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## **Protection of Digital Rights of Citizen as a Basis of Information Security of the State**

### **Introduction**

Nowadays, the issue of personal data protection is becoming increasingly important around the world. This topic has not escaped Ukraine either, and protection must be equally provided both online and offline. In its recent Resolution 38/20181, the UN Human Rights Council reiterated: “The rights that a person has offline must also be protected in the online environment, in particular, freedom of expression, which operates regardless of borders and the means of communication chosen by man (media), in accordance with Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights”<sup>1</sup>.

The emergence and development of the Internet has forced us to look at the issue of protecting the right to privacy in a new way. The availability of data posted on the Internet to a virtually unlimited number of individuals makes Internet users extremely vulnerable, questioning the existence of online privacy as such. In order to ensure the proper protection of human rights online, it is necessary to take into account the nature of the Internet not only as information but also as a communication space. We are already so connected to our smartphones and other electronic devices that without them we can't go anywhere and can't imagine life without them. Our smartphone is communication, work, entertainment, calendar of events, food, travel, maps, weather, sleep, health, etc., and this list can be supplemented by many more opportunities that we live with every day. Thus, the key problem for Ukraine is the inconsistency of the state of legal regulation of the level of development of modern information and communication technologies<sup>2</sup>.

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<sup>1</sup> The Human Rights Council A/HRC/38/L.10/Rev.1 «The promotion, protection and enjoyment of human rights on the Internet», 4 July 2018. [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/38/L.10/Rev.1](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/L.10/Rev.1). accessed: 14.11.2021.

<sup>2</sup> Legal remedies for the protection and restoration of the rights of Internet users in Ukraine in the context of the application of the Council of Europe Handbook on Human Rights for Internet Users, ed. A.V. Pazyuk. Kyiv, 2015.

The peculiarity of the Internet as an environment for the realization of human rights is also its non-classical nature: in addition to the relationship between the state and the user, the role of such players as Internet intermediaries is important. They can also violate human rights in their activities - illegally transferring personal data to third parties, blocking users' access to sites, or improperly deleting content containing hate speech. At the same time, they often remain inaccessible to states, as they are not under their jurisdiction<sup>3</sup>.

Therefore, it is important to ensure an appropriate level of cyber security, which is in fact a modern form of information security. As for the definition of "information security", it does not exist at the legislative level, so it is worth emphasizing the need to introduce such a concept as a kind of national security in the Law of Ukraine "On National Security" or in a special law. At the same time, there are a number of scientific developments on the concept of information security. As T. Muzhanova notes: "information security is a state of protection of vital interests of the individual, society and the state from negative information influences in the economy, domestic and foreign policy, science and technology, socio-cultural and defense spheres, public administration, independent development of all elements of the national information space and ensuring the country's information sovereignty, protection from information manipulation and misinformation and influences on the consciousness, subconscious of individuals and society as a whole, the state's ability to neutralize or reduce internal and external information threats"<sup>4</sup>. In other words, information security is a state of security (protection) of the individual, society and state from external and internal dangers and threats that can destroy them, deprive or limit, violate fundamental rights, material and spiritual values, harm, and so on. That is, we can say that there are three levels of information security: the first level - human security, the second - society, and the third - the state. Therefore, to ensure the security of the whole state or society, it is necessary, first of all, to provide a secure information environment for each person.

One of the types of digital rights that requires special attention and protection from the state is the right to protection of personal data, as ensuring the security of personal data is a guarantee of information security of the state as a whole.

The main normative act in the field of personal data protection is the Law of Ukraine "On Personal Data Protection"<sup>5</sup>. This Law applies to relations related to

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<sup>3</sup> On information: Law of Ukraine of October 2, 1992 № 2657-XII. <https://zakon.rada.gov.ua/laws/show/2657-12#Text> accessed: 14.11.2021.

<sup>4</sup> Muzhanova T. *Informatsiyina bezpeka derzhavy. Navchal'nyy posibnyk. [Information security of the state. Tutorial]*, Kyiv, 2019. [http://www.dut.edu.ua/uploads/l\\_1856\\_97597210.pdf](http://www.dut.edu.ua/uploads/l_1856_97597210.pdf) accessed: 14.11.2021. P.9.

<sup>5</sup> On personal data protection: Law of Ukraine dated 01.06.2010 No. 2297-VI. <https://zakon.rada.gov.ua/laws/show/2297-17#Text> accessed: 14.11.2021.

the processing of personal data using automated means, as well as to the processing of personal data contained in the file or intended for inclusion in the file, using non-automated means. It should be noted that there are many gaps and inconsistencies in the Law on Personal Data Protection. In view of this, on June 7, 2021, the draft Law on Personal Data Protection № 5628 (the Draft Law) was submitted to the Verkhovna Rada of Ukraine<sup>6</sup>. The purpose of this Bill is to: fulfill Ukraine's obligations under the EU-Ukraine Association Agreement to bring Ukrainian legislation in line with EU standards (including the GDPR); increase investor confidence and attract investment to the Ukrainian economy, especially in the IT and telecommunications sectors.

First of all, let's try to define the term "personal data" and what information may belong to them. The definition of this term is contained in 2 legal acts at once: Laws of Ukraine "On Personal Data Protection"<sup>7</sup> and "On Information"<sup>8</sup>. After analyzing them, we conclude that personal data (information about an individual) is information or a set of information about an individual that is identified or can be specifically identified.

According to Art. 5 of the Law "On Personal Data Protection", personal data may be classified as confidential information about the person by law or the person concerned. According to Art. 11 of the Law "On Information", confidential information about an individual includes, in particular, data on the person's nationality, education, marital status, religious beliefs, health status, as well as address, date and place of birth.

At the same time, the Constitutional Court of Ukraine in its decision of 20.01.2012 №2-rp / 2012 provided an official interpretation of parts 1 and 2 of Art. 32 of the Constitution of Ukraine: "Information on the personal and family life of a person (personal data about him) is any information or set of information about an individual who is identified or can be specifically identified, namely: nationality, education, marital status, religion no beliefs, state of health, financial status, address, date and place of birth, place of residence and stay, etc., data on personal and non-property relations of this person with other persons, including family members, as well as information about events and phenomena that have occurred or are occurring in the domestic, intimate, social, professional, business and other spheres of life of a person, except for data on the performance of full-fledged per-

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<sup>6</sup> Ukraine: Draft data protection law submitted to Parliament <https://www.dataguidance.com/news/ukraine-draft-data-protection-law-submitted-parliament>

<sup>7</sup> On personal data protection: Law of Ukraine dated 01.06.2010 No. 2297-VI. <https://zakon.rada.gov.ua/laws/show/2297-17#Text> accessed: 14.11.2021.

<sup>8</sup> On information: Law of Ukraine of October 2, 1992 № 2657-XII. <https://zakon.rada.gov.ua/laws/show/2657-12#Text> accessed: 14.11.2021.

son holding a position related to the functions of state or local government<sup>9</sup>. Such information about an individual and his or her family members is confidential and may be disseminated only with their consent, except as provided by law, and only in the interests of national security, economic well-being and human rights. ”

It should be noted that in the Law “On Personal Data Protection” the definitions of “processing of personal data” and “use of personal data” are not used correctly. Art. 2 of the Law states that processing includes use, and data protection is not an element of processing. At the same time, Art. 10 of the Law describes the Use, which includes processing and protection.

In accordance with the established practice of the Council of Europe and the European Union, protection is not an element of processing, as it does not involve any action with personal data. Use is usually an element of processing, but sometimes use is a separate processing action on personal data. In this case, under no circumstances can processing be an element of use. Accordingly, the “protection” of personal data should be considered as an action separate from their “processing” and “use”, and “use” - as one of the elements of “processing”.

Given that the Law contains an incorrect definition of these terms, it seems appropriate to streamline these definitions in the future.

It should also be emphasized that the legislation does not only define the terms “protection of personal data” and “the procedure for protection of personal data”, but also any requirements as to what criteria such protection must meet.

Therefore, it seems appropriate to introduce in both the Code of Ukraine on Administrative Offenses<sup>10</sup> and the Law of Ukraine “On Personal Data Protection” certain, at least basic requirements for the quality and level of such protection (sufficiency / adequacy / proportionality, etc.), take measures to determine the required level of protection (diagnose protection systems, identify risks associated with processing, etc.) and more.

In practice, identify the most common offenses in the field of personal data protection, and mostly illegal transfer of personal data (or illegal access by third parties):

- publication of the lists of persons who have applied for administrative services by the center for the provision of administrative services;
- dissemination by the medical institution of information on the state of health;
- posting a list of debtors by dormitories or garden societies or disseminating such information on the Internet;

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<sup>9</sup> Decision of the Constitutional Court of Ukraine of 20.01.2012 №2-пн/2012. <https://zakon.rada.gov.ua/laws/show/v002p710-12#Text> accessed: 14.11.2021.

<sup>10</sup> Code of Ukraine on Administrative Offenses: Law of Ukraine of December 18, 1984. Document 8073-X, on the basis - 1965-IX <https://zakon.rada.gov.ua/laws/show/80731-10?lang=en#Text> accessed: 14.11.2021.

- publication of personal data by officials of government agencies or legal entities on the Internet;
- illegal transfer by a public authority of a part of the state personal data base, etc.

Instead, violations of some of the most important provisions of the Law can (and should) be qualified as separate offenses in the field of personal data protection legislation.

As an example, we can cite:

- failure to notify the subject about the collection of personal data,
- illegal processing (and in particular dissemination) of personal data that is not related to a breach of protection,
- processing of personal data on the basis of consent in violation of the basic requirements relating to it (awareness, voluntariness, availability of documents confirming its provision),
- refusal to grant access to the subject to his personal data, providing incomplete information or providing a response in violation of the deadlines specified by law,
- failure to provide information on the processing of personal data,
- failure to provide information on the procedure for access to personal data,
- refusal to change / delete personal data that do not correspond to reality, non-appointment of a responsible person, etc.

Therefore, it seems necessary to improve the current provisions of the legislation of Ukraine on liability for breaches of personal data protection. In particular, it is necessary to extend the statutory deadlines for imposing administrative penalties for violations of the legislation on personal data protection and to guarantee the effective operation of the control body both quantitatively and through representation in the regions.

However, before making any conclusions about the effect and effectiveness of certain provisions of the law, it is necessary to analyze the practice of their application. In view of the practice formed as a result of the courts' consideration of protocols on administrative violations, it can be argued that the concept of "the procedure for protection of personal data established by the legislation on personal data protection" is interpreted quite broadly and covers any actions that constitute violations of the Law. In general, the interpretation of this concept is not paid attention at all in court decisions; they usually automatically take such a position.

Therefore, it seems appropriate to introduce in the Code of Ukraine on Administrative Offenses and in the Law on Personal Data Protection certain, at least basic requirements for the quality and level of such protection (sufficiency / adequacy / proportionality, etc.), the obligation to take measures to determine the required level, protection (diagnose protection systems, identify risks associated with processing, etc.) and more.

In this regard, another important issue arises, namely the expediency of combining the Commissioner for Human Rights with incompatible functions of parliamentary control over the observance of human rights and control over the observance of the legislation on personal data protection. It seems that the authority to monitor compliance with personal data protection legislation should be vested in a separate institution (eg information commissioner, special commission, etc.), as is the case in most States Parties to Convention No. 108<sup>11</sup>.

In summary, it can be stated that throughout the development of Ukrainian legislation on personal data protection, its guidelines were precisely the European standards contained in the documents and international treaties of the Council of Europe and the EU. At the same time, the current legislation of Ukraine on personal data protection contains a number of gaps and differences. The main problems that exist in this regard are:

- 1) the absence in the legislation of Ukraine of a full definition of the concept of “protection of personal data” / criteria that must meet such protection / requirements for determining the level of such protection by the owner and administrator;
- 2) blurring of the actual grounds for liability for violations during the processing of personal data;
- 3) insufficiency of exclusively administrative penalties as a means of punishment for violation of personal data protection standards;
- 4) significant shortcomings in the procedure for imposing penalties for committing an administrative offense;
- 5) inefficiency of the institutional system of prosecution for violation of the provisions of the legislation on personal data protection, which is currently implemented by the Secretariat of the Commissioner.

## Conclusions

Concluding for Ukraine, it is worth emphasizing the importance of adopting a Draft data protection Law, which establishes certain rules for:

- processing of personal data on the Internet, during video surveillance or video recording of public events;
- direct marketing issues;
- data processing by employers;
- features of personal data processing by law enforcement agencies and features of personal data processing in the field of electronic communications.

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<sup>11</sup> Convention 108+ (Convention for the protection of individuals with regard to the processing of personal data) of 18th May, 2018. [https://www.europarl.europa.eu/meetdocs/2014\\_2019/plmrep/COMMITTEES/LIBE/DV/2018/09-10/Convention\\_108\\_EN.pdf](https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2018/09-10/Convention_108_EN.pdf) accessed: 14.11.2021.

It should also be noted that the adoption of the Draft data protection Law will have a positive impact on Ukraine's fulfillment of its obligations under the EU-Ukraine Association Agreement to bring Ukrainian legislation in line with EU standards (including GDPR), as well as increase investor confidence and attract investment to Ukraine. economy, especially in the IT and telecommunications sectors.

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## **Protection of Digital Rights of Citizen as a Basis of Information Security of the State**

(summary)

The article raises the issue of protection of personal data as one of the elements of information security of the state. Nowadays, the issue of personal data protection is becoming increasingly important around the world, and protection should be equally provided both online and offline. The main problems that exist in Ukraine include: the lack of a full definition in the legislation of Ukraine «protection of personal data»; the criteria for such protection; inefficiency of the institutional system of prosecution for violations of the legislation on personal data protection implemented by the Secretariat of the Ombudsman. The author also emphasizes the need to adopt a Draft data protection law. The key objective of the Draft Law is to align the Ukrainian data protection landscape with the General Data Protection Regulation.

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