# Award of damages in data protection and free access to information cases: Lithuanian experience[1]

I. **Award of damages in data protection cases**. Up to date the administrative court practice as regards award of damages in data protection and free access to information cases is not very extensive. Still, there are some examples of the case-law of administrative courts, where applicants were successful in proving that conditions for awarding (as a rule, non-pecuniary) damages were met in particular case.

First of all, as regards the statutory regulation concerning the award of damage caused by action or inaction of state or municipal institutions in the above mentioned categories of cases, general provisions of the Civil Code are applicable.

Art. 6.271 of the Civil Code of Lithuania provides:

"1. Damage caused by unlawful acts of institutions of public authority must be compensated by the state from the means of the state budget, irrespective of the fault of a concrete public servant or other employee of public authority institutions. Damage caused by unlawful actions of municipal authority institutions must be redressed by the municipality from its own budget, irrespective of its employee's fault.

2. For the purposes of this Article, the notion "institution of public authority" means any subject of the public law (state or municipal institution, official, public servant or any other employee of these institutions, etc.), as well as a private person executing functions of public authority.

3. For the purposes of this Article, the notion "action" means any action (active or passive actions) of an institution of public authority or its employees, that directly affects the rights, liberties and interests of persons (legal acts or individual acts adopted by the institutions of state and municipal authority, administrative acts, physical acts, etc., with the exception of court judgements – verdicts in criminal cases, decisions in civil and administrative cases and orders).

4. Civil liability of the state or municipality, subject to this Article, shall arise where employees of public authority institutions fail to act in the manner prescribed by laws for these institutions and their employees."

According to the constant practice of the Supreme Administrative Court of Lithuania (hereinafter – the SACL) civil liability of public institutions (the administrative courts of Lithuania have a competence to deal with damage cases arising out of actions/inactions of only public institutions) arises, if the existence of three elements is proved in particular case: unlawful action or inaction of public institution; damage caused (pecuniary or non-pecuniary); a causal link between the unlawful action or inaction and the damage, caused by it. Thus, the fault is not

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the required element of civil liability of public institutions. As regards award of damages in data protection cases, Art. 54 of Law on Legal Protection of Personal Data could be mentioned:

„1. Any person who has sustained damage as a result of unlawful processing of personal data or any other acts (omissions) by the data controller, the data processor or other persons violating the provisions of this Law shall be entitled to claim compensation for pecuniary and non-pecuniary damage caused to him/it.

2. The extent of pecuniary and non-pecuniary damage shall be determined by a court."

These provisions of the Law seem to transpose provisions of Art. 23 of the Data Protection Directive[2], however, they are more or less superfluous, since, as mentioned above, the material conditions as regards award of damages are established in the Civil Code.

Speaking of the SACL data protection cases, in which the Court had to deal with the question of damages, the case No. A492 – 761/2014 should be mentioned. The applicant was a public official, the head of the section at the Ministry of Justice. As required by law, she submitted the declaration of private interests in 2012 through the electronic declaration system and the Chief Official Ethics Commission, which has the function of the management of such declarations, made it entirely public on its website. The applicant claimed that the publication of the whole declaration (including the data as regards her financial obligations and transactions (bank deposits, information on purchase of the Government bonds, etc.) was excessive and contrary to the Constitution and the Law on Legal Protection of Personal Data. The Chief Official Ethics Commission responded that it acted on the basis of the Rules concerning the filling, submission and correction of declarations on public and private interests, approved by it in July 5, 2012. The applicant sought the annulment of certain provisions of these Rules, and claimed, *inter alia*, for non-pecuniary damage of 1000 litas (approx. 300 Eur). Once the Supreme Administrative Court annulled various provisions of the Rules concerning the filling, submission and correction of declarations on public and private interests in different set of proceedings[3],

[2] Art. 23 of Directive 95/46/EC: „1. Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered.
2. The controller may be exempted from this liability, in whole or in part, if he proves that he is not responsible for the event giving rise to the damage."

[3] Judgment of the SACL of June 13, 2013 in case No. I502 -9/2013. The Court basically ruled that certain provisions of the Rules concerning the filling, submission and correction of declarations on public and private interests, establishing that all declarations should be submitted to the Chief Official Ethics Commission via the electronic declaration system and that all declarations are public and shall be published at the website of the Chief Official Ethics Commission is not in line with the Constitution of the Republic of Lithuania and provisions of the Law on the Adjustment of Public and Private Interests in the Public Service since the latter Law envisaged that only certain

Vilnius regional administrative court decided to award 300 litas (approx. 90 Eur) of non-pecuniary damage to the applicant. The first instance court ruled, that given annulment of certain provisions of the Rules by the SACL, publication of the applicants' declaration had no legal basis and was unlawful. The court noted that the applicant suffered certain negative feelings and anxiety, therefore awarded non-pecuniary damages. When deciding on the amount of damages the court took into account, among the other things, the short period of publication of personal data (9 days, since after complaint to the respondent the applicants' declaration was removed from the website).

Both the applicant (sought to increase the amount of awarded damage) and the respondent (sought the judgment that no damage was done) appealed to the SACL. The SACL dismissed both appeals and upheld the judgment of the first instance court. The SACL ruled that since the applicant did not belong to category of persons, who, under the Law, had the obligation to submit the declaration to the Chief Official Ethics Commission, both the *collection* and *making* of the applicants' declaration *public* was unlawful. The Court agreed with the findings of the first instance court that person, who's data was collected and made public unlawfully, suffers non-pecuniary damage, since he or she experiences substantial inconvenience and mental suffering.

**II. Admissibility of data received during wiretapping, in disciplinary proceedings**. As regards the use of wiretapping data in disciplinary proceedings the judgment of the SACL of November 9, 2004 (case No. A3-750/2004) should be mentioned. The applicant, the former Chief of the State Border Guard Service under the Ministry of Interior of the Republic of Lithuania, challenged the order of the Minister of Interior, by which he was dismissed from the service. The dismissal was based on the facts revealing that he abused the service and discredited the name of official. Part of the evidence, used during the disciplinary proceedings, which lead to his dismissal, was collected through wiretapping of his telephone conversations. The first instance court ruled in favour of the applicant mainly on the basis of procedural deficiencies of disciplinary proceedings. The SACL overturned judgment of the first instance court. On the one hand, the SACL ruled that only evidence, collected on the basis of law, are admissible in

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categories of public officials had the obligation to provide declarations to Chief Official Ethics Commission, whereas other categories of public officials had the obligation to submit declarations to the head of the state institution, in which a public official works. Further, the Law provided the compulsory publishing of declarations only of certain categories of public officials, besides, the Court noted that publication of certain data may be treated as excessive.

administrative proceedings. At the material time the Law on the Operative Activities allowed the wiretapping only for the purposes of criminal proceedings. Besides, the order for wiretapping issued by a court, was also specifically oriented to criminal proceedings. The SACL, relying on Art. 22 of the Constitution[4], Art. 8 of the ECHR and the practice of the ECtHR ruled that there was no legal basis under Lithuanian law to use the results of wiretapping in disciplinary proceedings; given the fundamental nature of the right to privacy, the expansive interpretation and application of law may not be tolerated. Therefore, the data received during wiretapping, may not be treated as admissible in administrative court proceedings in disciplinary cases[5].

[4] "The private life of a human being shall be inviolable.
Personal correspondence, telephone conversations, telegraph messages, and other communications shall be inviolable.
Information concerning the private life of a person may be collected only upon a justified court decision and only according to the law.
The law and the court shall protect everyone from arbitrary or unlawful interference in his private and family life, from encroachment upon his honour and dignity."

[5] Still, on the merits the SACL ruled, that the respondent produced enough other admissable evidence, justifying the dismissal of the applicant.