



Litigation Chamber

Decision 87/2023 of 27 juni 2023

Case number: DOS-2023-01459

Concerns: Exercise of the right to data erasure with no reaction from the defendant

The Litigation Chamber of the Data Protection Authority, composed of Mr Hielke Hijmans, Chairman, acting alone;

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 on the free movement of such data, and repealing Directive 95/46/EC* (General Data Protection Regulation), hereinafter referred to as the GDPR;

Having regard to the Act of 3 December 2017 *establishing the Data Protection Authority*, hereinafter referred to as the WOG;

Having regard to the Internal Rules of Procedure, as approved by the Chamber of Representatives on 20 December 2018 and published in the *Belgian Official Gazette* on 15 January 2019;

Having regard to the documents in the case;

has taken the following decision on:

The plaintiff: Mr. X, hereinafter "the plaintiff";

The defendant: Y, hereinafter "the defendant".

I. Facts and procedure

1. On 28 March 2023, the plaintiff filed a complaint with the Data Protection Authority against the defendant.
2. The plaintiff receives direct marketing emails from the defendant. On 23 February 2023, the plaintiff sent a request to the defendant to delete the plaintiff's data. However, the plaintiff did not receive a response to the request for inspection, but still received direct marketing emails on 1, 3, 6, 9, 15, 20, 22, and 28 March 2023. On 28 March 2023, the plaintiff reiterated his request to have data deleted. The plaintiff also received no response to this request. Following this, the plaintiff filed a complaint with the Data Protection Authority, submitting the two requests to delete his data and the direct marketing emails received.
3. On 6 April 2023, the complaint was declared admissible by the Front Line Service pursuant to articles 58 and 60 of the WOG, and the complaint was transferred to the Litigation Chamber pursuant to article 62, §1 of the WOG.

II. Justification

4. In order for the Litigation Chamber - to whom the plaintiff appealed under Article 77 of the GDPR - to be competent to handle his complaint, it is necessary, first of all, that the GDPR is applicable to the facts at issue or that other legislation relating to data protection that may form the basis of the Litigation Chamber's competence is applicable.
5. Regarding the territorial scope of the GDPR, Article 3 of the GDPR assumes two different cases. In the first case (Article 3(1) of the GDPR), the data processing operations are carried out in the context of the activities of an establishment of a controller in the territory of the European Economic Area. This first hypothesis therefore presupposes that there is an establishment in the territory of European Economic Area. The complaint in the present case is against a legal entity domiciled in the United States with no establishment in the territory of the European Economic Area. Article 3(1) of the GDPR therefore does not apply.
6. The second case provided for in Article 3(2) GDPR specifies that the GDPR applies to the processing of personal data that meet the following three cumulative conditions:
 - the processing was done by a controller not established in the European Economic Area;
 - the processing concerns data subjects who are in the territory of the European Economic Area;
 - and
 - these processing activities relate to:
 - (a) the offering of goods or services to these data subjects (Article 3(2)(a) GDPR) or
 - (b) the monitoring of their behaviour as far as their behaviour takes place within the European

Economic Area (Article 3(2)(b) GDPR).

7. Based on the documents in the file, the Litigation Chamber believes that these cumulative conditions have been met in this case. Regarding the first condition, the Litigation Chamber finds that the defendant is indeed not established in the European Economic Area. Regarding the second condition, the Litigation Chamber notes that it is not clear from the complaint whether the plaintiff was in the territory of the European Economic Area. On the assumption that the plaintiff was indeed in the territory of the European Economic Area at the time of the reported facts, this is also satisfied. Finally, the third condition is also met. Indeed, the processing activity in question is related to "the offering of goods and services." In fact, the defendant organises conferences in different parts of the world, including Europe (namely Amsterdam) and informs the data subject thereof and of the practical aspects thereof, such as ticket sales and discount codes, through the direct marketing emails. The intention to also actively offer these services within the European Economic Area is evidenced by the fact that the defendant has published a "Privacy policy" and a "GDPR policy." Consequently, the disputed processing meets the conditions of Article 3(2) GDPR, which means that the GDPR is applicable.
8. Article 27(1) GDPR stipulates that controllers or processors subject to the GDPR under Article 3(2) GDPR are required to designate a representative in the Union. The obligation in (1) of this article does not apply to: (a) processing which is occasional, does not include, on a large scale, processing of special categories of data as referred to in Article 9(1) or processing of personal data relating to criminal convictions and offences referred to in Article 10, and is unlikely to result in a risk to the rights and freedoms of natural persons, taking into account the nature, context, scope and purposes of the processing; or (b) a public authority or body. These exemption criteria are not applicable since the defendant is actively targeting data subjects in the territory of the European Economic Area for the provision of its services, and the defendant is not a public authority or body either.
9. The representative shall be established in one of the Member States where the data subjects, whose personal data are processed in relation to the offering of goods or services to them, or whose behaviour is monitored, are. (Article 27(3) GDPR) The identity and the contact details of the representative must be provided to data subjects in accordance with Articles 13 and 14 GDPR. However, the Litigation Chamber notes that the *GDPR Policy* as published on the defendant's website does not state the identity and contact details of the defendant.
10. In view of the foregoing, the Litigation Chamber therefore deems it appropriate to **warn** the defendant, pursuant to Article 58(2)(a) of the GDPR and Article 95, §1, 4^o of the WOG, that as a non-Union-based controller that is subject to the GDPR but has not designated a representative in the Union, or fails to inform data subjects thereof, it is in violation of Articles 13(1)(a), 14(1)(a) and 27(1) GDPR.

11. The Litigation Chamber confirms, based on the documents supporting the complaint, that the plaintiff exercised his right to data erasure pursuant to Article 17(1) GDPR on 23 February 2023. Pursuant to Article 12(3) GDPR, the controller, in this case the defendant, must respond to the request for data erasure within one month of receiving the request. Depending on the complexity of the request, this term may be extended by two months. The plaintiff must then be informed of this extension within one month of the request for data erasure. If the defendant decides not to entertain the plaintiff's request, it must notify the data subject within one month of receiving the request, in accordance with Article 12(4) GDPR. The evidence does not show that the plaintiff received any response regarding the action taken by the defendant to delete the data. As a result, the controller was in breach of Articles 12(3) and 12(4) GDPR, as well as Article 17(1) GDPR.
12. The Litigation Chamber is of the opinion that, on the basis of the above analysis, it must be concluded that the defendant was in breach of the provisions of the GDPR, which justifies proceeding to a decision in this case on the basis of Article 95, §1, 5° WOG, more specifically to order the defendant to comply with the plaintiff's exercise of his right to data erasure (Article 17(1) GDPR).
13. The present decision is a *prima facie* decision taken by the Litigation Chamber in accordance with article 95 WOG on the basis of the complaint filed by the plaintiff, within the framework of the "procedure prior to the decision on the merits"¹ and not a decision on the merits by the Litigation Chamber in the sense of article 100 WOG. The Litigation Chamber has therefore decided, pursuant to Articles 58(2)(c) and 95, §1, 5° of the Act of 3 December 2017, to **order** the defendant to comply with the data subject's requests to exercise his rights, specifically the right to data erasure ("right to be forgotten") as provided in Article 17 GDPR.
14. The purpose of the present decision is to notify the defendant of its breach of the provisions of the GDPR and to give it the opportunity to still conform to the above-mentioned provisions.
15. However, if the defendant does not agree with the content of the present *prima facie* decision and considers that it can assert factual and/or legal arguments that could lead to a different decision, it may send a request for a hearing on the merits of the case to the Litigation Chamber via the e-mail address litigationchamber@apd-gba.be within 30 days of the notification of this decision. The enforcement of this decision is suspended, if necessary, for the above-mentioned period.
16. If the examination of the case on the merits is continued, the Litigation Chamber will invite the parties, pursuant to Articles 98, 2° and 3° in conjunction with Article 99 WOG, to submit their defences as well as to attach to the file any documents they deem useful. This decision shall be permanently suspended if necessary.

¹ Section 3, Subsection 2 WOG (Articles 94 to. 97).

17. For the sake of completeness, the Litigation Chamber notes that a hearing on the merits of the case may result in the the measures listed in Article 100 WOG being imposed².

18. Finally, the Litigation Chamber notes the following:

If either party wishes to make use of the possibility to consult and copy the file (article 95, §2, 3° WOG), it should contact the secretariat of the Litigation Chamber, preferably at litigationchamber@apd-gba.be, in order to make an appointment. If a copy of the file is requested, the documents will be sent electronically if possible or otherwise by regular mail³.

III. Publication of the decision

19. Given the importance of transparency regarding the decision of the Litigation Chamber, this decision is published on the website of the Data Protection Authority. However, it is not necessary to directly disclose the parties' identifying information for this purpose.

² 1° to dismiss a complaint;

2° to order the acquittal;

3° to order the suspension of the ruling;

4° to propose a settlement;

5° to issue warnings and reprimands;

6° to order that the data subject's requests to exercise their rights be complied with;

7° to order that the data subject be notified of the security problem;

8° to order that the processing be temporarily or permanently suspended, restricted or prohibited;

9° to order that the processing be brought into compliance;

10° to order the rectification, restriction or deletion of data and notification thereof to the recipients of the data;

11° to order the withdrawal of accreditation of certification bodies;

12° to impose periodic penalty payments;

13° to impose administrative fines;

14° to order the suspension of cross-border data flows to another State or international institution;

15° to transfer the dossier to the public prosecutor's office in Brussels, which shall inform it of the action taken on the case;

16° to decide on a case-by-case basis to publish its decisions on the website of the Data Protection Authority.

³ Due to the extraordinary circumstances in the context of COVID-19, the option of collection from the Litigation Chamber Secretariat is NOT possible. Moreover, in principle, all communication takes place electronically.

FOR THESE REASONS,

the Litigation Chamber of the Data Protection Authority decides, subject to the submission of a request by the defendant for a hearing on the merits in accordance with Article 98 et seq. WOG¹, in order to:

- pursuant to **Article 58(2)(a) of the GDPR** and **Article 95, §1, 4° of the WOG**, warn the defendant that as a non-Union-based controller that is subject to the GDPR but has not designated a representative in the Union, or fails to inform data subjects thereof, it is in violation of Articles 13(1)(a), 14(1)(a) and 27(1) GDPR.
- pursuant to **Article 58(2)(c) of the GDPR** and **Article 95, §1, 5° of the WOG**, order the defendant to comply with the data subject's request to exercise his rights, in particular the right to data erasure (Article 17(1) GDPR), and proceed with the erasure of the personal data in question, and to do so within the period of 30 days from notification of this decision;
- to order the defendant to notify the Data Protection Authority (Litigation Chamber) by e-mail of the outcome of this decision within the same time period via the e-mail address litigationchamber@apd-gba.be; and
- if the foregoing has not been implemented by the defendant on time, to hear the case ex-officio on the merits in accordance with **Articles 98 et seq. WOG**.

Pursuant to Article 108, § 1 LCA, this decision may be appealed to the Market Court (Brussels Court of Appeal) with the Data Protection Authority as defendant, within a period of thirty days from the notification.

Such an appeal may be lodged through an adversarial petition that must contain the elements listed in Article 1034^{ter} of the Judicial Code⁴. The adversarial petition must be filed with the Registry of the Market

⁴ The petition shall state, under penalty of nullity:

- 1° the day, month and year;
- 2° the surname, first name, place of residence of the petitioner and, where appropriate, their capacity and national register or company number;
- 3° the surname, first name, place of residence and, where appropriate, the capacity of the person to be summoned;
- 4° the subject of the claim and the brief summary of the legal arguments supporting the claim;
- 5° the judge before whom the action is brought;
- 6° the signature of the petitioner or their attorney.

Court in accordance with Article 1034⁵*quinquies* of the Judicial Code⁵, or through the e-Deposit IT system of the FPS Justice (Article 32^{ter} of the Judicial Code).

(se). Hielke Hijmans

Chairman of the Litigation Chamber

⁵ The petition and its appendix, in as many copies as there are parties concerned, shall be sent by registered mail to the clerk of the court or filed at the Registry.