

Litigation Chamber

Decision on the settlement fund 157/2022

from November 4, 2022

File number: DOS-2020-03231

Subject: Use of cookies on the RTL website

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

Hijmans, chairman;

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

to 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

ACL);

Having regard to the internal regulations as approved by the House of Representatives on 20

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

Considering the documents in the file;

Having regard to the settlement proposal submitted to the party on September 14, 2022, as annexed and

forming an integral part of this decision;

Made the following decision regarding:

The part :

RTL Belgium SA,

Decision on the merits 157/2022 - 2/9

I. Procedure prior to the decision:

1.

In the context of this case involving RTL Belgium SA, a proposed transaction

was submitted to this party on September 14, 2022. The full contents of the letter containing this transaction proposal is appended to this decision.

2.

On October 4, 2022, the party submitted a letter to the registry of the Litigation Chamber requesting clarification of the terms proposed in the proposed transaction.

3.

On October 11, 2022, a response was given to this request for modification of the terms. In addition, an extension of the deadline for responding to the transaction proposal of 14 days was granted to the party, given the late response from the Litigation Chamber.

4.

On October 20, 2022, the party submitted a letter to the registry of the Litigation Chamber, in which the party makes a number of requests for clarification regarding the transaction proposal.

5.

On October 24, 2022, a response to the party's requests for clarification is provided. In this answer, some formulations which could serve to clarify the proposal of transaction – in this decision formalizing the transaction – are suggested.

6.

On October 28, 2022, the party confirms that it agrees to "the last proposal for the Litigation Chamber", which means that the party accepts the transaction proposal, provided that certain clarifications are made in the (present) decision of transaction formalizing this transaction.

7.

Given the express acceptance of the party, a transaction is then established on the 28 October 2022. This decision formalizes this transaction.

II. Terms of the transaction

8.

The conditions of the transaction are identical to those contained in the letter of settlement proposal of September 14, 2022. For this reason, the appendix containing this proposal forms an integral part of this decision. The conditions of this proposal are briefly summarized below.

9.

However, following requests from the party, the following clarifications are made, in excess of the conditions set out in the proposed transaction of September 14, 2022. In case of ambiguity in the wording of the formal settlement decision, the wording of the text of the decision takes precedence over that of the settlement proposal attached to the decision.

10. First of all, the Litigation Division specifies that the transaction was not preceded a deliberation on the merits of the facts of the file: the arguments put forward by the party in

Decision on the merits 157/2022 - 3/9

his defense were therefore not considered when the transaction was decided; there is no no more auditions.

11. This settlement decision extends to the potential breach of Article 129 of the Law of 13 June 2005 (in force at the time of the findings of the APD Inspection Service on file), as well as potential breaches of the General Privacy Regulations (GDPR), and in particular (but not only) in Articles 4, 5, 6, 7, 13, 14, 24 and 25 of the GDPR, in all matters relating to cookies, or more generally to the storage and consent to the placement and further processing of information on the device of the user as a data subject. The transaction decision concerns the sites web involved and mentioned in the file and relates to the party to which the proposal transaction is addressed.

12. The transaction relates only to a specific period: the period from 25 May 2018 to 11 November 2020, i.e. the date of submission of the additional report of the Inspection Service.

13. The transaction exhausts the powers of the Litigation Chamber to take measures corrective action against potential violations within the boundaries of the elements and legal provisions described above and in the proposed transaction, as well as in the period referred to above. The Litigation Chamber emphasizes that the transaction does not affect the powers of the courts and tribunals or those of other authorities to examine offenses if applicable. The transaction in this case only binds the Litigation Chamber of the Belgian Data Protection Authority.

III. Publication of the decision

14. Given the importance of transparency regarding the decision-making process of the Chamber Litigation, this decision is published on the website of the Protection Authority Datas.

FOR THESE REASONS,

the Litigation Chamber of the Data Protection Authority decides, after deliberation:

- Under Article 100, §1, 4 of the LCA, to validate the transaction accepted by the party on October 28, 2022, under the conditions contained in this decision and its appendix.

Decision on the merits 157/2022 - 4/9

In accordance with Article 108, § 1 of the LCA, an appeal against this decision may be lodged, within thirty days of its notification, to the Court of Markets (court d'appel de Bruxelles), with the Data Protection Authority as defendant.

Such an appeal may be introduced by means of an interlocutory request which must contain the information listed in article 1034ter of the Judicial Code¹. The interlocutory motion must be filed with the registry of the Market Court in accordance with article 1034quinquies of C. jud.², or via the e-Deposit information system of the Ministry of Justice (article 32ter of the C. jud.).

(Sé). Hielke HIJMANS

President of the Litigation Chamber

¹ The request contains on pain of nullity:

the indication of the day, month and year;

1°

2° the surname, first name, domicile of the applicant, as well as, where applicable, his qualities and his national register number or

Business Number;

3° the surname, first name, domicile and, where applicable, the capacity of the person to be summoned;

(4) the object and summary statement of the means of the request;

(5) the indication of the judge who is seized of the application;

6° the signature of the applicant or his lawyer.

2 The request, accompanied by its appendix, is sent, in as many copies as there are parties involved, by letter recommended to the court clerk or filed with the court office.

Litigation Chamber

RECOMMENDED

Decision on the merits 157/2022 - 5/9

For the attention of Mr. X

RTL Belgium SA,

Respondent

Secretariat

T: +32 (0)2 274 48 56

Email: litigationchamber@apd-gba.be

Your references

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Our references

DOS-2020-03231

Appendix(es)

Date

09/14/2022

Subject: transaction proposal in the file "Use of cookies on the RTL website"

Dear,

In the context of the large number of files awaiting examination by the Chamber

Litigation, which leads to long processing times for all cases, the Chamber

Litigation has decided, pursuant to Article 100, § 1, 4° of the law creating the Authority of

data protection ("LCA")³, to explore through this letter a proposal for

transaction in the file referred to under the heading ("transaction proposal").

The transaction proposal falls within a context where two of the ten files related to this

file (the ten files called "cookies on press sites") have already been the subject of a decision

on the merits in which the Litigation Division found violations giving rise to two

repeated the imposition of an administrative fine of EUR 50,000.⁴

This transaction proposal is made without any detrimental acknowledgment and does not bind

not the Litigation Chamber as to a position it could adopt in the event that the

this proposal would be refused.

Decision 85/2022 of 25 May 2022 of

3 MB, January 10, 2018.

⁴ See

<https://www.autoriteprotectiondonnees.be/publications/decision-quant-au-fond-n-85-2022.pdf>

103/2022

<https://www.autoriteprotectiondonnees.be/publications/decision-quant-au-fond-n-103-2022.pdf>.

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Decision on the merits 157/2022 - 6/9

If the party to whom the settlement proposal is addressed expressly refuses this

proposal, the Litigation Chamber will continue the procedure on the merits and will deal with the case

other than by transaction. If it finds that violations have been committed, it

may make use of the powers of sanction conferred on it by European law⁵ and Belgian law⁶.

a) Procedural status of the settlement proposal

The transaction proposal presented here precedes the deliberation phase relating to the

violations that may have been committed in this case. In this sense, the Chamber

Litigation only takes into account, in its settlement proposal, the findings that

were mentioned in the report of the Inspection Service of the Authority for the protection of

data, without having yet examined the accuracy of these findings.

Given that the procedure before the Litigation Chamber of the Data Protection Authority does not

cannot be assimilated to the procedure of criminal law, "the transaction" as provided for by the

Belgian legislator under article 100, § 1, 4° of the LCA cannot be assimilated to "the

transaction" provided for in criminal law.⁷ The transaction within the meaning of the LCA is indeed of the following character

generis.

First of all, the Litigation Chamber does not pronounce *hic et nunc* on the existence possible violations, even if the procedure is already in the examination phase "as to the merits" in accordance with Articles 98 and 99 of the LCA. The Litigation Chamber makes use of the competence which is explicitly attributed to it to formulate a transaction proposal, the image of what is also possible in the case of a "transaction" in criminal matters.

In addition, the Litigation Division mentions the precise facts, situating them in time and in space, on the basis of which the transaction proposal is made (*infra*). Although, as specified above, the Litigation Division does not pronounce *hic et nunc* on the existence of violations, it must however formulate the settlement proposal on the facts set out in the case. The amount that the Litigation Chamber proposes to the party to pay must indeed be proportional to the nature of the possible violations. The settlement proposal therefore relates to the facts, the period and the (technical) context, as described in the report of

5 See Article 58 of 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 Data Protection Regulation), hereinafter "GDPR";

6 See also Article 100 of the LCA.

7 See in particular articles 216bis and 216ter of the Code of Criminal Procedure ("CIC") concerning the termination of the action

public for certain offenses subject to the fulfillment of certain conditions (respectively the payment of a sum of money and the execution of measures and compliance with conditions).

the Inspectorate; the facts that are not covered by this period and this context not being covered by the transaction.⁸

Decision on the merits 157/2022 - 7/9

b) Findings by the Inspection Department in connection with the transaction proposal

In this case, the findings made by the Inspection Service of the Authority for the Protection of data that the Litigation Chamber takes into account - without however ruling on the merits

- when proposing the concrete conditions for the transaction are as follows:⁹

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"Observation 1: deposit of cookies not strictly necessary before the collection of the consent"¹⁰

"Finding 2: analytical cookies without consent"¹¹

"Finding 3: pre-ticked boxes for partners"¹²

"Finding 4: information about cookies inconsistent"¹³

"Finding 5: unjustified cookie retention periods"¹⁴

"Finding 6: withdrawal of consent not respected"¹⁵

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c) Substantive conditions

As part of the settlement proposal, the conditions accepted by the party to the procedure are the following :

- RTL undertakes to pay the sum of EUR 10,000 to the Belgian Treasury, in accordance with terms defined by the Federal Public Service Finance.¹⁶ RTL waives any civil action or otherwise in connection with the transaction, such as, but not limited to, communication unfavorable relating to this transaction;

- The Litigation Chamber finds no violation on the part of RTL and closes formalize the procedure by its transaction decision, provided that RTL accepts the transaction and complies with its conditions;

- For the Litigation Chamber, the fact of accepting a transaction proposal does not does not constitute an admission on the part of the defendant. This acceptance of

in particular, the transaction proposal cannot be used as a circumstance

8 In this sense, the ne bis in idem principle does not apply to facts that do not fall within this scope.

9 The Litigation Chamber takes full account of the additional investigation report of the Inspection Service of November 30, 2020 in DOS-2020-03231.

10 Report of the Inspection Service of the Data Protection Authority of October 7, 2020 in the file DOS-2020-3231 ("Inspection report"), p. 16-7.

11 Inspection report, p. 17-8.

12 Inspection report, p. 18-9.

13 Inspection report, p. 19-20.

14 Inspection report, p. 20-1.

15 Inspection report, p. 21.

16 Cfr. Art. 107 ACL.

Decision on the merits 157/2022 - 8/9

aggravating when establishing sanctions in possible future proceedings

before the Litigation Chamber;¹⁷

- In the event of explicit acceptance or in the absence of a response from the party to which the

transaction proposal is sent within the period specified below, this proposal

of transaction takes the form of a formal decision which is published on the website of

the Data Protection Authority, indicating the name of the party.

In the event of non-compliance with the terms of the accepted transaction, the Litigation Chamber reserves the right

the right to withdraw the settlement decision and deal with this matter in another way.

d) Deadline

RTL must indicate within 30 days of receipt of this proposal for

transaction whether it accepts it or not. In the absence of a response, the transaction proposal will be

considered accepted under the conditions set out above.

e) Existence of other controllers and/or processors

This proposal for an amicable resolution is addressed solely to RTL. She doesn't take position on whether and to what extent other actors are responsible for potential breaches that gave rise to this Proposed Settlement.

f) Validation of the amicable resolution

In the event that the transaction proposal gives rise to a formal decision of transaction due to explicit acceptance or lack of response, within the time aforementioned, of the party to whom the settlement proposal is addressed, an appeal may be introduced by the "aggrieved party".¹⁸

The final transaction does not affect the right of any individuals (in this case, the case is not based on a complaint) who suffered damages to claim damages and interests before a civil court on the basis in particular of Article 82 of the GDPR.

¹⁷ See in particular Article 83, paragraph 2, point e) of the GDPR in the context of the imposition of administrative fines when of the finding of violations following "any relevant violation previously committed by the person in charge of the processor or processor".

¹⁸ In accordance with Article 108, § 1 of the LCA, an appeal against this decision may be lodged within thirty days from the explicit acceptance or the absence of response, within the aforementioned period, to the Court of Markets (court d'appel de Bruxelles), with the Data Protection Authority as defendant.

Such an appeal may be introduced by means of an interlocutory request which must contain the information listed in Article 1034ter of the Judicial Code. The interlocutory request must be filed with the registry of the Court of Markets in accordance with article

1034quinquies of the C. jud., or via the e-Deposit information system of the Ministry of Justice (article 32ter of the C. jud.).

Please accept, Madam, Sir, the assurance of my highest consideration.

Decision on the merits 157/2022 - 9/9

(Sé).Hielke Hijmans

President of the Litigation Chamber