



PHARE PROGRAMME TWINNING PROJECT NO. LV/2002/IB/OT-01
DATA STATE INSPECTION

Document 1

Final Report on Activity 1.1
Preparation of a gaps analysis regarding the Latvian data
protection legislation

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1. OBJECTIVE OF THE ACTIVITY AND OVERVIEW4

**2. GAPS ANALYSIS WITH REGARD TO THE INDEPENDENCE OF THE DATA
STATE INSPECTORATE.....5**

 A) POWERS, RIGHTS AND FUNCTIONS OF THE SUPERVISORY AUTHORITY ACCORDING
 TO ART. 28 OF DIRECTIVE 95/46/EC5

 B) POWERS, RIGHTS AND FUNCTIONS OF THE DATE STATE INSPECTORATE7

 C) COMPARISON.....8

 D) RESULTS11

3. COURSE OF DISCUSSIONS AND PROPOSALS11

1. Objective of the Activity and Overview

The objective of the Activity 1.1 of the present Phare Twinning Project is the preparation of a gaps analysis regarding the Latvian data protection legislation. The activity was mainly carried out by analysing the regulations of the Latvian Personal Data Protection Law (further: PDP law) with focus on the regulations relating to the independence of the Data State Inspectorate (further: DSI). For the sake of clarity and better comprehensibility, this report also includes references to proposals for the amendment of the regulations related to the independence of the supervisory authority. . Therefore, there will be no separate presentation of this issue in the Report on Activity 1.2.

The existing Latvian regulations with regard to the notification procedure, the regulations of the public security and order laws and the regulations concerning electronic communications were also analysed and compared to the EU *acquis*. The results thereof will be included in the reports on the following activities.

Contents of this report:

This is a compilation of the results of discussions and interviews of the experts and the RTA with the director and staff members of the DSI, of reports written by the experts and of internal communication among the experts and the RTA. Some observations concerning the independence of the DSI were taken from the master thesis of Mārcis Gobiņš. An article-by-article comparison of the Directive 95/46/EC and the Latvian Personal Data Protection Law is enclosed as Annex 1. A synopsis of regulations with regard to the independence of the supervisory authorities for data protection in eleven Member States of the European Union is enclosed as Annex 2. The updated draft for the amendment of the PDP law and for the amendment of the Constitutional Court Law is enclosed as Annex 3.

2. Gaps analysis with regard to the independence of the Data State Inspectorate

a) Powers, rights and functions of the supervisory authority according to Art. 28 of Directive 95/46/EC

On 1 May 2004 the Republic of Latvia joined the European Union. Already by signing the Association Agreement in 1995, Latvia had undertaken to transpose the full *acquis communautaire* into national law. Considering that, it can be concluded that Directive 95/46/EC is setting out the basic standard of the *acquis communautaire* for personal data protection and being the principle source of the supranational law in the field for the Republic of Latvia.

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 of such data (Official Journal L281, 23/11/1995 P.0031-0050) prescribes:

Article 28 (1) Supervisory Authority

“Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by Member States pursuant to this directive. These authorities shall act in complete independence in exercising the functions entrusted in them.”

“Complete independence” is an essential (Recital 62 of the Directive) for the realization of a substantial protection of human privacy and control of public and commercial data processing. In most cases data processing operations are not perceptible for the data subject - he often knows nothing about violations of his privacy. He is not a subject of data processing, he becomes an object. And this is the reason why a plenipotentiary, a *chargé d’affaires*, an advocate is needed. This is the supervisory authority (the Data Supervisor or the Data State Inspectorate). Data protection is a human right. Each individual has the right to know: who knows what, why (what for), when and how long about them. And since in most cases personal data processing is not visible or tangible (it is not transparent),

the person needs a trustworthy and confidential official – an absolutely independent supervisory authority. This independence is part of the *acquis communautaire*.

An independently acting supervisory authority may be very annoying to the executive power and its highest representatives if his concern is of political impact or becomes the latter during the control procedure. It is known from experience that the law permanently obstructs the political leadership by supporting the adherence of competence, fair and clear procedures, open, comprehensive and court proof justifications instead of sublime arguments in the case decisions are made by “informal administrative assistance” and by the using of silent and plain information flow, pseudo-justifications and superior knowledge.

Everyone who keeps politics on the legal track in the described manner will become unpopular soon. This is valid in clearly arranged ergo personnel interwoven societies and is even more valid if a part of the media and therefore the publicity is politically bound or vice versa isolated by politics. All those who act due to legal regulations or approved rules of conduct contrary to patterns of behaviour of their organisation - regardless of their basis and influence – will be noticed as a disturbing factor and replaced by a person who seems to be compatible to the system. I.e. an independent Data Protector might be thwarted. This danger to the constitutional state must be prevented by a clear-cut guarantee of an institutional independence i.e. a factual, functional and personal independence.

According to established jurisprudence of the European Court of Justice (ECJ), certain provisions of the EC Treaty, or even a directive, may develop direct effect, provided that they are sufficiently clear, unconditional, and the time limit for their transposition into national law has expired. According to the *Francovich* judgment, Member States can be held liable for failing to transpose a directive within the prescribed deadline. Furthermore, according to Art. 226 of the Treaty establishing the European Community, the European Commission will launch infringement procedures against member states for failure to implement or for implementing incorrectly the directive in national law.

b) Powers, rights and functions of the State Data Inspectorate

Article 95 and 96 of the *Satversme* (Latvian Constitution) provide, respectively:

95. The State shall protect human honour and dignity. Torture or other cruel or degrading treatment of human beings is prohibited. No one shall be subjected to inhuman or degrading punishment.

96. Everyone has the right to inviolability of private life, home and correspondence.

While these provisions protect human dignity and privacy in general, data protection more particularly is addressed in the PDP Law of 23 March 2000, which came into force on 2 January 2001. Since its adoption, the PDP has been amended once – on 24 October 2002.

Based on the PDP Law, the DSI was created. The DSI is charged with and empowered to supervise and control the observance of the PDP Law in general, review complaints, certify data commissioners, register personal data processing systems, carry out inspections, order that data be blocked, and that incorrect or unlawfully obtained data be erased or destroyed, impose fines and/or other administrative sanctions for violations of the PDP Law, and bring actions in Court for violations of the PDP Law.

Section 29 of the PDP Law provides, respectively:

“ (1) Supervision over personal data protection shall be carried out by the State Data Inspection which shall be under jurisdiction of the Ministry of Justice, shall be acting independently in execution of functions provided in law, shall make decisions and issue administrative acts in accordance with the law. The State Data Inspection shall be an institution of state administration, functions, rights and duties of which shall be established by the law. The State Data Inspection shall be managed by a director who shall be appointed and released from his or her position by the Cabinet pursuant to the recommendation of the Minister for Justice.

(2) The State Data Inspection shall act in accordance with by-laws approved by the Cabinet. Every year the State Data Inspection shall submit a report on its activities to the Cabinet and shall publish it in the newspaper Latvijas Vēstnesis.”

The basic framework for the regulation of the supervisory authority for data protection in Latvia is thus in place, but does not ensure full compliance with Directive 95/46/EC. Certainly, more than passing a few basic laws and setting up a supervisory authority is required. In order to meet the requirements of the *acquis communautaire*, it is necessary that (a) every single provision of the directive be accurately transposed into Latvian law, and (b) the adapted legal provisions are properly implemented in Latvia. The attached article-by-article comparison of the Directive 95/46/EC and the PDP law shows several shortcomings of legal transposition of the Directive (see Annex 1).

c) Comparison

The one aspect of overriding importance in which the PDP Law clearly does not measure up to the standard of the *acquis communautaire* is the independence requirement with regard to the supervisory authority.

The Directive unmistakably speaks of “...*complete independence in exercising the functions entrusted to them.*” As mentioned above, the definite regulation of the directive has to be transposed into Latvian law. The analysis shows that the DSI is not able to act in complete independence in exercising the functions entrusted to it.

The following points compromise the autonomy of the DSI:

- The DSI's director is appointed and/or dismissed by the Cabinet of Ministers, on proposal of the Minister of Justice.
- The DSI's by-laws are approved by Cabinet.
- The DSI has to submit its reports to the Cabinet of Ministers (PDP Law, Art. 29(2)).
- The DSI's decisions may be appealed against in Court, and/or legally reviewed by the Minister of Justice.
- The DSI's budgetary plans are attached to those of the Ministry of Justice, and presented by the Minister to Cabinet.

In contrast to this, the minimum elements of acting in complete independence are:

1. The Director of the supervisory authority and his personnel shall not be elected and charged, appointed and released by the Cabinet, which is the supreme authority over all the administrative institutions of the State (Constitution of the Republic of Latvia, Art. 58).

2. The “complete independence” of the supervisory authority in exercising its functions is incompatible with “being under jurisdiction” of a part of State administration, because the State administration and all civil services are objects of control by the supervisory authority. Supervision is a form of subordination, which allows the supervising authority to ensure that the rule of law is being realized. The law describes that the Ministry of Justice has the right to examine the “lawfulness” of the DSI’s decisions and to revoke “unlawful” decisions or to issue an order.

In contrast “complete” independence means that the application of the law by the supervisory authority and its decisions are not under the supervision of any other administrative authority. It is the duty of the third constitutional power, the courts of law, to control the independent supervisory authority. For that reason, the European Directive 95/46/EC states: *“Decisions of the supervisory authority which give rise to complaints may be appealed against through the courts.”*

In her letter to the European Commission of July 26, 2004, the Latvian Minister of Justice wrote that Art. 31 of the PDP law means that the Ministry of Justice has “no possibility to impact examination of lawfulness of any decision taken by DSI. The government also cannot rule decisions of DSI.” This opinion does not reflect the present legal status of the DSI and the wording of the law. But it is a very good start to amend the Constitution. The independence of the data controlling institution should be established by Constitution, just like the independence of the State Audit Office.¹

The mere appearance of any kind of dependence of the DSI on the Executive power is detrimental for the public creditability and the reputation of the DSI. The clause that the DSI has to act *“in accordance with by-laws approved by the cabinet”* is untenable for the same reason.

¹ In Germany it was not necessary to modify the Constitution, because the Constitutional Court had already established the full independence of the German Federal Data Protection Commissioner in its jurisdiction. The dicta of the Constitutional Court are binding for all State power like the German Constitution.

In Latvia, one possibility would be to elect the Data Supervisor by the Saeima (in Germany the data protection commissioners are elected by parliament), or, to let him be appointed jointly by the Parliament, the Cabinet and the Constitutional Court. Alternatively, it is possible not to have a natural person as leader of the supervisory authority but a steering committee, whose members are elected and appointed by the three State powers – Saeima, Cabinet and Constitutional Court (the French solution). The procedure for discharging the Data Commissioner should be similar to the procedure for discharging a judge of the Constitutional Court.

Besides the three State powers (Parliament, Executive and Jurisdiction), there are other branches of power in all democratic systems. For example, the State Audit Office (Constitution of Latvia, Art. 87 and 88) is an “independent collegial institution”. The Constitutions of the German federal states, the “Laender”, guarantee independence of the Data Commissioners in a similar way. They are also elected by the parliaments of the “Laender”. The mere institutional link between the German Federal Data Protection Commissioner and the German Ministry of the Interior is at present subject to impeachment by the European Commission, although the Federal Data Protection Commissioner is elected by German Parliament, and his independence is guaranteed by law and dictum of the German Constitutional Court.

From the European point of view, an institutional guarantee for distance between the controlling institutions and the institutions to be controlled is mandatory. Any possibility of direct or indirect influence by the Executive power on the supervisory authority is a distortion of dependencies. There should not be any appearance of the possibility of such influences. This is crucial for the reputation of the supervisory authority as a good and powerful advocate for each person who feels insecure or precarious about the lawfulness and safety of their personal data. Such an uncertainty is incompatible with the human right of self-determination, but it is also detrimental from the point of view of the common good in general, because a modern, free and social community depends on the unrestricted freedom of everyone.

d) Results

The analysis shows that there are persistent shortcomings of legal transposition of law. Notably, the full independence of the Latvian supervisory authority is not yet ensured according to EU requirements in Art.28 of Directive 95/46/EC². On that point the European Commission defines its position in the first report on the implementation of the Data Protection Directive (95/46/EC), page 27, as follows:

“The Commission expects that, where necessary, Member States will amend their legislation to achieve compliance with the provisions of the Directive and provide supervisory authorities with sufficient resources.”

Therefore, it is suggested that to improve things, Latvia should learn from EU best practice, and its focus should be on proper transposition of basic principles of data protection, particularly respective to the independence of the supervisory authority. In order to comply with EU requirements of Art.28 of Directive 95/46/EC the regulations of the PDP law related to the powers, functions and rights of the DSI should be amended without delay.

3. Course of Discussions and Proposals

Since the European Commission first published an Opinion on Latvia's Application for Membership of the European Union in 1997, personal data protection, and specifically, the lack of sufficient independence of the supervisory authority, had consistently been pointed out as one of the key areas where the *EU acquis* has still not been transposed correctly. At the same time, it was clear that establishing a fully independent supervisory authority according to the standard of Directive 95/46/EC would involve major legislative and administrative changes, and perhaps even a constitutional amendment (see our analysis in the preceding section of this report).

² See also the synopsis of regulations with regard to the independence of the supervisory authorities in eleven member states in Annex 2.

Therefore, from the day of his arrival in Riga in September 2004, the RTA, Dr. Giesen, chose to address the urgency of the independence problem in a very direct, head-on manner in all his discussions with all Latvian counterparts. Furthermore, it was clear from the beginning that such an ambitious goal could only be reached by a complex approach on essentially four parallel tracks: raising awareness within the administration, and especially in the Government as one of the possible initiators of legislative amendments; informing the general public, e.g. through media; encouraging discussions within political parties and among Members of Parliament; and stimulating an informed debate in academic circles and among legal scientists.

The following paragraphs are a sequential record of legal drafts, analytical papers, important discussions and other activities of the MS advisers in the context of the key objective of Activity 1.1 – to install an independent supervisory authority for personal data protection in Latvia.

On 24 September 2004 a three-page analysis on the problem of the independence of the supervisory authority for personal data protection (in English) was written by the RTA, Dr. Giesen, and submitted to the Director of the DSI, Ms Plūmiņa, as well as to other interlocutors.

Also in September 2004 still, the RTA drafted and submitted a brief one-page note where he laid out the key requirements for independence of the supervisory authority (in English) and submitted this to the Director of the DSI, Ms Plūmiņa.

On 4 October 2004, a four-page analysis on fundamental problems of personal data protection and informational self-determination (in Latvian) was submitted to the Director of the DSI, Ms Plūmiņa, as well as to other interlocutors.

On 20 October 2004, a first draft of an amendment to the Latvian Constitution, the *Satversme*, along with a first draft of an amendment to the Latvian PDP law (in English), submitted to the Director of the DSI, Ms Plūmiņa.

On 15 November 2004, a second draft of an amendment to the *Satversme*, along with a second draft of an amendment to the Latvian PDP law (in Latvian and German, with reasoning/commentary), was submitted to the Director of the DSI, Ms Plūmiņa. These two drafts were produced with the participation of STE Dr. Schnoor.

On 3 December 2004, STE Thomas Mauersberger produced a synopsis of regulations in 11 other EU Member States with regard to the independence of the supervisory authority. The synopsis was submitted to the Director of the DSI, Ms Plūmiņa.

On the same day, STE Dr. Tino Naumann, produced an in-depth analysis of inconsistencies in the present Latvian PDP law from the point of view of the *EU acquis* in matters other than independence, including proposals for necessary legal amendments. The synopsis was submitted to the Director of the DSI, Ms Plūmiņa on 3 December.

On 4 December, an editorial by the RTA Dr. Thomas Giesen, *Privātuma aizsardzībai jābūt efektīvai* (Privacy protection must be effective), was published in the leading Latvian daily newspaper “Diena”. The article set out from a discussion of some fundamental problems of personal data protection, and ended with a focus on the question of independence of the supervisory authority, pointing out specific criteria for independence from the point of view of Directive 95/46/EC.

On 12 January 2005, as a possible alternative to a constitutional amendment and an amendment of the PDP law, a “Draft law on the Ombudsman” was produced, on the basis of a draft by the Chancery of the State President, and specifically, on proposal by the President’s Legal Adviser, Ms. Kukule. This legal draft, along with a brief reasoning or commentary, was prepared with the help of STE Dr. Wippermann, and then further amended with the help of STE Dr. Schnoor.

On 9 February 2005, a meeting was held in the Ministry of Justice with the participation of Minister Ms. Āboltiņa, the Adviser to the Minister, Mr. Dravnieks, State Secretary Mr. Bičevskis, Deputy State Secretary Ms. Juhansone, RTA Dr. Giesen and his Assistant, Mr. Gobiņš. In this meeting, Minister Ms. Āboltiņa made it clear that the Ministry under her leadership was committed to take all necessary steps to fully meet the requirements of the *acquis communautaire* with regard to independence of the supervisory authority

for personal data protection.

This very helpful and productive meeting was instrumental in initiating a series of meetings in the Ministry of Justice with the participation of Deputy State Secretary Ms. Juhansone, some of her staff, and Director Ms. Plūmiņa and some of her staff. It should be mentioned here that a meeting with Judge Egils Levits of the European Court of Justice in Luxembourg (on 29 January), and a discussion with the Head of the Latvian Parliament's legal service, Mr. Kusiņš (on 7 April) also added important positive momentum to the project dynamics.

In the first of the ensuing meetings in the Ministry of Justice, a "Draft law on the Data Supervisor" of 24 February 2005, which was essentially produced on the basis of the "Draft law on the Ombudsman", was discussed. However, the representatives of the Latvian side made it clear that an amendment to the present PDP law was sought, rather than an all-new law.

Following this clarification, in a series of further meetings in the Ministry of Justice, a draft amendment to the Latvian PDP law was discussed paragraph-by-paragraph, and eventually concerted. Agreement in principle on all the paragraphs of the said draft law was reached during a meeting in the Ministry of Justice on 28 April 2005.³

Just like the amendments to the PDP law, the necessity of constitutional amendments to cement the independence of the supervisory authority for personal data protection was clearly expressed by the RTA starting from the very first meetings right after his arrival in Riga in September 2004. Numerous discussions on the topic took place with the Director of the DSI, Ms Plūmiņa, and her staff, as well as with other relevant stakeholders.

The first in-depth discussions of this issue took place in December 2004 with the Adviser to the Minister of Justice, Mr Dravnieks. This first meeting with Mr Dravnieks was followed up by some similar meetings in the subsequent time.

³ The draft amendment to the Latvian PDP law, as agreed with the Ministry of Justice, is enclosed as Annex 3.

In February 2005, the RTA and his Assistant wrote a comprehensive analysis of the question of the compatibility of the existence of independent State bodies and Article 58 of the *Satversme*, which provides: “The administrative institutions of the State shall be under the authority of the Cabinet”. The article was distributed to Ms Plūmiņa and to other interlocutors in the Ministry of Justice, as well as in other institutions.⁴

As a result of the above efforts and discussions, privacy protection was included as one of the sectors that would require a fully independent supervisory authority entrenched in an amended Article 58 of the *Satversme*. A strategy paper including the said recommendation was adopted by the Committee of the Cabinet of Ministers on 25 April 2005, and in the Cabinet of Ministers on 17 May 2005.⁵

With this, the key decisions for installing a supervisory authority for personal data protection acting with complete independence in exercising the functions entrusted to it have now been made (the constitutional amendment), or are at least well on their way (the amendment to the Latvian PDP law) at the Latvian Government level. From now on, what remains to be done is the following:

- The draft amendment to Article 58 of the *Satversme* should be adopted in Parliament.
- The amendment to the PDP law should be adopted by the Cabinet of Ministers, and subsequently, by Parliament.
- A fully independent supervisory authority for personal data protection, in line with the requirements of the *acquis communautaire*, should be installed. This includes, *inter alia*, the election of an independent Data Supervisor by Parliament.

⁴ The said article is due to be published in Latvian and German language versions in pertinent legal science publications in summer 2005.

⁵ An English translation of the key parts of the said strategy paper is enclosed as Annex 4.