Litigation Chamber

Decision on the merits 112/2024 dated 6 september 2024

Case number: DOS-2020-03924

Subject: dismissal of a complaint file regarding the transfer of personal data to the United States due to a shortcoming in the representation mandate, under Art 80(1) GDPR.

Note: This document is an unofficial translation of the decision for the benefit of the second defendant. In case of possible confusion in the interpretation of the text, the wording in the official Dutch text shall prevail.

The Litigation Chamber of the Data Protection Authority, composed of Mr Hielke HIJMANS, chairman, and Mr Christophe Boeraeve and Mr Dirk Van Der Kelen, 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 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 'LCA';

Having regard to the 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[1];

Having regard to the documents in the case;

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[1] The new Rules of Procedure, following the amendments made by the Act of December 25, 2023 amending the Act of December 3, 2017 establishing the Data Protection Authority (GBA) came into force on 1 June 2024.

In accordance with Article 56 of the Law of December 25, 2023, the new Rules apply only to complaints, mediations, inspections and proceedings before the Litigation Chamber initiated on or after that date: https://gegevensbeschermingsautoriteit.be/publications/reglement-van-interne-orde-van-de-gegevensbeschermingsautoriteit.pdf

Cases initiated before 1 June 2024, as in the case at hand, are subject to the provisions of the LCA as unamended by the law of December 25, 2023 and the Rules of Procedure as it existed before that date: https://gegevensbeschermingsautoriteit.be/publications/reglement-van-interne-orde.pdf.

Has taken the following decision on:

The complainant: X, represented by Noyb - European Center for Digital Rights (Austria), hereinafter "the complainant";

The defendants: Roularta Media Group N.V, represented by Mr. Tom DE CORDIER and Mr. Valeska DE PAUW, hereinafter "the first defendant";

Google LLC, represented by Mr. Jan CLINCK, Mr. Florence NIEUWBOURG, Mr. Pierre ANTOINE and Mr. Gerrit VANDENDRIESSCHE, hereinafter "the second defendant".

I. Facts and procedure

1. The subject of the complaint concerns the alleged tracking of the complainant by the second defendant when the person visited a website (flair.be) owned by the first defendant. In the process, HTML code (for the Google Analytics tool) was allegedly embedded via the first defendant's website, which could be linked to the complainant's account with the second defendant. Related personal data is said by the complainant to have been illegally transferred to the United States of America in this context.[2]

2. On 18 August 2020, the complainant lodged a complaint with the Data Protection Authority, via her representative, against the defendants. The complaint was filed in French.

3. On 26 August 2020, the complaint was declared admissible by the Front Line Service pursuant to articles 58 and 60 of the LCA, and the complaint was transferred to the Litigation Chamber pursuant to article 62, §1 of the LCA.

4. On 25 September 2020, the Litigation Chamber decided to request an investigation from the Inspectorate pursuant to articles 63, 2° and 94, 1° LCA.

5. Subsequently, on 25 September 2020, in accordance with Article 96 §1 of the LCA, the Litigation Chamber's request to conduct an investigation was sent to the Inspectorate along with the complaint and the inventory of documents. Given that the first defendant is based in the monolingual Dutch-speaking jurisdiction, and the second defendant is based in the United States of America, the proceedings were conducted in Dutch in accordance with Article 57 LCA. The investigation of the Inspectorate therefore took place in Dutch, and the Inspectorate's report has been submitted in Dutch.

6. On 13 October 2022, the investigation by the Inspectorate was completed, the report was attached to the file, and the file was transferred by the Inspector-General to the Chairman of the Litigation Chamber (Article 91, § 1 and § 2 LCA). This investigation report exposes a number of issues relating to the lodging of the complaint.[3]

7. In its report, the Inspectorate first states that Noyb does not demonstrate in the complaint "*what is the 'sufficiently concrete interest' of the data subject (a natural person residing in Vienna, Austria) to lodge a complaint against the specific website . . . The Inspectorate also notes that the website [...] is a Dutch/French language website . . . while the data subject . . . is not proficient in the Dutch language*".[4] Furthermore, the Inspectorate states (freely translated): "*Given the above-mentioned procedural concerns, the Inspectorate can call into*

[2] Complaint in DOS-2020-03924, p. 2: "Le transfert des données du plaignant vers les États-Unis est illégal"; freely translated: "The transfer of data from the complainant to the United States is illegal."

[3] Investigation report of the Inspectorate in DOS-2020-03924, pp. 18-24.

[4] *Ibid.*, investigation report p. 19.

question the request of Noyb - *European Center for Digital Rights as a valid 'complaint' under domestic law."*[5]

8. Second, the investigation report states that the requests handled by *Noyb* "*that were submitted to the DPA in August 2020 used a semi-automated 'bulk' method of sending. . . The various requests for an investigation submitted in August 2020 had the same format and signature. Additional documents were sent again and again in a linked e-mail[...] For the different requests, the same data subject keeps coming back who granted a mandate to* Noyb – *European Center for Digital Rights."* [6]

9. Third, the Inspectorate points out that the procedure "*must comply with the usual basic requirements of any mandate . . i.e. clearly state who is the subject of the complaint.*"[7] The Inspectorate subsequently refers to "the mandate" in question, which is intended "*to be used with regard to the Irish Supervisory Authority and not the Belgian Supervisory Authority*" and merely refers to (at the time internal) file numbers (of *Noyb*) as to the identity of the first defendant. The Inspectorate concludes: "*The content of the mandate also shows that* Noyb - *European Center for Digital Rights was not properly mandated*" as several elements in the mandate were not detailed, or unclearly or ambiguously worded.

10. Fourth, the Inspectorate highlights the fact that the complainant was "employed" as a trainee at Noyb at the time the representation mandate was granted. In this context, the Inspectorate refers to several examples of personal communication made by the complainant on the public forum (via social media), referring to the work on the Noyb project. At one point, for example, the person writes that they are happy to have "worked" on the project.[8] The Inspectorate "*could not identify any justification of a personal interest on the part of the data subject.*"[9] The Inspectorate further states: "*Due to the lack of transparency regarding the modus operandi of* Noyb *. . the perception is therefore created at the least that* Noyb *. . . is using its employees to serve the interests of* Noyb *. . submitting requests/complaints rather than [...] the personal interest of a complainant.*" And furthermore: *" . . . confirms the indication that this* ***constitutes an improper use of the procedure under Article 80 GDPR****. The Inspectorate notes that trainees . . for the above-mentioned requests in 2021 were systematically listed as "complainants" in the activities of* Noyb - *European Center for Digital Rights. The above could possibly be an indication of a conflict of interest."*[10]

[5] *Ibid.*, investigation report p. 20.

[6] *Ibid.*, investigation report p. 21.

[7] *Ibid.*, investigation report p. 21.

[8] *Ibid.*, investigation report p. 24.

[9] *Ibid.*, investigation report p. 24.

[10] *Ibid.*, investigation report, p. 24-5; the Litigation Chamber emphasises and underlines the first sentence.

11. The Inspectorate's substantive findings are reprised, for the sake of the readability of the decision, under section III of this decision.

12. On 13 March 2024, the parties concerned were notified by registered mail of the provisions of Article 95 §2 as well as those in Article 98 LCA. They were also notified of the deadlines to submit their defences under Article 99 of the LCA.

13. The letter under Article 98 LCA only asks the parties to explain at this stage of the proceedings the position regarding the legality of the lodging of the complaint, and how the mandate was granted by the complainant to the representative in a given context (examined and explained by the Inspectorate), specifically in the light of Articles 80(1) and 77(1) GDPR. In addition, the Litigation Chamber requested the parties to take a position on whether the possible illegality of how the mandate was granted 'impacts' the case as a whole.

14. On 10 May 2024, the Litigation Chamber received the statement of defence on behalf of the two defendants as regards these procedural aspects.

15. On 29 May 2024, the Litigation Chamber received the complainant's statement of reply as regards these procedural aspects.

16. On 21 June 2024, the Litigation Chamber received the defendant's statement of reply as regards these procedural aspects.

17. On 12 June 2024, the parties were notified that the hearing would take place on 1 July 2024.

18. On 1 July 2024, the parties were heard by the Litigation Chamber. Following a request to this effect by the complainant, and the subsequent express agreement of both defendants, the hearing takes place in hybrid form. One person from Noyb is physically present, and one person from the same association joined via video link from Austria.

19. On 8 July 2024, the official report of the hearing was submitted to the parties.

20. On 12 July 2024, the Litigation Chamber received comments on the official report from the complainant, on 16 July 2024 from the second defendant, and on 17 July 2024 from the first defendant, which it decided to include in its deliberations.

II. Justification

II.1. Preliminary points

21. A first preliminary point concerns a document filed by the complainant's representative after the conclusions period ended. A document was filed by the complainant's representative three days before the hearing took place. The defendants both objected to the admissibility of this document, as the document was submitted after the conclusions. It was not clarified by the complainant at the hearing whether there are legitimate reasons for

the late submission. In view of the defendants' objection, the document dated 28 June 2024 was completely excluded from the debates, and not included in the deliberations for this case.

22. A second preliminary point concerns new documents submitted for the hearing by the complainant's representative. Both defendants objected to the submission of these documents and their addition to the case file. Given that the documents were submitted extremely late, the defendants' objection to the submission, and the fact that no well-founded reason was given for the late submission, the documents were completely excluded from the debates, and were not included in the deliberations of the Litigation Chamber.

23. In connection with these two first preliminary points, the Litigation Chamber points out that, as part of a supervisory authority, it must be able to take into account all the elements that have come to its attention, in order to ensure a high level of data protection. This does not alter the fact that the procedure must comply with requirements of the adversarial method, and the equality of parties. The procedure provided for under the subsection "deliberation and decision on the merits" in article 98 et seq. LCA actually intends to provide for an adversarial procedure. In administrative law, this must take account in particular of the right to be heard and the right of defence.[11]

24. A third preliminary point concerns whether the person (physically) appearing as the complainant's representative at the hearing was legally valid. At the time the hearing took place, both defendants indicated that they had reservations about the person's mandate to represent Noyb in accordance with the articles of association of this association.

25. It should be noted here that Noyb presented itself as a representative before the Litigation Chamber, by notification through a specific e-mail address. *Before* the person in question attended the hearing, the representative notified via the e-mail address that the employee of Noyb would be present as a representative. The Litigation Chamber is not obliged to examine, ex officio or at the request of the parties, how exactly this employee was designated. The fact that Noyb confirmed the identity of the relevant employee by email is sufficient. As such, this employee validly appeared at the hearing as the complainant's representative.

26. As a fourth and final preliminary point: at the hearing, the complainant, for the first time and without prior notice, but not *in limine litis*, questiones in their pleas the 'independence' of the Chairman of the Litigation Chamber handling this case. Moreover, the complainant requested that the Chairman of the Litigation Chamber recuse himself. The complainant

[11] Opdebeek I. and De Somer S., *Algemeen Bestuursrecht: grondslagen en beginselen*, Ed. 2, Antwerp, 2019 Intersentia, specifically Part V, Chapter III, Section 7 on the right to be heard.

refers in this regard to anonymous 'sources' who allegedly heard in private conversations that there was a strategy to dismiss complaints 'from Noyb', and to a public event that the Chairman of the Litigation Chamber attended. No further concrete evidence was provided to support the lack of 'independence' of the sitting member.

27. From the wording of the complainant, the Litigation Chamber understands that the issue is more (or at least also) about the impartiality rather than the independence of the Litigation Chamber.[12] In any event, such 'challenges' should be treated with caution and diligence by the requesting parties.[13] Expressing dissatisfaction about (the outcome or progression of) proceedings is not the same as raising a challenge against members of public institutions, whose legitimacy is in fact based on their independence and impartiality.[14]

28. Specifically with regard to the complainant's oral request for the recusal of the Chairman, the Chairman decides not to entertain this request for the following reasons.

29. First, it was sufficiently known to the complainant that the Chairman was (jointly) handling this case, at least as recently as 13 March 2024 when the parties were invited to submit their defences in this case in a letter signed by the same Chairman. The complainant had the opportunity to take the necessary steps. The fact that the request for a recusal was **late** is in itself sufficient reason not to entertain this request.

30. Moreover, the following facts can be highlighted. The observations regarding the complainant's interest (in bringing proceedings) and granted mandate, were **raised by the Inspectorate** of the DPA of its own accord. The Inspectorate functions as a separate and **autonomous** body within the DPA, and therefore highlighted the potential issues relating to the mandate and interest (in bringing proceedings), not the Litigation Chamber, nor its Chairman.[15] It is therefore factually incorrect to suggest there is any bias which could be linked to any single person or strategy of the Litigation Chamber or its Chairman.

31. The Litigation Chamber cannot therefore be requested not to examine the findings of the Inspectorate, as well as the arguments of the parties. Moreover, it is precisely the role of the

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[12] L. Van Den Eynde, "Partijdigheid en belangenconflicten bij het actief bestuur: de sluipweg van het gelijkheidsbeginsel", *TBP*, 2024, Ed. 4, 215-230, specifically section 2.1 "soorten (on)partijdigheid en bewijs"; Compare the confusion of the concepts in the context of the judiciary: Ooms A., "De rechterlijke onpartijdigheid is niet steeds wat ze lijkt. Een historische en prospectieve analyse of de grens tussen objectieve en subjectieve onpartijdigheid.", *Croniques de droit public*, 14(2010)4, p. 499-524; Opdebeek I. and De Somer S., *Algemeen Bestuursrecht: grondslagen en beginselen*, Ed. 2, Antwerp, 2019 Intersentia, specifically Part V, Chapter III, Section 8 regarding the principle of impartiality for the administration.

[13] Compare art. 835 Judicial Code for challenges against members of the judiciary, which states, among other things, that such challenges, with the reasons for the challenge, should be filed at the Registry in a formal document, and only by lawyers with more than 10 years of experience at the Bar.

[14] In this regard, the legislator enshrined a number of measures in Art. 44 LCA.

[15] See also Litigation Chamber, decision 22/2024 of 24 January 2024, available at: https://gegevensbeschermingsautoriteit.be/publications/beslissing-ten-gronde-nr.-22-2024.pdf, §§ 11 and 35.

Litigation Chamber to address the pleas and arguments raised, which need to be assessed on a case-by-case basis.[16]

32. *After* the Inspectorate of the Litigation Chamber presented its findings, the parties were *first* given the opportunity to present their arguments on these procedural elements for the sake of the efficient progression of the proceedings.

33. The Litigation Chamber of course decides independently and impartially, **without fear or favour to one party or the other**.

34. In the course of these proceedings and related proceedings, the Litigation Chamber has cooperated with other regulators within the European Economic Area, in accordance with Chapter VII of the GDPR. This is publicly known information.[17] The fact that in the context of confidentially[18] organised cooperation and loyal information sharing within and between supervisory authorities,[19] information could be supplied that would raise critical legal questions on a given issue is an inherent element of the cooperation procedure in Chapter VII of the GDPR.[20]

35. In the context of credible legal proceedings, one prudently arrives at the truth based on facts and qualitative arguments. In this context, it should of course be possible to ask (legal) questions without this in itself implying any bias.

36. Of course, the mere fact that a previous case[21] before the Litigation Chamber with similar circumstances entails a possible adverse outcome for the same party or its representative, does not in itself justify the recusal of a sitting member in another (i.e. this) case.

37. Where a party does not agree with a decision of an authority, it is entitled under Article 78 GDPR to seek a remedy against that decision. Moreover, in the Belgian legal system, this can also be initiated by any interested third-party before the Market Court, according to art. 108 §3 LCA. As such, if Noyb believes it has an interest[22] in appealing against such a decision, it has such access to justice if applicable. The fact that an appeal could not be filed in an earlier

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[16] See: Ruling of the Court of Appeal of Brussels (Market Court Section) of 16 September 2020, 2020/AR/1160, §5.7 (freely translated): "*A situation where the Litigation Chamber of the DPA could 'choose' which argument it does or does not respond to has no place in the rule of law.*"

[17] European Data Protection Board, *EDPB promotes consistent approach for 101 NOYB data transfers complaints*, 19 April 2023.

It can be seen from Exhibit 4 to the summary conclusion of the first defendant, that it was precisely this sharing of information "à charge" - in the light of the present case, among others – which Noyb publicly regarded as positive.

[18] See article 54(2) GDPR and art. 48 § 1 LCA.

[19] See in particular art. 70(1)(u) GDPR.

[20] The principle of impartiality cannot be applied *contra legem* in these circumstances with regard to international information-sharing, compare Council of State judgment of 23 june 2020, *Losseau*, nr. 224.038; bespreking in L. Van Den Eynde, "Partijdigheid en belangenconflicten bij het actief bestuur: de sluipweg van het gelijkheidsbeginsel", *TBP*, 2024, Ed. 4, (215)219, §11.

[21] There are references in this sense in the conclusions and pleas by various parties in the proceedings to Decision 22/2024 of 24 January 2024 of the Litigation Chamber, which was not appealed before the Market Court.

[22] The complainant's comments to the Official Report of the hearing state the following (freely translated): "*. . . now that not appealing this decision was not in Noyb's own interest.*"

case, as the complainant in question did not wish to do so – an element raised at the hearing - is not an argument that can be imputed to the Litigation Chamber (or the DPA), and is otherwise irrelevant.

II.2. The complaint filed under Art. 80(1) GDPR

38. **Article 80 GDPR** states the following:

Representation of data subjects

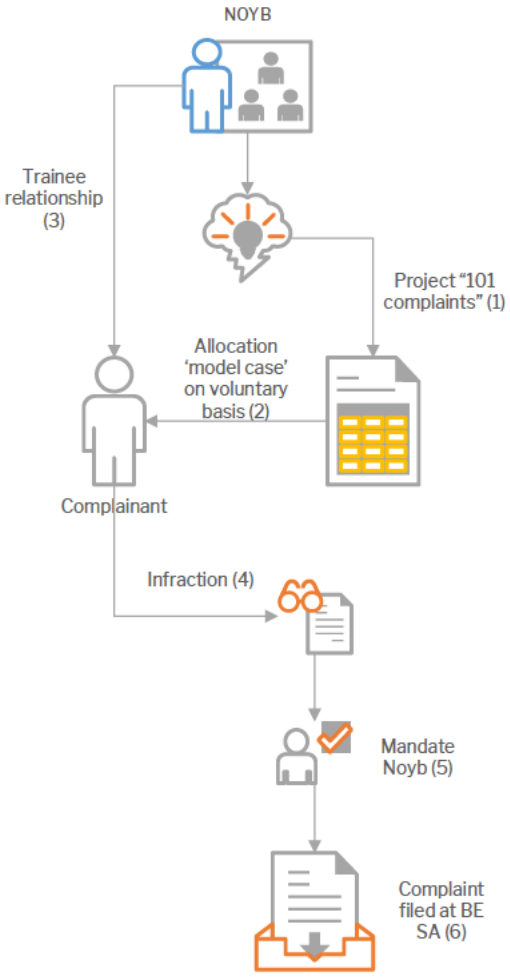
1. The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law.

2. Member States may provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing.

In light of this, **recital 142** of the preamble is also relevant:

Where a data subject considers that his or her rights under this Regulation are infringed, he or she should have the right to mandate a not-for-profit body, organisation or association which is constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest and is active in the field of the protection of personal data to lodge a complaint on his or her behalf with a supervisory authority, exercise the right to a judicial remedy on behalf of data subjects or, if provided for in Member State law, exercise the right to receive compensation on behalf of data subjects. A Member State may provide for such a body, organisation or association to have the right to lodge a complaint in that Member State, independently of a data subject's mandate, and the right to an effective judicial remedy where it has reasons to consider that the rights of a data subject have been infringed as a result of the processing of personal data which infringes this Regulation. That body, organisation or association may not be allowed to claim compensation on a data subject's behalf independently of the data subject's mandate.

39. The circumstances in which Noyb filed the complaint on behalf of the complainant can be visualised as follows.



This image serves purely as an illustration for the reader, and does *not* reflect the motives behind this decision.

40. This decision outlines the following factual circumstances. First, it is undisputed that Noyb had a project which formed the basis of the complaint in this case. In Noyb's communication about the project, a number of similar and self-created complaints are bundled together; the status of the project is publicly updated on Noyb's website.[23] In the context of the project, the subject matter of the 'grievances' was already defined, as well as the modus operandi prior to lodging the complaint and the identity of the requested controllers. One aim of Noyb's lodging of complaints was to send a 'warning' to the controllers in question.[24]

[23] Reference is made to several press releases by Noyb cited by the first defendant (Summary conclusion, exhibits 3 and 4), and the second defendant (Summary conclusion, exhibits 3, 4, 5 and 6), e.g. by the second defendant referring in the above-mentioned exhibit 3 to: Website Noyb, "EU-US Transfers Complaint Overview", available at: https://noyb.eu/en/eu-us-transfers-complaint-overview.

[24] Press release of Noyb cited in the Summary conclusion of the first defendant, p. 5 (exhibit 4): "*The 101 complaints filed by NOYB were therefore meant as a warning.*"

41. Second, the complainant was assigned the task of investigating a specific practice, targeting a specific controller. In this regard, the Litigation Chamber noted that there was no express coercion towards the complainant; the Litigation Chamber stressed that the complainant indicated that this person filed the complaint voluntarily, and that the person still stands behind the lodging of the complaint. None of this alters the fact that it was Noyb that took the initiative, not the complainant. The complainant's representative also indicated at the hearing that a "model case" is used in the present case, whereby trainees and employees are asked if they want to lodge a complaint in similar model cases, and if they want to become a data subject in this regard.

42. Third, at the time the project was assigned, and the data subject undertook to have their rights infringed and subsequently lodge a complaint in this regard, there was a working relationship (in this case, a traineeship) between the complainant and Noyb. Noyb stressed at the hearing that this traineeship was extremely informal, and the trainee was free to go whenever they liked. A workspace and equipment was nonetheless provided, and there was a limited remuneration of 30 euros.

43. Fourth, the complainant believes that there has been a breach of the GDPR and the person's rights have been infringed. It is unclear in this regard to what extent the complainant incurred damage. The Inspectorate established that the breach(es) did in fact take place, and that the complainant could therefore be genuinely aggrieved by a breach.

44. Fifth, the complainant gave Noyb a mandate *after* the outline of the project was set out, and the controllers were identified (by Noyb) and assigned (to the complainant).

45. Sixth, a complaint was lodged on behalf of the complainant by Noyb as representative. The complaint was formulated in consultation with the complainant and submitted to the Data Protection Authority.

46. This is all stated in the report of the Inspectorate and the procedural debates. The full course of events is therefore undisputed.

II.3. The dismissal: motives and consequences

47. In essence, the Litigation Chamber identifies two main issues in this case regarding the granting of a mandate, and the subsequent representation:

    1) the **prior coordination** by the representative in which the theme, content (including the identity of the controller) and the 'type of breaches' of complaints were specified in a detailed manner, without the full autonomy of the complainant, which suggests no free mandate was given, especially given the fact that the complainant was a trainee at her representative's association.

2) the **artificiality** of the way the representative invoked the objective and modus operandi provided under **Art. 80(2) GDPR**, thereby removing the substance of the distinction with Art. 80(1) GDPR explicitly laid down by the European legislator.

48. These main issues are broken down into three motives for dismissal. Each of these motives in isolation is sufficient to identify problems with the lodging of the complaint pursuant to Art. 80(1) in conjunction with Art. 77 GDPR, and therefore dismiss the complaint.

II.3.1. Motive for dismissal I: the fact that the complaint was lodged based on a pre-established 'model case' by Noyb creates an artificial interest (in bringing proceedings) and constitutes abuse of law

49. First, the **breaches** regarding the processing of the complainant's personal data are at least partly artificially constructed by Noyb. Noyb specifies the way in which the complainant should incite (alleged) breaches by the processing of her personal data for the purpose of lodging the complaint (apart from any 'general'[25] breaches that do not require personal data processing *in concreto*).

50. Without Noyb's project, the alleged breaches that cause damage to the complainant would not have occurred. It was expressly acknowledged at the hearing in this regard that Noyb 'asks' individuals such as the complainant (in any case trainees and possibly other members of Noyb's staff) whether they wish to '**become**' a '***data subject***'.[26]

51. The artificiality of the situation is further illustrated by the fact that the visits to the website were brief[27]; the visits were apparently purely for the purpose of allowing the breaches to occur or to record them, as the defendants also rightly point out in their conclusions. There is no argument by the representative at any stage of the proceedings that the complainant would have been a regular or even occasional visitor to the website pages in question[28]. All this suggests that the complainant **artificially created their own interest (to bring proceedings)** in favour of the representative.

52. In general, the Litigation Chamber points out that the right to lodge a complaint under the GDPR provides **broad and easy access** for the complainants in question to seise the supervisory authorities, if desired via a mandate granted to a representative. The importance of the right to lodge a complaint for a concerned citizen was recently reaffirmed in the case law of the CJEU.[29] It is precisely this broad access to lodge a complaint that renders it necessary to protect the right to lodge a complaint against abusive use by

[25] As an example, a breach of Art 25 GDPR can be considered.

[26] At the hearing, the word 'staff' was used by Noyb's representative.

[27] Compare with Decision 22/2024 of the Litigation Chamber dated 24 January 2024, §§53 et seq.

[28] The website pages are in French and Dutch.

[29] Judgment of the CJEU, 7 December 2023, *UF v. Schufa*, C-26/22 and C-64/22, ECLI:EU:C:2023:958, specifically rn. 58; see also Judgment of the CJEU of 16 July 2020, *DPC v. Facebook Ireland and Maximilian Schrems* ("Schrems II"), c-311/18.

companies or associations with their own policy objectives and associated projects.

a) *Abuse of law in the European legal system*

53. As regards non-compliance with Art 80(1) in conjunction with Art. 77 GDPR, reference should be made to established case law of the CJEU in connection with the abusive use of a subjective right under EU law, as a general principle of EU law.[30] In this regard, abuse of law relies on circumvention, which distinguishes the concept from fraud - which relies on deception.[31]

54. The CJEU itself frames the prohibition on abuse of rights as follows:

> *'It is settled case-law that there is, in EU law, a general legal principle that EU law cannot be relied on for abusive or fraudulent ends. . .*
> (...)
>
> *It thus follows from that principle that a Member State must refuse to grant the benefit of the provisions of EU law where they are relied upon not with a view to achieving the objectives of those provisions but with the aim of benefiting from an advantage in EU law although the conditions for benefiting from that advantage are fulfilled only formally.*
> (...)
>
> *It follows that the general principle that abusive practices are prohibited must be relied on against a person where that person invokes certain rules of EU law providing for an advantage in a manner which is not consistent with the objectives of those rules.*
> (...)
> *. . . that provision likewise cannot be interpreted as excluding the application of the principle of EU law that abusive practices are prohibited, since the application of that principle is not (..) subject to a requirement of transposition . . .*

[30] Velaers J. "Rechtsmisbruik: begrip, grondslag en legitimiteit" in Rozie J., Rutten S., Van Oevelen A. (eds.), *Rechtsmisbruik,* Antwerpen, Intersentia, (1)4, referring in vn. 19 to, inter alia, CJEU 5 May 2007, *Hans Markus Kofoed v. Skatteministeriet,* C-321/05, ECLI:EU:C:2007:408.;

Danon R. *et al*, "The Prohibition of Abuse of Rights after the ECJ Danish Cases" in *Intertax*, Vol. 49, Is. 6/7, 2021, 482-516, https://doi.org/10.54648/taxi2021050 ;

López Rodríguez J., "Some Thoughts to Understand the Court of Justice's Recent Case-Law in the Denmark Cases on Tax Abuse", *Ec Tax Review*, Vol. 29, Is. 2, 71-83, https://doi.org/10.54648/ecta2020009.

[31] See: "*If both frauds and abuses of law aim at wrongfully obtaining a benefit from the legal system, frauds involve misrepresentation, whereas abuses of law rely on circumvention*." in A. SAYDE, *Abuse of EU Law and the Regulation of the Internal Market*, Oxford, Hart Publishing, 2014, 24.

(...)

Whilst the pursuit by a taxpayer of the tax regime most favourable for him cannot, as such, set up a general presumption of fraud or abuse . . . the fact remains that such a taxpayer cannot enjoy a right or advantage arising from EU law where *the transaction at issue is* purely artificial *economically and is designed to circumvent the application of the legislation of the Member State concerned . . . "*

(emphasis added by the Litigation Chamber)

[32]

55. The case law of the Court puts forward two cumulative elements for there to be a violation of the prohibition on abuse of law, one subjective and the other objective.[33]

56. As regards the objective element [34]: the intended purpose of the right to lodge complaint under a mandate (art. 77 in conjunction with art. 80(1) GDPR) in this case is not respected: art. 80(1) GDPR states that it is the **data subject** that has the right to **mandate** an organisation to represent them. The wording 'data subject' shows, first of all, that personal data and associated processing in the context of the grievances raised had to already exist **before (the coordination prior to) the mandate**.

57. In turn, the term "mandate" indicates that the instruction **is one-way**: from the complainant to the representative, not the other way around.[35]

58. Moreover, recital 143 GDPR clarifies that the data subject must first ***himself*** **"believe**" that there is a problem under the GDPR, and not following a concrete instruction from the representative, *before* there is a mandate. The breach is incited by Noyb in order to qualify the complainant as a data subject.

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[32] Judgment of the CJEU, 26 February 2019, joined cases C-115/16, C-118/16, C-119/16 and C-299/16, §§ 96, 98, 102, 105 and 109 respectively;

See also the following judgments of the CJEU: 1) 14 December 2000,*Emsland-Stärke,* C-110-99; 2) 21 February 2006, *Halifax*, C-255/02; 3) 22 November 2017, *Cussens*, C-251/16.

[33] Judgment of the CJEU, 26 February 2019, joined cases C-115/16, C-118/16, C-119/16 and C-299/16, §139; Meirlaen M., *Ongeschreven rechtsgrenzen – Verbod van rechtsregelontduiking,* fraus omnia corrumpit *en verbod van (rechts)misbruik*, Antwerp, Intersentia, 2022, 353 (freely translated): "*The subjective element implies that, notwithstanding formal compliance with the conditions laid down by the EU rules, the objective pursued by the rules was not achieved. The objective element requires that a combination of objective circumstances shows that the essential purpose of the conduct is to obtain an undue advantage.*"

[34] Judgment of the CJEU, 26 February 2019, joined cases C-115/16, C-118/16, C-119/16 en C-299/16, §139: "*. . . a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved . . .*"

[35] The complaint is also lodged in the name of the data subject, so it is the data subject who is the central starting point. See. Frenzel E.M., "Art. 80 DS-GVO" in Paal B.P. and Pauly D.A., *Datenschutzgrundverordnung Bundesdatenschutzgesetz,* C.H. Beck, Ed. 3, (1030)1033: "*Doch ergibt sich aus dem Vergleich mit der englischen Sprachfassung . . . aus dem Begriff der "Beauftragung" und aus dem Sinn un Zweck des Abs. 1, dass die Organisation zur Wahrnemung der Rechte im Namen der betroffenen Person berechtigt sein soll.*"

Free translation: "*However, a comparison with the English version shows that . . it is clear from the word 'mandate' and the role and purpose of paragraph 1 that the organisation is entitled to exercise the rights on behalf of the data subject.*"

59. As regards the subjective element[36], **the representative** wishes to **create standing to bring proceedings before the DPA**; there can be no standing to bring proceedings without the complainant as an individual, based on Belgian law. This highlights the artificiality of the conditions under Art. 80(1) GDPR being met.[37]

60. In this way, the representative seeks to circumvent national law, as Article 80(2) GDPR was not activated in Belgian law.[38] This is also indirectly apparent from the arguments from the complainant in the statement of reply and the pleas at the hearing: it was argued that this complaint should actually also be admissible under Art. 80(2) GDPR and that the non-activation of this provision could be discriminatory.[39]

61. In this regard, the Litigation Chamber stresses that the GDPR leaves a discretionary margin to the national legislator to activate Art 80(2) or not. The choice of the Belgian legislator is obvious. According to the wording of Article 80(1) and the existence of Article 80(2) GDPR, it is not the intention of the GDPR that the representative uses this right to lodge a complaint under Article 80(1).

62. The **artificiality** of the construction is proved, according to the Litigation Chamber, since the identity of processors and the grievances raised were not identified by the complainant in question (but in advance by the representative), and by the brief website visits by the complainant in question, observed by the Inspectorate and indicated by both defendants in their defences. The representative publicly states that this complaint is part of a general project pertaining to data transfers.[40] It was stated at the hearing that **trainees** can '*become*' a data subject without any obligation.

63. The incitement to create access to justice represents an undue advantage, and is the subjective element of abuse of law on the part of Noyb under EU law. In this case, the advantage is aimed at pursuing the general (policy) objectives of the Noyb association.[41]

64. The two conditions for there to be an abuse of law under EU law are therefore satisfied and, in accordance with the case law of the Court, it follows that the Litigation Chamber must

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[36] Judgment of the CJEU, 26 February 2019, joined cases C-115/16, C-118/16, C-119/16 and C-299/16, §124: "*. . . a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it . . .*"

[37] On the artificiality of the conditions being met, see A. SAYDE, *Abuse of EU Law and the Regulation of the Internal Market*, Oxford, Hart Publishing, 2014, 25.

[38] On the distinction, see judgment of the CJEU of 28 April 2022, *Meta Platforms v. Verbraucherzentrale Bundesverband e.V.*, C-319/20; See the related issue in point c) of this section.

[39] *Infra*, section II.3.3; the discrimination here would be based on Art 10-11 Civil Code in the relationship between Art 220 Data Protection Act and Art 17 Judicial Code.

[40] Summary conclusion of the second defendant, exhibit 5 ("101 Complaints on EU-US transfers filed").

[41] See the 'abuse of law as gain-seeking choice of law' section: A. SAYDE, "I. The Basics: Abuse of Law as Gain-Seeking Choice of Law" in *Abuse of EU Law and the Regulation of the Internal Market*, Oxford, Hart Publishing, 2014, 24

refuse Noyb's use of the right (i.e. the lodging of a complaint).[42]

b) *Abuse of law applied in the Belgian legal system*

65. Secondly, the complaint must be lodged according to nationally established procedural rules, obviously within the limits set by EU law. As the CJEU has already stated (freely translated), "*under the principle of procedural autonomy, it is a matter for the internal legal system of the Member States . . to lay down the procedural rules governing actions in rights brought for the protection of litigants' rights . . .*"[43]

66. The fact that the legal rule from which the subjective right to lodge a complaint emanates (in this case, Art. 77 in conjunction with Art. 80(1) GDPR) does not expressly exclude the possibility of lodging a complaint on the basis of a created grievance does not, of course, mean that the legal rule has been correctly applied. As framed in recent Belgian legal doctrine (freely translated): "*Indeed, the full interpretation of the rule of law seems to allow the subjective right to be exercised in any manner or circumstances. The prohibition of (legal) abuse . . clarifies that this is not the case.*"[44]

67. The Supreme Court ('Hof van Cassatie') has repeatedly ruled on the application of the prohibition on abuse of rights.[45] The link with the Court of Justice's interpretation of this legal principle for its application in a national context is obvious in this regard.[46] The Supreme Court is clear on the fact that disregarding the purpose of a subjective right can also constitute an abuse of law. For example, the Supreme Court provides clarification in a judgment dated 15 February 2019:

> *Abuse of law consists in exercising a right in a manner that manifestly exceeds the limits of the exercise of that right by a prudent and careful person. Such abuse may also consist in the use of legal rules or legal institutions contrary to the purpose for which they were enacted.*[47]

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[42] Judgment of the CJEU, 26 February 2019, joined cases C-115/16, C-118/16, C-119/16 and C-299/16, §110 "*it is incumbent upon the national authorities .. to refuse to grant entitlement to rights .. where they are invoked for fraudulent or abusive ends*."

[43] Judgment of the CJEU, 4 May 2023, *Österreichische Post*, C-300/32, §53.

[44] Meirlaen M., *o.c.*, 277; see also below a discussion of legal origins in Velaers J. "Rechtsmisbruik: begrip, grondslag en legitimiteit" in Rozie J., Rutten S., Van Oevelen A. (eds.), *Rechtsmisbruik,* Antwerp, Intersentia, (1)1-4; By way of illustration, see art. 1.10, paragraph 2 new Civil Code (freely translated): "*Whoever exercises their right in a manner manifestly beyond the limits of the normal exercise of that right by a prudent and reasonable person in the same circumstances is abusing their right*".

[45] Recently on a ruling of the Supreme Court of 16 November 2023, *Docpharma v. Belgian State*, C.23.0053.N.

[46] See also Conclusion of the Public Prosecutor to the Supreme Court of 11 January 2024, *K. v. Belgian State*, F.23.0008.N: the application of the objective and subjective element is discussed here *in extenso*.

[47] Ruling of the Supreme Court of 15 February 2019, *G.C. v. KBC Bank NV*, C.18.0428.N, §1; see also Supreme Court judgment of 1 October 2020, C.18.0584.F, which essentially sets out that abuse of law consists in exercising a right in a manner that

68. The Litigation Chamber notes that the concept of abuse of law can also apply to the exercise of procedural rights. The conduct of Noyb in this case appears to exceed the limits of a normal and proportionate exercise of the right to representation, as provided for in Article 80(1) GDPR.

69. Indeed, a legal subject who invokes a subjective right must also adhere to the **general standard of care** in reading and interpreting the objective standard on which they base their subjective right, and take into account the " [...] *implicit, material limits which are . . . also contained therein*".[48] In this regard, a legal subject cannot disregard the objective of the legal provision from which the subjective right ensues.[49] The existence of Art. 80(2) GDPR is important in this regard.

70. The fact that the representative specifies the way in which a breach occurs, in order to get a mandate granted to exercise the right to lodge a complaint under Art. 77 in conjunction with Art. 80(1) GDPR before the Belgian authority, disregards the **general standard of care by the representative and therefore constitutes an abuse of law.** Indeed, it is not the objective of Art 80(1) GDPR to 'create' complainants in this way.[50] In this regard, the Litigation Chamber makes no judgement on whether there may be well-intentioned motives behind this modus operandi; it merely states that the right to lodge a complaint is being used *improperly* and, in particular, not in accordance with national legislation, which has ruled out the possibility of appeal by an organisation in its own name, independently from a data subject.

71. The Supreme Court held that where there is an abuse of law, the exercise of the right should be limited to its normal use.[51] In this case, the complaint was filed by Noyb as the representative. For this reason, this mere fact already means that the entire case must be dismissed.

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manifestly exceeds the limits of the normal exercise of that right by a prudent and careful person, and that this is the case, inter alia, when the damage caused is disproportionate to the advantage sought or obtained by the holder of that right.

[48] Meirlaen M., *o.c.*, 282; Rozie J., Rutten S., Van Oevelen A.(eds.), *Rechtsmisbruik,* Antwerp, Intersentia, 12.

[49] Meirlaen M., *Ongeschreven rechtsgrenzen – Verbod van rechtsregelontduiking,* fraus omnia corrumpit *en verbod van (rechts)misbruik*, Antwerp, Intersentia, 2022, vn. 898: "Supreme Court. 15 February 2019, AR C.18.0428.N; Supreme Court. 28 September 2018, AR C.18.0058.N; Supreme Court. 2 April 2015, AR C.14.0281.F; Supreme Court. 13 January 2012, AR C.11.0135.F; Supreme Court. 7 September 2006, AR C.04.0032.F; Supreme Court. 24 September 2001, AR S.00.0158.F; Supreme Court. 28 April 1972, *Supreme Court Ruling*. 1972, 815; *Pas.* 1972, 797; *RW* 1972-73, note R. Butlzer."; *ibid.* p. 323 (freely translated): "*Where it can be shown that the rule of law, the subjective right arising therefrom, can only be used for a specific purpose, it is enough to establish that the (intended) use is not for this purpose in order to have a situation of abuse*."

[50] On abuse of law by using a right whose purpose is disregarded, see: Cornet L., "L'abus de droit et le nouveau droit des contrats" in Kohl B. (eds.), *L'abus de droit*, Liege, Anthemis, 2024, (1)25-6.

[51] Supreme Court judgment of 23 May 2019, *V.M. v. P.B.,* C.16.0474.F, paraphrasing the French text: « *La sanction d'un abus de droit peut résider dans la réduction dudit droit à son usage normal.* »

II.3.2. Motive for dismissal II: fictive mandate by invoking pre-established grievances and controller within traineeship

72. The **grievances** are **pre-established** on behalf of the complainant, in the same way as the **modus operandi** with mandates under Article 80(1) GDPR is **pre-determined**. Moreover, the identity of the requested controller is also established by the representative *before* the complainant accepts the 'model case' and grants a mandate in this regard. [52]

73. While it is certainly not ruled out that the complainant, as data subject, had a say in deciding on the outline of the project, these outlines were at the least not *purely* decided on by the complainant as the data subject, as evidenced by the fact that similar (i.e.: quasi-identical) complaints were lodged by *different* complainants in the context of the project. This is shown in the Inspectorate's findings in connection with Noyb's "bulk" method of sending.

74. In this context, the Litigation Chamber highlights the fact that it is difficult for an employee to question the overall setup of a project and not agree to grant the mandate according to the outlined plan - just as it is difficult for a data subject to consent to the processing of personal data within the meaning of Article 6(1)(a) GDPR under various different circumstances in an employment relationship.[53]

75. In particular, the European Data Protection Board (EDPB) indicated in its Guidance Note 5/2020 on consent that given the dependency that results from the employer/employee relationship, it is unlikely that the data subject is able to deny his/her employer consent to data processing without experiencing the fear or real risk of detrimental effects as a result of a refusal.[54] The same applies *mutatis mutandis* to trainees, no matter how informal the relationship is: indeed, it can be asserted that a successful or unsuccessful traineeship can have consequences for an individual's career.

76. Reference should also be made once again to the legal provision on granting mandates (art. 80(1) GDPR), which states that it is the **data subject** that has the right to **mandate** an organisation to represent them. The wording 'data subject' shows, first of all, that personal data and associated processing in the context of the grievances raised had to already exist **before (the coordination prior to) the mandate**. In turn, the term "mandate" indicates that the instruction **is one-way**: from the complainant to the representative, not the other way around.[55] Moreover, recital 143 GDPR clarifies that the data subject must first *himself*

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[52] In its summary conclusion, the first defendant cites a press release from the complainant's representative on page 6, which explains how the identification proceeded: "*The websites were chosen based on the TLD of the Member State … We searched major websites in every EU member state …* " (the first defendant's exhibit 3 to its summary conclusion (paraphrased); redacted and underlined by the Litigation Chamber).

[53] Compare with Decision 22/2024 of the Litigation Chamber dated 24 January 2024, §§46-52.

[54] EDPB, Guidelines 5/2020 on consent under Regulation (EU) 2016/679, paragraphs 21-23.

[55] See also Art. 1984 Civil Code which states that a person gives power to another person to do something for the client and in *their* name. Article 1989 of the Civil Code can also be highlighted, which stipulates that the representative may not do anything beyond the limits of their mandate; this supports the argument that the complainant should determine the limits of the mandate him or herself.

"believe" that there is a problem under the GDPR, and not following a concrete instruction from the representative, *before* there is a mandate.

77. It should be added that this fictive mandate also raises a problem of **potential damage** on the part of the complainant in question, which would not be the case if the representative had not started the project and bring the data subjects to incite breaches and subsequently lodge complaints about them. This applies first and foremost as regards the processing of the complainant's personal data, possibly in violation of the provisions of the GDPR.

78. Whatever the case may be here, it is established that the grievances are identified in advance by the complainant's representative, thereby compromising the lawful and free mandate granted by the complainant, who is also a trainee with the representative. This is sufficient to establish that the granted mandate is problematic and, more specifically, fictive, and **not in accordance with article 80(1) GDPR**.

II.3.3. Motive for dismissal III: artificial construction for raising general and accessory issues for the policy objectives of an association

79. The third and final motive for dismissal concerns the way in which the representative Noyb - beyond the artificially created interest to bring proceedings and the fictive mandate - also seeks to raise general and accessory issues through access to justice, and in particular the allegedly unlawful data transfers to the US from the European Economic Area following the *Schrems II* ruling of the EU Court of Justice.[56] This is closely linked to policy objectives of the Noyb association. As the Inspectorate rightly notes in this regard, there is a potential **conflict of interests, or at least different interests,** at issue here. In a mandate for representation, the representative must put the **interests of the complainant first**, and not pursue its own policy objectives.

80. Art. 80(2) GDPR (not Art 80(1) GDPR) in fact serves as a provision for associations to independently highlight certain practices.[57]

81. The European legislator therefore did provide for the possibility for organisations such as Noyb to lodge complaints of their own accord, but only when the national legislator allows it. However, the **Belgian** legislator ruled this out.[58] The Litigation Chamber believes that this decision by the legislator should be put in context.

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[56] Summary conclusion of the second defendant, exhibit 5: "101 Complaints on EU-US transfers filed": .

[57] On Art. 80(2) GDPR, one author writes: "*The right to lodge a complaint is therefore accessory to the (alleged) violation of subjective rights, and the association is therefore only a 'complainant behind the complainant'.*" Free translation from: Frenzel E.M., "Art. 80 DS-GVO" in Paal B.P. and Pauly D.A., *Datenschutzgrundverordnung Bundesdatenschutzgesetz,* C.H. Beck, Ed. 3, (1030)1034: "*Das Klagerecht ist damit akzessorisch zur (behaupten) Verletzung subjektiver Rechte, der Verband damit nur 'Klager hunter dem Kläger'*

[58] Both defendants refer to the legislative preparations of the Belgian Chamber:

1) summary conclusion of the first defendant, p. 18, and;

82. Indeed, it is significant that **Art 80(2) GDPR *was drafted separately*** from **Art 80(1) GDPR** and should be activated *separately* in the domestic legal system. The national legislator has the possibility to decide on the 'activation' of the article, for example to avoid an unmanageable influx of complaints, just as for complaints from individual data subjects, the GDPR provides the possibility for supervisory authorities to refuse to handle complaints in the event of excessive[59] use. Art. 80(2) GDPR has a preventive role, according to the CJEU, giving the organisations in question the possibility to raise issues in a general manner, if they consider that the rights of a data subject under the GDPR have been infringed as a result of the processing.[60]

83. The fact that Noyb appeared in a case[61] before the CJEU where it represented a (former) employee, and that therefore taking action before the DPA would be permitted, is clearly the wrong conclusion.[62] Even if the circumstances were exactly the same as in the present case - which they are not - access to the courts is different from access to the supervisory authority. Moreover, the defendants correctly note that the preliminary issue before the Court had nothing to do with the power of representation before an authority within the meaning of Article 80 GDPR.

84. When complaints relating to actual breaches are lodged on a large scale, based on fictive complaints under Art 80(1) GDPR, the supervisory authority's requirement to take action may become *de facto* impossible, and its supervisory responsibilities **in the public interest** are compromised.[63] This disregards the intention of the European legislator, who leaves autonomy to national legislators to judge whether access to justice for interest groups is desirable.[64]

85. It should be noted that the fact that the right to lodge a complaint is easily accessible prompts many hundreds of *individual* data subjects every year to lodge a complaint with the

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2) summary conclusion of the second defendant, para 69 - referring in footnote to: Draft law of 11 July 2018 on the protection of natural persons with regard to the processing of personal data, Parl. St. Chamber, 2017-18, no. 54-3126/001, 226.

[59] See art. 57(4) GDPR.

[60] Judgment of the CJEU of 28 April 2022, *Meta Platforms v. Verbraucherzentrale Bundesverband e.V.*, C-319/20, § 76; Judgment of the CJEU of 11 July 2024, *Meta Platforms Ireland Ltd. V. Bundesverband der Verbraucherzentralen e.a.*, C-757/22, ECLI:EU:C:2024:598, §64.

[61] Judgment of the CJEU of 4 May 2023, *CRIF*, C-487/21.

[62] In the statement of reply, the complainant states the following (freely translated): ""*If even the CJEU considers such representation legally valid, the DPA must also permit it.*"

[63] See also the obligations for the supervisory authority to take measures when it identifies infringements during the administrative procedure, see CJEU, Opinion Advocate General Pikamäe of 11 April 2024, *TR v Land Hessen*, C-768/21.

[64] The proposal of the European Commission did not make national 'activation' mandatory; this shows all the more that it is a deliberate and important consideration by the European legislator to leave this decision to the national legislator. COM 2012, 11 final, Art 73.2.;

See also Frenzel E.M., "Art. 80 DS-GVO" in Paal B.P. and Pauly D.A., *Datenschutzgrundverordnung Bundesdatenschutzgesetz,* C.H. Beck, Ed. 3, (1030)1032: "*Gem. Art. 76 Abs. 2 DS-GVO-E (Rat) wurde das Verbandsklagerecht nicht mehr von Anfang an vorgesehen, sondern die Anonrdnung den Mitgliedstaaten überlassen . . . ",*

free translation: "*In accordance with Art 76(2) GDPR the position (of the Council) was that the right to lodge a complaint for an association was no longer provided as a basic situation, but the transposition was left to the Member States . . .*"

DPA, as complainants. Many of these complaints are given substantive treatment, are thoroughly investigated and lead to (corrective) measures. In any case, complaints from individuals already resulted in many hundreds of decisions by the Litigation Chamber.

86. Within the European Economic Area, (well over) **100,000 complaints**[65] are lodged **annually** under the complaints procedure of the GDPR, and within *all* supervisory authorities, **just under 4,000 staff**[66] are at work as of 2024, according to the most recent publicly available figures. Handling the complaints of individual data subjects demands the necessary attention and diligence with the limited resources available to the authorities.

87. This demonstrates the context in which it is important that the **limits of the legislator** must be respected. These limits were also upheld by the Court of Justice.[67]

88. Of course, this does not mean that **civil society** should not play a role in disputes relating to data protection law, or in lodging complaints. In fact, organisations can clearly play a role in Belgium, as representatives, in facilitating the lodging of complaints through representation, and informing data subjects and controllers of their rights and obligations. However, this is not the same as designing complaints for individuals who are not yet complainants at that time.

89. The method by which the complaint is an attempt, at the initiative of the representative, to highlight a general predetermined practice, by addressing it accessorily in a complaint of an individual data subject, shows that there is an **artificial** construction with regard to Article 80(1) GDPR in lodging this complaint, in order to highlight practices in a way exclusively provided for under Article 80(2) GDPR.[68] This practice may also create potential conflicts of interest during the mandate for representation. The Litigation Chamber finds that the representative's use of Article 80(1) GDPR in this case is not lawful for these reasons.

II.3.4. The dismissal

90. The reasons given above illustrate that this case is **not a mere question of semantics**, but that the modus operandi as in the present case also causes or can cause real problems. Individually, the motives are sufficient to prove non-compliance with the decisions made by the European and Belgian legislators: the modus operandi of the complainant in this case goes against the law in several ways. The Litigation Chamber has carefully and objectively

[65] European Commission Communication of 25 July 2024, *Second report on the application of the General Data Protection Regulation*, COM(2024) 357 final, section 2.3, see also the section 2.5.2 regarding the "Difficulties handling a high number of complaints".

[66] Based on the sum of the projections provided by the supervisory authorities in EDPB, *Contribution of the EDPB to the report on the application of the GDPR under Article 97*, 12 December 2023, p. 28-9.

[67] Judgment of the CJEU of 28 April 2022, *Meta Platforms v. Verbraucherzentrale Bundesverband e.V.*, C-319/20, § 59.

[68] EU law should not be abused to circumvent national law, see Judgment of the CJEU, *Halifax*, C-255/02.

examined the case, and cannot but conclude that the complaint lodged should be dismissed for the above-mentioned reasons.

II.3.5. Consideration of the *consequences* of the dismissal

91. The fact that the mandate and interest (in bringing proceedings) are fundamentally problematic elements in this case has been proven on several above-mentioned grounds. As a result, this case is **dismissed under art. 100, §1, 1° LCA**. However, this does not rule out the fact that the complainant may feel aggrieved as a data subject after an alleged breach has occurred, as that alleged breach may then actually occur following the actions that happen before and as a result of the fictive mandate.

92. First, the representative raises the fact that the complainant could have lodged a complaint even without representation, and the case could therefore continue unabated; in addition, the representative also raises the fact that the 'autonomous' representation without the complainant in question under Art. 80(2) GDPR may just be a possibility for the representative in Belgium.

93. In this case, it is precisely the **improper** use of the right to lodge a complaint (including the use of a fictive mandate that creates the breach on the part of the data subject) that gives rise to the dismissal of *this* complaint file.

94. The Litigation Chamber rejects the argument that the breach/damage occurred in any case, and therefore the case should continue. The Litigation Chamber believes that procedural - as well as substantive - rules must be followed, regardless of whether a particular outcome appears most favourable or desirable depending on the policy objectives of a party.

95. In other words, the complainant did not lodge a complaint *without* representation, so the Litigation Chamber will not handle the complaint file that way either. The Litigation Chamber cannot re-qualify a complaint in a manner in which it was not lodged.

96. Besides, the representative did *not* invoke Art 80(2) GDPR for the lodging of the complaint either, so the Litigation Chamber will not handle the case as though it did. For this last point, furthermore, the representative does not refer to the existing legal norms, but to the possible discriminatory situation (under the Constitution) where Noyb can represent data subjects before the courts and tribunals in this 'independent' manner under Art. 17 Judicial Code, but not before the DPA. However, the GDPR leaves the possibility to the Belgian legislator to activate Art. 80(1) GDPR *separately*, so the Litigation Chamber sees no reason

to consider this situation as discriminatory.[69] Different scenarios do not need to be handled in the same way.

97. The mere fact that these breaches occurred, or that damage would have been incurred in this context, **does not justify accepting the fictive mandate and artificially created interest in bringing proceedings**. Procedural rules are in the interest of maintaining the quality and fairness of proceedings.

98. Second, the Litigation Chamber stresses that this does not mean that an employee of an organisation such as Noyb could never lodge a complaint, with Noyb as a representative.

II.4. Granting a mandate under Art 80(1) GDPR: form and elements.

99. First, various elements emerge during the proceedings that reveal potential problems with the wording of the mandate. At the hearing, the complainant's representative argued that the provision in EU law should be interpreted autonomously to mean that a mandate does not entail formal requirements[70], referring to the purely oral possibilities of doing so. The defendants, on the other hand, like the Inspectorate, raise the fact that there are certain formal or substantive shortcomings, which pertain to the essential elements[71] of the mandate agreement, as well as whether it is sufficient as evidence[72] for the representation. In its mandate agreement attached to the complaint, the first defendant is not expressly named.

100. In the mandate agreement attached to the complaint, the complainant refers to 25 different (Noyb) case numbers in the one document for the mandate, which further confirms the above-mentioned points on the artificially created interest in bringing proceedings within

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[69] De Bot D., *De toepassing van de Algemene Verordening Gegevensbescherming in de Belgische context: commentaar op de GDPR, de Gegevensbeschermingswet en de Wet Gegevensbeschermingsautoriteit,* Mechelen, Wolters Kluwer, 2020, 1164-5 (§2998-9).

[70] As regards form, the European legislator does not clarify whether the "mandate" in Art. 80(1) GDPR refers to the *instrumentum* (the written contract or other) or the *negotium* (the agreement).

As regards the *instrumentum*, conventional domestic legal doctrine holds that a mandate agreement can be solo consensu (Tilleman B., "Titel V: Vorm van de Lastgevingsovereenkomst" in *Lastgeving*, Ghent, Story-Scienta, 1997, §§139 et seq.).

In the specialised legal doctrine on the GDPR, it is open to doubt whether a mandate under Art. 80(1) GDPR does not require a written document:
See Frenzel E.M., "Art. 80 DS-GVO" in Paal B.P. and Pauly D.A., *Datenschutzgrundverordnung Bundesdatenschutzgesetz,* C.H. Beck, Ed. 3, (1030)1033-4: *"Dies setzt – schon aus Gründen der Sicherheit für den Rechtsverkehr und des Ausschlusses der Missbrauchgefahr – eine ausdr., schriftliche Erklärung voraus . . ."*(redacted by the Litigation Chamber);

free translation: "*This requires - at least for reasons of certainty within the legal system and ruling out the risk of abuse - an express, written declaration . . ."*

[71] The legal acts to be performed by the representative could be regarded as essential elements, but arguably also the identity of the controller referred to in a GDPR complaint. See also: Van Oevelen A., *Beginselen van Belgisch Privaatrecht. 10: Overeenkomsten. 2: Bijzondere overeenkomsten. E: Aanneming van werk – lastgeving*, Mechelen, Wolters Kluwer, 2017, §389;

Compare also Article 1988 Civil Code: "*Granting a mandate, expressed in general terms, includes only acts of management;*"

[72] It is up to the person invoking a mandate agreement to prove that it exists, see: Tilleman B., *O.c.*, §172; Van Oevelen A., *o.c.*, §417 (freely translated): *"In addition, the mandate contract has the specificity that the representative, in the exercise of their mandate, performs legal acts in relation to a third party vis-à-vis whom they must be able to prove their power of representation."*; *ibid*, §419.

Noyb's project with model cases. The fact that 25 complaints were lodged itself raises questions regarding the applicability of the excessive[73] use of the right to complain - for the sake of clarity, without the Litigation Chamber making any decisions in this regard.

101. The complainant sought to **rectify** the criticism of the initial mandate by attaching to its summary conclusion *another* document in which a mandate was granted, identifying the individual controllers (in particular the first defendant) - together with the identification of controllers in three other complaint files before the DPA that are not formally related to the present complaint file. This document is merely signed by the complainant in this case (as opposed to the document attached in the complaint).[74]

102. Given that in this case the dismissal decision is already based on various other grounds for dismissal, the Litigation Chamber shall not proceed *hic et nunc* to further examine the legality of the rectification of the alleged insufficient aspects of the representation mandate in the document annexed to the complaint with the document filed with the complainant's statement of reply. These are purely considerations in the context of transparency regarding the pleas and arguments raised.

103. Second, both defendants allege a shortcoming on the part of the complainant under Belgian law. At issue here is Article 220 §2 Data Protection Act, as the defendants highlight the fact that the representative has not been active in the field of personal data protection "for at least three years" or at least has not presented the correct evidence to that effect (presentation of evidence required under Article 220 §3 Data Protection Act), as well as under the same legal provision that it is not an association established "in accordance with Belgian law".

104. As regards this point, the complainant indicated at the hearing that it had been set up more than three years before the complaint was lodged; its objectives are to promote and enforce the rights of data subjects and natural persons in the digital sphere.

105. In addition, the Litigation Chamber points out that the requirement that an association within the meaning of Article 80 GDPR must be established under "Belgian law" according to Article 220 Data Protection Act is inconsistent with European Union law, and more specifically the exhaustive nature of Article 80(1) GDPR and the wording of the accessory recital 142 of the preamble. In this sense, the primacy of EU law obliges the Litigation Chamber to disregard national legislation that is manifestly in conflict with EU law. Art. 80(1)

[73] See art. 57(4) GDPR.

[74] In civil law, the expression of will of the representative may also be apparent from their actions, see Van Oevelen A., *o.c.*, §416 *in fine* (freely translated): "*The signature of the representative is not necessary . . but does have the advantage that it proves the latter's express acceptance of their mandate and therefore the existence of the mandate.*"

GDPR is directly applicable in the Belgian legal system. The complainant rightly raises this fact, referring to the relevant case law on the matter.[75]

106. In any event, the Litigation Chamber cannot submit questions for a preliminary ruling, neither to the Court of Justice nor to the Constitutional Court.[76]

107. Given the multiple grounds on which this dismissal decision is already based, the Litigation Chamber is not proceeding to examine these aspects further and these are merely considerations in the context of transparency regarding the pleas and arguments raised.

108. Third, the defendants raise the fact that the person who signed the agreement[77] with the complainant on behalf of Noyb would not be authorised under the articles of association to do so - and therefore, for that reason, could not validly bind the representative in court in this case. In this regard, the Litigation Chamber merely notes that there is no written evidence in the administrative file showing that the person in question could validly bind the representative. Given the multiple grounds on which this dismissal decision is already based, the Litigation Chamber is not proceeding to examine this aspect further, and it is a mere consideration in the context of transparency regarding the pleas and arguments raised.

III. The substantive findings of the Inspectorate

109. This decision merely pertains to aspects relating to correct representation and the interest (of bringing proceedings) of the complainant, emanating from procedural issues concerning the complaint. It makes no binding rulings against the two defendants except to the extent that the case initiated against them on the basis of a complaint is dismissed.

110. Nevertheless, it seems appropriate for the Litigation Chamber to reiterate the Inspectorate's findings in this decision, as part of the factual record[78], since the Inspectorate's extensive investigation (whose final report alone runs to **191 pages**) should also demonstrate that the **complaint was thoroughly investigated in its entirety**.

111. The findings are reprised below by the Litigation Chamber as a brief summary of the Inspectorate's findings, reflecting the general lines of the report, without seeking to present a complete overview of all incriminating or mitigating elements of the report.

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[75] The complainant refers to the CJEU judgments of 9 March 1978, C-106/77 (Simmenthal), of 19 June 1990, C-213/89 (Factortame), para. 13, and of 22 June 2010, C-188/10 et C-189/10 (Melki)."

[76] The Litigation Chamber is an administrative body, albeit with quasi-jurisdictional powers; see also the wording "semi-judicial" in Brussels Court of Appeal Judgment (Chamber 19A, Market Court section) of 28 October 2020, 2020/AR/582, § 7.4.

[77] This is the document attached to the complaint (exhibit 1 administrative file).

[78] see reference above, part I decision.

- Finding 1: the personal data of the data subject is exported to the processor (second defendant) via the "Google Analytics" functionality on the website https://www.flair.be/:
    - The Inspectorate framed these findings in a technical comparison (in the period following the above-mentioned decision 21/2021 of the Litigation Chamber) for cookie settings between 9 August 2022 and 15 September 2022, noting that various changes were made to the cookie banner (including the addition of a "reject all cookies" button) and that the Didomi "consent management platform" was used.
    - Furthermore, the Inspectorate found that even in the most recent situation, the "Google Advertising Products" and "Google Analytics" cookies are listed among the partners, and reference is made to the fact that these partners are provided through the "Transparency and Consent Framework" of IAB Europe non-profit association.
    - The first defendant's processing register shows, inter alia, that "Google Analytics" is defined as "reporting and analysis of digital visit and reading behaviour (aggregated anonymous statistics only)" and that the controller relies on legitimate interest for the processing.
    - As regards the Google Analytics tool, the first defendant argues to the Inspectorate that in accordance with the terms of use of this tool, the first defendant "has *no other choice but to transfer personal data, if and to the extent the data qualifies as personal data, to the US.*"
    - The Inspectorate refers to several decisions by foreign supervisory authorities that highlighted a similar issue, in connection with transfers to the second defendant in the US, with the latter as "data importer".
- Finding 2: concerning the first defendant - breaches of Articles 5.1.a, 12.1, 13.1.b), 13.1.c), 13.1.d), 13.1.e), 13.1.f), 13.2.a, 13.2.c), 13.3, 14.1.a), 14.1.b), 14.1.c), 14.2.a) and 14.2.b) and a breach of Article 10/21° of the Data Protection Act: the right to transparent information.
    - In preparation for this finding, the Inspectorate examined several historical versions with - at that time - the most current version (7th version dated 23 August 2022) of the first defendant's privacy policy. In this context, the Inspectorate noted that new facts emerged from an earlier investigation against the first defendant.
    - The Inspectorate found that there was no transparency regarding new versions and version management of the cookie policy and privacy policy before 23 August 2022. In the version dated 23 June 2021, "substantial additions" were

made by the first defendant, according to the Inspectorate, regarding the information provided in the "cookie tables".

- Following the new version dated 23 August 2022 of the privacy policy combined with a cookie policy, the Inspectorate found that the information made available in the Didomi "consent management platform" matches that in the above-mentioned policy statements. The Inspectorate indicated that it "welcomed" the changes. Nevertheless, the Inspectorate still identified several "shortcomings" following the changes made on 23 August 2022, including the use of English on the Didomi CMP (while the website pages are in Dutch and French), and the fact that the policy is inaccessible if no choice has been made via the cookie banner.
- In general, the Inspectorate states that vague wording is sometimes used in the privacy policy, including the terms "some", "etc." and "among others" without further specification: in the cookie policy, this information is less vague, according to the Inspectorate. Concrete information regarding the data protection officer also is missing, as does information on processing pursuant to Articles 6(1)(c) and 6(1)(f) GDPR, information on the (categories of) recipients of personal data and information on the transfer of personal data to a third country, see Articles 46, 47 or 49(1) GDPR. In addition, according to the Inspectorate, the retention periods for certain personal data (by type) are missing, as is concrete information regarding the withdrawal of consent and the selling on or commercialising of certain personal data. Finally, information on personal data received that were not collected directly from the data subject, within the meaning of Article 14 GDPR, is missing.

- Finding 3: concerning the first defendant - breach of Articles 13(1)(b), 37(7) and 38(4) GDPR: the contact details of the data protection officer.
- Finding 4: concerning the first defendant - breaches of Articles 30(1)(a), 30(1)(b), 30(1)(c), 30(1)(d), 30(1)(e) GDPR on the register of processing activities.
    - In this regard, the Inspectorate points out that the first defendant's processing activities are incompletely recorded, referring to its findings relating to processing activities regarding staff activities, processing via camera surveillance of visitors to its premises, and the list of processors in the register.
    - In addition, the Inspectorate refers to missing elements in the processing register, including the list of all possible processing purposes of personal data under article 30(1)(b) GDPR, a description of the categories of recipients to whom the personal data have been or will be disclosed under article 30(1)(d) GDPR.

- Finding 5: breach as regards invoking Art 6(1)(f) GDPR (legitimate interest) for placing analytical cookies that are not strictly necessary - use of Google Analytics from 25 May 2018 to 20 August 2020.
    - In this context, the Inspectorate points out that the legislation on placing cookies has been in place for quite some time, and that the first defendant did not take any action for two years even after 25 May 2018, i.e. not strictly necessary cookies without consent are banned from website pages. The Inspectorate notes as an additional fact here that there was no document consideration when starting (or continuing) the processing activity after the GDPR came into force.
- Finding 6: breaches of Articles 5, 6 and 4(11) in conjunction with Article 7 GDPR and Article 10/2 Data Protection Act: the principles governing the processing of personal data and the lawfulness of processing for the DIDOMI CMP since 20 August 2020
    - Since 20 August 2020, the first defendant has relied on the consent for (the personal data processing operations following) the placing of non-essential analytical cookies; the Inspectorate finds that the transparency is insufficient here and the consent ambiguous, referring to the "misleading colours" used - the Inspectorate highlights the difference in colours and contrast ratio based on the "rgb code or hex code" in this regard.
    - The Inspectorate also asserts that the "withdraw consent" is not valid, as the "reject all" button is at the second information level.
- Finding 7: breach of Articles 5 and 6 GDPR: the principles relating to the processing of personal data and the lawfulness of processing for the cookie _gat_UA-# of the second defendant
    - The Inspectorate highlights the fact that the above-mentioned cookie is listed as an essential cookie, while the Inspectorate believes that Google Analytics is not strictly necessary for the website to work.
- Finding 8: Breach of Articles 5(1)(e) and 25 GDPR: principles relating to processing of personal data: storage limitation and data protection by design and by default.
    - The Inspectorate points out that several cookies are still subject to relatively long retention periods that "may be seen as disproportionate": in its consultation on 15 September 2022, the Inspectorate specifically questioned whether the retention period of 21 of the 298 cookies examined was proportionate to the purpose of the processing.

- Finding 9: breach of Article 32(1) GDPR: Security of processing - no pseudonymisation from 25 May 2018 to 30 September 2022.
    - In this context, the Inspectorate also indicates that the defendants cannot vouch that certain processing in the context of the contested cookies is anonymous.
- Finding 10: breach of Articles 5(2), 13(1)(f), 24(1), 28(1), 32(2) GDPR regarding the points where there is collaboration with a processor.
    - In the context of the investigation, the second defendant confirmed to the Inspectorate that it is the processor as regards the disputed processing (i.e. analytical cookies).
    - The Inspectorate further states with regard to the first defendant that it has taken the appropriate technical and organisational measures specific to the processing agreement and the conclusion of "Standard Contractual Clauses" ("SCC"). However, the Inspectorate asserts that the first defendant failed to ensure appropriate transparency to data subjects in this regard.
- Finding 11: Breaches of Articles 32(2), 44 and 46(1) GDPR: assessing the appropriate level of security and providing appropriate safeguards that give data subjects enforceable rights and effective remedies prior to the transfer of personal data to a third country or an international organisation by a controller.
    - In this context, and in the light of the CJEU's case-law on the matter, the Inspectorate highlights the first defendant's duty of investigation.
    - Having referred to multiple independent investigations on the issues related to data transfers to the US, the Inspectorate established that a transfer of personal data to the US (to the second defendant as "data importer") takes place outside the EEA through the use of Google Analytics. When invoking Article 46 GDPR (appropriate safeguards), and so-called "model contractual clauses" in this context, the Inspectorate considers this insufficient to meet the legal requirements in the light of the interpretation of the CJEU. The Inspectorate further highlights in this context the lack of evidence regarding the implementation of organisational measures to assess the third country legislation.
    - Furthermore, the Inspectorate points out that while the second defendant published new SCC's on 21 March 2022, the most recent privacy notice examined does not contain any information about these (alleged) changes.

112. The Inspectorate also submits a number of "additional considerations", including regarding the interaction of the findings with the earlier decision of the Litigation Chamber relating to the first defendant. Furthermore, the Inspectorate also highlights the presence of several elements in the file that are among the strategic priorities of the DPA, and the fact that the first defendant in particular is a listed company.

113. In any event, the defendants have been made aware of the findings by the Inspectorate, and - in accordance with their obligations in this regard under articles 5(2) and 24 GDPR - advised to take due cognizance of the Inspectorate's findings. The defendants are also in possession of the full investigation report as well as the administrative file containing all the substantive and technical elements preceding and underlying that report.

IV. Publication of the decision

114. Given the importance of transparency regarding the decision of the Litigation Chamber, this decision is published on the website of the Data Protection Authority.

115. Given that the complainant's representative has already proceeded to the overall publication of the details of the defendants in this dispute,[79] and given the order of magnitude of the defendants and the Inspectorate's non-handled findings regarding their activities due to procedural issues, the Litigation Chamber has decided to publish the details of all parties.

116. However, it is by no means necessary from a societal perspective, or for any other reason, for the identity of the complainant to be revealed.

FOR THESE REASONS,

the Litigation Chamber of the Data Protection Authority decides, after deliberation, to dismiss the case by virtue of **Art. 100, § 1, 1° LCA.**

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 Code[80]. The adversarial petition must be filed with the Registry of

[79] Summary conclusion of the first defendant, exhibit 5: "Overview of NOYB cases 101 complaints"; summary conclusion of the second defendant, exhibit 7: "Overview prepared by the defendant of all 101 complaints lodged by NOYB in connection with transfers of personal data."

[80] The petition shall state, under penalty of nullity:
1° the day, month and year;

the Market Court in accordance with Article 1034*quinquies* of the Judicial Code[81], 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

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.

[81] 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.