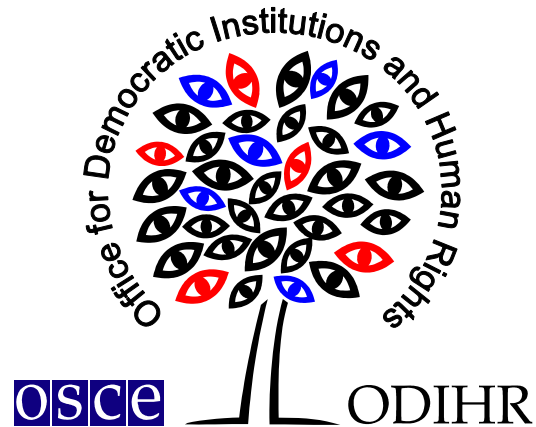


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OPINION

CONCERNING DATA PROTECTION ASPECTS

OF THE CONCEPT

OF THE DRAFT LAW OF THE REPUBLIC OF BELARUS

ON POPULATION REGISTER

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1. INTRODUCTION

1. *On 21 October 2005, the OSCE ODIHR was requested by the National Institute of Lawmaking under the President of the Republic of Belarus to review the Concept of the draft Law of the Republic of Belarus on Population Register (official request reference number 04-9/1060).*
2. *This Opinion has been prepared on the basis on the Russian translation of the Concept of the draft Law.*

2. SCOPE OF REVIEW

3. This Opinion analyzes the Concept of the draft Law of the Republic of Belarus on Population Register (hereinafter referred to as “Concept”) with particular regard to data protection and privacy aspects and from the viewpoint of the compatibility of the provisions of the Concept with relevant international human rights standards and the OSCE commitments. The Opinion also examines the Concept in light of the international best practices with regard to human rights and data protection. The international standards referred to by the Opinion may not be only those legally binding for the Republic of Belarus, but may include international instruments not binding upon Belarus as well as documents of declarative or recommendatory nature which have been developed for the purpose of interpretation of relevant provisions of international treaties.
4. This Opinion does not purport to provide a comprehensive review.
5. The OSCE ODIHR would like to mention that the opinion provided herein is without prejudice to any further opinions or recommendations that the ODIHR may wish to make on the issue under consideration.

3. EXECUTIVE SUMMARY

6. The intent of the draft Law as envisaged by the Concept would be to set forth the objectives and purpose of the central population register (hereinafter referred to as “Register”), provide the legal framework for its establishment and maintenance, and to regulate the “*collection, processing, storage, updating, protection and transfer*”¹ of personal data subject to recording in the Register.
7. A full list of recommendations follows below.

¹ Concept of the draft Law on Population Register, Chapter 1 (General Provisions).

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of the Draft Law of the Republic of Belarus on Population Register*

- 1) Given the insufficient focus on data protection by the Concept itself, it is recommended that Belarus consider having a separate Law on Data Protection. [see para 9]
- 2) It is recommended that the Concept as well as the draft law define what constitutes “processing” of personal data. [see para 10]
- 3) It is recommended to limit the types of data contained in the Register to those directly relevant and necessary to achieve the declared objectives of the Register. [see para 20]
- 4) It is also recommended that the status of personal identifier in relation to personal data be clarified. An option of passing a separate Law on Personal Identification Number may be considered. [see para 20]
- 5) It is strongly recommended that file matching and merging not be used in compiling the Register. [see para 24]
- 6) It is recommended that the law to be drafted include clear and detailed legislative provisions concerning the subsequent use of personal identification numbers and the bodies which may use them. [see para 27]
- 7) It is recommended that the draft law include specific provisions enabling a data subject to establish the identity of the data controller. It is also recommended that the exact relationship between the Register, other data controllers and data subjects be clarified. [see para 30]

4. ANALYSIS AND RECOMMENDATIONS

4.1 General observations

8. Laws do not operate in a vacuum – any legal act becomes part of a tightly interwoven legislative fabric and depends on it as well as on established practices in order to be successfully implemented. The Concept in question should therefore be analyzed in connection and in relation to a wider framework of legislation concerning data protection, which will largely affect the enforceability of the ensuing Law on Population Register.
9. To the extent that the OSCE ODIHR is aware of the issue, the Republic of Belarus does not at present have a Law on Data Protection. Given the insufficient focus on data protection by the Concept itself, this is a serious gap which can be addressed either by incorporating data protection provisions in the body of the Law on Population Register, or, alternatively, by passing a data protection act – the latter

option would be clearly preferable since it would lay regulatory basis for data protection in general and not only in the narrow context of population registration. Belarus would only gain from this approach as its economy develops and the rapid advance in technologies enabling, for instance, digital cash or online banking pose additional challenges before worldwide communities.

4.2 The intent, purpose and scope of the draft Law and its overall approach. Core definitions

10. The intent of the draft Law as envisaged by the Concept would be to set forth the objectives and purpose of the central population register, provide the legal framework for its establishment and maintenance, and to regulate the “*collection, processing, storage, updating, protection and transfer*”² of personal data subject to recording in the Register. The draft Law would – presumably for the first time in Belarus – give definitions of “population register,” “personal data,” population register controller,” and “identification number.” At the same time, essential terms, most importantly, “processing” of data, remain undefined by the Concept. Understandably, the Concept cannot be as detailed as the law itself but is merely intended as a position paper helping crystallize the main principles of the future law, however, it is of central importance that core definitions be given already at this stage. This gains central importance against the background of no legislation dealing specifically with personal data and data protection. It is therefore recommended that the Concept as well as the draft law define what constitutes “processing” of personal data.
11. The Concept defines the Register as a “*centralized single level database of personal records of citizens of the Republic of Belarus, as well as of foreign citizens and stateless persons habitually resident in the Republic of Belarus (hereinafter referred to as “natural persons,” if not specified otherwise) and the relevant automated maintenance system.*”³ “Personal data,” in their turn, are defined as “*identifiable information on a natural person, recorded on an electronic carrier.*”⁴
12. The scope of personal data to be collected, processed and stored by the Register is extremely broad. In fact, the Register as envisaged by the Concept would be intended to serve as a single reference point nationwide for retrieval and exchange of personal data and for the collection of statistics that would normally be dealt with by a number of individual specialized government agencies (i.e. Ministry of Health or a related health agency for health records; tax inspectorate for data on taxpayers, etc.).
13. The multipurpose nature of the Register as an alternative to individual limited purpose databases finds its confirmation in Chapter 5 of the Concept, which lists an

² See previous footnote.

³ Concept of the draft Law on Population Register, Chapter 1 (General Provisions).

⁴ *Id.*

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extremely wide range of purposes of the nationwide database to be set up. Among these are:

Information support of the activities of law enforcement and other government agencies and other organizations of the Republic of Belarus in the limits of their mandate;

Monitoring and planning of social and economic development of the nation;

Improvement of the system of tax collection and state budget income allocation to regions and economic development areas;

Planning and implementation of social welfare and public health programs;

Combating organized crime, corruption, economic and other crime;

Compilation of military draftee lists for military commissioner's offices (local executive bodies in rural areas as well as in towns and settlements which do not have a military commissioner's office);

Compilation of voters' lists or lists of other categories of natural persons;

Optimization of the network of sales branches, household service establishments, healthcare and education providers;

Documentation of natural persons;

Enforcement of natural persons' rights;

Conducting of censuses and surveys;

Compilation of statistical data on natural persons.⁵

14. The proposed solution may have some limited advantages – such as reducing duplication of activities by government agencies (which is not achieved in this case, since the Concept envisages that the Register will exist simultaneously with various limited-scope databases; moreover, reduction in duplication of activities can also be achieved by other means, first of all structural reform of the agencies concerned).

⁵ Concept of the draft Law on Population Register, Chapter 5 (Use of Personal Data in the Register).

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However, the disadvantages of the proposed system are far greater and range from immense workload (obtaining and continuously updating a vast array of data) on the Register, with the resulting need to raise staffing levels and consequently increase budget allocations, to the possibility of direct threats to individual liberties.

15. As far as individual liberties are concerned, the risks here are ultimately and essentially similar to those posed by data matching⁶ and file interconnection arrangements. An individual's privacy is reduced sharply and innumerable possibilities for surveillance and control are opened up by enabling the state to merge different personal data files into one and to take decisions affecting the individual concerned on the basis of such accumulated information. It is a fundamental principle set forth by the Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (hereinafter referred to as the "Data Protection Convention" that "[p]ersonal data undergoing automatic processing shall be ... adequate, relevant and not excessive in relation to the purposes for which they are stored."⁷ While it is hardly possible to contest the benefits resulting from the legitimate use of cross-sectoral data accumulation and similar arrangements – ranging from more efficient auditing to better designed social welfare programs – the law needs to provide adequate safeguards against all too possible privacy threats.
16. One may argue that the risks posed by such cross-sectoral accumulation of data are inherent in any system based on the use of a single and unique personal identifier (such as multipurpose "personal identification number"), while such personal identifiers have to date been adopted by the a significant number of developed countries and have since proven to be a most useful tool of a modern democratic welfare state.⁸
17. While all this is true, the countries that have chosen to introduce a unique personal identifier have a number of legal safeguards in place to prevent possible abuse in file interconnection. The prohibition against a personal identifier composed of too many personal data, given the purpose for which it is to be used, is key to proper balance between the obvious benefits derived from the use of an all-purpose identifier and inescapable reduction in privacy through increased individual "traceability." The noted prohibition goes beyond a best practice adopted by the states and finds its basis

⁶ Data matching is understood here as the computerized comparison of separate sets of personal data, relating to the same individual but generally collected for unrelated purposes, in order to identify unwarranted differences and duplications.

⁷ Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Article 5. Although the Convention has not been ratified nor signed by the Republic of Belarus, it is still referred to by this Note as a widely accepted source of international standards in the field of data protection. Full text of the Convention is available at <http://conventions.coe.int/treaty/en/Treaties/Html/108.htm> (last visited on 2 November 2005).

⁸ Although, it must be noted, there is an ever-continuing debate on the desirability of multipurpose personal identifiers as an alternative to a number of context-specific identifiers. As a result, some countries (e.g. Germany or Ireland) have never adopted a unique all-purpose code.

in the above-noted principle that personal data should be adequate, relevant and non-excessive.

18. In this connection, it has to be noted that the personal identification number as envisaged by the Concept will not contain coded personal data. This approach presents a partial solution to the above outlined problem of disproportionality of data to the personal identifier purpose. However, it is still desirable that the Concept clarify the status of the personal identification number in relation to personal data.
19. At this point the Concept classifies the personal identification number as basic personal data alongside with personal names (last, first, patronymic), citizenship, place of birth, and place of residence.⁹ It is, however, recommended that the Concept and the ensuing law do not treat the personal identifier as personal data at all. The legislator may consider passing a separate Law on Personal Identification Number as a future option, since currently the only regulatory basis for personal identifiers is found at the level of executive decrees.
20. As a summary, it is recommended that the status of personal identifier in relation to personal data be clarified. An option of passing a separate Law on Personal Identification Number may be considered. It is also recommended to limit the types of data contained in the Register to those directly relevant and necessary to achieve the declared objectives of the Register. Legislation from other OSCE participating States may be used by the Belarusian legislator as a source of inspiration.¹⁰

4.3 Data subject knowledge and involvement

21. The issue of data subject knowledge and involvement comes to the foreground when considering the personal data obtaining methodology. The Concept as it stands now provides that data on the same individual across various sectors will be obtained simply through merging any pre-existing files (for example, the Ministry of Interior for the information on the person's residence, the Ministry of Labor and Social Welfare on pension records and other social entitlements, the Supreme Attestation Commission on the educational attainment data, etc.) rather than compiled by directly addressing the data subject.¹¹
22. The proposed option is problematic from the privacy viewpoint as it tends to exclude the data subject from the information circuit. The issue here is that in the case of file matching an administrative body no longer needs to contact a particular person in

⁹ Concept of the draft Law on Population Register, Chapter 5 (Use of Personal Data in the Register).

¹⁰ Legislation of the Scandinavian and Baltic countries (e.g. Finland, Lithuania, Norway) may prove particularly useful since these countries use the single (rather than context-specific) identifier model that Belarus intends to introduce.

¹¹ Concept of the draft Law on Population Register, Chapter 2 (Personal Data Entered in the Register and the Procedure of the Register Maintenance).

order to obtain or verify his or her personal data, but rather enjoys a free license to acquire and check any information needed by referring to other personal data files without the knowledge of the person concerned. Similar use of pre-existing personal records may amount to a breach of the prohibition on the use of personal data in a way incompatible with the purposes for which they were originally collected.¹²

23. International experience may prove inspirational to the Belarusian legislator in this regard. For instance, Portugal chose to introduce a prohibition against file interconnection at the constitutional level.¹³
24. It is strongly recommended that file matching and merging not be used in compiling the Register.

4.4 Public services and the use of personal identifier

25. Some of the purposes of the Register listed by the Concept – such as “*planning and implementation of social welfare and public health programs*” -- are directly linked to the provision of public services, and some others – for instance, “*enforcement of natural persons’ rights*” – may involve the provision of public services depending on the context.
26. In view of the intimate connection of personal identifiers with public service provision, the legislators and implementers alike should bear in mind the danger of the so-called “function creep,” or unexpected extension of a limited-purpose item or process to serve additional purposes. In the case of personal identifiers, the risk is that pressure may be brought to bear on the identifier holder to release the code to an ever-increasing number of service providers even though such use of the identifier was not contemplated from the outset. For instance, without adequate safeguards it may become possible that telecom providers or credit facilities would require the personal identifier disclosure as a condition of receiving services – which may not be exactly unacceptable *per se* but would trigger an avalanche of ensuing data protection related problems and the need to rectify them by additional legislative action.¹⁴

¹² Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Article 5 (“*Personal data undergoing automatic processing shall be: ... (b) stored for specified and legitimate purposes and not used in a way incompatible with those purposes.*”).

¹³ Constitution of Portugal, Article 35(2) (“*Access to personal data records or files are forbidden for purposes of getting information relating to third parties as well as for the interconnection of these files, save in exceptional cases as provided for in the law and in Article 18.*”) Full text of the Constitution is available at http://www.oefre.unibe.ch/law/icl/po00000_.html#S002 (last visited on 3 November 2005).

¹⁴ The Swedish example is illustrative in this regard. As the use of the single multipurpose personal identifier in Sweden has “creeped” into most branches of public services (and private services to some extent), there is a draft law contemplated which could provide for either mandatory data subject consent or legal authorization in order for the personal identifier to be used in an electronic data processing file.

27. The risk of “function creep” calls for heightened priority on adequate and clearly spelled out restrictions on personal identifier use. It is recommended that the law to be drafted include clear and detailed legislative provisions concerning the subsequent use of personal identification numbers and the bodies which may use them.

4.5 Data subject rights

28. It is highly welcome that the Concept places a high emphasis on the rights of data subjects, including access rights and the right to obtain rectification of data.
29. The provision of the Concept that allowing delayed access to data “*where additional queries to other state bodies or organizations maintaining registers of individual categories of natural persons are required in order to provide the requested data,*” however, remains unclear (although it is possible that the actual draft law will shed light on the issue). In accordance with the Data Protection Convention, a data subject should be enabled “*to establish the existence of an automated personal data file, its main purposes, as well as the identity and habitual residence or principal place of business of the controller of the file.*”¹⁵ If data requested are not those controlled by the Register, is the data subject advised of the identity of the actual data controller? What is the exact role of the Register in the relationship between data subjects and data controllers? Is it merely expected to take on the part of an intermediary where the requests for access have to be addressed, or its envisaged functions would also involve regulatory oversight of data controllers?
30. It is recommended that the draft law include specific provisions enabling a data subject to establish the identity of the data controller. It is also recommended that the exact relationship between the Register, other data controllers and data subjects be clarified.

¹⁵ Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Article 8(a).