

Legal regulation of public information infrastructure in Republic of Croatia

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Abstract – Draft proposal of the Croatian State Information Infrastructure Act was made public in December 2013. This Act, due to be entered into legislative procedure by summer 2014, aims to regulate rights, obligations and responsibilities of the state regulatory bodies concerning establishment, development and management of the state information infrastructure system. The Act adopts a unified method of establishing and managing public registries and conditions the state information infrastructure has to implement with regard to public registries as well as using common data interchange platform within the system of state information infrastructure. The draft proposal regulates government to citizen (G2C) and government to businesses (G2B) services. The aim of the article is to analyse the current draft proposal, consider its compatibility with the European legal framework as well as with national legislative and, where current provisions fail to meet the legislative standards, to propose modifications de lege ferenda.

Keywords – information infrastructure, public sector, public registers, master register, metaregister, regulation, Croatia

I. INTRODUCTION

On the 12th of December 2013, the Public Sector Informatization Coordination Commission of the Government of the Republic of Croatia adopted the draft proposal of the State Information Infrastructure Act ("Draft Proposal") [1]. The government ministry in charge of the development of the mentioned Draft Proposal is the Ministry of Public Administration.

The Draft Proposal was made available to the public on the 19th of December which marked the start of the public discussion [2]. As of the beginning of February, the official documents regarding the public discussion, received comments and criticism from experts and the general public are yet to be made available to the public.

The proposed Act, due to be entered into legislative procedure by summer 2014, aims to regulate rights, obligations and responsibilities of the government institutions and other bodies concerning establishment, development and management of the state information infrastructure system.

The Act adopts a unified method of establishing and managing public registries and conditions the state information infrastructure has to implement with regard to public registries as well as using common data interchange platform within the system of state information infrastructure. The draft proposal regulates government to citizen (G2C) and government to businesses (G2B) services as well as other users and further development of information society in the Republic of Croatia. The Act is an important step toward further integration of the Republic of Croatia into established European as well as global information networks and services.

Establishment and development of state information services is undoubtedly a challenging task considering the rapid development of information technology, information services, electronic media, privacy and other data protection issues etc. Furthermore, both from the organizational as well as financial, legal and security perspectives, establishing and managing public registries while at the same time insuring their interoperability, authenticity and information security is a daunting task even for societies far ahead of the Croatian one regarding transition into information society.

It is obvious that this complicated issue needs to be properly addressed through legislative effort - even more so in light of the facts concerning public spending on various informatization projects in the recent years. According to the publicly available state budget reports, the State and various other public sector bodies, institutions and other budget funded entities spend around billion Croatian Kuna a year on various IT projects. While budget informatization spending has been on this level for a number of years, the real question is has it had the much needed impact on the quality and speed of state administration and on the total costs of government.[3]

We feel that the Draft Proposal of the State Information Infrastructure Act suffers from numerous inconsistencies and nomotechnic defects that, proposers good intentions notwithstanding, bring the success of the legislative measures in question.

II. REASONS FOR NEW LEGISLATIVE ACTION

The published draft proposal contains an additional document with the main motives regarding the proposition to adopt measures to regulate state information infrastructure.

While correctly stating that Croatian legal framework at this time does not include a set of rules to regulate establishment, development and management of the state information infrastructure, it does describe the main problem of the current state of state information infrastructure, as well as perhaps public administration in general: *"Just like the development of the real world institutions which are developed autonomously and function autonomously, like islands, so is the development of the information systems. Connecting them into an integral system that can serve citizens and business entities is something delegated to the very same citizens and business entities who are burdened to carry information and documents from one institution to another, regardless of their state of informatization".*[4]

This *modus operandi* of public administration, both central as well as the one within local and regional self-government has often been underlined as one of the main antagonists in attracting significant foreign investments and businesses to the Republic of Croatia.

As a result, the citizens and businesses alike are expected to know:

1. the competences and area of jurisdiction of state institutions
2. their address and office hours
3. documentation they need to bring, along with the fact that they need to set aside significant time for each interaction with state authorities.

Both the citizens as well as business entities go through these steps each time they interact with public administration. Administration institutions relentlessly demand documents and data already available to other institutions within the administration, although the State Administration System Act [5], as well as the General Administrative Procedure Act [6] clearly state that civil servants have a duty to obtain data contained within public records established by government bodies. The document concludes that *"...currently there is no technical system in place to enact the said provisions."*

At this point, a remark needs to be made - the Draft Proposal does not only imply technical measures regarding infrastructure services, it also steps into the matter regulated by both the State Administration System Act as well as the General Administrative Procedure Act.

In order to solve the above mentioned problems the Draft Proposal:

- Establishes the central state internet portal as a unique administrative location in the virtual domain
- The National Authentication and Identification System is mandatory for all institutions
- Provides for the Public Sector institutions (see infra for clarification on "public sector") communicating with citizens through a personal electronic mailbox

These steps create legal conditions and prerequisites to enable the e-Citizens ("*e-Gradani*") project.

Additionally, the Draft Proposal describes and regulates public and master registries, authentic data, and interconnection of registries stipulating the obligation of the public sector bodies to access data from master registries

without demanding the same data from citizens or business entities.

Article 47. p.2 of the Croatian General Administrative Procedure Act stipulates that *"Civil servant is required to acquire data regarding information in registers run by other administrative institutions or courts"*. Its predecessor, the former federal General Administrative Procedure Act adopted 1991, that was in force until 2009. contained a very similar provision.

In general, a question arises why does a new legislative measure strive to regulate matter regulated by general principles of administrative procedure well over half a century ago instead of ensuring the application of existing provisions, just to improve what has correctly been detected as a problem - the absence of a systemic technical solution required to apply the existing provisions in the first place.

III. DRAFT PROPOSAL TERMINOLOGY

The terminology of the provisions in this Draft Proposal requires special scrutiny. Since the proposed Act, the State Information Infrastructure Act represents a general normative text, the terminology contained therein defines a number of extremely important concepts on a national level with repercussions throughout the Croatian legal system.

It has long been known that speed and efficiency of the public administration (or more precisely, lack of) present significant challenges to both the citizens and business entities in the Republic of Croatia. The main goal of this new legislative proposal is to regulate the legal framework of electronic governance in the Croatian legal system and to allow anyone with legal interest to access data harvested by the public administration and other entities performing public service.

While we can agree with the proposition that legal framework of e-government as it is in Croatian positive legal system needs additional normative effort in order to be fully effective as well as compliant to the existing normative mechanisms of (personal) data protection, right to access information, management of identity in digital environment and other aspects of what is increasingly being recognized as information law, there are certain inconsistencies and nomotechnical problems with the current draft proposal that merit analysis.

In this chapter we shall present provisions of the draft proposal that we find inconsistent with existing legislative framework and try to offer solutions.

Article 1 of the draft proposal contains an unclear reference to *"public sector bodies responsible for establishing, developing and managing the system of the national information infrastructure"*. The colloquial expression *"public sector bodies"* is not a legal standard. While it seems obvious that this provision actually refers to the bodies listed in the provisions of the Articles 2 and 3 of the State Administration System Act [5], the expression *"public sector bodies"* is referenced throughout the draft proposal including provisions in Articles 2.1.1, 2.1.4, 2.1.6., 2.1.9 etc. Furthermore, Article 2.1.20 defines *"public sector bodies as public administration bodies, state bodies and public services"*.

While Croatian legal system does occasionally within a few other Acts, government Strategies and Decisions

contain the expression "public sector bodies", most notably the Budget Act [7]. However, this expression is not broadly accepted as a legal term that describes the range of public administration entities (central, regional and local bodies) and other legal persons with public/official authority within the Croatian legal system. Furthermore, the Budget Act in this regard provides a different definition of public sector bodies (Article 3.21 of the Budget Act defines public sector as "... state budget, units of local and regional selfgovernment, budget and extrabudget users of state budget and the budgets of units of local and regional selfgovernment"). The draft proposal also contains another unclear expression - "public services" (2.10.) - defined as "...public institutions and other legal persons whose means of operation are provided by the state budget".

It would appear more prudent to avoid usage of non-standard expressions in legal documents, especially general norms like Acts in order to avoid confusion regarding the scope and applicability of law. The proposal should instead refer to the provisions of the State Administration System Act and the Organisation and Scope of Ministries and Other Central State Administration Bodies Act (OG 150/11 and 22/12)

The Article 2 of the draft proposal contains basic expressions and concepts used throughout the proposal. Several of these warrant analysis, most notably *autentification* (2.1.2.), *electronic identity* (2.1.4.), *electronic certificate* ("vjerodajnica", 2.1.5.), *identification* (2.1.7), data (2.1.12), and aforementioned provision 2.1.20.

Concerning *autentification* (2.1.2) and *identification* (2.1.7), there seems to be some duplicity in terms of defining these procedures. The proposal states that "*Autentification is a formalized process of verification of users electronic public services certificates resulting in affirming/denying identity*", whereas "*Identification is a process in which it is necessary to ascertain or recognize electronic public services users identity*". It would be more appropriate to merge these provisions into a single provision, perhaps defining both identification and autentification as a process of establishing users identity and level of access to information system or service (public register or any other information system or service) by verifying his advanced electronic signature and qualified certificate, as defined by the Croatian Electronic Signature Act [8].

With regard to *electronic identity* (2.1.4.) and *electronic certificate* ("vjerodajnica", 2.1.5.), the draft proposal should be inline with the provisions of the existing Electronic Signature Act, which defines electronic signature, advanced electronic signature, certificate and qualified certificate. The draft proposal defines electronic identity as "...a unique set of identification data regarding a certain subject (natural person, public sector body, information system) being kept in electronic form allowing for identification of related subject". Meanwhile, the electronic certificate according to the draft proposal is "...a set of data identifying the user of an electronic service which serves to prove electronic identity in order to allow access to electronic services".

At the same time, the existing Electronic Signature Act defines electronic signature (as well as advanced electronic signature, Articles 2.1 and 2.2) as "...a set of data in electronic form associated or logically connected to other data in electronic form providing identification of user (signee) and authenticity of the signed electronic document", and certificate (and qualified certificate) "...as an electronic certificate that associates electronic signature

verification data to a certain person thereby verifying that person's identity."

Furthermore, the definition of the master register ("*temeljni registar*") is also questionable (2.1.18.). The master register is one of the fundamental notions of this Act. According to the Draft Proposal, "*a master register is a public register that collects and contains at least one authentic data item*". Evidently, almost every state register contains authentic data making this provision too broad without a clear purpose. In our opinion, master registries are in fact state registries ("*državne matice*") and a limited number of other important registries organized and run by the state.

The question here is the relationship between electronic identity, electronic signature and electronic certificate. Separate definitions relating to the same matter (in this context identifying users identity in an electronic environment via electronic signatures and certificates) present a challenge regarding legal interpretation, even more so when there is no clear distinction which of the conflicting norms is the more specialized one (*Lex specialis derogat legi generali*).

The solution to this situation is to adapt the draft proposal inline with the provisions of the Electronic Signature Act or add a provision to the draft proposal concerning the conflict between Electronic Signature Act and the draft proposal effectively derogating the prior law (*lex posterior derogat legi priori*).

IV. PUBLIC REGISTRIES

One of the most important parts of the Draft Proposal is the Chapter III titled "*Public Registers*". This Chapter, along with the rest of the Draft, contains several serious flaws and inconsistencies. Analyzing all of them in detail is not possible within limits of this short paper, so we shall concentrate on those we deem most important.

The Draft Proposal states that the purpose of master registries is to, through facilities of the state information infrastructure, to ensure availability of collected authentic data required to perform duties stemming from their jurisdiction to all bodies of the public sector (8.1).

Regarding this provision several questions come to mind. Why should data be made available only through facilities of the state information infrastructure, and even then why only to the bodies of public sector? Does this imply that all registers need to be based on a state controlled infrastructure, and what does this mean for the registers maintained by companies with public competences? Also, the provisions of the Right to Access Information Act allow interested parties to access data collected by the public sector bodies, under certain conditions.

Furthermore, where purpose of the proposed Act is concerned, there is no point in regulating the exact technical procedure by which the said purpose is to be achieved, especially considering the very dynamic of technological change information technology is renowned for. Since much data stored in master registries is already available to the general public, there is no point in limiting access to it by a specific norm.

Regarding the collection of authentic data, the Draft Proposal states "*authentic data is collected only once, and*

entered into the master register" (8.2). This is a classic provision stipulating that data should be entered into an electronic system only once, and henceforth should this data be required, it should be requested from said electronic system, not from citizens or other subjects.

The provision that "*the master register is established by decision of the Government of the Republic of Croatia following a proposal by the central administration body responsible for E-Croatia matters*" (8.3) also raises doubt. A decision by the Government of the Republic of Croatia by which a register is declared a master register is in essence a constitutive decision. We find that it is not necessary that Government should proclaim a register to be a master register by an individual decision (there are literally hundreds of registers!) when the definition of terminology used in the Draft Proposal already defines which register is, in fact, a master register. To illustrate, let us consider registers connected to maritime affairs - implementation regulation concerning maritime affairs contains several registers, and this is for a field of activity that is just one of more than hundred and fifty administrative areas regulated by Croatian law. [9]

Furthermore, the following Article (9.2.) stipulates: "*Public registers are established by law or a general act of a legal person with public authority or by an international treaty, that clearly specify data to be collected, what data is authentic and who is the manager of the public register.*" If a register is established by law or an international treaty then no separate decision by the Government of the Republic of Croatia is necessary. Even when a register is established by the means of a general act by a legal person with public authority, the public administration has authority and administrative mechanisms to analyze the establishment and organization of a public register (i.e. through mechanisms of administrative oversight - Article 21.1 of the State Administration System Act which grants the competent ministry adequate administrative oversight authority)

With this in mind, it is perhaps interesting to note that according to the Ordinance on Internal Organization of the Ministry of Public Administration there is no administrative oversight provided for activities administered by Directorate for e-Croatia [10]. Since the Ministry of Public Administration regulates that master registries are established following a proposal by the Directorate for E-Croatia, the Ordinance should be amended and the Directorate for E-Croatia should be provided with powers of administrative oversight.

According to the Draft Proposal, official records of the public sector bodies are established exclusively as public registers (9.1). Issue we detect here is the following - is the term "*official record*" comparable to the term "*public register*"? Croatian nomotechnic practice has so far failed to produce a standard concerning this issue. Legislative practice itself has seen usage of distinctly different terms - registers, lists, accounts, record files etc. (registri, evidencije, upisnici, očevidnici itd.). With this in mind, even if we lack legislative standards, it may be prudent to consult theoretical division as it is currently understood in Croatian academia.

Registers or record files are statutory regulated data collections containing records on important data regarding exercising certain rights, performing duties on the grounds of administrative authority defined by law or protection of legally defined public interest in a manner that contained

records are made by a competent authority (i.e. boat register, road vehicle register, but also a land register etc.)

Inquest register or records of evidence are data collections of events and procedures established and maintained by competent authorities without regard or consent of the subject of inquiry (i.e. during a criminal investigation or a misdemeanor record).

Catalogues, inventories and other listings are data collections governed by internal rules and regulations concerning a certain activity without a formal legal grounds.

Of course, suggested division is not systemic nor formally, *de lege lata*, acknowledged. Current legislative practice contains various division, some rather peculiar (i.e. the one suggested by the Regulation on archive evidence records [11] which divides the archive evidence records into: books, general inventory, dossiers and evidence records (!)).

State information infrastructure Act should take advantage of this existing division, especially considering unequal and diverging legal status of the registers, records of evidence and data catalogues already in existence.

There is further evidence of terminological confusion. The Draft Proposal states: "*Public sector bodies maintaining master registers are obliged to, without delay and without asking for additional permits, to deliver (dostaviti) authentic data to a public register of another public sector body...*" (9.3). as well as: "*Establishment of public records for the purpose of collecting authentic data already being collected by other master registries is not allowed, instead data has to be taken up (preuzeti) from master registers.*" Here a difference in terminology is present, however the actual meaning of these two different terms (*dostaviti, preuzeti*) is evidently the same.

Draft Proposal also iterates already present statutory obligations of the public bodies. Article 11 of the states: "*Public sector bodies maintaining master registries shall deliver without asking for additional permits data to another public sector body that uses said data within the scope of performing prescribed duties*". This provision is an exact copy of the Article 47.p.2. provision of the General Administrative Procedure Act that has the same objective. Perhaps this provision of the Draft Proposal is a reaction to the abysmal lack of compliance to this norm observable in the practice of the Croatian public administration and public sector bodies, however including the same provision into two different laws is not going to miraculously enable its enforcement but rather trigger further nomotechnic disorder. A proper way to ensure enforcement of this provision would be to apply existing oversight mechanisms.

Similar duplication of provisions can be also observed in the Article 15.p.2 of the Draft Proposal that states: "*Law or a general act abolishing a public register shall establish a method of continuity of further accesibility and processing of data from the abolished public register, especially an abolished master register.*" In and of itself, within the confines of this Draft Proposal, this provision seems in order. However, data from an abolished public register constitutes archive matter, as defined by the Archive and Archive Matter Act [12]. This Act defines archive matter as: "*...records or documents originated by action of legal or physical persons in performing their activities, and have lasting significance on culture, history and other sciences without regard to place and time of their origination, form or carrier medium stored on*".

When abolishing a register there may be some special circumstances that need to be defined by a competent authority (such law needs no special provisions in this regard apart from the fact that a public register is being abolished), however the *lex specialis* in this matter obviously exists - the Archives and Archive Matter Act - and should be applied.

Additionally, this Draft Proposal should contain specifications of longterm electronic data storage that have not been included into the Archives and Archive Matter Act, especially since Republic of Croatia has already adopted the relevant ISO 19005 standard. [13]

V. METAREGISTER

Another interesting feature of the Draft Proposal is the establishment of the Metaregister in the Article 16.

Metaregister is a public register established as a part of the state information infrastructure containing information on all public registers, specifically:

- legal grounds on establishment of the public register
- indication if the register is a master register
- indication of the kind of data collected by the public register and whether that data is authentic
- delivery of data and possible recipients of that delivery
- legal grounds of data delivery
- description of the data collection process
- overview of the manner and conditions of data utilization

Article 16. p.1 states that the purpose of establishment of the Metaregister is to ensure interoperability of all public registers, reminiscent of the Central Register implemented by the provisions of the Article 14 of the Personal Data Protection Act concerning the establishment and management of personal data collections.

In Article 16.p.2.sp.4 the Draft Proposal states "*...delivery of data and possible recipients of that delivery*" and continuing in the sp.5 "*...legal grounds of data delivery*". Meanwhile, Article 11 of the Personal Data Protection Act regulates the act of allowing a third party to receive collected and processed personal data as handing over rather than delivery (*davanje* instead of *dostava*). While both of these expressions stand for essentially the same thing, keeping them both in equivalent legal norms might needlessly incur legal uncertainty.

VI. MANAGEMENT OF THE STATE INFORMATION INFRASTRUCTURE

Finally, Articles 18 through 20 of the Draft Proposal regulate the management of the state information infrastructure.

While Article 18.p.1.sp.1 through 10 regulate the mandate of the body competent to oversee application of the State Information Infrastructure Act, Article 19 regulate the duty of that body to report to the Government of the Republic of Croatia on the progress and development of the

state information infrastructure and Article 20 stipulates that the head of the competent body has duty to implement measures aimed at raising awareness regarding the activities and importance of the state information infrastructure.

Regarding this chapter of the Draft Proposal, our main concern lies within the provisions of the Article 18. More precisely, provision 18.1.10 is unclear on how this new Act relates to the provisions of Personal Data Protection Act as well as the Right to Access Information Act [14].

It is unclear what the expression "*verifies the compliance of the legal grounds and the request for access to information in public registers and authorizes the same*" actually means. However, provisions of Article 15. of the Right to Access Information Act, especially p.3 of said Article, regulate the terms and conditions how public authorities can limit access to information - these regulations do not provide for an additional level of control the Draft Proposal seems to impose.

Furthermore, this provision influences the Personal Data Protection Act as well. Article 32. and 33. of the Personal Data Protection Act regulate the competence of the Personal Data Protection Agency. The current provision in the Draft Proposal might obstruct several of the currently prescribed duties of the Agency, such as those regulated in Articles 32.1 and 32.5.

VII. CONCLUSION

The Draft Proposal, as presented to the public, is a goodhearted attempt motivated by positive and constructive intent, but falls short of the goal of facilitating effective legal framework for development of the state information infrastructure and new generation of services for citizens and businesses.

The main problem of the proposal is unnecessary and superfluous mixing of technical concepts and measures within what is supposed to be a general normative text. As it is, this draft simply does not connect with the provisions of many applicable and existing laws and regulations, including but not limited to General Administrative Procedure Act, Electronic Signature Act, State Administration System Act, Archival Matter and Archives Act, Personal Data Protection Act, Right to Access Information Act as well as Office Transactions Regulation [15].

Ensuring better and more effective public administration and public sector performance is a question of well designed and implemented procedures, not merely a question of technology and technological infrastructure. Recent experiences show that major investments in information and communication technology divorced from rethinking and implementing modern business procedures in the public administration environment fails to produce an improvement in quality, availability and speed of public administration services.

In this regard, the Draft Proposal offers very little - management of state information infrastructure is again limited on management of the physical and software infrastructure, and not on the modernization and improvement of administrative procedures which should, in our opinion, represent a focus of activity for the Ministry of Public Administration.

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* “Narodne novine” is “Official Gazette” of the Republic of Croatia.)