

Litigation Chamber

Decision on the merits 28/2020 of 29 May 2020

File number: DOS-2019-04191

Subject: **Complaint for the sending of advertising by the asbl Y**

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

Hijmans, chairman, and Messrs. Frank De Smet and Yves Pouillet, members;

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

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

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

data protection, hereinafter the "GDPR");

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

ACL;

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;

Decision on the merits 28/2020 - 2/13

made the following decision regarding:

-

-

X, "the complainant"; and

Y, "the defendant".

1. Facts and procedure

1. On August 8, 2019, the complainant filed a complaint with the Data Protection Authority against  
the defendant.

2. The subject matter of the complaint relates to the complainant's repeated receipt by mail of material

promotion by the defendant, despite the fact that the plaintiff asked (several  
occasions) to the defendant to no longer send him this type of promotional material and to delete his  
personal data.

3. On August 27, 2019, the complaint was declared admissible on the basis of Article 58 of the LCA, the complainant  
is informed in accordance with article 61 of the LCA and the complaint is forwarded to the Chamber  
Litigation under article 62, § 1 of the LCA.

4. On September 12, 2019, the Litigation Division decides, pursuant to Article 95, § 1, 1° and  
Article 98 of the LCA, that the complaint can be dealt with on the merits.

5. By registered letter of September 12, 2019, the parties are informed that the complaint  
may be dealt with on the merits and, under Article 99 of the LCA, they are also informed of the  
deadlines for submitting their conclusions.

6. On October 6, 2019, the Litigation Chamber received an email from the complainant containing photos  
new advertisements that the defendant sent him by mail.

7. On October 10, 2019, the Litigation Chamber received the defendant's submissions.

8. By e-mail of December 7, 2019, the complainant informed the Data Protection Authority of the fact  
that she again received promotional material from the defendant and attached evidence of it.

2

Decision on the merits 28/2020 - 3/13

9. By e-mail of April 27, 2020, the Litigation Chamber informed the defendant of the intention to impose  
an administrative fine as well as the amount of the fine and the defendant's possibility of  
report its conclusions on the matter.

10. The Litigation Division did not, however, receive any reaction from the defendant concerning this  
intention to impose an administrative fine.

2. Legal basis

Article 6.1 GDPR

"1. The processing is only lawful if and insofar as at least one of the following conditions is

filled: ☐

a) the data subject has consented to the processing of his or her personal data for one or ☐  
several specific purposes; ☐

b) the processing is necessary for the performance of a contract to which the data subject is party or ☐  
the execution of pre-contractual measures taken at the latter's request; ☐

c) processing is necessary for compliance with a legal obligation to which the data controller ☐  
treatment is submitted; ☐

d) processing is necessary to protect the vital interests of the data subject or of a ☐  
other natural person; ☐

e) the processing is necessary for the performance of a task carried out in the public interest or relating to the exercise of ☐  
the public authority vested in the controller; ☐

f) 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 fundamental rights and freedoms prevail ☐  
of the data subject who require protection of personal data, in particular ☐  
when the data subject is a child. ☐

Point (f) of the first paragraph does not apply to processing carried out by public authorities in ☐  
the execution of their missions. ☐

Article 17.1.c) GDPR ☐

"1. The data subject has the right to obtain from the controller the erasure, within the ☐  
as soon as possible, of personal data concerning him and the controller has ☐  
the obligation to erase this personal data as soon as possible, when one of the ☐  
following grounds apply: (...) ☐

3 ☐

Decision on the merits 28/2020 - 4/13 ☐

c) the data subject objects to the processing pursuant to Article 21(1) and there is no ☐  
no overriding legitimate grounds for the processing, or the data subject objects to the processing ☐

pursuant to Article 21, paragraph 2;"

Article 17.1.d) GDPR

"1. The data subject has the right to obtain from the controller the erasure, within the

as soon as possible, of personal data concerning him and the controller has

the obligation to erase this personal data as soon as possible, when one of the

following grounds apply: (...)

d) the personal data has been unlawfully processed;"

Article 21.2 GDPR

"2. When personal data is processed for prospecting purposes, the person

data subject has the right to object at any time to the processing of personal data

concerning for such prospecting purposes, including profiling insofar as it relates to a

such prospecting.

Article 21.3 GDPR

"3. When the data subject objects to processing for prospecting purposes, the data to be

personal character are no longer processed for these purposes."

Article 21.4 GDPR

"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."

3. Motivation

3.1.

Regarding the violation of Articles 17.1.c), 21.2 and 21.3 of the GDPR

11. It appears from the documents in the file that with regard to the repeated receipt of promotional material from

the part of the defendant, the plaintiff asked him by e-mail of July 5, 2019 not to send her any more

this kind of promotional material and to erase his personal data:

4

"Sir,

After having already asked you for it previously, request unfortunately remained without

following, I would again like to urge you to stop using my email address.

inappropriate manner for sending gadgets for the purpose of raising funds for your

organization. Please delete my address immediately. I have indeed never

given my consent under the GDPR to use my address. (...)" [NdT: all

the passages from the documents in the file are free translations made by the

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

12. Plaintiff directs this motion to Defendant regarding receipt of gadgets by mail

- namely a bimonthly magazine and a ballpoint pen bearing the defendant's logo.

13. The Respondent does not, however, reserve any favorable response to this request and continues to send

promotional material similar to the complainant.

14. Even after notification of the complaint by the Data Protection Authority to the defendant

(by letter of September 12, 2019), the latter continues to process data for the purposes of

direct marketing.

15. By email of October 6, 2019, the complainant informed the Data Protection Authority

the receipt of new promotional material from the defendant - namely a magazine and

a toiletry bag - and attached proof of it.

16. By e-mail of October 10, 2019, the Respondent sends its conclusions to the Litigation Chamber.

In response to the complaint, the defendant claims that the data of the complainant was recorded

in her database since the complainant made a donation in 2012 to the benefit of the

respondent. The latter asserts that they "disregarded [the complainant's] request to terminate

correspondence from [the defendant]" and that in the meantime they ensured that the plaintiff did not receive

no more mail from their departments.

17. Furthermore, the Respondent asserts in its defense the following:

“We keep donor data for another 10 years after their last donation, like  
this is specified in our "privacy" clause and communicated to all our donors when  
the introduction of the new GDPR.

Since [the defendant] is always looking for donors to support his projects [...],  
we regularly contact our former donors in writing in the hope that they wish  
to reiterate their past financial support.

5

Decision on the merits 28/2020 - 6/13

For these fundraising activities, we rely on "legitimate interest" as  
legal basis for processing personal data, not consent  
explicit from the donor. [The defendant] can only achieve its objectives by means of  
the necessary means. Therefore, it is important for us to (be able to) address ourselves to a  
target audience as wide as possible".

18. By e-mail of December 7, 2019, the complainant informed the Data Protection Authority of the fact  
that she again received promotional material from the defendant and attached evidence of it.

This is a letter dated November 26, 2019 asking the complainant to make a "Christmas gift".

19. The Litigation Chamber considers that the sending of this type of advertising must be considered as  
"prospecting" within the meaning of Article 21 of the GDPR. It uses in this context the definition such as  
included in Recommendation No. 1/2020 of the Data Protection Authority relating to  
processing of personal data for direct marketing purposes, worded as follows:

“Any communication in any form, whether solicited or unsolicited, from  
of an organization or a person and aimed at the promotion or sale of services,  
products (paid or not), as well as brands or ideas, addressed by an organization  
or a person acting in a commercial or non-commercial context, which is addressed  
directly to one or more natural persons in a private or professional context and  
involving the processing of personal data.”<sup>1</sup>

This definition develops in particular the proposal for a Regulation of the European Parliament and of the

Advice on respect for privacy and the protection of personal data in

electronic communications and repealing Directive 2002/58/EC<sup>2</sup>.

20. This is an unsolicited communication sent by mail to the person

concerned and aimed at the promotion of the services of the defendant, on the one hand, and the raising of funds by the

defendant, on the other hand. The communication requires the processing of personal data,

namely the name and address of the person concerned.

21. In accordance with recital 70 of the GDPR, in the event of the processing of personal data

personal information for prospecting purposes, the data subject has the right, at any time and free of charge, to

to object to this processing, and whether or not it is an initial processing or a subsequent processing.

1 Recommendation of the Data Protection Authority n° 01/2020 of January 17, 2020 relating to data processing

of a personal nature for direct marketing purposes, e.g. 8.

2 COM(2017) 10. Article 4 of the proposal defines: " "direct marketing communications": any form

advertising, both written and oral, sent to one or more end users, identified or identifiable, of services of

electronic communications, including by means of automated communication and calling systems, with or without

human intervention, by e-mail, SMS, etc."

6

Decision on the merits 28/2020 - 7/13

22. Article 21.3 of the GDPR provides in this respect that "Where the data subject objects to the

processing for prospecting purposes, personal data is no longer processed for these

purposes".

23. In the context of direct marketing, such opposition must therefore give rise immediately

and without additional examination to the pure and simple cessation of all data processing of the person

concerned for these direct marketing purposes<sup>3</sup>.

24. In the present case, however, the Respondent does not respond to the opposition formulated by the

data subject under Article 21.2 of the GDPR and continues to process data for the purposes

of direct marketing, and this at least five months after the complainant's last opposition and three

months after notification of the complaint to the defendant by the Data Protection Authority.

25. The defendant therefore violates Articles 21.2 and 21.3 of the GDPR.

26. The data subject not only objects to the processing of his data to

personal character for direct marketing purposes but also asks the defendant in his

email of July 5, 2019 to delete his data. The data subject thus invokes his right in

pursuant to Article 17 of the GDPR.

27. In accordance with Article 17.1.c) of the GDPR, the data subject has the right to

of the controller of the right "to obtain the erasure, as soon as possible, of data

personal character concerning him" when he "objects to the processing under Article 21,

paragraph 2".

28. The Respondent does not, however, reserve any favorable response to this request for erasure of the

data of the complainant and thus also violates Article 17.1.c) of the GDPR.

3.2.

Regarding the violation of Articles 6.1 and 21.4 of the GDPR

29. In its letter of defense dated October 10, 2019, the defendant states that for its direct marketing

with regard to former donors with a view to raising funds, he invokes the "legitimate interest" (article 6.1.f)

of the GDPR) as the legal basis for the processing of personal data and not the

explicit consent of the data subjects (article 6.1.a) of the GDPR), in order to "(power)

address the widest possible target audience.

3 Recommendation of the Data Protection Authority n° 01/2020 of January 17, 2020 relating to data processing

of a personal nature for direct marketing purposes, e.g. 53.

7

Decision on the merits 28/2020 - 8/13

30. Although the GDPR does not completely exclude the use of legitimate interest as a basis

of lawfulness for the processing of personal data for direct marketing purposes, this does not



does not mean that each processing for prospecting purposes can be considered as

legitimate<sup>4</sup>.

31. In accordance with Article 6.1.f) of the GDPR and the case law of the Court of Justice of the Union

European Union (hereinafter "the Court"), three cumulative conditions must in fact be met for a

responsible for the processing can validly invoke this basis of lawfulness, "namely,

first, the pursuit of a legitimate interest by the controller or by the third party(ies)

to whom the data is communicated, secondly, the necessity of the processing of the data to

personal character for the achievement of the legitimate interest pursued and, thirdly, the condition

that the fundamental rights and freedoms of the person concerned by data protection

do not prevail" (judgment "Rigas"<sup>5</sup>).

32. 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)

2)

3)

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

(the "finality test");

the intended processing is necessary to achieve those interests (the "necessity test"); and

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

data subjects weighs in favor of the controller (the "weighting test").

33. With regard to the first condition (the so-called "purpose test"), the GDPR recognizes

that the processing of personal data for direct marketing purposes may in itself be

considered to be made for a legitimate interest<sup>6</sup>.

34. In this case, these are direct marketing messages addressed to former donors with a view to

the promotion of the services of the defendant and the raising of funds by the latter from these

former donors. According to recital 47 of the GDPR, the interest that the defendant was pursuing

as controller can in itself be considered legitimate. The first one

condition set out in Article 6.1.f) of the GDPR is therefore fulfilled.

4 Recommendation of the Data Protection Authority n° 01/2020 of January 17, 2020 relating to data processing

of a personal nature for direct marketing purposes, e.g. 49.

5 CJEU, 4, C-13/16, Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA „Rīgas satiksme”, recital 28. See also CJEU, 11 December 2019, C-708/18, TK c/ Asociația de Proprietari bloc M5A-ScaraA, recital 40.

6 Recital 47, in fine, of the GDPR.

8

Decision on the merits 28/2020 - 9/13

35. In order to fulfill the second condition, it must be demonstrated that the processing is necessary for the achievement of the aims pursued. This means more precisely that one must ask oneself whether the same result cannot be achieved by other means, without processing personal data

personnel or without unnecessary substantial processing for data subjects<sup>7</sup>.

36. In this case, it can be considered that the processing of personal data was

necessary for the achievement of the purpose defined by the controller, namely the sending of direct mail marketing messages to past donors to raise funds.

In order to address this direct marketing to the persons concerned, their name and address are processed.

The purpose thus defined by the controller could not actually be achieved

without the aforementioned processing of personal data.

37. The fact that the interest pursued by the controller is legitimate and that the processing of

personal data is necessary to achieve this purpose, however, is not sufficient to

that the data controller can validly invoke Article 6.1.f) of the GDPR.

38. 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 data subject on the other hand - can be fulfilled, in accordance with the

recital 47 of the GDPR, the reasonable expectations of the person must first be taken into account

concerned. 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"<sup>8</sup>.

39. 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

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

expect further processing of these."

7 Recommendation of the Data Protection Authority n° 01/2020 of January 17, 2020 relating to data processing

of a personal nature for direct marketing purposes, e.g. 49.

8 Recital 47 GDPR.

9 CJEU, 11 December 2019, C-708/18, TK v Asociația de Proprietari block M5A-ScaraA, recital 58.

9

Decision on the merits 28/2020 - 10/13

40. In this case, the question arises whether the Complainant could reasonably expect

that his personal data be used for direct marketing purposes with a view to

a fundraiser just over seven years after the data was collected.

41. In addition to the reasonable expectations of the data subject, a second element to be

also consider a controller intending to use the legitimate interest

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

the person concerned. This aspect is highlighted by Group 29 in its opinion 06/2014<sup>10</sup>:

"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. Factors to

to be taken into account in this balancing are in particular:

[...]□

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

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

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

data processing and portability.”□

42. 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 find a balance between□

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

of the person concerned.□

43. The unconditional nature of this right of opposition is specific to processing for the purposes of□

direct marketing and is guaranteed by Article 21.3 of the GDPR (see above). As specified above,□

this opposition in the context of direct marketing must give rise immediately and without examination□

additional to the pure and simple cessation of all data processing of the data subject for□

direct marketing purposes<sup>11</sup>.□

44. In accordance with recital 70 of the GDPR in fine, and Article 21.4 of the GDPR, the controller□

processing must also facilitate this right to object in the context of direct marketing:□

“When personal data is processed for prospecting purposes, the□

data subject should have the right, at any time and free of charge, to object to this□

processing, including profiling insofar as it relates to such prospecting, whether□

10 Opinion 06/2014 on the notion of "legitimate interest pursued by the data controller", adopted on 9 April 2014□

by Group 29, p. 3.□

11 Recommendation of the Data Protection Authority n° 01/2020 of January 17, 2020 relating to data processing□

of a personal nature for direct marketing purposes, e.g. 53.□

10□

Decision on the merits 28/2020 - 11/13□

whether it is initial or subsequent treatment. This right should be explicitly extended to□

the attention of the data subject and presented clearly and separately from any other

information.”<sup>12</sup>

“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.”<sup>13</sup>

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

simple and unambiguous, in all direct marketing messages, from the first

message<sup>14</sup>. It is not enough to include the possibility of exercising this right in the declaration of

confidentiality; this possibility must be offered explicitly to the data subject<sup>15</sup>. This

obligation is not new and already existed, before the entry into force of the GDPR, under

article 7 of Directive 95/46/EC<sup>16</sup>.

46. In the present case, the defendant does not fulfill this obligation imposed by Article 21.4 of the GDPR

and clarified by recital 70 of the GDPR. In its defence, the defendant refers to its declaration of

confidentiality but does not demonstrate that it has effectively facilitated the exercise of the right of opposition,

as required by Article 21.4 of the GDPR. Indeed, the marketing messages transmitted as

evidence by the complainant does not mention the possibility of exercising the right of opposition.

47. The defendant has therefore not effectively guaranteed the general and unconditional right of opposition

applicable to the processing of personal data for direct marketing purposes and has not

fulfilled its obligation to provide effective additional safeguards from the outset

which can limit possible unintended consequences for the data subject.

48. Since this element is essential in order to be able, as controller, to

validly invoke Article 6.1.f) of the GDPR (legitimate interest) as the basis of lawfulness for the

processing of personal data for direct marketing purposes, it must be concluded in this

<sup>12</sup> Recital 70 GDPR.

<sup>13</sup> Article 21.4 of the GDPR.

<sup>14</sup> ZANFIR-FORTUNA, G., “Article 21. Right to object” in KUNER, C., BYGRAVE, L.A. and DOCKSEY, C. (eds.), *The EU General*

Protection Regulation: A Commentary, Oxford University Press, 2020, (508)516-517: “As explained by recitals 65 and 69 GDPR the 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 subject wants the processing to stop on the basis of his or her particular situation.”

15 Recommendation of the Data Protection Authority No. 01/2020 of January 17, 2020 relating to data processing of a personal nature for direct marketing purposes, e.g. 53.

16 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (OJ L 281 of 23.11.1995, p. 31).

11

Decision on the merits 28/2020 - 12/13

case that the third condition ("weighting test") has not been fulfilled and the defendant does not could not validly continue the processing under Article 6.1.f) of the GDPR.

49. The defendant therefore violates Articles 6.1 and 21.4 of the GDPR.

50. Violations of the above provisions are subject to administrative fines mentioned in Article 83.5 of the GDPR.

51. Taking into account the criteria set out in Article 83.2 of the GDPR as well as the case law of the Court contracts<sup>17</sup>, the Litigation Chamber justifies the imposition of an administrative sanction in this case based on the following circumstances:

-

the nature, gravity and duration of the breach (Article 83.2.a) of the GDPR), namely the character continuous violation of Articles 6.1, 17.1.c) and d), 21.2, 21.3 and 21.4 of the GDPR for at least five months after the last opposition and request to erase the data from the

complainant and three months after notification of the complaint to the defendant by the Protection Authority Datas ;

the fact that this is the first breach observed by the controller

concerned (article 83.2.d) of the GDPR);

the degree of cooperation established with the supervisory authority with a view to remedying the breach and

mitigate any negative effects (article 83.2.f) of the GDPR): contrary to what the

defendant asserts in his defense dated October 10, 2019, despite opposition and

request for erasure of the complainant's data and notification of the complaint by the Authority

data protection, the latter has not taken the necessary measures to put

immediately put an end to the violations described above; he continued the data processing

pursuant to GDPR Article 6.1.f) (legitimate interest) for direct marketing purposes; and

the fact that the defendant is a non-profit association with a limited turnover

(article 83.2.k) of the GDPR).

-

-

-

52. The Litigation Chamber emphasizes that in this case, the other criteria of Article 83.2 of the GDPR do not

are not such as to give rise to an administrative fine other than that fixed by the Chamber

Litigation in the context of this decision.

17 Brussels Court of Appeal (Cour des Marchés section), judgment 2020/1471 of 19 February 2020.

12

Decision on the merits 28/2020 - 13/13

53. The Litigation Chamber considers that this fine is proportional given the annual accounts

published by the defendant in the Belgian Official Gazette for the 2018 financial year (positive result between 500,000 and

€600,000).

54. Given the importance of transparency regarding the decision-making process of the Chamber

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

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

directly communicated.

FOR THESE REASONS,□

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

-□

pursuant to Article 58.2, c) and g) of the GDPR and Article 95, § 1, 6° of the LCA, to order□

the defendant to grant a favorable response to the request for erasure of the data from the□

complainant in accordance with Article 17.1.c) of the GDPR, within one month of receipt of□

this decision and to inform the plaintiff as well as the Litigation Chamber in this□

same deadline; and□

pursuant to Article 83 of the GDPR and Articles 100, § 1, 13° and 101 of the LCA, to impose□

an administrative fine of 1000 euros to the defendant for violation of articles 6.1, 17.1.c) and□

d), 21.2, 21.3 and 21.4 GDPR.□

-□

Under article 108, § 1 of the LCA, this decision may be appealed within a period□

thirty days, from the notification, to the Court of Markets, with the Authority for the Protection of□

given as defendant.□

(Sr.) Hielke Hijmans□

President of the Litigation Chamber□

13□