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Litigation Chamber

Decision on the merits 03/2020 of February 21, 2020

File number: DOS-2018-05326

Subject: Complaint by Mr. X against two former employers

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

Hijmans, chairman, and Messrs. Romain Robert and Christophe Boeraeve, members;

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

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

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

Data Protection), hereinafter 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;

Made the following decision regarding:

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the complainant

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controller 1 (hereinafter the first respondent)

the data controller 2 (hereinafter the second defendant)

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I.

Feedback from the procedure

Having regard to the complaint filed on September 30, 2018 by the complainant with the Authority for the Protection of

data;

Having regard to the decision of October 15, 2018 of the Frontline Service of the Data Protection Authority

declaring the complaint admissible and forwarding it to the Litigation Chamber at the same

date;

Having regard to the decision taken by the Litigation Chamber during its session of October 23, 2018 to consider

that the file was ready for processing on the merits under articles 95 § 1, 1° and 98 LCA;

Having regard to the letter dated October 30, 2018 from the Litigation Chamber informing the parties of its decision

above to consider the file as ready for substantive processing on the basis of Article 98

ACL;

Considering the invitation of November 29, 2018 sent by the Litigation Chamber to the parties inviting them to

make their case according to an established schedule;

Given the changes made to the initial schedule by decisions of the Litigation Chamber of 9

January 2019, April 30, 2019 and June 12, 2019;

Having regard to the submissions in response of the first defendant filed by his counsel, received on January 28

2019;

Having regard to the request made by the first defendant under these conclusions to be, at the end of

the exchange of conclusions, heard by the Litigation Chamber pursuant to Article 51 of the

Internal regulations of the Data Protection Authority;

Having regard to the complainant's conclusions received by the Litigation Chamber on March 27, 2019;

Having regard to the request made by the complainant in his conclusions to be heard by the Chamber

Litigation following the exchange of conclusions pursuant to Article 51 of the Rules of Procedure

inside the Data Protection Authority;

Having regard to the submissions filed by the second defendant represented by his counsel, received by the

Litigation Chamber on April 26, 2019;

Having regard to the submissions in reply of the first defendant filed by his counsel, received on May 3, 2019;

Considering the granting by the Litigation Chamber of a final deadline to conclude addressed to all parties

dated June 12, 2019;

Having regard to the invitations to the hearing sent by the Litigation Chamber dated December 20, 2019

and January 15, 2020;

Having regard to the hearing during the session of the Litigation Chamber of January 28, 2020 during which

only the complainant was present;

Considering the minutes of the hearing of January 28, 2020 and the complainant's annotations of February 4, 2020 which

were attached thereto and communicated to the first and second defendants on February 11, 2020.

II.

The facts and the subject of the complaint

The complaint lodged by the complainant falls within the context of a conflict between him and his former

employer, the first defendant, and a second former employer, the second defendant.

The first defendant - which includes several general practitioners - hired the plaintiff on 24

August 2016 as marketing and communication assistant. The complainant was dismissed by the first

defendant subject to the performance of a notice period of two months by registered mail of 2

October 2017.

The first defendant produces in the context of these proceedings a certain number of letters

addressed to the plaintiff from which it appears that, according to the first defendant, the latter did not execute

the services requested during the notice period, i.e. during the months of November and

December 2017. In his registered letter sent to the complainant on January 10, 2018, the first

respondent considers that the complainant breached his professional obligations by not performing

all of the agreed work and therefore decides, for the month of December 2017, to declare it as

unpaid leave without right to remuneration.

Following this letter, the complainant contacted his trade union organization. This tells the complainant

having sent a formal notice to the first defendant dated April 11, 2018. An exchange of

letters ensued between the union and the first defendant, including the mail - subject of the dispute brought
before the Litigation Chamber - of June 14, 2018 sent by the first defendant to the union.

It appears from the documents filed in the context of the procedure that, by this letter of June 14, 2018, the
first defendant wrote to the union, in particular the following (excerpt):

“Since then, his new employer – the second defendant – contacted us to let us know
of his attitude comparable to that which he had within our society, that is to say that he does not
no longer showed up at his place of work after a while and no longer reported
its services. The company had to give him his notice after 2 months.
According to my information, a dispute recently took place between your affiliate and his new
employer during which he would have used false arguments and acted against the
company regulations.
The court condemned him to pay damages for these facts”.

After being dismissed by the first defendant, the plaintiff worked from January to April 2018 for
the second defendant. He was fired by the second defendant a few months after he started with
of this company, i.e. in April 2018. It appears from the judgment delivered by the Court of First
instance of Brussels sitting in chambers produced in the context of this procedure that the second
Defendant initiated summary proceedings by summons against Plaintiff to recover
files with him. It was to this decision – with erroneous mention of its date – that the first
defendant alludes in his letter of June 14 addressed to the union.

This letter of June 14 is the response of the first defendant to the letter sent to him by the union on
May 23, 2018.

In this letter of May 23, the union disputes the reasons for the complainant's dismissal (qualifying the
dismissal for manifestly unreasonable) and claims in particular, in addition to the payment of
services performed during his notice by the plaintiff:

- An indemnity corresponding to 17 weeks of remuneration in accordance with Article 9 of

collective agreement no. 109 of February 12, 2014 concerning the grounds for dismissal

(no reason for dismissal);

The complaint lodged by the complainant with the Data Protection Authority consists of two

shutters:

 First part against the second defendant

The plaintiff accuses the second defendant of having communicated to the first defendant

information relating to the performance of his work with the latter as well as information

relating to the legal proceedings opposing the second defendant for the recovery of documents

belonging to this company at the end of their contractual relationship (decision of the Court of First

instance of Brussels sitting in summary proceedings).

 Second part against the first defendant

The plaintiff also criticizes the first defendant for having collected this same information from

of the second defendant and to have them, by letter dated June 14, 2018, communicated to his union.

The complainant asks the Data Protection Authority to declare his complaint founded and to

consider the appropriate sanctions for the acts that have been committed and the damages that have resulted.

III.

The hearing of January 28, 2020

During his hearing on January 28, 2020, the complainant recalled the facts and contested several elements

put forward by the first defendant in its pleadings by referring to its own pleadings.

He added the following:

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His reading of the conclusions of the first respondent reveals that contacts prior to that

at the end of which the second defendant communicated to the first defendant the information

disputes relating to his conviction in court have taken place between the defendants;

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The fundamental right nature of the right to data protection;

Failure to respect the principle of proportionality and minimization on the part of the defendants

during the communication of data concerning him and the lack of relevance of the data

communicated with regard to the problem of the absence of delivery of the original of his

form C4 (unemployment certificate) and the nature of the dismissal of which he had been the subject

from the second defendant;

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The lack of respect for the principle of loyalty towards him during this same communication

data concerning him;

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The absence of an admissible basis of lawfulness, the overriding legitimate interest on the part of the

defendants as invoked cannot, in his opinion, be accepted;

- An infringement of his right to be forgotten as well as his right of opposition, even if this is the right to apply;

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The lack of consent on his part to the communication of personal data

personnel concerning him between the defendants.

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The difficulties encountered in obtaining his C4 (unemployment certificate) and the fact that he

was established before the contacts established between the defendants.

IV.

As for the competence of the APD, in particular of the Litigation Chamber

As to the competence of the Data Protection Authority, in particular the

Litigation Chamber

Pursuant to Article 4 § 1 of the LCA, the Data Protection Authority (DPA) is responsible

monitoring compliance with the fundamental principles of personal data protection

contained in the GDPR and in other laws containing provisions relating to the protection of the

processing of personal data.

Pursuant to Article 33 § 1 of the LCA, the Litigation Chamber is the litigation body

ODA administration. It is seized of the complaints that the Service de première ligne forwards to it in

application of Article 62 § 1 LCA, i.e. admissible complaints provided that in accordance with Article

60 paragraph 2 LCA, these complaints are written in one of the national languages, contain a statement

of the facts and the indications necessary to identify the processing of personal data

to which they relate and fall within the jurisdiction of the Data Protection Authority.

Data processing is carried out in multiple sectors of activity, in particular in the

framework of contractual and post-contractual employment relationships as in the present case. It does not

nevertheless remains the competence of the Data Protection Authority in general, and of the

Litigation Chamber in particular, is limited to monitoring compliance with the applicable regulations

data processing, regardless of the sector of activity in which this data processing

intervene. Its role is not to replace the labor courts in the exercise of

their skills in labor law in particular.

Article 2 § 1 of the GDPR defines the material scope of the GDPR as follows:

“This Regulation applies to the automated processing of personal data

in whole or in part, as well as to the non-automated processing of personal data

personnel contained or required to be contained in a file".

As for the communication of information by the second defendant to the first defendant (part 1 of

the Complaint), the Defendants both state in their submissions that this exchange

information did take place, but only orally.

In its pleadings, the first respondent states in this regard1:

"Having indeed had contact with the next employer of the complainant who will put an end to

his employment contract a few months later on April 6, 2018 (this information comes under the

record of this proceeding).

Obviously, the professional relations between the complainant and his new employer are

as the complainant explains in his complaint in this case.

1 Item 5.1. submissions in response from the first defendant of January 25, 2019.

The approach of the first defendant, in its relationship with the second defendant, was

essentially to understand the most optimal way to respond to complaints from the

complainant. (…)".

According to its pleadings, the first respondent certifies that it did not, however, have access to any

judgment2 “since the judgment of … mentioned in the letter of June 14, 2018 is not

not even a correct data when the plaintiff affirms, in his complaint, that his judgment

was rendered on ..., which also makes it more difficult to transmit this judgment between the two

companies in question, the same day as that of its pronouncement by the court on the one hand, and of the drafting,

and the sending of the registered letter of June 14, 2018 by the first defendant on the other hand! »3

As for the second defendant, he specifies in the terms of his submissions to the same effect4:

Translation

“1.26. (…) In June 2018, the Deputy Executive Director of the second defendant was contacted

by the complainant's previous employer. He asked her what her

experiences with the complainant. In good faith and quite informally, the second

Respondent generally portrayed his experiences with Complainant. And in particular

advised that the employment contract with the complainant had ended and that they had to hire

summary proceedings in order to be able to recover certain properties from the plaintiff

of the company. No written information was provided, let alone the decision

(!)."

Further to point 3.2. from its submissions, the second respondent concludes that:

Translation

"First of all, this is not an automated processing of personal data.

personal data or non-automated processing of personal data which is

listed in a file. Indeed, the second defendant only communicated

verbally and by telephone general information to the complainant's former employer,

at his request. Therefore, (…) and the General Regulation on the protection of

data are principally not applicable".

2 It is the Litigation Chamber which underlines.

3 Page 5 of the conclusions of the first defendant of January 25, 2019.

4 Item 1.26. of the submissions of the second defendant of April 26, 2019. Translation into French as soon as the submissions w

written in Dutch.

Moreover, it does not follow from the documents in the file submitted by the complainant that this communication

would have taken place in an automated manner by the second defendant.

In conclusion, the communication by the second respondent of the information that the plaintiff

had been the subject of a conviction by the courts and tribunals is not constitutive, on the part of the

second defendant, automated data processing or manual data processing

called to appear in a file within the meaning of Article 2 of the GDPR.

The Litigation Chamber of the Data Protection Authority is therefore not competent with regard to

of these facts. The complaint in its part directed against the second defendant is unfounded.

v.

On the reasons for the decision

On the breach of the obligation of lawfulness by the first defendant (part 2 of the complaint)

In its capacity as data controller, the first respondent is required to comply with the principles

data protection and must be able to demonstrate that they are respected (principle

liability – article 5.2. of the GDPR) and to implement all the necessary measures for this

effect (Article 24 GDPR).

Pursuant to Article 5 § 1 a) of the GDPR, any processing of personal data, even

totally or partially automated, must in particular be fair and lawful. To be lawful, all

processing of personal data must in particular find a basis in Article 6 of the

GDPR. It is up to the data controller to determine what this basis is.

In this case, the collection of information from the second defendant and the communication by mail

of June 14, 2018 from the first defendant to the information union of the difficulties encountered in the

working relationship with the complainant as well as the information that the complainant was the subject of a

judicial decision are processing of personal data subject to the application of the

GDPR. They must be based on one of the bases of lawfulness listed in Article 6 of the GDPR.

As for the nature of the data processed, the Litigation Chamber recalls that Article 10 of the GDPR

concerns the processing of only personal data related to criminal convictions and

offenses or related security measures.5 Article 10 of the GDPR cannot be extended to sanctions

administrative or civil judgments. The scope of this provision is reduced and the margin

5 Article 10 § 1 of the Law of 30 July 2018 on the protection of natural persons with regard to data processing

personal data which implements Article 10 of the GDPR relates, in the same sense, only to the processing of

personal data relating to criminal convictions and criminal offenses or security measures

related.

procedures contained in Directive 95/46/EC relating to the protection of natural persons

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

(article 8 § 5 paragraph 2) to broaden the notion of “judicial data” no longer exists.

The information that the plaintiff was sentenced by decision of the Court of First Instance

of Brussels does not therefore constitute “judicial” data within the meaning of Article 10 of the GDPR.

The fact remains that by nature, information relating to court convictions

such as judicial data of a civil nature as in the present case, take on a certain sensitivity.

The inaccuracy of this data (i.e. the date of the judgment mentioned to the first defendant by the

second defendant, which was not the exact date of the judgment) does not, however, cause him to lose

its qualification as personal data. The object of the judgment and the context in which it

is registered are all personal data relating to the plaintiff, even the date of the judgment

inaccurate. This same inaccuracy, was it attributable to the second defendant and not to the first

defendant, is also not likely to remove the materiality of the facts as invoked by the first

respondent.

As to the lawfulness of the processing (Article 5 § 1 a) of the GDPR), the first defendant indicates that it is based

on Article 6 § 1 f) of the GDPR according to which the processing of data is lawful “if, and in the

to the extent that it is necessary for the purposes of the legitimate interests pursued by the controller

or by a third party, unless the interests or fundamental rights and freedoms of the

data subject who require the protection of personal data, in particular

when the person concerned is a child”.

The first defendant states that in the disputed context between itself and the trade union of the

complainant, in view of the threats to take legal action against him made by the

union and given the need to present his defence, the first defendant collected and

communicated the disputed information to the union.

The complainant considers that there is no reason to legitimize the contact made by

the defendants among themselves, in particular by the first defendant to the second defendant, nor the

communication of information concerning him to his trade union organization.

The Litigation Chamber notes that point f) of Article 6 of the GDPR refers to a legitimate interest

pursued by the controller (a). The processing of personal data must

be “necessary for the fulfillment of the legitimate interest”6 pursued by the controller (b).

6 The italics are the Litigation Chamber.

Finally, recourse to legitimate interest is expressly subject to an additional criterion of

in balance, which aims to protect the interest and the fundamental rights and freedoms of persons

concerned. In other words, the legitimate interest pursued by the controller must be

compared with the interest or fundamental rights and freedoms of the data subject, the purpose of

the balance being to prevent a disproportionate impact on these rights and freedoms. interest

pursued by the data controller, even if legitimate and necessary, cannot validly be

invoked that if the fundamental rights and freedoms of the persons concerned do not prevail over this

interest. The Court of Justice of the European Union has clarified that these three conditions – either the prosecution

of a legitimate interest by the data controller (a), the necessity of the processing for the performance

the legitimate interest pursued (b) and the condition that the fundamental rights and freedoms of individuals

concerned do not prevail over the interest pursued (c), are cumulative7.

If it is initially for the data controller to assess whether the conditions

set out in Article 6 § 1 (therefore including letter f)) of the GDPR are satisfied, the legitimacy of the

treatment can then be the subject of another evaluation, and possibly be contested, between

others by the persons concerned and by the authorities responsible for supervising the protection of

data. A case-by-case examination, taking into account the concrete circumstances of each complaint,

will thus allow the Litigation Chamber of the DPA to conclude as to the lawfulness of processing based on

on the basis of the legitimate interest invoked, as in this case, by the data controller.

The processing of personal data must be “necessary for the fulfillment of the interests

legitimate”8 pursued by the controller. This condition of necessity between the treatment

operated and the legitimate interest pursued is particularly relevant in the case of Article 6 § 1 f) of the

GDPR to ensure that data processing based on legitimate interest does not lead to

an overly broad interpretation of the interest in processing data.

In this context, the Litigation Chamber is of the opinion that the use of means of defense

relying on data resulting from direct data collection from the person

concerned must, in order to satisfy the principle of fairness, be favoured.

The first defendant relies on the legitimate interest of defending against the grievances brought before it.

opposed by the trade union organization representing the complainant. The Litigation Chamber considers that in

In this case, this defense is part of the “defence in court”, i.e. of a fundamental right enshrined in

Article 48 of the Charter of Fundamental Rights of the Union. In general, the "defence in

7 See. in particular Court of Justice of the European Union (CJEU), Judgment of November 11, 2019 (C-708/18), TK c. Associat

Proprietari bloc M5A-ScaraA pronounced with regard to article 7 f) of directive 95/46/EC.

8 The italics are the Litigation Chamber.

justice" can indeed be considered a lawful legitimate interest in the context of

the application of Article 6 § 1 f) of the GDPR.9 In accordance with Opinion 06/2014 of the Article 29 Group

on the notion of legitimate interest 10, this interest must be real and present, or not hypothetical.

The Litigation Chamber finds that this interest constituted a legitimate interest at the material time.

real and present. Indeed, when contact was made between the first defendant and the second defendant

in June 2018, the first defendant had been sent several letters already since April 2018,

in particular the letter of May 23, 2018 from the union calling him into question as was

described above in the statement of facts.

Nevertheless, for this legitimate interest of "defence in justice" of the first defendant to prevail, the

data processing must be “necessary” and “proportionate” to the exercise of this defense in

justice. It would be excessive and contrary to these requirements of necessity and proportionality to admit

that all previous employers of an employee can, by virtue of this quality, exchange any

information relating to an employee, even for legal defense purposes.

In this regard, the Litigation Chamber, on the basis of the documents in the file, finds that the first defendant dismissed the plaintiff and formulated the reasons for this dismissal before any exchange with the second defendant. In its letter of June 14, 2018 to the union, the first respondent writes that it notified the complainant's reasons for dismissal to the latter dated December 21, 2018. Said letter from December 21, 2018 is otherwise produced. During his hearing, the complainant indicated that his C4 (unemployment certificate) sent to the National Employment Office (ONEM) had also been drawn up before this contact.

In other words, the reasons for the plaintiff's dismissal which the first defendant could legitimately rely on the union are independent and prior to any information that the second defendant could or could have brought. Indeed, it was at the time of dismissal, informing the complainant of his reasons as well as the establishment of the C4 that he belonged to the first defendant to identify the reasons for the dismissal. And it is with regard to these that the first defendant could legitimately defend himself, the union qualifying the dismissal as patently unreasonable.

9 Article 29 Group, Opinion 06/2014 of 9 April 2014 on the notion of legitimate interest pursued by the controller data within the meaning of Article 7 of Directive 95/46/EC (WP 217), page 38 of the French version. The Litigation Chamber is of the opinion that the considerations expressed in this opinion remain valid on this point with regard to Article 6 § 1 f) of the G

10 Article 29 Group, Opinion 06/2014 of 9 April 2014 on the notion of legitimate interest pursued by the controller data within the meaning of Article 7 of Directive 95/46/EC (WP 217), page 27 of the French version. The Litigation Chamber is of the opinion that the considerations expressed in this opinion remain valid on this point with regard to Article 6 § 1 f) of the G

The "defence in court" cannot legitimize the collection and other subsequent processing such as dissemination or communication to third parties of any data relating to the data subject. Those data processing must, in order to be necessary and proportionate, be carried out in a

relevant and proportionate to the precisely identified purpose of this legitimate interest, i.e. its

legal defense in respect of the dispute concerned.

In the present case, the information processed by the first defendant actually supplemented the

defenses already available to the first defendant with respect to the plaintiff's dismissal

and this, without having any link of relevance with it. The grounds for dismissal on which the first

defendant had relied to dismiss the plaintiff and issue his C4 being at the heart of the dispute with the

union, other personal data extraneous to these reasons were irrelevant, and a fortiori

not necessary in this case, for his defense on this aspect vis-à-vis the union.

The Litigation Chamber concludes in view of the foregoing that the first defendant could not

base the data processing referred to in the complaint on its legitimate interest, failing which for these

processing to be necessary and proportionate within the meaning of Article 6 § 1 f) of the GDPR. In the absence of

basis of lawfulness, the Litigation Chamber concludes that Article 5 § 1 a) of the GDPR combined with Article 6

of the GDPR have not been complied with in this case.

The Litigation Division also finds that the first defendant did not respect the principle

of loyalty also enshrined in Article 5 § 1 a) of the GDPR when processing information

disproportionate and irrelevant - since, as set out above, unrelated to the grounds on

which it had based the dismissal of the complainant - obtained from third parties without the deliberate knowledge of the

complainant.

VI.

On corrective measures and sanctions

Under the terms of 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;

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;

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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.

The principles of lawfulness and fairness enshrined in Article 5 § 1 a) of the GDPR are principles

founders of the data protection framework. Their respect is essential. The requirement of a

basis of lawfulness - which is lacking in this case - is part of it.

As for the nature of the personal data processed, the Litigation Chamber has already recalled

that there was in particular processing of judicial data of a civil nature. These data are not

covered by Article 10 of the GDPR, but they are nonetheless of a certain sensitivity.

As to the way in which the personal data were processed, the Litigation Chamber

finds that the disputed data was initially collected orally and made accessible

by a single letter, to a single addressee, the union, which represented the complainant himself.

The Litigation Chamber also notes that the staff of the union is, in addition to the fact that the
syndicate is itself required to comply with the obligations arising from the GDPR, subject to an obligation
own confidentiality.
The Litigation Division also notes the ad hoc nature of said processing and the absence of
relevant breach previously committed by the first defendant.
In conclusion, in view of all the elements developed above specific to this case, the
Litigation Chamber considers that the facts found and the breach of Articles 5 § 1 a) and 6 of the
GDPR, justify that as an effective, proportionate and dissuasive sanction as provided for in Article
83 of the GDPR a reprimand (article 100 § 1, 5° LCA) is pronounced against the first
respondent.
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.

FOR THESE REASONS,
The Litigation Chamber of the Data Protection Authority decides, after deliberation:
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to declare the complaint unfounded with regard to the second defendant;
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to pronounce against the first defendant a reprimand on the basis of article 100 §
1st, 5° ACL;
Under Article 108, § 1 LCA, this decision may be appealed to the Court of
contracts within 30 days of its notification, with the Authority for the protection of
given as a defendant.

(Sr.) Hielke Hijmans

President of the Litigation Chamber

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