European data protection law25, as it is used as an exception□

to the requirement of consent which must be explained in accordance with the GDPR.□

The Litigation Chamber, as an organ of the DPA, is therefore competent to interpret the□

exceptions to the consent requirement of section 129 of the ECA26.□

the□

in□

electronic□

22 The exception "a service expressly requested by the subscriber or end user" in article 129 of the LCE (5.3 of the□

Privacy and electronic communications) has no real equivalent in the GDPR. Article 6.1.b of the GDPR implies□

the requirement of processing that is "necessary" for the performance of a contract. Article 129 of the LCE uses the criterion "str

necessary".".□

23 See Article 1 of the Privacy and Electronic Communications Directive: "1. This Directive harmonises the provisions□

Member States necessary to ensure an equivalent level of protection of fundamental rights and freedoms, and in□

particular of the right to privacy, with regard to the processing of personal data in the sector of□

electronic communications, as well as the free movement of such data and of equipment and services of□

communications□

2.□

The provisions of this Directive specify and supplement Directive 95/46/EC for the purposes set out in paragraph 1. […]"□

[Emphasis by the Litigation Chamber].□

24 See also a recommendation of the European Data Protection Board: "Certain amendments propose□

an additional exemption to the confidentiality of communications based on the legitimate interest of service providers□

services and other parties to process electronic communications data. Neither the "Privacy and□

electronic communications" nor the proposed regulation contain such an exemption and the draft
report did not propose any such exemption, neither for metadata nor for content." (EDPS, Recommendations
concerning specific aspects of the proposed “privacy and electronic communications” regulation, p. 2,
https://edps.europa.eu/sites/edp/files/publication/17-10-05_recommendations_on_ep_amendments_en.pdf).
25 Concerning the notion of "necessary" in the context of data protection, see mutatis mutandis the Lines
Guidelines 2/2019 of the European Data Protection Board regarding Article 6.1.b of the GDPR in the context of
online services", points 23-25: "Necessity of processing is a pre-requisite for both parts of Article 6(1)(b). At the outset, it is
important to note that the concept of what is ‘necessary for the performance of a contract’ is not simply an assessment of what
is permitted by or written into the terms of a contract. [...]The concept of necessity has an independent meaning in European
Union law, which must reflect the objectives of data protection law. Therefore, it also involves consideration of the fundamental
right to privacy and protection of personal data, as well as the requirements of data protection principles including, notably, the
fairness principle. The starting point is to identify the purpose for the processing, and in the context of a contractual relationship,
there may be a variety of purposes for processing. Those purposes must be clearly specified and communicated to the data
subject,
obligations."
https://edpb.europa.eu/sites/edpb/files/consultation/edpb_draft_guidelines-art_6-1-final_public_consultation_version_en.pdf:.
Community.
transparency
controller's
limitation
purpose
with
and
line
tea
in

26 See also Data Protection Working Party, Opinion 04/2012 on the exemption from the consent requirement

for some cookies, WP194, on analysis cookies, https://ec.europa.eu/justice/article-29/documentation/opinion-

recommendation/files/2012/wp194_en.pdf.

2.2 Infringements found

The defendant's explanations in his pleadings in response and during the hearing confirm the

finding that several offenses have been committed.

2.2.1 Lack of transparent information about

the declaration of

confidentiality on the initial website (Article 12 of the GDPR) and violation

rules concerning the information to be provided (article 13 of the GDPR)

Article 12.1 of the GDPR provides that the controller must take appropriate measures

to provide the data subject with any information referred to in particular in Article 13 of the GDPR of a

concise, transparent, comprehensible and easily accessible manner, in clear and simple terms.

Article 12.2 of the GDPR provides that the controller must facilitate the rights of the person

concerned.

Articles 13.1 and 13.2 of the GDPR provide the following:

1. When personal data relating to a data subject is collected

with this person, the data controller provides him, at the time when the data in question

question are obtained, all of the following information:

a) the identity and contact details of the controller and, where applicable, of the representative of the

controller;

b) where applicable, the contact details of the data protection officer;

c) the purposes of the processing for which the personal data are intended as well as the basis

legal basis for the processing;

d) where the processing is based on Article 6(1)(f), the legitimate interests pursued

by the controller or by a third party;

e) where applicable, the recipients or categories of recipients of the personal data

staff ;

f) where applicable, the fact that the data controller intends to carry out a transfer of

personal data to a recipient in a third country or an international organization,

and the existence or absence of an adequacy decision issued by the Commission or, in the case of

transfers referred to in Article 46 or 47, or in the second subparagraph of Article 49(1), the reference to

appropriate or suitable warranties and the means of obtaining a copy thereof or the place where they were

made available.

2. In addition to the information referred to in paragraph 1, the controller shall provide the data subject

data subject, at the time the personal data is obtained, the information

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following additional information that is necessary to ensure fair and transparent treatment

:

a) the retention period of the personal data or, where this is not possible, the

criteria used to determine this duration;

b) where the processing is based on Article 6(1)(f), the legitimate interests pursued

by the controller or by a third party;

c) the existence of the right to request from the controller access to personal data

personal information, rectification or erasure thereof, or limitation of processing relating to the

data subject, as well as the right to object to processing and the right to data portability.

data;

d) where the processing is based on Article 6, paragraph 1, point a), or on Article 9, paragraph

2, point a), the existence of the right to withdraw consent at any time, without prejudice to the

lawfulness of processing based on consent given before its withdrawal;

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

f) information on whether the requirement to provide personal data

personal has a regulatory or contractual nature or if it conditions the conclusion of a contract

and whether the data subject is required to provide the personal data, as well as on the

possible consequences of not providing this data;

g) 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

underlying, as well as the importance and the expected consequences of this processing for the person

concerned.

In the Planet49 judgment, the Court of Justice held that for the placement of cookies, the person responsible for the

processing should provide information on the duration of the operation of cookies as well as on the

possibility or not for third parties to have access to these cookies, in order to guarantee information

fair and transparent (article 5.3 of the Privacy and Electronic Communications Directive

regarding the placement of cookies juncto the information obligations of Article 13.2 (a) and (e) of the

GDPR)27.

Under Articles 5.2 and 24 of the GDPR, the controller must take steps

appropriate technical and organizational measures in order to guarantee and be able to prove that the processing

of personal data using cookies is carried out in accordance with Articles 12 and 13

of the GDPR. The Respondent acknowledges in its submissions that certain mandatory particulars in the

website's original privacy statement were missing, such as the purposes for

27As the Court of Justice explained in the Planet judgment49, Article 5, paragraph 3 of Directive 2002/58, as amended

by Directive 2009/136 (the so-called "cookie provision" of the Privacy and Electronic Communications Directive),

"must be interpreted as meaning that the information that the service provider must give to the user of a website

include the duration of the operation of cookies as well as the possibility or not for third parties to have access to these cookies."

item 81.

which the personal data is intended, the legal basis for the processing, the

retention period of the data processed, the rights that the data subjects can invoke

or the possibility of lodging a complaint with the Data Protection Authority.

The Litigation Chamber finds that certain initial lacks of information have been resolved in

later versions of the website, as specified below:

Information concerning the purposes of processing and the retention period for cookies

are available by cookie in the third version of the cookie statement,

contrary to the findings relating to the analyzed version of April 29, 2019.28

 Regarding access to cookies by third parties: already in the July 2019 version of the

website (fourth version) and in the October 2019 version (fifth version),

information is provided in this respect: the name of the third party placing the cookie is mentioned,

as well as the name of the third party using the cookie, when this third party is different from the one placing

the cookie on the website.29

Nevertheless, the Litigation Chamber considers that the defendant was negligent with regard to

several aspects of its transparency obligations under Articles 12 and 13 of the GDPR.

First, the text of the March 12, 2019 privacy statement reviewed by the Service

of Inspection did not correspond to reality; according to the assertions of the defendant, cookies

of analysis were used only after the consent of the persons concerned, and this contrary to

to the information communicated in the privacy statements in question on the site

Internet30. The data controller must however guarantee the veracity and transparency

information made available on its website pursuant to Articles 12 and 13 of the GDPR.

Secondly, the initial website did not provide any means (for example a link) for the

privacy statement is made readily available to data subjects.

Now, the defendant has provided a cookie management window at the bottom of each page,

allowing the Internet user to access the declaration relating to cookies.31

Third, the provision of information in languages different from that of the target group. The

privacy policy and management of cookies for the website (version of March 12, 2019)

were only available in Dutch, although the website is also aimed at

28 Inspection report, p. 6.

29 Respondent's submissions and Supplementary Inspection Report, p. 15 and following.

30 Respondent's submissions, p. 7.

31 hearing minutes.

French speakers32. In any case, the defendant has rectified this part of the information relating to the

privacy after a second letter from the Inspection Service.33

It also appears from the additional inspection report of October 24, 2019 that the

information relating to cookies is now only provided in English (neither in French nor in

Dutch): "After clicking on the aforementioned link "our cookie policy", the person

concerned arrives on the Internet page https://Y/cookies/. It gives, only in English,

explanations on cookies, there is the link "Change your consent" and different cookies are

mentioned in a table under the column headings "Name", "Provider", "Purpose", "Expiry" and

"Kind"; these titles are only visible on one of the screenshots below.".”

Fourth, earlier versions of the website referred to the "US Privacy Law" and the

California Privacy Protection Act. The defendant states that this was due to a computer bug,

namely the execution of an erroneous "plug-in" when resuming a back-up of the website34. Bedroom

Contentious emphasizes in this regard that, in its capacity as controller, the defendant has

the obligation to ensure the accuracy of legal information relating to the rights of individuals

concerned, including the legal framework in which they can invoke their rights.

Fifth, there is confusion about the cookies used. The list of cookies that the defendant

submitted does not correspond to the findings of the Inspection Service, in particular with regard to

the presence of "Google Adsense", "Google Tag Manager" and "Google Analytics".35 This is due

to the fact that these findings were made using different applications and that according to the statements

of the defendant during the hearing, the "Cookiebot" application failed to return a list

correctness of the cookies placed. The defendant therefore resorted to a new technology to

remedy.

Sixth, all inaccuracies have not been removed. In the Inspection Report

complementary, the Inspection Service noted for example that the version of the website (October

2019) did not provide sufficient information as to the data subject's right to

withdraw consent. The Inspection Service found that the person concerned was

invited to send "to us" a written proof or an electronic request with proof of his

32 The Inspection Service claimed that the information in the first version of the website of March 12, 2019 "was not

available only in Dutch, whereas it appears from the mention "French" at the top left that these (and by extension the

website https://Y) are also aimed at French speakers" (Inspection report, p. 4).

33 On 29 May 2019, the Inspection Service noted that the information mentioned was available in Dutch and in

French.

34 Respondent's submissions, p. 2.

35 As part of the investigation by the Inspection Service of March 2019 (see Respondent's submission 9). See also

Exhibit 2 of the Inspection Report.

identity, without clear mention of the electronic or other contact details which were to be used for this

effect.36.

In addition, the website included the erroneous statement that certain data processing

took place "anonymously" while it was a question of allocating to each visitor a "number

of identification chosen randomly", which constitutes a form of pseudonymization within the meaning of

article 4.1.5 of the GDPR37. However, there can be no question of anonymisation unless it is no longer possible

to directly or indirectly link the data in question to an individual, if necessary using

other information38. After the hearing, the defendant adapted its website to this point.

The Litigation Division thus finds that the defendant demonstrated negligence on several

points. However, it emphasizes in this regard that the Respondent made efforts to correct the
information provided under Articles 12 and 13 of the GDPR, albeit after receiving the comments
the Inspection Service and/or the Litigation Chamber.
The defendant wrongly assumes that the target group of the website, namely "lawyers,
tax experts, lawyers, notaries, bailiffs, legal assistants, magistrates or students in
right", can release it from its transparency obligations under Articles 12 and 13 of the GDPR. In this regard,
the defendant asserts that visitors to the website would understand a statement of
very "concise" confidentiality, in the context of the target group of the website consisting of
"lawyers, tax experts, jurists, notaries, bailiffs, paralegals, magistrates and
law students".39
The Litigation Chamber cannot accept this defence. Under Article 12 of the GDPR,
information relating to privacy must of course be "understandable", which means that the
message must in particular be adapted to the target group with regard to the level of language
("in plain and simple terms")40. The fact that the information relating to the private life
36 Additional inspection report, p. 10.
37 In Article 4.1.5 of the GDPR, "pseudonymisation" is defined as "the processing of personal data of
such that they can no longer be assigned to a specific data subject without recourse to information
additional information, provided that this additional information is kept separately and subject to measures
technical and organizational to ensure that personal data is not assigned to a person
identified or identifiable physical".
38 Data Protection Working Party, Opinion 05/2014 on Anonymisation Techniques, WP216,
https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp216_en.pdf.
39 Respondent's submissions, p. 5.
40Data Protection Working Party, Guidelines on Consent within the meaning of Regulation 2016/679,
WP259, p. 4; Guidelines on transparency within the meaning of Regulation (EU) 2016/679, WP260, p. 8: "The requirement that
information is “understandable” means that it should be able to be understood by the majority of the intended audience.

Comprehensibility is closely linked to the requirement to use clear and simple terms. A data controller□

knows□

topic□

those□

of which□

knowledge□

of□

to understand. For example, a data controller collecting the personal data of professionals exercising□

information□

this□

profit□

susceptible□

from□

determine□

to□

to put□

people□

collection□

public□

would□

for□

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than□

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must be "concise", in accordance with Article 12 of the GDPR, does not mean, however, that one

can dispense with mentioning the mandatory information under Article 13 of the GDPR, such as

a clear designation of the data controller, even if the target group concerned is low-level

university. In order to comply with the requirement to provide advance information as to the identity and

to the contact details of the controller in accordance with Article 13, paragraph 1, a) of the GDPR, he

for example, it is not enough to mention that the website is an "initiative of X". As specified

the Data Protection Working Party, this information must "make it possible to identify

easily the data controller (…) (for example, telephone number, e-mail, address

mail, etc.)"41.

The Litigation Chamber infers from the findings of the aforementioned offenses that the defendant did not

initially failed to comply with its transparency obligations under Article 12 of the GDPR nor its

information obligation arising from Article 13 of the GDPR, and that this omission is due to a

reprehensible negligence, contrary to the principle of liability. In this regard, the House

Litigation emphasizes that it is the responsibility of the data controller to ensure

even that the information provided on the website corresponds to reality, in accordance

in Articles 12 and 13 of the GDPR. The Litigation Chamber refers in this case expressly to the

principle of responsibility established in articles 5.2 and 24 of the GDPR.

2.2.2 Consent (“opt-in”) obligations (Article 5, Article 6.1.a

and article 4.11 juncto article 7 of the GDPR, read together with article 129

of the LCE) and obligations with regard to the withdrawal of consent (Article 5,

article 6.1.a and article 4.11 juncto article 7.3 and 13.2.c of the GDPR, read

in conjunction with Article 129 of the LCE)

(a) Reminder of the applicable GDPR rules

a.1 The law relating to consent

Article 5.3 of the Privacy and Electronic Communications Directive, as transposed by Article

129 of the LCE, lays down the condition that the user "has given his consent" for the placement and

the consultation of cookies on its terminal equipment, with the exception of the technical recording

information or the provision of a service expressly requested by the subscriber or user

final when the placement of a cookie is strictly necessary for this purpose.

an activity can assume that its audience has a higher level of understanding than if that same person in charge of the

processing

children.

[…]".".

regarding

staff

character

was collecting

data

from

from

at

41 Data Protection Working Party, WP260, Guidelines on transparency within the meaning of Regulation (EU)

2016/679, p. 41.

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Recital 17 of this Directive specifies that for its application, the notion of "consent"

shall have the same meaning as "data subject consent", as defined and

specified in the Data Protection Directive 95/4642, now replaced by the GDPR.

In the Planet49 judgment, the Court of Justice of the European Union clarified the requirement of consent

for the placement of cookies following the entry into force of the GDPR and explained that a consent

explicit asset was now prescribed:

"Active consent is thus now expressly provided for in Regulation 2016/679. It is important

to note in this respect that, according to recital 32 of this regulation, the expression of consent

could be done in particular by checking a box when consulting a website. Said

recital, on the other hand, expressly excludes consent “in the event of silence, boxes

ticked by default or inactivity”.It follows that the consent referred to in Article 2(f) and

Article 5(3) of Directive 2002/58, read in conjunction with Article 4(11) and Article

6, paragraph 1, under a), of Regulation 2016/679, is not validly given when the storage

information or access to information already stored in the user's terminal equipment

of a website is authorized by a box checked by default that the user must uncheck to

refuse to give his consent." (Emphasis by the Litigation Chamber)43.

The consent must also be "specific". The Litigation Chamber refers to the Lines

guidelines on consent within the meaning of Regulation 2016/67944 which have been ratified by the EDPB:

"Article 6(1)(a) confirms that the consent of the data subject must be

given in connection with “one or more specific purposes” and that the data subject has a choice

concerning each of these purposes”.”45 This means “that a data controller who requests the

consent for various specific purposes should provide separate consent for each

purpose so that users can provide specific consent for purposes

specific.”.”.46

In particular, the user of the website should receive information, among other things

on the methods of expressing his will about cookies, and how he can "all the

42 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons

with regard to the processing of personal data and on the free movement of such data.

43 Planet49 judgment, points 61 and 62.

44 Data Protection Working Party, Guidelines on Consent within the meaning of Regulation 2016/679,

WP259, p. 4.

45 Ibid, p. 14.

46 Ibid, p. 14.

accept, accept only some or none47". The Litigation Chamber refers in this respect to the

Data Protection Working Party guidelines on how to collect the

consent. According to the Data Protection Working Party, consent must be

obtained by cookie or by category of cookies48.

a.2 The right to withdraw consent

Article 7.3 of the GDPR lays down strict conditions for the withdrawal of valid consent (Article

7.3 GDPR): (a) the data subject has the right to withdraw consent at any time, (b)

it must be informed in advance, and (c) it must be as simple to withdraw as to give

consent. Pursuant to Article 129, last paragraph of the LCE, the controller is

obliged to give "free of charge" the possibility to end users of the terminal equipment concerned

"to withdraw consent in a simple way".

This right to withdraw consent must therefore be subject to prior information (article 7.3.b),

and should also be read in conjunction with the requirement for fair and transparent treatment at

meaning of Article 5 and Article 13.2.c of the GDPR. Non-existent or incomplete information concerning

the right to withdraw consent would imply that consent would de facto be given for a

infinite duration and that the data subject would be deprived of his right to withdraw his consent.

These rules apply both with regard to so-called "first party" cookies.

than those of "third parties", as explained above.

(b) Findings

As explained in detail below, the Litigation Chamber finds the following with the help of the first

Inspection report of May 29, 2019:

-

the website did not provide for a consent process prior to placement

"first party" analysis cookies on the terminal equipment of users of the

website, according to the privacy statement of March 12, 2019 and April 29, 2019

; in this regard, the defendant wrongly invokes the legal basis of "legitimate interest" (violation of

articles 5, 6.1.a and 4.11 juncto article 7 of the GDPR);

the website used pre-ticked boxes to obtain consent for cookies;

-

47 Data Protection Working Party, Working Document 02/2013, setting out guidelines on the collection

consent for the deposit of cookies, p. 3, https://cnpd.public.lu/dam-assets/fr/publications/groupe-art29/wp208_fr.pdf.

48 Ibid.

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-

the first two analyzed versions of the website from March 12, 2019 and April 29, 2019

did not mention how the data subject could withdraw the consent given

for the use of cookies by the controller or by third parties (violation of

GDPR article 7.3).

(c) Defense Regarding the Consent Process

In its first Inspection Report, the Inspection Service found that on the website,

did not ask for consent prior to the placement of analysis cookies (without distinction

between "first party" and "second party" analytics cookies) on devices

terminals, and that the defendant was referring to "our legitimate interest" as the legal basis for

cookies used "to simplify your use of the website and to collect data

statistics relating to the use of the website".49 In its letter of 29 May 2019 to the Service

of Inspection, the defendant claimed that the website had been adapted following the findings of the

March 12, 2019, regarding the consent for the use of cookies and the withdrawal of the

consent.

In its conclusions of July 29, 2019, the defendant claimed that the website (May version

2019) did require consent prior to placing analytics cookies, and

this contrary to the private life information disseminated previously. The defendant does not dispute

nor that on the first two versions of the website no consent was

request.

This is confirmed in the synoptic table which was submitted by the defendant during the hearing. The

Chambre Litigation finds that the consent for the use of cookies not necessary

was not requested in March and April 2019.

With respect to the May 2019 version of the website, the defendant asserted in its pleadings

that the consent was indeed requested, contrary to what was mentioned in the declaration of

website privacy:

“Despite the mention of the processing of cookies for the simplification of the use of the website and

the collection of statistical data, these data were collected only after the consent of the

concerned person. […] It can be seen from Exhibit 10 that the analytics cookies were not loaded without

consent (see cookie window in the background)."

49 Inspection report, p. 9.

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However, the Litigation Division cannot deduce from the documents produced by the defendant whether the

the consent of the persons concerned was indeed requested in concreto, prior to the placement

of "first party" analytics cookies in the version of the website of May 29, 2019. The parts

produced do not include a date certifying that the consent was in fact requested from the

during the period in question. More fundamentally, there is no description of the process

of consent that the defendant claims to have put in place.

The Litigation Chamber therefore considers that the defendant fails to refute the findings

of the Inspection Service:

-

“"consent for the use of cookies by the data controller or by Google

is not asked of the persons concerned" (findings of March 12, 2019 and April 29,

2019);

-

in the website's privacy policy, reference is made to "our legitimate interest" in

as the "legal basis for cookies which are used to simplify your

use of the website and to collect statistical data relating to the use of the

website" (finding of May 29, 2019)50

(d) With respect to "first party" analytics cookies:

The defendant claims that cookies for the analysis and use of the website and the establishment

statistics are cookies "essential for the platform and to attract authors (in

particular of fixed authors)". The Litigation Chamber understands that the defendant means by this

that these cookies are "essential" to provide the service by the website, it being understood that no

consent is required to place such "strictly necessary" cookies under Article

129, 2° of the LCE51.

The defendant asserts in its conclusions that "statistical and analytical cookies" are

essential to provide the authors of the website with "essential results concerning the articles

that they write" because "authors are and indeed remain willing to contribute articles [to the website]

if it appears that they reach a large number of readers".

50 Inspection report, p. 11.

51 For information, Article 129 of the LCE is stated as follows: "The storage of information or the obtaining of access to

information already stored in the terminal equipment of a subscriber or user is authorized only to

condition

:

[…] 2° the subscriber or the end user has given his consent after having been informed in accordance with the provisions

referred to in point 1°. Paragraph 1 does not apply to the technical recording of information or access to

information stored in the terminal equipment of a subscriber or an end user with the sole purpose of carrying out

sending a communication via an electronic communications network or providing a service expressly requested

by the subscriber or the end user when it is strictly necessary for this purpose." [Emphasis by the Litigation Chamber].

than

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(d.1) Definitions of "first party" vs. "third party" cookies

Whether a cookie is "first party" or "third party" depends on the website or

domain that places the cookie and processes it. First party cookies are placed directly by the

website that is visited by the visitor. […]. "Third party" cookies are placed by a domain

different from the domain that is visited by the user. This typically happens when the website

incorporates material from other websites such as images, social media "plugins"

or advertisements. When these elements are retrieved by the browser or other software at the

From other websites, these may also place cookies. 52

“Third party cookies allow “personal data to be sent to

third parties, either directly (for example by an active element linked to a banner or a tracking pixel),

either indirectly by placing cookies accessible for other websites than that of

the advertiser"53. These data transfers are implicit during the loading of the page "and take place

therefore without the knowledge of the Internet user". 54.

"First party" cookies do not involve any transfer of personal data to

third parties, but may use a third-party subcontractor, for example for the establishment

of statistics. Provided that the third-party processor does not use this data for its own purposes,

such cookies are in principle less intrusive in terms of privacy. However, they assume

processing of personal data (pseudonymized or not) and that this processing is

subject to the GDPR rules on consent (and Article 129 of the LCE).

(d.2) Analytics Cookies

Analytics cookies "collect information about technical data from the exchange or

the use of the website (pages visited, average duration of consultations, etc.) in order to be able to

to improve its functioning [i.e. to get to know the use of the website]. The

data collected in this way by the website is in principle aggregated and is processed anonymously

but may also be processed for other purposes." 55 The fact that data is often

processed anonymously by analytics cookies does not mean that the processing process is

completely anonymous from the start.

52 Based on ICO, Guidance on the use of cookies and similar technologies, under the title "What are ‘first party’ and ‘third party’

Cookies",

are-cookies-and-similar-technologies/#cookies.

https://ico.org.uk/for-organisations/guide-to-pecr/guidance-on-the-use-of-cookies-and-similar-technologies/what-

53 OPC, Recommendation No. 01/2015 of 4

https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/recommandation_01_2015.pdf.

February 2015 regarding

the use of cookies, e.g. 21,

54 Ibid.

55 Ibid., p. 23. See also: Data Protection Group, Opinion 4/2012 on exemption from the consent requirement

for

http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-

recommendation/files/2012/wp194_en.pdf, p. 10.

Cookies,

some

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(d.3). "First party" analytics cookies

The defendant refers to the opinion of the Data Protection Working Party on the exemption from

the requirement of consent for certain cookies (WP 194) to support its point of view that

applicable law does not require consent for such cookies. The working group on

data protection asserted that, under certain conditions, "first-party" analytics cookies

party" did not generate a risk to privacy: "According to the Group, it is unlikely that the

first-party analytics cookies pose a privacy risk when strictly limited to

compiling aggregate statistics regarding the origin and when used by websites

which already provide clear information about these cookies in their provisions relating to the

protection of privacy, as well as adequate safeguards in this respect"56.

The Litigation Chamber does not contest this finding of the Working Group on the protection

data, but notes that it has no consequences on the requirement of consent. In

As the law currently stands, there is no exception to consent for "web analytics cookies".

first party", so that prior consent for the placement of such cookies is indeed

well required. The Litigation Chamber refers in this respect to an opinion of the predecessor in right of

the APD (Commission for the protection of privacy) which affirmed "that it is up to the legislator to provide

a clarification of the problem posed by the non-exemption of user consent in

relationship with the original analytics cookies." 57.

In this respect, the Litigation Chamber cannot anticipate the outcome of the debates on a possible

future modification and possible relaxation at European level of the rules included in the

Privacy and Electronic Communications Directive 2002/58/EC58 and notes that the

Consent is still always required for the placement of analytics cookies, so the

failure to consent constitutes a violation of Article 6 and Article 7 juncto Article 4.11 of the

GDPR, read in conjunction with Article 129 of the LCE.

The Litigation Chamber considers that "first party" statistical cookies do not fall under

the exception of "strictly necessary cookies" of article 5.3, paragraph 2 of the Privacy Directive and

electronic communications, an exception which, as explained above, could be based on the

56 Data Protection Working Party, Opinion 04/2012 on the exemption from the requirement of consent for certain

cookies, WP208, p. 10.

57 OPC, Recommendation of initiative n° 01/2015 concerning the use of cookies, Ibid, point 311, p. 64.

58 Proposal for a Regulation of the European Parliament and of the Council on respect for private life and the protection of

personal data in electronic communications and repealing Directive 2002/58/EC (regulation “life□

privacy and electronic communications”), COM/2017/010 final.□

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legal basis for the "legitimate interest" of the GDPR insofar as the Privacy and□

electronic communications clarifies and complements the GDPR on this point59.□

The Litigation Chamber considers that statistical cookies cannot be considered as□

cookies strictly necessary to provide a service requested by a subscriber, within the meaning of□

Article 129, paragraph 2 of the LCE. The notion "necessary" must be interpreted in accordance with the objectives□

of protection of European data protection law60, in the sense that this exception□

can only be invoked in the interest of the persons concerned (visitors to the website) and not□

in the exclusive interest of the providers of the information service. Even if the operators of the website□

consider that these cookies are essential to provide their service, they are not in themselves□

absolutely necessary to provide the information service requested by the website visitor.61□

The Litigation Chamber does not exclude that under certain conditions, certain statistical cookies□

are indeed necessary to provide a service (e.g. information) requested by the□

data subject, for example to detect browsing problems. It is not, however,□

no question in this case.□

Regarding all cookies that are not strictly necessary to provide the service□

concerned of the information society, the Litigation Chamber considers that the consent within the meaning□

of article 7 and article 6.11 of the GDPR is required, prior to placing the cookie on□

the data subject's terminal equipment.□

(d.4) decision regarding "first party" analytics cookies on the website□

Even if the Litigation Chamber is willing to take into account the low potential impact of cookies□

of "first party" analysis of the website at the level of possible sanctions62, and this under□

59 See the explanation under heading 2.1 "jurisdiction of the Litigation Chamber". The Litigation Chamber can no longer adhere

CPP's (contradictory) statements in the now obsolete Recommendation No. 1/2015 that□

"In accordance with various positions, it can be considered that this processing [statistical (analysis) cookies of first part] meets a legitimate interest of the data controller provided that the cookies are specific to the site visited and that the statistics are strictly anonymous" (p. 308).

60 On the notion of "necessary" in a data protection context, EDPB Guidelines 2/2019, cited in the footnote 25.

61 Along the same lines, Data Protection Working Group, Opinion 04/2012 on the exemption from the obligation to consent for certain cookies, WP208: "While these tools are often considered "strictly necessary" for operators supply a feature expressly requested by the user (or subscriber). In fact, the user can access all the functionality provided by the website when these cookies are disabled. These cookies are therefore not affected by the exemption defined [in article 5.3, paragraph 3]", p.11. See also ICO, "How do the exemptions apply to different types of cookies": "You are likely to view analytics as ‘strictly necessary’ because of the information they provide about how visitors engage with your service. However, you cannot use the strictly necessary exemption for these. Consent is required because analytics cookies are not strictly necessary to provide the service that the user requests. For example, the user can access your online service whether analytics cookies are enabled or nothttps://ico.org.uk/for-organisations/guide-to-pecr/guidance-on-the-use-of-cookies-and-similar-technologies/how-do-we-comply-with-the-cookie-rules/COlytics,

62 See ICO: "Although the ICO cannot rule out the possibility of formal action in any area, this may not always be the case where the setting of a first-party analytics cookie results in a low level of intrusiveness and low risk of harm to individuals.",

Ibid.

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subject to an investigation into the purpose of the processing by any subcontractors who may process the

data at the request of the data controller, it cannot however accept the

defendant's arguments regarding the "essential" nature of "first party" cookies in

question. Indeed, it appears from the defendant's conclusions that these cookies are not "strictly

necessary" to provide the information service to the persons concerned, but would on the other hand be

used to provide aggregate information to third parties. The Litigation Chamber therefore finds

a breach of the GDPR.

The Litigation Chamber also reminds the defendant that the exception of consent of

Article 129 of the ECA only applies to the provision of services to subscribers or end users

of an information service – such as that provided by the website to Internet users – and that this

exemption applies only to subscribers or end users on whose terminal equipment

the cookie is placed. This exemption therefore does not apply to the placing of cookies which – according to the

defendant's statements

himself – aim

the

providing analytical services to

authors/contributors of the website, given that these authors are not subscribers or

end users of the information service in question, which, according to the description of the site

Internet itself, on the provision of legal information.63

The Inspection Service found that on March 12, 2019 and April 29, 2019, the website used

cookies from "Google Analytics", without requesting consent for this purpose. In addition, the Chamber

Contentious also points out that in the latest available declaration relating to cookies (version

of the website as presented after the hearing), this cookie is described by the defendant as a

"first party" cookie.

Since the Inspection Service has not analyzed the nature of the cookies in question or the flows

underlying data on the website, the Litigation Chamber will refrain from any

qualification in concreto of these "Google Analytics" cookies as "first party" cookies

(with or without analysis by a third party processor) or "third party". This would indeed require a

precise analysis of the website in question as well as the underlying IT and legal environment.

The Litigation Chamber can only note that the relevant versions of the website of 12

March 2019 and April 29, 2019 did not provide for a consent process for the use of

non-essential cookies by the controller. According to the Inspection Report and the

statements of the defendant during the hearing, in the third version of the website (May 29, 2019),

however, a consent process is provided for the use of cookies which are not

strictly necessary.

63 Respondent's submissions, p. 6.

64 Inspection report, p. 10.

The Inspection Service found that on March 13, 2019 and April 29, 2019, the website used

analytical cookies such as "Google Analytics", without asking for consent in this regard. In the

list of cookies submitted by the defendant, we do not include cookies from "Google Analytics". the

Respondent, however, asserted in its submissions relating to these two versions of the website that

"the cookies that were being used at that time [were] identical to the cookies still being used

currently on the website". 65

The controller explained during the hearing that the problems relating to the updating

of the list of cookies present were due to the "Cookiebot" technology, and that in the meantime it had

changed technology to fix it.

The Litigation Chamber takes note of the adapted declaration relating to cookies that the defendant

filed after the session. The respondent states therein that a prior consent process is

well and truly provided with respect to "first party" analytics cookies, which the defendant has

limited to two types of cookies: "Google Analytics" and "Pikwik" cookies. Bedroom

Contentious, however, was unable to concretely examine this consent process, which we do not

therefore not taken into account in this decision.

(e) With respect to "third party" cookies

The defendant filed a list of cookies that were used in the July version of the website,

including cookies placed by third party domains such as "doubleclick.net" or "youtube.com" (all

two related to Google).

Given the lack of precision in the lists updated by the "Cookiebot" technology, according to the latest

defendant's statements, the Litigation Chamber cannot make a finding

definitive nor with regard to third-party cookies that were present on the first two

versions of the website, nor with regard to the lack of consent for the placement of

"third party" cookies on these versions of the website.

(f) Cookie opt-in requirement decision

The Litigation Chamber must therefore note that in the versions of the website of March 12, 2019

and of April 29, 2019 which were analysed, the defendant was not asking for consent, while he

was required, for the collection and processing of personal data using cookies from

"first part".

65 In its conclusions (pp. 7 and 8), the defendant refers to the version of the website which predates the adaptation, of

so consent for cookies was requested.

In addition, the Inspection Service found on the website on May 29, 2019 that there were boxes

pre-checked for cookie preferences, which does not constitute consent according to the

recital 32 of the GDPR. In this regard, reference should also be made to the Planet 49 judgment, in which the

Court of Justice of the European Union affirms "that, according to recital 32 of this regulation,

the expression of consent could be done in particular by ticking a box during the consultation

of a website. The said recital, on the other hand, expressly excludes consent "in

silence, boxes checked by default or inactivity". 66

The defendant explains in his pleadings that he voluntarily chose to switch from a system of

"opt-in" to an "opt-out" system with boxes checked by default (with all boxes checked

by default in order to accept the use of cookies).

The violation of articles 6 and 7 juncto 4.11 of the GDPR is thus established.

(g) Defense of Right to Withdraw Consent

The Litigation Division does not comment on the finding of the first inspection report according to

which the third version of the analyzed website contains an "OK" button to accept the

cookies, but no button to refuse cookies. In its pleadings, the Respondent points out to

rightly so that such an "opt-out" button is not required and that the website of the ODA – which has in

principle an example function – does not include either an explicit function of "opt-

out" in addition to an "opt-in" function.

In his conclusions, the defendant submits a document, which should attest that the visitor to the site

The Internet "[can] refuse (implicitly) in a simple way the use of cookies (not necessary)".

This is a cookie banner on which we can read the following: "Some cookies are necessary

to the proper functioning of the website and cannot be refused if you wish to visit this site.

Other cookies are used for analytical purposes. These can be declined if desired.

More information." The defendant, however, does not demonstrate the simplicity to then refuse the

consent for cookies, after clicking on "more information".

In the latest version of the website analyzed by the Inspection Service, it appears that the

information to the data subject about their right to withdraw consent

are not sufficient to enable the effective exercise of this right. The Inspection Service has indeed

noted on October 17, 2019 that the person concerned who wishes to withdraw their consent must

66 Planet49 judgment, paragraph 62. See also paragraphs 63-64.

address "to us" a written or electronic request with proof of identity, without referring or

indicate the contact details that the person concerned must use for this purpose.

The Litigation Chamber reminds the defendant that under article 7.3, the person concerned has

the right to withdraw consent at any time and that withdrawal of consent must be

as easy as granting it. In this respect, under the same provision of the GDPR, the person

data subject must be informed of this right before giving consent (Article 7.3 of the

GDPR).

In its additional note, the data controller explains that the declaration relating to the

cookies and the privacy statement have been adapted following the additional report of the

Inspection Service "to make clearer the possibility of withdrawing consent relating to

cookies"".67

The Litigation Chamber considers that in the last analyzed version of the website (October

2019), the defendant violates Article 7.3 of the GDPR, in that the withdrawal of consent is not as

easier than granting it, and because the data subject does not receive sufficient information

on how she can withdraw her consent (imprecision as to the contact details to be used).

(h) Other findings from the last Inspection Report of October 2019 regarding placement

4 cookies without consent and the condition of "specific" consent

In the additional inspection report, the Inspection Service finds that the website

places 4 cookies before the user is informed and has expressed himself on the acceptance or not of the

cookies68. These are 3 cookies placed by the website itself and one cookie placed from

the Cloudflare.com domain. The Inspection Service does not explain to what extent this

would constitute an infringement of the GDPR, in particular because it is not demonstrated that such cookies

do require prior consent or that they do not fall under one of the exceptions of

Article 5.3 of the Privacy and Electronic Communications Directive (and Article 129 of the LCE)

(such as for example technical storage or cookies that would be essential for the service

requested by the subscriber). The Litigation Chamber therefore does not take these findings into account.

The Complementary Inspection Report describes the concrete consent process on the site

Internet of October 17, 201969 and notes that the user cannot comment on an individual choice,

"cookie by cookie". The Inspection Service considers that the way of obtaining consent, with

67 Additional note from the controller, p. 5 and 6.

68 Additional inspection report, p. 9.

69 Additional inspection report, p. 8.

for the only possibility either to accept all cookies, or to accept only cookies

necessary, does not comply with the requirement of consent as imposed by Article 4, point 11

[juncto article 7] of the GDPR "as it is not specific" (Ibid., p. 8). Bedroom

Litigation notes that in its previous cookie guidelines, the Group 29

does not explicitly require such granularity in the consent and that it suffices to offer a

choice by “type of cookie or by category of purpose of these cookies”.70 These guidelines date

however from the period before the GDPR.

In its Guidelines on consent within the meaning of Regulation 2016/679 of 10 April 2018, the

Data Protection Working Group explained that the condition of a consent

"specific" has not been changed by the GDPR:

““The requirement that consent must be “specific” is intended to ensure a certain

degree of user control and transparency for the data subject. This requirement

has not been modified by the GDPR and remains closely linked to the requirement that the

consent must be "informed". At the same time, it must be interpreted in accordance with

the requirement that consent must be “detailed” to be considered as

being "free". To sum up, in order to comply with the "specific" nature of the

consent, the data controller must guarantee:

(i) the specification of the purposes as a guarantee against any misuse,

(ii) the detailed nature of consent requests, and

(iii) clear separation of information related to obtaining consent to processing

data and information relating to other matters." 71

Considering the interpretation and information available so far about the requirement

of a "specific" consent under Article 4, point 11 [juncto article 7] of the GDPR, the Chamber

Litigation considers that on this specific point, there is no breach of the consent requirement

of the GDPR.

In this case, the website for example used 47 cookies in July 201972. The purpose of the GDPR cannot

not be to absolutely require consent for each of these 47 cookies. GDPR requires

however, a more detailed choice than a simple "all or nothing". The Litigation Chamber therefore considers that

70 Guidelines guidelines on obtaining consent for the deposit of cookies,

https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2013/wp208_en.pdf,

3.

p.

71 Data Protection Working Party, Guidelines on Consent within the meaning of Regulation 2016/679,

WP260, p. 13.

72 Respondent's submissions.

the consent must be obtained in the first place not by cookie but by type of cookie, given

the importance of reconciling the specific consent requirement with the information requirement.

The website (version October 2019) gives a choice between different types of cookies, with the

possibility for data subjects to obtain information about the individual cookies that have

been grouped for each category of cookie (e.g. "marketing cookies"). We do not offer

no possibility of accepting or not certain cookies of the same category (for example "cookies

marketing" or "statistical cookies"), which is justified according to the Litigation Chamber.

However, the Litigation Chamber does not rule out that a choice by cookie may still be

relevant, but then in the second instance, in the context of a second layer of information.

Once the person concerned has been able to express their consent by category of cookie, they

should also ideally be able to express consent in the future if necessary by type of cookie,

in each category. Of course, the interpretation of the GDPR and the consent requirement must also

take into account the evolution of society as well as the expectations of average Internet users, ideally

increasingly tech-savvy and privacy-conscious, who

would like to express their preferences between different cookies depending for example on the intrusiveness

whether or not certain cookies and/or the reputation of the third party placing the cookie on the site

Internet.

2.2.3 Other conclusions of the controller

In its statement of facts, the defendant asserts that certain findings of the Inspection Service

"exceed the initial scope of the indices" (conclusions, p.2). The Litigation Chamber

would like to point out in this respect that the Inspection Service is not obliged under the LCA to

limit to the scope of its initial findings and may, ad nutum, proceed or not to

additional findings on the basis of its right of initiative.

"The inspection service can be seized: (...) on its own initiative, when it finds that there are

serious indications of the existence of a practice likely to give rise to an infringement of the principles

fundamentals of the protection of personal data, within the framework of this law and

laws containing provisions relating to the protection of the processing of personal data

staff" (article 63, 6° of the LCA). By virtue of article 92, 3° of the LCA, the Litigation Chamber

can then be seized by the Inspection Service following its new findings. She ensures that

that all grievances raised by the Inspection Service as to indications of a breach of the GDPR

be submitted to a contradictory debate, in compliance with the rights of the defence. To be clear, the

jurisdiction of the Litigation Chamber is not limited to the facts of which it is informed by the Service

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of Inspection pursuant to Article 92, 3° of the LCA. The Litigation Chamber is therefore free,

subject to respect for the rights of the defence, to confront the fundamental principles applicable

of the protection of personal data the facts submitted for its assessment through

questions addressed to the defendant, pursuant to Article 4, § 1 of the LCA.

The defendant agrees with the argument that similar practices are used on other sites

Internet that provide legal information73. This defense does not hold water. One

controller cannot invoke the principle of equality in cases in which

a violation of the GDPR is found.

The defendant also asserts that the website is certainly specialized in the publication

legal information but does not itself have any particular legal expertise. This

legal expertise would rather be the work of the authors of the publications, which implies that the website

would not have an example function to ensure with regard to the declaration of confidentiality,

contrary to the findings of the Inspection Service in this regard. The Litigation Chamber in

take note. In a context where the essence of the website's activities consists in disseminating

legal information, the Litigation Division assumes that the defendant is aware of

the importance of the accuracy of the legal information that is placed on its website, as well as

than the obligation to comply with legal requirements. Like any data controller, the

defendant is subject to Article 24 of the GDPR, which implies the obligation to take measures

appropriate technical and organizational measures to guarantee and be able to demonstrate that the processing is

performed in accordance with the GDPR. Moreover, the Litigation Division considers that the fact that the

controller provides general legal services would not justify a sanction

more severe.

According to the defendant, the breach of the information obligation (of Articles 12 and 13 of the GDPR) has "no

impact" on the rights of data subjects "given that the processing was mainly aimed

obtaining statistical information" (Respondent's submissions, p 10). This argument does not convince

not. The right to data protection is a fundamental right of everyone and is included in

as such in Article 8 of the Charter of Fundamental Rights of the European Union. The manager

processing has no competence to assess the scope of this right according to the

allegedly low impact of the breach, while the GDPR imposes a positive obligation, as per

example the mention of the data controller (article 13 of the GDPR) or the communication

transparent information (article 12 of the GDPR). The Brussels Court of Appeal has clarified this principle

as follows in its recent judgment of October 9, 2019, in the context of a dispute in which the person

concerned had unsuccessfully requested the rectification of his personal data:

73 Respondent's submissions, p. 4.

"To state now (in 2019!) that adapting a computer program would require

several months and/or an additional financial cost for the banking establishment, does not allow the […]

ignore the rights of the data subject. The rights attributed to the person are

assimilated to performance commitments on the part of the person who processes the data

personal character. A well-functioning banking institution can be expected to –

when he uses a computer program, he uses one that meets current standards,

including the aforementioned right to the correct spelling of the name. The right of rectification is a

fundamental right. […] The question of whether […] damages would result from the

erroneous mention of his surname is irrelevant. Such a condition is only imposed

neither by the GDPR, nor by the Privacy Framework Law, nor by the LCA, and would be contrary to Article 8,

paragraph 3 of the Charter of Fundamental Rights of the European Union, which cites the right to

correction

as part of the very essence of the fundamental right of everyone to the protection

of his personal data”"74.

The fact that "all personal data that has been collected through cookies" has,

according to the Respondent, "always been anonymized" (Respondent's Submissions, p. 10) does not constitute
a convincing defence: the GDPR – including transparency and information obligations – remains
application as long as the data has not been truly rendered "anonymous", i.e. if it is
still possible to link the data in question directly or indirectly – if necessary using
other information – to an individual75. As long as the data is not anonymized, there are still
a risk of physical, material damage or moral prejudice for natural persons,
such as loss of control of their personal data, limitation of their rights,
loss of confidentiality of personal data protected by professional secrecy or any
other significant economic or social harm to the persons in question76.
Consequently, the Internet user must be able to decide independently, on the basis of transparent information,
if he continues browsing the website concerned, or if he gives his consent for certain
processing where such consent is required. Anonymization also constitutes processing
subsequent processing of personal data77 and, as such, the initial processing must respect
all GDPR requirements, including with respect to the availability of a legal basis.
74 Brussels Court of Appeal, 9 October 2019, 2019/AR/1006, p. 15 and 16, available on the APD website.
75 Data Protection Working Party, WP216, Opinion 05/2014 on anonymisation techniques, WP216.
76 See recital 85 of the GDPR: "A breach of personal data risks, if we do not intervene in time and
in an appropriate manner, to cause the natural persons concerned physical or material damage or prejudice
moral, such as a loss of control over their personal data or the limitation of their rights, discrimination,
identity theft or theft, financial loss, unauthorized reversal of the pseudonymization procedure,
damage to reputation, loss of confidentiality of personal data protected by professional secrecy
or any other significant economic or social damage".
77 Data Protection Working Party, Opinion 05/2014 on anonymisation techniques, WP216, p. 3.

Moreover, the defendant does not produce any evidence for its assertion that the data in question
were ultimately "anonymized" (not just pseudonymized), so that the

The Litigation Chamber cannot take this into account either.

2.2.4 Sanction Decision

The Litigation Chamber considers that the violation of articles 6, 7 juncto 4.11°, 12 and 13 of the GDPR is established and proceeds to the imposition of sanctions.

Under Article 100 of the LCA, the Litigation Chamber is competent to impose fines (article 100.13°, 101 and 102 of the LCA) and to publish the decision on the website of the Data Protection Authority (article 100.16° of the LCA).

With regard to "first party" analysis cookies, the Litigation Chamber takes into account that the defendant now only maintains the use of "first party" analytics cookies can be done on the basis of the legal basis of "legitimate interest".

In its capacity as data controller, the defendant is responsible for being able to guarantee and demonstrate that "first party" analytics cookies do fall within the exception of "strictly necessary" cookies of article 128 of the LCE, it being understood that the notion of "necessary" must be explained in accordance with the GDPR, i.e. in the interest of the persons concerned whose personal data are processed and not exclusively in the interest of the website. In accordance with Article 24.1 of the GDPR, the controller has also the obligation to take all necessary measures in order to guarantee and to be able to demonstrate that the processing is carried out in accordance with this Regulation, taking into account the nature, scope, context and purposes of the processing as well as potential risks for the rights and freedoms of persons concerned.

Regarding the consent process for the acceptance of cookies, the Chamber Litigation finds that the defendant has stopped checking the chosen cookies by default. Bedroom Litigation considers, however, that the imposition of a fine is appropriate given the nature negligence of the offense and the presence of clear guidelines in this regard in the recitals of the GDPR itself (see recital 32 of the aforementioned GDPR).

To determine the level of the fine, the Litigation Chamber must take into account the criteria defined

to Article 83 of the GDPR, depending on the circumstances. In this case, the Litigation Chamber holds

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account of the following circumstances which it considers sufficient to support the decision on the

penalty:

at)

the duration of the infringement: several infringements were resolved only after a second

warning from the Inspection Service, which is not acceptable in the context of

Article 24 of the GDPR (see above, under 2.2.1);

b)

the number of data subjects reached: self-proclaimed monthly reach of

35,000 readers;

vs)

whether the violation was committed deliberately or negligently: the Chamber

Litigation finds the defendant's repeated negligence with regard to the obligations

of transparency of Articles 12 and 13 of the GDPR (see above, under 2.2.1); bedroom

Litigation also points out that the defendant took the initiative to move from a

method "compliant with the GDPR" to a method voluntarily "non-compliant" with regard to

concerns the pre-ticked boxes for the cookies presented (see above, under 2.2.2.f);

with regard to the legal basis of "legitimate interest" which is wrongly invoked by the

data controller with regard to statistical cookies, the Litigation Chamber limits itself

a repetition and clarification of the usual principles (see above, under 2.2.d); in this

regarding the obligation to provide an easy way to withdraw consent,

defendant remains in default after repetition of the applicable rules by the Inspection Service

in its first report (see above, under 2.2.2.g);

d)

the measures taken by the controller: the subsequent rectifications made to the

the confidentiality statement by the respondent do not prejudice the findings□

initials□

of□

violation□

from□

items□

12□

and□

13□

from□

GDPR,□

made on March 12, 2019 and April 29, 2019.□

In this context, the defendant's neglect of the transparency and accuracy of the□

privacy statement as well as the placement of cookies without consent are□

reprehensible, so that a fine of 15,000 euros is justified for violations of articles□

12 and 13 of the GDPR, as well as articles 6, 7 juncto 4.11 of the GDPR.□

The Litigation Chamber considers that this amount is not disproportionate with regard to the figure□

announced turnover of EUR 1,710,319.69 for the 2018 financial year.□

The fact that the defendant always took account of the remarks of the Inspection Service does not prevent□

not that the website should provide correct information from the outset.□

Given the importance of transparency concerning the decision-making process of the Litigation Chamber,□

this decision is published on the website of the Data Protection Authority. In this□

regard, it is however not useful for the company name of the data controller to be published□

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directly.□

FOR THESE REASONS,□

the Litigation Chamber of the Data Protection Authority decides with regard to the defendant, after

deliberation:

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under Article 101 of the LCA, to impose an administrative fine of 15,000 euros

for this offence;

to publish this decision on the website of the Data Protection Authority, in

pursuant to article 100, § 1, 16° of the law of December 3, 2017, admittedly without publishing the

company name of the controller.

Pursuant to article 108, § 1 of the law of December 3, 2017, this decision may be the subject of a

recourse within thirty days, as of the notification, to the Court of Markets, with

the Data Protection Authority as defendant.

(seg.) Hielke Hijmans

President of the Litigation Chamber