



ANONYMIZATION OF COURT DECISIONS IN THE EU: ACTUAL AND COMPARATIVE ISSUES

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SUMMARY

As the Charter of Fundamental Rights establishes the right to data protection as a separate right for privacy, the Regulation on Data Protection aims mainly at finding balance between the right to data protection and freedom of expressions. Also, it aims at creating the uniform legal environment of data protection in all Member States. The Regulation on Data Protection is applicable to the judicial authority, however with certain exceptions. The Regulation on Data Protection remains silent on the requirement to anonymize courts decisions. However, the Regulation on Data Protection give the single definition of personal data for all EU, and we assume that it can standardize the data which is anonymized in court decisions. The aim of the article is to analyze the impact of the EU Regulation on Data Protection to the rules on anonymization of court decisions in Lithuania. The research led us to the conclusion that in Lithuania the existing regulation on the anonymization of the decisions of courts does not reach its aim. Lithuanian rules on anonymization of courts decisions require anonymizing all courts decisions by default. This requirement shows that Lithuania gives the highest priority to the protection of privacy but not the freedom of expression. However, the aim of the anonymization is not reached while the Lithuanian rule requires anonymizing the exhaustive list of personal data, which includes not all data by which directly or indirectly the person can be identified.

KEY WORDS

Fundamental Rights, right for privacy, data protection, EU, personal data.

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INTRODUCTION

On the 25 of May 2018, the Regulation on Data Protection comes into force. Article 16 of the Treaty on the Functioning of the European Union and Article 8 of the Charter of Fundamental Rights establish the legal grounds for the Regulation on Data Protection. As Charter of Fundamental Rights establishes the right to data protection as a separate right for privacy, the Regulation on Data Protection aims at finding balance between the right to data protection and freedom of expressions. Also, it aims at creating the uniform legal environment of data protection in all Member States. The regulation does not cover the personal data of legal persons.

The Regulation on Data Protection is applicable to the judicial authority, however with certain exceptions. First, Member States can specify the procedure in relation to a proceeding of personal data in the courts. Secondly, the supervisory authority has no control over courts, when the courts are acting in their judicial capacity. This exception is made in order to ensure the independence of the courts. According to regulation, the specific body within the judicial system should ensure the compliance with the Regulation and handle complains in relation to personal data. Thirdly, any decision of a court or administrative authority of a third country requiring a controller or processor to transfer or disclose personal data may only be recognized or enforceable if based on an international agreement, such as a mutual legal assistance treaty.³ Fourthly, courts are acting in their judicial capacity is allowed ? to process personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited. Fifthly, the Regulation is applicable to the courts, however, it does not apply to „competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security“⁴.

However, on the requirement to anonymize courts decisions the Regulation on Data Protection remains silent. However, the Regulation on Data Protection gives the single definition of personal data for all EU, and we assume that it can harmonise the data which is anonymized in court decisions.

The aim of the article is to analyse the impact of the EU Regulation on Data Protection on the rules on anonymization of courts decisions in Lithuania.

The objectives of the article are:

1. To review the rules on the anonymization of courts decisions in the other Member States.
2. To analyze the definition of personal data in Regulation on Data.
3. To determine the possible impact of EU Regulation on Data Protection to the rules on anonymization of courts decisions in Lithuania.

³ 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), Official Journal of the European Union (2016 L 119/1), art. 48.

⁴ 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 Personal Data, and Repealing Directive 95/46/EC, (2016 L 119/1), sec. 19.

THE ANONYMIZATION OF COURTS DECISIONS IN THE MEMBER STATES

In terms of anonymization of courts decisions, the debate always arises over the balance between the right to self-expression and the right to privacy. The analyses of the principles of anonymization of court decisions proved that understanding of these main fundamental rights and means of their protection in terms of anonymization of court decisions differ considerably.

Without the extensive research, it is obvious that the court decisions are differently anonymized in Member States, the Court of Justice of the European Union and the European Court of Human Rights⁵. When implementing the project “Building on the European Case Law Identifier” the scholars analysed in detail the anonymization of court decisions in Member States. The study revealed “notable differences with regard to anonymization of court decisions, not only between the Member States but also within the Member States.”⁶

The data presented in the study prove this conclusion. For example, the question raised in the study was “whether decisions are anonymised by default, or only as an exception: on request of the data subject or by a decision of the judge ex officio.”⁷ In all Member State free jurisdiction (Civil/Criminal jurisdiction, Administrative jurisdiction, Constitutional jurisdiction) were analysed.

⁵ Edita Gruodytė and Saulė Milčiuvienė, Anonymization of Court Decisions: Are Restrictions on the Right to Information in “Accordance with the Law”? *Baltic Journal of Law & Politics*, 9(2) (2017): 161-163 // DOI: 10.1515/bjlp-2016-0016.

⁶ On-line Publication of Court Decisions in the EU. Report of the Policy Group of the Project „Building on the European Case Law Identifier“, (February 2017) // <http://bo-ecli.eu/uploads/deliverables/Deliverable%20WS0-D1.pdf>.

⁷ On-line Publication of Court Decisions in the EU. Report of the Policy Group of the Project ‘Building on the European Case Law Identifier’, 15 February 2017, <http://bo-ecli.eu/uploads/deliverables/Deliverable%20WS0-D1.pdf>, p. 22.

Figure 1 Anonymization of court decisions in different types of jurisdiction.⁸

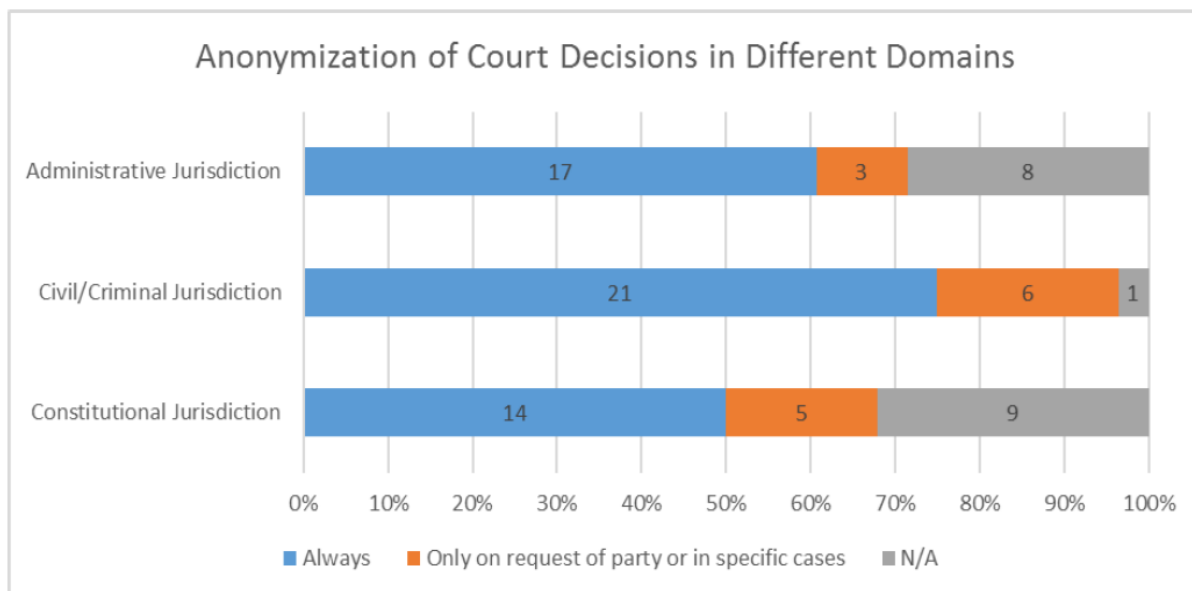


Figure 1 leads to a conclusion in most cases court decisions are anonymised by default. Also, it is worth to mention that the Court of Justice of the European Union and the European Court of Human Rights held on the different position. In these European Courts, as a rule, the decisions are not anonymized.

Additionally, the scholars tried to classify personal data, which are anonymized in court decisions⁹. However, they found out that huge variety of decisions, where personal data should be anonymized, exist and classification is impossible. It means that Member States lack uniform understanding what data should be considered personal data and should be anonymized in terms of protection of privacy.

Such difference in terms of anonymization of court decisions led authors to investigate whether all data which is considered personal according to the Regulation on Data Protection, is anonymized in Lithuanian court decisions. This issue is directly related to the question whether Lithuania anonymizes all personal data the court decisions and the right to privacy is properly protected.

The Regulation on Data Protection aims to unify the definition of “personal data” in all Member States because it is a directly applicable legal act. The Regulation states that “personal

⁸ On-line Publication of Court Decisions in the EU. Report of the Policy Group of the Project ‘Building on the European Case Law Identifier’, 15 February 2017, <http://bo-ecli.eu/uploads/deliverables/Deliverable%20WS0-D1.pdf>, p. 23.

⁹ On-line Publication of Court Decisions in the EU. Report of the Policy Group of the Project ‘Building on the European Case Law Identifier’, 15 February 2017, <http://bo-ecli.eu/uploads/deliverables/Deliverable%20WS0-D1.pdf>, p. 23.

data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”.

It is obvious that the definition does not establish the exhaustive list of personal data. For the analyses, we can divide definition into three parts: general rule and two types of data, which are attributed to personal data according to the definition.

The main rule according to the Regulation on Data Protection is that the personal data are any data, which enable identification of a person directly or indirectly. Later the definition gives the list comprising the most usual categories of personal data: a name, an identification number, location data, an online identifier. And the third part of the definition states that personal data is any specific factor or its combination of the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person, which allow identifying the person.

After analysing the definition of personal data, which is established by the Regulation on Data Protection we would like to look at the compatibility of it with the anonymization rules of the courts' decisions in Lithuania.

The Lithuanian Rules on the anonymization of court decisions identify four types of following data that should not be published in court decisions: (1) secrets of state, civil service, professional or commercial activities, banks and other secrets protected by law; (2) identification number, addresses of places of residences, dates and place of birth, marriages, divorces and deaths; (3) data enabling identification of property owned or managed on other legitimate basis by natural persons - state car numbers, bank account numbers, unique real estate numbers, the location of this property, other property requisites; (4) other case material recognized non-public by court order or law with the exception to the arguments of the court decisions that are significant for a uniform interpretation and application of the law, if they do not damage the purposes of the recognition of all the material (or part thereof) as a non-public in the proceedings.

The first and the fourth sections have no relation to personal data, therefore, we would not analyse them. We will consider the second and the third sections as they define which personal data should be anonymized. At this point, the question arises whether Lithuanian rules require anonymizing all data, which is defined in the Regulation on Data Protection as personal data.

Comparing personal data definition, which is given in the Regulation on Data Protection, with the Lithuanian rules on anonymization published court decisions we can draw several conclusions.

Table 1 Comparison of personal data definition in the Regulation on Data Protection and Lithuanian rules on anonymization of published courts decisions.

	Regulation on Data Protection	Lithuanian rules on courts decisions anonymization
General rule	any data, which enable to identify a person directly or indirectly.	No general rule
The most usual categories of personal data	The most usual categories of personal data: a name, an	2. identification number, addresses of places of residences, dates and place of

	identification number, location data, an online identifier.	birth, marriages, divorces and deaths 3. data enabling identification of property owned or managed on other legitimate basis by natural persons - state car numbers, bank account numbers, unique real estate numbers, the location of this property, other property requisites;
Specific factor or their combination	is any specific factor or their combination of the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person, which allow to identify the person	

In Table 1. the definition of personal data is divided into three categories: (1) general rules, (2) the most usual categories of personal data, (3) specific factor or their combination.

Firstly, we can notice that contrary to the Regulation on Data Protection Lithuanian rules on the anonymization of court decisions only spell out what data should be anonymized but do not give general rule what is personal data.

Secondly, both Regulation on Data Protection and Lithuanian Rules on courts decisions anonymization identify specific data which are personal data. Some data are identical in both legal acts: an identification number and location data. Lithuanian rules on the anonymization of courts decisions divides the most usual categories of personal data in two: dates directly linked to the person (identification number, addresses of places of residences, dates and place of birth, marriages, divorces and deaths) and non-exhaustive list of data, which are directly linked to the property. The Regulation on Data Protection list the data directly related to the person and adds one rather new category an online identifier to personal data.

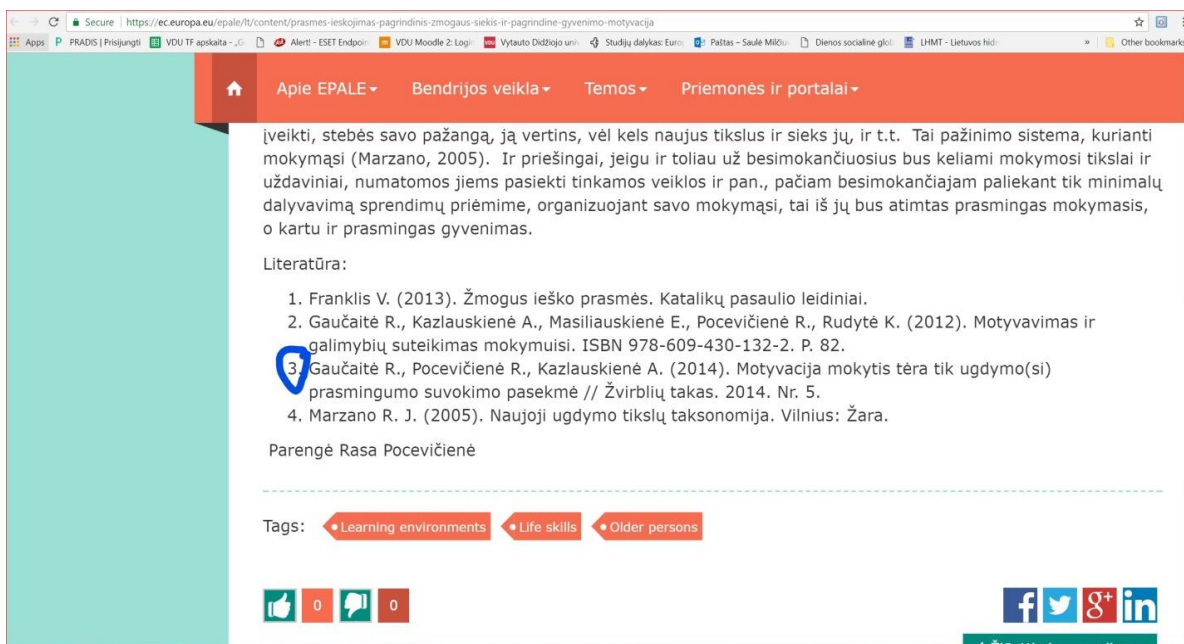
Thirdly, the Regulation on Data Protection distinguishes a separate category of personal data, which includes “any specific factor or their combination of the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person, which allow identifying the person”. Lithuanian regulation on anonymization does not refer to this category of personal data.

The comparison reveals that Lithuanian regulation on anonymization of courts decisions requires anonymizing not all personal data. Therefore, the question arises whether anonymizing not all personal data the Lithuanian rules on anonymization of court decisions properly protect the right to privacy.

To answer the question whether anonymizing of not all personal data the Lithuanian rules on anonymization of court decisions properly protect the right to privacy, we analysed the decisions of Lithuanian courts and according to the information about the person in court decision we tried to identify a person.

For example, the decision of Supreme Administrative Court of Lithuania¹⁰ cites the title of the book which was written by the parties of the case “Motivation and Opportunities for Learning” (“Motyvavimas ir galimybių suteikimas mokymuisi”). If we put this title to the google search we can easily discover who is the author of the book and the parties of the case¹¹.

Picture 1 Revealed authors of the cited book.



Also in a criminal case¹² concerning defamation and non-pecuniary damage the court cited a statement, which is considered as defamation "R. B. was a fictitious work supervisor who later copied her dissertations and other scholars 'essays'" („R. B. buvo fiktyvus darbo vadovas, kuris vėliau jos ir kitų mokslininkų disertacijas esą „nusirašė“). If we put this phrase to the google search we immediately will find this phrase in the press and will be able to identify the parties in the case. This phrase was found in the most popular Lithuanian web page Delfi, and as you can see the parties are easily identified - R. Banevičius and Z. Migonienė¹³.

¹⁰ A. K., R. G., K. R., R. P. ir E. M. v Office of Ombudsman for Academic Ethics and Procedures of the Republic of Lithuania., The Supreme Administrative Court of Lithuania (2016, no. eA-2170-502/2016).

¹¹ <https://ec.europa.eu/epale/lt/content/prasmes-ieskojimas-pagrindinis-zmogaus-siekis-ir-pagrindine-gyvenimo-motyvacija>

¹² State v Z.M., The Supreme Court of Lithuania (2015, no. 2K-564-489/2015).

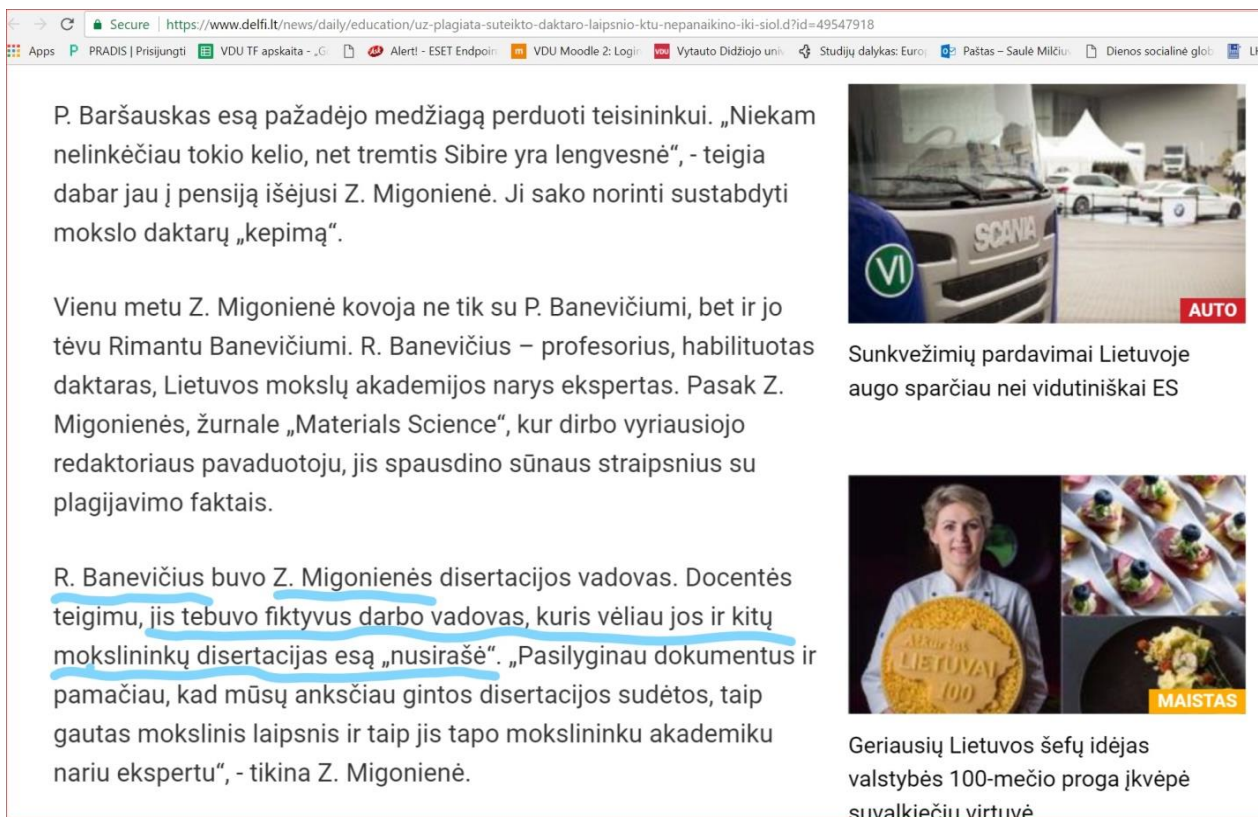
¹³ <https://www.delfi.lt/news/daily/education/uz-plagiata-suteikto-daktaro-laipsnio-ktu-nepanaikino-iki-siol.d?id=49547918>

Picture 2 Revealed parties of the case.

P. Baršauskas esą pažadėjo medžiagą perduoti teisininkui. „Niekam nelinkėčiau tokio kelio, net tremtis Sibire yra lengvesnė“, - teigia dabar jau į pensiją išėjusi Z. Migonienė. Ji sako norinti sustabdyti mokslo daktarų „kepimą“.

Vienu metu Z. Migonienė kovoja ne tik su P. Banevičiumi, bet ir jo tėvu Rimantu Banevičiumi. R. Banevičius – profesorius, habilituotas daktaras, Lietuvos mokslų akademijos narys ekspertas. Pasak Z. Migonienės, žurnale „Materials Science“, kur dirbo vyriausiojo redaktoriaus pavaduotoju, jis spausdino sūnaus straipsnius su plagijavimo faktais.

R. Banevičius buvo Z. Migonienės disertacijos vadovas. Docentės teigimu, jis tebuvo fiktyvus darbo vadovas, kuris vėliau jos ir kitų mokslininkų disertacijas esą „nusirašė“. „Pasilyginau dokumentus ir pamačiau, kad mūsų anksčiau gintos disertacijos sudėtos, taip gautas mokslinis laipsnis ir taip jis tapo mokslininku akademiku nariu ekspertu“, - tikina Z. Migonienė.



Sunkvežimių pardavimai Lietuvoje augo sparčiau nei vidutiniškai ES

Geriausių Lietuvos šefų idėjas valstybės 100-mečio proga įkvėpė suvalkiečių virtuvė

The performed analyses proved that the existing procedure of the decision anonymization in Lithuania does not properly protect the right to privacy, as the information outlined in the court decisions allows to identify the person.

Looking at the requirements of the anonymization of court decisions in Lithuania the big incompatibility between requirements exists. The requirement to anonymize all courts decisions shows the aim to protect the right to privacy as much as possible. On the other hand, the requirement to anonymize not all personal data precludes the protection of privacy as information placed in courts decisions allow to identify the person.

We would suggest changing the procedure of the anonymization of court decisions. We can see two possible ways of changes. First, to adopt the position of CJEU and to anonymize only the published court decisions which were made under the non-public hearing procedure.

The second possible way is to keep the position which would ensure that the person is not identified according to the data of the published court decision. It means that all personal data should be anonymized. For this purpose, the rules of court decisions anonymization should be changed. It should require anonymizing all data, which could allow directly or indirectly to identify the person. However, as we can see from The Regulation on Data Protection the list of

personal data is non-exhaustive, though the anonymization of court decisions could not be any more based on the technical decision. The order on anonymization of court decisions should spell personal data, which should be anonymized without any doubt and the judge himself should evaluate if the decision contains any specific data, which could allow identifying the person and issue the order to anonymize them.

The performed analyses showed that the personal data which is anonymized in court decisions do not match the definition given in regulation and in certain ways allow identification of the parties of the case

The analyses also show that in spite of the fact the anonymization of courts decisions is directly related to the protection of fundamental human rights, the Members States and the European Courts apply considerably different rules on anonymization.

CONCLUSIONS

1. The courts of the Members States and European supranational courts take very different approaches to the anonymization of court decisions. Some courts anonymize all court decisions by default, others only by the request of the parties or separate decision of the judge. Also, date, which is anonymized in court decisions, differ considerably among courts.
2. The personal data, which is anonymized in Lithuanian court decisions, do not match the definition of personal data of Regulation on Data Protection. The most obvious difference is that on the contrary to the Regulation on Data Protection the Lithuanian law spells out the almost exhaustive list of the personal data which should be anonymized, as Regulation gives the non-exhaustive list of personal data referring to every data which enable identification of the person directly or indirectly.
3. In Lithuania, the existing procedure of the decision anonymization does not reach its aim. Lithuanian rules on anonymization of courts decisions require anonymizing all court decisions by default. This requirement shows that Lithuania gives the highest priority to the protection of privacy but not freedom of expression. However, the aim of the anonymization is not reached while the Lithuanian rule requires anonymizing the exhaustive list of personal data, which includes not all data by which directly or indirectly the person can be identified.
4. The Lithuanian rules on the anonymization of court decisions should be changed. Depending on the right to which we want to grant the greater protection these rules can be changed in two possible ways. If Lithuania wants to give the greater protection to the freedom of expression, Lithuania should adopt the position of the CJEU and anonymize only theses published court decisions which are made under the non-public hearing procedure. If Lithuania wants to give the greater protection to the privacy, Lithuania should require should require anonymizing all data, which could allow directly or indirectly to identify the person.

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SANTRAUKA

TEISMŲ SPRENDIMŲ NUASMENINIMAS ES: AKTUALŪS IR LYGINAMIEJI ASPEKTAI

Europos Sąjungos Pagrindinių teisių chartijos 8 straipsnis numato teisę į asmens duomenų apsaugą kaip atskirą teisę. 2016 m. balandžio 27 d. Asmens duomenų apsaugos reglamentą priėmė Europos Sąjungos Taryba ir Parlamentas. Jis pradėtas taikyti Valstybėse Narėse nuo 2018 m. gegužės 25 d. Reglamentu siekiama užtikrinti dviejų esminių žmogaus teisių balansą: teisę į asmens duomenų apsaugą ir saviraiškos teisę; taip pat juo siekiama užtikrinti vienodą teisinę asmens duomenų apsaugą visose Valstybėse Narėse. Reglamentas su tam tikromis išimtimistaikomas ir teisminei valdžiai. Asmens duomenų apsaugos reglamentas tiesiogiai nereguliuoja teismų sprendimų nuasmenintino klausimo, tačiau reglamente pateikiamas bendras asmens duomenų apibrėžimas ir jis bus taikomas visose Valstybėse Narėse. Tikėtina, kad, įsigaliojus vienodam asmens duomenų apibrėžimui, valstybių narių teismai teismo sprendimuose suvienodins nuasmeninamus duomenis.

Straipsnyje analizuojama Asmens duomenų apsaugos reglamento įtaka teismų sprendimų nuasmeninimui Lietuvoje, apžvelgiamos sprendimų nuasmeninimo Valstybių Narių teismuose taisyklės, detaliam aptariamam reglamente pateikto asmens duomenų apibrėžimo turinys, o paskutinėje straipsnio dalyje aptariama, kokių pokyčių teismų sprendimų nuasmeninimo taisyklėse galima tikėtis įsigaliojus reglamentui. Pagrindinėje taisyklėje, apibrėžiančioje asmens duomenis reglamente, teigiama, kad asmens duomenys yra bet kokie duomenys, pagal kuriuos galima nustatyti asmenį. Toliau apibrėžime pateikiamas sąrašas dažniausiai pasitaikančių asmens duomenų: asmens vardas, pavardė, asmens identifikavimo numeris, buvimo vietos duomenys, interneto identifikatorius arba vienas ar keli to fizinio asmens fizinės, fiziologinės,

genetinės, psichinės, ekonominės, kultūrinės ar socialinės tapatybės požymiai. Valstybių narių ir supranacionalinių institucijų teismai taiko labai skirtingas taisykles dėl sprendimų nuasmeninimo: vieni teismai automatiškai nuasmenina visus teismo priimtus sprendimus, kiti – tik gavę suinteresuotos šalies prašymą ar pagal atskirą teismo sprendimą. Taip pat labai skiriasi asmens duomenys, kurie nuasmeninami teismo sprendimuose.

Autorės priėjo prie išvados, kad Lietuvoje sprendimų nuasmeninimo taisyklės yra labai formalios ir nepasiekia savo pagrindinio tikslo – apsaugoti asmens duomenis bei užtikrinti asmens teisę į privatumą. Lietuvoje reikalaujama nuasmeninti visus teismų sprendimus, tai tarsi leistų manyti, kad Lietuvoje teisė į privatumą yra ginama labiau nei saviraiškos teisė, bet gilesnė analizė parodo, kad Lietuvoje pateikiamas baigtinis sąrašas asmens duomenų, kurie turi būti nuasmeninti teismo sprendimu bet jis neapima visų duomenų, pagal kuriuos tiesiogiai ar netiesiogiai galima nustatyti asmens tapatybę. Todėl pasitaiko atvejų, kad iš paskelbtų duomenų Lietuvos teismų sprendimuose galima lengvai nustatyti byloje dalyvaujantį asmenį. Tokių situacijų būtų galima išvengti, jei reikalaujamų nuasmeninti duomenų sąrašas atitiktų reglamente pateiktą asmens duomenų apibrėžimą.

REIKŠMINIAI ŽODŽIAI

Pagrindinės teisės, teisė į privatumą, duomenų apsauga, ES, asmeniniai duomenys.