

Litigation Chamber

Decision on the merits 82/2020

from December 23, 2020

File number: DOS-2019-05498

Subject: Complaint regarding the need to create a Microsoft account to download a

FPS Finance document

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

Hijmans, chairman, and Messrs Jelle Stassijns and Christophe Boeraeve, members;

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

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

"LCA";

Having regard to the internal regulations as approved by the House of Representatives on

December 20, 2018 and published in the Belgian Official Gazette on January 15, 2019;

Considering the documents in the file;

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made the following decision regarding:

- Mr. Willem Debeuckelaere, domiciled at [...] hereinafter "the complainant", and

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the SPF Finances, with company number 0308.357.159, and whose registered office is located at

1030 Brussels (Schaerbeek), Boulevard du Roi Albert II, 33 box 10 (North Galaxy), below

"the defendant" ; counseled by Maître Agnès Maqua, lawyer, and Maître Willem-Jan

Cosemans, lawyer, both having their office at 1170 Brussels, Chaussée de la Hulpe, 166.

1. Facts and procedure

The complaint

1. In his complaint of October 24, 2019, the complainant expresses his objection to a practice on

the website of the FPS Finances. This practice requires citizens (as people

concerned) to log in with a Microsoft¹ user account in order to access a brochure

determined, more precisely "invoice with exemption from VAT" (and to be able to download it,

if applicable). According to the complainant, this practice would be problematic in light of the GDPR and

more specifically in the light of the recommendation of 6 February 2019 from this Authority,²

concerning "The obligation to create a user account with Microsoft to consult

utility applications".

2. Prior to filing his complaint, the Complainant had himself contacted the Respondent about

his objection and

also attached to

his complaint evidence to

this regard.

3. On September 26, 2019, the Complainant requested information from the Respondent regarding the

practice complained of. This request for information concerned in particular the

whether or not the aforementioned recommendation applies.

4. The Respondent communicated the same day and asked the Complainant to specify the hyperlink by

question. Complainant provided the exact hyperlink to Respondent on October 3, 2019. Complainant provided

further provided some screenshots to support his point. □

1 When reference is made to 'Microsoft' in this decision, it is the legal person Microsoft Corporation having its □

headquartered at One Microsoft Way, Redmond (WA 98052-6399) in the United States of America, with an establishment in Bel □

Brussels National Airport ZN, Building 1K, 1930 Zaventem and having the company number 0437.910.359 in the Bank- □

Business Crossroads. □

2 Data Protection Authority Knowledge Centre, Recommendation No. 1/2019, available via: □

<https://www.autoriteprotectiondonnees.be/publications/recommandation-n-01-2019.pdf>. □

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5. On October 15, 2019, after consultation with the "Service de sécurité de l'information et de protection de □

privacy" of the defendant, the defendant made it known that a new ICT application was in □

course of development. The objective was to arrive at a system which would allow access to the □

public part of FisconetPlus via MyMinfin. Identification and authentication would then be done □

via the Federal Authentication Service (hereinafter "FAS"), which □

would eliminate the need to create a Microsoft account. This system should be operational □

early 2020. □

In the meantime, according to the Respondent, a transitional solution had been introduced since □

January 31, 2019, giving the user the ability to access this documentation through a □

anonymous account, created through a third-party service provider, namely Microsoft. □

6. On October 29, 2019, the complaint was declared admissible by the Frontline Service and the Chamber □

Litigation is seized of it. □

The Inspection Service investigation □

7. On November 29, 2019, the Litigation Chamber requested an investigation from the Inspection Service. □

In its request under article 94, 1° of the LCA, the Litigation Chamber affirms what □

follows: "The Litigation Chamber [...] noted that there was an imprecision as to the position □

of the FPS Finances according to which it is possible, as a temporary solution, to access the □

documentation with an anonymous account created by Microsoft without collecting personal data □

personal, more particularly to what extent it is or is not possible that this account is created

by Microsoft without collecting personal data, in particular in which

whether or not it is possible that this account is truly anonymous."

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

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

8. Once the Inspection Service has been seized of the case under Article 63, 2° of the LCA, it has

sent a letter directly to the Chairman of the Respondent's Management Committee on December 5

2019 for additional information. These were questions

following (screenshot of the letter from the Inspection Service):

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9. On January 10, 2020, the DPA Inspection Service receives a written reaction from the defendant. The

Respondent's responses are worded as follows:

(Question 1) "Upon receipt of the recommendation from the Data Protection Authority,

the FPS Finances, in a first phase:

1. given access to a basic search engine via the MyMinfin portal, without identification

of the user (entry into force in the first quarter of 2019),

2. provided anonymous access through an anonymous account (effective from the second

quarter of 2019). In a second phase, the project is launched for the development

a version that places public content from FisconetPlus on MyMinfin. This version

final, which does not require an anonymous account but which allows authentication

by means of a FAS identification, will replace all other current solutions for

the external public of FisconetPlus, i.e. the FisconetPlus versions with account

Microsoft, the simple search engine via MyMinfin and the version with Microsoft account

anonymous."

(Question 2) "Several cases are possible:

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1. The user has already opened access to the portal (via a registered account or the solution□ anonymous). In this case, clicking on a link will give direct access to the□ document.□

2. The user has opened while still having access to the portal, he receives a message in which□ we ask for identification. Either the user has an account and identifies himself. He has access to□ documents. Either the user does not have an account or does not wish to create an account,□ the user can copy the URL and use the possibility of anonymous access via MyMinFin,□ as mentioned in answer 2.□

3. The user can also note the title of the document he wishes to consult and use□ the search engine available via MyMinfin."□

(Questions 3 and 4) "At the beginning of January 2019, anonymous access to FisconetPlus was planned. Its□ objective is that no more personal data is requested from the person□ who wishes to access the application. There can therefore be no problem for the□ data processing that does not exist. We refer to answer 2 with regard to the□ anonymous Microsoft account content."□

(Question 5) "The decision to build a new technical environment in order to access□ Fisconet, without having to use a Microsoft account, was taken internally by the FPS Finances□ on January 14, 2019 (after preparatory meetings in December 2018). This decision was□ taken, in the presence of the DPO, jointly by the Chairman of the Management Committee, the□ of the ICT support service and the Director in charge of managing the General Administration Expertise and□ Strategic support. The decision was communicated to Microsoft the same day. Given□ that the temporary and definitive technical solutions have been taken in accordance with the□ recommendation no. 91/2019 of February 6, 2019, it was not necessary to send another□ recommendation to the Chairman of the Management Committee. On the other hand, in mid-February 2019 (the 12,□ 13, 19 and 21 February), e-mails were exchanged between the Chairman of the Management Committee□ and the DPO regarding the aforementioned recommendation (n° 91/2019). The recommendation was□

communicated with the decision to adapt access to Fisconet. In addition, on 23 and

October 24, 2019, the DPO informed the Chairman of the Management Committee by e-mail on the one hand,

of the requests of the [complainant], and on the other hand, of the complaint of the [complainant] to the Authority

data protection."

10. On 17 January 2020, the Inspection Service sent a letter specifically to the delegate for the

data protection (hereafter: DPO) of the defendant to ask him some questions. the

Inspection Service states in this letter that no concrete answer has been given to the

questions 3, 4 and 5. The Respondent's DPO is requested to forward these answers together with the

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documents supporting the Respondent's view that "(temporary) solutions are

comply with recommendation 1/2019".

11. On February 4, 2020, the Respondent's DPO responds to the Inspection Service. The essential elements

of this response can be summarized as follows:

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With regard to questions 3 and 4: "the ICT Supervisory Service has confirmed that at no

moment the user does not provide any information about himself, Microsoft does not have

so no personal or private information. ICT did not provide me with copies of documents,

emails, ... with Microsoft".³

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With respect to question 5, the Respondent's DPO asserts the following: "I myself have

made the draft answer to question 5 and I believe that it is answered concretely. I do not

can provide documents that do not exist." ⁴

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Regarding the DPA's recommendation, the Respondent asserts that the internal decision

of the defendant (regarding the switch from Microsoft tools to an internally developed solution)

dated January 14, 2019. This date predates the DPA's recommendation of

February 6, 2019.□

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The Respondent's DPO asserts that these new solutions are compatible with the□
recommendation. The technique previously used, however, was not. The DPO says□
the following: "During the analysis of the second draft recommendation submitted by the DPA to the□
SPF Finances on February 7, 2019, I actually found that the technical solution used□
previously was not compatible with this project but that the adaptation decisions made□
by the FPS Finances were in line with the recommendation".⁵ This is more in line with□
specifically in the context of §§ 2, 3 and 4, point 15 of the recommendation.□

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Then, the DPO declares that: "These new technical solutions requiring□
budgetary (exceeding €180,000) and human, two temporary solutions have been implemented□
implemented as quickly as possible, namely - a simple consultation via MyMinfin, - a□
consultation via the creation of an anonymous account at Microsoft. The consolidated version of□
consultation via MyMinfin without authentication was put into production at the end of January 2020.□
The version with authentication is planned for the end of March 2020. There was no evaluation□
proposed temporary solutions. An evaluation may take place after the implementation□
of the 2 final access solutions offered."⁶□

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Finally, a brief explanation is given about the independence of the DPO and how□
which he positions himself within the defendant.□

3 Extract from the response written in French.□

4 Extract from the response written in French.□

5 Extract from the response written in French.□

6 Extract from the response written in French.□

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12. The Inspection Service then makes a few technical findings. The investigation report□
technical follow-up on April 28, 2020, the investigation report on May 11, 2020. The Inspection Service has□
made a series of findings during the period from April 7 to April 20, 2020.□

The report of the Inspection Service□

13. The investigation report of the Inspection Service is sent to the Litigation Chamber on□
May 11, 2020, in accordance with Article 91, § 2 of the LCA.□

14. The first two findings (findings 1 and 2) established by the Inspection Service□
concern the existence of three ways of accessing the FisconetPlus service via two websites.□
There would (have been) three ways to access FisconetPlus:□

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access via the website www.myminf.be with authentication via the FAS;□
access via the website www.myminf.be without authentication (the public part of□
FisconetPlus);□

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access via the general FPS Finance website with a personal Microsoft account ("access□
Sharepoint Online").□

The Inspection Service notes that this is a complex access scheme.□

15. In Findings 3 and 4, the Inspection Service examines the qualification of the respondent in□
as controller, within the meaning of Article 4, 7) of the GDPR. The Inspection Service in□
concludes that the respondent is the controller for processing that takes place via the□
Microsoft platform integrated on its website.□

16. Findings 5 to 7 inclusive of the investigation report relate to the use of cookies. Those□
findings are linked to some findings of the technical report.□

The technical report first examined the website with the following URL:□
<https://eservices.minfin.fgov.be/myminf-web/pages/fisconet>. At the time of findings□

techniques, this website uses a cookie banner which states that if a user continues
browsing, it accepts the use of cookies (so-called "further browsing"). In the light
of the GDPR, there must be a clear declaration or positive act by the user to have a
free, specific, clear and unequivocal consent.

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Not only the "further browsing" technique but also the defendant's cookie policy
raises questions in the head of the Inspection Service. He makes the following observations on this
regard: "In the policy, there is no differentiation between the different types of cookies or
tracers. Impossible for the user to have information on the different cookies, but also on
cookies for which he has the right to express his consent. (Cookies not strictly
necessary)."7A comparison between the cookies listed in the cookie policy and the
cookies loaded when opening the website reveals that the first ones are not complete
(exhaustive) and are not entirely correct either.

In addition, the technical report also looks at the website with the URL:
<https://finances.belgium.be/fr/E-services/fisconetplus>. Here too, the Inspection Service observes
a cookie situation which he believes is problematic in light of the GDPR. There are
indeed a discrepancy between the cookies listed in the cookie policy and those that are
actually loaded when the website is opened.

The Inspection Service's investigation report formulates three problems with the use of
cookies by the defendant.

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First, the defendant considers further browsing to be valid consent
for the use of cookies on both websites, even if these cookies are not
necessary for the proper functioning of the website(s). This 'further browsing' is
however considered by the defendant as a valid consent in its 'banner of
Cookies'. However, continuing to use the site is not the same as consent.

- Secondly, the Inspection Service notes a consequence in this respect: given

that no valid consent is required for the placement of cookies, it cannot

either be proven, so that the principle of responsibility is not respected. It is

problematic in the light of Article 5, second paragraph and Article 7, first paragraph of the

GDPR.

- Third, website visitors are not informed of how a

consent given can be withdrawn and no consent withdrawal mechanism is

foreseen. This finding again applies to both websites. We refer to this

with regard to Article 7, third paragraph of the GDPR as well as to decision 12/2019 of the Chamber

Litigation.⁸

17. Findings 8 to 11 inclusive of the Investigation Report contain some findings regarding

the anonymity of the user accounts in question and the principle of loyalty. A visitor to the site

Internet "<https://finances.belgium.be/fr/E-services/fisconetplus>" will thus have the choice to create a

7 Extract from the technical report written in French.

8 Decision of the Litigation Chamber 12/2019 of December 17, 2019.

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personal account and the information provided therein gives the impression that he can create a

"anonymous account".

18. On the other hand, the technical investigation showed that there would be no 'anonymous account'.

If the user chooses the option "a quick search (anonymous)", he returns to the website

www.myminfin.be. The only alternative that works on the second website is, according to the

Inspection Service, using an account with Microsoft. In addition, the cookie policy on

the general website of the FPS Finances refers to the use of said Google statistical cookies

analytics (types "_ga" "_gat" and "_gid") which are used to distinguish between users

so that according to the technical investigation report, there can be no question of accounts

anonymous.⁹

19. Next, the Inspection Service finds (finding 8) that the information that the defendant has provided on June 15, 2018 to the APD about the impossibility of connecting anonymously to the Microsoft's Sharepoint platform do not correspond to the aforementioned information that the defendant provides on its website www.financien.belgium.be to users, nor to technical report findings. In addition, visitors to the defendant's website are not properly informed that Microsoft does not allow anonymous access to the Sharepoint Online platform, as previously communicated to the DPA (Finding 9 of the report of the Inspection Service).

20. In addition, the Microsoft account is not truly anonymous due to cookies placed by the respondent (finding 10). In this way, the terms "a quick search (anonymous)" don't really correspond to something 'anonymous', giving the user a misrepresentation of the situation (finding 11).

21. The Inspection Service considers that the combination of these elements leads to the conclusion that the respondent continuously provides inaccurate information to data subjects. the defendant would thus violate the principle of fairness of Article 5, first paragraph, point a) of the GDPR.

22. In finding 13, the Inspection Service asserts that there is a violation of the principle of purpose limitation (Article 5, first paragraph, point b) and Article 32 of the GDPR). The service d'Inspection indeed finds that the defendant provides Microsoft with more personal data personnel as necessary, including the personal email address (which Microsoft uses to send the invitation email), and does not inform the person concerned.

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23. In Finding 14, the Inspection Service finds that the Respondent violates the obligation information within the meaning of Article 13, first paragraph, point f) of the GDPR. According to the findings of the Inspection Department's technical investigation report, there is a flow from and to Microsoft, which the user is not transparently informed. These include data authentication and the e-mail address of the data subject as well as his information

profile (the surname and first name of the person concerned). These data streams are hidden away from the user.

24. Finding 15 addresses the Respondent's obligation of transparency as well as the obligation to inform the user in an understandable way, in clear and simple terms (respectively Article 5, first paragraph, point a) and Article 12, first paragraph of the GDPR). the Firstly, the Inspection Service notes that there is an imprecise user manual concerning the three access options. Based on the information available, it would also not be clear for the user to determine the difference between these three access possibilities. Independently of the manual, the choices available to the user are not explained simply and clearly.

The Inspection Service emphasizes in the investigation report that the information is too fragmented and scattered, so that the access procedure can be considered as a 'maze of information'. Finally, the Inspection Service also points to the finding that the personal data of data subjects is transferred to Microsoft when choosing on the second website. So there is indeed a difference between the two websites, according to the Inspection Service.

25. The Inspection Service asserts in the investigation report that the Respondent does not respect the liability principle of Article 5, second paragraph of the GDPR. The Service Report of Inspection affirms the following on this subject: "The Inspection Service therefore asked the FPS Finances, by letter dated December 5, 2019, what guarantees Microsoft had provided to it for this regard, and whether proof could be provided (Exhibit 7). He did not initially receive a response to that question. It was only after a reminder that he received the response from the delegate indicating that he had not received any parts from the ICT service, which is not a direct answer to the question (page 1 of item 12). The Inspection Service considers this response as an indication of contempt for the obligation to cooperate (refusal to respond, article 31 of the GDPR), and proof of violation of the liability principle (article 5.2 of the GDPR)."

26. Finding 16 relates to the findings of the Inspection Service on compliance by the

defender of the principle of data minimization, in accordance with Article 5, first paragraph,

point c) of the GDPR. The Inspection Service notes that the DPA has underlined in its recommendation

01/2019 that an identification obligation can only be imposed if it is a question of proof

a necessity and a clear basis under Article 6 of the GDPR (points 10 and 11 of the

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aforementioned recommendation). Then, the Inspection Service concludes that the defendant does not respect

not this recommendation for the following reasons:

1. Inaccuracies surround the final scenario for access to FisconetPlus. It is therefore difficult

to assess its proportionality.

2. The replacement of the three different access possibilities by a single one, namely the system

authentication

FAS,

is not

not

compliant

to

point

10 of recommendation 01/2019.

3. The replacement of the three different access possibilities by two options cannot

lead to a misrepresentation of the situation. The defendant must therefore ensure that he

cannot simply present these two options as alternatives (one anonymous, one

not anonymous), while de facto the user (through the use of cookies) is always identified

(whichever option he chooses).

4. Access to Microsoft cloud services must be through a Microsoft account and is, by itself, not

necessary.

5. There is no need to keep running simultaneously with two services

authentication methods (via the FAS and via Microsoft).□

6. Continuing to work with Microsoft's service for more than a year□

after the publication of the APD recommendation can also not be explained by a□

temporary "transitional situation" since it has lasted for more than a year.□

The Inspection Service considers that there is a violation of the principle of minimization of data as well as□

than the principle of proportionality.□

27. Finding 17 – In light of Article 25 of the GDPR, the Inspection Service affirms that the□

respondent fails to offer the most privacy-friendly choice in a clear manner and as a□

default choice (direct access to the FisconetPlus knowledge database without□

authentication). Consequently, the Inspection Service considers that there is a violation of Article 25 as regards□

concerns data protection by design and data protection by default.□

28. Findings 18 and 19 of the Investigation Report relate to the Respondent's failure to perform□

a data protection impact assessment in accordance with Article 35 of the GDPR□

(better known in English as 'data protection impact assessment', and therefore□

hereinafter abbreviated DPIA or AIPD). The Respondent's DPO asserts in this respect with regard to the Service□

of Inspection: "After examination, it seems to us that no impact analysis relating to the protection□

of data (DPIA) should not be carried out, since it is not likely that the processing□

in question involves a great risk for the rights and freedoms of the persons concerned, given its□

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nature, scope and context." In other words, the DPO considers that the conditions□

that require the performance of such a DPIA are not met.□

Based on its own analysis as well as on DPA Recommendation 01/2019, the Service□

d'Inspection affirms that a DPIA should have taken place for the processing operations in question (the creation□

a Microsoft account to access FisconetPlus).□

29. Findings 20 and 21 relate to the position of the Respondent's DPO (Article 38, first paragraph□

GDPR and Article 39 GDPR). The Inspection Service finds that the defendant has violated article□

38, first paragraph of the GDPR, since its DPO was not involved in a timely manner□

in adapting the FisconetPlus service (Finding 20). The Inspection Service also refers□

to his correspondence between himself and the defendant, from which it appears that there is no point of view□

clearly distinct (opinion, point of view, etc.) between that of the DPO and the response of the chairman of the□

respondent (Finding 21).□

30. In light of Article 31 of the GDPR and Article 66, § 2 of the LCA, i.e. legal provisions□

which detail the obligation of cooperation of the data controller, the Inspection Service□

affirms in the investigation report that the defendant must cooperate with the supervisory authority when□

of the accomplishment of its missions. This implies that responses given to ODA must□

be duly analyzed and cannot be manifestly false and potentially□

misleading. Initially, the Inspection Service did not receive a response to certain□

of his questions, in a second time, he received a manifestly erroneous answer, which he□

therefore considers problematic in the light of the obligation to cooperate.□

31. On May 18, the Inspection Service issues a temporary suspension order to the□

defendant, pursuant to Article 70 of the LCA. The defendant is thus summoned to suspend□

FisconetPlus,□

more□

specifically□

access□

at□

this□

service□

via□

the□

platform□

Gcloudbelgium.sharepoint.com from Microsoft. The measure is valid for a period of 3 months from□

from the date of receipt of the registered letter. No appeal was brought by the defendant□

against this provisional measure, in accordance with Article 71, first paragraph of the LCA.□

32. On June 2, 2020, the Chairman of the Respondent's Management Committee informed the Inspection Service□

that access to FisconetPlus via the Gcloudbelgium.sharepoint.com platform has been disabled since□

May 29, 2020 and that access is now only possible via the MyMinfin portal.□

The procedure before the Litigation Chamber□

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33. On May 11, 2020, the Inspection Service forwarded the file to the Litigation Chamber.□

34. On June 4, 2020, the parties were informed of the Litigation Chamber's decision to deal with the□

file on the merits, in accordance with articles 98 e.s. of the ACL. The letter addressed to the parties□

sets the deadlines within which the submissions and the means of defense must be filed.□

Counsel for the defendant requests an extension of the deadlines for submissions on July 3, 2020,□

after which the Litigation Chamber proceeds to a new establishment of the deadlines for conclusions□

at a later date, since it considers the defendant's request to be reasonable.□

35. On Friday August 14, 2020, the Respondent submitted its submissions in response. Because of a□

technical problem, the e-mail containing the conclusions and its annexes did not arrive in time□

useful to the Litigation Chamber. The complainant, for his part, received the conclusions on□

August 14, 2020.□

36. Given that the Complainant was able to see the submissions and exhibits of the□

defendant in a timely manner, and was even able to introduce rebuttal submissions on this□

basis, there was no need to redefine the deadlines for the conclusions. After noticing the□

technical problem, the Litigation Chamber requested the conclusions in response from the defendant□

and then received them and added them to the file on October 7, 2020.□

The complainant's conclusions□

37. On November 4, 2020, the complainant filed his conclusions. The complainant is the former president of□

the Commission for the Protection of Privacy (hereafter: CPVP) and the APD.□

38. The Complainant asserts that it seeks to preserve access to public sector information from the intervention of a third-party service provider. The plaintiff states that this is the case in the meantime, so that this objective is achieved. However, the situation was not the same at the time of the filing of the complaint. On this subject, the plaintiff refers to some elements and evidence of the file and more particularly also to his own complaint and to the screenshots he attached.

39. The complaint is inherently based on a breach of DPA Recommendation 01/2019, according to the complainant.

40. The Complainant points out that the Complaint is not based on any knowledge that the complainant would have in respect of his position as former President of the CPP, predecessor in law Decision on the merits 82/2020 - - 14/47 of the DPA.¹⁰ The complainant reserves the right to defend himself against this accusation of violation of the obligation of confidentiality of article 48, § 1 of the LCA.

41. The Complainant submits that the Respondent also fails to comply with Article 25, second paragraph of the GDPR, because it does not clearly offer the alternative mechanism of the anonymous account. Defendant's submissions

42. On September 25, 2020, the defendant's reply submissions were sent. The defendant asks the Litigation Chamber to close the complaint without further action, and at least to declare it unfounded. The defendant asks the Litigation Chamber to declare inadmissible, or at least unfounded, the additional findings of the Inspection Service (which go beyond part of the complaint) – as well as any legal consequences in this regard.

43. The Respondent's submissions begin with a presentation of the parties. The defendant underlines here that the complainant was president of the CPP and director of the Knowledge Center of the Data Protection Authority, during the period preceding the introduction of the complaint.

44. The defendant also explains the FisconetPlus service. This is a portal integrated with the G-Cloud federal, developed through SharePoint Online, a digital tool managed by Microsoft. The latter requires

the creation of a user account to access its platform. Microsoft has denied access□

anonymous. In view of the use of this platform, the defendant was contacted by□

ODA, following which a first temporary and then permanent solution was adopted.□

45. The temporary solution consists of three access possibilities:□

A. Access via the basic search engine of FisconetPlus via Myminfin.be, without any□

authentication: the user clicks on a link leading him to a page where he can carry out□

simple searches.□

B. (As of January 31, 2019) access to FisconetPlus via an anonymous account: the defendant asserts□

that this option has been highlighted on the website, so that the user is led to□

the most privacy-friendly option. The user clicks on "create an anonymous user"□

and then receives a random username and password that he must keep himself.□

The user does not have to enter personal data himself.□

C. Access via Microsoft account.□

10 Compar. article 3, paragraph 2 of the LCA.□

The respondent illustrates the access options by means of the following schematic presentation¹¹:□

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46. Furthermore, the Respondent emphasizes that there is in any case no problem as to the solution□

envisaged, given that this solution implies the complete integration of the□

information on its own platform, without the intervention of any service provider□

third. The Respondent asserts in this regard: "The President of the Respondent also informed□

clear to the Autorité from the first contacts that the aforementioned developments had to be□

carried out gradually, according to the means available and the different directions□

concerned. Given the current absence of a full-fledged Government, involving□

additional difficulties and longer delays in obtaining budgets, as well as the crisis in the□

Covid-19 that we are facing, these developments take longer than□

originally planned. At the technical level too, it is not easy to implement in the very short term□

term the aforementioned definitive solution which is the most desirable. In this regard, they envisage a delay from 9 to 12 months".

47. After an overview of the preliminary proceedings, the Respondent turns to its concrete arguments. We

Let us review below the 22 pleas relied on by the defendant:

48. "GROUND 1: "OBSCURI LIBELLI" AND NON-ADMISSIBILITY OF LEGAL ACTIONS"

The defendant asserts that the Litigation Chamber took more than six months after the filing of the

complaint to ask the defendant for the first time to make known his means of

defence, although in the meantime there has been, inter alia, an interim measure taken by the Service

of Inspection with respect to the defendant, in accordance with Article 70 of the LCA. The defendant considers

that "it is not at all clear what acts [him] are specifically accused of."

11 Excerpt from Respondent's Reply Submissions

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49. "GROUND 2: THE AUTHORITY VIOLATED ARTICLE 54.2 OF THE GDPR AND ARTICLE 48, § 1 OF THE APD LAW

BECAUSE ITS MEMBERS HAVE NOT RESPECTED THE OBLIGATION TO PRESERVE THE CHARACTER

CONFIDENTIAL OF THE FACTS, ACTS OR INFORMATION OF WHICH THEY HAVE BEEN AWARE IN

REASON FOR THEIR DUTIES"

The Respondent asserts that "it is clear and obvious from the record that the Complainant

used facts and elements of the file of which he had previously become aware in his

as Chairman of the Authority and Director of the Knowledge Center." According to the Respondent,

the complainant has special prior knowledge about elements of the file and the

uses to file a complaint later as a citizen. The defendant refers in particular

in this respect to Article 48, § 1 of the LCA and to Article 54, second paragraph of the GDPR and considers that

a violation of these legal provisions can be found on the part of the plaintiff.

50. "GROUND 3: A RECOMMENDATION HAS NO LEGAL EFFECT – CONFLICT OF JURISDICTION

AND DISTRIBUTION OF TASKS WITHIN THE AUTHORITY"

The respondent clarifies its plea as follows: "by drafting a recommendation

[1/2019] in his capacity as director of the Knowledge Center on the one hand, and by filing a complaint□
for non-compliance with this same recommendation on the other hand, the plaintiff violated various□
legal principles and the tasks specifically entrusted to the Knowledge Centre."□

The defendant also considers that the aim is not to resolve a specific situation via a□
recommendation, notwithstanding the opinion and recommendation powers of the DPA. In addition,□
a recommendation has no binding legal force.□

51. "GROUND 4: UNFAIR TRIAL, VIOLATION OF THE RIGHTS OF THE DEFENSE AND IMPARTIALITY"□

The defendant claims that his rights of defense are systematically ignored. The defendant□
points out that the complainant is the former president of the APD, which compromises the lawfulness of the□
procedure and the impartiality of the members of the Litigation Chamber.□

The defendant also draws attention to the new website of the Protection Authority□
of data, which was launched during the procedure, and which made inaccessible a whole series□
publications relevant to defence, resulting in "a further attack on the equality of□
weapons."□

52. "GROUND 5: THE AUTHORITY VIOLATED THE PRINCIPLES OF GOOD ADMINISTRATION AND THE□ PRINCIPLE OF LEGAL SECURITY"□

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Since March 2018, the DPA was aware of the existence of the new FisconetPlus portal, according to the□
respondent. Eventually, meetings also took place in December 2018 between the Respondent□
and ODA. At this time, no objections were raised to the temporary solutions and□
definitive.□

Despite this, on May 20, 2020, the Inspection Service suddenly imposed on the defendant a□
temporary suspension order regarding access to FisconetPlus. The advice of□
defendant claim that too short a period of time was granted to develop a new□
system. No prior consultation took place with the defendant and no deadline was□
granted.□

53. "GROUND 6: BURDEN OF PROOF"□

The Inspection Service has not drawn up a report within the meaning of Article 67 of the LCA. the□
respondent asserts that the findings of the Inspection Service did not (or cannot□
have) of particular probative force and stresses that by each means, he can provide proof□
contrary to the contested findings.□

54. "GROUND 7: THE AUTHORITY VIOLATED ACL SECTION 63 BECAUSE THE SERVICE□
OF INSPECTION HAS CONDUCTED AN INVESTIGATION INTO ASPECTS OF WHICH IT WAS NOT SEIZED"□

The defendant refers here to the request of the Litigation Chamber with regard to the Service□
of Inspection, in accordance with Article 94, 1° of the LCA, which was much more limited than the investigation□
and the final findings made by the Inspection Service, as set out in the□
report discussed above.□

55. "GROUND 8: THE AUTHORITY VIOLATED ARTICLE 96, § 1 OF THE ACL BECAUSE THE REQUEST FOR□
THE LITIGATION CHAMBER TO HAVE AN INVESTIGATION CARRIED OUT BY THE DEPARTMENT□
OF INSPECTION HAS NOT BEEN SENT TO THE INSPECTOR GENERAL OF THE INSPECTION DEPARTMENT□
WITHIN THIRTY DAYS AFTER THE LITIGATION CHAMBER WAS SEIZED OF THE COMPLAINT□
BY THE FRONT LINE SERVICE"□

The respondent asserts that this request was made after 31 days, which exceeds the time limit□
provided for in law. Consequently, the inspection report as well as the documents annexed to the report□
of inspection must be excluded from the proceedings, according to the defendant.□

56. "GROUND 9: THE COMPLAINT IS INADMISSIBILITY AND AT THE VERY LEAST UNFOUNDED"□

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The complaint concerns the fact that the brochure can only be viewed by creating an account□
Microsoft. The Respondent counters that the Inspection Service stated in its report that□
the plaintiff's objection "has not been proven". The fact that screenshots provided by the□
complainant indicate the possibility of creating a Microsoft account does not in fact imply that there is a□
obligation to create a Microsoft account.□

Furthermore, the Respondent asserts that the principle that access to industry information
public should be exempt from the involvement of third-party service providers is not included in
the GDPR.

57. "GROUND 10: ACCESS TO THE FISCONETPLUS SERVICE DOES NOT FOLLOW AN ACCESS SCHEME
COMPLEX"

The inspection report concludes that if we schematically present all the access choices on
FisconetPlus and MyMinfin, we obtain a complex access scheme.¹² Therefore, access to the service
FisconetPlus would follow a complex access scheme which is not transparent to the user. the
Respondent disputes this and asserts that it correctly complied with the obligation of transparency.

58. "GROUND 11: THE RESPONDENT IS RESPONSIBLE FOR THE TREATMENT, EITHER ALONE OR
JOINTLY FOR CERTAIN PROCESSING OF PERSONAL DATA –
MICROSOFT IS RESPONSIBLE FOR CERTAIN DATA PROCESSING
PERSONAL"

With respect to Microsoft's Sharepoint Online Cloud application, the conventions
contractual agreements between the defendant and Microsoft qualify the defendant as a data controller
and qualify Microsoft as a processor, according to the defendant.

Nevertheless, the defendant considers that certain clarifications must be made, specifically
regarding authentication via Microsoft account. First, the Respondent points out
the fact that when choosing to integrate FisconetPlus with the Sharepoint Online Cloud application of
Microsoft, it was not required to sign in with a Microsoft account to access
the Sharepoint Online Cloud app. For security reasons, Microsoft then made this choice
and implemented it structurally worldwide. It is not the defendant's choice.

Second, Microsoft confirmed to the defendant that for any authentication done via
Microsoft account, Microsoft acted as the controller.

¹² The defendant refers in this respect to the technical investigation report of the Inspection Service, p.5.
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The defendant submits that it is a separate responsibility for the processing, Microsoft being liable for some aspects and the defendant for others. The defendant does not would thus not be responsible for the authentication method prescribed by Microsoft.

59. "MID 12: THE INFORMATION IN THE COOKIES POLICY IS COMPLETE, TRANSPARENT AND CORRECT"

The Inspection Service claims that the cookie policy is not complete and is not (entirely) correct. In reality, cookies not listed in the cookie policy would be placed. The defendant insists that it is only one unmentioned cookie; it's about a security cookie (session cookie).

60. "GROUND 13: FOR THE COOKIES PLACED BY THE RESPONDENT, NO CONSENT IS NECESSARY – IF REQUIRED, CONSENT HAS BEEN VALIDLY OBTAINED"

The defendant claims that all cookies that the defendant places via its website (including also cookies that have been identified by the Inspection Service) are essential cookies or functional.

Therefore, it is not required to seek the consent of data subjects under article 129 of the law on electronic communications (in execution of article 5.3 of the Privacy and Electronic Communications Directive).¹³ If consent was when even required, it is validly obtained by the defendant. The cookie banner indeed asks the consent of the person concerned by clicking on "Yes, I agree" and specifies that the data subject gives consent by actively continuing to browse the website. This is indeed an explicit and active consent. The advice of defendant therefore assert that findings 5 and 6 of the inspection report are not correct.

61. "GROUND 14: THE INSPECTION DEPARTMENT DOES NOT PROVIDE EVIDENCE THAT THE ACCOUNT ANONYMOUS VIA FISCONETPLUS WAS NOT ANONYMOUS"

The defendant objects that the Inspection Service indicates in several places in its report that

"the 'anonymous' account was not truly anonymous, without really demonstrating this

assertion." The defendant refers here to the analysis of the Inspection Service in which the latter

notes that the placing of cookies by Microsoft after logging in via a user account

Law of 13

June 2005 relating to electronic communications, M.B. 20

13

;

Directive (EU) 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of

privacy in the electronic communications sector, O.J. EU L/37 (directive on privacy and communications

electronic).

June 2005

(ECL)

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implies that the use of the account is not truly anonymous. However, there was no analysis

by the Inspection Service of the "anonymous" account, according to the defendant.

The defendant further asserts in this context that certain findings of the Inspection Service

are not accurate. The report of the Inspection Service does not contain a technical analysis of the

anonymous account and moreover, the Inspection Service does not indicate which cookies contain

personal data or are associated with an identifier, such as an IP address.

62. "GROUND 15: THE COOKIES POLICY DOES PROVIDE AN EXPLANATION AS TO THE

MANNER IN WHICH GIVEN CONSENT CAN BE WITHDRAWN AND A MECHANISM FOR

WITHDRAWAL OF CONSENT"

According to the Inspection Service, the two websites would not give any explanation about the

(withdrawal of) consent for the use of cookies. The defendant asserts that no

Consent only needs to be obtained from the data subject for the placement of

essential and functional cookies. The defendant does, however, provide an explanation of how

to delete cookies.□

63. “MOUNT 16: NO BREACH OF GDPR PRINCIPLES”□

Counsel for the Respondent assert that the Respondent's statements are misrepresented in□

The report. Therefore, according to the defendant, the principle of loyalty set out in the first paragraph of Article 5,□
point a) of the GDPR has not been violated and various findings of the Inspection Service are not□
correct.□

The findings of the Inspection Service concerning compliance with the principle of finality (Article 5,□
first paragraph, point b) of the GDPR) and sufficient security of personal data□
(Article 32 of the GDPR) are not correct and are based on incorrect assumptions.□

The defendant also refers to the user's manual of its website to argue□
that – contrary to the findings of the Inspection Service – the obligation to inform□
of Article 13, first paragraph of the GDPR has been complied with. In this case, the defendant asserts that□
the recipients of personal data were clearly indicated and that no□
personal data has been transmitted outside the Union.□

64. “GROUND 17: NO BREACH OF DUTY TO COOPERATE”□

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The respondent claims that it has duly complied with its obligations within the meaning of Article 31 of the GDPR and□
of Article 66 of the LCA.□

65. “GROUND 18: NO BREACH OF DATA MINIMIZATION OBLIGATION”□

The defendant points out that the connection to the FisconetPlus portal presented for users□
the advantage of benefiting from personalized services (such as the conservation and categorization of□
documents).□

66. “MEANS 19: NO BREACH OF DATA PROTECTION PRINCIPLES FROM THE□ DESIGN AND DATA PROTECTION BY DEFAULT”□

Defendant reiterates that when choosing Microsoft's Sharepoint platform for the□
development, login with a user account was not required, and that it□

it was a choice of Microsoft, and therefore cannot be blamed for a violation of

GDPR Article 25.

67. "GROUND 20: IT WAS NOT NECESSARY TO CONDUCT AN IMPACT ASSESSMENT RELATING TO THE DATA PROTECTION"

According to the defendant, there is "no question of a 'potentially high risk'" within the meaning of Article

35 GDPR and the processing also does not fall under one of the situations of Article 35 GDPR.

Furthermore, the Respondent points out that the processing is also not on the list of

processing requiring a DPIA, established by the Data Protection Authority.

68. "WAY 21: DELEGATE"

Respondent asserts that DPO's position is sufficiently independent within the model

organization of the defendant, in accordance with articles 37 and 38 of the GDPR, and that he has always

correctly performed its tasks within the meaning of Article 39 of the GDPR.

The defendant also points out that the Inspection Service itself created confusion

by first writing to the Chairman of the Management Committee. The DPO was not contacted directly

in writing in the first instance and therefore did not respond directly to questions from the Service

of inspection.

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69. "GROUND 22: IN THE ALTITUDE: LICENSIVE ENFORCEMENT"

In the alternative, the defendant asks the Litigation Division to proceed with an application

merciful to his skills.

The defendant asks in main order:

1. to close the complaint without further action pursuant to Article 100, § 1, 1° of the LCA, or at least

to declare the complaint unfounded;

2. to declare the additional findings – and any legal consequences thereof –

as inadmissible, or at least unfounded, and therefore to order the non-suit in

application of article 100, § 1, 2° of the LCA.

The Respondent requests in the alternative:□

1.□

to order the suspension of the pronouncement, pursuant to Article 100, § 1, 3° of the LCA.□

The Respondent asks in the alternative:□

2. issue warnings and reprimands, pursuant to Article 100, § 1, 5° of the□

ACL.□

The hearing□

70. By ministerial decree of October 28, 2020 on emergency measures to limit the□

spread of the coronavirus COVID-19 (M.B. of 28/10/2020), the federal authorities have taken□

several binding measures making it difficult to organize a hearing with all parties□

in the usual composition. The Litigation Chamber therefore offered the parties the possibility□

arrange the hearing electronically. Both parties have confirmed their attendance at the hearing□

beforehand, in accordance with Article 51 of the Internal Rules of the Protection Authority□

Datas.□

71. The hearing took place on November 16, 2020. Both parties were present.□

72. A record of the hearing was drawn up, the sole purpose of which is to provide additional□

information and clarifications regarding previously filed findings. Like□

always, the parties were also given the opportunity to make factual remarks on the□

minutes, without implying a reopening of the debates. The defendant transmitted such□

remarks which have been added to the file as an appendix to the minutes.□

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3. Motivation□

at. The jurisdiction of the Inspection Service and the Chamber□

Litigation and the extent of the case□

i. Defendant's Motion to Exclude Exhibits from Proceedings□

73. On October 29, 2019, the Front Line Service declared the complaint admissible and forwarded it to□

the Litigation Division, pursuant to Article 62, § 1 of the LCA. On November 24, 2019, the Litigation Chamber concluded that an investigation by the Inspection Service was necessary, in application of article 94, 1° and article 63, 2° of the LCA. On November 29, 2019, the request to carry out an investigation has been transmitted to the Inspection Service, in accordance with Article 96, § 1 of the LCA.

74. In Ground 8 of its Reply, Respondent asserts that the Service's report of Inspection, as well as the documents annexed to the report, must be excluded from the discussions, because of the late transmission by the Litigation Chamber of the request with regard to the Service of Inspection to carry out an investigation. The complaint was in fact the subject of a referral by the First Line service on October 29, 2019, i.e. 31 days before the request within the meaning of article 96, § 1 of the LCA.

The Litigation Division considers the period referred to in Article 96, § 1 of the LCA, the exceeding of which is not subject to any sanction in the legal norm strictly speaking, such as a time limit. Exceeding the time limit does not in itself constitute the nullity of the following actions of an authority administrative¹⁴. The Litigation Chamber therefore sees no need to exclude from the debates the report of the Inspection Service, as well as the documents provided by the Inspection Service, and not to take them into consideration in the deliberation aimed at making this decision, especially since exceeding the deadline (in this case just 1 day) does not affect a legally protected interest of the defendant.

75. If only for the legal protection of the persons concerned (citizens), and more particularly in view of the right of data subjects to lodge a complaint in accordance with Article 77, first paragraph of the GDPR, and the tasks and powers to deal with this complaint, attributed to the supervisory authority in accordance with Articles 57 and 58 of the GDPR, it cannot be

¹⁴ Compar. Cas. Judgment of June 27, 2019 (available via juportal.be): "This deadline, which is not accompanied by any sanction in order, the overrun of which does not result in making the administrative fine illegal."

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besides accepting that a provision of national procedure providing for a period of order thus deprives
the supervisory authority of these missions and powers.¹⁵

ii. The defendant's pleas in terms of "obscuri libelli", "inadmissibility
legal action" and the investigative powers of the Inspection Service
in a file containing a complaint

76. Following its investigation, the Inspection Service makes several observations in its report
which concern the same defendant (as controller) as mentioned
in the complaint, although these findings do not – or at least not always – relate
directly to the subject of the complaint.

77. In the first ground of its reply submissions, the Respondent argues that the Complaint
concerns only one aspect, but that the Inspection Service examines many aspects, so
that for the defendant "it is not at all clear which acts are precisely
alleged against the defendant".

In the seventh ground of its conclusions in reply, the defendant asserts that "the authority has
violated Article 63 of the LCA because the Inspection Service carried out an investigation into aspects
of which it was not seized".

78. Once the Inspection Service is seized of the case by the Litigation Chamber
in accordance with article 63, 2° of the LCA, he has the power to analyze more
before processing related to the subject of the complaint. It can be emphasized in this respect that the mere fact
that the complaint concerns access to a specific brochure cannot limit the competences
investigation of the Inspection Service (articles 64 to 90 inclusive of the LCA) to a simple finding of
the accuracy of the complaint. Investigative skills must indeed be used to examine compliance
provisions for the protection of personal data. For this reason,
the investigation must at least also be able to relate to elements which are incidental to the object of the
complaint.

79. The Litigation Chamber also emphasizes that when the Inspection Service finds

during an investigation into a complaint that there are serious indications of the existence of a

practice that may give rise to a violation of the fundamental principles of the protection of

15 With regard to the legal protection of citizens based on Union law and the principles of 'direct action' and

of 'primacy', see in particular the CJEU judgment of 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van

Loos c. Nederlandse Administratie der Belastingen, C-26-62, ECLI:EU:C:1963:1; CJEU, Judgment of July 15, 1964, Flaminio C

vs. E.N.E.L., C-6-64, ECLI:EU:C:1964:66; see also the doctrine on this subject: C. BARNARD, The Substantive Law of the EU:

Tea

17.

Freedoms,

Oxford

2016,

Oven

ed.),

(5th

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personal data, the Inspection Service may examine new elements of

on its own initiative, in accordance with article 63, 6° of the LCA. The Litigation Chamber specifies

however, that in the case in question, all the findings of the Inspection Service relate

directly or indirectly to the subject matter of the complaint and all findings form part of a

single file, of which the Inspection Service was referred on the basis of article 63, 2° of the LCA.

80. Nor can it be said in this case that the scope of the case was unclear to the

defendant, since the decision of the Litigation Chamber of June 4, 2020 inviting the two

parties to submit their submissions in accordance with Articles 98 and 99 of the LCA, refers

clearly to the complaint and to the findings of the Inspection Service.16

81. The request of the Litigation Chamber with regard to the Inspection Service does not therefore limit

the scope of the investigation or the investigative possibilities of this service. It stands out

clearly from the text of the law. For this reason, the argument based on ground 1 of the conclusions in the respondent's reply cannot be accepted. In addition, the Litigation Chamber specifies for the sake of completeness that the LCA does not provide for the possibility of declaring a complaint "inadmissible" so to speak a posteriori – after having been declared admissible by the Front Line Service.¹⁷

b. The independence and integrity of employees and members of the Data Protection Authority as a whole, and the Litigation Division in particular (Article 54, second paragraph of the GDPR and article 48, § 1 of the LCA)

82. In the second plea of its Reply, the Respondent asserts that the DPA itself even violated Article 54, second paragraph of the GDPR as well as Article 48, § 1 of the LCA "due to that its members did not comply with the obligation to preserve the confidentiality of the facts, acts or information of which they have knowledge by reason of their functions".

83. In support of this argument, the Respondent refers to the communication – which it attaches itself – between himself and the complainant in his capacity as President and Director of APD (and previously President of the CPP), and in particular to a letter dated June 15, 2018. In addition, it is emphasized that recommendation 1/2019 on which the complainant bases his complaint was signed by the

16 The letter addressed to the defendant mentions, inter alia, literally: "On the basis of the complaint and the findings made by the Inspection Service, the Litigation Chamber decides to carry out a substantive examination."

17 The Litigation Chamber also has the power to decide that no infringement can be found and, in pursuant to Article 100, § 1, 2° of the LCA, to order the dismissal or to close the complaint without further action, in accordance § 1, 1° or Article 100, § 1, 1° of the LCA (depending on the stage of the proceedings at which the case is).

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plaintiff

in

her

quality

of□

director□

from□

Center□

of□

Knowledge.□

84. The Litigation Chamber wishes above all to specify that the DPA, including the Litigation Chamber,□
carries out its tasks in a transparent and honest manner, using as a minimum threshold the obligation□
legal integrity, included in article 54, second paragraph of the GDPR and article 48, § 1 of the LCA,□
legal provisions to which the defendant refers. The defendant wrongly asserts that it is a question□
of an unfair trial, violation of the rights of the defense and impartiality.¹⁸□

85. The Litigation Chamber emphasizes in particular the constant policy that it applies in terms of□
publication of its decisions – with or without deletion of identification data and under□
subject to the decision-making competence of the sitting members whether or not to publish the decision in□
an individual file –, in the context of which it makes public, as far as possible,□
its post-closure activities and decisions in a way that is transparent to citizens.¹⁹□
This decision will thus also be published (see below).□

86. When making the decision, all the documents in the file are taken into consideration and when□
assessment of the case, the Litigation Chamber is therefore in no way limited to the elements to be□
charge.²⁰ During the intrinsic assessment of the case and the deliberations that preceded the□
present decision, account has always been taken of the defendant's arguments and submissions,□
as well as the answers and documents provided by the defendant to the Inspection Service and which□
integral part of the file.□

87. The Complainant is not currently a member or staff of the DPA and is not involved□
in the intrinsic activities of the Authority, nor was it at the time of the complaint. He□
lodged a complaint from his private e-mail address. A distinction must be made between the□

professional status (prior or not) of the complainant and his status as a citizen of the Union□

Europe and the Kingdom of Belgium. No European or national legislation deprives the□

complainant the right to lodge a complaint with a supervisory authority, in this case the DPA,□

in accordance with Article 77 of the GDPR, from the fact that he is or has been involved himself in the□

functioning of this authority. This applies a fortiori to people who have worked at□

ODA in the past (recent), but no longer part of it.□

18 More particularly in plea 4 of the defendant's reply pleadings.□

19 The Litigation Chamber decides on a case-by-case basis as to the publication of decisions, in accordance with Article 95, § 1

in Article 100, § 1, 16° of the LCA, depending on the stage of the procedure in which the case is.□

20 Ground 4 of the defendant's reply submissions: "the case was conducted exclusively against the [respondent], without□

the various reports show that [the defendant] has always cooperated with the Authority in this case."□

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88. Moreover, there is no question of the fact that the plaintiff is "therefore 'judge and party' in a□

same dispute", as the defendant argues in its reply submissions.21 The members□

of the Litigation Chamber appointed by the Chamber of Representatives rule in a manner□

independent and autonomous in each file for which they sit, in accordance with Article□

52 of the GDPR and articles 43 e.s. of the ACL.□

89. The members emphasize that no external influence was exerted on them when processing□

of this file and that the members have not accepted any instructions whatsoever from anyone□

as part of the processing of this case.22 It can also be noted that when the□

complainant carried out activities (as a director) for the CPP or the APD, the members□

sitting on this file were not simultaneously employees or appointed members of the DPA.□

90. The Respondent asserts in its Reply submissions that: "The Complainant is clearly using□

of his particular prior knowledge of the file (...). The complaint does not mention□

indeed no explicit reference to confidential elements of the file, but it is□

clear, however, that the complainant's prior knowledge of the file played a role□

decisive for the plaintiff in the filing of his complaint."□

91. It may be noted that in his complaint or at other stages of the processing of the file at the DPA, the plaintiff did not submit any illicit evidence, and what is more, he only relied on publicly available documents. The letter of June 15, 2018 to which the defendant refers was brought by the defendant himself and was not submitted by the plaintiff in order to exercise his rights as a citizen.□

92. Of course, it is a fact that as former President and Director respectively of the CPP and the DPA, the complainant has some expertise in data protection at personal nature and was thus able to identify and submit relevant public documents. the simple fact that a citizen has a good command of the legislation and regulations in this area because of his professional activities and uses this knowledge to exercise his rights as citizen does not however mean ipso facto that this person abuses his rights or violates obligations of integrity (which arise from his professional activities).□

93. The Litigation Division therefore sees no reason why a breach of Article 54, second paragraph or in Article 48, § 1 of the LCA would have been committed by the complainant or the DPA□
21 Ground 2 of the submissions in reply defendant.□

22 Compar. Article 52, second paragraph of the GDPR and Article 43, first paragraph of the LCA.□

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herself ; the argument of the second ground of the conclusions in response of the defendant cannot therefore not be detained.□

vs. The controller(s) within the meaning of Article 4(7) GDPR□

94. The Litigation Chamber appoints the data controller for the processing concerning the subject of the complaint and the findings of the Inspection Service in its report. Pursuant to Article 4(7) of the GDPR, the controller is:□

"the natural or legal person, public authority, agency or other body which, alone□

or jointly with others, determines the purposes and means of the processing; when the□

purposes and means of this processing are determined by Union law or the law of a

Member State, the controller may be designated or the specific criteria

applicable to its designation may be provided for by Union law or by the law of a State

member".

95. In its report, the Inspection Service asserts that the respondent is the data controller

for the entire management of the 'FisconetPlus service', including the connection by means of a

Microsoft user account (both via an anonymous user account and via a user account

'normal'). The Inspection Service asserts that the defendant's liability includes "a

combination of various choices concerning the offer of various possibilities of access involving or not

processing of personal data, namely" (screenshot without copying notes

footer):

Free translation :

-

The provision of the FisconetPlus database in various forms (also

both as an "unprotected resource"²⁰ and as a "protected resource"²¹;

the choice to continue to use Microsoft²² for the authentication service (in particular)

(along with the choice of the federal FAS authentication service);

whether or not the authentication service is hosted on Microsoft's infrastructure;

establishing the layout of the first and second websites;

-

-

-

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communication (or

lack of communication) of

mandatory information for

users concerned (which is relevant in the light of the application of Articles 12, 13 and 14

GDPR).

96. In its eleventh plea, the Respondent asserts, however, that for a certain number of

processing of personal data, mentioned in the file, it may not be considered

as controller within the meaning of Article 4, point 7 of the GDPR: "The [respondent] does not

does not dispute that he is responsible for the choice to integrate FisconetPlus in the cloud application

Microsoft's Sharepoint Online [...] The [respondent] made no choice

for :

- continue to use Microsoft for the authentication service (in particular);
- Whether or not to host the authentication service on the Microsoft infrastructure.

These choices were made solely by Microsoft and the [respondent] had no choice but to

to continue at this time (provisionally) with Microsoft."

97. Respondent submits that "Microsoft is a data controller with respect to any

authentication that is done via the Microsoft account and therefore also for any authentication via the

Microsoft account within the framework of FisconetPlus." The defendant refers in this respect to the position

of Microsoft as a "processor" within the meaning of Article 28 of the GDPR, Microsoft becoming

controller in accordance with Article 28(10) GDPR for processing that

requires authentication via a Microsoft account.

98. The Court of Justice has confirmed that for the identification of the controller or controllers, it is

required a factual assessment of the natural person(s) or the person(s)

morals which determine(s) "the purposes" and "the means" of the processing, the notion being defined as

broadly in order to protect those affected.²³ The court also held that a

natural person who influences, for his own purposes, the processing of personal data

personal character and thereby participates in determining the purposes and means of this

processing, can be considered a controller.²⁴

99. The Court of Justice has also confirmed that it is possible that, in the context of processing with

of the joint controllers, all the operations carried out with the data to be

personal character by the respective controllers do not concern the

23 CJEU judgment of 13 May 2014, *Google Spain en Google*, C-131/12, ECLI:EU:C:2014:317, par. 34; CJEU judgment of June

Wirtschaftsakademie Schleswig-Holstein, C-210/16, ECLI:EU:C:2018:388, para. 28.

24 CJEU judgment of 10 July 2018, *Jehovan todistajat*, C-25/17, ECLI:EU:C:2018:551, par. 68.

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responsibility

of

each

responsible

from

treatment²⁵.

This is particularly the case when it comes to a specific controller who determines

the purposes and means of a specific operation. This means that this operation is

sufficiently distinct from the processing for which another controller determines

(together) the purposes and means for the processing of personal data.

100. In the present case, the connection procedure via Microsoft (both via an 'anonymous' account and

via an 'ordinary' user account) is necessary for the use of FisconetPlus and its

possibilities for personalization (such as document retention by users).

When during the successive stages – facilitated via a website of the defendant –,

personal data is processed, this processing is strongly linked to the purposes of the

website in its entirety, as determined by the defendant, and to the FisconetPlus service therein

is proposed, in particular.

101. Moreover, it was the defendant himself who entered into the contractual agreements for

the hosting of the FisconetPlus service by means of Microsoft's Sharepoint Online service, this

latter requiring the use of a user account ('anonymous' or not) for the use of its

services. It is therefore the defendant who opts for the (digital) services and products of

Microsoft and thus determines the means of processing.

102. It does not matter if in this respect it was not necessary, at the time of entering into the undertakings

between the defendant and Microsoft, to use a user account ('anonymous' or not) to be able to

use the Sharepoint Online platform. This is a contractual matter between the defendant

and Microsoft, which does not prejudice the legal obligations of data controllers to

with regard to the processing of personal data. Authentication via user account

('anonymous' or not) is indeed necessary to use the defendant's website, the processing

being inseparably linked to the website and its owner.

103. For the processing of personal data when using the FisconetPlus service

on Sharepoint Online, including authentication via a Microsoft user account, the

defendant is therefore fully responsible for the processing within the meaning of Article 4, point 7)

of the GDPR.

104. This implies that the defendant must respect its responsibilities within the meaning of Article 5, second

paragraph and article 24 of the GDPR with regard to compliance with the provisions of the GDPR. It is also worth

see

25

Verbraucherzentrale NRW eV, C-40/17, ECLI:EU:C:2019:629, par. 76.

CJEU,

2019,

July

stop

from

29

Fashion

ID GmbH & Co KG

vs.□

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where Microsoft is also the controller for authentication and Microsoft□

and the defendant are joint controllers, in accordance with Article 26 of the GDPR.26□

d. Compliance with the principles relating to the processing of personal data□

(article 5 of the GDPR) and data protection by design and protection□

default data (article 25 of the GDPR)□

i. The requirement of compliance with the principles relating to data processing□

of a personal nature in the light of Article 25 of the GDPR□

105. The Litigation Chamber reviewed all the elements of the file in its deliberation, and concludes□

that the heart of the problem which gave rise to the complaint can be reduced to respect for the□

principle of fairness and transparency of processing within the meaning of Article 5, first paragraph, point□

a) of the GDPR, on the one hand, and compliance with the principle of data minimization – set out in article□

5, first paragraph, point c) of the GDPR, on the other hand.□

106. The Inspection Service rightly notes a number of problems, which lead□

for example to the finding "that the [defendant] allows, when transferring personal data□

personal to Microsoft, to communicate more elements than necessary and thus does not respect□

the principle of purpose", as well as the statement relating to the security of personal data□

personnel when they are processed by Microsoft.27 The Litigation Chamber considers that these□

problems arise, however, from initial problems with the provisions set out in□

previous points (and, as we will explain below, breaches of these provisions), both when□

of the determination of the means of processing than during the processing itself.□

107. In the strict sense of the GDPR, there must be a processing of personal data before□

be able to ascertain a violation of Article 5 of the GDPR. In theory, it is indeed possible that no□

data subject authenticates via a user account by entering data to□

personal character in order to access FisconetPlus, implying the absence of data processing□

of a personal nature and therefore also implying that no violation of the

provisions relating to the protection of personal data.²⁸

Compar.

26

:

"Regardless of the terms of the agreement referred to in paragraph 1, the data subject may exercise the rights conferred on him

this Regulation with respect to and against each of the controllers".

paragraph

item

GDPR

26,

from

3

27 Finding 13 of the Inspection Service's report.

28 Compar. mutatis mutandis the reasoning when a decision of the Litigation Chamber is annulled by the Court of

markets, where the Litigation Chamber had found, in this decision, a violation of Article 5, first paragraph, point c)

of the GDPR: judgment of the Court of Appeal (Chamber 19A) of February 19, 2019, X c. APD, roll no. 2018/AR/1600, 27: "No e

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108. In this case, it appears, simply on the basis of the documents submitted by the complainant, that this

last did not log in using a user account. Screenshots do not

indeed show that the login screen and not the use of FisconetPlus after the

complainant has already been authenticated.

109. In this sense, one cannot accept, in the light of the powers of the supervisory authorities²⁹ as well as

In light of the importance of the protection of personal data³⁰, that the protection

of citizens via the Data Protection Authority is only possible when a

actual processing gives rise to an infringement, not when a data subject refuses a

treatment determined as a practice because it considers that it is not in conformity with

the guarantee of his own rights.

110. The European legislator has therefore also provided for an Article 25 in the GDPR, which obliges the

controller to take certain measures to comply with the provisions of the

GDPR, for any and/or future processing of personal data, and in particular

"when determining the means of processing".³¹ Article 25 of the GDPR specifies

the general obligation of a data controller to take technical and

appropriate organizational measures (the principle of "responsibility", as established in Article 24 of the GDPR).

111. The Litigation Division therefore considers compliance with the principles relating to the processing of

personal data of Article 5 of the GDPR in the light of the obligations in the

a controller under Article 25 of the GDPR, which provides the following:

"1. Taking into account the state of knowledge, the costs of implementation and the nature,

the scope, context and purposes of the processing as well as the risks, including the degree of

probability and severity varies, that presents the treatment for the rights and freedoms of

natural persons, the controller implements, both at the time of the

determination of the means of processing only at the time of the processing itself, of the measures

appropriate technical and organizational arrangements, such as pseudonymization, which are

intended to implement the principles relating to data protection, for example the

in this case was produced by the complainant and therefore no processing of her data took place. The ODA does not prove as s

no actual violation of personal data." (emphasis by the Litigation Chamber).

29 Specifically Article 58 of the GDPR and the national implementing provisions in the LCA.

30 The protection of personal data is included in Article 8 of the Charter of Fundamental Rights of the European Union

European.

31 For an explanation of the link between Article 25 and the principles relating to the processing of personal data

personal, see Guidelines 4/2019 of 20 October 2020 of the European Data Protection Board (EDPB)

regarding

:□

https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_201904_dataprotection_by_design_and_by_default_v2.0_en.pdf.□

data protection from□

design and default□

(v. 2.0.), available via□

the□

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minimization of data, in an effective way and to match the processing of the guarantees□

necessary to meet the requirements of this Regulation and to protect the rights of□

the person concerned.□

2. The controller implements the technical and organizational measures□

appropriate to ensure that, by default, only personal data that is□

necessary with regard to each specific purpose of the processing are processed. This applies□

the amount of personal data collected, the scope of their processing,□

their shelf life and their accessibility. In particular, these measures ensure that,□

by default, personal data is not made accessible to a number□

of natural persons without the intervention of the natural person concerned.□

3. A certification mechanism approved under Article 42 may serve as an element□

attesting to compliance with the requirements set out in paragraphs 1 and 2 of this article."□

(underlining by the Litigation Chamber)□

ii. Microsoft's role as a third-party service provider and the□

Recommendation 1/2019□

112. In its Reply Submissions, the Respondent made it clear that when using□

FisconetPlus, the persons concerned always had the choice of authenticating themselves by means of a□

own Microsoft account (containing personal data), or via an account□

anonymized Microsoft, which normally contains no personal data, but the

Inspection Service noted the placement of various cookies that would undermine the

character

anonymous

from

account

user.³²

113. The defendant states in its ninth plea that reading the provisions of the GDPR

does not in any way indicate that access to public sector information should be exempted from

the intervention of a third-party service provider, as long as the GDPR is respected. Bedroom

Contentieux considers that this is not an accurate representation of the situation at the time

of the complaint, where the access option to FisconetPlus which is de facto the most user-friendly leads to a

active collection and processing of personal data of data subjects by

the third-party service provider, in order to access the defendant's platform. It is in particular the

case when using an existing or new (own) Microsoft user account.

114. The legal basis of the problem resides in the fact that the intervention of this

service provider may be considered problematic in some cases, is not in

32 For an explanation of the Respondent's use of cookies, see below in Part 2.6.

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effect not taken up in recommendations – as the Respondent rightly points out

– but in the legislation itself. The Litigation Chamber stresses, however, that

interpretation of the legislation requires an examination of the facts, as well as an application

of the legislation to these elements, under the responsibility of the data controller during the

determination of the means of processing (Article 25, first paragraph of the GDPR).

115. In a complex and constantly changing digital environment in which

personal data are processed, the legislator has therefore provided for an advisory role for

supervisory authorities, for example to be able to respond to societal questions and needs,³³ as well as some trends. The Litigation Chamber underlines in this respect the established powers³⁴ legally in Article 58, third paragraph of the GDPR and the concretely regulated role in this respect for³⁵ the ODA Knowledge Center to articles 23 e.s. of the ACL.³⁶

116. In Recommendation 1/2019 of 6 February 2019, the Knowledge Center has indeed issued³⁷ a recommendation concerning the obligation to create a user account at Microsoft for³⁸ consult public service applications, in accordance with the aforementioned legal provisions.³⁹ This recommendation clarifies what the legislation requires in particular in respect of the defendant⁴⁰ as a public service, without however being binding in itself on the defendant.⁴¹

117. The Litigation Chamber emphasizes that in this decision, it intervenes by sanctioning⁴² against the defendant on the basis of the legislation, but also that this legislation has been clarified⁴³ in a recommendation of the Knowledge Center and which can therefore hardly be said⁴⁴ that the concrete interpretation of the legislation lacks precision. The defendant also seems⁴⁵ confirm this himself, since he feels that action is necessary after taking⁴⁶ aware of Recommendation 1/2019 and that he asserts in his reply submissions that:⁴⁷

"After having taken note of the recommendation, the FPS Finances took measures in order to⁴⁸ comply with the content of this recommendation. It was thus decided in a first phase of⁴⁹ implement an intermediate solution which would then be followed by a definitive solution."⁵⁰33⁵¹

118. Recommendation 1/2019 is intended to enlighten data controllers as to the⁵² the interpretation of the legal norm. In his third ground of his pleadings in reply, the⁵³ respondent rightly asserts that a recommendation has no legal value. However, a⁵⁴ Recommendation, as a form of "soft law", is an accepted instrument for clarifying the⁵⁵ things when the legal norm leaves a certain margin. In addition to this, in this case, the⁵⁶

33 Respondent's Reply Submissions, point 15.⁵⁷

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defendant does not question the accuracy of the explanation of the legal standard in the⁵⁹

recommendation.□

iii. Violation of Article 5, first paragraph, point a) juncto Article 25□

GDPR□

119. The Litigation Chamber notes that the collection and structuring of a certain□

documentation by the persons concerned via a public service website which has□

(jointly) control of tax legislation and tax regulations can be□

sensitive when associated with a citizen (as a data subject). We can thus□

think about the collection of certain information by the data subject as part of his□

defense in proceedings before this public service. In this situation, the defendant□

could infer information from certain searches carried out by identified citizens,□

that he could use against the citizen concerned, in determining the tax to be paid.□

120. It goes without saying that the personal data of the data subject which are associated□

to such information must be handled in a fair and transparent manner.□

121. Furthermore, the Litigation Division underlines that the defendant does indeed propose□

information in a way that does not require the use of a user account ('anonymous' or□

no) from Microsoft, namely via the "basic search engine of FisconetPlus via Myminfin.be".□

The Litigation Chamber notes, however, that it is not because there is an option (offering□

moreover less functionalities) resulting in no or less data processing at□

personal character, that the possibilities of access where personal data are indeed□

properly collected and further processed should benefit from less protection in□

under the GDPR.□

122. The possibility of accessing information via the basic search engine without connection via a□

user account means, however, that there can be no question of a violation of article 6, first□

paragraph of the GDPR, since access to the information is not in itself excluded without the use□

a Microsoft user account. The free nature of consent when using the□

Microsoft user account is therefore not problematic in this case.□

123. In its review carried out as part of the drafting of Recommendation 1/2019, the Center of Knowledge highlighted some aspects specific to the use of the user account Microsoft, implying for example that data relating to browsing and

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research and other online activities related to the applicable user's Microsoft account are subsequently used by Microsoft.³⁴

124. Where the most user-friendly option for accessing FisconetPlus is through the use of a Microsoft user account ('anonymous' or not), it cannot be said that the data personal data of the persons concerned are processed in a transparent and fair manner, nor that when determining the means of processing, the technical measures and sufficient organizational measures have been taken to guarantee these principles, within the meaning of Article 5, first paragraph, point a) juncto Article 25, first paragraph of the GDPR. This is the case when a possibility of access requiring a Microsoft user account implies that personal data personal data subjects cannot be treated fairly. Furthermore, the defendant does not explain in a sufficiently transparent manner to the persons concerned (potential) in what way the personal data of data subjects, and associated information that is processed via FisconetPlus on a Sharepoint Online platform, are subsequently used by Microsoft, are not used, or may be used by refine or market Microsoft's own (digital) services and products.

Violation of Article 5, first paragraph, point c) juncto Article 25 of the GDPR

125. The Litigation Division has already pointed out that the circumstances in which the defendant offers the information on its website imply a certain sensitivity and require from when taking the necessary care and precautions when processing personal data associated. The Litigation Chamber then notes that the possibility that a user account anonymous from Microsoft can be used to use FisconetPlus (where this account with random connection data collects and processes in any case less data than

personal character) proves by definition that the access option, in which data to be

personal nature of an existing or new Microsoft account are processed, processes more than

personal data only strictly necessary within the meaning of Article 5, first paragraph, point

c) GDPR.

126. For the foregoing reason, Respondent is in violation of the principle of minimization of

data referred to in Article 5, first paragraph, point c) juncto Article 25, first paragraph of the GDPR, in

offering the persons concerned an access possibility (which is moreover the most user-friendly) to

which the processing of personal data is not necessary in relation to the purposes

(i.e. access to FisconetPlus) for which they are processed, and with the intervention of a

third-party service provider, namely Microsoft, and that service's processing of such data to

personal character.

34 Recommendation 1/2019, point 8.

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e. Carrying out a Data Protection Impact Assessment (DPIA,

GDPR Art. 35)

127. The Inspection Service stresses in its report the need to carry out a DPIA. According to

defendant's argument, one can "conclude that it was not necessary to carry out a [DPIA]

by the [respondent] as controller regarding the website of

FisconetPlus".³⁵

128. Article 35 of the GDPR provides the following:

1. When a type of processing, in particular through the use of new technologies, and

taking into account the nature, scope, context and purposes of the processing, is

likely to create a high risk for the rights and freedoms of natural persons,

the controller carries out, before the processing, an analysis of the impact of the

processing operations envisaged on the protection of personal data. A

one and the same analysis may relate to a set of similar processing operations which

present□

from□

risks□

students□

similar.□

2. When carrying out a data protection impact assessment, the controller□

of the processing seek advice from the data protection officer, if such a officer has□

been appointed.□

3. The data protection impact assessment referred to in paragraph 1 shall, in□

particular, required in the following cases: a) the systematic and thorough evaluation□

of personal aspects relating to natural persons, which is based on processing□

automated, including profiling, and on the basis of which decisions are made□

producing legal effects with regard to a natural person or affecting him in a way□

similarly significant; b) large-scale processing of special categories□

data referred to in Article 9(1), or personal data relating□

criminal convictions and offenses referred to in Article 10; or c) monitoring□

large-scale system of an area accessible to the public.□

4. The supervisory authority shall establish and publish a list of the types of processing operations for□

which a data protection impact assessment is required in accordance with□

in paragraph 1. The supervisory authority shall communicate these lists to the committee referred to in Article 68.□

35 Respondent's Reply Submissions, point 191.□

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5. The supervisory authority may also draw up and publish a list of the types of transaction□

processing for which no impact assessment relating to data protection is□

required. The supervisory authority communicates this list to the committee.□

6. Before adopting the lists referred to in paragraphs 4 and 5, the competent supervisory authority□

apply the consistency check mechanism referred to in Article 63, when these lists

include processing activities related to the provision of goods or services to individuals

data subjects or the monitoring of their behavior in several Member States, or may

significantly affect the free movement of personal data within the Union.

7. The analysis contains at least:

a) a systematic description of the processing operations envisaged and the purposes of the

processing, including, where applicable, the legitimate interest pursued by the data controller

processing ;

b) an assessment of the necessity and proportionality of the processing operations at the

regard to the purposes;

c) an assessment of the risks to the rights and freedoms of data subjects

in accordance with paragraph 1; and

d) the measures envisaged to deal with the risks, including guarantees, measures and

security mechanisms aimed at ensuring the protection of personal data and

provide proof of compliance with these regulations, taking into account the rights and interests

legitimate interests of data subjects and other affected persons.

8. The respect, by the data controllers or processors concerned, of codes of

approved conduct referred to in Article 40 shall be duly taken into account when assessing

the impact of the processing operations carried out by said data controllers or

subcontractors, in particular for the purposes of an impact analysis relating to the protection of

data.

9. Where appropriate, the controller shall seek the opinion of data subjects or

of their representatives about the planned processing, without prejudice to the protection of

general or commercial interests or the security of processing operations.”

10. Where the processing carried out pursuant to Article 6(1)(c) or (e),

has a legal basis in Union law or in the law of the Member State to which the

controller is subject, that this law regulates the processing operation□

specific or all of the processing operations in question and that an impact assessment□

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on data protection has already been carried out in the context of an impact assessment□

general made in the context of the adoption of the legal basis in question, the paragraphs□

1 to 7 do not apply, unless the Member States deem it necessary□

to perform such analysis prior to processing activities.□

11. If necessary, the controller shall carry out a review to assess whether the□

processing is carried out in accordance with the impact assessment relating to the protection of□

data, at least when there is a change in the risk presented by the operations□

treatment.□

129. The Litigation Chamber considers that during the processing of personal data by the□

defendant for a possibility of access to FisconetPlus with the requirement to use an account□

Microsoft user, it was indeed a question of a "high risk" for "the rights and freedoms of□

natural persons", as referred to in Article 35, first paragraph of the GDPR. Several elements□

advanced by the Inspection Service lead to this conclusion of the Litigation Chamber□

(report of the Inspection Service):□

"a) The FisconetPlus service is integrated into the federal G-cloud, which is itself developed□

on the Microsoft platform which is owned by Microsoft (page 28 of exhibit 13 and exhibit 14).□

The owner of gcloudbelgium.sharepoint.com is, according to the technical report, Microsoft□

Corporation (Figures 18 and 19 in Exhibit 13). The ODA technical survey highlights□

also the problem that the FisconetPlus service is offered on Microsoft's infrastructure□

(note on illustration 18 of exhibit 13). Such "hybrid cloud" technology□

offered by third parties outside the EU has associated particular risks with□

elements³⁶that the public authorities must study carefully, by means of the□

conclusion of additional contractual guarantees and the application of appropriate standards□

that have been developed for cloud technology such as ISO/IEC 17788:2014 and ISO/IEC

17789:2014.

As far as the Inspection Service was able to verify it, the FPS Finances did not apply any

additional guarantees at this level (see the lack of concrete response to this subject mentioned

on the concept of liability above).

36 "the place of back-ups, the separation of processing elements that do not remain within the EU (separation between

storage in the EU and processing outside the EU) or parts of the platform which remain in Belgium from

underlying way, the access of

Microsoft to the data, the ownership of the encryption keys, the lack of autonomy of the SPF Finances when

use of a standard Microsoft solution, access by public bodies in the USA if Microsoft were subject to

to a citation, the unknown place and the retention period of these solutions".

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[...]

c) By transferring information to Microsoft (or storing it with Microsoft), there is

operations which in themselves involve a loss of control for the person concerned over

their personal data and a reduced possibility to exercise the rights of the RGPD in

due to a lack of transparency and inaccurate information (concerning the possibility of

create an "anonymous account") that the FPS Finance provides on this subject concerning the operations

actually performed by Microsoft with users' personal data

FisconetPlus with a personal account. The above is also illustrated by the

extensively worded terms of the free Microsoft account³⁷ under which the user

Microsoft grants a "free worldwide license of intellectual property to

use its content" (and therefore also its personal data). There are no elements

indicating that the FPS Finance has analyzed Microsoft's third party risk, or has limited it

by contractual guarantees.

d) FPS Finance continuously uses a third party to provide the service

(authentication), which, combined with other criteria, has an increased impact on the risk of

breach of personal data for the data subject³⁸ (see page 28 of the

piece 13).

e) In the technical investigation report [...], it is demonstrated that the users of the service

FisconetPlus (via the Sharepoint platform) are profiled by a private company that

offers the authentication service. The information that the data subject has

data to Microsoft for creating an Outlook e-mail account are used to create a

³⁷The page <https://www.microsoft.com/nl-be/servicesagreement/> contains the following provision "To the maximum extent

necessary to provide the Services to you,

or provide it to others (which may include changing the size, shape or format of Your Content so as to

to provide you with better storage or display), to protect you and the Services, and to improve the products and services

Microsoft,

you grant Microsoft a royalty-free worldwide license to use

Your Content and, for example, copying it, storing it, transmitting it, modifying its format,

distribute it via communication tools and display it on the Services. If you post Your Content in areas of the

Service where it is made publicly available online or without restrictions, Your Content may appear at

within demonstrations or

materials to promote the Service. Some of the Services are ad-supported. checks on how

whose Microsoft customizes the

advertising are available on the Security and Privacy page of the site

Microsoft Internet for Management

of account. We do not use the content of your emails, chats, video calls, audio calls, documents,

photos or any other personal file in order to send you targeted advertising. Our Advertising Policies

are described in detail in the Privacy Statement."

³⁸ "See page 7 of EDPB Opinion 05/2018 published at <https://edpb.europa.eu/sites/edpb/files/files/file1/2018-09->

25-opinion_2018_art._64_de_sas_dpia_list_en.pdf."

FisconetPlus account. If the user creates a profile via the second website, the report

investigative technique demonstrates that it is a question of a personalized profile associated with a

personalized e-mail address of the person concerned (text of illustration 12 of exhibit

13). The account that is thus created is indeed a Microsoft account. Protocols

are also used (text of figures 16 and 17 of the

piece 13).

The FPS Finances has no control over how Microsoft then uses these

profile information.

f) In the previous case (connection via the Sharepoint Online platform), it is also

question, according to the technical investigation report, [...] of the comparison and the combination

of datasets by Microsoft. If the data subject logs in via the

Sharepoint platform with its Microsoft email address, Microsoft associates it with data

that the person concerned has not provided to the FPS Finances but to the own data of which

has Microsoft (the name, place and date of birth of the person concerned).

g) There is an accumulation of absence of transparency during the data flows which follow one another (see

the findings of the lack of transparency of the FPS Finances and Microsoft)."

130. For this reason mentioned above, the Respondent should therefore have carried out a DPIA for the

processing of personal data related to the access options to the FisconetPlus service with

authentication, given the characteristics of the processing and also given the lack of guarantees

provided by the defendant to protect the personal data of

persons concerned.

131. More particularly, by using the method of authentication via a third-party company

(Microsoft user accounts) who, as controller and without

concrete instructions from the defendant, can technically link the data processing operations to

personal character by means of user accounts via FisconetPlus with the processing of

personal data that has nothing to do with the defendant's website or the activities of the defendant, it is a question of the "systematic and thorough evaluation of aspects of personal data relating to natural persons, which is based on automated processing" which is referred to in Article 35, first paragraph, point a) of the GDPR, on which decisions are based which "significantly affect" the natural person.

132. The Litigation Chamber therefore finds an infringement of Article 34 of the GDPR.

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f. The placement of cookies via FisconetPlus and the data protection by default and data protection by design (articles 4, 6, 7 and 25 GDPR; article 5 of the privacy and communications directive electronic)

133. The Inspection Service came to the conclusion that the defendant considers the 'further browsing' ('continuation of browsing') on both websites as a consent for the use of cookies, even if these cookies are not necessary for the proper functioning of the website.

134. On the one hand, the Inspection Service stresses the fact that 'continued use' is not the same as consent given under the GDPR. On the other hand, the Service of Inspection finds that the defendant's cookie policy has shortcomings: "In the policy, there is no differentiation between the different types of cookies or trackers. [He is] impossible for [the person concerned] to have information on the various cookies, but also on cookies for which [the data subject] has the right to express consent (Cookies not strictly necessary)".³⁹ In addition, a comparison between the cookies set out in the cookie policy and those loaded when opening the website reveals that the enumeration in the cookies policy is not complete (exhaustive) and is not entirely correct.

135. The Inspection Service finds that the defendant uses various cookies called 'cookies of

session' (diagram 4 of the technical report). Such session cookies are 'non-persistent', which means that they are present only during the session, i.e. as long as the browser is open. They do not persist over the different sessions. The fact that a cookie is saved that temporarily is however not similar to the fact that this cookie is merely technical and necessary.

136. The Litigation Chamber considers the issue relating to cookies according to the different possibilities of access to FisconetPlus. On one side there are cookies that are placed by the defendant itself and on the other hand there is a possibility of access via Microsoft, where cookies are placed by Microsoft.

137. With regard to the first possibility of access, the Inspection Service notes that thirteen cookies are active. The Litigation Chamber considers that this practice of the defendant is not

39 Extract from the technical report written in French. "In politics, there is no differentiation between the different types of cookies or tracers. Impossible for the user to have information on the different cookies, but also on the cookies for which he is entitled to express his consent. (Cookies not strictly necessary)".

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punishable, given that there is no factual basis in the Service's findings of Inspection as to the essential or non-essential nature of these cookies. This is why the Litigation Chamber wishes, prima facie and on the basis of the means of defense in the conclusions of the defendant, to assume that these thirteen cookies are indeed cookies technically necessary and therefore essential. Pursuant to Article 5, third paragraph of the privacy and electronic communications directive, the requirement of consent does not apply for this type of cookies.

138. The Litigation Chamber nevertheless insists on the importance of a policy of cookies legally correct. In order to provide correct information to the end user, and thereby otherwise achieve transparency, there can be no mismatch between the cookies listed in the policy of cookies and the cookies actually placed, which turned out to be the case in this case given the absence

mention of a single cookie, which the defendant also acknowledges in its reply submissions.□

139. With regard to the second possibility of access (via Microsoft), the Litigation Chamber□
refers to section 3.3. of this decision. It shows that the defendant must indeed be□
considered as the (joint) controller with Microsoft, for processing□
made by the latter on the defendant's website, when the defendant makes use of the□
Microsoft authentication process. The same applies to the placement of cookies and the□
processing of personal data relating thereto.□

140. The correlation between access to Defendant's service and Microsoft's connection facilities is□
indeed so strong that the defendant is co-responsible for the cookies that are placed at□
the user by Microsoft. The defendant also made a deliberate choice to collaborate with□
Microsoft.□

141. It appears from the findings of the Inspection Service⁴⁰ that Microsoft places 54 cookies with□
the end user, including also cookies that are not purely "essential". The sub-investigation□
of the Inspection Service is technical and detailed (the technical report alone includes□
42 pages) and in this decision, the Litigation Division therefore refers only to the□
broad outlines of what is observed there.□

142. The Litigation Chamber refers in particular to the technical report in which the Service□
d'Inspection claims that the cookies that are placed when authenticating with the account□
Microsoft user (both the 'anonymous' user account and the 'normal' one) are not all□
essential cookies, and refers to the type "ANON" and "NAP", of which the investigation of the Inspection Service□
⁴⁰ Technical report, p. 33-38.□

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demonstrates that cookies are used for marketing, personalization and purposes□
operations of Microsoft.⁴¹ In addition, cookies may also link to the Microsoft profile□
a whole series of personal data such as age, language, postal code, etc.□

143. The Litigation Chamber notes that these are indeed cookies which 1) are not□

essential and 2) collect personal data (and therefore process them within the meaning of GDPR). The use of such cookies is subject to an information obligation (article 10 of the privacy and electronic communications directive and article 13 of the GDPR) and consent given by the end user (Article 5, third paragraph of the Privacy and Communications Directive electronic devices and articles 6 and 7 juncto article 4, point 11 of the GDPR).

144. The Litigation Chamber recalls that continued use ('further browsing') cannot not be equated with granting valid consent under the GDPR and the Life Directive privacy and electronic communications. This consent indeed requires, under Article 4, point 11, of article 6, first paragraph, point a) and article 7 of the GDPR, as well as on the basis of Article 5, third paragraph of the Privacy and Electronic Communications Directive, a free, specific, clear, unmistakable and active consent.

145. Such consent does not meet the legal conditions when the data subject, after having seen a mention of the use of cookies on a website, continues to use this website.⁴² In the situation noted by the Inspection Service where the defendant is resting on the 'further browsing' instead of a full-fledged cookie banner with a lawful consent, the Litigation Chamber finds (given the absence of the possibility of a valid consent in law at the time of determining the means of processing) a violation of articles 6, 7 juncto 4, point 11 and article 25, first paragraph of the GDPR.

g. The other findings of the Inspection Service (articles 31, 38 and 39 of the GDPR)

146. The Inspection Service asserts in particular that the defendant violates article 38 and article 39, due to "non-timely involvement" of the DPO "when adapting the service

⁴¹ See the technical report, p. 37-38: "On the other hand, those filed indirectly by the third party are not all filed. indeed, we find there among others the cookies "ANON"; "NAP"; for which we have confirmation that they are marketing and tracking cookies: ANON: Contains the ANID, a unique identifier derived from your Microsoft account, which is used for advertising, personalization, and operational purposes. It is also used to preserve your choice to opt out of interest-

based advertising from Microsoft if you have chosen to associate the opt-out with your Microsoft account; PIN:□

Contains an encrypted version of your country, postal code, age, gender, language and occupation, if known, based on your□
Microsoft account profile".□

See□

42□

CJEU judgment of October 1, 2019, Planet49 GmbH, C-673/17, ECLI:EU:C:2019:801.□

litigation□

Bedroom□

decision□

12/2019□

of□

the□

the□

from□

17□

December□

2019□

;□

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FisconetPlus" as well as because of the absence of a "clearly distinct point of view" between that of the□

DPO and that of "the presidency of the [respondent]".□

147. According to the Litigation Chamber, the inaccuracies that appeared in the responses of the□

defendant and the DPO are closely related to the offenses committed by the defendant in the light□

of Article 5, first paragraph, points a) and c) of the GDPR. In this sense and in the eyes of the Chamber□

Litigation, the findings of the Inspection Service concerning Articles 38 and 39 of the GDPR□

do not give rise to additional breaches of the law by the defendant.□

148. With regard to compliance with the obligation of cooperation set out in Article 31 of the GDPR, the Litigation Chamber also considers that there is no violation, since the defendant rightly asserts that the right of defense and the prohibition of self-incrimination must also be taken into account in the examination of the obligation to cooperate.⁴³ When an official of the processing provides information as to its interpretation of a legal or factual situation, and the Inspection Service or another body of the DPA does not agree, it cannot be considered as an additional breach under Article 31 of the GDPR.

4. GDPR Violations and Complainant's Claims

149. The Litigation Chamber considers that the violations of the following provisions by the Respondent are proven:

a. Article 5, first paragraph, point a), juncto Article 25, first paragraph of the GDPR, given that the defendant offered on its FisconetPlus website two possibilities of access, with more features than the possibility of access where no data of personal character was processed, by means of authentication via a provider of third-party services, Microsoft, where personal data was processed, which, for the reasons set out in the foregoing reasoning, cannot be considered as fair and transparent processing of personal data at the time of the determination of the means of processing;

b. Article 5, first paragraph, point c), juncto Article 25, first paragraph of the GDPR, given that the defendant offered on its FisconetPlus website a possibility of access where the data subject could use a Microsoft user account existing or new (a non-'anonymous' user account), where processing of personal data necessary for authentication were used by

⁴³ Respondent's Reply Submissions, point 155.

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Microsoft, which does not meet the data minimization principle, at the time of

determining the means of processing;□

vs. Article 35 of the GDPR, given that the defendant should have carried out a DPIA for□

the use of Microsoft user accounts via its FisconetPlus website, therefore□

that the use of this third-party service provider involves a risk potentially□

high for the rights and freedoms of natural persons;□

d. Articles 6, first paragraph and 7, juncto 4, point 11) and Article 25, first paragraph□

of the GDPR, given that through the use of Microsoft user accounts by the□

defendant on its FisconetPlus website, non-essential cookies were placed and□

that no valid consent has been obtained for them, given that the banner on the site□

The aforementioned Internet also allowed consent by means of 'further browsing', at□

time of determination of the means of treatment.□

150. Given that the defendant indicated to the Litigation Division in its defenses□

that, following the interim measure of the Inspection Service under Article 70 of the LCA against□

which the defendant did not lodge an appeal with the Litigation Chamber, the site□

The Internet no longer offered a possibility of authentication by means of accounts□

Microsoft user, the Litigation Chamber does not consider it necessary to order the defendant□

to bring processing into compliance; the Litigation Chamber will however be content to□

reprimand the defendant. Pursuant to article 220, § 1, second paragraph of the law of 30 July□

2018 on the protection of natural persons with regard to the processing of personal data□

personal character. (M.B. September 5, 2018), the Litigation Chamber is not competent□

to impose a fine within the meaning of Article 83 of the GDPR on public bodies.□

151. Given the importance of transparency with regard to the decision-making process of the Litigation Division,□

this decision is published, pursuant to Article 100, § 1, 16° of the LCA, on the website□

of the Data Protection Authority, with publication also of the identification data□

of the parties and natural persons in question, given the person of the plaintiff, the□

specific skills of the defendant and the importance of transparency in this regard vis-à-vis the□

outside world. The Litigation Chamber emphasizes, for the sake of completeness, that the plaintiff and the defendant agreed to this (after being questioned on the matter during the hearing), or at least did not put forward arguments indicating that the publication of the decision without deletion of their direct identification data would be particularly detrimental.

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FOR THESE REASONS,

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

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in accordance with Article 100, § 1, 5° of the LCA and Article 58, second paragraph, point

b) of the GDPR, to reprimand the defendant for violations of Articles 5, first

paragraph, points a) and c); 6, first paragraph; 7; 25, first paragraph and 35 GDPR.

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

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