The European Union's IPA Programme for Serbia

SUPPORT TO THE OFFICE OF THE COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE AND PERSONAL DATA PROTECTION

Letter of Contract N°2010/231701

REPORT

Prepared by:
Edmond Miletić
Stevan Lilić
Dovydas Vitkauskas

September 2010

The project is financed by the European Union

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Your Partner for Sustainable Results

The project is implemented by IBF International Consulting

SUPPORT TO THE OFFICE OF THE COMMISSIONER FOR INFORMATION OF PUBLIC IMPORTANCE AND PERSONAL DATA PROTECTION

PODRŠKA INSTITUCIJI POVERENIKA ZA INFORMACIJE OD JAVNOG ZNAČAJA I ZAŠTITU PODATAKA O LIČNOSTI

Program IPA Evropske unije za Srbiju

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Ugovor broj 2010/231701

IZVEŠTAJ

Pripremili:
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List of Abbreviations

COE – Council of Europe
IC – Office of the Information Commissioner (U.K.)
IDPC – Office of the Information and Data Protection Commissioner (Serbia)
DPC – Data Protection Commissioner (Ireland)
DPI – Data Protection Inspectorate (Lithuania)
ECHR – European Court of Human Rights
ECJ – European Court of Justice
EU – European Union
JMBG – Personal Identification Numbers (in Serbia)
NSB – National Supervising Body (Slovenia)
PDP – personal data protection

Table of Content

EXECUTIVE SUMMARY 9

I. INTRODUCTION 12

II. METHODOLOGY 14
A. PROJECT OBJECTIVES AND REQUIRED EXPERTISE 14
B. ACTIVITIES 14
C. TIMING 14
D. INTERVIEWS 15
E. ANALYSES 17

III. RELEVANT STANDARDS AND PRINCIPLES 18
A. EU LAW ON PERSONAL DATA PROTECTION 18
1) Directive 95/46/EC 18
2) Schengen Convention 19
3) Other Relevant EU Rules 21
4) Relevant ECJ Jurisprudence 22
a. SCOPE OF APPLICATION 22
b. ROLE AND INDEPENDENCE OF SUPERVISING BODY 22
c. PRINCIPLES AND GROUNDS OF DATA PROCESSING 23
d. MEDIA AND FREEDOM OF EXPRESSION 24
5) Criticism of Directive 95/46/EC 24
B. EUROPEAN CONVENTION ON HUMAN RIGHTS AND OTHER GENERAL STANDARDS 25
1) European Convention on Human Rights 25
a. SCOPE OF APPLICATION 25
b. PRINCIPLES AND GROUNDS OF DATA PROCESSING 26
I. INTELLIGENCE GATHERING AND POLICE SURVEILLANCE 26
II. MEDICAL RECORDS 26
III. ACCESS TO PERSONAL DATA AND OTHER POSITIVE OBLIGATIONS 27
c. MEDIA AND FREEDOM OF EXPRESSION 27
2) The Convention on Automatic Processing of Personal Data 28
a. SCOPE OF APPLICATION 28
b. COMPLAINT PROCEDURES AND INVESTIGATION OF BREACHES 28
c. PRINCIPLES AND GROUNDS OF DATA PROCESSING 29
d. TRANS-BORDER MOVEMENT OF DATA 29
3) Madrid Resolution of 2009 29
C. COMPARATIVE LAW AND PRACTICE OF EU AND OTHER STATES 30
1) General Remarks 30
2) Scope of Protection and Core Definitions 31
a. MEANING OF 'PERSONAL DATA' 31
b. 'DATA SUBJECT', 'CONTROLLER' AND 'PROCESSOR' 32
c. MEANING OF 'SENSITIVE DATA' 32
d. SCOPE OF APPLICATION 33
e. EXEMPTIONS 33
3) Role, Independence, Duties and Powers of Supervising Body 34
a. SINGLE OR DUAL ROLE 34
b. INDEPENDENCE 34

c. DUTIES 35
d. POWERS 35
4) Conditions of Processing by Data Controllers 37
a. PRINCIPLES OF DATA PROCESSING 37
b. GROUNDS FOR DATA PROCESSING 38
c. OTHER CONDITIONS AND TIME-LIMITS 39
d. ROLE OF DATA PROCESSOR AND DATA SECURITY 40
e. OBLIGATION OF NOTIFICATION BY DATA CONTROLLER 41
5) Access Requests, Complaint Procedures and Investigation of Breaches 42
a. DATA SUBJECT ACCESS REQUEST 42
b. COMPLIANCE ASSESSMENT, INVESTIGATION AND ENFORCEMENT 43
c. RIGHT TO COMPENSATION 44
d. ADMINISTRATIVE RESPONSIBILITY 44
e. CRIMINAL RESPONSIBILITY 44
6) Trans-Border Movement of Data 45
7) Specific Regulation in regard to Certain Sectors, Types of Data or Purposes of Processing 47
a. GENERAL REMARKS 47
b. SENSITIVE DATA 48
c. NATIONAL SECURITY, DEFENCE AND CRIMINAL JUSTICE 49
d. HISTORICAL, STATISTICAL AND RESEARCH PURPOSES 50
e. MEDICAL DATA 51
f. MEDIA 51
g. TELECOMMUNICATIONS AND INTERNET 52
h. BIOMETRICS 52
i. VIDEO SURVEILLANCE (CCTV) 52
j. BANKING, FINANCIAL AND SOLVABILITY DATA 53
k. TAX AND SOCIAL SECURITY DATA 54
l. EMPLOYMENT RELATIONS AND HUMAN RESOURCES 54
m. EDUCATION AND SCHOOL RECORDS 54
n. ELECTIONS 54
o. DIRECT MARKETING 55
p. PERSONAL IDENTIFICATION NUMBERS, E-DOCUMENTS & E-SIGNATURES 55
q. OTHER AREAS 56

IV. APPLICATION OF THE RELEVANT STANDARDS IN SERBIAN LAW AND PRACTICE 57
1) General Remarks 57
2) Scope of Protection 58
a. SCOPE OF APPLICATION 58
b. CORE DEFINITIONS 58
c. MEANING OF 'SENSITIVE DATA' 59
d. EXEMPTIONS 59
e. TERRITORIAL APPLICATION OF THE LAW 60
3) Role, Independence, Duties and Powers of Supervising Body 60
a. DUAL ROLE 60
b. INDEPENDENCE 61
c. DUTIES 61
d. POWERS 61
4) Conditions of Processing by Data Controllers 63
a. PRINCIPLES OF DATA PROCESSING 63

b. GROUNDS FOR DATA PROCESSING 64
c. OTHER CONDITIONS AND TIME-LIMITS 65
d. ROLES OF DATA PROCESSOR AND SECURITY OF DATA 66
e. OBLIGATION OF NOTIFICATION BY DATA CONTROLLER 67
5) Access Requests, Complaint Procedures and Investigation of Breaches 68
a. DATA SUBJECT ACCESS REQUEST 68
b. COMPLIANCE ASSESSMENT, INVESTIGATION AND ENFORCEMENT 69
c. RIGHT TO COMPENSATION 70
d. RESPONSIBILITY FOR A BREACH 71
6) Trans-Border Movement of Data 71
7) Specific Regulation in regard to Certain Types of Data or Purposes of Processing 72
a. GENERAL REMARKS 72
a. SENSITIVE DATA 73
b. NATIONAL SECURITY, DEFENCE AND CRIMINAL JUSTICE 74
c. HISTORY, STATISTICS AND RESEARCH 74
d. MEDICAL DATA 74
e. MEDIA, ARTISTIC AND LITERARY EXPRESSION 75
f. TELECOMMUNICATIONS AND INTERNET 75
g. BIOMETRICS 76
h. VIDEO SURVEILLANCE (CCTV) 76
i. BANKING, FINANCIAL AND SOLVABILITY DATA 76
j. TAX AND SOCIAL SECURITY DATA 77
k. EMPLOYMENT RELATIONS AND HUMAN RESOURCES 77
l. EDUCATION AND SCHOOL RECORDS 77
m. ELECTIONS 78
n. DIRECT MARKETING 78
o. IDENTIFICATION NUMBERS, E-DOCUMENTS & E-SIGNATURES 78
p. OTHER AREAS 78

V. CONCLUSIONS 80

VI. RECOMMENDATIONS 82
A. DRAFT AMENDMENTS TO THE PERSONAL DATA PROTECTION ACT 82
1) Amendments to the existing provisions 82
a. SCOPE OF THE LAW (Article 1.1) 82
b. PURPOSES OF THE ACT (Article 2) 82
c. DEFINITION OF TERMS (Article 3) 83
I. AUTHORITY 83
II. CONSENT 83
III. RECIPIENT & THIRD PARTY 83
d. APPLICATION OF THE LAW (Article 4) 83
e. EXEMPTIONS (Article 5) 84
I. CONTRARY INTEREST 84
II. MEDIA AND ART 84
f. PROCESSING DATA FOR HISTORICAL, STATISTICAL, RESEARCH OR DEVELOPMENT PURPOSES (Article 6) 84
g. CONTROLLER APPOINTED UNDER SPECIAL REGULATION (Article 7) 85
h. INADMISSIBILITY OF PROCESSING (Article 8) 85
i. PROCESSING WITH CONSENT (Article 10) 86
I. FORM OF CONSENT 86

II. WHO CONSENTS FOR A DECEASED PERSON 86
j. WITHDRAWAL OF CONSENT (Article 11) 86
k. PROCESSING WITHOUT CONSENT (Article 12) 86
I. CONSTITUTIONALITY 86
II. DATA PROCESSING IN THE FIELD OF EMPLOYMENT LAW 87
l. PROCESSING BY PUBLIC AUTHORITIES (Article 13) 87
m. DATA COLLECTION (Article 14) 87
n. NOTIFICATION OF DATA PROCESSING (Article 15.1) 88
o. PARTICULARLY SENSITIVE DATA (Article 16) 88
I. PROPER TRANSPOSITION OF TERMS 88
II. IMPLEMENTING REGULATION 89
p. WITHDRAWAL OF CONSENT TO PROCESSING OF PARTICULARLY SENSITIVE DATA (Article 18) 89
q. RIGHT TO NOTIFICATION OF DATA PROCESSING (Article 19) 89
r. DECIDING ON REQUESTS FOR NOTIFICATION, ACCESS AND COPY (Article 25.5) 89
s. DECIDING ON REQUESTS UPON OBTAINING ACCESS TO DATA (Article 26.5) 90
I. PRIVILEGED POSITION OF STATE AUTHORITIES 90
II. WHAT GOVERNMENT BODY 90
t. PROCESSING FOR THE PURPOSES OF PUBLIC MEDIA (Article 29), ATTACHMENT OF REPLIES AND OTHER INFORMATION (Article 30), and PROTECTION OF PERSONALITY (Article 31) 90
u. FORWARDING OF REQUESTS TO THE COMMISSIONER (Article 32) 91
v. RETENTION AND USE IN THE EVENT OF DEATH (Article 35.1) 91
w. ESTABLISHMENT OF FACTS IN APPEAL PROCEEDINGS (Article 40.2) 91
x. MANDATORY NATURE AND ENFORCEMENT OF RULINGS (Article 41.2) 92
y. LEGAL REMEDIES AGAINST RULINGS (Article 42) 92
z. COMMISSIONER'S DUTIES AND POWERS (Article 44) 92
I. GENERAL DUTIES 92
II. LAW-MAKING PROCES 93
III. DEPUTY COMMISSIONER 93
aa. SEARCH AND ENTRY (Article 45.2-4) 94
bb. CONFIDENTIALITY DUTY (Article 46.3) 94
cc. ORGANISATIONAL AND TECHNICAL MEASURES (Article 47) 94
dd. DATA PROCESSING RECORDS (Article 48) 95
I. GENERAL REMARKS 95
II. CONTENT OF THE DATA FILE AND WHEN A DATA FILE IS NOT NECESSARY 95
III. IMPLEMENTING REGULATION 95
ee. NOTIFICATION OF THE COMMISSIONER (Article 49) 96
I. DEADLINE 96
II. HARMONIZATION WITH THE DIRECTIVE 96
ff. CENTRAL REGISTER (Article 52) 96
I. CONFUSING TERMS 96
II. PUBLICATION IN THE OFFICIAL GAZETTE 96
gg. TRANSBORDER TRANSFER OF DATA OUT OF THE REPUBLIC OF SERBIA (Article 53) 97
hh. COMMISSIONER'S POWERS (Articles 56.5) 100
ii. PENALTIES (Article 57) 100
2) Unregulated areas (new provisions of the Serbian PDP Act) 100
a. RECORDS OF CRIMINAL AND ADMINISTRATIVE OFFENCES AND CIVIL COURT JUDGMENTS 101

b. PERSONAL IDENTIFICATION NUMBER 101
c. RIGHT TO COMPENSATION 102
d. MEDICAL DATA 102
e. MEDIA 103
f. BIOMETRICS 103
g. VIDEO SURVEILLANCE 103
h. ENTRY TO AND EXIT FROM PREMISES 104
i. TELECOMMUNICATION AND INTERNET 104
j. BANKING, FINANCIAL MANAGEMENT AND E-COMMERCE 104
k. ELECTIONS 105
l. PUBLIC BOOKS 105
m. DIRECT MARKETING 105
n. SCHOOL RECORDS 105
o. EMPLOYMENT RECORDS AND HUMAN RESOURCES MANAGEMENT 106
p. E-DOCUMENTS, E-SIGNATURES 106
a. DATA PROCESSING IN THE JUDICIAL AND POLICE SECTOR 106
b. SCHENGEN CONVENTION 107
c. SECURITY COMPANIES AND PRIVATE DETECTIVES 107
B. PROPOSED ACTIONS WITH RESPECT TO OTHER SECTORS: DIRECTIONS FOR REFORM 107
C. SUGGESTIONS A STRATEGIC PAPER ON THE DEVELOPMENT OF THE OFFICE OF THE COMMISSIONER IN THE MEDIUM TERM 108

VII. ANNEXES 110
ANNEX 1: TABLE OF CONCORDANCE DIRECTIVE 95/46/EC VS. THE SERBIAN PDP ACT 110
ANNEX 2:TABLE OF CONCORDANCE THE SCHENGEN CONVENTION (TITLE VI ONLY) VS. THE SERBIAN PDP ACT 1455
ANNEX 3: LIST OF INTERVIEWS 151

EXECUTIVE SUMMARY

Data protection is one of the most rapidly developing areas of social life as well as legal regulation. The multitude of sectors – both public and private, foreign and domestic – are affected.

The objectives of the EU-funded Project on the "Support to the Office of Commissioner for Information of Public Importance and Personal Data Protection" are to identify regulations in the field of public administration that need to be brought in line with the Serbian Personal Data Protection (PDP) Act , while providing recommendations on harmonisation of the Act with EU Directive 95/46/EC and other relevant European and international standards.

In order to achieve the Project objectives, the Expert Team interviewed the relevant stakeholders, reviewed documentation produced by previous technical assistance projects in the field of personal data protection, assessed the Serbian PDP Act vis-à-vis various European and international standards - including 'hard' standards such as the European Convention on Human Rights, or 'soft' standards such as the so-called Madrid Resolution approved by an international conference of information and data protection supervisory bodies in 2009. In this process, the Expert Team identified specific ways that personal data protection issues should be regulated by the Serbian PDP Act or other domestic statutes, and drafted model amendments to the Act for this purpose. In doing so, the Team did not contain itself to considering the protection of personal data as a self-standing topic, but took into account the broader framework within which this right co-exists with other rights (e.g. the freedom of expression and information).

The Report consists of the following parts: methodology; relevant standards and principles; application of the relevant standards in Serbian law and practice, and conclusions, including recommendations and annexes.

EU Directive 95/46/EC sets up a regulatory framework balancing the need to ensure a high level of protection for the privacy of individuals with the interest of the free movement of personal data. The Directive puts limits on the collection and handling of personal data, requiring the Member States to establish one or more independent supervisory bodies responsible for the protection of personal data and for monitoring the application of the legislative provisions transposing the Directive.

The Schengen Agreement, supplemented by the Convention implementing the Schengen Agreement on the gradual abolition of checks at their common borders (the Schengen Convention) was also analysed as one of the relevant standards, on account of a somewhat limited extent to which it deals with the questions of personal data protection.

The Expert Team also conducted an analysis of the relevant jurisprudence of the European Court of Justice as to the role and independence of a supervising body, the principles and grounds of data processing, and the questions pertaining to the media and freedom of expression.

The ECHR and the Council of Europe Convention on Automatic Processing of Personal Data of 1981 were also given an overview in the Report.

In addition, the Expert Team carried out a comprehensive analysis of comparative law and practice of several EU member states (Ireland, Italy, Lithuania, Slovenia, United Kingdom). Special emphasis was given not only to the questions regulated in PDP Acts of these EU Member States, but also to other data protection issues regulated by the so-called 'sectoral' legislation in a wide spectrum of areas ranging from criminal justice to social security, and from health to education.

By using a comparative method, the Expert Team looked into issues such as the desired scope of protection in the PDP legislation, the role, independence, duties and powers of the supervising body, the conditions for processing by data controllers, individual access requests, complaint procedures and investigation of breaches.

The Team concludes that the regime created by the Serbian PDP Act is largely comparable in its nature, scope and extent to personal data protection regulation which exists in individual EU Member States reviewed in this Report. Most importantly, the Serbian PDP Act has already established a functioning mechanism of oversight - the Office of the Information and Data Protection Commissioner (IDPC) - which acts with sufficient independence and efficiency. At the same time, some structural, conceptual and formal inconsistencies require the Serbian PDP Act to be amended in a number of areas in order to make it compatible with certain European standards, while also bringing the domestic practice in applying the law closer to its letter and spirit. As the matters stand, while the Act at times lacks clarity and foreseeability, some issues, on the other hand, are regulated in an overly prescriptive manner. Therefore, the Act should undergo a major overhaul, if a not a complete redrafting.

The Expert Team observed a general trend in the more modern personal data protection legislation of EU Member States to establish specific provisions in the relevant PDP statute in regard to the processing of personal data depending on its type, purposes and sources of collection. Such an attempt to give "umbrella" to all the possible personal data protection issues in one piece of legislation is not intended to replace the additional need for specific sectoral laws and supplementary regulations, or codes of good practice, in the field of data protection. At the same time, it remains a matter of policy as to whether the Serbian Parliament chooses the path of a more detailed 'umbrella' law in the personal data protection field – which would provide more explicit statutory basis for specific sectoral laws - or, by contrast, a 'basic' law on personal data protection which leaves it to various sectoral laws and regulations to deal with questions of personal data protection, where necessary. Considering that that the volume of the proposed interventions could make the statutory text hard to use, a legislative technique of a 'consolidated text' (co-called 'prečišćen tekst zakona') should be considered. However, if reasons of rationality, efficiency and economy prevail, instead of a 'consolidated text', it might be more rational to adopt a new PDP Act altogether.

It is important to bring the PDP Act and other personal data protection legislation in line with Article 42 of Serbian Constitution which prescribes that collecting, keeping, processing and using of personal data shall be regulated by statute, despite the fact that many aspects of personal data protection in Serbia are currently covered by by-laws.

The Report includes recommendations with "draft model amendments" to the PDP Act, while also proposing actions with respect to other sectors and giving directions for reform and suggestions for a strategic paper on the development of the IDPC in the medium-term perspective.

The Report recommends *inter alia* that the Serbian PDP Act should be amended in the following main areas: reformulation of the purposes of the law, inclusion of express statements about the prohibition of discrimination, redefinition of "data", "data subject", "personal data", "sensitive data" and other core notions, clarification of absolute (national security, defense, and criminal justice) and qualified (media, artistic and literary expression) exemptions from the application of the Act. Moreover, clarification on the territorial application of the Act should be made. More flexible, albeit clear, regime of trans-border data transfers should also be envisaged. The Act should separate the notions of 'duties' and 'powers' of the Supervising Body. Definition of the 'principles' should be done separately from the 'grounds' of data processing. Time-limits and further statutory conditions should be streamlined. More detailed

definition of the roles of data controller and data processor in ensuring the security of data is needed. The scope, content and form of data controllers' obligations to notify and give access should be simplified. In addition, any legislative amendments should increase flexibility and bring clearer enforcement mandate for the Supervising Body in conducting compliance assessment, increase participation of the parties in assisting the Supervising Body in its fact-finding endeavors, create the right of compensation for the data subject, clarify elements of a breach in the case of more severe penalties.

All in all, the Act should focus more on 'what' the data controllers have to achieve rather than 'how' they will achieve it. A greater emphasis must be placed on trust, confidence, transparency, governance and accountability. New realities, whereby privacy and safeguarding information have become major reputational issues for individuals, businesses and governments, have to be taken into account.

I. INTRODUCTION

1. In the contemporary digital information society, personal data protection is an important and complex legal issue. In Serbia, legal regulation of personal data protection was introduced only recently and is still in need of being fully harmonised with European and international standards.

2. The Constitution of Serbia (2006) states that Serbia is committed to European principles and values (Art. 1). In the process of European integration, Serbia has concluded the Stabilisation and Association Agreement (SAA) with the European Union in October 2008, and submitted candidacy for EU membership in December 2009. Article 81 of the SAA states *inter alia* that Serbia will harmonise its legislation concerning the personal data protection with the EU law and other relevant European and international standards.

3. In the field of personal data protection, the first step was made by way of adoption of the Personal Data Protection (PDP) Act in October 2008, which entered into legal force in January 2009. However, this Law was not fully harmonised with the relevant standards, notably Directive 95/46/EC on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data). The EU Serbia Progress Report for 2009 (§ 4.3.6) states: "some progress has been made on the protection of personal data (... however] the [Act] is not fully in line with the EU standards (... .] Overall, Serbia is moderately advanced in the area of the protection of personal data."

4. Legal framework regulating the questions pertaining to the personal data protection has existed since the time of the Federal Republic of Yugoslavia (FRY) consisting of two member republics – Serbia and Montenegro. In 1992, the Federal Parliament of FRY ratified the Council of Europe Convention No. 108 on the Protection of Individuals with regard to Automatic Processing of Personal Data of 1981. This was among the first binding international instrument of significance on data protection in Serbia, The FRY also adopted a federal Personal Data Protection Act in 1998 which was limited to some personal data protection, without regulating the processing of personal data to a fuller extent. Subsequently, Serbia, as a successor of the FRY (and later the State Union of Serbia and Montenegro), found itself in a situation whereby it had personal data protection legislation which was not implemented *inter alia* by reason of the lack of a dedicated oversight body.

5. Serbia ratified the European Convention on Human Rights – which includes the guarantees of Article 8 on the respect for private and family life, home and correspondence – in ..... Subsequently, the new a new Constitution of Serbia of 2006 explicitly guaranteed not only the right to privacy but also the personal data protection as a human right (Article 42).

6. In the process of harmonising its personal data protection legislation with the European standards, in 2005 Serbia again signed the COE Convention on the Automatic Processing of Data of 1981, while also ratified the Additional Protocol to the Convention of 2001.

7. Serbia adopted the Personal Data Protection Act in October 2008. It entered into force in January 2009. A number of relevant by-laws was adopted, including a decree on the Record-Keeping in the Personal Data Processing (2009), regulation on the Prior Checking (2009); Regulation on Identification Cards (2009). Currently, the Ministry of Justice is preparing a draft on the manner of achieving and security measures for particularly sensitive data, to be subsequently adopted by the Government.

8. Serbia faces a delicate task of securing efficient personal data protection in accordance with the existing constitutional and legislative framework on the one hand, and the relevant European and international standards on the other. This entails further efforts in improving the Serbian law and practive to achieve efficient implementation of the constitutional and statutory guarantees on personal data protection, while fulfiling Serbia's obligations deriving from the Stabilisation and Association Agreement (Article 81). In particular, this requires harmonisation of Serbian legislation with the EU Directive 95/46/EC and other relevant rules.

9. In this Report, in accordance with the Terms of Reference of the Project for the "Support to the office of the Commissioner for Information of Public Importance and Personal Data Protection" (EU Delegation in Serbia, March 2010), the Expert Team analyses the wider context and specific issues pertinent to the interest of harmonising the Serbian PDP Act and other legislation with the above standards with a view to proposing specific draft amendments as well as indicating more general directions for reform.