

Following the consultation of the Serbian authorities on the draft law on data protection prepared by the Ministry of Justice which aims to align the legal framework of data protection in Serbia with the framework in the EU<sup>1</sup>, please find our preliminary general comments below and other more detailed on the draft law in the attachment.

We would like to raise the following issues:

- (a) the structure and the readability of the draft law
- (b) the substance of certain provisions
- (c) information currently missing regarding the institution of the Commissioner that we would need for our assessment
- (d) other

a) Regarding the structure of the draft law, the combination of rules reflecting the Police Directive and the GDPR in one text creates a consistency problem. In particular, a high number of exceptions<sup>2</sup> make the draft law excessively complicated and thus less transparent. This technique also impacts the readability of the text. Since data protection is a fundamental right in the European Union, particular attention should be paid to the clarity of the law which gives citizens a number of important rights. This does not seem to be the case in the current draft.

It should be also noticed that a law which incorporates large parts of a Regulation (in this case the GDPR) would need to be amended and some parts revoked upon the accession of Serbia to the EU when the Regulation will be directly applicable. Regulations are directly applicable without need for Member States to ""transpose"" them into their national law (and this is in fact only admissible where EU law allows for further specifications e.g. when there are technical, financial or institutional changes to be made to the national legislation in order to make possible its direct application).

Please note that the recital 8 of the GDPR allows only for limited ""imports"" from the GDPR to national law, i.e. when individual Articles expressly envisage further specifications or restrictions by Member State law. Aside from this, Member States may only incorporate elements of the GDPR into their national law to the extent this is necessary for ensuring that national provisions necessary to allow Member States to apply the GDPR are comprehensible.

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<sup>1</sup> - the General Data Protection Regulation (Regulation (EU) 2016/679 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, ""GDPR"");

- Directive (EU) 2016/680 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties (""Police Directive"").

<sup>2</sup> The draft contains over forty exceptions derogating from the general rules. The derogating articles take usually the following form: ""Provisions... of this Article shall not apply to the data processing by competent authorities for the purpose referred to in Article 1 Para 2 [i.e. law enforcement purposes] of this Law"".

However, in line with the accession requirements, there is a need for Serbia to bring the Data protection law in line with the *acquis*. Therefore, to avoid a situation where the entire data protection law would need to be revoked on the day of accession, it may be preferable to draft a law which separates provisions reflecting the GDPR from provisions reflecting the Police Directive so that the future revocation or amendments will be targeted to the specific parts..

b) Regarding the substance a number of articles significantly differ from the relevant provisions in the GDPR. An example is the notion of "*legitimate interests*". The GDPR considers as lawful data processing which is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject. These interests refer to the stake that a controller may have in the processing, or the benefit that it derives (or that others might derive) therefrom (e.g., the interest of a bank to use its customer data to detect fraud or protect against money laundering schemes). The draft Serbian law substitutes this notion of "*legitimate interests*" with "*interest based on law*" (Art. 12, 24, 25, 28, 34, 54, 70, 91 of the draft law) which however is not the same.

Other examples of differences with the GDPR include the definition of consent (Art 4), the provisions on transfers in specific situations (Art. 69) or the references (only) to "administrative disputes" (rather than judicial redress) in Art. 83.

Finally, while as a rule the recitals to an EU regulation only have interpretative character, they play an important role in the specific case of the GDPR which contains a number of (sometimes complex) concepts that the recitals help to clarify. We notice that the draft law does not reflect these recitals, but it should then be checked whether there are important clarifications which should be included directly in the text of the draft law.

c) There is also missing information which we would need in order to be able to assess the draft. Concretely, as regards the status and independence of the Commissioner for Information of Public Importance and Personal Data Protection, the draft law contains some provisions but also refers to the Law on Free Access to Information of Public Importance. Given that this 2004 law is currently under amendment, we need to receive the text of this draft law in order to check whether there are no gaps or contradictions. In addition we would like to suggest that the authorities should reflect whether for the sake of legal certainty, other legal solution should not be adopted regarding the law that contains the provisions regarding the institutional framework given the two roles of the Commissioner (data protection and access to information)<sup>3</sup>.

d) some technical issues should be addressed. This concerns an important number of complex, and sometimes highly convoluted provisions (e.g. Art. 40), wrong cross references (e.g. penultimate paragraph of Art. 65, the first paragraph of Art. 68), but also for instance the

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<sup>3</sup> Eg in the Slovenian legislation a separate law establishes the institution (the Information Commissioner Act) and in addition to this there are two separate laws one on data protection and one on access to documents <https://www.ip-rs.si/en/legislation/information-commissioner-act/>

missing paragraphs numbers which make the text difficult to read, as well as existing track changes in the text.

In order to facilitate the assessment, it might be helpful to arrange a meeting with representatives of the Ministry of Justice and the Commissioner for Information of Public Importance and Personal Data Protection to further discuss the process of drafting the new data protection law as well as our comments.

You might wish to have a look at the detailed guidelines provided by the Commission in January 2018<sup>4</sup>

Annex: comments on the draft law

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<sup>4</sup> [http://europa.eu/rapid/press-release\\_IP-18-386\\_en.htm](http://europa.eu/rapid/press-release_IP-18-386_en.htm)