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Litigation Chamber

Decision on the merits 36/2021 of 15 March 2021

File number: DOS-2019-03499

Subject: Use of Smartschool to carry out a "well-being" survey with

of minor pupils without the consent of the parents (re-examination after the judgment of the Court of

markets)

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

Hijmans, chairman, and Messrs. Christophe Boeraeve and Jelle Stassijns, 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. X, hereinafter "the complainant"

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Educational establishments Y, hereinafter "the defendant".

1. Facts and procedure

1. This decision is a review of decision 31/2020 of the Litigation Chamber of the

June 16, 2020 and executes the judgment of the Markets Court of November 18, 2020 bearing the number

2020/AR/990.

2. This Decision should be read in conjunction with Decision 31/2020 and contains a review that

limited to the elements of the said decision which have not been annulled by the Court of Markets.

3. On July 22, 2019, the complainant filed a complaint with the Data Protection Authority

against the defendant.

The subject of the complaint concerns the "well-being" survey which was submitted to minor pupils of Z via

the smart school system. In this context, several provisions of the GDPR would have been violated.

Complainant claims there is a lack of information, that parental consent is required

to carry out the survey, that an information society service has been used and that the processing

concerns more data than necessary in relation to the purposes for which they are processed.

According to the complainant, a data protection impact assessment should also have

be carried out by the defendant but this was not done.

4. On August 6, 2019, the complaint was declared admissible on the basis of Articles 58 and 60 of the law of

December 3, 2017, the complainant is informed pursuant to article 61 of the law of December 3, 2017

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

December 3, 2017.

5. On August 27, 2019, the Litigation Division decides, pursuant to Article 95, § 1, 1° and Article 98

of the law of December 3, 2017, that the case can be dealt with on the merits.

6. On August 28, 2019, the parties concerned are informed by registered letter of the provisions

referred to in Article 95, § 2 as well as in Article 98 of the law of December 3, 2017. Pursuant to Article 99

of the law of December 3, 2017, the parties concerned were also informed of the deadlines for

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report their findings. The deadline for receiving the submissions in reply has thus been

set for October 7, 2019 for the complainant and November 7, 2019 for the respondent.

7. On September 9, 2019, the Respondent informed the Litigation Chamber that he was aware of

the complaint, he requests a copy of the file (art. 95, § 2, 3° of the law of December 3, 2017) and he

accepts all communications relating to the case by electronic means (art. 98, 1° of the law

of December 3, 2017).

8. On September 11, 2019, a copy of the file is sent to the defendant.

9. On September 26, 2019, the Litigation Chamber received the defendant's submissions in response.

The defendant states in his conclusions that for the investigation he bases himself on a legal obligation

and that no consent is required, implying also, according to him, that Article 8 of the GDPR does not

would not apply. The defendant also denies that special categories of data to be

personal character within the meaning of Article 9.1 of the GDPR would be processed on the basis of the inquiry.

The defendant also gives an explanation of how the data is processed after

the survey (who has access to the individual survey, storage of general data (anonymised)

class level, deletion of surveys completed at the end of the school year).

The following survey would be based on the "welfare questionnaire" used by the inspectorate of

teaching in order to respect the principle of minimization of data. Finally, a suggestion

of mail is attached so that the school can better inform parents and

students about the purpose of the survey.

10. On October 23, 2019, the Litigation Chamber receives the submissions in reply from the

complainant. He responds in detail to the submissions in response of the defendant and

mentions several new elements that were not yet included in the complaint:

• According to the complainant, Y is the organizing authority for school Z and the Free Center

supervision center for pupils W, but given that a pupil supervision center

must be able to intervene completely independently, they seem to intervene as

joint controllers.

• The complainant gives a statement of the provisions which, in his opinion, have been violated. He asks

also :

1. that a fine be imposed on the defendant,

2. that all persons concerned are informed of the facts committed (in 2016 and

in 2018, and if necessary also for the 2017 survey) which would constitute a

personal data breach,

3. and that the decision of the Litigation Chamber be communicated on the sites

Internet of the defendant and the Center for the supervision of pupils as well as to all the parents

through smart school.

11. On November 8, 2019, the Litigation Division receives the defendant's submissions in reply,

which deal in more detail with the lawfulness of the processing, the designation of the controller,

the requirement of consent and the non-applicability of Article 8 of the GDPR, the principle of

minimization of data, the obligation of the data controller to provide information

transparent and an argument supporting the position that no impact assessment

relating to data protection is necessary.

12. On May 4, 2020, the Litigation Division notified the defendant of its intention to

the imposition of an administrative fine and the amount thereof, in order to give the

defendant the opportunity to defend himself before the penalty is actually imposed.

13. On May 22, 2020, the Litigation Chamber received the defendant's reaction concerning the intention

to impose an administrative fine and the amount thereof.

The Respondent repeats the arguments set out in the pleadings by asserting that the treatment

is lawful under the decree of April 27, 2018 relating to the supervision of students in education

fundamental, secondary education and in student guidance centers and that

GDPR Article 8.1 would not apply.

The Respondent also points out that it has already considered previous remarks.

Finally, the defendant also argues that the Litigation Chamber cannot impose a fine

administrative since being an educational institution funded by the Community

Flemish, the defendant aims to provide education, which is a mission

of public interest. According to the Respondent, it follows that it must be considered an "authority

public" within the meaning of article 5 of the law of July 30, 2018 on the protection of persons

physical with regard to the processing of personal data and therefore that Article 221,

§ 2 of this same law would apply.

14. On June 16, 2020, the Litigation Chamber decides, in its decision on the merits 31/2020:

- pursuant to Article 100, § 1, 9° of the LCA, to order the defendant to bring the

processing with Articles 5.1.a), 12.1 and 13.1.c) and d) and 13.2.b) of the GDPR.

- pursuant to Article 100, § 1, 13° of the LCA and Article 101 of the LCA, to impose a fine

administrative charge of 2,000 euros following violations of Article 5.1.a), Article 5.1.c), Article

6.1, Article 8, Article 12.1 and Article 13 of the GDPR.

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15. On July 23, 2020, the Litigation Chamber receives from the Brussels Court of Appeal the notification

an application against the DPA, lodged at the Registry of the Court.

16. On September 2, 2020, the introductory hearing takes place before the Market Court, the deadlines for

the conclusions of the parties are fixed and the pleadings for this case have been fixed at the hearing

of October 21, 2020.

On November 18, 2020, the Market Court delivers its judgment.

Judgment1 broadly includes the following points of attention concerning the evaluation

of the subject of the request:

• Rejection of the Respondent's pleas concerning the violations established by the Chamber

Litigation of Article 6.1 of the GDPR, as well as Articles 8 and 5.1.c) of the GDPR;

• Annulment of decision on the merits no. 31/2020 of June 16, 2020, only in the

to the extent that the defendant is recommended to bring the processing into conformity with the

Articles 5.1.a), 12.1, 13.1.c) and d) and 13.2.b) of the GDPR and that an administrative fine of

2000 euros is imposed.

Not only does the Markets Court partially annul the decision of June 16, 2020 of the

Litigation Chamber, but it also asserts that within four months from

from the date of the judgment, the Litigation Chamber will have to re-examine and justify the decision again

to impose an administrative fine.

The Court registers the case for review by the Markets Court in public session on April 14, 2021.

17. Following the judgment, the Litigation Chamber now decides to verify whether, and if necessary in

to what extent, the administrative fine should be maintained.

2. Legal basis

• Lawfulness of processing

Article 6.1 GDPR

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

filled:

a) the data subject has consented to the processing of his or her personal data for one or

several specific purposes;

1 The judgment is available on the website of the Data Protection Authority, at the following address:

https://www.autoriteprotectiondonnees.be/publications/arret-intermediaire-du-02-septembre-2020-de-la-cour-des-marches-

available-in-dutch.pdf.

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[…]

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

treatment is submitted;

[…]

• Conditions applicable to the consent of children with regard to

information society services

GDPR Article 8

1. Where Article 6(1)(a) applies, as regards the direct offer of services

of the information society to children, the processing of personal data relating

to a child is lawful when the child is at least 16 years old. When the child is under the age of

16 years old, such processing is only lawful if and to the extent that consent is given or authorized

by the holder of parental responsibility for the child. Member States may provide

by law a lower age for these purposes provided that this lower age is not below

13 years old.

2. The controller shall make reasonable efforts to verify, in such cases, that the

consent is given or authorized by the holder of parental responsibility for the child,

taking into account the technological means available.

3. Paragraph 1 shall be without prejudice to the general contract law of the Member States, in particular

rules concerning the validity, formation or effects of a contract with respect to a child.

• Data minimization

Article 5.1.c) GDPR

1. Personal data are:

[…]

c) adequate, relevant and limited to what is necessary in relation to the purposes for which

they are processed (data minimization);

3. Motivation

A. Notion of public authority

18. Following the judgment of the Markets Court of November 18, 2020, the challenge by the defendant of

the violation of Article 6.1 of the GDPR, as well as Article 8 and Article 5.1.c) of the GDPR has been

dismissed as unfounded, while the contestation of the violation of Articles 5.1.a), 12.1, 13.1.c)

and d) and 13.2.b) of the GDPR was accepted as being justified. This partial cancellation brings the Court of Markets to decide that the Data Protection Authority must have the possibility to review and reconsider the decision to impose an administrative fine.

19. In its decision of June 16, 2020, the Litigation Chamber imposed an administrative fine for all violations of Section 5.1.a), Section 5.1.c), Section 6.1, Section 8, of article 12.1 and article 13 of the GDPR that it has observed. Since the Court of markets only confirms violations of Article 5.1.c), Article 6.1. and article 8 of the GDPR, the Litigation Chamber verifies whether the administrative fine of 2000 euros which has been imposed is maintained or not and whether it should be adapted if necessary. Regarding violations of Article 5.1.c), Article 6.1 and Article 8 of the GDPR, the Litigation Chamber refers to the reasoning set out in points 20 to 42 inclusive of its decision on the merits 31/2020 of June 16, 2020.

20. Since the imposition of an administrative fine is directly linked to the quality of the defendant as a private, subsidized educational institution which, according to the Chamber Litigation, does not come under the exemption from an administrative fine as defined in Article 83.7 of the GDPR and article 221, § 2 of the law of July 30, 2018 on the protection of persons physical with regard to the processing of personal data (hereinafter the law relating to the data protection), the Litigation Chamber explains in this decision its point view that the respondent cannot be considered a public authority, nor as a servant or agent of the public authority.

21. According to the view of the Litigation Chamber in its decision of June 16, 2020, a organization governed by private law such that Y does not benefit from the exemption from an administrative fine in accordance with Article 221, § 2 of the Data Protection Act, even if this organization carries out tasks of public interest in the field of education. The Court of markets considered that the Litigation Chamber had not refuted the arguments of the defendant

that the sanctions were not applicable to public authorities and that he complied with

all the requirements of article 5, 3° of the data protection law and that, by

Consequently, by virtue of the exemption provided for in Article 221, § 2 of the law relating to the protection of

data, the penalty provided for in Article 83.7 of the GDPR could not be imposed on him. The Court of

markets adds that the Litigation Chamber also did not check whether the defendant was not

at least one employee or agent of the public authorities when he performed the tasks of

public authority (consisting of the provision of education).

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22. The Litigation Chamber clarifies below its view that the defendant does not enter

in consideration for the dispensation of an administrative fine according to article 221, § 2

of data protection law.

Article 83.7 of the GDPR provides that:

"Without prejudice to the powers which the supervisory authorities have with regard to the adoption of

corrective measures pursuant to Article 58(2), each Member State may establish the

rules determining whether and to what extent administrative fines may be imposed

to public authorities and public bodies established in its territory."

23. Article 83.7 of the GDPR therefore offers Member States the possibility to determine that fines

administrative measures cannot be imposed (or can only be imposed to an extent

limited) to "public authorities and public bodies". The GDPR does not further define

the concept of "public authorities and public bodies".

Unless Union law itself expressly refers to the law of the Member States for

the definition of a concept, the concepts which appear in Union law must be interpreted

autonomously and uniformly throughout the Union2. The content of this interpretation is

(in principle) defined by the Court of Justice on the basis of the context of the provision in question and

of the purpose of the regulation concerned.

24. In this respect, the national discretionary competence that Article 83.7 of the GDPR attributes to Member States

members relates solely to the autonomy of:

• whether or not to exempt public authorities and public bodies from administrative fines,

and

•

in the event of an exemption, determine whether it is full or partial in nature; a dispensation

partial may for example consist of lower maximum fine amounts

for public authorities and public bodies, or in an exemption which only applies to

certain public authorities and certain public bodies.

25. Article 83.7 of the GDPR does not explicitly authorize Member States to define the notion

of "public authorities and public bodies". It is therefore a concept of EU law

which must have an autonomous and uniform meaning. It therefore belongs only to

2 See for example CJEU, C-260/17, Anodiki Services EPE, 25 October 2018, EU:C:2018:864, § 25; C-15/16, Baumeister,

19 June 2018, EU:C:2018:464, § 24; C 174/14, Saudaçor, 29 October 2015, EU:C:2015:733, § 52; C-279/12, Fish Legal

Shirley, 19 December 2013, EU:C:2013:853, § 42; C-400/10, McB, 5 October 2010, EU:C:2010:582, § 41; C-195/06,

Osterreichischer Rundfunk, 18 October 2007, EU:C:2007:613, § 24; C-66/08, Kozłowski, 17 July 2008, § 42.

institutions of the Union, namely the Court of Justice, to define the limits of this concept. By means of

compliance with the principle of equality, a Member State may of course determine independently

which of these "public authorities and public bodies" it exempts, but it is incumbent

only for the Court of Justice to determine the ultimate limits of this notion of the right to

The union. So far, the Court of Justice has not yet had to rule on the interpretation

of the notion of "public" of article 83.7 of the GDPR, but it is a fact that for its interpretation,

the context of Article 83.7 of the GDPR and the purpose of the GDPR must be taken into account.

26. In Article 221, § 2 of the Data Protection Act, the Belgian legislator has used the

possibility offered to Member States by Article 83.7 of the GDPR. Article 221, § 2 of the law relating

to data protection provides that:

"Article 83 of the Regulation does not apply to public authorities and their servants or

agents except in the case of legal persons governed by public law who offer goods or

services in a market."

27. The concept of "public authority" is further defined in Article 5, second paragraph of the law on

to data protection:

For the purposes of this law, "public authority" means:

1° the Federal State, federated entities and local authorities;

2° legal persons governed by public law which depend on the Federal State, federated entities

or local authorities;

3° persons, whatever their form and nature, who:

- were created to specifically meet needs in the general interest having a

nature other than industrial or commercial; and

- have legal personality; and

- whose activity is mainly financed by the public authorities or organizations

mentioned in 1° or 2°, either the management is subject to control by these authorities or

bodies, i.e. more than half of the members of the administrative, management or

supervisors are appointed by these authorities or bodies;

4° associations formed by one or more public authorities referred to in 1°, 2° or 3°."

28. The Litigation Chamber affirms that free subsidized educational establishments,

like the Respondent, meet the criterion of the notion of "public authority" as defined in

Article 5, second paragraph of the Data Protection Act. The defendant is part

of the Catholic education network and therefore not of "free" education (i.e. not

official) and therefore adopts the form of a private ASBL. However, it was created for the purpose

specific to satisfy a need in the public interest which is not of an industrial or commercial nature

(i.e. providing primary and secondary education), it has legal personality, its

activities are mainly financed by the Flemish Authority and it is also subject to its

control. Pursuant to Article 5, second paragraph, 3° of the Data Protection Act,

the defendant is therefore a "public authority" within the meaning of this law.3

29. However, this data alone is not sufficient to apply the exemption of Article 221, § 2

of data protection law. This exemption does not apply if an "authority

service" within the meaning of Article 5 of the Data Protection Act offers "goods or

services on a market". This demonstrates that the legislator intends to limit the public authorities

dispensed to traditional public authorities. The Litigation Chamber points out out of concern

completeness that it is also a question of a market in education. Indeed, the offer

Belgium also includes approved (and even unaccredited) private education, not limiting

thus competition in this market of services solely to official education and to

free education.

30. The Data Protection Act does not further specify what is meant by

"the supply of goods or services in a market". But both (1) parliamentary work and (2)

the required strict interpretation of Article 83.7 of the GDPR, that Article 221, § 2 of the law on the

data protection performs, make it clear that educational institutions free

subsidized do not come under the exemption of article 221, § 2 of the law relating to the protection

Datas.

1. The will of the Belgian legislator

31. It emerges from parliamentary proceedings that the words "unless they are legal persons governed by

public who offer goods or services on a market" were added after a negative opinion

of the Legislation Section of the Council of State on the initial draft fine waiver

administrative for public authorities. In the initial draft, the dispensation was worded

more broadly: it applied to all data controllers with the quality

public authority or public body. The Council considered that this distinction between the sector

public and the private sector was not reasonably justified and was therefore contrary to Articles

10 and 11 of the Constitution. The Council suggested to the authors of the project that they also apply

3 In the contested decision, the Litigation Division did not rule on the scope of application of Article 5, second

paragraph, 3° of the Data Protection Act, as this article is not relevant in this case. The fact that teaching

free may fall within the general definition of "public authority" in data protection law is not sufficient in

effect not to be able to apply article 221, § 2 of the data protection law. Only "public authorities

and public bodies" within the meaning of Article 83.7 of the GDPR may indeed be exempted from administrative fines.

broader interpretation of the exemption contained in Article 221, § 2 of the Data Protection Act would be contrary

Union law and should therefore not be applied by the national authorities, including the Litigation Chamber of

ODA.

administrative fines to the public sector, but to establish lower maximums for these

fines, so as not to compromise the continuity of the public service.4

32. The Council of State's suggestion was ultimately not followed by the legislator, but the draft

initial law has however been amended. Public authorities remain in principle exempt from fines

administrative, except in the case of a legal person governed by public law which offers goods and

services in a market.5 During parliamentary debates6, it was explained that the aim was to

in particular to provide the federal public services (FPS) and the public services of

programming (SPP) of administrative fines.7 Only traditional public authorities

should therefore still benefit from the exemption. During the parliamentary debates, it was returned

specifically to municipal schools as an example of bodies which, thanks to the amendment,

can no longer benefit from the exemption. A municipal school could also be inflicted with a

administrative fine, just like a free school, because it "offers a service" to citizens" 8.

33. It therefore undeniably emerges from parliamentary proceedings that the explicit intention of the legislator

Belgian was also that schools, both official education and free education,

may be subject to administrative fines. Since under the

consistent case law of the Constitutional Court, an imprecise or vague legal provision

must be interpreted in the light of the will of the legislator9, the defendant cannot, for

this reason alone, invoke the exemption of article 221, § 2 of the law relating to the protection of

data.

4 Council of State, legislation section, opinion no. 63.192/2 of April 19, 2018, Doc. Speak. Chamber, 2017-2018, no. 54-3126/1,

5 Report drawn up on behalf of the Justice Commission by Mr P. Dedecker, Doc. Speak. Chamber, 2017-2018, n° 54-3126/3,

97.

6 Amendment No. 44 by E. Lachaert, P. Dedecker and others, Doc. Speak. Chamber, 2017-2018, n° 54-3126/2, 55.

7 Report drawn up on behalf of the Justice Commission by Mr P. Dedecker, Doc. Speak. Chamber, 2017-2018, n° 54-3126/3,

98.

8 Report drawn up on behalf of the Justice Commission by Mr P. Dedecker, Doc. Speak. Chamber, 2017-2018, n° 54-3126/3,

98. See also p. 44, for the remark in question: "Under paragraph 2 of article 221 of the preliminary draft, the fines

administrative do not apply to data controllers having the status of public authority or public body.

They do, however, apply to data controllers in the private sector. According to the Council of State, this difference

treatment cannot be justified and therefore constitutes a violation of the principle of equality. Organizations which, in substance,

carry out the same activities, must be treated in the same way, whether they belong to the public or private sector. Thereby,

it is for example unjustifiable that a hospital managed by a CPAS cannot be imposed an administrative fine, whereas

this could be the case for a hospital with the legal form of an asbl; the same goes for schools of education

free compared to community education schools, for example."

9 See for example Cour const., n° 50/2008, 19 March 2008, B.15.12; No. 35/2011, March 10, 2011, B.5-B.6; No. 23/2016, 18

February 2016, B.14.3. See also A. ALEN and K. MUYLLE, Handboek van het Belgisch Staatsrecht, Mechelen, Kluwer, 2011, 1

2. Article 83.7 GDPR

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34. The second reason why Article 221, § 2 of the Data Protection Act does not

cannot be interpreted so broadly that it would also exempt institutions from

free education such as the defendant of an administrative fine is that Article 221, § 2

of data protection law shall be interpreted in accordance with the GDPR, and

in particular in article 83.7, the provision which it executes. Article 83.7 of the GDPR leaves the freedom to
Member States themselves to determine whether and to what extent "public authorities and
public bodies" may also be subject to administrative fines
(see also recital 150 GDPR).
35. The optional waiver of administrative fines for public authorities and bodies was not
not taken up in the Commission's initial proposal, but was later inserted into the GDPR,
at the instigation of the Council10. In the Commission's initial proposal, the maximums provided for
the administrative fines were much lower (i.e. respectively 250,000 EUR,
EUR 500,000 and EUR 1,000,000)11. These maximums were significantly increased by the Board
(up to 20,000,000 EUR) in order to be sufficiently dissuasive for large companies such as
than Facebook and Google. As compensation, Member States were granted the
freedom to exempt their public authorities and public bodies from such fines
high administrative.
36. The GDPR does not further specify what is meant by "public authorities and
public bodies". As underlined above (point 25), this does not mean that it is incumbent
it is up to the Member States themselves to determine the limits of the concept of the public set out in Article
83.7 GDPR. It is a concept of EU law which must have an independent meaning
and uniform, given the context of GDPR Article 83.7 and the purpose of the GDPR.
37. The context of Article 83.7 of the GDPR and the objective of the GDPR invite a restrictive interpretation
of the notion of public in this provision. Article 83.7 of the GDPR indeed provides for
public authorities an exception to the general rule that violations of the GDPR
may be sanctioned, if necessary, with an administrative fine (Art. 58.2.i) of the GDPR).
10 See the Position of the Council at first reading with a view to the adoption of the Council Regulation on the protection of
natural persons with regard to the processing of personal data and on the free movement of such data, and
repealing
data protection), 8 April 2016,

https://data.consilium.europa.eu/doc/document/ST-5419-2016-REV-1/fr/pdf.

Directive 95/46/EC

(general rules

on

11 See Article 79 of the Proposal for a Regulation of the European Parliament and of the Council on the protection of persons

with regard to the processing of personal data and on the free movement of such data (General Regulation

on

final

(COD), https://eur-lex.europa.eu/legal-

content/FR/TXT/?qid=1599056276058&uri=CELEX:52012PC0011.

data protection),

COM/2012/011

- 2012/0011

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According to the settled case law of the Court of Justice, the exceptional provisions must be

interpreted strictly. With particular regard to the European rules of

data protection, the Court of Justice has already held on several occasions that the exceptions

provided for in European legislation should be interpreted restrictively, "As

that they render inapplicable the personal data protection regime provided for

by [this] directive [to this regulation] and thus deviate from the objective underlying it,

to ensure the protection of the fundamental rights and freedoms of natural persons

with regard to the processing of personal data, such as the right to respect for life

private and family life as well as the right to the protection of personal data, guaranteed

by Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (…)."13

38. By moderating the sanctions for public authorities and bodies, Article 83.7 of the GDPR derogates

undeniably to the objective underlying the GDPR, namely the protection of the rights of individuals

to the protection of personal data (Art. 1.2 GDPR). The penalty of

the administrative fine offers an effective means of pressure and therefore a guarantee

additional for the citizen that the data protection rules will be

respected.

39. It is precisely to strengthen the application of data protection rules14 that the

Union legislator has established explicitly in the GDPR that administrative fines must

if necessary be imposed for violations of this regulation. The old directive on the

data protection, repealed by the GDPR, did not explicitly impose such a sanction.

Article 24 of that directive provided only generally that Member States

"take appropriate measures to ensure the full application of the provisions of the

this Directive and determine in particular the penalties to be applied in the event of breach of the

provisions taken pursuant to this Directive" (own underlining). This is

also of the usual method of the Union legislator concerning the application of the

regulations it promulgates. Generally16, European legislative acts require

12 See for example CJEU, C 288/07, Isle of Wight Council and Others, 16 September 2008, EU:C:2008:505, § 60; C 174/14,

29 October 2015, EU:C:2015:733, § 49.

13 See e.g. CJEU, C 73/16, Puškár, 27 September 2017, EU:C:2017:725, § 38 (own emphasis); C 25/17, Jehovan

todistajat, 10 July 2018, EU:C:2018:551, § 37; C 345/17, Buivids, 14 February 2019, EU:C:2019:122, § 41.

14 Recital 148 of the GDPR (own emphasis): "In order to strengthen the application of the rules of this Regulation,

Sanctions including administrative fines should be imposed for any violation of this Regulation, in

in addition to or instead of appropriate measures imposed by the supervisory authority under this Regulation."

15 See K. LENAERTS and others, EU Procedural Law, Oxford, Oxford University Press, 2014, 108.

16 The GDPR is by no means the only exception to the rule. Other European legislative acts also prescribe

specific penalties. See for example Articles 65-66 of Directive 2013/36/EU of the European Parliament and of the Council

of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions

credit and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and

2006/49/EC.

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only that Member States apply to breaches sanctions which are "effective,

proportionate and dissuasive", but let the Member States themselves determine the nature

of these sanctions (e.g. compensation for the victim, administrative fine, sanction

criminal, …)17. The organization of the application of European rules in a State

member is therefore in principle subject to the autonomy of the Member States.

40. According to the EU legislator, the application of the old directive on the protection

data, however, left something to be desired in some Member States. To strengthen and harmonize

this application of data protection rules18, the GDPR provides for a

system of administrative fines for the whole of the Union19 (art. 83 of the GDPR). GDPR has

therefore severely limited national procedural autonomy.

41. By providing an (optional) exception to this system of enforcement, Article 83.7 of the

GDPR derogates from the purpose of the Regulation and should be interpreted restrictively

in accordance with the settled case law of the Court of Justice. This applies a fortiori since

the purpose of the GDPR is to protect a fundamental right, namely the right to protection of

personal data (Art. 1(2) GDPR) and that the EU legislator

has set itself the particular objective of strengthening and harmonizing the application of the rules

about this fundamental right.

42. It follows that the notions of "public authorities and public bodies" in Article 83.7 of the

GDPR should be interpreted restrictively. This means concretely that the legislator

of the Union cannot have had the objective of enabling the Member States to also extend

the optional exemption from Article 83.7 of the GDPR to all private law organizations that

perform a mission of public interest and who, in compensation, receive public aid,

as the defendant. If such private law organizations were by definition to escape the

means of pressure constituted by the administrative fine, this could in fact compromise

seriously the achievement of the objective of the GDPR.

17 See, for example, Article 15 of Council Directive 2000/43/EC of 29 June 2000 on the implementation of the principle
equal treatment between people without distinction of race or ethnic origin; article 25 of the Directive
2006/54/EC of the European Parliament and of the Council of 5 July 2006 relating to the implementation of the principle of equa
opportunities and equal treatment between men and women in matters of employment and work; article 15 of the Directive
2009/45/EC of the European Parliament and of the Council of 6 May 2009 establishing safety rules and standards for ships
passenger; Article 87 of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 on the
making available on the market and the use of biocidal products.

18 See also recital 150 of the GDPR (own emphasis): "In order to strengthen and harmonize the penalties
administrative procedures applicable in the event of a breach of this Regulation, each supervisory authority should have the pow
to impose administrative fines."

19 Certainly with a slight nuance for Member States whose legal system does not provide for administrative fines
(notably Denmark and Estonia). See GDPR Article 83.9 and Recital 151.

43. The broad definition given by the Belgian legislator to the notion of public in Article 5, second
paragraph of the data protection law can therefore clearly not be reconciled
with the strict interpretation required by Article 83.7 of the GDPR. The definition of the notion of public
in Article 5 of the Data Protection Act corresponds almost literally to the
definition of the concept of "public sector body" in Directive 2003/98/EC on
the re-use of public sector information20 and of the notion of "contracting authority" in
European legislation on public procurement21. But the purpose of these legislative acts
precisely takes on its full meaning with the widest possible interpretation of the
concept of public which in fact determines the scope of these legislative acts. Since then,
according to the settled case-law of the Court of Justice, the concept of "contracting authority" in
public procurement directives "must be interpreted both functionally and
broad", "in the light of the dual objective of opening up to competition and transparency pursued

by the said directive". According to the Court of Justice, such a broad interpretation is "the only one likely

to fully preserve the effectiveness of the Directive [on public procurement] (…)".22

44. The same applies to the interpretation of the concept of "public authority or public body" in

the context of Article 37.1.a) of the GDPR, which provides for the obligation to appoint a Data Protection Officer

data protection when the data processing is carried out by a public authority or

a public body. The objective of the GDPR, namely the protection of personal data,

is precisely served by a broad obligation to appoint a data protection officer,

and therefore by a broad interpretation of the notion of public in Article 37.1.a) of the GDPR.

45. The context of the concept of "public authorities and public bodies" in Article 83.7 of the GDPR

is in fact quite different since it does not determine the personal scope of the

GDPR but does establish an exception to a general rule of the GDPR, namely that breaches

of the GDPR may be sanctioned by an administrative fine. As an exception to this

As a general rule, Article 83.7 of the GDPR must be interpreted strictly (see point 37

above).

20 Article 2, points 1 and 2 of Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the

reuse of public sector information.

21 See in particular Article 2.1, points 1 and 4 of Directive 2014/24/EU of the European Parliament and of the Council of 26 Febr

2014 on public procurement and repealing Directive 2004/18/EC.

22 See for example CJEU, C-373/00, Truley, EU:C:2003:110, § 43; C-214/00, Commission v. Spain, May 15, 2003,

EU:C:2003:276, §§ 53 and 56; C-283/00, Commission v. Spain, 16 October 2003, EU:C:2003:544, §§ 73 and 75.

46. By analogy, reference can be made to the case law of the Court of Justice concerning the concept

of "other bodies governed by public law" in Article 13.1 of Directive 2006/112 relating to the system

common value added tax23. This provision establishes an exception to the general rule

on which the common system of VAT is based, namely the rule according to which the field

application of VAT extends to all services performed for consideration. Section 13.1 provides

an exception to this rule for activities that "bodies governed by public law" carry out

"as public authorities". The Court of Justice explicitly considered in the Saudaçor judgment

that the notion of "bodies governed by public law" in this exceptional provision could not

be interpreted as broadly as the concept of "contracting authority" in the directives

relating to public procurement (own underlining):24

“44 In this context, the referring court asks whether, as Saudaçor maintains, the

concept of "other bodies governed by public law", within the meaning of Article 13(1) of that

Directive, must be interpreted by having recourse to the definition of the concept of "body of

public law" set out in Article 1(9) of Directive 2004/18.

45 Such an interpretation of Article 13(1) of Directive 2006/112 cannot

be retained.

46 Indeed, by broadly defining the notion of "body governed by public law" and, by

consequently, that of "contracting authorities", Article 1(9) of the

Directive 2004/18 aims to delimit the scope of this directive in such a way

sufficiently broad to ensure that the rules on, in particular, transparency

and non-discrimination in the context of public procurement

apply to a set of state entities that are not part of the administration

public but which are nevertheless controlled by the State, in particular through their

funding or management.

47 However, the context in which the concept of "other bodies governed by public law" appears

in Article 13(1) of Directive 2006/112 is fundamentally different.

48 Indeed, this concept is not intended to define the scope of VAT but operates at the

otherwise a derogation from the general rule on which the common system of this

tax, namely that according to which the scope of the said tax is defined in such a way

very broad as covering all services provided for consideration, including

including those provided by bodies governed by public law (see, to this effect, judgment

Commission v Netherlands, C□79/09, EU:C:2010:171, points 76 and 77).□

49 As a derogation from the general rule of liability to VAT for any activity□

of an economic nature, Article 13(1) of Directive 2006/112 shall be interpreted□

23 Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.□

24 C□174/14, Saudaçor, 29 October 2015, EU:C:2015:733, § 733.□

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strict (see, in particular, Isle of Wight Council and Others, C□288/07, EU:C:2008:505, paragraph 60,□

as well as order Gmina Wrocław, C□72/13, EU:C:2014:197, paragraph 19).""□

47. By analogy with this case-law, the notion of public in Article 83.7 of the GDPR must also be□

interpreted strictly. This notion can in no way be interpreted in a way□

as broad as the notions of "contracting authority" and "public body" taken up□

respectively in the Directives on public procurement and in the Directives on□

access to public sector information.25 A fortiori, since the GDPR (unlike the GDPR)□

aforementioned VAT Directive) aims to protect a fundamental right, Article 83.7 of the GDPR cannot□

be interpreted in such a broad way that would allow Member States to dispense with all□

legal persons under private law carrying out a mission of public interest (and who are□

financed mainly by public authorities and/or are subject to public control)□

administrative fines for violations of the GDPR.□

48. The Litigation Chamber emphasizes that referring to the aforementioned analogy with regard to the interpretation□

restrictive of exception provisions does not mean that the defendant is considered by the□

Litigation Chamber as a "legal person under public law".□

49. Having regard to the principles of primacy and full effectiveness of Union law, Article 221, § 2 of the law□

relating to data protection must be understood in the restrictive interpretation that is appropriate□

to give in Article 83.7 of the GDPR. This means that article 221, § 2 of the law on the□

data protection cannot be interpreted so broadly that it would allow□

definition of also exempting free education establishments, such as the□

defendant, administrative fines.□

50. Given that the Litigation Chamber considers that the defendant does not come under the application□

of Article 83.7 of the GDPR due to the fact that it is not a "public authority or a public body" at the□

meaning of this provision and that it therefore concludes that Article 83.7 of the GDPR is not□

of application, the Litigation Chamber also considers it inevitable that Article 221,□

§ 2 of the Data Protection Act, which transposes Article 83.7 into Belgian law□

of the GDPR, does not apply either. Precisely because of this transposition, the□

concept of "public authority or public body" of Article 83.7 of the GDPR corresponds to the framework□

notional "public authorities and their servants or agents" used in Article 221, § 2 of the□

data protection law. Because the defendant cannot be qualified□

25 The definitions of the expressions “public sector bodies” and “public law body” in Directive 2003/98/EC are□

drawn from the directives relating to public procurement (recital 10 of Directive 2003/98/EC).□

of "public authority or public body", it is also not ipso facto an "authority, a□

servant or agent of a public authority".□

51. The Litigation Chamber concludes that:□

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the GDPR does not define the notion of "public authorities and public bodies" within the meaning of□

GDPR Article 83.7;□

it follows from the consistent case-law of the Court of Justice that the concept of "authorities□

authorities and public bodies" in Article 83.7 of the GDPR is an autonomous concept of the right□

of the Union, which must be interpreted taking into account the context of this provision and□

the purpose of the GDPR; that since Article 83.7 of the GDPR is an exception provision,□

the notion of public must more particularly be interpreted restrictively in this case□

;□

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the notion of "public authorities and public bodies" in Article 83.7 of the GDPR cannot

any event be construed so broadly that it would also include

legal persons governed by private law who carry out a mission in the public interest, such as

free education establishments;

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the broad interpretation of Article 221, § 2 of the Data Protection Act would be

contrary, on the one hand, to the explicit will of the Belgian legislator not to exempt schools

administrative fines and on the other hand to the restrictive interpretation required by article 83.7

GDPR as an exception provision;

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Article 221, § 2 of the Data Protection Act must therefore also be interpreted

in such a way that free education establishments are not exempted

administrative fines for violations of the GDPR.

B. Administrative fine

52. The fact that the defendant, as a subsidized private educational institution, can

being imposed an administrative fine leads the Litigation Chamber to maintain the fine

administration. This sanction is not intended to put an end to an offense committed, but to

strengthen the application of GDPR rules. As is clear from recital 148 of the

GDPR, the GDPR indeed lays down the principle that for any serious violation – therefore also when

an initial finding of a violation – sanctions, including fines

administrative measures, should be imposed, in addition to or instead of appropriate measures26.

26 Recital 148 provides the following: "In order to reinforce the application of the rules of this Regulation, penalties

including administrative fines should be imposed for any violation of this Regulation, in addition to or

instead of appropriate measures imposed by the supervisory authority under this Regulation. In the event of a minor violation

or if the fine that may be imposed constitutes a disproportionate burden for a natural person, a reminder to

the order can be addressed rather than a fine. However, due consideration should be given to the nature, seriousness and

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The Litigation Division demonstrates below that the violations of Articles 5.1.c), 6.1 and 8 of the

GDPR that the defendant has committed are in no way small violations and that the fine

does not constitute a disproportionate burden for a natural person as referred to in

recital 148 of the GDPR, two cases in which the imposition of a fine can be waived. The

Litigation Chamber imposes the administrative fine pursuant to Article 58.2.i) of the GDPR.

The instrument of the administrative fine is therefore in no way intended to put an end to violations.

To this end, the GDPR and the LCA provide for several corrective measures, including the orders cited in

Article 100, § 1, 8° and 9° of the LCA.

53. In view of Article 83 of the GDPR and the case law27 of the Court of Markets, the Chambre

Litigation motivates the imposition of an administrative sanction in a concrete way:

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The seriousness of the offence: the reasoning set out below demonstrates the seriousness of

the offence.

The duration of the infringement: since the GDPR is in force, the "well-being" investigation

the subject of the complaint was organized only once.

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The necessary deterrent effect to prevent new offences.

54. With regard to the nature and gravity of the violation (Art. 83.2.a) of the GDPR), the Chamber

Litigation emphasizes that compliance with the principles set out in Article 5 of the GDPR – in particular

here the principle of legality as well as the principle of minimization of data – is essential, because

that these are fundamental principles of data protection. The Litigation Chamber

considers that the violation of the principle of lawfulness of Article 6 of the GDPR which is committed by the

defendant therefore constitutes a serious breach. Furthermore, a violation of Article 8 of the GDPR is

committed, an article aimed at the particular protection of young people, which therefore also constitutes a

serious breach.

55. Despite an earlier complaint lodged against the Respondent in 2016 with the Commission of

the privacy protection of the time regarding the same investigation, the defendant has when

even organized a new investigation in 2018. However, the Litigation Chamber does not hold

account of the 2016 complaint to determine the administrative fine. First of all, no follow up

the duration of the violation, the intentional nature of the violation and the measures taken to mitigate the damage suffered, the

degree of responsibility or any relevant violation committed previously, of the manner in which the supervisory authority had

knowledge of the breach, compliance with the measures ordered against the controller or processor,

the application of a code of conduct, and any other aggravating or mitigating circumstance. The application of sanctions

including administrative fines should be subject to appropriate procedural safeguards in accordance with the principles

principles of Union law and the Charter, including the right to effective judicial protection and to due process

regular. [proper underline]

27 Brussels Court of Appeal (Market Court section), Verreydt S.A. c. DPA, Judgment 2020/1471 of February 19, 2020.

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has been associated with the 2016 complaint by the Privacy Commission and to this

At that time, the GDPR did not yet apply.

56. To set the administrative fine, the Litigation Chamber nevertheless takes into account the fact that the

Respondent declares its readiness to provide for an investigation which may in the future be organized under a

anonymous form and has already made efforts in this direction, provided that the defendant takes the

necessary measures to ensure the anonymity of the survey (as set out in points 39-40 of

substantive decision 31/2020 of 16 June 2020). Also, when setting the amount

of the fine, the Litigation Chamber also takes into account the fact that this is an establishment

school, non-profit.

57. Another important factor in determining the amount of the fine is the fact that at

Following the judgment of the Markets Court of November 18, 2020, the violations only concern

Article 5.1.c), Article 6.1 and Article 8 of the GDPR, and therefore not Article 5.1 a), Article 12.1 and Article 13 of the GDPR, which leads the Litigation Chamber to reconsider the amount of the fine and reduce it to €1,000.00.

58. All of the elements set out above justify an effective, proportionate and dissuasive, as referred to in Article 83 of the GDPR, taking into account the assessment criteria that it contains. The Litigation Chamber draws attention to the fact that the other criteria of the article 83.2 of the GDPR are not, in this case, likely to lead to another administrative fine than that defined by the Litigation Chamber in the context of this decision.

C. Publication of the decision

59. Given the importance of transparency regarding the decision-making process of the Chamber Litigation, this decision is published on the DPA website. However, it is not necessary for this purpose that the identification data of the parties are directly communicated.

FOR THESE REASONS,

the Litigation Chamber of the Data Protection Authority decides, after deliberation, to review its decision 31/2020 of June 16, 2020 and to impose on the defendant, under article 100, § 1, 13° of the LCA and Article 101 of the LCA, an administrative fine of €1,000.00 for violation of Article 5.1.c), Article 6.1 and Article 8 of the GDPR.

Pursuant to Article 108, § 1 of the LCA, this decision may be appealed to the Court of Markets within thirty days of its notification, with the Authority of data protection as defendant.

(Sr.) Hielke Hijmans

President of the Litigation Chamber