



Litigation Chamber

Decision 13/2024 of 22 januari 2024

Case number: DOS-2023-05059

Concerns: Complaint for failure to implement data erasure request

The Litigation Chamber of the Data Protection Authority, composed of Mr. Hielke HUMANS, sole 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 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 'DPA';

Having regard to the Rules of Procedure, as approved by the House 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 Complainant: X, hereinafter referred to as 'the Complainant';

The Defendant: Y, hereinafter referred to as 'the Defendant'.

I. Facts and procedure

1. On 6 December 2023, the Complainant filed a complaint with the Data Protection Authority against the Defendant.

The Complainant had entered into a contract relating to anti-virus software with the Defendant in 2021. This contract was renewed in November 2022. On 23 November 2023, the Complainant terminated this agreement and requested that the Defendant delete their account and personal data in view of the termination of the contractual relationship. The Complainant claims that he did not receive an appropriate response to his repeated requests regarding the deletion of his personal data.

2. On 8 December 2023, the complaint was declared admissible by the First Line Service under articles 58 and 60 of the DPA¹ and the complaint was transferred to the Litigation Chamber under article 62, § 1 of the DPA².
3. Pursuant to Article 95, §2, 3° of the DPA as well as Article 47 of the DPA's rules of procedure, the parties may request a copy of the file. If either party wishes to make use of the possibility to consult and copy the file, it should contact the secretariat of the Litigation Chamber, preferably at litigationchamber@apd-gba.be.

II. Justification

II.1. Competence of the Litigation Chamber

4. The Litigation Chamber notes that the complaint was filed against the Defendant located outside the territory of the European Economic Area.
5. In order for the Litigation Chamber - as an organ of the Data Protection Authority invoked by the complainant under Article 77 of the GDPR - to have competence to deal with his complaint, it is imperative, first of all, that the GDPR is applicable to the facts at issue or that other data protection-related legislation that may form the basis of the competence of the Litigation Chamber is applicable.
6. Regarding the territorial scope of the GDPR, Article 3 of the GDPR distinguishes 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 thus presupposes the

¹ In accordance with Article 61 of the DPA, the Litigation Chamber hereby informs the parties that the complaint has been declared admissible.

² In accordance with Article 95, §2 of the DPA, the Litigation Chamber hereby informs the parties that the file has been transferred to it as a result of this complaint.

existence of an establishment³ in the territory of European Economic Area. The complaint in the present case is directed against a legal entity based in the UK. There is no establishment in the territory of the European Economic Area. Article 3(1) of the GDPR therefore does not apply.

7. 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).

8. 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 Complainant was in the territory of the European Economic Area. However, given that the Complainant is domiciled in Belgium and there are no indications that the Complainant was outside the territory of the European Economic Area at the time of the facts complained of, the second condition is also met. The third condition requires that the processing activity in question relates to 'offering goods and services', or to 'monitoring behaviour of data subjects'.

9. The offering of goods and services is to be understood as an offering of goods and services specifically aimed at those in the European Economic Area⁴. These elements must be assessed *in concreto* to determine whether the provision of goods and services is taking place.⁵ Recital 23 of the GDPR clarifies this: 'In order to determine whether such a controller or processor is offering goods or services to data subjects who are in the Union, it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union.'

³ The concept of establishment is explained in Recital 22: Establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect.

⁴ EDPB Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) dd. 19 November 2019. p at https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_3_2018_territorial_scope_nl.pdf.

⁵ D. SVANTESSON 'Article 3. Territorial scope', in C. KUNER a.o., the EU General Data Protection Regulation, A Commentary, Oxford University Press 2020, p. 90.

10. This recital goes on to state the following: *'Whereas the mere accessibility of the controller's, processor's or an intermediary's website in the Union, of an email address or of other contact details, or the use of a language generally used in the third country where the controller is established, is insufficient to ascertain such intention, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union.'*⁶
11. The Litigation Chamber notes that the Defendant's website is available in several European Economic Area languages, such as Dutch, but also, for example, German, Portuguese, Spanish and payments can be made in euros. The goods supplied by the Defendant include anti-virus software that can be delivered to the EEA. Consequently, the Litigation Chamber finds that this third condition is also satisfied.
12. The above suggests to the Litigation Chamber that the conditions of Article 3.2 of the GDPR are met which would bring the processing by the Defendant based in a third country within the scope of the GDPR.

II.2. Exercising the right to data erasure

13. Article 17.1 GDPR stipulates that the data subject shall have the right to obtain from the controller erasure of personal data concerning him or her without undue delay, and the controller shall have the obligation to erase personal data without undue delay if the personal data are no longer necessary for the purposes for which they were collected or otherwise processed.
14. In accordance with Article 12.3 GDPR, the controller shall provide the data subject with information on the follow-up given to the request pursuant to Articles 15 to 22 GDPR without delay and in any case within one month of receiving the request. That period may be extended by two further months where necessary, taking into account the complexity and number of the requests. The controller shall inform the data subject of any such extension within one month of receipt of the request, together with the reasons for the delay.
15. The Litigation Chamber confirms, based on the documents supporting the complaint, that the Complainant exercised their right to data erasure pursuant to Article 17(1) GDPR on 23 November 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.

⁶ EDPB Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) dd. 19 November 2019. p 18, available at https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_3_2018_territorial_scope_nl.pdf.

Depending on the complexity of the request, this term may be extended by two months. The Complainant must then be informed of this extension within one month of the request for data erasure. If the Defendant decides not to entertain the Complainant's request, it must notify the data subject within one month of receiving the request, in accordance with Article 12(4) GDPR. The Litigation Chamber cannot establish from the case that the Complainant has received any response regarding the action taken by the Defendant to delete the data. As a result, the controller was potentially in breach of Articles 12.3 and 12.4 GDPR, as well as Article 17.1 GDPR.

16. The above analysis leads the Litigation Chamber to suspect that it should be concluded that a breach of the provisions of the GDPR may have been committed by the Defendant, which justifies proceeding to a decision *in the case at hand* pursuant to Article 95, § 1, 5° of the DPA.
17. The present decision is a *prima facie* decision taken by the Litigation Chamber in accordance with article 95 DPA on the basis of the complaint filed by the Complainant, within the framework of the '*procedure prior to the decision on the merits*'⁷ and not a decision on the merits by the Litigation Chamber in the sense of article 100 DPA.
18. The Litigation Chamber has therefore decided, pursuant to Articles 58(2)(c) GDPR and Article 95, § 1, 5° of the DPA, the Defendant should be ordered to comply with the data subject's request to exercise their rights, specifically the right to data erasure ('*right to be forgotten*') as provided in Article 17 GDPR.
19. 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.
20. 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.
21. 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 DPA, 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.

⁷ Section 3, Subsection 2 DPA (Articles 94 to. 97).

22. Finally, for the sake of completeness, the Litigation Chamber notes that a hearing on the merits of the case may result in the measures listed in Article 100 DPA being imposed⁸.

23. As the complaint has been filed in the Dutch language, this decision is drawn up in Dutch. An English-language copy of this decision will be provided to the Defendant.

III. Publication of the decision

24. 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.

⁸ Article 100. §1. The Litigation Chamber has the power:

- 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.

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. of the DPA, to:

- pursuant to **Article 58(2)(c) of the GDPR** and **Article 95, § 1, 5° of the DPA**, order the Defendant to comply with the data subject's request to exercise their rights, *in particular the right to data erasure (Article 17(1) GDPR), and proceed with the erasure of the data subject's personal data on the websites*], 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 the action taken on 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. of the DPA**.

Pursuant to Article 108, § 1 DPA, 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 Code⁹. The adversarial petition must be filed with the Registry of the Market Court in accordance with Article 1034^{quinquies} of the Judicial Code¹⁰, 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

⁹ 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.

¹⁰ 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.