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- LITHUANIA: Report on Data Protection

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Delegations will find attached the declassified version of the above document.

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# RESTREINT UE



COUNCIL OF  
THE EUROPEAN UNION

Brussels, 24 October 2006

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SCH-EVAL 155  
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## REPORT

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from : Data Protection Evaluation Committee  
to: Schengen Evaluation Working Party

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Subject : Schengen evaluation of the new Member States  
- LITHUANIA: Report on Data Protection

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According to the mandate given by the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the Evaluation and implementation of Schengen (SCH/Com-ex (98) 26 def) to the Schengen evaluation working group, a team of experts has visited Lithuania from 17 to 19 September according to the program mentioned in doc. 5014/4/06 REV 4 SCH-EVAL 1 COMIX 4.

The following experts participated:

FIN - Reijo Aarnio (Leading Expert)

B - Willem Debeuckelaere

CZ - Jan Zapletal

I - Vanna Palumbo

NO - Guro Slettemark

CION - Carmen Guillen Sanz

CS - Wouter van de Rijt

## PRELIMINARY REMARKS

*The Lithuanian Data Protection Authority and all the Ministries involved have considerably helped the work of the inspection team by providing in advance of the mission written information on the main issues, including the translation of the key legislation. The experts have valued the interest shown by the Director of the State Data Protection Inspectorate himself and his staff by attending and by contributing in person and extensively to the evaluation work.*

*It should be noted that this evaluation, like the ones to follow in the new Member States, but unlike previous Schengen evaluation missions, are of a special nature: instead of verifying the practical implementation of the Schengen acquis, the evaluation team has been assessing the capacity and the capability of the Data Protection Authority (further DPA) to properly perform all its duties in relation to the implementation of the provisions on Data protection in the Schengen acquis.*

*It should be taken into account, that the new Member States apply the Schengen acquis category I (Articles 126 – 130 of the Schengen Convention) as of the date of accession to the EU.*

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## Management summary

Lithuania has shown that it has carefully prepared for the requirements for the proper implementation of the Schengen acquis in Data protection and that it is ready to apply it. The main concern of the inspection teams deals with the fact that the Data Protection Authority is administratively embedded within the government structures, which could represent a risk for its functional independence <sup>1</sup>.

Several measures adopted in Lithuania rank as best practices, although the experts noted too a few weaknesses that should be remedied.

From a technical point of view, experts noted that Lithuania is planning to establish well known technical solutions in the implementation phase of the NSIS and SIRENE system based on the experience of other Member states. The authorities are aware of possible problems. It is recommended to confirm after the finalisation of the SIS II legal instruments that the DPA is made fully competent as supervisory authority under the new special implementing law.

## 1. LEGAL BASE AND ORGANISATIONAL ENVIRONMENT FOR DATA PROTECTION

- A reference in the Constitution, in article 22, although it does not mention directly to Data protection,
- the Law on legal protection of personal data, adopted on 21 January 2003,
- the Law on Electronic communication, adopted on 15 April 2004,
- the Law on Police activities, adopted on 17 October 2000, as last amended on 11 May 2006, as well as the legislation necessary to implement 1981 Convention 108 of the Council of Europe, as well as Resolutions of the Government and orders of the State Data Protection Inspectorate (later in this report to be named DPA for Data Protection Authority).

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<sup>1</sup> Currently the Inspectorate is preparing for 1 February 2007 the draft of Law on Legal Protection of Personal Data in which there will be the provisions concerning the reinforcement of the Inspectorate's independence.

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There is no specific Act implementing the 1987 Recommendation of the Committee of Ministers of the Council of Europe.

Lithuania should formalise this application at short notice, since this has actually become an obligation under art. 129 of Schengen, which entered into force in Lithuania on 1 My 2004, together with the other so-called "Category I" measures of the Schengen acquis.

The Data Protection legislation does not explicitly refer to the competence of the DPA over Police files. Experts were told that the fact that no limitation is foreseen in the Data Protection Act, except for State security and Defense, implies that in principle there is no limitation to the competence of the DPA over Police files.

Experts were particularly appreciative of the fact that the DPA's role not only extends to advising on new legislation but that the DPA can participate in the meetings of Seimas (the Lithuanian Parliament) when it deals with issues of Data protection

The Ministry of Interior is obliged to notify all the databases held under the responsibility of the Police. An extensive set of register provisions has been drawn up by the Ministry of Interior in accordance with the DPA. However it remained unclear for experts how the provisions are adopted and which formal role the DPA has in this procedure <sup>2</sup>.

New legislation is under preparation to adapt to the SIS II.

Experts noted with satisfaction that the DPA is participating in the more or less bi-monthly meetings of the interdepartmental committee that prepares the implementation of the Schengen acquis in the Republic of Lithuania.

## **The Office of the State Data Protection Inspectorate**

The Office of the State Data Protection Inspectorate (DPA) has been established in 1998 (The Inspectorate was established in 1997). The DPA has been designated by a Resolution of the Government as the supervisory authority over the processing of data in N-SIS.

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<sup>2</sup> The setting up a register, must be sent for comments to and agreed on with the State Data Protection Inspectorate. The Inspectorate may provide it's conclusion that the Inspectorate does not accept the provided draft due to inadequacy of requirements of data protection.

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The Office is headed by a Director, who is recruited after a competition. He/she is appointed according to Resolution No 1156 of 25 September 2001 (On structural reform of the State Data Protection Inspectorate, authorization) chapter IV, " the Inspectorate shall be headed by Director, who shall be admitted and dismissed from work in accordance with the procedures laid down in the Law of Public Service and accountable the Prime Minister".

The DPA describes his office as being part of the Executive branch. The Director can, like every other civil servant, be dismissed after two unsatisfactory yearly evaluations. This has happened to the previous Director.

Experts are somewhat puzzled by this system, because it could affect the independence of the Director if he has to be evaluated by a committee of fellow high-ranked civil servants, while his duty as DPA is to supervise over the respect for Data protection, i.a. in other Ministries. Even if the DPA is seen as a part of the executive branch, it would underline his independence if the rules for dismissal were made more similar to the ones applied for judges than for (top) civil servants. Experts wonder in particular if this yearly evaluation is compatible with art 30 (2) of the DP Act, which says "(...) the State Data Protection Inspectorate shall be independent; its rights may be limited only by law".

In any case, the implementation of the Schengen acquis would offer an excellent opportunity to better define purpose, tasks and power of the Data protection authority in order to grant it at least an effective and sounding "functional independence" in the sense required by the EU Directive on data protection. It is important to ensure the independence of the DPA by setting up specific procedures on dismissal, whereby the Director could have a higher level of protection against dismissal than civil servants.

Since the Schengen Acquis sets requirements for the status of the independent supervisory authority, the Lithuanian system raises some concern, if there are no transparent and pre-defined criteria used for the yearly assessment of the Director <sup>3</sup>.

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<sup>3</sup> The criteria of performance evaluation of civil servants are approved by the Resolution No 909 of the Government of the Republic of Lithuania of 17 June 2002. They are: 1. workload of civil servant; 2. performance quality of civil servant; 3. complexity of tasks performed by civil servant; 4. capability to use available knowledge and skill for the performing functions provided in a description of position; 5. skill of communication and cooperation of civil servant performing functions provided in a description of position.

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Experts recommend therefore to Lithuania to adapt the legislation in conformity with the Schengen acquis by establishing a clearly defined independent status for the Director of the DPA. In the meantime, and until such legislation is in place, it is recommended that a Memorandum of Understanding be drafted between the Government authorities and the DPA, which should describe the functional independence in the sense required by the EU Directive. (The Inspectorate is not in any way subdued to the Ministry of Interior, therefore we think that there is no need of such kind of Memorandum of Understanding. Currently the Inspectorate is preparing the draft of Law on Legal Protection of Personal Data in which will be the provisions concerning the reinforcement of the Inspectorate independence. The draft Law has to be provided to the Government of the Republic of Lithuania until 1<sup>st</sup> February 2007.)

The office has a staff of 34, out of which 26 positions are currently filled. The high level of education of the staff is worth noticing since all staff members have an academic degree. The DPA is free to select its own staff. It was noted that the DPA finds it more difficult to hire IT specialists than lawyers; however, the DPA is allowed to hire external know how when it needs to perform specialised tasks (as it has been the case when inspecting the State Enterprise Centre of Registers

The budget of the Authority amounts for 2006 1781 thousand Litas, thereof for expenses – 1731 thousand Litas (thereof for salary – 1055 thousand Litas) and for purchasing of property – 50 thousand Litas. This amount has proven in the past years to be insufficient and additional funding had to be asked. The additional funds have been granted.

There are no financial plans for an awareness campaign, although the need of such an initiative was underlined

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## 2. DATA SUBJECT RIGHTS AND COMPLAINTS HANDLING

### The right of access

Data subjects can exercise their right of access directly with the Data controller. It is only in case of a complaint that the DPA intervenes. According to the law, the Data controller must provide the data subject with the identity of data controller and his representative, the purposes of the processing and any other additional information.

Data subject are entitled to obtain information on the source and type of personal data, the purposes and recipients.

The data controller must reply within a month, such information must be provided to the data subject in writing if he requests so.

Information is only provided free of charge once a year.

Experts consider that these access rights largely match the general requirements; however, they regret this limitation that information is provided only once a year for free. In the context of raising awareness, there seems to be no need for such a limitation <sup>4</sup>

Data subject may appeal act/omissions of data controller to the DPA, within 3 months of the receipt of the reply from data controller. No fees are charged for the complaint.

Data controller and data subject may appeal the decision of DPA to the administrative court of the Vilnius region within 1 month from the day of receipt of the decision.

Investigation of a complaint may not last longer than 30 days, in special cases the consent of applicant is requested for extension of investigation term.

These provisions are of general application (i.e. apply as well to police activities and data processing).

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<sup>4</sup> Lithuania thinks that there is no need to change the current situation.



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## 3. SUPERVISORY ROLE (INSPECTIONS)

Looking in the recent history of the organisation, one can only state that the DPA has performed an impressive list of supervisions, like in the Ministry of Interior, the Police headquarters, the Prime Minister's Office and even in the Office of the President of the Republic.

It is however not sure whether these inspections can really been compared to an in-depth inspection or supervision of the system, as the one which is required for the SIS. Neither the length of the supervision reports, nor the staffing of the DPA seem to allow such an in-depth supervision. It should be underlined that the DPA is allowed to hire external staff to perform inspections to which it has not the necessary (IT)-skills.

Experts regret that the DPA has to send an advanced warning to the visited body about its intentions. It would be a sign of its independence if the DPA was allowed to conduct supervisions without prior notice <sup>5</sup>.

The Office is entitled, in the framework of its supervisory role, to set fines, from €30,- to €571,-. However, it is up to the Courts to impose such a fine. Experts wonder whether the level of these fines is sufficient to be dissuasive.

## 4. TECHNICAL SECURITY REQUIREMENT

The state of preparedness of the SIRENE-bureau, both the legal framework, the operational plans and the training of the staff have been presented.

Experts were pleased to see that the DPA is a representative in the PHARE project on the establishment of the National SIRENE bureau and necessary infrastructure. In general, cooperation between the DPA and the Police seemed to be smooth, it was noted that the Police has on its website a link to the DPA. Confusion seemed to remain however on the question whether the DPA needed to be involved in decisions to transfer data to third countries.

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<sup>5</sup> Currently the Inspectorate is preparing the draft of Law on Legal Protection of Personal Data which foresees that the State Data Protection Inspectorate shall be empowered to obtain easier access to the premises of the supervised person, including the premises which are leased or used on any other basis, or to the territory [...]. The draft Law has to be provided to the Government of the Republic of Lithuania until 1<sup>st</sup> February 2007.

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Article 28, paragraph 4 of the DP Act introduces exceptions to the general rule that any transfer of personal data to recipients in third countries must be authorized by the DPA, allowing transfers to “third countries or an international law enforcement organization” on other legal ground, in particular when (sub letter 6) the transfer is necessary for the prevention or investigation of criminal offences.

Apart for the rules set in the Europol, custom and Schengen Conventions –which are to be monitored by the DPA expressly, nothing is said about the need of a bilateral/multilateral agreement and the specific rules – included the role of the DPA- to govern the exchange of data between the Law enforcement agencies of third States. <sup>6</sup>

The relations between the Ministry of Interior and the DPA are not fully settled yet. It is an ongoing process where registers created before the introduction of the DP rules are being legalized.

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<sup>6</sup> There is rightly mentioned that the Inspectorate kind of has not be involved in decisions to transfer data to third countries pursuant to the exception provided in the point 6 of paragraph 4 of Article 28 of the Law on Legal Protection of Personal Data of the Republic of Lithuania. But in accordance with the Rules of Procedure of the Government of the Republic of Lithuania approved by the Resolution No 728 of the Government of the Republic of Lithuania of 11 August 1994 (as replaced by Resolution No 313 of the Government of the Republic of Lithuania of 13 March 2003) draft legal acts proposed to the Government, concerning not only the sphere of administration or competence of the institution which has drafted (or proposes) it, but also the sphere of administration or competence of other institutions, must be sent for comments to and agreed on with the institutions concerned (thereof the Inspectorate). The Inspectorate must give it's conclusions or comments and suggestions concerning the draft of legal act related to the questions falling within the competence of the Inspectorate (for example the drafts of treaty of cooperation determining the transfer of personal data to third countries). It is a reason why the Inspectorate is involved in decisions to transfer data to third countries.)

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Given the large number of authorities, which currently have access to the databases, it is recommended that the DPA reflects on whether this could lead to using the SIS for more administrative purposes than for the ones it is designed.<sup>7</sup>

Experts noted that the DPA will have access to the SIS in order to monitor the system. This access should not necessarily be available at the DPA's premises but could be performed during inspections.

## 5. DATA PROTECTION IN RELATION TO VISA ISSUANCE

Representatives of the Ministry of Foreign Affairs sketched the security measures adopted between Vilnius (both the Ministry of Interior and the Ministry of Foreign Affairs) in order to prepare the Lithuanian consular posts by 1 January 2007. These measures include an increase of the physical security, of the quality and security of the communication channels and the training of staff.

Experts were pleased to note that the DPA has already visited two Consulates in order to assess their preparedness for Schengen. This proactive approach ranks among the best practices in Schengen. The Consulates chosen were the ones in Kiev and in Kaliningrad, which is a sound decision given the distribution of visas issued. The experts have been made available the results of these inspections.

Experts were satisfied to see that a procedure is foreseen to answer to a request for information by a visa applicant whose application has been turned down.

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<sup>7</sup> Measures of Implementation of Action Plan of National Schengen acquis Acceptance provide that Ministry of Interior has to prepare the draft of regulations of National Schengen information system determining the operation of NSIS and other legal acts concerning NSIS. These drafts of legal acts must be sent for comments to and agreed on with the State Data Protection Inspectorate.

After considering the drafts of legal acts the Inspectorate will evaluate the list of institutions which will be indicated as having access to NSIS and the purpose of using NSIS in order to conform to the data protection requirements provided in the Schengen Convention.)

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## 6. INTERNATIONAL COOPERATION (COOPERATION WITH OTHER DPA)

Lithuania is an active contributor in the European cooperation and participates in the work of the Schengen Joint Supervisory Authority as well. Furthermore, it is worth mentioning Lithuania's participation in the Central and Eastern European Data Protection Authorities meetings, International Conferences for Freedom of Information Commissioners and Data Protection, Case Handling workshops, Commissioners TAIEX seminars, Baltic Region Conference on E-Commerce and Data Protection.

## 7. PUBLIC AWARENESS (INFORMATION POLICY)

Quite a few efforts have been undertaken by the DPA to raise awareness, although the DPA recognises itself that it has not been sufficient until now. Apart from the website, which is comprehensive (especially in Lithuanian), the DPA has organised conferences and seminars and made press releases, leaflets, recommendations, participated on TV and radio broadcasting and has initiated an opinion poll on the interest for data protection, awareness of personal data security and on the awareness of person's rights in this field, awareness of the Inspectorate's activities, sources of information and evaluation of the Inspectorate activities. The results of this poll showed a mixed picture

The DPA performs tasks in this field without special department devoted to public relations

One plan called "Pagalba" deserves to be specially mentioned. It will provide help for data subject to exercise his/her right with respect to the processing of his/her personal data. The system will provide:

- IT system implemented in web technology,
- possibility of online requests from data subjects,
- secure connection of data controllers for providing requested information,
- answers to data subjects can be sent by e. mail or given directly (providing password for online connection).

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List of additional documents, which were made available to the inspection team:

- annual reports,
  - recommendable form of complaint,
  - inspection reports to the Consulates in Kiev and in Kaliningrad,
  - the composition of the interdepartmental Schengen committee and reports of that body
- + the legislation referred to in Chapter One and several extracts of other Acts.

## 8. CONCLUSIONS AND RECOMMENDATIONS

### *General conclusion*

The experts are confident that the Data protection rules in Lithuania will comply with the requirements of the Schengen acquis, once a satisfying follow-up has been given to the recommendations mentioned below, in particular with the sensitive question of the functional independence.

Lithuania is invited to confirm the follow-up to the recommendations in writing at a later stage, when reporting on the follow up of the current evaluations in the SCH-Eval group.

### *On the legislation*

1. Even if some form of administrative embedding is necessary, the legislation should reflect a real independence of the DPA. Otherwise, this is contrary to the Schengen acquis and should be modified. In the meantime, until the legislation is modified, the independence in the sense required by the EU Directive may be formalised in a Memorandum of Understanding between the Government authorities and the DPA.<sup>8</sup>
2. Introduce the principles of the Council of Europe Recommendation (87) 15 in the legislation.

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<sup>8</sup> see footnote 5.

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## *On the implementation*

3. Information is provided only once a year for free. In the context of raising awareness, the need for such a limitation should be reconsidered.
4. Experts suggest to reconsider whether the level of these fines is sufficient to be dissuasive.

## *On the functioning*

5. It is recommended that the DPA reflects on whether the large number of authorities, which currently have access to the databases could lead to using the SIS for more administrative purposes than for the ones it is designed. It would be a sign of its independence if the DPA was allowed to conduct supervisions without prior notice <sup>9</sup>.

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<sup>9</sup> see footnote 6.