



## THE RIGHT TO COMPENSATION IN VIOLATIONS OF DATA PROTECTION

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**Authors: Berfu Yalçın, Oğuz Çerçi, Serdarhan Güler**

In the previous days, it was claimed that YemekSepeti had been hacked, and the personal data of millions of users had been stolen. Alleged hackers have blackmailed the YemekSepeti, in return for not leaking customers' data, and when their request was rejected, hackers disclosed the personal data of twenty thousand users online. In a public statement, the Turkish Personal Data Protection Authority (KVKK) has announced that it has launched an ex officio investigation about the situation. KVKK had previously initiated another inquiry on YemekSepeti on March 29, 2021. If any violation is detected during these investigations, YemekSepeti will be fined as regulated in the Law on the Protection of Personal Data (Law No. 6698). However, with these administrative fines, it is not possible to compensate the victims of data breach. Therefore, with this legal brief, we will examine the right to compensation, as a legal remedy that can be used to compensate victims of data breaches, both in terms of Turkish Law and legal regulations and judicial decisions of other countries.

With the development of personal data protection law and legislation both in Turkey and in the rest of the world in recent years, norms and sanctions of this discipline have been discussed in legal communities and often become a subject of debate. The principal regulations regarding the processing of personal data do not only regulate the data processing conditions that must be complied with but also contain provisions regarding the compensation of possible damages. In Turkey, the fundamental regulation regarding the protection of personal data is Law No. 6698 on the Protection of Personal Data. In addition, the Turkish Penal Code No. 5237 (art. 135-140)

and the Constitution of the Republic of Turkey (art. 20) possess regulations regarding the protection of personal data. There are various regulations at the international level, but the most relevant regulation for the EU member states is the General Data Protection Regulation (GDPR). According to the GDPR, data controllers must secure personal data to prevent possible infringements. In case of detection of any data breach, data controllers are required to notify the competent supervisory authority within 72 hours and the victims of data breaches without any delay (GDPR articles 33-34). Data controllers might face significant fines if they do not comply with the duty of notification.

As for the jurisdiction of Turkey, Articles 11 and 14 are significant in terms of Law No. 6698. Under Article 11, data subject may request compensation for the damage arising from the unlawful processing of their personal data. According to Article 14, right to compensation under general provisions of those whose personal rights are violated is reserved. In this context, the data subject, who has suffered pecuniary or non-pecuniary damage as a result of the violation of Law No. 6698, may request compensation for this damage from the data controller. The data subject, whose request is not accepted by the data controller, may apply to the Personal Data Protection Board (Board) following Article 14 of the Law or may apply to the civilian judiciary for the compensation of pecuniary and non-pecuniary damage, per the general provisions. It is crucial to mention that the complaint to the Board cannot be filed before exhausting the remedy of application to the controller. However, there is no such prerequisite for applying to the civilian judiciary as per the general provisions.

The nature of applying to the judiciary according to the general provisions is a matter of debate in the doctrine. Pursuant to the dominant opinion, when the literal meaning of the law is considered, applying to the Board and applying to the judiciary based on general provisions are independent pursuits of rights. However, the Board had already decided on the contrary. Indeed, the Board decided that data subjects shall request compensation from the general courts, per general provisions, and no action shall be taken by the Board. However, considering the legislation, the main opinion is that the application to the judiciary does not override the Board's authority on compensation since it is an additional legal remedy.

In Turkish law, above mentioned general provisions for compensation cases are regulated under the Turkish Civil Code and the Turkish Law of Obligations. According to article 25/3 of the Turkish Civil Code; "Right of the claimant to demand compensation for physical and moral damages and to request the transfer of gains incurred from unlawful assault in his favor under the provisions stipulating performance of business without the requirement of a proxy, is hereby reserved." Lastly, claims for pecuniary damages may be based on the provisions of tort law or breach of a contract. The type of responsibility of the data controller in claims for financial compensation due to the violation of personal data is controversial. Although the dominant opinion in the doctrine is that the data controller has to have a fault in pecuniary compensation claims, there is also an opinion that strict liability should be applied in such cases. In terms of non-pecuniary damage, the Turkish Civil Code article 25/3 and the Turkish Law of Obligations article 58 are principal regulations.

There is no precedent at the international level regarding claims for compensation for personal data violations. In addition to the personal data legislation shaped by different directives, agreements, and regulations, the existence of various judicial authorities and supervisory bodies in Europe and the USA results in the emergence of different approaches related to this issue. In the context of the EU, per article 82 of GDPR, in case of breach of personal data, the data subject has the right to claim compensation from the organization that caused the data breach.

In this context, it is possible for the data subject to claim both "pecuniary" and "non-pecuniary" compensation. For example, assuming that an event similar to the one alleged to have occurred in YemekSepeti, took place in a country where GDPR is in effect; If the credit card information of the data subject is stolen and used, the damage suffered by the data subject will be concretely detectable. In this case, since the GDPR article 32 and other articles are violated as a result of not providing sufficient security while processing the data by the data controller, the data breach victim may demand compensation from the data controller for the pecuniary damage suffered. Even if the data subject had not suffered a financial loss in the previous example, they might have been extremely worried as they found out that other data subjects were financially harmed because of their stolen data. In this case, the specific situation might cause moral compensation even if the data subject doesn't have real material damage, considering the victims can claim non-pecuniary damages for the inconvenience, distress, and loss of control over the accessibility of their data (Vidal-Hall and others v Google Inc.). In a recent judgment (Lloyd v. Google LLC) decided under the "Data Protection Act 1998" on the same issue, it was stated that in order for the data subject to be entitled to non-pecuniary damage, the data controller must commit an illegal act, and as a result, the data subject must suffer demonstrable damage.

In Turkish Law, two recent Court of Cassation decisions<sup>1</sup> are significant for the subject. The subject of both decisions is related to the use of the plaintiff's identity and billing information without the plaintiff's consent, thereby subscribing to a mobile telephone line from a communication company on behalf of the plaintiff. Due to the non-payment of the invoices of the relevant line, enforcement proceedings were initiated against the plaintiff and the plaintiff had to take legal action by hiring a lawyer. The plaintiff stated that he had to pay a fee to the lawyer and requested pecuniary and non-pecuniary damages. In the compensation cases, the other party was the real person who used the plaintiff's information to subscribe to the mobile telephone line in the communication company. According to the Court of Cassation, the communication company should be held responsible for the damages incurred as a result of the actions of its distributor, as it is "obligated to choose its distributor well and shall adequately train and supervise it". Also, "it is clear that the plaintiff's personal data was obtained and used unfairly due to the use of the plaintiff's identity information without his consent, and considering that the defendant's action constitutes an attack on the plaintiff's rights, an appropriate amount of non-pecuniary compensation should be awarded in favor of the plaintiff". Consequently, both defendants were held responsible together for non-pecuniary damages.

Although the Court of Cassation's judgments are guiding in the evaluation of claims for pecuniary and non-pecuniary damages in case of violation of the right to personal data protection, it should be noted that the discipline of personal data protection has not reached sufficient maturity in practice yet. In this respect, at least at the EU level, the answer to the preliminary question addressed to the European Court of Justice on "*whether the data subject will be entitled to compensation under the GDPR even if no material damage has been incurred*"<sup>2</sup> will be a milestone for compensation claims.

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<sup>1</sup> Yargıtay 4. HD, E. 2019/979, K. 2019/2679, T. 8.5.2019 ve Yargıtay 4. HD, E. 2021/724, K. 2021/3272, T. 17.6.2021.

<sup>2</sup> In this context, both the German Federal Court and the Austrian Supreme Court have referred the Court of Justice of the EU on the interpretation of article 82/1 of the GDPR. The foundation of the questions is under what conditions non-pecuniary damage can be awarded without pecuniary damage and the interpretation of Article 82 of the GDPR. These questions have been referred to the European Court of Justice within the scope of the preliminary ruling procedure and have not yet been decided on.

## CONCLUSION

- Although it is controversial in the doctrine, the standpoint of the Board in its current decisions is that the data subject should request pecuniary and non-pecuniary damages through the civil judiciary per the general provisions.
- According to the legislation, data subjects who incurred damage by the unlawful processing of their personal data, have a right to apply to the data controller for compensation by using their right regulated under Article 11 of Law No.6698. Within this scope, when the attitude of the Board on compensation claims is evaluated, it will be in favor of the persons concerned to file a lawsuit in accordance with the general provisions. Pursuant to the general provisions, complainants are not obliged to apply to the data controller who violates their data right.



İsmail Paşa Sok. No: 77  
34718 Koşuyolu, Kadıköy/İstanbul  
Tel : +90 0216 327 27 00 pbx  
Faks : +90 0216 327 27 44  
<https://www.urey.av.tr>

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