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Litigation chamber

Decision on the merits 32/2020 of 16 June 2020

File number: DOS-2019-04845

Subject: Complaint by Mrs X against ASBL Y - Exercise of the right of opposition in matters of

direct marketing and lack of cooperation with the Data Protection Authority

The Litigation Chamber of the Data Protection Authority (hereinafter DPA), made up of

Mr Hielke Hijmans, Chairman, and Messrs J. Stassijns and C. Boeraeve, members. The case

is included in this composition.

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;

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

Having regard to the internal rules of the Data Protection Authority as approved by the

Chamber 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:

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The complainant: Ms. X

The controller (defendant): asbl Y

I.

Facts and retroacts of the procedure

1. According to her complaint of September 17, 2019, the complainant indicates that on several occasions she

informed the defendant that she did not wish to receive emails from him, emails which

are sent to his e-mail address and which relay different services and animations-

performances proposed by the defendant. The complainant further requests that her data

personal data no longer appear in the defendant's database.

2. On March 25, 2019, the Complainant informed the Respondent by email that she was filing a complaint with

of the DPA and reiterates its request to no longer receive the type of emails referred to in the paragraph above.

3. It appears from the documents in the file that on July 26, 2019, the complainant received a similar email

to those previously mentioned listing the shows offered by the defendant for the months of

November and December 2019.

4. On September 17, 2019, the Complainant filed a complaint with the DPA.

5. On October 2, 2019, his complaint was declared admissible by the Front Line Service (SPL) of the APD

on the basis of Articles 58 and 60 LCA. The complainant was informed of this under Article 61 LCA and

the complaint was forwarded on the same date to the Litigation Division pursuant to Article 62, § 1

ACL.

6. On October 15, 2019, the Litigation Chamber decided, pursuant to Articles 58.2.c) of the GDPR

and article 95, §1, 5° LCA, after deliberation:

- To order the defendant, prior to any decision on the merits, to comply, in

7 days from the date of notification of the said decision, upon request to exercise the rights

objection and deletion of the complainant (Art. 21 § 2 and 17 § 1 c) of the GDPR) and therefore,

to cease all processing of personal data for prospecting purposes

concerning (Article 21 § 3 of the GDPR);

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- To order the defendant, prior to any decision on the merits, to comply, in

7 days from the date of notification of the said decision, to its notification obligation as

provided for in Article 19 of the GDPR, or to notify the deletion carried out to any recipient

possible to which the defendant would have communicated the personal data of the

plaintiff;

- To order the defendant to inform the DPA (Litigation Chamber) of the action taken on

these injunctions and this at the latest within 7 days of the notification of the said decision;

- To publish the said decision on the website of the DPA pursuant to article 95 § 1, 8° LCA, admittedly

after anonymization.

7. This decision of October 15, 2019 was notified to the parties - including the defendant - by mail

registered on October 17, 2019. It remained without reaction from the defendant, who did not

not contacted the APD (Litigation Chamber) in any way whatsoever, nor has, a fortiori,

notified the DPA (Litigation Chamber) of the follow-up to this decision as required by its

device.

8. Accordingly, the Litigation Chamber continued the proceedings on the merits and, pursuant to Articles 95

§ 1st 1°, 98 and 99 LCA, invited the parties to present their arguments according to a communicated timetable

November 7 and 26, 2019.

9. The defendant reacted by sending an e-mail to the DPA on November 26, 2019, the content of which is the

following: “Are we serious here? What are we talking about please? Emails? And then we are surprised that the world

not going well ".

10. None of the parties has submitted arguments for the attention of the Litigation Division.

11. On April 29, 2020, the Litigation Chamber sent an email to the defendant, communicating to it

the amount of the fine envisaged against him as well as the reasons for which the breaches

found in the GDPR justify the said amount of fine. The defendant was invited, by this same

e-mail, to assert its means of defense with regard to the amount of the fine envisaged within a time

of 3 weeks or, where applicable, to request, giving reasons, an additional period of

reaction.

12. The Litigation Division did not receive any reaction to this email within the said 3-week period nor

request for its extension.

PLACE□

II.□

On the reasons for the decision□

As to the breach of Articles 21 §§ 2 and 3 and 17 § 1 c), taken together with Article 12.3. of the GDPR (rights□

objection and deletion) as well as Article 31 of the GDPR (duty of cooperation)□

13. The GDPR does not define what is meant by “processing for marketing purposes” or for□

purposes of "direct marketing" according to the English terminology. In its Recommendation 01/2020 of 17□

January 2020 relating to the processing of personal data for direct marketing purposes,□

the APD indicates that “direct marketing” should be understood as “any communication,□

solicited or unsolicited, aimed at promoting an organization or a person, services,□

products, whether paid for or free, as well as brands or ideas, addressed by a□

organization or person acting in a commercial or non-commercial context, directly to□

one or more natural persons in a private or professional context, by any means,□

involving the processing of personal data” (page 8 of the Recommendation –□

definition).□

14. The processing of the Complainant's email address by the Respondent is, under this definition,□

personal data (article 4.1. of the GDPR) processed for prospecting purposes (direct□

marketing) within the meaning of Article 21 § 2 of the GDPR. The complainant was therefore entitled to exercise her right□

opposition pursuant to Article 21 § 2 of the GDPR1.□

15. It appears from the documents in the file that the defendant did not provide the complainant with information on□

the measures taken following the exercise of his right of opposition within a period of one month from□

upon receipt of such request as required by Article 12.3. of the GDPR2.□

1 Article 21 § 2 GDPR – Right to object□

2.□

When personal data is processed for prospecting purposes, the data subject has the right□

to object at any time to the processing of personal data concerning them for such prospecting purposes, including□

including profiling insofar as it is linked to such prospecting.

3.

no longer processed for these purposes.

When the person opposes the processing for prospecting purposes, the personal data are not

2 Section 12.3. of the GDPR – Transparency of information and communications and procedures for exercising the rights of the

concerned person

The controller provides the data subject with information on the measures taken following a request

formulated pursuant to Articles 15 to 22, as soon as possible and in any case within one month from

of receipt of the request. If necessary, this period may be extended by two months, taking into account the complexity and the nu

of requests. The controller informs the data subject of this extension and the reasons for the postponement in

one month from receipt of the request. When the person concerned submits his request under a

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16. It also appears from the documents in the file that the processing of the complainant's e-mail address

continued beyond the expiration of this month, still for the same purposes of prospecting and this, in

violation of Article 21 § 33 of the GDPR. Indeed, as noted in the statement of facts, the request

Defendant's objection of March 25, 2019 was followed by a new unsolicited email on March 26, 2019.

July 2019.

Consequently, the defendant did not comply with Article 21 §§ 2 and 3, taken together with Article 12.3. of the GDPR.

17. As a result of the exercise of its right to object based on Article 21 § 2 of the GDPR by the

plaintiff, the defendant was also under an obligation, pursuant to Article 17 § 1 c)4 of the

GDPR, to delete the complainant's personal data as soon as possible and no later than

late within the one-month period referred to in Article 12.3. of the GDPR. It appears from the documents in the file that this

deletion did not take place, the complainant having again received, as already mentioned, an email on 26

July 2019, i.e. after the expiry of the period of one month following receipt by the

defendant of its opposition request of March 25, 2019.

Therefore, the defendant has therefore also failed to comply with Article 17 § 1 c) of the GDPR,

combined with Article 12.3. of the GDPR.

18. Pursuant to Article 19 of the GDPR5, the defendant was also required to notify each

recipient to whom the personal data of the complainant would have been communicated

electronic form, information is provided electronically where possible, unless the person

concerned does not require otherwise.

3 Article 21 § 3 GDPR – Right to object

3.

no longer processed for these purposes.

When the person opposes the processing for prospecting purposes, the personal data are not

4 GDPR Article 17 – Right to erasure (“right to be forgotten”)

The data subject has the right to obtain from the controller the erasure, as soon as possible, of data to

personal data concerning him and the data controller has the obligation to erase this personal data

as soon as possible, when one of the following reasons applies:

(…)

c) the person objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for

the processing, or the data subject objects to the processing pursuant to Article 21(2).

5 Article 19 GDPR – Notification obligation regarding rectification or erasure of personal data

or restriction of processing

The controller notifies each recipient to whom the personal data has been communicated

any rectification or erasure of personal data or any restriction of the processing carried out in accordance with

in Article 16, in Article 17, paragraph 1, and in Article 18, unless such communication proves impossible or requires

disproportionate effort. The controller provides the data subject with information about these

recipients if the latter so requests.

any erasure of personal data carried out in accordance with Article 17, paragraph

1 c) GDPR.

19. In addition to the foregoing breaches, the defendant did not respond to the injunction of the

Litigation Chamber of October 15, 2019 to comply as soon as possible and to all

less, to inform him of the follow-up given or not to this injunction

20. The Litigation Chamber also notes a lack of cooperation on the part of the

defendant. His email of November 26, 2019 “Are we serious there?” reproduced above in

testifies in particular. The Litigation Chamber considers that the attitude of the defendant reflects a

manifest lack of consideration and cooperation contrary to what is expected of a

data controller pursuant to Article 31 of the GDPR6.

21. Pursuant to Article 3 LCA, a supervisory authority within the meaning of Article 51 of the GDPR is established

in Belgium. Article 4 LCA states that the Data Protection Authority (DPA) thus created is

responsible for monitoring compliance with the fundamental principles of data protection at

personal character. Its missions and powers, including those conferred on the Litigation Chamber (articles

95 et seq. LCA), are exercised without prejudice to the powers of governments and parliaments

community and regional, throughout the territory of the kingdom.

22. This control by an independent authority is an essential element of the fundamental right to

data protection specifically enshrined in Article 8 (§ 3) of the Charter of Rights

fundamentals of the European Union.

23. Pursuant to Article 58 of the GDPR, the LCA has empowered the DPA to impose sanctions and

other corrective measures. These are binding and are, with some exceptions,

6 Article 31 of the GDPR - Cooperation with the supervisory authority" The controller and the processor as well as, where

where appropriate, their representatives cooperate with the supervisory authority, at the latter's request, in the performance of its

7 Article 8 of the Charter of Fundamental Rights of the Union (Protection of personal data):

1. Everyone has the right to the protection of personal data concerning him or her.

2. These data must be processed fairly, for specific purposes and on the basis of the consent of the person

concerned or under another legitimate basis provided for by law. Everyone has the right to access the data collected

concerning it and to obtain its rectification.

3. Compliance with these rules is subject to control by an independent authority.

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provisionally enforceable (article 108 § 1 al. 2 and 3 LCA). It is the responsibility of data controllers

to take such sanctions seriously, notwithstanding the possibility open to them to introduce a

appeal against the decisions of the Litigation Chamber to the Court of Markets (article 108

§ 1 al.1 LCA).

24. In this case, the defendant was sent a decision, admittedly prior to any decision

in substance, under which he was required to comply with the exercise of the rights of

the complainant AND to inform the Litigation Chamber of the follow-up given to this decision. Bedroom

Contentieux received no reaction whatsoever from the defendant to this

first decision. No appeal to the Market Court has been filed.

25. Subsequently, the defendant also did not put forward any arguments against the injunction which

had been given to her as permitted by article 99 LCA (of which she had been informed by letter

recommended by the Litigation Chamber of November 7, 2019). The defendant limited itself to

send a message “Are we serious here? to the Litigation Chamber.

26. The defendant also did not react to the email of April 29, 2020 from the Litigation Chamber

informing him of the amount of the proposed fine and the reasons underlying this sanction.

27. In conclusion, the Litigation Division considers that the defendant's attitude reflects a lack

manifest consideration and cooperation contrary to what is expected of a person responsible for

processing, in particular pursuant to Article 31 of the GDPR8.

III.

On corrective measures and sanctions

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

1° dismiss the complaint without follow-up;

2° order the dismissal;

3° order a suspension of the pronouncement;

4° to propose a transaction;

5° issue warnings or reprimands;

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

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

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

8 Article 31 of the GDPR - Cooperation with the supervisory authority" The controller and the processor as well as, where

where appropriate, their representatives cooperate with the supervisory authority, at the latter's request, in the performance of its

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9° order the processing to be brought into conformity;

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

data recipients;

11° order the withdrawal of accreditation from certification bodies;

12° to issue periodic penalty payments;

13° to impose administrative fines;

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

international;

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

data on file;

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

data.

29. It is important to contextualize the breach of Articles 21§§ 2 and 3, 17 § 1 c), 12. 3 and possibly

19 of the GDPR as well as Article 31 of the GDPR with a view to identifying the most effective corrective measures

adapted.

30. If the data processed is not particularly sensitive, the reinforcement of their rights by the

data subjects is one of the main objectives of the GDPR. Violation of these rights constitutes

a serious breach (Article 83 § 2 a) of the GDPR). It is indeed essential that people

concerned can exercise effective control over the data concerning them which are processed and

that data controllers comply with their obligations arising from the

recognition of these rights. This applies in particular to the right of opposition, which is unconditional

moreover, in terms of direct marketing. It is essential that data controllers give

the desired follow-up quickly, at the latest within the period of one month prescribed by the GDPR. It is the same

for the prohibition of processing following the exercise of this right and the erasure that must follow.

31. For these various reasons, the Data Protection Authority has made compliance with the GDPR in terms of

direct marketing one of the key areas of its 2020-2025 strategic plan. The implementation of this

plan has already materialized with the adoption of Recommendation 01/2020 of January 17, 2020 on

to the processing of personal data in the context of direct marketing already mentioned. Not everything

however is not new. Since 2013, a recommendation on the same subject has existed9 and Article 12

§ 1 para. 3 of the Law of 8 December 1992 on the protection of privacy with regard to processing

of personal data transposing Article 14 b) of Directive 95/46/EC10 already required

9 Commission for the protection of privacy, Recommendation 02/2013 of 30 January 2013 “Direct marketing and protection

personal data”.

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

with regard to the processing of personal data and the free movement of such data

of a data controller such as the defendant that he follows up on the exercise – already unconditional

– a right of opposition in relation to direct marketing.

32. The inclusion of the theme of direct marketing in the ODA's 2020-2025 strategic plan

does not imply that any breach of Article 21 of the GDPR must necessarily be sanctioned by

a fine. The Litigation Chamber always conducts a case-by-case examination.

33. In the present case, the Litigation Chamber particularly notes, in addition to the breach of the rights

of the plaintiff, the absence of total cooperation on the part of the defendant who not only

not reacted to the first injunction of the Litigation Chamber of October 15, 2019 (even though

this one was not accompanied by any fine) but who also, in a second time, testified to a

real lack of interest in compliance with the GDPR by sending the APD its email of November 26, 2019 “We

what are you talking about here? ". The Litigation Chamber considers that this behavior is contrary to Article

31 of the GDPR and constitutes an aggravating circumstance within the meaning of Article 83 § 2 f) and k) of the GDPR.

The amount envisaged by the Litigation Chamber must be all the more dissuasive.

34. In view of all the elements developed above specific to this case, in particular

the seriousness of the breach relating to the exercise of the data subject's rights (Article 83 § 2 a) of the

GDPR) and the aggravating circumstance linked to the behavior of the defendant (article 83 § 2 f) and

k) of the GDPR) which also constitutes a breach of Article 31 of the GDPR, the Litigation Chamber

considers that a reprimand accompanied by a fine of 1,000 euros constitutes an effective sanction,

proportionate and dissuasive within the meaning of Article 83 of the GDPR.

35. 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 of

data protection through the deletion of the direct identification data of the parties and

of the persons mentioned, whether natural or legal.

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FOR THESE REASONS,

THE CONTENTIOUS CHAMBER 11

- orders the defendant, pursuant to Article 100, § 1, 6° and 10° LCA, within a period of one

months12 from the notification hereof13:

o to comply with the complainant's request for the right to object, in accordance with

to Articles 21 §§ 2 and 3 of the GDPR

o to comply with the complainant's request for erasure, in accordance with Article

17 § 1 c) GDPR

o as well as, where applicable, to comply with Article 19 of the GDPR by notifying

the deletion made to any potential recipient to whom it would have communicated the

complainant's data.□

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orders the defendant to inform the APD (Litigation Chamber: litigationchamber@apd-□

gba.be) of the follow-up reserved for these injunctions and this at the latest in the month14 of the□

notification15 of this decision;□

imposes on the defendant a reprimand accompanied by an administrative fine of an amount□

EUR 1,000 (one thousand euros) pursuant to Articles 100, 5° and 13° and 101 LCA as well as□

GDPR Article 83.□

Under Article 108 § 1 LCA, this decision may be appealed to the Court of Justice.□

contracts (Brussels Court of Appeal) within 30 days of its notification, with□

the Data Protection Authority as defendant.□

(seg.) Hielke Hijmans□

President of the Litigation Chamber□

11 Asbl Y presents itself on its website as an international agency offering artistic services in Belgium□

and in another neighboring country. This same website mentions a single establishment (head office) in Belgium. From□

when the complaint relates to processing which the Litigation Chamber considers cannot be qualified as “cross-border”□

within the meaning of Article 4.23 b) of the GDPR (as long as it cannot be considered that it significantly affects or is likely to□

materially affect data subjects in more than one Member State), Article 56 of the GDPR has not been applied in□

the case (see also recital 135 of the GDPR as well as the WP 244 Guidelines of the Group 29, included in its□

account by□

data protection: https://ec.europa.eu/newsroom/article29/item-□

detail.cfm?item_id=611235).□

12 This deadline takes into account the current exceptional circumstances and any organizational measures taken by the□

defendant in this context (Ministerial Order of March 23, 2020 on emergency measures to limit the spread□

of the coronavirus COVID-19 and its successive modifications).□

13 The date of dispatch of this decision by the Registry is deemed to be the date of notification).

the European Committee of

14 Same as footnote 11.

15 Same as footnote 12.