



Berlin Commissioner for Data Protection and Freedom of Information
Alt-Moabit 59-61, 10555 Berlin, Germany

521.13169.27 / 631.249

CR: 164705

Draft Decision IMI DD

416207

Berlin, 9 June 2023

Final Decision

Preliminary remarks

The complaint (ref. no. 521.13169 / 631.249) was raised before the Berlin DPA in July 2020. It was transferred to the supervisory authority of Belgium, which was determined to be the Lead Supervisory Authority (LSA) for the cross-border processing carried out by A Growing Three NV (from hereon also referred to as the controller), in accordance with Article 56 GDPR. The LSA Belgium conducted the investigation and the cooperation procedure with all concerned supervisory authorities in accordance with the cooperation mechanism as laid out in Article 60 GDPR. The LSA Belgium proposed the Draft Decision 416207 in IMI, thereby rejecting the complaint. In accordance with Article 60 (8) GDPR, the Berlin DPA as the supervisory authority with which the complaint was lodged, hereby adopts the decision as it was agreed upon in the cooperation procedure and is included below:

File Number: DOS-2021-00037

Subject: Complaint regarding the sending of direct marketing without legal basis for processing

The Litigation Chamber of the Data Protection Authority, formed by Mr Hielke Hijmans, President, sitting 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 GDPR;

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

Having regard to the Law of 30 July 2018 on the protection of natural persons as regards the processing of personal data (hereinafter LTD);

Having regard to the internal Regulations 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 file;

Has made the following decision regarding:

The Complainant: X, hereinafter "the Complainant";

The Defendant: Y, hereinafter "the Defendant";

I. Facts and procedure

- 1. This complaint was received via the IMI system by the Berlin Data Protection Authority (Berliner Beauftragte für Datenschutz und Informationsfreiheit) on 6 January 2021 at the Data Protection Authority (DPA). Various email exchanges subsequently took place between the Berlin Data Protection Authority and the DPA in the context of Article 60 of the GDPR.*

2. *The Complainant reproaches the Defendant sending him an advertising message to his email address without having a legal basis for such processing, dated 29 March 2020. Following a message from the Complainant to the Defendant questioning the legal basis on which it was processing his email address, the Defendant replied to the Complainant on 1 April 2020 that his personal data had been deleted, and that it had obtained his email address (processed personal data) via its takeover of the German-law company Z.*
3. *Since a referral to the DPA's Inspection Service for further examination of the case would be disproportionate and does not seem appropriate in light of the DPA's priorities (as specified in its File Without Follow-Up Policy), the Litigation Chamber focuses in this decision on the Defendant's processing of the Complainant's email address.*

II. Motivation

II.1.1. On the competence of the DPA under the IMI system

4. *Article 56 of the GDPR stipulates that "Without prejudice to Article 55, the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority for the cross-border processing carried out by that controller or processor in accordance with the procedure provided in Article 60."*
5. *Article 4.23 GDPR, on the other hand, explains the concept of cross-border processing in the following terms:*
 - "a) processing of personal data which takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union where the controller or processor is established in more than one Member State;*
 - or*
 - b) processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State.*

6. The Defendant has its headquarters in Belgium, but also has establishments in other Member States. It has an establishment in Berlin and has acquired the German company Monoqi GmbH. The Litigation Chamber bases its competence on a combined reading of Articles 56 and 4.23.b) of the GDPR. The DPA was referred to by the Data Protection Authority in Berlin, following a complaint by the Complainant to an authority in the Member State in which they are habitually resident, in accordance with Article 77.1 of the GDPR, and declares itself the lead supervisory authority (Article 60 of the GDPR).

11.1.2. On the competence of the DPA and the Litigation Chamber

7. Pursuant to Article 4, § 1 of the LCA, the DPA is responsible for monitoring the data protection principles contained in the GDPR and other laws containing provisions on the protection of personal data processing. Pursuant to Article 33, §1 of the LCA, the Litigation Chamber is the administrative litigation body of the DPA.

8. On the basis of the facts described in the complaint file as summarised above, and on the basis of the powers conferred upon it by the legislature under Article 95.1. LCA, the Litigation Chamber decides to file the complaint without follow-up, in accordance with Article 95.1, 3° LCA, for the following reasons.

9. This complaint concerns the sending of an advertisement by the Defendant to the Complainant without legal basis. The GDPR does not define what is meant by "processing for the purpose of marketing" or "direct marketing".

10. In its Recommendation 01/2020 of 17 January 2020 on the processing of personal data for direct marketing purposes, the DPA indicates that "direct marketing" should be understood as "any communication, whether solicited or unsolicited, aimed at promoting an organisation or person, services, products, whether paid or free of charge, brands or ideas, sent by an organisation or a 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."

11. In accordance with Recital 70 of the GDPR, in the event of the processing of personal data for the purpose of direct marketing, the data subject shall have the right

to object to such processing at any time and without charge, irrespective of whether this is initial processing or sub-processing. Article 21.3 of the GDPR states in this respect that, "Where the data subject objects to processing for direct marketing purposes, the personal data shall no longer be processed for such purposes." In the context of direct marketing, such an objection must therefore result immediately and without further examination in the outright cessation of all processing of the data subject's data for these direct marketing purposes. However, it is not apparent from the documents in the file that the Complainant exercised his right to object or his right to deletion. The complaint was restricted to the processing of the Complainant's email address without any legal basis. However, as noted above (see para. 2), the Defendant explained that it had deleted the Complainant's personal data.

12. In the event of filing without follow-up, the Litigation Chamber must give reasons for its decision in stages and¹:

-pronounce a technical filing without follow-up if the file contains no or insufficient elements likely to lead to a sanction or if it contains a technical obstacle preventing it from making a decision;

-or pronounce a filing of the case on the basis of efficiency if, despite the presence of elements likely to lead to a sanction, the continued examination of the case does not seem appropriate in view of the priorities of the DPA as specified and illustrated in the filing without follow-up policy of the Litigation Chamber².

13. In the event of filing without follow-up on the basis of several reasons (technical and/or efficiency respectively), the reasons for filing without follow-up must be treated in order of importance³.

¹ Contract Court (Brussels Court of Appeal), 2 September 2020, 2020/RD/329, p. 18.

² See Judgment of the Brussels Court of Appeal (Contract Court), 2 September 2020, No. 2020/5460, 18.; <https://www.autoriteprotectiondonnees.be/publications/politique-de-classement-sans-suite-de-la-chambre-contentieuse.pdf>.

³ See Litigation Chamber Filing without follow-up Policy, 18/06/2021, point 3 ("In what circumstances is the Litigation Chamber likely to file my complaint without follow-up?"), available at <https://www.autoriteprotectiondonnees.be/publications/politique-de-classement-sans-suite-de-la-chambre-contentieuse.pdf>.

14. In the present case, the Litigation Chamber decides to proceed with filing without follow-up for reasons of efficiency. Indeed, the Litigation Chamber notes that the grievances raised by the Complainant do not meet the criteria of high general or personal impact, as defined by the DPA in its memorandum on the filing without follow-up policy of 18 June 2021.

15. Therefore, the Litigation Chamber weighs the personal impact of the Complainant's circumstances on their fundamental rights and freedoms against the effectiveness of its intervention, to decide whether it deems it appropriate to deal with the complaint further⁴. Since it is clear from the documents in the file that the Complainant is raising a single advertisement, and that the Defendant has deleted the Complainant's data (his email address in this case), the Litigation Chamber considers that its intervention would be of limited effectiveness and that it is therefore not appropriate to examine the case further.

III. Publication and communication of the decision

16. In accordance with its policy of filing without follow-up, the Litigation Chamber will communicate the decision to the Defendant(s)⁵. The Litigation Chamber decided to communicate the decision to file the case without follow-up to the Defendants by default. However, the Litigation Chamber refrains from such communication if the Complainant has requested anonymity or when the communication of the decision to the Defendant, even pseudonymised, risks allowing the identification of the latter by the Controller⁶. This is not the case here.

⁴ See Litigation Chamber Filing without follow-up Policy, 18/06/2021, point 3.2 ("Criteria for filing without follow-up on the basis of opportunity: societal/personal impact and effectiveness"), available at <https://www.autoriteprotectiondonnees.be/publications/politique-de-classement-sans-suite-de-la-chambre-contentieuse.pdf>.

⁵ See Litigation Chamber Filing without follow-up Policy, 18/06/2021, heading 5 ("Will a case filed without follow-up be published? Will the Opposing Party be informed, available at <https://www.autoriteprotectiondonnees.be/publications/politique-de-classement-sans-suite-de-la-chambre-contentieuse.pdf>.

⁶ <https://www.autoriteprotectiondonnees.be/publications/politique-de-classement-sans-suite-de-la-chambre-contentieuse.pdf> (heading 5 ("Will a case filed without follow-up be published? Will the Opposing Party be informed?"))

17. Given the importance of transparency regarding the decision-making process and the decisions of the Litigation Chamber, this decision will be published on the website of the Data Protection Authority⁷. However, it is not necessary for this purpose that the data identifying the parties be directly provided.

FOR THESE REASONS,

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

- *to **file the present complaint without follow-up** for reasons of efficiency pursuant to Article 95. 1, 3° of the Law of 3 December 2017 establishing the Data Protection Authority.*

Pursuant to Article 108 § 1 of the LCA, this decision may be appealed to the Contract Court within thirty days of its notification to the Complainant by the Data Protection Authority of Berlin, with the Data Protection Authority as Defendant. The DPA will coordinate with the Berlin Data Protection Authority to ensure that the decision is notified to the Complainant and the Defendant at the same time, in order to avoid an asymmetry in the timeframe for appeal to the Contract Court.

To allow the Complainant to consider any other possible course of action, the Litigation Chamber refers the Complainant to the explanations provided in its policy on filing without follow-up⁸.

Appeal Notice to the complainant

Against this decision a lawsuit before the Verwaltungsgericht Berlin (administrative court of Berlin), Kirchstraße 7, 10557 Berlin is admissible. The lawsuit needs to be filed in written form

⁷ Art 95, §1, 8° and 100, §1, 16° of the Law of 3 December 2017 establishing the Data Protection Authority; Cf Data Protection Authority, "Strategic Plan 2020-2025," 28 January 2020; Cf Policy for the Publication of Decisions of the Litigation Chamber, 23/12/2020, available at <https://www.autoriteprotectiondonnees.be/publications/politique-de-publication-des-decisions-de-la-chambre-contentieuse.pdf>.

⁸ Cf. Heading 4 - What can I do if my complaint is dismissed? in the policy on filing without follow-up of the Litigation Chamber.

within one month after the notification of this decision, it can also be filed as an electronic document with a qualified electronic signature (QES) or for the record of the clerk of the court. Please note that in case of filing the lawsuit in writing the legal deadline is only met if the lawsuit reaches the administrative court within the deadline.

Yours Sincerely,

The Berlin Commissioner for Data Protection and Freedom of Information