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Ukrainian Law Enforcement Reform Digest

Digest is dedicated to the process of reform of law enforcement authorities in Ukraine, first of all of police, prosecution authorities, State Bureau of Investigation and criminal justice legislation. It is published with the aim to better inform the society, expert community and international institutions on the state of reforming mentioned authorities and spheres of their activity.

I. NATIONAL POLICE

System of law enforcement authorities in Ukraine undergoes a long transformation process from soviet system of internal affairs authorities directed at protection of state security to law enforcement agencies with European standards, which should be oriented on provision of services to population, public dialogue and human rights observance.

However, as of the beginning of 2017, changes occurring in police have a more non-systemic character as a result of the lack of detailed, step-by-step roadmap for conducting a reform elaborated in the form of one comprehensive document, and the very process of reforming is sometimes oriented on the interests of the institution itself rather than on the needs of people.

On November 25, the Law of Ukraine *On Amending the Customs Code of Ukraine and Some Other Legislative Acts of Ukraine on Bringing Vehicles to the Customs Territory of Ukraine* became effective.

Among other things, the law amends the Law of Ukraine *On National Police*, which grants the following powers to police officers:

- identifying vehicles that were temporarily brought to the customs territory of Ukraine for personal use by citizens for more than 30 days and not registered in Ukraine within the timelines provided for by law;
- taking measures to identify the instances of illegitimate driving of vehicles, which violate the limits provided for in the Customs Code of Ukraine as well as measures for identifying illegitimate disassembling of such vehicles.

National Police Receives New Tools to Guarantee Drivers' Rights

Furthermore, Article 35 of the Law of Ukraine *On National Police* that sets forth the grounds for stopping a vehicle by police officers was appended with a new ground – stopping a vehicle with foreign number plates in order to identify instances of a transfer of the vehicle for possession, use or maintenance to individuals who did not bring the respective vehicle to the customs territory of Ukraine. At the same time, police officers are obliged to stop vehicles if they have information that the driver violated the customs rules.

These legislative changes solved the problem when police officers had no powers and authorities to stop vehicles in order to check possible violation of the rules for temporary entrance or transit.

Furthermore, starting December 21 an electronic Driver's Account is available in Ukraine. Now, everyone can find relevant information about their vehicles, driver's licenses, check and pay fines for administrative violations, revise history of any vehicle using its VIN-code, and sign up for an electronic queue to Service Centers of the Ministry of Internal Affairs.

Law № 2612-VIII on the web site of the Verkhovna Rada of Ukraine: <https://goo.gl/znYyZ6>

Driver's account at: <https://goo.gl/MrN47w>

Constitutional Court Closes Proceedings on Police Taking DNA Samples

On December 6, the Constitutional Court of Ukraine adopted a ruling on closing the constitutional proceedings in the case upon a constitutional submission by the Verkhovna Rada Commissioner for Human Rights concerning compliance with the Constitution of Ukraine (constitutionality) of Part 2 Article 26 of the Law of Ukraine *On National Police*.

The submission referred to unconstitutionality of the power of the National Police to take and store biometric data of an individual in the form of DNA samples in the absence of the procedure

for storing and sharing with the third parties, differentiation of the cases of sample taking, etc. This is one of the elements of a global problem of the absence of proper protection of personal data in Ukraine.

The proceedings were closed upon request of the Ombudsperson, Liudmyla Denisova, although it was submitted by the previous Commissioner for Human Rights, Valeria Lutkovska.

The Chairman of the Constitutional Court of Ukraine, Stanislav Shevchuk, presented his dissenting opinion regarding the ruling in which he expressed his disagreement with the Constitutional Court ruling.

Members of parliament of Ukraine are collecting signatures necessary for a repeat constitutional submission to be considered by the Court.

Ruling of the Constitutional Court of Ukraine № 10-up dated December 6, 2018: <https://goo.gl/XM1JkD>

Stanislav Shevchuk's Dissenting opinion to the Ruling: <https://goo.gl/y8V4MF>

Constitutional Court of Ukraine Recognizes Immediate Application of Punishment for Administrative Offenses as Unconstitutional

On November 23, the Constitutional Court of Ukraine adopted a decision in the case upon a constitutional submission of the Verkhovna Rada Commissioner for Human Rights concerning compliance with the Constitution of Ukraine (constitutionality) of the provisions of Part 1 Article 294, and Article 326 of the Code of Ukraine on Administrative Offenses referring to unconstitutionality of the Code provisions on imposing an administrative arrest immediately after adoption of a respective resolution on administrative liability.

The same fact was emphasized by the European Court of Human Rights, which mentioned that a revision of a resolution on imposing an administrative arrest after its complete implementation by a court of appeal constitutes

a violation of the right to appeal guaranteed by Article 2 Protocol № 7 to the Convention for the Protection of Human Rights. Therefore, the right to appeal becomes illusory, which means impossible to implement.

The ECHR came to this conclusion in the case *Shvydka v. Ukraine* (2014) having recognized the violation of the complainant's right to revision of a penalty since as of the moment of examination of her appeal, Halyna Shvydka had effectively spent 10 days under an administrative arrest imposed on her.

Despite the fact that after the respective decision

was canceled by a court of appeal a person can demand material and moral compensation, the ECHR believes such retrospective and exclusively compensatory remedy cannot be seen as a replacement of the right to revision provided for in Article 2 of Protocol № 7. The Court emphasized that the Convention has to guarantee not some theoretical or illusory rights but the rights that are effective in practice.

Decision of the Constitutional Court of Ukraine № 10-r dated November 23, 2018: <https://goo.gl/Ye2PC5>

II. PROSECUTOR'S OFFICE

Reform of prosecutorial bodies started only after the Revolution of Dignity, although it was one of the commitments to the Council of Europe from the times of accession to this organization and adoption of the Constitution of Ukraine. For a long time, prosecution preserved its centralized and militarized structure with absolute internal subordination of prosecutors to their line managers established back in the Soviet times.

Over the last three years, a new Law on Prosecution was adopted (2014), prosecution lost its general oversight function (2014), the General Inspectorate was created (2015), prosecutorial self-government bodies and the Qualification and Disciplinary Commission began their work (2017), and public prosecution offices were deprived of their powers to carry out pre-trial investigation of crimes (2017). At the same time, several initiatives were not completed, and no evaluation of overall reform efficiency was done.

On December 7, the President signed the Law on the State Budget for 2019, which recognizes the Qualification and Disciplinary Commission of Prosecutors as an independent administrator of budget funds for the first time. More than 15 million hryvnias are allocated for the Commission's activities in the upcoming year. The Commission received powers and authorities transferred from the Prosecutor General to appoint prosecutors to their positions and to bring them to disciplinary liability, including dismissal.

Despite direct requirements of the Law on Public Prosecution, the Commission – from the moment of its establishment in 2017 – was financed with the funds of the Prosecutor General's Office exclusively. This could be the cause of illegal influence by the Prosecutor General's Office on its activities. Such financial dependence could be one of the reasons why the Commission until today did not dare to impose disciplinary fines on heads of public prosecution offices. When examining cases against the Prosecutor General, Yurii Lutsenko, and the Chief Military Prosecutor, Anatolii Matios, concerning their

Qualification and Disciplinary Commission of Prosecutors Becomes Budget Funds Administrator

disregard of the presumption of innocence as well as against the Deputy Prosecutor General, Dmytro Storozhuk, concerning his participation in a political party congress, the Commission did not find any violations in their actions.

Procedural Management of Criminal Proceedings of the SBI

After the launch of the State Bureau of Investigations, the procedural management of its criminal proceedings was carried out by the Prosecutor General's Office of Ukraine.

In order to maintain this process, the Prosecutor General issued Order № 161 dd. August 14, 2018, which approves the Regulations on the Department of Procedural Management in Criminal Proceedings Falling within the Jurisdiction of the State Bureau of Investigations of the Prosecutor General's Office of Ukraine. These Regulations provide for procedural management in criminal proceedings carried out by investigators in the central apparatus of the State Bureau of Investigations.

The Prosecutor General, Yuriy Lutsenko, stated on December 3 that he signed an order on establishing a department for organizing

procedural management in pre-trial investigations carried out by investigators of local departments of the SBI, or so-called 'bush' units.

"You are responsible to appoint in all regions – regardless whether it is a bush or a non-bush region – procedural managers of local departments of the SBI from among former investigators", he emphasized addressing regional prosecutors.

In one of the previous newsletters, it was mentioned that the procedural management unit was established and staffed outside the competition procedure. The prosecutors were appointed by a transfer from other units of public prosecution of the same level, and not based on the results of an open competition because the Law of Ukraine on Public Prosecution requires a mandatory competition only when a prosecutor is transferred to a higher level. The Prosecutor General's Office did not create opportunities for prosecutors of regional public prosecution offices to apply for positions in procedural management units for the SBI based on a competitive procedure.

Information on the web site of UNIAN Information Agency: <https://goo.gl/dqRGuf>

III. STATE BUREAU OF INVESTIGATION (SBI)

An important reform in law enforcement must be the creation of the State Bureau of Investigation – the main controller of all law enforcement officers, high-level officials and judges.

The State Bureau of Investigations is a pre-trial investigation body authorized to investigate crimes committed by politicians, members of Parliament, civil servants, judges, prosecutors, police officers and other staff members of law enforcement agencies.

November 27, State Bureau of Investigations Officially Started Working

On November 27, the State Bureau of Investigation finally commenced its work. On this day, 300 investigators took the oath and first criminal proceedings were registered. On the eve, a respective announcement was posted in the *Uriadovyi Kurier*. Simultaneously, the central apparatus and seven local departments of the Bureau were launched that cover the entire Ukraine with its activities.

At the same time, as previously reported, the Bureau started its work without operative units because of legislative gaps. At present, it is impossible to announce the competition because of the absence of respective provisions in the law. Therefore, currently officers of other law enforcement agencies will be involved for carrying out operative (search) activities.

A respective draft law №5395-d is aimed at solving this problem, and currently is being finalized for the second reading by the Law Enforcement Committee of the Verkhovna Rada of Ukraine.

Card of the draft law № 5395-d on the web site of the Verkhovna Rada of Ukraine: <https://goo.gl/X9hqLr>

Heads of Local Departments of SBI Appointed

23 out of 27 winners of the competition for management positions in the State Bureau of Investigations held by an “external” selection commission back in July were appointed to office after the launch of the SBI activities.

The Bureau Director, Roman Truba, emphasized that the “external” commission violated legislation during the competition and destroyed materials with polygraph test results of the winners that had to be submitted for making an appointment decision, yet he still made the decision after several months of arguments. More detailed information about the SBI Director’s discretion to make such decisions can be found in the previous issue of the Digest № 8-9.

It should be mentioned that according to the Law *On the State Bureau of Investigations*, an external commission had to carry out a

competition for 170 management positions in the SBI – from the head of sector to the SBI Director. Members of the “external” commission are representatives of the President of Ukraine, the Verkhovna Rada, and the Cabinet of Ministers – three representatives from each.

Law Enforcement Committee in Parliament Supported Draft Law on Parliamentary Oversight of SBI Activities

The Verkhovna Rada Committee on Legislative Support for Law Enforcement Activities supported a draft law № 9326 on amending some laws of Ukraine on ensuring parliamentary oversight of activities of the State Bureau of Investigations and the procedure for expressing no confidence for the Director of the State Bureau of Investigations.

The draft law envisages amending the Laws of Ukraine *On the State Bureau of Investigations*, and *On the Rules of Procedure of the Verkhovna Rada of Ukraine* that grants the right to the Verkhovna Rada to exercise oversight of activities of the State Bureau of Investigations in the form of examining the issue of expressing no confidence for the head of this law enforcement agency, and hearing reports on the work of the State Bureau of Investigations every year at its plenary sessions.

There are some questions concerning constitutionality of the suggested powers and authorities of the Verkhovna Rada of Ukraine to express no confidence for the SBI Director as well as their compliance with the principle of independence in the Bureau’s activities.

Card of the draft law № 9326 on the web site of the Verkhovna Rada of Ukraine: <https://goo.gl/RtBb1J>

IV. CRIMINAL JUSTICE

There is still a problem with harmonization and approximation of criminal and criminal procedural legislation with the European standards. Since adoption of the CPC in 2012, this law has been going through chaotic and unsystematic changes (such as Lozovyi's amendment), which necessitates systematization of changes. Both amendments to the CPC of Ukraine and the CC of Ukraine have a strong impact on fighting corruption that today is one of the largest challenges faced by Law Enforcement agencies. More specifically, introducing misdemeanors influences efficiency of activities of the criminal justice bodies in general, more specifically – workload of investigative and operative units, efficiency of the criminal law, and adherence to the principle of inevitability of punishment. It should be mentioned that draft of law №7279-d on criminal misdemeanors has gone through first reading in Verkhovna Rada. Also there has been currently working group established under the Committee for the Legislative Support of the Law Enforcement of the Verkhovna Rada conducting comprehensive review of the CPC and developing systematic amendments of the Code.

Verkhovna Rada of Ukraine Adopts the Law on Misdemeanors

On November 22, the Verkhovna Rada of Ukraine supported the Law of Ukraine *On Amending Some Legislative Acts of Ukraine on Simplifying Pre-Trial Investigation of Certain Categories of Criminal Offenses*.

The law on misdemeanors will make it possible to investigate minor crimes using a simplified procedure, which fact will significantly decrease the workload of investigators. Before this law was adopted, only investigators carried out pre-trial investigations of all statements and reports containing data about criminal offenses. After the

notion of a misdemeanor has been introduced together with a simplified procedure for its investigation, investigators will be able to focus on solving grave and especially grave crimes.

In the opinion of a UMDPL Association expert, Yevhen Krapyvin, the adopted draft law has a purely formalistic approach to solving this problem. Moreover, it grants additional powers to police that can present a threat to the right for protection. That is why the Council of Europe provided negative feedback about the draft law, but the critical comments mentioned in it were not taken into consideration during voting.

As of today, the draft law № 7279-d has been signed by the Chair of the Verkhovna Rada of Ukraine and has to be signed by the President.

Card of the draft law № 7279-d on the web site of the Verkhovna Rada of Ukraine: <https://goo.gl/WVK3UP>

Council of Europe Conclusion for Draft Law №7279-d: <https://goo.gl/cdQ2wk>

Article by the expert of the UMDPL Association, Yevhen Krapyvin, Misdemeanors: Panacea from Petty Crimes or Restriction of Rights?: <https://goo.gl/1mqVba>

The Supreme Court Rules on Qualification of Violent Crimes Committed by Law Enforcement Officers

On December 5, the Grand Chamber of the Supreme Court adopted a resolution on violent crimes committed by officers of law enforcement agencies. The problem with classification of such crimes emerged after the law on visa liberalization with the EU came into force in 2014. The law, among other things, introduces amendments to Articles 364 and 365 of the Criminal Code. Bringing to liability for abuse of office as well

as exceeding the powers and authorities was possible in the event when the inflicted damage totaled or exceeded UAH 88 100.

After the aforementioned law became effective, there has been varied practice regarding violent crimes committed by law enforcement officers before and after the law came into force.

The Supreme Court ruled that in the event when law enforcement officers use or threaten to use violence, the amount of inflicted damage does not matter. This action constitutes a separate crime that is punishable by law.

Parliament Fails to Overrule Presidential Veto of the Law on Private Detective Activities

On December 18, the Verkhovna Rada of Ukraine failed to overrule the Presidential veto of the

Law on Private Search (Detective) Activities (draft law registration № 3726). The Law created a possibility for introducing a new profession in Ukraine – a private detective. It was planned that licenses for this type of activities would be issued by departments of the Ministry of Justice. The task of detectives had to be assistance in collecting information for protection of individuals in criminal proceedings, searching for debtors and their property, etc.

The parliament's refusal to support the Law with suggestions from the Head of State means that this type of activities will continue to be unregulated by laws. Absence of the state control in this sphere will result in widespread instances of illegal interference into the sphere of private and family life.

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Association of Ukrainian human rights monitors on Law Enforcement (Association UMDPL) – non-governmental human rights organization implementing systemic all-Ukrainian monitoring of human rights and fundamental freedoms on law enforcement agencies activity.

Activities (programms):

- Expertise and Analytics programm;
- Development of civic control;
- Education;
- Penitentiary programm.

More about organization and results of work – www.umdpl.info/police-experts

Centre of Policy and Legal Reform (CPLR) – is a Ukrainian think-tank that promotes reform in the law and politics of Ukraine. The organization has its general goals the strengthening of democracy, the rule of law and good governance in our country. The Centre was established in 1996.

CPLR works through research, policy advising, monitoring of public decision making and via civic education. The work of CPLR is focused on the following policy areas: constitutionalism, public administration, judiciary, and criminal justice. The issues of human rights, combating corruption and gradual adaption of the Ukrainian legal system to the standards of the European Union are cross-cutting themes throughout all policy areas.

More about organization and results of work – <http://pravo.org.ua/en>

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