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Activity 2.2
Analysis of current practise of the DSI
regarding the management of claims and complaints

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1. Introduction

This paper is based on the analysis of the current practise of the DSI by STE Claudia Goliembiewski and takes over that paper's chapter on the legal basis dealing with the rights and duties of the SDI and some facts concerning the practice of dealing with complaints and claims which were also affirmed by the DSI in additional interviews. Additional information concerning the daily practise was gathered in interviews with the Director of the DSI, Mrs. Plumina, and the former Head of the Control Division, Mrs. Guserova, who is Head of the Legal Division since 1st of May 2005. Two interviews took also place in the presence of Mrs. Balode who is now Head of the Development and Analysis Division, and one interview also in the presence of the Advisor to the Director on public relations matters, Mr. Alers. They answered detailed questions concerning the legal basis and the practical handling of claims and complaints. Also, the annual report of the DSI of 2002 (which is the only report which is available in English) and the reports of STE Andreas Schneider and STE Peter Paul Klein have been analysed.

2. Rights and duties of the State Data Inspection according to the Latvian PDP law

The DSI has different rights and duties prescribed by Personal Data Protection Law (PDP law) of Latvia. In particular section 29 paragraph 3 of the Law describes the duties of the DSI as follows:

- 1) to ensure compliance of personal data processing in the State with the requirements of this Law;
- 2) to take decisions and review complaints regarding the protection of personal data;
- 3) to register personal data processing systems;
- 4) to propose and carry out activities aimed at raising the efficiency of personal data protection and submit reports on compliance of personal data processing systems created by government and local government institutions with requirements of regulatory enactments;

- 5) together with the Office of the Director General of the State Archives of Latvia, to decide on the transfer of personal data processing systems to the State archives for preservation thereof
- 6) accredit persons wishing to perform system auditing of personal data processing systems of government and local government institutions in accordance with procedure established by the Cabinet of Ministers.

The rights of the DSI particularly are described in section 29 paragraph 4 of the Personal Data Protection Law as follows;

- 1) in accordance with the procedures prescribed by regulatory enactments, to receive, free of charge, information from natural persons and legal persons as is necessary for the performance of functions pertaining to inspection;
- 2) to perform inspection of a personal data processing system;
- 3) to require that data be blocked, that incorrect or unlawfully obtained data be erased or destroyed, or to order a permanent or temporary prohibition of data processing; and
- 4) to bring an action in court for violations of this Law;
- 5) cancel a certificate of personal data processing registration if violations were established when inspecting the personal data processing system;
- 6) impose administrative punishments for violations in personal data processing in accordance with procedure provided by the law;
- 7) carry out inspection with the purpose to determine compliance of personal data processing with requirements of regulatory enactments in cases when the law bars the system controller from information delivery to the data subject and the corresponding application was received from the data subject.

An important task of the DSI is to register personal data processing systems in accordance with Chapter IV of the Personal Data Protection Law of Latvia. According to section 21 paragraph 1 of the Law all State and local government institutions, and other natural persons and legal persons who carry out or wish to commence carrying out personal data processing, and establish systems for personal data processing, shall register such in accordance with the procedures prescribed in this Law unless otherwise prescribed by law. The registration procedure is particularly described in section 22 of the Personal Data Protection Law.

Another important task of the DSI is to take decisions and review complaints regarding the protection of personal data (see Section 29). In the following it will be pointed out in which way DSI is handling complaints at present. This practise will be analysed.

3. Analysis of the current practise of handling complaints and claims by the DSI

In the annual report of DSI from 2002 there are described some cases regarding claims and complaints which have been handled by the DSI. In the interviews the expert was told that in 2004 the DSI dealt with 136 complaints. In 18 cases fines were imposed. Altogether fines in the amount of 1610.- LVL were imposed.

During the last year 407 telephone calls were answered. Questions by telephone are documented in a quite detailed form (at which time did the call take place; which subject did it concern; who was the caller, if his/her name is known; what was the result). But in these cases it is better to talk about "advice" given to the calling person, because these calls are not qualified as formals complaints. For lodging a formal complaint the DSI employees said that it is necessary to send it in a written form or to submit it personally to the DSI, because the complainant has to identify himself/herself.

The Control Division comprises the Head of Division and six employees. They are dealing with complaints. Five employees of the division are lawyers or law students. One employee is a technician. If there are cases that affect technical aspects the technician participates in the work of the lawyers.¹ Internal "rules of procedure" about the handling of complaints or a "control methodology" do not exist, but rules concerning the DSI were adopted and were also approved by the Ministry of Justice in June 2005. Furthermore rules for each division were issued. The "reglement" of the control division contains an enumeration of tasks to be fulfilled by the division and describes the structure of the division. Both texts are only available in Latvian at the moment. They refer to a Statute of Data State Inspection, which regulates the tasks of the Director and contains also some organizational provisions concerning the employees.

¹ See STE Dr. Claudia Golembiewski, Analysis of current practice of the DSI, 3.

At present the DSI is particularly concerned with two different kinds of applications. On the one hand there are complaints that are based on the Administrative Procedure Law (APL). On the other hand there are applications dealing with general questions. These are based on the *lesniegumu, sudzibu un priekslikum izskatisanas kartiba valsts un pasvaldibu institucijas* (annotation: English version of this Law was not available) which contains provisions about handling of applications and in particular it contains time periods for answering these applications. In the interview the expert was told that such applications are not “complaints”, but they contain general questions like for example the question how many people work in the DSI.

The procedures of handling complaints and claims are in detail described by the Administrative Procedure Law, which has been established in 12 June 2003 and 19 January 2004. According to Section 3 paragraph 1 this Law shall be applied to administrative procedure in institutions to the extent that special norms of law in other laws do not provide otherwise. The DSI employees told the expert that claims and complaints have to be handled based on this Law.

When a complaint is received, it is registered by the Director’s Assistant or by an official of the Supervision Department, and viewed by the Director. Then it is forwarded to the Head of the Supervision Department and from there to the Control Division. The responsible staff member has to deal with it in substance. First, the staff member establishes whether a violation of data protection has taken place or not. In the interview it was said that in principle every letter that is sent by the DSI has to be signed by the Director herself. If there is a complaint, a statement of the potential violator about the facts of the case has to be requested. Also in this case the letter, which is sent to the insulted controller, has to be approved by the Head of the Control Division, the Director of the Supervision Department and the Director. Then the employee has to write a record about the facts of the case. After that the violator has to sign this. If he refuses signing the record, the employee of the DSI has to make a note and has to gather more facts of the case. Then a decision has to be taken by the head of the supervisory authority if a violation has taken place (in this case the procedure is continued) or not (in this case the procedure is stopped).

In the case of continuation a meeting has to be arranged by the Deputy Director who is also Head of the Supervisory Department. The Head of the Supervision

Department (Deputy Director), probably also the Head of the Control Division (there was no such meeting since the new structure of the authority has taken effect) and the Head of the Legal Division as well as an employee participate in this meeting. The submitter and the addressee of the complaint and other involved persons are allowed to participate in this meeting. After the meeting the Director of the Supervision Department decides if the addressee should be admonished or fined. This decision is based on the Latvia Administrative Violations Code. The Latvia Administrative Violations Code was issued in 1984 and has been changed several times until now. Articles 204.⁷ to 204.¹¹ of the Law contain regulations about fines that could be imposed by the DSI. The Law contains provisions about different cases. These are the following: unlawful processing of personal data, failure to inform the data subject, operating a data processing system without registration, failure to provide information of the National Data Inspectorate and the failure to accredit a person with the National Data Inspectorate.

The decision has to be signed by the Head of the Supervisory Department who also is the Deputy Director of the DSI. The decision is addressed to the violator (controller). The submitter of the complaint is also informed in a written form about the administrative act. If there were requested statements of third parties they also get copies of the administrative decision.

It was said by the DSI employees that it is also possible to pronounce a verbal admonition in cases of marginal infringements of data processing. But in cases of violations regarding sensitive data according to the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement normally it is not possible to refrain from imposing a fine.²

The addressee of the administrative decision could be a private or a public body.

The decision of the DSI is an administrative decision, which could be appealed to a court (see Section 31 of the Personal Data Protection Law), the Administrative Court. Since April 2004 this happened in three cases. Two cases were won by the DSI, one case is still pending. In the case of an appeal the court asks the DSI for an opinion

² Golembiewski, Analysis, 4.

which has also to be approved by all instances of the internal hierarchy of the DSI (and finally signed by the Director).

According to Section 64 Paragraph 2 of the Administrative Procedure Act the DSI has to take decisions on formal complaints within one month, if it needs more information within four months. But after this deadline of four months it would not be possible to impose a fine and it could only be stated that there has been a data protection violation. There are no statistics on such cases available, but in the interviews the number of such cases was estimated with about 20%.

In specific cases Section 64 Paragraph 2 would allow an extension of the time period to one year by the State Secretary of the Ministry of Justice. As the expert was told the DSI does not make use of this provision for reasons of independence. When the DSI will not be subordinated to the Cabinet in the future, the situation will be different, because then the Director of the DSI will have the competence to take such decisions.

In the interviews it was said that in any case, if there has been a violation, the procedure has to be terminated by an administrative act.

There was only one case in which inspections were made on the spot (concerning medical records). There are no rules existing, which regulate in which cases an inspection on the spot should take place.

On the question if also an informal procedure is possible the expert was told that every case is dealt with on the basis of the Administrative Procedure Law. There is no clear legal basis to give for example only a recommendation to the controller if a violation has been established.

The expert was told that the decisions of the DSI are not published in the internet (in an anonymized way) because of lack of staff.

3. Evaluation

3.1. Legal situation:

As mentioned before in Latvia the procedure of handling complaints is regulated in the Administrative Procedure Law. Section 25 provides that "a submitter is a private

person who is applying to an institution in order to establish, alter, determine or terminate specific public legal relations. A private person for the protection of whose rights and legal interests a matter has been initiated pursuant to a legal entity or private person referred to in Section 29 of this Law should also be considered a submitter.” In the opinion of the expert the “submitter” seems to be a data subject whose rights are concerned. In Section 27 Paragraph 1 APL it is provided that “an addressee is a private person in regard to whom an administrative act is issued or an actual action is (is to be) carried out.” In Paragraph 2 it is said that a public legal entity may also be an addressee of an administrative act or it may be affected in actual cases where it finds itself in a similar situation as a private person and in the specific case is subject to the same legal regulations as private persons.

The main advantages of handling such complaints according to strict procedural rules are transparency and simplicity.

Nevertheless the expert shares the opinion that there could be cases that should be solved without any formal administrative decision.³ There must be flexibility to the DSI especially in dealing with complaints, which do not affect the rights of the complainant. It seems to be the case that according to the current legal situation there could be a certain room for manoeuvre in dealing with “complaints” by somebody who is not concerned in his/her legal sphere by the data protection violation. But as soon as the DSI decides to initiate a procedure against a controller (see Section 55 APL), it is bound to procedural rules.

Furthermore, the Latvia Administrative Violations Code has to be taken into account. The Code distinguishes between different kinds of law infringements. In the case of unlawful processing of personal data physical persons could be admonished or fined between five and two hundred and fifty lats, legal persons between one hundred and one thousand lats. For unlawful processing of sensitive personal data natural persons are admonished or fined between one hundred to two hundred and fifty lats, and legal persons between five hundred and one thousand lats; this admonition or fine is supplemented by confiscation of the means of the violation.

For a failure to inform the data subject physical and legal persons could be admonished or fined between twenty-five lats and two hundred and fifty lats. For

³ Golembiewski, Analysis, 6.

operating a data processing system without registration a fine between twenty-five lats and two hundred and fifty lats is imposed. There are also other provisions concerning the failure to provide information to the DSI (admonition or fine between twenty-five and two hundred and fifty lats) and the failure to accredit a person with the DSI (admonition or fine between twenty-five and two hundred and fifty lats).

The expert shares the opinion that it is difficult to facilitate compliance with Data Protection Law by imposing fines.⁴ First of all it should be an important aim to prevent infringements before imposing fines. It must be a principal concern to strengthen the consciousness of data protection within the population. Before imposing fines all appropriate measures to prevent controllers from infringing data protection rules should be exhausted.

It would also be better to admonish the addresses of the administrative decision before imposing a fine. Penalties such as fines imposed to the controller are not the best way to achieve better data protection in all cases, and that there should be more flexibility in dealing with complaints. Sometimes it can be sufficient to state that there has been a data protection violation or to order the erasure of personal data or to give access to the data subject's personal data.

In certain cases fines could be efficient and also have a certain prevention effect, but they should be restricted to a number of well-defined data protection violations. The obligation to clearly define criminal acts derives from the European Convention on Human Rights. Fines should also be adequate to the concrete infringement. The practise of imposing relatively low fines does not seem to be an appropriate measure of prevention; in certain cases they should be high to have a prevention effect for the future.

The expert was informed on a draft amendment to the Latvian Data Protection Act drafted by the project team. It was said that this draft has been accorded with the Ministry of Justice in detail. According to this amendment (which can be regarded as *lex specialis*) the DSI should have powers, which should not necessarily be exercised in the framework of a formal administrative procedure.

⁴ Golembiewski, Analysis, 6.

In the opinion of the expert, the DSI should have the right to issue non-binding legal instruments like the right to issue recommendations to a controller. On the one hand this could be an instrument used in light cases instead of a decision, if the submitter does not have the explicit right to obtain a decision (when he is not data subject); on the other hand a recommendation could also be a supplementary instrument (supplementing a formal decision), if there is a big number of data subjects concerned by the data protection violation.

Furthermore, exemptions from the Latvia Administrative Violations Code should be foreseen. For example it could be regulated that in cases of minor data protection infringements the DSI can refrain from imposing a fine.

The draft amendment concerning the PDP law seems to enable more flexibility in providing a number of powers which can be exercised by the Data Supervisor in pursuing data protection violations by public administration. The Data Supervisor is free in his choice and application of the methods of intervention mentioned in the draft provision [Art. 30 (2)]⁵; he is bound only by the principle of proportionality. Regarding data protection violations by a private person, according to the draft amendment the Data Supervisor would have powers which differ from those in the “public area” (for example he/she would have the powers to process, block, erase or destroy data, impose a temporary or definitive ban on processing or impose fines on private persons for violations of personal data protection rules according to the Latvia Administrative Violations Code). In the opinion of the expert these powers should be at least supplemented by the power to order to give the data subject access to his/her personal data.

3.2. Practise of the DSI:

In general the handling of complaints and claims by the DSI seems to follow a logic, which is also partially determined by the Administrative Procedural Act. The fact that the Director checks all incoming correspondence and the Head of the Supervisory Department is the sole person entrusted to give decisions is a good measure of

⁵ For example the Data Supervisor would have the right to interrogate public institutions and summon them to comment on the matter, to make recommendations and/or admonish them, lodge a formal complaint with the heads of the public institutions concerned, inform the public about the matter, etc.

coordination and seems to be appropriate to give an overview to the responsible persons and to bring a “certain line” into the decisions of the DSI. The Director has also the possibility to inform herself about the open cases, because an electronic filing system has been established in which you can also find the different procedural steps that have been taken and also the time periods in which the complaint procedure should be terminated. Everybody can also look up his/her own open cases or the open cases of his/her employees.

Nevertheless, in the opinion of the expert it would be more useful if certain internal processes could be shortened. For example a simple letter for gathering more information on a specific case has to be approved by four instances: the employee, the Head of the Control Division, the Head of the Supervisory Department and the Director. This does not seem to be necessary and costs also time. At least the Head of the Supervision Department could be entrusted with the responsibility for the approval of such intermediary steps.

Furthermore the incoming complaints should be registered only by one person and not by persons in different functions on different places.

As it was said, at the moment there is no specialisation of the employees according to the different branches of data protection law. But in the future the employees should be more specialised.

A certain specialisation could be helpful to make the daily work more effective. It could make sense to differentiate between complaints regarding private bodies and complaints regarding public bodies.⁶ It could also be useful that certain employees become specialised in specific material law areas, such as police law or health law. So the specialisation of employees in the future would help to make the daily work more effective.

As it was mentioned before, only one inspection on the spot has taken place until now. It is recommended to use this instrument more frequently, especially in cases where the technical complexity is high (for example if a complicated technical system

⁶ Golembiewski, Analysis, 7.

is used) and/or the acquisition of facts would be difficult or not possible without an inspection on the spot.

The DSI has an Internet website <http://www.dvi.gov.lt>. At present the publicly available part of information on personal data processing systems registered with the DSI there is published on this website. Also information about laws and other regulations are available. The expert shares the opinion that it would be useful to make more information available on the Internet website.⁷ Furthermore in the opinion of the expert it would be useful to publish anonymized decisions of the DSI as it is the case for example in Austria.

As a number of questions concerning the managing of complaints are open and the whole internal procedure of handling complaints in the DSI is not laid down formally (there are no internal rules of procedure) a manual dealing with such internal complaint management would be useful.

⁷ Golembiewski, Analysis, 7. As she says, there could be a column which contains frequently asked questions so that some complaints of citizens could already be answered by referring them to the information on the website. Also there could be distributed leaflets that contain information about recurring topics. E.g. this could be information about prevention against unsolicited advertising (spam). This information could also help to facilitate the daily work of the DSI.