Litigation Chamber

Decision on the merits 140/2021 of 15 December 2021

File number: DOS-2019-02547

Subject: use of the professional e-mail address by a platform for launching

petitions - principle of legality and transparency - exercise of rights

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

Chairman, and Messrs. Yves Poullet and Christophe Boeraeve;

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

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

of this data, and repealing Directive 95/46/EC (General Data Protection Regulation),

hereinafter “GDPR”;

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

Having regard to the internal regulations as approved by the House of Representatives on December 20, 2018

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

Considering the documents in the file;

made the following decision regarding:

The complainant :

X, represented by Me Matthias Vierstraete and Me Willem-Jan Cosemans, hereinafter "the

plaintiff";

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Defendant: CHANGE.ORG, PBC, 548 Market Street Private Mailbox 29993 San Francisco, CA

94104-5401, USA, by

through its representative in

the EEA:

Change.org, Servicios Promocionales, S.L., 08021 Barcelona, Carrer de Santalo (1st

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floor), Spain, represented by Maître Patrick Van Eecke and Maître Anne-Gabrielle

Haie, hereinafter: "the defendant".

I. Facts and procedure

1. On April 26, 2019, the complainant filed a complaint with the Data Protection Authority

against the defendant.

The subject of the complaint concerns the repeated sending of emails concerning a petition to

the email address of the plaintiff against the development of the future line 3 of the

metro in Brussels. The complaint was filed by Mr. X, general administrator of a company

public transport, against a group of associations that initiated a petition and against the

change.org PBC and/or The change.org charitable foundation inc.

The complaint relates to the following:

- The lack of basis for the lawfulness of the processing and the disproportionate nature of the frequency

the sending of these emails to the complainant (articles 5.1,a,b,e) and 6 of the GDPR);

- The lack of information to the complainant about the processing of this data (article 12 of the

GDPR);

- The impossibility for the complainant to assert his rights as a data subject

(Article 12 and Articles 15 to 22 of the GDPR).

2. On May 15, 2019, the complaint was declared admissible by the Front Line Service on the basis of the

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

62, § 1 of the LCA.

3. On May 28, 2019, the Litigation Chamber decides to request an investigation from the Inspection Service,

pursuant to Articles 63, 2° and 94, 1° of the LCA.

4. On the same day, in accordance with Article 96, § 1 of the LCA, the request of the Litigation Division to

carry out an investigation is forwarded to the Inspection Service, together with the complaint and

parts inventory.

5. On April 27, 2020, the investigation by the Inspection Service is closed, the report is attached to the file and

this is forwarded by the Inspector General to the President of the Litigation Chamber (art. 91, § 1)

and § 2 of the LCA).

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

1. The responsibility for processing the data of decision makers lies with the “Collective

of associations” and that Change.org has a role of subcontractor;

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2. The means to be implemented to identify the data controller do not

would not be appropriate.

6. On July 6, 2020, the Litigation Chamber decides to launch a procedure to identify

the lead authority on the basis of Article 56 of the GDPR, given that it considers that the

defendant is

the joint data controller with

collective

associations”1. The Spanish supervisory authority is indicated as the lead authority

presumed.

7. On November 11, 2020, the Spanish Control Authority indicates in the IMI system that,

in accordance with the Privacy Policy of Change.org, Change.org, Servicios Promocionales,

S.L. (hereinafter: “the Spanish entity”) is not an establishment of the Data Controller, but

is, under articles 3.2, 4.17 and 27 of the GDPR, the representative of CHANGE.ORG Public Benefit

Corporation (hereinafter: “Change.org PBC” or “the defendant”) based in the United States. It follows

that the one-stop-shop mechanism provided for in Article 56 of the GDPR is not applicable.

8. The IMI procedure is closed on January 29, 2021.

9. On March 11, 2021, the Litigation Division decides, pursuant to Article 95, § 1, 1° and Article 98 of

the ACL, that the case can be dealt with on the merits.

10. On March 12, 2021, the parties concerned are informed by registered letter of the provisions

as set out in article 95, § 2 as well as in article 98 of the LCA. They are also informed

under Article 99 of the LCA, deadlines for transmitting their conclusions.

The deadline for receipt of the defendant's submissions in response was set for 23

April 2021, that for the plaintiff's reply submissions on May 14, 2021 and finally that for the

submissions in reply of the defendant on June 4, 2021.

11. On March 19, 2021, the Complainant agrees to receive all communications relating to the matter by

electronically and expresses its intention to make use of the possibility of being heard,

in accordance with Article 98 of the LCA. On the same day, he requests a copy of the file (art. 95, §2, 3°

LCA), which was sent to him on October 8, 2021 after a reminder.

12. On July 28, 2021, the defendant expressed its intention to use the possibility of being

of course, this in accordance with article 98 of the LCA. The same day, she asks for a copy of the file

(art. 95, §2, 3° LCA), which was sent to him on August 6, 2021.

13. On April 15, 2021, the defendant requests the postponement of the deadlines for submissions by twenty days.

1 This issue is discussed in more detail in points 27 et seq.

14. On April 23, 2021, the Litigation Chamber informs the parties of the postponement of the deadline for submissions

one week.

15. On April 23, 2021, the Litigation Chamber receives the submissions in response from the

defendant. The latter relates first of all that she does not consider herself responsible

spouse of the processing, but as a separate controller. She then adds

that it is based on the legitimate interest to process the personal data. She also emphasizes

the impact extremely□

limited treatments on□

the complainant and details measures□

that have been taken to minimize the impact for the people concerned. the□

compliance with the principle of data minimization and the duty to inform are also□

defended. The defendant also explains that it was always open to the plaintiff□

to exercise his rights and that he has never done so.□

16. On May 21, 2021, the Litigation Chamber received the submissions in reply from the complainant.□

First of all, he argues therein that the defendant is indeed jointly liable for the□

treatment and considers that, in the alternative, it can be recognized as responsible for the□

separate treatment. Next, the plaintiff explains that the disputed data processing must be seen□

as direct marketing within the meaning of the Privacy and Communications Directive□

2002/58/EC of the European Parliament and of the Council of 12 July 20022 (hereinafter:□

“ePrivacy Directive”) and the Belgian Code of Economic Law. He adds that the defendant would not have□

never provided the complainant with the information required under Articles 12, 13 and 14 of the□

GDPR. The plaintiff also disputes the use of consent (as a principal) and interest□

legitimate (in the alternative) as bases for the lawfulness of the processing and that the possibility has not been□

given to the complainant to exercise his right of opposition. Finally, the complainant indicates that the□

other data protection principles (listed in Article 5 of the GDPR) have not been□

respected, and that the complainant was not able to exercise his rights, not having received the□

sufficient information.□

17. On June 11, 2021, the Litigation Chamber receives the submissions in reply from the□

defendant. Beyond the arguments already summarized above, the defendant contests the□

qualification of direct marketing put forward by the complainant, considering that it does not apply□

to petitions.□

18. On August 31, 2021, the parties are informed that the hearing will take place on October 11, 2021.□

19. On October 11, 2021, the parties are heard by the Litigation Chamber. During this

hearing, in response to a point newly raised by the defendant, the Chamber

Litigation decides, after deliberation, to allow the parties to re-conclude

2 OJ L 201, 31.7.2002, p. 37.

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regarding the question of the qualification and role of the defendant (subcontractor or

controller) in relation to the disputed processing.

On October 12, 2021, the parties are informed of this decision by letter. It is also to them

asked to rule on the publication of the decision on the merits, keeping the

identification data of the parties. Deadline for receipt of additional submissions

in response from the defendant was set for October 19, 2021, that for the conclusions

additional replies from the complainant on October 26, 2021 and finally that for the conclusions

additional replies from the defendant on November 2, 20213.

20. On October 19, 2021, the Litigation Chamber receives the additional submissions of the party

defendant. She puts forward three means. First of all, principally, it considers that the letter of the

March 12, 2021 constitutes a violation of his rights of defense, since the Litigation Chamber

would have ruled on the case in question before having received the observations of the defendant and that it

would have violated its obligation to state reasons by not explaining why the procedure under Article 56

GDPR would have become obsolete. It considers that relying on the policy of

confidentiality published by Change.org PBC is also wrong. Then, principally, the part

defendant considers that it is not the data controller in question and that there is reason to

dismiss the complaint without further action or to order the dismissal of the case. Finally, in the alternative, the part

defendant considers that the case should be dismissed with regard to the grievances put forward by the plaintiff

based on Articles 5.1, a), b) e), 6, 12 and 14 of the GDPR.

21. On October 21, 2021, the minutes of the hearing are submitted to the parties.

22. On October 26, 2021, the Litigation Chamber received the complainant's conclusions. First of all, to

preliminary title it considers that the defendant made use of an unfair practice and□

abusive by adopting during the hearing a position contrary to that which it had developed in□

its conclusions as to its role with regard to the disputed processing. Mainly, the plaintiff□

therefore requests the dismissal of the defendant's new arguments which do not relate to□

the question of the qualification of Change.org with regard to the treatment. Then, in the alternative, the□

plaintiff indicates that the rights of defense have not been violated, since the defendant has□

had the opportunity three times to make her case on this point, which she herself changed□

of position on this subject, that the qualification provided by the Litigation Chamber was motivated in□

its minutes of July 6, 2020, and that this qualification was only intended to determine the chief authority□

in line, without deciding the issue on the merits. Finally, the complainant argues that Change.org should be□

considered as joint controller, or at the very least, controller of the□

separate treatment. Finally, the plaintiff objected to having his name and that of the Société de□

public transport are identified in the decision.□

3 Deadline subsequently postponed to November 3, 2021 at the request of the defendant, due to the November 1 public holiday

23. On November 3, 2021, the Respondent sent its summary submissions to the Chamber□

Litigation. Beyond the elements set out in its additional submissions, the party□

defendant indicates that it considers that it is indeed the letter from the Litigation Chamber of 12□

March 2021 which led her to change her position regarding her qualification. She then develops□

in more detail its position on its qualification and disputes that it can be considered□

as determining the purpose or means of the processing in question.□

24. On November 4, 2021, the Litigation Chamber received some remarks from the complainant relating□

in the minutes.□

25. On November 5, 2021, the Litigation Chamber receives comments from the defendant□

relating to the minutes.□

II. Motivation□

26. Before being able to pronounce on possible violations of the legislation on the protection of

personal data, the Litigation Chamber will examine five questions

preliminary.

II.1. Preliminary questions

II.1.a. The jurisdiction of the Litigation Chamber

27. In order to be able to determine the territorial scope of the processing in question on the basis of Articles 55

and 56 of the GDPR, the Litigation Chamber considered that the defendant had at least one

establishment in the EU or in the EEA (specifically the Spanish entity).

28. Given that the processing was probably cross-border processing within the meaning of Article

4, 23) of the GDPR, the Litigation Chamber launched a procedure, on the basis of Article 56 of the GDPR,

to designate a lead authority. Since the only establishment of the defendant which had

been in contact with the DPA was the Spanish establishment, the Litigation Chamber considered that

the Spanish Supervisory Authority could be considered as lead supervisory authority

presumed. This justifies the introduction of the file by the DPA in the IMI system.

29. It was only during the IMI procedure that the Spanish Supervisory Authority indicated, on the basis of the

Privacy policy of the defendant, that the Spanish establishment was considered

as the representative within the meaning of Article 27 of the GDPR and that the main establishment of

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Change.org PBC was based in the United States. As a result of this, the processing does not constitute

cross-border processing and the one-stop-shop mechanism does not apply.

30. In its minutes of March 11, 2021, the Litigation Chamber agreed with the information

provided by the Spanish Control Authority. The Litigation Chamber, at that time,

considered this to be a change to the Respondent's Privacy Policy,

given that the Privacy Policy listed the Spanish establishment as

representative, although the latter had previously identified himself to the Inspection Service

as a subcontractor. This confusion in the information provided by the establishment

Spanish is discussed below (see points 32 et seq.).

31. Since the one-stop-shop mechanism is not applicable to the processing in question, the Chamber Litigation is competent on the basis of article 55 of the GDPR.

II.1.b. The defendant

32. This decision is directed against the defendant, namely, Change.org PBC, established in the United States. This organization has a representative within the meaning of Article 27 of the GDPR, established in Spain which is called Change.org, Servicios promocionales (before and after: the Spanish entity).

33. When the Inspection Service approached the defendant for the first time, it did so at through dpt@change.org. He then received a response from the Spanish entity. In response to questions from the Inspection Service, this entity indicated that it considered itself to be under contractor for the disputed processing. In fact, the defendant's reply letter to the questions from the Inspection Service begins with the following sentence:

“Thank you for giving us, as the Data processor, the opportunity to answer the six questions that have arisen after a complaint […]”4.

It is clear from this letter that the Spanish entity presented itself as an establishment of the subcontractor. At no time in its response does the Spanish entity inform the Service of Inspection that it responds as a representative within the meaning of Article 27 of the GDPR.

It was only later, when the IMI procedure was launched, that the Litigation Chamber was informed, by his Spanish counterpart, of the fact that the Spanish entity was in fact the representative of the defendant within the meaning of Article 27 of the GDPR. This confusion on the part of the Spanish entity had important consequences for the handling of the case. Indeed, the fact

4 Free translation by the Litigation Chamber: We thank you for giving us the opportunity, as a subcontractor, to respond to the six questions that were raised as a result of a complaint [...]. »

that this entity has identified itself as the establishment of the subcontractor entails the application of the

GDPR based on article 3.1. This also entails the possibility that the processing may be
considered cross-border within the meaning of Article 4.23 of the GDPR, which implies the designation
of a lead authority under Article 56 of the GDPR. Conversely, the fact that the Spanish entity
be designated as a representative within the meaning of Article 27 means that the application of the GDPR derives
of Article 3.2, and necessarily implies that the defendant does not have an establishment
in the EEA. It also follows that the processing cannot be cross-border within the meaning of
Article 4.23 of the GDPR.
By identifying
incorrectly as a subcontractor and not as a representative,
the entity
Spanish indicated that the territorial jurisdiction of the GDPR was exercised on the basis of its article 3.1,
entailing all the consequences listed in the preceding paragraph and leading the Chamber
Litigation to launch a procedure for designating the Lead Authority. It is only when
this procedure that the Litigation Chamber was informed by its Spanish counterpart, that
the Spanish entity was in fact a representative within the meaning of Article 27 of the GDPR (see points 29 and
s.). This qualification as a representative was subsequently systematically confirmed by the party
defendant in its four conclusions, in contradiction with what had been put forward during
investigation by the Inspection Service.
34. The Litigation Chamber considers that it is up to the entity communicating with the DPA to specify
its quality correctly, particularly if the entity acts as a representative, because of the
implications for the handling of the case. The Litigation Chamber notes that
this was not the case during the exchange that took place with the Inspection Service. Bedroom
Litigation can only regret this lack of clarity on the part of the entity in question, which
in addition to changes in position during the procedure, leads to unnecessary procedural steps
and generates an obvious confusion of the debates. It invites the representative of the party
defendant to show much more clarity in its contacts with the supervisory authorities

in the future.

II.1.c. Respect for the rights of the defense

35. During the hearing, the defendant indicated, for the first time, that it considered that the letter from the DPA of March 12, 2021 addressed to the parties constitutes a violation of the rights of the defense in that it determines the qualification of the parties without having given them the possibility of express themselves on this subject and without giving reasons for their decision.

36. The Litigation Division reminds the defendant that the launch of proceedings on the merits on the basis of article 98 constitutes the only way for it to receive the arguments of the

parties as to the questions of law that arise in a case. To allow the defendant to express his qualification as to the treatment, he must necessarily carry out a substantive examination on the basis of Article 98 of the LCA.

37. The Litigation Division argues that this element was fully understood by the party defendant, since it expressed itself at length on the qualification of responsible spouse of the treatment which had been retained by the Litigation Chamber in its letter of March 12 2021. Indeed, the defendant argued over several pages, in its two sets of conclusions of April 23 and June 11, 2021, that the correct qualification of the defendant was that as a separate controller and not as a joint controller. Bedroom Litigation fails to understand what prevented the defendant from also express itself on a possible qualification as a subcontractor, if it considers that this was the correct qualifications.

38. For the Litigation Chamber, it is established that the defendant had the possibility of make its point of view heard, both in its conclusions of April 23 and June 11, 2021, only during the hearing. For the sake of completeness and in order to obtain the greatest possible clarity on this essential element of the dispute, the Litigation Chamber nevertheless authorized the reopening discussions on this particular point.

39. The Respondent therefore had the opportunity to express itself in writing on four different occasions.

and during the hearing on his precise role and his qualification in relation to the treatment, and this from

the commencement of the proceedings on the merits5. The defendant has moreover ruled on this

point on all these occasions. The Litigation Chamber cannot be held responsible for the fact that

the defendant initially decided to limit its argument to the

qualification as separate controller rather than joint controller

treatment (qualification adopted by the Chamber), without looking into a possible qualification

of subcontractor.

40. Furthermore, determining the role of an entity is an essential preliminary step for the

Litigation Chamber can deal with a case on the merits. As pointed out in the part

defendant itself, the potential infringements examined in this case are

closely linked to the qualification attributed to it, the GDPR imposing obligations

substantially more important to the controller than to the processor.

41. It necessarily follows that in order to examine the alleged breaches of the GDPR, the Chamber

Litigation must qualify the role of the defendant in relation to the disputed processing,

even if the qualification adopted is refuted later by the parties in their conclusions.

5 The complainant went so far as to qualify this reopening of the proceedings as “overzealous” on the part of the Litigation Cham

conclusions following the reopening of debates.

42. In this context, the Litigation Chamber adds that under Article 33.1 LCA, it is the competent body

administrative litigation of the ODA. Provisions relating to the procedure before the Chamber

Litigation (see Articles 92 to 100 LCA) do not indicate that it is linked in any way

manner by the conclusions of other ODA bodies. When entered on the basis

of article 92 LCA and that it decides to deal with the case on the merits on the basis of article 98.1 LCA, the

Litigation Chamber has the power to reclassify the facts that are brought to its attention

by the complaint or the investigation report.

43. Consequently, the Litigation Chamber is not bound by the conclusions of the Service
of Inspection. On the other hand, the latter are elements on which the Litigation Chamber
bases its decision to deal with a case on the merits. It naturally follows that the House
Contentious has the power to requalify certain findings of the Inspection Department. In the
present case, it is indeed the elements of new facts brought by the Inspection Department in
its investigation report, which directed the Litigation Chamber towards the qualification of responsible
spouse of the treatment.

44. Finally, the Litigation Chamber wishes to emphasize that it is indeed the impossibility of identifying
the author of
the petition (impossibility noted by
the Inspection Department) resulting from
functionalities of the platform operated by the defendant which obliged the Chamber
Litigation to turn to it6.

45. The considerations and different steps that led to this process are included in the minutes of the
Litigation Chamber of July 6, 2020 and March 11, 2021 which are part of the file and have been
forwarded to the defendant upon request.

46. Based on the above points, the Litigation Chamber cannot follow the argument of the party
defendant and finds no irregularity in the procedure.

II.1.d. Procedural unfairness and abuse of process

47. In its new submissions, the Complainant considers that the Respondent has radically
changed position for the first time during the hearing of June 11, 2021 by advancing
arguments contradicting the content of its conclusions. The complainant considers that this is
of an unfair and abusive practice which is not justified by any new element. The complainant invites
therefore the Litigation Chamber to reject the new arguments of the defendant. HAS

6 See points 53, 54, 66, 112.

in the alternative, the complainant requests the dismissal of any new element that is not

necessary to clarify the question of the qualification of the defendant.

48. As previously indicated, the Litigation Chamber argues, like the complainant,

that the defendant had had the opportunity, before the hearing, to express himself twice in writing

before the Litigation Chamber on the question of her qualification, which she did by choosing

to limit oneself to the issue of joint or separate responsibility for the processing, without addressing

a possible qualification of subcontractor. The defendant does not provide any evidence

new which justifies that a new opportunity to express themselves be left to them.

49. Given that all the violations that are brought to the examination of the Litigation Chamber in

this case are conditional on the fact that the defendant can actually be

qualified as controller (joint or separate), this question is of great importance

central. In order to ensure that all the arguments on this point have been presented to him,

the Litigation Division has therefore decided to authorize a new exchange of conclusions limited

strictly to the question of the qualification of the defendant.

50. The Litigation Division notes, however, that the third plea developed by the party

respondent in its additional submissions in reply of October 19, 2021 and of October 3,

November 2021 relates to an examination of the grievances put forward by the complainant on the basis of Articles 5.1 a),

b) and e), 6, 12 and 14 of the GDPR and not on the precise point of which the new exchange of conclusions made

subject and which was specified in its letter of October 12, 2021. As such, the arguments put forward in

this means must be excluded from the debates.

II.1.e. The controller

Background

51. The complaint lodged with the DPA is directed against the “Collectif d’associations” on the initiative of

the petition and potentially against change.org PBC and/or the change.org Foundation

Inc.

52. In its minutes n°10 of May 28, 2019, the Litigation Chamber notes that the identification of

persons against whom the complaint is directed is uncertain, since the petition was

initiated by a “Collective of associations” whose members are not identified. She requests a

investigation to the Inspection Service, in particular, in order to collect elements allowing to attribute

the role(s) of controller and processor.

53. During its investigation, the Inspection Service came to the conclusion that the “Collective

d’associations” is responsible for the processing and that the defendant is a processor. This

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position was also that which had been put forward by Change.org, Servicios promocionales

(the Spanish entity) during the investigation. The Inspection Service also noted that, even if

the identification of the data controller was technically possible through his IP address,

“in accordance with article 64, § 2 of the law of December 3, 2017, [he] does not consider it appropriate to put

implement more intrusive powers in an attempt to identify the person behind the account”

Collective of associations”. »

54. On the basis of the elements at its disposal, the Litigation Chamber estimated in its report of July 06

2020, that the “Collectif d’associations” and the defendant should be considered as

joint controllers within the meaning of Article 26 of the GDPR. This qualification has only

intended to initiate an examination as to the merits of the case and may be rebutted by the parties in

their conclusions. This approach was based on the following elements:

- First of all, the platform provided by the defendant does not allow the plaintiff to

contact the alleged data controller due to the lack of personal data

contact or identification of the “Collective of associations”. This prevents the complainant from entering

in contact with the “Collective of associations” to exercise their rights. So there is a void

in the protection of the rights of the complainant, which is created by the absence of data

identification or contact information for the presumed data controller. This is the platform

of the defendant which allows the launching of a petition without providing data

identification or contact

- Next, as it appears that the defendant determines, jointly with□

the Collective, the purposes and means of the processing. This analysis is supported by the□

case law of the Court of Justice of the European Union (hereinafter, CJEU), which in the judgment□

Fashion□

ID GmbH & Co. KG□

(C 40/17), based in particular on□

the stops□

Wirtschaftsakademie Schleswig-Holstein8 and Jehovan todistajat9 recall that the objective of□

the definition of the controller "being to ensure, by a broad definition of the□

concept of "responsible", effective and complete protection of the persons concerned,□

the existence of joint liability does not necessarily result in a□

equivalent responsibility, for the same processing of personal data,□

of the different actors. On the contrary, these actors can be involved at different stages□

of this treatment and according to different degrees, so that the level of responsibility□

of each of them must be evaluated taking into account all the circumstances□

relevant to the case at hand". 10□

7 As demonstrated by the fact that the Litigation Chamber reopened the debates on this specific subject, following□

the hearing.□

8 CJEU, 5 June 2018, C□210/16, Wirtschaftsakademie Schleswig-Holstein, point 28.□

9 CJEU, 10 July 2018, C-25/17, Jehovan todistajat.□

10 CJEU, 29 July 2019, C-40/17, Fashion ID GmbH & Co.KG v Verbraucherzentrale NRW eV, point 70.□

The Court adds that "it follows from the definition of the concept of 'controller'□

[…], that, when several actors jointly determine the purposes and means□

processing of personal data, they participate, as managers, in□

to this treatment. »□

This broad conception of the notion of controller had already been adopted

by the Court in its judgment in Google Spain11.

In view of the elements noted, the Litigation Chamber considers that Change.org is indeed

joint controller of the complainant's email address (Articles 4, 7) and 26 of the

GDPR). Due to the lack of contact or identification data of the Collective,

Change.org is the only controller that can be contacted.

55. In its pleadings, the defendant refutes this characterization by putting forward that of

separate controller. Subsequently, during the hearing, the defendant party

withdrew from its conclusions by arguing that it was only a subcontractor for the processing in

question. It reiterates this position during the new exchange of conclusions authorized by the Chamber

Litigation by letter of October 12, 2021.

56. The complainant, for his part, indicates that the two entities jointly determine the purpose and

means of processing, and can therefore be qualified as joint controllers. The qualification of

separate controllers being recognized only on a subsidiary basis.

Position of the Litigation Chamber after the exchanges of conclusions

57. Beyond the elements already exposed in its minutes of July 06, 2020, summarized above

(see paragraph 54),

the Litigation Division considers it appropriate to provide elements

additional evidence demonstrating the joint nature of the responsibilities of the defendant and the

“Collective of associations”.

58. According to the guidelines of the EDPB12, “joint participation needs to include the determination of

purposes on the one hand and the determination of means on the other hand. If each of these

elements are determined by all entities concerned, they should be considered as joined

controllers of the processing at issue.”13 It is therefore necessary to determine whether the purposes of a

part and the means on the other hand, have been determined jointly.

11 EDPB, “Guidelines 07/2020 on the concepts of controller and processor in the GDPR”, adopted on July 7, 2021.

12 EDPB, Ibidem, § 53. Free translation of the Litigation Chamber: “The joint participation must include the determination of the
ends, on the one hand, and the determination of the means, on the other. If each of these elements is determined by all the enti
concerned, they must be considered joint controllers of the processing in question”.

13 EDPB, Ibidem, § 59. Free translation by the Litigation Chamber: “There is joint control when entities involved in the
same processing carry out the processing for jointly defined purposes. This will be the case if the entities involved process the
data for identical or common purposes.

59. With regard to the determination of purposes, the EDPB guidelines explain that

“Joint controllership exists when entities involved in the same processing carry out the processing
for jointly defined purposes. This will be the case if the entities involved process the data for the
same, or common, purposes.” As established below (see points 81 et seq.), the purpose of the
treatment is the sending to the complainant of a petition concerning the activities of the public company
of which he is the leader. This purpose is common both to the “Collective of associations” and to the
defendant. It is moreover this purpose that the defendant explicitly claims in its
conclusions in response14. This purpose also emerges from the process of creating a petition,
screenshots of which are included in the investigation report. In fact, screenshots
clearly indicate that the process asks the petitioner to choose the recipients of the
petition15. On the “choose your decision-maker” page, a screenshot of which is also taken in the
investigation report16, is reproduced below:

“Choose your decision maker

If you add your decision maker's email address in the petition menu, they will be required
informed about your petition and the support you are getting.

Address your petition to people, not organizations

It is easier to hold a person accountable and force them into position than a
organization or institution as a whole. Address your petition to the person
who, within the organization, is in charge of finding a solution to your request. By

example, “Madame Mayor of Paris Anne Hidalgo” rather than “Paris City Hall”.□

Choose someone who is directly responsible□

It is more efficient to choose someone who can respond to your request rather than a□

more “highly placed” person or public figure. someone directly□

manager can make a decision and respond to your request more quickly. These□

people are also more sensitive to the pressure of public opinion because they are less□

accustomed. For example, if your campaign aims to obtain the replacement of a□

red light in your neighborhood, it is more useful to contact the town planning department than the□

mayor of the city himself.□

Don't forget to add [sic] the email of your decision maker□

If you add your decision maker's email address to the menu, Change.org will let them know□

automatically of the existence of your petition and will keep it informed of new□

signatures obtained. It is therefore important to enter the correct e-mail address. For the□

find, you can:□

• use search engines and check on pages and documents such as□

presentations or press releases (sic)□

• use the email address template of the organization to which your decision maker belongs and□

try different variations. For example, to contact Mélanie Jourdain, you can□

try m.jourdain@NomDeLorganisation.com, melanie@NomDeLorganisation.com,□

14 Conclusions in response, p. 5.□

15 Investigation report, “Screenshots”, p. 3.□

16 Investigation report, “Screenshots”, p. 8.□

jourdain@NomDeLorganisation.com, melanie.jourdain@NomDeLorganisation.com. Email□

which does not come back to you is the right one.□

Otherwise, you can simply call the organization or institution and ask! »□

60. The Litigation Chamber highlights the parts in bold. It is clear from these

that it is in fact the defendant who determines the purpose of the processing. The tool she

provides to the petitioner does not allow them to process the data of the recipients for another

purpose than that determined by it, namely: to inform the recipient of the existence of the petition

and inform him of new signatures. In this sense, the platform offered by the defendant

clearly distinguishes from other email sending platforms that allow a user to define

itself the purpose of sending emails (for example for advertising purposes, invitation to a

event, or sharing newsletters). This is not the case with the defendant's platform.

which imposes a well-defined purpose on the processing to the detriment of any other.

61. Assuming that the processing in question is only implemented in order to achieve this

purpose, and that this purpose is common to the defendant and the “Collective of associations”, it

it follows logically that the purpose was jointly determined.

62. With regard to the determination of the means of processing, the guidelines of the EDPB

point out that “It may also be the case that one of the entities provides the means

of the processing and makes it available for personal data processing activities by other entities.

The entity who decides to make use of those means so that personal data can be processed

for a particular purpose also participates in the determination of the means of the processing.

This scenario can notably arise in case of platforms, standardized tools, or other infrastructure

allowing the parties to process the same personal data and which have been set up in a certain way

by one of the parties to be used by others that can also decide how to set it up”17.

63. For the Litigation Chamber, it appears that the present case corresponds to the situation described by

the EDPB, since it is a platform provided by the defendant and used by the “Collectif

associations”. The latter merely integrated the complainant's email address and validated

certain parameters offered by the defendant (frequency of sending emails). Once again the

means are here well proposed by the defendant and simply parameterized or not by the

petitioner. The communication of the petition, which constitutes the purpose of the processing, is only done

by standard emails, of which it is possible to configure the frequency or part of the content.

The platform thus differs from a platform for sending emails or the means of processing

17 EDPB, Ibidem, § 64. Free translation by the Litigation Chamber: “It may also be that one of the entities concerned provides

the means of processing and makes them available for personal data processing activities by other entities.

The entity that decides to use these means so that the personal data can be processed for a particular purpose

also participates in the determination of the means of treatment. This scenario can occur in particular in the case of platforms,

standardized tools or other infrastructures allowing the parties to process the same personal data and which

have been set up in some way by one of the parties for use by others who can also decide on the

how to implement them.

are left to the discretion of the user. This is apparent from exhibit 16 of the

file which consists of a series of screenshots taken by the Inspection Service to

document the process of creating an online petition. The Litigation Chamber finds

that the petitioner is asked to choose a theme for his petition, among different categories

proposed, to choose a title, to select a decision-maker, to present the problem to be solved and

to add a possible photo or video. Each of these steps is accompanied by instructions and

tips. With regard more specifically to the processing of the data of a "decision maker", the

Litigation Chamber refers to the observations made on the screenshot given in point 59 which

demonstrate the essential influence of the defendant on the means of treatment. Bedroom

Litigation emphasizes more particularly the fact that the defendant insists that the creator

inserts an email address ("Don't forget to add the email of your decision maker"), it

request to address a natural person rather than an institution (“Address your

petition to people, not organisations”) and gives advice on how

to obtain the email addresses of decision-makers. Similar indications are also found on

the page “How can I contact the decision-maker?”18 on which the defendant indicates that it has a

database of decision makers in its systems in which the petition creator can

search for the name of a decision maker. Only when this name is not in the system of the
defendant, that the petition creator is asked to create a new recipient of
petition (“If your decision maker is not in our list, you must add their
contacts [sic] yourself so that he can be contacted”). The decision-making power exercised
the
defendant on the determination of the means of treatment is much more important than in the
case of other platforms, and it is only by the conjunction of the wills of the defending party
and of the creator of the petition that the means are determined in the common interest of one and all
the other, which makes them joint controllers.
64. The Litigation Chamber notes that in its additional submissions in reply, the party
defendant also details this process, but that the screenshots are different from
those found in the one provided by the inspection report and contains in particular a
additional step called “Petition letter”. The procedures for creating a petition and
sending emails seem to have changed over time (see points 98, 106, 113). Bedroom
Contentious recalls in this respect that it examines the disputed processing as it took place at the time
of the facts and vis-à-vis the complainant, without excluding that the way in which the means of the
treatment are determined may have changed after the disputed treatment.
65. Although these elements are sufficient in themselves to consider the defendant as a
joint controller, the Litigation Chamber recalls that according to the CJEU, the notion
controller must be understood in the broad sense. The CJEU indicates that
18 “Screenshots”, p. 9.

“the objective of this provision is to ensure, by a broad definition of the concept of “responsible
“, effective and comprehensive protection of data subjects”19.
66. This broad interpretation of the concept of controller finds its usefulness in the
this dispute. Indeed, it is the platform offered by the defendant that allows the creation of a

petition, without it being possible to identify or contact the petitioners.

This impossibility of identification was noted by the Inspection Service20. So it is indeed the platform offered by the defendant which deprives the complainant of any possibility of contacting the petitioner, while it is recognized by all parties how being (also) responsible of the treatment. In this case, due to the specificities of the platform, the complainant finds himself unable to contact the petitioner directly in order to exercise his rights. This situation fundamentally infringes the rights of the data subject.

67. In view of the points developed above, the Litigation Chamber considers that the defendant and the "Collective of associations" must be considered as being jointly responsible for the disputed treatment. The means to be implemented in order to be able to identify the people who created the petition on behalf of the "Collective of associations" being considered disproportionate by the Inspection Service, the Litigation Chamber decides to deal with the case against the joint controller, in this case, the defendant.

II.2.

As for the background

68. Given that the defendant can be considered a joint controller, the Litigation Chamber is continuing to examine the alleged violations. To do so, she relies on the elements that emerge from the investigation report as well as from the conclusions filed by the parties before the hearing. The alleged violations relate to the following points:

o The lack of basis for the lawfulness of the processing and the disproportionate nature of the frequency the sending of these emails to the complainant (articles 5.1,a,b,e) and 6 of the GDPR);

o The lack of information from the complainant about the processing of this data (Article 12 of the GDPR);

o The impossibility for the complainant to assert his rights as a data subject (Article 12 and Articles 15 to 22 of the GDPR).

19 CJEU, 13 May 2014, C 131/12, Google Spain and Google, , point 34, as well as 5 June 2018, C 210/16, Wirtschaftsakader

Holstein, item 28.

20 Investigation report, p. 9: "on the basis of these elements, the Inspection Service finds that the means to be implemented to

identifying the data controller would not be appropriate”

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II.2.a. Direct marketing (lawfulness of processing)

69. With regard to the criterion of the lawfulness of the processing among the bases set out in Articles

5.1.a) and 6 of the GDPR, the defendant indicates that it bases itself on Article 6.1, f) of the GDPR, that is to say on the

concept of legitimate interest. The complainant considers that the data processing in question constitutes

direct marketing, and that pursuant to Article 13.1 of the ePrivacy Directive, as well as Article

XII.13 of the Belgian Code of Economic Law, the consent of the data subject. As

in the alternative, he considers that the legitimate interest claimed by the defendant does not apply.

70. The complainant maintains that the disputed processing constitutes direct marketing and that, by

therefore, the consent of the person concerned was necessary for its sending. It is based for

do so on article 13.1 of the ePrivacy Directive21, as well as article XII.13 of the Belgian Code of Law

economic22. In its conclusions, the complainant uses the definition of direct marketing formulated

by the Knowledge Center The definition of direct marketing on which the complainant relies

is the one provided by the Knowledge Center and which is reproduced below:

“Any communication, whether solicited or unsolicited, aimed at promoting an organization or a

person, services, products, whether paid or free, as well as brands or

of ideas, sent by an organization or a person acting in a commercial or

non-commercial, directly to one or more natural persons in a private or

professional, by any means, involving the processing of personal data

personal. »

71. The defendant disputes that the emails sent to the complainant can be qualified as marketing

direct, since they are in fact petitions. It indicates that the petition is not sent

for advertising or commercial purposes but to inform the complainant, within the framework

of these public functions, the claims of citizens.

72. Before considering the exact qualification to be given to the processing, the Litigation Division,

recalls that the disputed processing consists of sending emails to the complainant about a

21 “The use of automated call systems without human intervention (automatic calls), fax machines or mail

electronic mail for the purpose of direct marketing can only be authorized if it targets subscribers who have given their consent

prior ".

22 “§ 1. The use of e-mail for advertising purposes is prohibited without the prior, free, specific and

informed of the recipient of the messages.

On the joint proposal of the Minister and the Minister responsible for Justice, the King may provide for exceptions to

the prohibition provided for in the first paragraph.

§ 2. When sending any advertising by e-mail, the service provider:

1° provides clear and understandable information concerning the right to object, for the future, to receiving advertisements;

2° indicates and makes available an appropriate means of effectively exercising this right by electronic means.”

contested initiative for which the latter was identified as the “decision maker”23. It is therefore not

not, contrary to what was invoked by the complainant, to examine “promoted petitions”24,

that is, petitions which may be, for a fee, promoted by the defendant on

its platform or on social networks. The case before the Chamber

Litigation does not concern this type of processing, but only the sending of emails to the complainant

as a decision maker. As indicated by the defendant in its submissions, the frequency of sending

of emails to the decision maker is not affected by whether a petition is “promoted” or not.

73. As indicated by the Inspection Service in its investigation report, the first email sent to the

complainant consists in informing him of the fact that he has been appointed as a “decision maker” within the framework of a

petition created on the platform provided by the defendant. Subsequent emails are intended to

inform him that the petition has already received a set number of signatures. The first email

notably gives the complainant the possibility of "viewing the petition", "replying to the petition", or

“continue the dialogue”26. The email in question does not contain a link to a privacy policy.□

confidentiality and does not contain a link to a contact address. About the□

number of emails received by the complainant, the Inspection Department came to the following conclusion:□

“At the date of the complaint, the complainant had received between 9 and 11 notification e-mails (or even less than 5□

given that the email of 100 signatures is considered by the plaintiff's lawyer to be the□

first e-mail received, see step 3/part 10). As of April 24, 2020 (3842 signatories), he would have received□

21. »27□

74. The introductory paragraph of the petition reads as follows:□

“The construction site for line 3 of the metro would gut Brussels for 10 years, from the Midi market to the□

square Riga, passing by the avenue de Stalingrad… However, there are faster solutions,□

less devastating and less ruinous to improve soft mobility! We ask the□

Brussels Region and the [Public Transport Company] to change course. It is still□

time. »□

75. In the present case, the Litigation Division considers it established that the processing in question□

constitutes a petition, that is to say, "a writing, most often collective, expressing a complaint, a□

request, a protest, and addressed to the competent authority.28”. The petition, when it is□

23 “Decision-maker” in the English documentation provided by the defendant. Translation by the Chamber□

Litigation.□

24 “promoted petitions” in the English documentation provided by the defendant. Translation by the Chamber□

Litigation.□

25 See in particular Exhibit 2 of the submissions in reply to the complainant, in which the “promoted petitions” are described in th

following: “Promoted Petitions are advertisements, allowing you to have your favorite petitions discovered by thousands of poten

supporters. Similar to boosted posts on Facebook or sponsored tweets on Twitter, promoted petitions let you pay to show any pe

(including your own) to other potential supporters on Change.org (http://change.org/) or our distribution channels.”□

26 Translation by the Litigation Chamber.□

27 Investigation report, p. 7.□

28 Dictionary of the French Academy, 9th edition, (Available: http://www.dictionnaire-academie.fr/article/A9P1813)

addressed to a public authority constitutes the exercise of a fundamental freedom recognized by the Belgian Constitution. Article 28 of the Belgian Constitution, which enshrines this freedom, is drafted in the following way:

"Everyone has the right to address to the public authorities petitions signed by one or more people.

The constituted authorities alone have the right to address petitions in collective name. »

76. The Litigation Chamber recalls that the GDPR does not define what is meant by " processing for prospecting purposes" or for "direct marketing" purposes according to the terminology English29. It is therefore appropriate to rely on the definition formulated by the Center for Knowledge, mentioned above. For the Litigation Chamber, the right to petition as defined previously cannot be assimilated to direct marketing according to the definition of the Center of Knowledge, given that the petition is a fundamental constitutional freedom, which does not aim "to promote an organization or a person, services, products, […] as well as trademarks or ideas, […] directly to one or more natural persons in a private or professional framework", but the submission of a collective complaint to an authority public or its leaders. The processing is therefore not covered by Article 13.1 of the ePrivacy Directive.

II.2.b. The basis of lawfulness and the frequency of sending letters

77. As regards the positions of the parties, the Litigation Division refers to points 15 to 23 above.

78. The Litigation Chamber has previously established both that the data processing in question does not constitute direct marketing and that the defending party does not claim the consent as the basis for the lawfulness of the processing, it therefore considers that only the basis for the legitimate interest provided for in Article 6.1. (f) must be subject to review. This is written as

follows:

“the processing is necessary for the purposes of the legitimate interests pursued by the data controller.

processing or by a third party, unless the interests or freedoms and rights

fundamentals of the data subject which require protection of personal data

personal, in particular when the person concerned is a child. »

79. The case law of the Court of Justice of the European Union asserts that three conditions

cumulative must be met for a data controller to be able to validly

29 Decision on the merits 80/2021 of 19 July 2021, § 18.

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invoke this basis of lawfulness, "namely, first, the pursuit of a legitimate interest by the

controller or by the third party or third parties to whom the data is communicated,

secondly, the necessity of the processing of personal data for the performance of

interest

legitimately sued and, thirdly,

the condition that

the rights and

them

freedoms

fundamental rights of the person concerned by data protection do not prevail" (judgment

"Rigas"30).

80. In other words, in order to be able to invoke the basis of lawfulness of "legitimate interest"

in accordance with Article 6.1.f) of the GDPR, the controller must demonstrate that:

1)

the interests it pursues with the processing can be recognized as legitimate (the

"finality test");

2)

the intended processing is necessary to achieve those interests (the “necessity test”);

and

3)

the weighing of these interests against the fundamental interests, freedoms and rights

data subjects weighs in favor of the data controller (the "test of

weighting").

81. With regard to the first condition (the so-called "finality test"), the Chamber

Litigation argues that the purpose of sending to a "decision maker", the leader of a

public company, a petition concerning the field of activity of his company to inform him

of the existence of this petition and to inform him of the evolution of the number of signatures collected

by the petition constitutes a legitimate purpose, particularly in view of the fact that the right to

Petition is a fundamental freedom enshrined in the Belgian Constitution.

Bedroom

Litigation does not dispute that the data controller may be moved, as the

maintains the plaintiff, by a commercial or profit-making interest in its general activity as

platform for launching and managing online petitions. This lucrative interest

characterized by its activity of “promoted petitions”, that is to say petitions which, against

remuneration, are promoted by the controller on various social networks. This

interest is not, however, to be confused with the purpose of the disputed processing, which in this case consists

to inform the decision-maker of the existence and progress of the petition, and for which, no

commercial transaction does not take place. The first condition is therefore satisfied.

82. In order to fulfill the second condition, it must be demonstrated that the processing is necessary for the

achievement of the aims pursued. This condition means precisely that one must ask oneself

if the same result cannot be achieved by other means, without data processing

of a personal nature or without substantial unnecessary processing for the data subjects. This

30 CJEU, 4 May 2017, C-13/16, Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvaldecontre Rīgas pašvaldības S

satiksme", recital 28. See also CJEU, 11 December 2019, C-708/18, TK c/ Asociația de Proprietari bloc M5A-ScaraA,

recital 40.

question is therefore also linked to the principle of data minimization which finds its source

in Article 5.1, c) of the GDPR.

83. In the present case, the question is therefore whether the achievement of the aim pursued (the exercise

of the right of petition) required the sending of a first email informing the "decision maker" of the existence of

the petition and subsequent emails informing him at regular intervals of the number of signatures

collected for the petition.

84. This implies considering the nature of the right of petition and the way in which it can be exercised. HAS

In this respect, as A. Heraut and G. Pijcke point out, the right to petition is "a full and

unconditional which is enshrined in Article 28 of the Constitution". It therefore follows that "the

legislator cannot subject the exercise of the right of petition to stricter conditions than

those provided for by the settlor, whether procedural, substantive or

admissibility."31 These conditions are therefore directly provided for in Article 28 of the Constitution.

85. It follows from this article that the scope of the right of petition is delimited by several

elements. These are first of all the holders of the right of petition, then the recipients of the

petition. In addition to this element, two formal conditions (the obligation to sign the petition,

and written nature of any petition32), as well as a substantive obligation33. From these conditions, the

Litigation Chamber will analyze more particularly that of the recipient of the petition, since it

This is precisely what is at stake in the dispute brought to its attention.

86. Article 28 of the Belgian Constitution specifies that petitions are addressed to the "authorities

public", denomination which includes "any body to which is entrusted a power of decision

legally defined and having a portion of public power"34. The company from which the

complainant is a general administrator, as a public law association organizing the

public transport in any part of the Kingdom, falls under this category.35

87. If it is well established that the company of which the complainant is general manager may be

recipient of a petition, the question arises whether the general administrator himself can

being. On this subject, the Litigation Chamber considers that if it is possible for petitioners

address a public authority without addressing a particular person, it is

nevertheless remains legitimate for petitioners to wish to address themselves specifically to the

head of the public authority in question, since it can be assumed that the sending to this person

would give the petition greater visibility than sending it to an email address

general for example. In this sense, the Litigation Chamber argues that sending the petition to

31 A. HERAUT and G. PIJCKE, “the right to petition”, Constitutional rights in Belgium (vol.2), Brussels, Larcier, 2011, p. 683.

32 Ibid, p. 694.

33 Ibid, p. 690.

34 Ibid, p. 692.

35 Ibid.

a generic email address does not necessarily mean sending to the email address of a

natural person exercising an essential managerial function within a company. By

therefore, the same purpose could not have been achieved without the processing of the email address of the

defendant (or another natural person with a similar function). It follows that the principle

minimization of data in accordance with Article 5,.1, c) of the GDPR is also not violated, since

the data in question (the complainant's email address) is necessary for the processing.

88. The right to petition is a fundamental freedom enshrined in the Constitution, which has the specificity

to be full and unconditional. It is not for the Litigation Chamber to decide instead

place of the petitioners of the person to whom they should or should not have addressed their complaint. In

In this case, deciding that a petition should be addressed to the general administrator of a

association under public law is part of the prerogative of the petitioner when exercising his right

constitutional. In this sense, the Litigation Chamber considers that the processing was necessary

to achieve the purpose.

The second condition is therefore fulfilled.

89. The Litigation Chamber recalls, however, that it is indeed the use of the email address

name of the complainant which triggers the application of the GDPR in this case. The use of a

general email address by the petitioners and the defendant would have had as

consequence that the sending of emails to a legal person would have escaped the scope

of the GDPR, since they would not have involved the processing of personal data (in

case: the email address of the complainant).

90. In order to check whether the third condition of Article 6.1.f) of the GDPR - the so-called "test of

balancing" between the interests of the controller on the one hand and the freedoms and rights

fundamentals of the person concerned on the other hand - can be fulfilled, it is also necessary

take into account the reasonable expectations of the data subject, in accordance with recital

47 GDPR. In particular, it must be assessed whether "the data subject can reasonably

expect, at the time and in the context of the collection of personal data, that

they are processed for a given purpose".36

91. This aspect is also underlined by the Court in its judgment "TK v. Asociația de Proprietari bloc

M5A-ScaraA" of December 11, 2019, which states the following:

"Also relevant for the purposes of this balancing are the reasonable expectations of the

data subject that his or her personal data will not be processed

36 Recital 47 GDPR.

where, in the circumstances of the case, that person cannot reasonably expect

to further processing thereof." 37

In this case, the interest of the data controller consists in exercising his right of petition

against the complainant. The complainant meanwhile receives several emails about this petition

in his professional mailbox, which constitutes an intrusion in his right to

protection of personal data, which is also a fundamental freedom

guaranteed by Article 22 of the Belgian Constitution, Article 8 of the European Convention on Human Rights

Rights and Article 8 of the Charter of Fundamental Rights of the European Union. For the

Litigation Chamber, it is therefore a question of carrying out a balance of interests between two freedoms

fundamentals.

92. It has been established above that the processing of the complainant's personal data was

necessary to achieve the purpose. In accordance with the third criterion established by the

case law of the CJEU, the Litigation Chamber examines whether this processing is proportional by

in relation to the intrusion into the complainant's right to the protection of personal data38.

93. The frequency of the processing can cause an intrusion in the protection of the data

personal information of the complainant who repeatedly receives emails in his mailbox

professional. In its investigation report, the Inspection Service estimated that in April 2020, the

complainant had received 21 emails about the petition. While this does not in itself constitute a violation

importance of the rights of the complainant, it is however a frequency of sendings which can be

perceived as irritating and as causing inconvenience in the management of a company

professional email.

94. In addition to the reasonable expectations of the data subject, another criterion which must also

consider a controller intending to use the legitimate interest as

basis of lawfulness is its obligation to provide additional safeguards in favor of the

concerned person. This aspect is emphasized by Group 29 in its opinion 06/201439:

“The test involves a comprehensive consideration of several factors, so as to ensure that the interests

and the fundamental rights of data subjects are duly taken into account. The

Factors to consider in this balancing act include:

[…]

- the additional safeguards that could limit any unjustified impact on the person

concerned, such as data minimization, technologies enhancing the protection of the

37 CJEU, 11 December 2019, C-107-18, TK v Asociația de Proprietari block M5A-ScaraA, recital 47.

38 As regards the number of emails received by the complainant, see point 73.

39 Article 29 Data Protection Working Party, Opinion 06/2014 on the notion of legitimate interest pursued by the

responsible for data processing within the meaning of Article 7 of Directive 95/46/EC", adopted on April 9, 2014.

private life ; greater transparency, a general and unconditional right to object to the

data processing and portability."

95. Providing for a right to object to processing is an essential element in this context. In

the absence of a real and effective right of opposition, we cannot indeed find a balance between

the legitimate interests pursued by the controller and the freedoms and rights

fundamentals of the data subject.

96. This guarantee should be read in conjunction with Article 21.4 of the GDPR which explicitly provides for the obligation

next :

"4. At the latest at the time of the first communication with the data subject, the right

referred to in paragraphs 1 and 2 is explicitly brought to the attention of the data subject and is

presented clearly and separately from any other information. »

97. The controller must therefore clearly formulate this right to object, in terms

simple and unambiguous, in all communications based on the legitimate interest and

from the first message. Moreover, this obligation is not new and already existed before

the entry into force of the GDPR, pursuant to Article 7 of Directive 95/46/EC41. In the present case,

it appears from the file that the complainant was not informed of this possibility when sending the

first email he received from the defendant, since this was not part of the information

contained in the email. This first email also did not contain a link to the privacy policy.

confidentiality of the defendant or a link to contact details (see point 73). the

complainant was therefore not properly informed of his right to object. Bedroom

Litigation considers, however, that this mention constitutes a clear obligation which has all its

importance in the case of automated sending of emails to data subjects who have not

not requested.

98. In these conclusions of April 12, 2021, the defendant indicates that it has put in place other

safeguards to limit the impact on the persons concerned and mentions a possibility

to request the erasure of the data as well as a possibility of “opt out”. She also does

reference to a link to the defendant's privacy policy as well as a data link

contact information that would be included in the first email sent to the "decision makers". This email being

different from the one sent to the complainant, it is not relevant for the examination of the treatment

litigious.

40 ZANFIR-FORTUNA, G., “Article 21. Right to object” in KUNER, C., BYGRAVE, L.A. and DOCKSEY, C. (eds.),The EU Gener

Protection Regulation: A Commentary, Oxford University Press, 2020, (508)516-517: “As explained by recitals 65 and 69 GDPR

right to erasure applies where the retention of the personal data infringes the GDPR or Union or Member State law to which the

controller is subject, while, on the contrary, the right to object applies when personal data is processed lawfully, but the data sub

wants the processing to stop on the basis of his or her particular situation.”

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

with regard to the processing of personal data and on the free movement of such data, OJ, L 281, 23.11.1995, p. 31–50

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99. As a result of the above elements, the Litigation Division finds that the processing of

data in question does not contain an additional and binding guarantee for the

preservation of the fundamental rights of the data subject. It follows that the test of

weighting was not met by the defendant and the disputed processing therefore does not meet the

criteria of Article 6.1.f). Since the defendant does not claim any other basis for the lawfulness of the processing,

the principle of lawfulness of Article 5.1.a of the GDPR in combination with Article 6.1.f of the GDPR has been

violated.

100. This impact on the complainant's rights must however be weighed against the complainant's right to petition.

the defendant, which is a constitutional freedom which has the specificity of being full and unconditional

(see point 84). In the present case, the right for citizens, associations, or foundations of power
address public authorities through petitions to report grievances about
matters of public interest constitutes a fundamental democratic guarantee. This is why the
Chambre Litigation considers that the processing consisting of sending emails to decision-makers in order to
informing them of the petition could be processed on the basis of legitimate interest (article 6.1.f of the GDPR),
provided that they fulfill the minimum mandatory guarantees, including facilitating the exercise of the right
of opposition.

II.2.c. The obligation of information and transparency

101. In the complaint form sent to the DPA, the complainant indicates that he has never received a policy
of confidentiality on the part of the data controller (then identified as being the “Collective
organisations”) and that this seems to him to be a violation of the principle of transparency. In
application of Article 12.1 and Articles 13 and 14 of the GDPR, any person whose data to
personal character are processed must, depending on whether the data is collected directly from
from it or from third parties, to be informed of the elements listed in these articles42.

102. In its investigation report, the Inspection Service attaches a copy of an e-mail sent to a
decision maker (provided by Change.org during the survey) to inform him/her that he/she has been added as a
decision-maker within the public transport company and therefore recipient of the petition. the
Inspection Service notes therein that "the decision maker is informed of the informed identity of the launcher of
petition, its status as a recipient of the petition/decision maker, the subject of the petition and the
opportunity to publish a response. The Litigation Chamber also notes that no
reference is made to a privacy policy and that the email in question, which constitutes the
first interaction between Complainant and Respondent also does not provide contact information
of the defendant's contact (see point 76).

42 Decision on the merits 41/2020 of 29 July 2020 of the Litigation Chamber of the DPA available via the webpage
https://www.autoriteprotectiondonnees.be/citoyen/publications/decisions

103. In its submissions in response, the defendant again provides a copy of an email which is

sent to a "decision maker" when the latter has been identified as such in a petition. Bedroom

Litigation finds that this copy of the email does contain a link to a policy of

confidentiality as well as an opportunity to contact the defendant. It therefore differs from

the sample email that had been provided by the defendant itself during the Service's investigation

Inspection (see points 64, 98, 106, 113).

104. By providing the complainant, in the first e-mail concerning the petition, with information that

limited to the informed identity of the petition launcher, his status as recipient of the

petition/decision-maker, the subject of the petition and the possibility of publishing a response, the defendant

has not complied with Article 12 of the GDPR, which refers to the elements listed in Article 14 of the GDPR 43.

Based on the elements present in the exhibit file, the Litigation Chamber concludes that the

defendant failed in its obligations to inform by not mentioning to the plaintiff, whose

the email address was processed in order to send him the petition and the subsequent emails processed, the

following elements:

-

the identity and contact details of the defendant as data controller or of

his representative (Article 14.1, a));

-

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the contact details of the data protection officer (Article 14.1, b));

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

as the legal basis for the processing (Article 14.1, c));

the categories of personal data concerned (Article 14.1, d));

the recipients or categories of recipients of the personal data

(Article 14.1,e));

-

the length of time the personal data will be retained or, where

this is not possible, the criteria used to determine this duration (Article 14.2, a));

-

the legitimate interests pursued by the controller on the basis of Article 6,

paragraph 1, point f) (Article 14.2, b));

-

the existence of the right to request from the controller access to the data to

personal character, the rectification or erasure of these, or a limitation of the

processing relating to the data subject, as well as the right to oppose the processing and

the right to data portability (Article 14.2, c));

-

the right to lodge a complaint with a supervisory authority (Article 14.2, e));

43 Article 14 applies and not Article 13 because the data was not obtained directly from the data subject, but

well through another data controller (the “Collective of associations”).

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105. The Litigation Division therefore finds a violation of Article 12.1 juncto 14 of the

GDPR.

106. It also appears from the documents in the file that on an undetermined date, the first email that the

defendant sends to a person identified as "decision maker" has been modified. It contains

now a link to the defendant's privacy policy, as well as a link that allows

to contact her. This privacy policy was added to the exhibit file by the Complainant

(the last modification date of the document is indicated as being April 15, 2021).

107. On examination, it appears that this privacy policy does not contain any mention of the

processing of data of a person identified as a "decision maker", the policy only targeting

signatories or creators of petitions Such a person is not currently in any way

informed of the processing of this personal data. It follows that the violation of Article 12.1

juncto 14 of the GDPR currently continues.

II.2.d. The exercise by the person concerned of his rights

108. As regards the positions of the parties, the Litigation Division refers to points 15 to

23 and 101 to 103 above.

109. In view of the elements developed above, it appears that the complainant was not

properly informed of these rights, as defined in Articles 15 to 22 of the GDPR, and in particular

in Article 21.4 of the GDPR, when processing such personal data. information

as developed in the current privacy policy of the defendant does not

still does not allow correct information to be given to the persons concerned (see point 107 above).

In addition, the lack of possibility given to the complainant to contact the controller

in a simple way when receiving the first email is also a problem, as much as

the absence of explicit mention of the possibility of exercising one's right of opposition (see points 94 et seq.).

110. In these first responses provided to the Inspection Service during the investigation, the defendant

answered the question whether the defendant could exercise these rights, as follows:

“It is the responsibility of the Data Controller to ensure that a data subject can exercise his or her

rights. As the Data Processor, Change.org, has ensured that a decision maker can contact

Change.org's Help Desk (https://help.change.org/s/contactsupport?language=en) in order to

learn more about our role and to answer any of their questions.”44

44 Free translation of the Litigation Chamber: “It is the responsibility of the data controller to ensure that a

data subject can exercise their rights. As a data processor, Change.org has made it possible for a decision maker to

contact Change.org Support (https://help.change.org/s/contactsupport?language=en) to find out more about

our role and to answer all his questions. »

111. The Litigation Chamber recalls that Article 12.2 of the GDPR also contains an obligation

for the data controller to facilitate the exercise of the rights conferred on the person

concerned under Articles 15 to 22.

112. It is apparent from the above points that the Respondent did not allow the Complainant to contact it

to exercise its rights, since it still identified itself as a subcontractor at the time. Otherwise,

the platform set up by the defendant did not allow the exercise of these rights either.

vis-à-vis the other data controller, since the latter was not identifiable or directly

reachable via the platform offered by the defendant (see paragraphs 44, 53, 54, 66). The service

of Inspection in its investigation report had also concluded that

the identification of the

responsible for

treatment

(the Collective of associations) would require resources

disproportionate45. It follows that the complainant was put in a position that made the exercise

of his rights, if not impossible, at the very least relatively complicated. The Litigation Chamber

therefore concludes that the controller has failed to facilitate the exercise of the rights of

the person. It therefore finds a violation of Article 12.2 of the GDPR.

113. In its summary submissions, the defendant indicates that a person indicated as

being "decision maker" can exercise a right of "opt-out" or opposition with regard to the sending of emails.

The Litigation Chamber refers in this respect to these findings made previously and

specifies that these links did not appear until after the investigation by the Inspection Service (see

dots 98, 106, 113). In addition, the privacy policy appended to the file (updated to 15

April 2021) does not contain any reference to “decision makers”, which affects their ability to inform themselves

on the exercise of their rights (see point 107).

114. In this case, although the complainant has not done so to date, the Litigation Chamber

considers that the complainant should have been able to exercise his right of opposition provided for in Article 21.1 of the

GDPR with respect to processing. This article is reproduced below:

“Rule 21

Right of objection

1. The data subject has the right to object at any time, for reasons relating to his or her

particular situation, to processing of personal data concerning him based on

Article 6(1)(e) or (f), including profiling based on these provisions. the

controller no longer processes the personal data, unless he

demonstrates that there are compelling legitimate grounds for the processing which override the

interests and the rights and freedoms of the data subject, or for the establishment, exercise or

defense of rights in court.

45 Investigation report, p. 8-9.

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[…]»

115. The exercise by a data subject of his right to object entails the need for a second

weighting test, distinct from that carried out for the lawfulness basis of legitimate interest (see points

90 and s.). As part of this examination, it is up to the data controller (in this case, the

defendant and/or the Collective of associations) to demonstrate that there are legitimate reasons and

imperative for the processing which prevails over the interests and the rights and freedoms of the person

concerned. In accordance with the principle of responsibility set out in Articles 5.2 and 24 of the GDPR, it is

it is up to this or these data controllers to carry out this analysis. If the Chamber

Contentitieuse cannot carry out this analysis in place of the controller(s),

however, it wishes to establish a few guidelines.

116. In this case, the impact on the rights of the complainant must be weighed against the right to petition

of the defendant, which is a constitutional freedom which has the specificity of being full and

unconditional (see paragraphs 84 and 100). In the present case, the right for citizens, associations,

or foundations to be able to address public authorities through petitions for their

reporting grievances about matters of public interest is a democratic guarantee

fundamental. Nevertheless, the use of automated platforms and digital tools to

facilitating the sending of petitions brings innovations in the exercise of the right to petition that were not

probably not foreseen by the original constituent power of 1831. The frequent sending of emails

aimed at keeping the decision-maker informed of the progress of the petition constitutes one of these innovations

recent. The Litigation Chamber judges that the right to the protection of personal data raises

certain guidelines regarding this type of processing, without these being able to carry

infringement of the essence of the right of petition.

117. For the Litigation Division, this second weighting test should in this case make it possible to

reduce the impact on the complainant's right to the protection of personal data, without

as much to call into question the foundations of the right of petition, the exercise of which constitutes

demonstrates a "legitimate and compelling reason for the processing".

118. The Litigation Chamber specifies in this respect that if the right of petition consists in being able

“address to the public authorities petitions signed by one or more persons”, it

does not necessarily imply the right to send emails repeatedly without any

possibility of objection. The exercise by a decision-maker of his right of opposition should enable him

to modulate and significantly reduce the frequency of sending emails, without preventing

sending, at a minimum, an email notifying the decision-maker of the launch of the petition and a final email

informing him of the number of signatures collected.

119. Furthermore, in the event that the email address used is incorrect or refers to a person

who is not the desired decision-maker, the data subject should also be able to exercise his or her

right of opposition. It will then be up to the data controller(s) to demonstrate that the

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data subject is effectively a decision maker to whom a petition may be legitimately

sent.

120. Under the liability principle of Articles 5.2 and 24 of the GDPR, the precise modalities of

this exercise are left to the discretion of the defendant, in compliance with the guarantees

provided by the Litigation Chamber above.

II.2.e. As for the damage

121. In its conclusions in response, the defendant considers that the plaintiff's damage is entirely

minimal fact given that it is only the receipt of several “unwanted” emails.

122. In this regard, the Litigation Division wishes to recall that the right to data protection

is a fundamental right of everyone enshrined in Article 8 of the Charter of Rights

fundamentals of the European Union. The controller therefore has no

discretion as to the extent of this right depending on the alleged low impact of

the breach, while the GDPR imposes a positive obligation, such as mentioning the

responsible for processing (Article 13 of the GDPR) or the communication of transparent information

(Article 12 of the GDPR). The Brussels Court of Appeal clarified this principle as follows in its 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:

"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 party processing the personal data

personal. A well-functioning banking institution can be expected that – when using

a computer program, he uses one that meets current standards, including the aforementioned right

to the correct spelling of the name. The right to rectification is a fundamental right. […] The

question whether […] damage would result from the erroneous mention of his surname

is not relevant. Such a condition is 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 Union

European Union, which cites the right of rectification as an element of the very essence of the right

fundamental for everyone to the protection of their personal data”46.

III. Regarding Violations and Sanctions

46 Brussels Court of Appeal, Judgment of 9 October 2019 (2019/AR/1006), p. 15 et seq.

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

1° dismiss the complaint without follow-up;

2° order the dismissal;

3° order a suspension of the pronouncement;

4° propose a transaction;

(5) issue warnings or reprimands;

6° order to comply with requests from the data subject to exercise these rights;

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

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

9° order the processing to be brought into conformity;

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

data recipients;

11° order the withdrawal of accreditation from certification bodies;

12° to issue periodic penalty payments;

13° to impose administrative fines;

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

international body;

15° forward the file to the public prosecutor's office in Brussels, who informs it of the follow-up

data on file;

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

data.

124. By virtue of the elements set out above, the Litigation Division finds a violation of

Article 5.1.a juncto 6.1.f of the GDPR, Article 12.1 juncto 14 of the GDPR as well as a violation of Article

12.2 GDPR.

125. In conclusion from the foregoing, and in view of all the circumstances of the case, the Chamber
Litigation considers that the reprimand (i.e. the call to order referred to in Article 58.2.b of the GDPR) is
in this case, the effective, proportionate and dissuasive sanction which is necessary with regard to the
defendant.

126. In addition, it orders the defendant to update its confidentiality policy in order to
reflect its qualification as joint controller of the processing which consists of sending emails
to the decision-makers of the petition and to inform them in accordance with Articles 12.1 and 14 of the
GDPR within three months.

127. The Litigation Chamber also found a violation of Article 12.2 of the GDPR. She
orders the defendant to update the form and content of the emails so that
the exercise of the rights of decision-makers is now facilitated upon receipt of the first email and this
within three months Given that the defendant has, since sending the first email to the
complainant, already modified the form and content of his emails, it is up to him to analyze the compliance
of these with the requirements of the Litigation Chamber.

128. The Litigation Chamber also orders the defendant to inform it, documents
evidence in support of compliance of the processing with respect to the points above and this
within the same time.

129. The Litigation Chamber considers that the imposition of a fine, which is a sanction provided for
Article 100. §1, 13° LCA and Article 58.2.i of the GDPR, is not appropriate in this case. In effect,
on the one hand, one of the main questions of the file concerns the articulation between two freedoms
fundamentals: the right to petition and the right to the protection of personal data.
The balance between these two freedoms implies that the data controller must carry out a
balancing of interests which can be tricky. The Litigation Chamber concludes that it is not
not appropriate in this specific case to impose a financial fine to sanction a
assessment which may differ from his own. The Litigation Chamber argues that the

publication by name also has a deterrent effect on the part of the defendant.

On the other hand, it appears on several occasions from the file that the defendant adapted certain functionalities of its platform in order to ensure better respect for the rights of individuals concerned. The Litigation Division considers it more appropriate in this case to allow the defendant to demonstrate that these modifications meet the requirements that it has developed in this decision, or to give him the opportunity to make additional changes if need and report to the Litigation Chamber.

IV. Publication of the decision

130. Given the importance of transparency regarding the decision-making process of the Chamber Litigation and in accordance with Article 95, § 1, 8° of the LCA, this decision is published on the website of the Data Protection Authority. In accordance with its Policy of

publication of the decisions of the Litigation Chamber47, the Litigation Chamber may decide to publish the decision with or without the identification data of the parties.

131. The Litigation Chamber, in its letter of October 12, 2021, expressly asked the parties to express themselves in writing on this point. In his submissions, the complainant objected to the publication of the decision containing his identification data. The defendant did not provide arguments as to whether or not to maintain their identification data in the publication of the decision.

132. The Litigation Chamber therefore decides that the maintenance of the identification data of the defendant is justified on grounds of public interest. Indeed, as the defendant points out itself in its additional submissions in reply, "With more than 329 million members around the world, Change.org PBC is the largest global platform for citizens and organizations to start, sign, and support petitions on issues important social and community. Change.org PBC empowers everyone, whether natural persons, associations or organizations, to start a petition on its

platform totally free. It thus provides citizens with a tool enabling them

to exercise their right to petition, recognized in the majority of democratic States. »48

133. The importance of the defendant and the place of its platform in the implementation of the right to

petition in contemporary democracies, make a decision rendered against it

definite public interest. It is also of interest to all signatories and recipients

Belgians of petitions managed by the defendant. In this regard, the Litigation Chamber notes that for

the only contentious petition, there are more than 3,500 signatories and four decision makers who all have a

office of high public responsibility. The Litigation Chamber considers that the manner in which

the defendant processes the personal data is in the general interest which justifies that his identity

be maintained.

134. On the other hand, it does not appear that the complainant's identification data are necessary for the

understanding of the decision, reason why the Litigation Chamber decides to withdraw them.

47 Available on

decisions-of-the-litigation-chamber.pdf)

48 Additional Reply Submissions, p. 5.

the website of

ODA (https://www.autoriteprotectiondonnees.be/publications/politique-de-publication-des-

FOR THESE REASONS,

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

- Pursuant to Article 100, §1, 9 of the LCA, to order compliance of the processing

- Under Article 100, §1, 5 of the LCA, to impose a reprimand;

- To order the defendant to inform, with supporting documents, the Authority of

data protection (Litigation Chamber) of the follow-up to this decision

and within the same timeframe. This communication can be done by e-mail addressed to the address

(contact address of the Litigation Chamber): litigationchamber@apd-gba.be.

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

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

data protection as defendant.

(se). Hielke Hijmans

President of the Litigation Chamber