

Litigation Chamber

Decision on the merits 30/2020 of 8 June 2020

File number: DOS-2018-05939

Subject: municipality of X c/ Y (municipal file)

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

Hijmans, chairman, and Messrs. Y. Poulet and C. 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 GDPR;

Considering the law of December 3, 2017 creating the Data Protection Authority, hereinafter LCA;

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

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

Considering the documents in the file;

made the following decision regarding:

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the complainant: Municipality of X, represented by its College of Mayor and Aldermen,

represented by Me V;

the defendant: Mr Y, represented by Me W.

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1. Facts and procedure

1.

The complainant lodged a complaint on October 12, 2018 through her representative at

data protection, against the defendant, complaint by which it also notified a

data breach of which it considered itself a victim. The complaint was declared admissible on March 21 2019 and the Litigation Chamber, then composed of Messrs. D. Van Der Kelen, F. De Smet and I. Vandermeersch, decided during its meeting n° 8 of April 17, 2019 to request an investigation from the Service inspection. The latter transmitted to the Litigation Chamber his investigation report dated August 8 2019. The President of the Litigation Chamber decided on September 16, 2019, that the file could be examined on the merits. The parties exchanged their conclusions and the complainant asked to be heard. The parties were invited to a hearing and finally withdrew, the complainant April 21, 2020, and the defendant on April 20, 2020. As a result, no hearing could be held. organized. On April 22, the Litigation Chamber sent a feedback form by e-mail to against a proposed fine of EUR 5,000. On May 11, 2020, the defendant sent his reaction in the Litigation Chamber.

2.

In summary, the plaintiff criticizes the defendant for having used a list of the personnel of the municipality of X in order to send to their homes to municipal agents of X, and this, in their capacity municipal agents, an electoral propaganda letter in the context of the municipal elections of October 2018. On the occasion of these elections, the defendant was head of the list of the U list.

3.

This list (nb: in this decision, the following terms all refer to this list:

"staff list", "staff listing" or even the "municipal file") includes,

per staff member: date of birth, surname, first name, address and telephone number

telephone (landline and/or mobile). The staff is also classified according to the following categories:

"Director General", "Administrative Staff", "Specific Administrative Staff",

"Secretary of schools", "Technical staff", "Roads-environment staff, Chief

team", "Roads-environment staff, workers", "Trainee", "Cleaning staff",

"Lunchtime surveillance" and "Extra-curricular facilitator". 68 people are concerned.

2. Preliminary observation

4.□

Section 58 of the LCA provides that “Any person may lodge a complaint or request□  
written, dated and signed with the Data Protection Authority”. And in accordance with article□  
60 paragraph 2 of the LCA, “A complaint is admissible when it: - is written in one of the languages□  
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national; - contains a statement of the facts and the indications necessary to identify the processing□  
on which it relates; - falls within the competence of the Data Protection Authority”.□

5.□

The preparatory works of the ACL state that: “Anyone may lodge a complaint□  
or a request to the Data Protection Authority: natural persons, but□  
also legal persons, associations or institutions wishing to denounce a□  
alleged violation of the rules. A complaint or request addressed to the Data Protection Authority□  
data must be written, dated and signed by the competent person. A request must□  
be interpreted in the broadest sense of the word (request for information or explanation, request□  
of mediation,...)” (italics added by the Litigation Chamber)1.□

6.□

In other words, the LCA does not exclude that persons other than a data subject, or□  
the person authorized by it referred to in article 220 of the law of 30 July 2018 on the protection□  
natural persons with regard to the processing of personal data, may introduce□  
a complaint to the Authority. The Litigation Division considers in this regard that Article 58 of the□  
LCA allows anyone to lodge a complaint as long as they have a sufficient interest.□

7.□

If it is true that the GDPR envisages the “complaint”, from the point of view of the data subject□  
by imposing obligations on the supervisory authorities when such a person introduces□  
such complaints (see Articles 57, 1., f), and 77 of the GDPR), the GDPR does not prevent national law□  
to allow persons other than the persons concerned to lodge complaints with the□

the national supervisory authority. The possibility of such a referral to the Authority is also consistent with the tasks assigned to the supervisory authorities by the GDPR. In this sense in a way that in general, each supervisory authority: monitors the application of the GDPR and ensures compliance with it (article 57, 1., a) of the GDPR), and fulfills any other mission relating to the protection of data to a personal character (Article 57, 1., v) of the GDPR). A broad referral may also, and where appropriate, be compensated by the power of the Litigation Chamber to dismiss a complaint without follow-up (articles 95, § 1, 3°, and 100, § 1, 1° of the LCA).

8.

In the present case, the defendant, referring to the context in which the complaint was brought to the Authority (that of a hard electoral campaign against him) maintains that the objective of the plaintiff is to reach, by all means, a political adversary and that it is “permitted to question the motivations of the latter, whose personal interest is not harmed”<sup>2</sup>. Supporting these considerations and with regard to the present case, it notes that the complaint lodged with the APD was released two days before the municipal elections and that the press was informed directly. Doc. Parl., Chamber of Representatives, 2016-2017, DOC 54 2648/001, p. 40 (commentary to article 58 of the bill initial).

<sup>2</sup> Conclusions of Mr. Y's lawyer, dated October 16, 2019.

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He again notes the unflattering articles published about the defendant during the filing of the complaint and again on May 8, 2019, following the admissibility of the complaint, during the campaign for the elections regional, federal and European (the defendant was then a candidate in the regional elections).

9.

The fact that the complaint lodged with the Authority against an election candidate was a certain moment of the electoral process and that it was evoked and used in a context media relating to these elections does not, however, render the complainant's interest in introducing a complaint to the Authority illegitimate or non-existent<sup>3</sup>. In this case, on the contrary, the plaintiff had a

real interest in acting, for the following reasons:□

10.□

First, the complainant is the data controller□

personnel (the list of its personnel) who were the subject of the alleged data breach. She□

maintains in its conclusions that it is its duty to protect its administrative staff against□

the alleged practices. It is indeed his responsibility to match the data processing□

for which it is responsible, appropriate technical and organizational measures to□

in particular to guarantee that the data will not be further processed for a purpose□

incompatible (Articles 5, 1., f), 6, 1., a), and 4., and 32 of the GDPR). As data controller□

victim of a data breach, breach of which, moreover, she was unable to identify the source (see below,□

points n° 18 et seq.), it therefore has an interest in lodging a complaint with the Autorité (in addition to its□

possible obligation to notify the data breach in accordance with Article 33 of the GDPR).□

11.□

Second, the data affected by this data breach is data□

concerning the staff of the complainant (municipal agents), and the data breach was□

carried out with the aim of addressing this same staff for their specific quality of staff of the□

complainant. In addition to her responsibility as data controller, the complainant is also affected□

in the working relationship it has with its agents. It is therefore also legitimate to□

intend to protect its administrative staff as an employer, by lodging a complaint□

with the Authority.□

12.□

Thirdly, finally, it can still be remarked in a superabundant way, that among the□

persons involved in the procedure internal to the municipality of X and which gave rise to□

the complaint lodged with the Authority, there are two people directly concerned by the□

data breach: the director general of the municipality and the data protection officer□

of the latter.4□

3 Which is furthermore without prejudice to the fact that late notification of a data breach may as a

such as being the subject of a corrective measure in application of the GDPR (see on this subject article 33, 1. of the GDPR).

4 See the list of staff, exhibit no. 8 in the file.

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For these reasons, the Litigation Chamber considers that the plaintiff had an interest in

13.

lodge a complaint with the Authority, a complaint which has been decided to be admissible.

3. GDPR Breaches

14.

The complainant explains in her conclusions that "The fraud was discovered because some

private addresses used by Mr. Y do not correspond to the addresses listed in the file

voters but correspond to the addresses listed in the municipal file". In the

Observation No. 1 of his report, the Inspector General notes that: "The former addresses of agents

municipalities of X – different from the updated addresses appearing in the register of electors –

used in the context of sending electoral propaganda mail correspond to the addresses of the

listing of the personnel of the municipal administration of X at the time of the dispatch".

15.

In his finding No. 2, the Inspector General further notes that: "Mr Y does not refute

the use of a list containing the contact details of municipal officials. He also compares his

electoral propaganda mail to internal communication within the administration

communal: '(...) it did not occur to us that it was problematic that a political group

having within it municipal councilors writes to municipal agents. For us, it is

of a letter that was sent to municipal officials by a group in which there are

municipal councilors as if it were almost an internal communication at the

communal functioning of the relationship between councilors and agents'[5]".

16.

municipality of the municipality of X in order to send the disputed electoral letters.□

17.□

On the basis of these elements of the file, the Litigation Chamber considers that it is established□

that the defendant used the staff list of the municipality of X in order to send the letters□

elections in question.□

18.□

In her conclusions, the complainant notes that to this day, she “still does not know how□

Mr. Y was able to obtain the communal file, especially since Mr. Y did not exercise any mandate□

policy to X at the time of the disputed facts” (emphasis added in the conclusions). From his original complaint,□

the complainant noted: “We do not know how he was able to obtain this listing [...]”. Bedroom□

In his pleadings, the defendant does not contest either, having used the list of personnel□

5 This is an excerpt from a letter from Mr. Y to the Inspector General, dated July 7, 2019 (Exhibit 15 of the□

case).□

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The Inspector General's report does not identify how the Respondent was able to□

Contentious, however, recalls in this regard, although it is not seized of these facts (the impossibility□

to trace the source of the data breach) with regard to the complainant in his capacity as responsible□

of the processing, that the latter is required to put in place technical measures and□

appropriate organizational measures to ensure a level of security appropriate to the risk, including□

measures to guarantee the confidentiality of processing systems, and measures□

ensuring that any natural person acting under the authority of the controller who has□

access to personal data does not process them except on instructions from the person responsible for the□

processing, in accordance with Articles 5, 1., f), and 32 of the GDPR. Given the level of risk,□

in this context, security measures must be put in place to ensure traceability and□

the non-repudiation of actions taken with regard to personal data (consultation,□

etc.), and detection of any security breaches. In particular in this case a logging□

access logs to the list of personnel would have made it possible to identify the author of the leak.□

19.□

access the list of municipal staff.□

20.□

However, in his letter of May 27, 2019, the Inspector General explained to the Respondent that “The□  
purpose of this survey is to better understand your method of obtaining and using□  
personal data for electoral propaganda purposes in accordance with the regulations□  
applicable” (italics added by the Litigation Chamber)6.□

21.□

The response provided by the Respondent in its letter of July 7, 2019 does not specify what□  
about obtaining personal data from the municipal staff list.□

The respondent writes the following (without this response being identified as responding specifically□  
to one or other of the Inspector General's requests): "In the present case, it is not for us□  
came to mind that it was problematic that a political group with advisers□  
municipal writes to municipal agents. For us, it is a letter that was forwarded to□  
municipal agents by a group which includes municipal councilors□  
as if it were almost a communication internal to the communal functioning of relations□  
between advisers and agents.□

22.□

In this context, the Litigation Chamber is therefore not in a position to establish, on the basis of□  
the basis of the elements of the file, how the defendant was able to access the list of municipal staff.□

6 That being said, on this subject and under the specific questions of the Inspector General, the latter asks the following:□

“I would be grateful if you could send me the documents/information mentioned below by return mail: - an extract from the□  
electoral list which may have served as the basis for the disputed communication and the method of obtaining it; - the list – addi□  
– having served as the basis for the processing when the letters were specifically addressed to the municipal agents and that□  
letters have reached the former homes of certain agents [...]”.□



23.

However, the Litigation Chamber finds that the Inspector General had clearly explained the respondent the purpose of the investigation, including the need to identify the method of obtaining the data, point about which the Respondent remained silent, even though it is the first element of the definition of processing of personal data enshrined in Article 4, 2. of the GDPR and of a crucial stage of the processing since it conditions the lawfulness of the processing (if the collection of the data is unlawful, the subsequent stages of the processing are also unlawful).

24.

The defendant disputes the nature of electoral propaganda of the letters which were sent to municipal officials. He notes that municipal officials told him verbally about things that would have been held a few days before the election of October 14, 2018 by the outgoing authority which would have stated that in the event of a change in the power of the commune, several staff members would be fired and that they therefore had an interest in campaigning for the political party Z. Shocked by this speech, municipal agents belonging to the U list would have related this situation to the respondent. And the latter would then have wanted in good faith, on the eve of the ballot, to reassure the staff communal of his benevolence towards him.

25.

However, firstly, the defendant does not adduce any factual element capable of supporting this allegation. Secondly, the contentious electoral mail, supposed to reassure the staff communal, makes no mention of the declarations given above, nor does it refer to them with a view to reassure staff. Third, the defendant points out that the mail was sent to "a twenty people" while the list of personnel he would have agreed to reassure includes 67 people (not including the Executive Director). On this point, without being contradicted in its summary submissions by the Respondent, the Complainant alleges in her submissions that only the employees and workers who live in X have received the disputed document, those who live outside

of the commune did not receive it. Finally, in a superabundant way, if such was the will of the candidate, there were other sufficient means of notifying municipal staff (media, word of mouth, printed matter, electoral meetings, etc.).

26.

On the contrary, the litigious letter does indeed appear in its content, in the context of an electoral campaign, such as an advertising/electoral propaganda letter from its author and the list U, addressed to municipal officials: it informs about the general objective of the list program and this in particular, with regard to municipal officials and their involvement, which it encourages by elsewhere to support, at least indirectly. This letter is worded as follows:

“Day after day, you are at the service of our fellow citizens and very often close to their daily concerns.

You are committed to finding the most appropriate solutions to meet their needs.

You know all the difficulties, but also the riches of daily contact with the

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population.

With List U, we want to breathe new life into the municipality of X. We want to develop an ambitious, open and participatory project. We also want to bring the citizens, elected officials and the administration. We are convinced that this rapprochement will also allow everyone to understand and respect your work.

If the majority of Xoises and Xoisis trust us, we will be keen to build, with you, the X of tomorrow. We are committed to involving you in the project by allowing you, too, to give your opinion, share your ideas and your enthusiasm. We want you, too, to be the actors of this new breath.

We are counting on you, convinced that it is Together that we will go further at X. It is in joining the force of municipal agents involved and a college combining skills and innovations that we can be ever more efficient.

Thanking you for your involvement and hoping to be able to bring with you a new

dynamism for our commune, the whole team of the U list wishes you a very good

mandate 2018-2024" (italics added by the Litigation Chamber).

The Litigation Chamber concludes that it has been established that the data on the list

27.

For these same reasons and in a superabundant way, because as underlined by the

plaintiff in its conclusions without being challenged on this point, "At the time of the facts in dispute,

Mr Y does not exercise any political mandate within X, he is therefore not authorized to draft

'internal communication[s]' intended for municipal staff", the litigious letters cannot

be considered as internal communications to the municipality.

28.

municipal staff were processed for the purposes of advertising/electoral propaganda.

29.

However, firstly, as to the purpose of this list, for which the complainant is responsible for the

processing, the latter explains in its conclusions that "The municipal file is a file for

which includes personal data, some of which is of a markedly private nature.

Unlike the voters file, the municipal file is not intended to be used by third parties,

even less for electoral purposes" (emphasis added in the conclusions).

30.

Second, it is clear that the purpose of electoral advertising/propaganda is not

not a subsequent purpose of data processing compatible with the original purpose of collection

data from the staff list just mentioned, while data cannot be

further processed in a manner incompatible with their purpose of collection (Article 5, 1., b) of the

GDPR). Pursuant to the criteria referred to in Article 6, 4. of the GDPR: there is no link between the two

purposes of processing, and the contexts of data collection are totally unrelated, one

concerning the internal management of the municipality within the framework of a relationship of the type responsible for the

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treatment employer and data subject employee, the other that of the relationship between an elector and a candidate for an elective mandate. This incompatibility is further illustrated by the fact that the applicable law allows electoral candidates to have access to a list of voters specially dedicated to the carrying out their campaign.

31.

Thirdly, the defendant does not base its data processing either on the consent of the persons concerned, nor on a legal basis under Belgian or European law constituting a measure necessary and proportionate in a democratic society to ensure the objectives referred to in Article 23, 1. GDPR (Art. 6, 4. GDPR).

32.

Under these conditions and on the basis of all of these elements (points 25-31), the Litigation Chamber considers that the defendant processed personal data of the list of staff of the municipality of X in violation of Article 5, 1., b) (limitation of purposes) of the GDPR.

33.

In addition, these data have been processed outside the assumptions set out in article 6, 1. GDPR. Thus the use of the list of municipal staff in order to send the mail of advertising/electoral propaganda in question is not based on the consent of the persons concerned (Article 6, 1., a) of the GDPR), is not necessary for the performance of a contract (Article 6, 1., b) of the GDPR), a legal obligation or a mission of public interest or relating to the exercise of the public authority vested in the controller (Article 6, 1., c) and e) of the GDPR), and nor is it necessary to safeguard the vital interests of anyone (Article 6, 1., d) of the GDPR). Finally, in this case, if it was in the legitimate interest of the defendant to make known his candidacy for elections and the program of its list, the interests and rights of the persons concerned clearly prevailed when, on the one hand, he had another means of processing for this purpose

less detrimental to the interests and rights of the persons concerned (the list of electors), and that  
on the other hand, it is by diverting its purpose that he used the litigious means of processing (the list  
municipal staff) (on this point see above, point nos 26-30) (article 6, 1., f) of the GDPR).

34.

Consequently, the Litigation Chamber considers that the defendant processed data at  
personal character of the staff list of the municipality of X in violation of articles 5, 1., a)  
(lawfulness) and 6, 1. GDPR.

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4. Corrective action

35.

The Litigation Chamber has already had the opportunity to settle cases of unlawful processing  
of data for electoral purposes in the following cases: DEDF11-20197; DEDF10-20198;  
BETG04-2019ANO9.

36.

In these three cases, the Litigation Chamber imposed administrative fines,  
in particular for non-compliance with the purpose principle, enshrined in Article 5, 1., b), of the GDPR. He  
These cases concerned the subsequent unlawful processing for electoral purposes of personal data  
personnel collected within the framework of the exercise of municipal powers. This case  
fall within the scope of this case law.

37.

The Litigation Chamber considers that the breaches it has identified (supra, points  
Nos 32 and 34) justify the imposition of administrative fines in accordance with Articles 100, 13° and  
101 of the LCA as well as 83 of the GDPR, and this taking into account the following elements.

38.

First, the nature and seriousness of the breaches are taken into account (article 83, 1.,  
a) GDPR). Indeed, breaches of Articles 5, 1., b) (incompatible further processing) and

5, 1., a) (lawfulness) and 6, 1. of the GDPR (unlawful processing) identified in this decision constitute

breaches of fundamental data protection principles. It is, moreover,

breaches for which the maximum fine amounts are the highest (article 83, 5.,

GDPR).

39.

Secondly, the Litigation Chamber considers that the quality of the defendant, in the

context of the shortcomings, namely that of the municipal elections, constitutes a circumstance

aggravating under Article 83, 2., k). On this subject at the time of the facts, the defendant was the head of

list in the municipal elections, without being challenged on this point, the complainant emphasizes that it is

candidate mayor, that he is an employee in the office of a political representative and

administrator of a mutual fund. In view of this role played by the defendant in public life, it

could legitimately be expected of him the greatest concern to lead an electoral campaign in

compliance with all the rules applicable therein and, in this case, the rules for the protection of

data, all the more so with regard to the processing of data relating to the staff of the institution in

in which he was seeking an elective mandate.

7 See [https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/DEDF11-2019\\_FR.pdf](https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/DEDF11-2019_FR.pdf).

8 See [https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/DEDF10-2019\\_FR.pdf](https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/DEDF10-2019_FR.pdf).

9 See [https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/BETG04-2019ANO\\_FR.pdf](https://www.autoriteprotectiondonnees.be/sites/privacycommission/files/documents/BETG04-2019ANO_FR.pdf).

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40.

In its response to the Proposed Fine Reaction Form, the Respondent

first of all mentions good faith and its objective, already mentioned, of wanting to reassure the staff

communal.

41.

In addition to what has already been stated previously on this subject (see below, point 25), the Chamber

Litigation still considers, in accordance with the principle of responsibility of article 5.2 and 24 of the

GDPR, that the defendant necessarily had to ask himself the question of not violating the rules□

electoral and respect for privacy, as soon as he obtained electoral addresses otherwise□

only via the list of voters made available for this specific purpose.□

42.□

The defendant then points out that the parties did not agree on the number of mailings□

postal items, the plaintiff reporting about forty items while the defendant identifies one□

twenty out of several thousand voters.□

43.□

However, on the one hand, this does not change the fact that the personal data□

relating to 68 data subjects were unlawfully processed, namely the entire listing of the□

municipal staff (see above, point 3). And on the other hand, the ratio between the number of people□

affected by the data breach and the number of voters is not relevant for the analysis of□

violation of data protection rules.□

44.□

In terms of the advantages obtained and the risk of recidivism, the defendant responds in substance□

that he only got in trouble from the alleged facts, that he left all his political functions and□

devotes to new professional activities and that therefore the deterrent effect has already been met□

and the risk of new infringements is completely ruled out.□

45.□

However, on the one hand, nothing excludes that within the framework of its new activities□

professional, the defendant is brought in one way or another, to have to apply and□

comply with data protection rules. On the other hand, there is also nothing to prejudice the□

future activities of the Respondent who may wish to resume political responsibilities at a□

level of power or another.□

46.□

Finally, as to the amount of the fine, the defendant points out that it is not unreasonable to□

take into account its quality and put forward a series of elements of a financial nature and comparisons□  
to criticize the high amount according to him, of 5000 EUR. Thus, as municipal councilor of□  
the opposition, he would have received in 2019 only a few hundred euros in attendance fees, and□  
a mayor of a municipality like that of X would receive a gross annual salary of□  
the order of XXX EUR. Furthermore, the defendant had neither the capacity of mayor nor the capacity□  
of alderman.□

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For these reasons, the Litigation Chamber considers that it is appropriate to maintain the amount of□  
47.□

However, on the one hand, it does not change the status of the Respondent that the Chamber□  
On the contrary, Litigation retains, as an aggravating circumstance in this case (see above,□  
item 39). On the other hand, in an overabundant way, the Litigation Chamber cannot follow the□  
reasoning suggested by the defendant which would require him to systematically establish the assets and□  
the income of each natural person defendant and to make comparisons on this basis□  
between its decisions – it has not, moreover, embarked on such a path, having already sanctioned a□  
alderman and a burgomaster in the same way. Not only would such an approach prove□  
impracticable and would give rise to endless discussions likely to jeopardize the effectiveness of the□  
work of the Litigation Chamber, but moreover, it does not fall within the competence of the Chamber□  
Litigation.□

48.□

the envisaged fine of EUR 5,000.□

49.□

Given the importance of transparency with regard to the decision-making process□  
and the decisions of the Litigation Chamber, this decision will be published on the website of the Authority□  
data protection by deleting the direct identification data of the parties□  
and the persons cited, whether natural or legal.□



FOR THESE REASONS,□

THE LITIGATION CHAMBER,□

Decides, after deliberation, to impose on the controller a fine of 5000□

EUR on the basis of Articles 100, 13° and 101 of the LCA as well as 83 of the GDPR, for□

all of the breaches identified, namely for breach of Article 5, 1., b) of the□

GDPR, and breach of Articles 5, 1., a) and 6, 1. of the GDPR read together.□

This decision may be appealed within thirty days from the□

notification, to the Court of Markets<sup>10</sup> (article 108, § 1 of the LCA), with the Authority for the protection of□

given as defendant.□

(seg.)Hielke Hijmans□

President of the Litigation Chamber□

<sup>10</sup> The Brussels Court of Appeal.□