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COMPARATIVE STUDY

ON

BLOCKING, FILTERING AND TAKE-DOWN OF ILLEGAL INTERNET CONTENT

Excerpt, pages 728-752

This document is part of the Comparative Study on blocking, filtering and take-down of illegal internet content in the 47 member States of the Council of Europe, which was prepared by the Swiss Institute of Comparative Law upon an invitation by the Secretary General. The opinions expressed in this document do not engage the responsibility of the Council of Europe. They should not be regarded as placing upon the legal instruments mentioned in it any official interpretation capable of binding the governments of Council of Europe member states, the Council of Europe's statutory organs or the European Court of Human Rights.

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National reports current at the date indicated at the end of each report.

I. INTRODUCTION

On 24th November 2014, the Council of Europe formally mandated the Swiss Institute of Comparative Law (“SICL”) to provide a comparative study on the laws and practice in respect of filtering, blocking and takedown of illegal content on the internet in the 47 Council of Europe member States.

As agreed between the SICL and the Council of Europe, the study presents the laws and, in so far as information is easily available, the practices concerning the filtering, blocking and takedown of illegal content on the internet in several contexts. It considers the possibility of such action in cases where public order or internal security concerns are at stake as well as in cases of violation of personality rights and intellectual property rights. In each case, the study will examine the legal framework underpinning decisions to filter, block and takedown illegal content on the internet, the competent authority to take such decisions and the conditions of their enforcement. The scope of the study also includes consideration of the potential for existing extra-judicial scrutiny of online content as well as a brief description of relevant and important case law.

The study consists, essentially, of two main parts. The first part represents a compilation of country reports for each of the Council of Europe Member States. It presents a more detailed analysis of the laws and practices in respect of filtering, blocking and takedown of illegal content on the internet in each Member State. For ease of reading and comparison, each country report follows a similar structure (see below, questions). The second part contains comparative considerations on the laws and practices in the member States in respect of filtering, blocking and takedown of illegal online content. The purpose is to identify and to attempt to explain possible convergences and divergences between the Member States’ approaches to the issues included in the scope of the study.

II. METHODOLOGY AND QUESTIONS

1. Methodology

The present study was developed in three main stages. In the first, preliminary phase, the SICL formulated a detailed questionnaire, in cooperation with the Council of Europe. After approval by the Council of Europe, this questionnaire (see below, 2.) represented the basis for the country reports.

The second phase consisted of the production of country reports for each Member State of the Council of Europe. Country reports were drafted by staff members of SICL, or external correspondents for those member States that could not be covered internally. The principal sources underpinning the country reports are the relevant legislation as well as, where available, academic writing on the relevant issues. In addition, in some cases, depending on the situation, interviews were conducted with stakeholders in order to get a clearer picture of the situation. However, the reports are not based on empirical and statistical data, as their main aim consists of an analysis of the legal framework in place.

In a subsequent phase, the SICL and the Council of Europe reviewed all country reports and provided feedback to the different authors of the country reports. In conjunction with this, SICL drafted the comparative reflections on the basis of the different country reports as well as on the basis of academic writing and other available material, especially within the Council of Europe. This phase was finalized in December 2015.

The Council of Europe subsequently sent the finalised national reports to the representatives of the respective Member States for comment. Comments on some of the national reports were received back from some Member States and submitted to the respective national reporters. The national reports were amended as a result only where the national reporters deemed it appropriate to make amendments. Furthermore, no attempt was made to generally incorporate new developments occurring after the effective date of the study.

All through the process, SICL coordinated its activities closely with the Council of Europe. However, the contents of the study are the exclusive responsibility of the authors and SICL. SICL can however not assume responsibility for the completeness, correctness and exhaustiveness of the information submitted in all country reports.

2. Questions

In agreement with the Council of Europe, all country reports are as far as possible structured around the following lines:

1. **What are the legal sources for measures of blocking, filtering and take-down of illegal internet content?**

Indicative list of what this section should address:

- Is the area regulated?
- Have international standards, notably conventions related to illegal internet content (such as child protection, cybercrime and fight against terrorism) been transposed into the domestic regulatory framework?

- Is such regulation fragmented over various areas of law, or, rather, governed by specific legislation on the internet?
- Provide a short overview of the legal sources in which the activities of blocking, filtering and take-down of illegal internet content are regulated (more detailed analysis will be included under question 2).

2. What is the legal framework regulating:

2.1. Blocking and/or filtering of illegal internet content?

Indicative list of what this section should address:

- On which grounds is internet content blocked or filtered? This part should cover all the following grounds, wherever applicable:
 - the protection of national security, territorial integrity or public safety (e.g. terrorism),
 - the prevention of disorder or crime (e.g. child pornography),
 - the protection of health or morals,
 - the protection of the reputation or rights of others (e.g. defamation, invasion of privacy, intellectual property rights),
 - preventing the disclosure of information received in confidence.
- What requirements and safeguards does the legal framework set for such blocking or filtering?
- What is the role of Internet **Access** Providers to implement these blocking and filtering measures?
- Are there soft law instruments (best practices, codes of conduct, guidelines, etc.) in this field?
- A brief description of relevant case-law.

2.2. Take-down/removal of illegal internet content?

Indicative list of what this section should address:

- On which grounds is internet content taken-down/ removed? This part should cover all the following grounds, wherever applicable:
 - the protection of national security, territorial integrity or public safety (e.g. terrorism),
 - the prevention of disorder or crime (e.g. child pornography),
 - the protection of health or morals,
 - the protection of the reputation or rights of others (e.g. defamation, invasion of privacy, intellectual property rights),
 - preventing the disclosure of information received in confidence.
- What is the role of Internet Host Providers and Social Media and other Platforms (social networks, search engines, forums, blogs, etc.) to implement these content take down/removal measures?
- What requirements and safeguards does the legal framework set for such removal?
- Are there soft law instruments (best practices, code of conduct, guidelines, etc.) in this field?
- A brief description of relevant case-law.

3. Procedural Aspects: What bodies are competent to decide to block, filter and take down internet content? How is the implementation of such decisions organized? Are there possibilities for review?

Indicative list of what this section should address:

- What are the competent bodies for deciding on blocking, filtering and take-down of illegal internet content (judiciary or administrative)?
- How is such decision implemented? Describe the procedural steps up to the actual blocking, filtering or take-down of internet content.
- What are the notification requirements of the decision to concerned individuals or parties?
- Which possibilities do the concerned parties have to request and obtain a review of such a decision by an independent body?

4. General monitoring of internet: Does your country have an entity in charge of monitoring internet content? If yes, on what basis is this monitoring activity exercised?

Indicative list of what this section should address:

- The entities referred to are entities in charge of reviewing internet content and assessing the compliance with legal requirements, including human rights – they can be specific entities in charge of such review as well as Internet Service Providers. Do such entities exist?
- What are the criteria of their assessment of internet content?
- What are their competencies to tackle illegal internet content?

5. Assessment as to the case law of the European Court of Human Rights

Indicative list of what this section should address:

- Does the law (or laws) to block, filter and take down content of the internet meet the requirements of quality (foreseeability, accessibility, clarity and precision) as developed by the European Court of Human Rights? Are there any safeguards for the protection of human rights (notably freedom of expression)?
- Does the law provide for the necessary safeguards to prevent abuse of power and arbitrariness in line with the principles established in the case-law of the European Court of Human Rights (for example in respect of ensuring that a blocking or filtering decision is as targeted as possible and is not used as a means of wholesale blocking)?
- Are the legal requirements implemented in practice, notably with regard to the assessment of necessity and proportionality of the interference with Freedom of Expression?
- In the case of the existence of self-regulatory frameworks in the field, are there any safeguards for the protection of freedom of expression in place?
- Is the relevant case-law in line with the pertinent case-law of the European Court of Human Rights?

For some country reports, this section mainly reflects national or international academic writing on these issues in a given State. In other reports, authors carry out a more independent assessment.

UKRAINE

1. Legal Sources

Formation of information legislation of Ukraine began in 1990s. But, with the course of time, provisions that were considered as progressive at the beginning stopped corresponding to up-to-date challenges and a lot of questions became unregulated or were improperly determined, including issues, connected with regulation of the Internet.

Proceeding to questions connected with blocking, filtering and take-down of illegal Internet content, it is necessary to note that there is no specific regulation on these issues in Ukraine. Common rules, enshrined in different legislative acts, apply to relations in this area.

In its turn, provisions of these acts are based on rules, foreseen by international treaties, related to illegal Internet content (such as child protection, cybercrime, countering terrorism, etc.). Most of international standards that are set by such conventions have been transposed into Ukrainian domestic regulatory framework, including: Convention on Cybercrime (Budapest Convention);¹ Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems;² Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data;³ Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows;⁴ Convention for the Protection of Human Rights and Fundamental Freedoms;⁵ the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms;⁶ Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention);⁷ Convention on the counterfeiting of

¹ Law of Ukraine "On ratification of Convention on Cybercrime" of 07.09.2005, № 2824-IV, Vidomosty Verkhovnoi Rady of Ukraine, 2006, № 5-6, Art. 71, <http://zakon4.rada.gov.ua/laws/show/2824-15>.

² Law of Ukraine "On ratification of Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems" of 21.07.2006 № 23-V, Vidomosty Verkhovnoi Rady of Ukraine, 2006, № 39, Art.328, <http://zakon4.rada.gov.ua/laws/show/23-16>.

³ Law of Ukraine "On ratification of Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows" of 06.07.2010 № 2438-VI, Vidomosty Verkhovnoi Rady of Ukraine, 2010, № 46, Art.542, <http://zakon4.rada.gov.ua/laws/show/2438-17>.

⁴ Ibid.

⁵ Law of Ukraine "On ratification of Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol as well as Protocols No. 2, 4, 7 and 11 to the Convention" of 17.07.1997 № 475/97-BP, Vidomosty Verkhovnoi Rady of Ukraine, 1997, № 40, Art.263, <http://zakon1.rada.gov.ua/laws/show/475/97-%D0%B2%D1%80>.

⁶ Ibid. In some exceptional cases that concern temporary seizure or arrest of servers (more details in Section 2) there is a possibility for a person to complain on violation of the Art. 1 of the Protocol (e.g., if servers are not returned to owners during a long period of time (and it leads to impossibility of their owners to maintain economic activity) or if servers are returned, but in non-operational state).

⁷ Law of Ukraine "On ratification of Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse" of 20.06.2012 № 4988-VI, Vidomosty Verkhovnoi Rady of Ukraine, 2013, № 19-20, Art. 180, <http://zakon4.rada.gov.ua/laws/show/4988-17/paran2#n2>.

medical products and similar crimes involving threats to public health;⁸ Convention on the Prevention of Terrorism⁹ and others.

Provisions that contain grounds for regulating issues on blocking, filtering and take-down of illegal Internet content are fragmented over various areas of law (criminal, administrative, civil, economic, etc.). In connection with that, legal sources that regulate these activities can be divided into several groups.

General guarantees of the right to freedom of thought, speech and expression, right to privacy protection (including privacy of correspondence), freedom of belief and religion are foreseen in the Constitution of Ukraine.¹⁰ Such Laws of Ukraine as “On Information”,¹¹ “On Access to Public Information”,¹² “On Printed Mass Media (Press) of Ukraine”,¹³ “On Television and Radio Broadcasting”,¹⁴ “On Informational Agencies”^{15 16} define general principles, connected with the right to information, freedom of speech and expression as well as foresee a number of restrictions that can be applied to the right to freedom of expression.

Liability for terrorism, cybercrime, children sexual exploitation and abuse, propaganda of war, racism, religious intolerance is enshrined in the Criminal Code of Ukraine¹⁷ and specific Laws of Ukraine (including Laws “On Combating Terrorism”,¹⁸ “On Public Morals Protection”¹⁹ and other legislative acts). Questions connected with violations in the field of personal data protection are

⁸ Law of Ukraine “On ratification of Convention on the counterfeiting of medical products and similar crimes involving threats to public health” of 07.06.2012 № 4908-VI, Vidomosty Verkhovnoi Rady of Ukraine, 2013, № 17, Art. 160, <http://zakon5.rada.gov.ua/laws/show/4908-17/paran2#n2>.

⁹ Law of Ukraine “On ratification of Convention on the Prevention of Terrorism” of 31.07.2006 № 54-V, Vidomosty Verkhovnoi Rady of Ukraine, 2006, № 39, Art.340, <http://zakon1.rada.gov.ua/laws/show/54-16>.

¹⁰ Constitution of Ukraine of 28.06.1996 № 254к/96-BP, Vidomosty Verkhovnoi Rady of Ukraine, 1996, № 30, Art. 141, <http://zakon4.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>.

¹¹ Law of Ukraine “On Information” of 02.10.1992 № 2657-XII, Vidomosty Verkhovnoi Rady of Ukraine, 1992, № 48, Art.650, <http://zakon2.rada.gov.ua/laws/show/2657-12>.

¹² Law of Ukraine “On Access to Public Information” of 13.01.2011 № 2939-VI, Vidomosty Verkhovnoi Rady of Ukraine, 2011, № 32, Art.314, <http://zakon4.rada.gov.ua/laws/show/2939-17>.

¹³ Law of Ukraine “On Printed Mass Media (Press) of Ukraine” of 16.11.1992 № 2782-XII, Vidomosty Verkhovnoi Rady of Ukraine, 1993, № 1, Art. 1, <http://zakon4.rada.gov.ua/laws/show/2782-12>.

¹⁴ Law of Ukraine “On Television and Radio Broadcasting” of 21.12.1993 № 3759-XII, Vidomosty Verkhovnoi Rady of Ukraine, 1994, № 10, Art. 43, <http://zakon4.rada.gov.ua/laws/show/3759-12>.

¹⁵ Law of Ukraine “On Informational Agencies” of 28.02.1995 № 74/95-BP, Vidomosty Verkhovnoi Rady of Ukraine, 1995, № 13, Art. 83, <http://zakon2.rada.gov.ua/laws/show/74/95-%25D0%25B2%25D1%2580>.

¹⁶ A lot of press issues, television and radio stations as well as information agencies have their own websites, where they maintain their activity. That is why provisions of specific Laws apply to relations, connected with blocking, filtering and taking down/removal of content, placed on their on-line resources.

¹⁷ Criminal Code of Ukraine of 05.04.2001, № 2341-III, Vidomosty Verkhovnoi Rady of Ukraine, 2001, № 25-26, Art.131, <http://zakon5.rada.gov.ua/laws/show/2341-14>.

¹⁸ Law of Ukraine “On Combating Terrorism” of 20.03.2003 № 638-IV, Vidomosty Verkhovnoi Rady of Ukraine, 2003, N 25, Art.180, <http://zakon2.rada.gov.ua/laws/show/638-15>.

¹⁹ Law of Ukraine “On Public Morals Protection” of 20.11.2003 № 1296-IV, Vidomosty Verkhovnoi Rady of Ukraine, 2004, № 14, Art.192, <http://zakon2.rada.gov.ua/laws/show/1296-15>.

regulated by the Criminal Code of Ukraine, Code of Ukraine on Administrative Violations²⁰ and the Law of Ukraine “On Personal Data Protection”.²¹ Violations in the sphere of copyrights and related rights, and liability for their commitment are specified in the Criminal Code of Ukraine, Civil Code of Ukraine,²² Code of Ukraine on Administrative Violations, Law of Ukraine “On Copyright and Related Rights”.²³ Issues that deal with activity in the sphere of telecommunications (and, particularly, with rights and obligations of consumers, operators and providers of telecommunication services) are defined in the Law of Ukraine “On Telecommunications”.²⁴ Liability of Internet web-sites’ owners for dissemination of defamation is prescribed by the Civil Code of Ukraine and Economic Code of Ukraine.²⁵

2. Legal Framework

2.1. Blocking and/or filtering of illegal Internet content

In Ukraine there is no special law that regulates questions, connected with blocking of Internet content. Nevertheless, Ukrainian legislation foresees a number of restrictions that can be applied on the right to freedom of expression. If these limitations are disregarded, a person can demand protection of his/her violated rights (Section 2 includes detailed information on these issues).

As to filtering of Internet content, the State does not regulate such actions. At the same time, any concerned person has the right to install software aimed at protecting from illegal content (e.g. parents can install relevant software programs on computers so that children will not be able to access certain content). There is no relevant case-law on filtering of Internet content in Ukraine.

2.1.1. General Legal Framework

According to Art. 34 of the Constitution of Ukraine, everyone shall be guaranteed the right to freedom of thought and speech, and to free expression of his/her views and beliefs. Everyone shall have the right to freely collect, store, use, and disseminate information by oral, written, or other means at his/her discretion. Exercise of these rights may be restricted by law in the interests of national security, territorial integrity or public order for prevention of disorders or crimes, protection of public health, reputation or rights of other persons, for preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary.

In Ukraine censorship is forbidden (Art. 15 of the Constitution, Art. 24 of the Law “On Information”, par. 2 Art. 2 of the Law “On Printed Mass Media (Press) of Ukraine”, Art. 5 of the Law “On Television and Radio Broadcasting”, par. 2 Art. 2 the Law “On informational agencies”).

²⁰ Code of Ukraine on Administrative Violations of 07.12.1984 № 8073-X, Vidomosty Verkhovnoi Rady of Ukrainian SSR, 1984, Annex to № 51, Art.1122, <http://zakon2.rada.gov.ua/laws/show/80731-10>, <http://zakon2.rada.gov.ua/laws/show/80732-10>.

²¹ Law of Ukraine “On Personal Data Protection” of 01.06.2010 № 2297-VI, Vidomosty Verkhovnoi Rady of Ukraine, 2010, № 34, Art. 481, <http://zakon5.rada.gov.ua/laws/show/2297-17>.

²² Civil Code of Ukraine of 16.01.2003 № 435-IV, Vidomosty Verkhovnoi Rady of Ukraine, 2003, №№ 40-44, Art.356, <http://zakon4.rada.gov.ua/laws/show/435-15>.

²³ Law of Ukraine “On Copyright and Related Rights” of 23.12.1993 № 3792-XII, Vidomosty Verkhovnoi Rady of Ukraine, 1994, № 13, Art.64, <http://zakon5.rada.gov.ua/laws/show/3792-12>.

²⁴ Law of Ukraine “On Telecommunications” of 18.11.2003 № 1280-IV, Vidomosty Verkhovnoi Rady of Ukraine, 2004, № 12, Art. 155, <http://zakon2.rada.gov.ua/laws/show/1280-15/parao2#o2>.

²⁵ Economic Code of Ukraine of 16.01.2003 № 436-IV, Vidomosty Verkhovnoi Rady of Ukraine, 2003, № 18, № 19-20, № 21-22, Art.144, <http://zakon5.rada.gov.ua/laws/show/436-15>.

The Law “On Information” enshrines that everyone has the right to information that includes the possibility to receive, use, impart, store and protect information, necessary for the realization of the person’s own rights, freedoms and lawful interests, freely. The realization of this right does not have to violate rights, freedoms and lawful interests of other persons (Art. 5). Nobody can limit the right of a person to choose forms and sources of receiving information, except cases, foreseen by the Law. Any person, association of citizens and authorities has the right to demand a remedy for any violations of their right to information (part 2 Art. 7).

The laws of Ukraine determine that the right to information can be limited by the law in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of public health, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary (part 2 of the Art. 6 of the Law “On Information”, Art. 2 of the Law “On Printed Mass Media (Press) of Ukraine”, part 2 Art. 6 of the Law “On Access to Public Information”).

Information cannot be used for statements to overthrow the constitutional system, to break Ukrainian territorial integrity, for propaganda of war, violence, cruelty, stirring up interethnic, racial or religious hatred, commitment of terroristic acts and encroachment on human rights (Art. 28 of the Law “On information”). Similar provisions are foreseen in the Law “On Printed Mass Media (Press) of Ukraine” (Art. 3) and the Law “On Television and Radio Broadcasting” (Art. 6). Press also cannot be used for dissemination of such categories of information as pornography and other crimes, propaganda of communist and/or national-socialist (nazi) totalitarian regimes and their symbols, interference in private life (except cases, established by the law), causing harm to honour and dignity of a person, information, disclosure of which can lead to pointing on minor offender without his/her consent and his/her representative’s consent. Similar provisions are foreseen in the Law “On informational agencies” (Art. 2).

More severe restrictions on freedom of thought, speech and expression, right to privacy protection (including privacy of correspondence), freedom of belief and religion can be applied only during martial and emergency state with the determination of terms of such limitations (Art. 64 of the Constitution of Ukraine).

Thus, during **martial state** in Ukraine or its regions, in the frame of the mentioned restrictions, authorized bodies have the right to regulate activity of telecommunications’ enterprises, printing enterprises, publishing houses, television and radio organizations, broadcasting stations and other enterprises, entities, organizations and cultural institutions as well as mass media, to use local radio stations, television stations and printing houses for military necessity and for explanatory work conduction among troops and population; to forbid activity of reception-transmission of radio stations of private and collective usage and information transfer through computer networks (point 11 part 1 Art. 8 of the Law “On Legal Regime of Martial State”²⁶).

As to the **state of emergency**, the Law defines that if such state is imposed on the grounds of mass violations of public order,²⁷ along with general measures that not related to freedom of thought,

²⁶ Law of Ukraine “On Legal Regime of Martial State” of 12.05.2015 № 389-VIII, Vidomosty Verkhovnoi Rady of Ukraine, 2015, № 28, Art.250, <http://zakon4.rada.gov.ua/laws/show/389-19>.

²⁷ Such grounds include: mass terroristic attacks that led to people’s death or demolition of objects of primary vital importance; arising of interethnic and interreligious conflicts; blocking of certain object of primary importance (including infrastructure) or regions that threatens citizens’ safety and violates normal state and municipal bodies’ functioning; arising of massive disorders together with violence against citizens, restrictions of their rights; attempts to seize state powers or to overthrow the constitutional system of Ukraine by means of violent oppression; massive state border crossing from

speech and expression, right to privacy protection (including privacy of correspondence), freedom of belief and religion some additional measures can also be implemented. They include: prohibition of production and distribution of information materials that can destabilize situation; regulation of civil broadcasting stations' activity, prohibition of activity of reception-transmission radio stations and radio-tail equipment of private and collective usage; and specific rules of communications' usage and information transfer through computer networks (points 6-8 par. 1 Art. 18 of the Law "On Legal Regime of Emergency State"²⁸).

It is noteworthy to mention the Law "On Amending the Law "On Judicial System and Status of Judges" and Procedural Laws on Additional Protection Measures of Citizens Security".²⁹ This Act foresaw a number of limitations, connected with the sphere of Internet. It prescribed criminal liability for dissemination of extremist materials and libel, including by means of Internet, established the right of National Commission for the State Regulation of Communications and Informatization to limit access to the Internet resources that violate legislation of Ukraine on the ground of expert conclusion (such decision had to be implemented by the operator of telecommunications) etc. However this Law was in force only during 12 days. Today it is repealed.³⁰

Along with that a lot of drafts of laws and secondary legislation, aimed on regulation of the Internet appeared during last years. Most of them were either dismissed, or shelved. Nevertheless, recently a new Draft of Law "On Amending Certain Laws of Ukraine on Strengthening of Liability for Committed Violations in the Sphere of Informative Security and Countering Cybercrime"³¹ was registered in Verkhovna Rada of Ukraine. Its initiators propose, among other, to provide Security Service of Ukraine with the right to receive access to the processed information about subscriber and in case such information can be lost, to maintain actions for its preservations, including blocking access to such information resources. It is proposed to amend the Law "On telecommunications" and to empower National Commission for the State Regulation of Communications and Informatization on limiting (stopping, blocking) access of its subscribers to Internet resources that disseminate information that violates the law and to renew such access in case of this information is eliminated or on the basis of judicial decision; to provide the authorized body with information about its subscribers and services, consumed/provided by them/them; as well as to oblige operators to install on their own account technical equipment, necessary for secret investigation actions' maintenance, on their telecommunication networks and to ensure its protection, etc.

the territory of neighboring states; necessity of constitutional system's renewal and state bodies' activity.

²⁸ Law of Ukraine "On Legal Regime of Emergency State" of 16.03.2000 № 1550-III, Vidomosty Verkhovnoi Rady of Ukraine, 2000, № 23, Art.176, <http://zakon2.rada.gov.ua/laws/show/1550-14>.

²⁹ Law of Ukraine "On Amending the Law "On Judicial System and Status of Judges" and Procedural Laws on Additional Protection Measures of Citizens Security" of 16.01.2014 No. 721-VII, Vidomosty Verkhovnoi Rady of Ukraine, 2014, № 22, Art.801, <http://zakon4.rada.gov.ua/laws/show/721-vii>. This Law was a part of so called "Dragon Laws", adopted by Verkhovna Rada of Ukraine of 16, January, 2014.

³⁰ This Law was repealed by the Law of Ukraine "On Repealing of Certain Laws of Ukraine" of 28.01.2014, No. 732-VII, Vidomosty Verkhovnoi Rady of Ukraine, 2014, № 22, Art.811, <http://zakon4.rada.gov.ua/laws/show/732-18/paran2#n2>.

³¹ Draft of Law "On Amending Certain Laws of Ukraine on Strengthening of Liability for Committed Violations in the Sphere of Informative Security and Countering Cybercrime", http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55668.

2.1.2. Protection of Copyrights and Related Rights

Relations, connected with copyrights and related rights, are regulated by the Civil Code of Ukraine (Chapter 36, 37³²) and the Law of Ukraine “On Copyright and Related Rights”. These acts enshrine a number of rights that belong to authors, co-authors, performers, producers of phonograms, producers of videograms, broadcasting organizations and persons that received author’s or related rights according to the agreement or law (hereinafter – “**subjects of copyrights and related rights**”) (Art. 423, Art. 438, Art. 440, Art. 452 of Civil Code of Ukraine; Art. 14, Art. 15, Art. 38-41, part 1 Art. 52 of the Law of Ukraine “On Copyright and Related Rights”). They include, among others, the right to prevent any invasion into intellectual property rights that can harm honour or reputation of the creator of the object of intellectual property rights; exclusive right to permit usage of such an object; exclusive right to prevent misuse of the object of intellectual property rights, including forbiddance of such usage.

Violations in this area can be different. They are enshrined in the Criminal Code of Ukraine, the Code of Ukraine on Administrative Violations and the Law of Ukraine “On Copyright and Related Rights”.

Art. 50 of the abovementioned Law foresees a list of actions that may be recognized as violations and can give grounds for judicial protection of intellectual property rights. They include, for example, actions that infringe personal non-property rights as well as property rights of subjects of copyrights and related rights; piracy; plagiarism; commitment of actions that threat violation of copyrights or related rights, etc.

The Law of Ukraine “On Copyright and Related Rights” determines that protection of violated rights can be exercised in the frame of civil, criminal proceedings as well as in the frame of proceedings, foreseen by the Code of Ukraine on Administrative Violations (Art. 51). Art. 53 of this Act empowers the court to deliver orders on securing of a suit³³ that forbid defendants to maintain a number of actions³⁴ before the court delivers a decision. If there is enough information regarding commitment of criminal violation of copyrights or related rights, the pre-trial investigative body or a court shall take measures to provide detection and arrest of copies of works (including computer programs and databases), recorded executions, phonograms, videograms, broadcasting programs that are intended to be counterfeit and means of circumvention of technical means of protection; materials, designated for their production and execution; documents, accounts and other objects that can be evidences of commitment of illegal actions. Except that, the Civil Code foresees that the court can deliver a decision on securing of a suit and, in particular, to obligate a person to undertake certain actions or withhold certain actions (Art. 152).

³² Chapter 36 of Civil Code of Ukraine “Intellectual Property Rights on Literature, Artistic and Other Work (Copyright)”, Chapter 37 of Civil Code of Ukraine “Intellectual Property Rights on Execution, Phonogram, Videogram and Programs of Broadcasting Organization (Related Rights)”.

³³ Order on securing of a suit is one of the kinds of court’s decisions on procedural questions that is delivered before entertaining of a suit on merits. In particular, the court has the right to apply such measures, as temporary seizure or arrest of property so that the possibility to execute decision of the court on merits would not be lost. Thus, it is a decision on applications of interim measures. Such order has to be executed immediately (par. 9 Art. 153 of Civil Code of Ukraine).

³⁴ These actions include production, reproduction, selling, rent, leasing, import into the customs territory of Ukraine and other usage, foreseen by this Law as well as transportation, storage or possessing of copies of works (including computer programs, databases, recorded executions, phonograms, videograms, broadcasting programs that are intended to be counterfeit, and means of circumvention of technical means of protection) with the aim put them into civil circulation.

Misuse of the object of intellectual property rights, appropriation of authorship or other deliberate violation of rights on the object of intellectual property rights that is protected by the Law, entails a fine together with confiscation of illegally made production as well as equipment and materials that served for its production (Art. 51-2 Code of Ukraine on Administrative Violations).

If deliberate violation of copyrights and related rights inflicted material damage that exceeds twenty or more times the citizen's personal exemption,³⁵ it is considered to be a criminal offence. Depending to the gravity of a crime it can be punished by a fine or correctional labour or deprivation of liberty with confiscation and destruction of all copies of works, material media of computer programs, databases, execution of phonogram, videogram, broadcasting programs as well as tools and materials that were used specially for their production, as well as with or without deprivation of a right to hold certain offices or maintain certain activity up to three years together with abovementioned confiscation and destruction (Art. 176 Criminal Code of Ukraine).

A person, whose rights were violated has a right to demand their recognition and restoration (including, forbiddance of actions that violate or create threats for violations of copyrights and/or related rights); to file a suit to the court with a demand to restore violated rights and/or stoppage of actions that violate or create threats for violations of copyrights and/or related rights; to file suits on remuneration of material as well as non-pecuniary damage; to demand stoppage of actions that prepare to violations of copyrights and/or related rights etc. (Art. 16 of the Civil Code of Ukraine; part 1 Art. 52 of the Law of Ukraine "On Copyright and Related Rights").

In criminal proceedings authorized persons (e.g. investigator, prosecutor) have the right to file to the court a request on execution of a search with mentioning of certain equipment (for instance servers) that can be temporary seized during the search. They have the right to file a request on arresting of suspected person's property (that can also include servers) (Art. 168, Art. 171 of Criminal Procedural Code of Ukraine³⁶). If the court fulfills such a request, the authorized persons have the right to seize temporary or to arrest servers that entails physical blocking of Internet content.

Along with that, the person accused of infringement of copyrights and related rights as well as the owners of the temporary seized/arrested property (if these persons are different) has a right to appeal the relevant court's decision.

On 31 January 2012, militia³⁷ made a submission³⁸ to the LLC "Internet Invest"³⁹ on locking of access of persons that registered and used the domain name "ex.ua" to its administration panel, blocking of mentioned domain name, and suspension of this domain name's service. It happened because of complaints of violations of intellectual property rights. It is necessary to underline that the order for actions on blocking was not regulated. Militia informed that during the search execution it seized 200 servers on which information, related to ex.ua' activity, was stored. Later the investigative department withdrew its previous submission to the LLC "Internet Invest" and asked it to annul

³⁵ For the aims of crimes' and administrative violations' qualification the sum of one citizen's personal exemption is equal to 609 UAH (in 2015).

³⁶ Criminal Procedural Code of Ukraine of 13.04.2012, № 4651-VI, Vidomosty Verkhovnoi Rady of Ukraine, 2013, № 9-10, № 11-12, № 13, Art.88, <http://zakon5.rada.gov.ua/laws/show/4651-17>.

³⁷ From 07, November 2015 militia will be officially called "police".

³⁸ According to the Criminal-Procedure Code of Ukraine that was in force at that time, such a submission was obligatory for execution during one month, otherwise a person that failed to execute it, could be held administratively liable (Art. 23-1, <http://zakon0.rada.gov.ua/laws/show/1001-05/parao211#o211>).

³⁹ National registrar of domain names "Imena.ua".

blocking of the domain name “ex.ua”,⁴⁰ but along with that it did not return the seized servers (they were given back some time later).⁴¹

A similar case happened a year later, when activity of the web-site “fs.ua” was suspended. According to the information in mass media, the reason of this was a complaint of civic organization “Ukrainian Anti-Piracy Association”, filled to the Directorate for Combating Cybercrimes of the Ministry of Internal Affairs of Ukraine. The Association complained that the web-site illegally disseminated audiovisual works and it led to suffering of material damage of almost 345 000 UAH by their copyright holders. Militia seized server equipment and sent it for the expertise to the Research Expert-Criminalistics’ Center of the Main Department of the Ministry of Internal Affairs of Ukraine (approx. 20 servers).⁴² However, later “fs.ua” began to work on another domain registered outside Ukraine.⁴³

2.1.3. Violations in the Sphere of National Security and Public Morals

Violations in these spheres are prescribed in the Criminal Code of Ukraine and specific Laws of Ukraine (“On Combating Terrorism”, “On Public Morals Protection” etc.).

The Law “On Public Morals Protection” forbids production and dissemination of products that propagate war, national and religious hatred, overthrow of the constitutional system and territorial integrity by means of violence; propagate fascism and neo-fascism; humiliate or offend the nation or an individual on ethnic grounds; propagate fanaticism, sacrilege, disrespect to national and religious sanctities; humiliate individual, is a demonstration of abuse towards physical disability, mentally sick, old people; propagate illiteracy, disrespect towards parents; propagate drug addiction, toxic substances addiction, alcoholism, smoking and other bad habits (Art. 2). It forbids drawing of minors into activity connected with the production and turnover of the products of sexual or erotic character, pornography materials, providing services as well as organization and carrying out of entertainment events of sexual or erotic character; dissemination of mentioned products, materials, providing services and carrying out of the abovementioned entertainment events among minors; usage of minors’ images in any form in products of sexual or erotic character and carrying out of entertainment events of sexual or erotic character; production, storage, advertisement, dissemination, purchase of products that contains child pornography, its import, export, transit through territory of Ukraine and postal sending; proposing or providing access to products that contain child pornography (Art. 7). Persons that violated rules of this Law can be subject to civil, disciplinary, administrative or criminal liability (Art. 21).

Together with that, provisions of the Law “On Public Morals Protection” are so unclear that it is possible, for instance, to treat products either as “of pornographic character” (dissemination of which is forbidden), or as “of erotic character” (dissemination of which is allowed). Thus, there is a risk that it could lead to abuse of power by authorized bodies.

As this sphere is very sensitive, representatives of associations and unions of providers as well as distributors of TV-channels decided to sign⁴⁴ a Memorandum on protection of minors during

⁴⁰ <http://tyzhden.ua/News/41176>.

⁴¹ <http://tyzhden.ua/News/53031>, <http://tyzhden.ua/News/91728>.

⁴² <http://www.telekritika.ua/pravo/2013-10-16/86773>.

⁴³ <http://ckp.in.ua/2014/12/15/chynovnyky-proponuyut-blokuvaty-sajty-za-12-godyn/>,
http://osvita.mediasapiens.ua/media_law/world_journalists/fayloobminnik_fsto_vidnoviv_robotu_za_novoyu_adresoyu/.

⁴⁴ <https://www.youtube.com/watch?v=Dpv2vyFu-R4>,
<http://www.nrada.gov.ua/ua/news/radanews/22180.html>.

software service provision.⁴⁵ This document joins the efforts of the National Television, Radio Broadcasting Council, representatives of society, professional civic organizations, all participants of service programs' market in Ukraine, and is based on European standards.⁴⁶ Under the Memorandum, access providers are obliged to take proper measures to ensure that TV-programs do not contain any elements that can harm minors' development, particularly, pornography or abuse. It means that if the transmission or retranslation of programs is uncoded, it has to be limited in time period from 24.00 till 4.00 o'clock (if other time limitation is not foreseen by local self-government). Otherwise, programs' signal has to be blocked in such a way that its reception would be impossible without a decoding device. The parties of the Memorandum decided that they shall not provide access service to these programs free of charge and shall warn a consumer on the necessity of viewing limitation of such programs by minors. Unfortunately this document does not speak about measures that have to be taken in case of violation of its provisions and do not contain mentions to freedom of expression safeguards, thus it remains to have advisory nature.

Persons considered guilty of terroristic activities and its assistance are subject to criminal liability. Organizations liable for commitment of terroristic acts and recognized as terroristic by the court shall be liquidated and its property confiscated (Art. 23-25 of the Law "On Combating Terrorism").

The Criminal Code of Ukraine foresees that terroristic acts as well as a threat to commit such acts are punished by deprivation of liberty with or without property's confiscation (Art. 258). It is necessary to note that Art. 258-2 of this Code prescribes liability for public calls to commitment of a terroristic act, as well as for dissemination of materials with such calls, their production or storage with the aim of dissemination. A person can be punished for such actions by correctional labour or by arrest or by restraint or deprivation of liberty with or without confiscation of property. Criminal liability is enshrined for drawing in commitment of terroristic act, the creation of a terroristic group or organization, assistance in commitment of a terroristic act, and financing terrorism (Art. 258-1, Art. 258-3 – 258-5). Depending on the gravity of a crime, a person can be deprived of liberty for commitment of these actions with or without deprivation of a right to hold certain offices or maintain certain activity, as well as with or without confiscation of property.

Criminal liability is also prescribed for the infringement of the territorial integrity of Ukraine (Art. 110); import, production or dissemination of goods that propagate cult of violence and cruelty, race, national or religious hatred and discrimination (Art. 300); import, production, sale or dissemination of pornography products (including child pornography and forcing children to participate in their creation) (Art. 301); unsanctioned intervention into work of computers, automatic systems, computer networks or communication networks (Art. 361); creation of malware or technical means with the aim of their usage, dissemination or sale as well as their dissemination and sale (Art. 361-2); unsanctioned sale or dissemination of information with limited access that is stored in computers, automatic systems, computer networks or on such information media (Art. 361-2); unsanctioned actions with information that is processed in computers, automatic systems, computer networks or on such information media, maintained by the person that has the right to its access (Art. 362); violation of rules of exploitation of in computers, automatic systems, computer networks

⁴⁵ Memorandum on protection of minors during software service provision, <http://www.inau.org.ua/146.3162.0.0.1.0.phtml>.

⁴⁶ Convention for the Protection of Human Rights and Fundamental Freedoms of 04.11.1950, <http://conventions.coe.int/Treaty/EN/Treaties/Html/005.htm>; European Convention on Transfrontier Television of 05.05.1989, <http://conventions.coe.int/Treaty/EN/Treaties/Html/132.htm>; **Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)**, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32010L0013>.

or communication networks or rules of protection of information that is processed in them (Art. 363); intervention in the work of computers, automatic systems, computer networks or communication networks by means of telecommunication messages' mass dissemination (Art. 363-1); propaganda of war (Art. 436); planning, preparation, initiation and conducting of aggressive war (Art. 437); genocide (Art. 442).

Usually these crimes are investigated by investigative departments of internal affairs bodies, except some cases that are investigated by the relevant departments of State Security Service of Ukraine (e.g. infringement of territorial integrity of Ukraine; propaganda of war; planning, preparation, initiation and conducting of aggressive war; genocide). If the crime was detected, investigators or prosecutors also have the right to conduct search procedures of suspected person's property and to temporary seize as well as to arrest his/her servers (if they obtained a relevant judicial decision). As a consequence, Internet content can be physically blocked.

On 7, April, 2015 the Security Service of Ukraine seized servers⁴⁷ of the domain registrar "NIC.ua"⁴⁸ during search procedure⁴⁹ because of materials posted by unknown persons on five web-sites that supposedly were on the "NIC.ua"'s equipment. These actions were done in the course of pre-trial investigation of a crime, foreseen by Art. 258-2 of the Criminal Code of Ukraine. According to the investigator of the Security Service of Ukraine, mentioned articles contained calls to overthrow constitutional system by means of violence and encroached on the integrity of Ukraine. The aim of the seizure was to find data that can be used as evidence in the criminal proceeding.⁵⁰ After the seizure, Internet media published information that these actions did not lead to blocking of web-sites in question because they were hosted outside Ukraine or redirected to another web-site that was not on the "NIC.ua"'s equipment, but they were the reason why 30 000 (thirty thousands) of web-sites of Ukrainian Internet segment went down.⁵¹ Governmental bodies of Ukraine stated that open source publications did not reflect the position of State Security Service of Ukraine and distorted the real course of events. However "NIC.ua" affirmed information that was published in the Internet media⁵².

As to cases regarding limitation of access to web-resources that propagandize war, terrorism and national hate, one of them was connected with a relevant request of the Security Service of Ukraine to the Internet Association of Ukraine.⁵³ In July 2014, the Department of Counterintelligence Security of State's Interests in the Information Security Sphere of the Security Service of Ukraine sent a letter to the Head of the Internet Association of Ukraine where it asked to "provide restriction of the access"⁵⁴ to a number of web-sites on the territory of Ukraine. In this case the Security Service of

⁴⁷ <http://info.nic.ua/blog/servers-nicua/>.

⁴⁸ "NIC.ua" also provides hosting services.

⁴⁹ <http://biz.liga.net/all/it/novosti/2984267-servera-u-nic-ua-izyali-a-sayty-separatistov-prodolzhili-rabotu.htm>.

⁵⁰ http://ain.ua/wp-content/uploads/2015/04/yhvala_nic4.jpg.

⁵¹ <http://biz.liga.net/all/it/novosti/2984267-servera-u-nic-ua-izyali-a-sayty-separatistov-prodolzhili-rabotu.htm>, <http://ain.ua/2015/04/22/576967>.

⁵² Letter of LLC "NIC.ua" to the Media Law Institute of 11.04.2016, No. 20160411-1.

⁵³ The Internet Association of Ukraine is a voluntary non-profit, non-governmental union of legal entities whose activity is connected with functioning of services market in Internet. Its members are obliged to keep to the Charter and other documents of the Association and to execute decisions of its bodies. Otherwise, they can face negative consequences (up to the exclusion from the association or union).

⁵⁴ Letter of the Department of Counterintelligence Security of State's Interests in the Information Security Sphere of the Security Service of Ukraine to the Head of the Internet Association of Ukraine of 16.07.2014, No. 30/2/2-8125, <http://www.telekritika.ua/kontekst/2014-08-04/96601>.

Ukraine considered the conclusions of National Expert Commission on Protection of Public Morals,⁵⁵ according to which all these resources (approx. 60 web-sites) propagandized war, terrorism and national hate.⁵⁶ It is noteworthy that resources, registered abroad, were among these web-sites. Most of state bodies recognize impossibility of restriction of illegal content that is contained on servers placed outside the Ukrainian jurisdiction. That is why the regulation of information's dissemination that they contain is a serious problem for Ukraine. In this case, the Internet Association of Ukraine disagreed that the conclusions of National Expert Commission on Protection of Public Morals were an appropriate legal basis of such request.⁵⁷ From the Association's point of view it had to be grounded on a court's decision because the Association itself does not have powers to decide which web-sites violate the law and which do not. There is no single position on this situation among lawyers.⁵⁸ Some of them consider that the Association's position was correct because the Security Service of Ukraine did not have right to demand from the Association to limit the access to the mentioned web-sites. Other experts consider that the Security Service of Ukraine did not demand, but informed the Internet Association about the illegality of information that passes through some of its members-providers. At the same time, all of them agree with the opinion that in Ukraine there is no other mechanism of influence on persons that disseminate illegal Internet content, except opening criminal proceedings and bringing them to criminal liability.

2.1.4. Defamation

The Civil Code of Ukraine enshrines that the individual whose personal non-property rights were violated as a consequence of dissemination of unreliable information about him/her or members of his/her family has a right on a reply as well as on contradiction of such information (par. 1 Art. 277). Contradiction of unreliable information is exercised by the person that disseminated it (for example, if it was printed in the newspaper, such newspaper has to publish contradiction of such information). In case such a person that disseminated unreliable information is unknown, the individual whose rights were violated can fill a petition to the court and ask it to establish the fact that such information is unreliable and to ask its contradiction (par. 4 Art. 277 Civil Code of Ukraine).

According to the par. 7 of the Resolution of the Plenum of the Supreme Court of Ukraine⁵⁹ "On judicial practice in cases on protection of dignity and honour of an individual as well as business

⁵⁵ National Expert Commission on Protection of Public Morals was a state body that, among other, was empowered to control compliance with legislation of Ukraine in the sphere of public morals' protection. Its decisions were obligatory for consideration by central and local authorities, mass media as well as for individuals and legal entities. But, in fact, this body imposed censorship. That is why Verkhovna Rada of Ukraine adopted the Law "On amending the Law "On Public Morals' Protection" (the Law of 10.02.2015 № 173-VII, Vidomosty Verkhovnoi Rady, 2015, № 16, Art. 106, <http://zakon2.rada.gov.ua/laws/show/173-19>) that cancelled all powers of the Commission on state control. Afterwards Cabinet of Ministers of Ukraine adopted a Regulation "On liquidation of National Expert Commission on Protection of Public Morals" (Regulation of 27.05.2015 № 333, <http://www.kmu.gov.ua/control/uk/cardnpd?docid=248200589>). Today this Commission is liquidated.

⁵⁶ <http://www.telekritika.ua/kontekst/2014-08-04/96601>.

⁵⁷ <http://www.inau.org.ua/52.2801.0.0.1.0.phtml>.

⁵⁸ <http://www.telekritika.ua/pravo/2014-08-08/96777>.

⁵⁹ Resolutions of Supreme Court of Ukraine as well as of Informative and Review letters High Courts of Ukraine are documents with case-law analysis. Although they have advisory nature, courts strictly adhere to these provisions in their work. These documents contain guiding principles that courts have to use when deciding on cases. They are alike to principles that are developed in decisions of the European Court of Human Rights and that have to be applied in other cases.

reputation of individual and legal entity”,⁶⁰ all cases, connected with protection of honour, dignity and business reputation have to be reviewed in the frame of civil proceedings, except cases on protection of business reputation between legal entities and other subjects of economic activity in the sphere of economic activity. The last are reviewed in the frame of economic proceedings.

Par. 12 of this Resolution foresees that the author of relevant information material together with the web-site’s owner are proper defendants in cases on disputable information’s dissemination in the Internet. If the author of disseminated information is unknown or it is impossible to identify him/her and/or his/her place of living (location) as well as if information is anonymous and access to the web-site is free, the proper defendant shall be recognized as the owner of the web-site, where such material is placed, because he/she/it created the technologic possibility and conditions for unreliable information’s dissemination. Data about web-site’s owners can be demanded from the administrator of Ukrainian segment of Internet domain names’ registration and accounting system, according to the rules of the Civil Procedural Code of Ukraine.⁶¹

A similar position is fixed in the Informative letter “On certain questions on practice of implementation of legislation on information by economic courts”⁶² and Review Letter “On certain questions on practice of implementation of legislation on information by economic courts (on the basis of cases, heard by High Economic Court of Ukraine)”⁶³ of the High Economic Court of Ukraine. The Court stated that a person, whose rights and lawful interests were violated by dissemination of information, posted in the Internet in the form available for public review, can fill a suit against the web-site’s owner. If such information is recognized by the court as unreliable, it has to be contradicted on the same web-site, according to the court’s judgment in the order, prescribed by the Law “On Printed Mass Media (Press) in Ukraine”. If such information is not disseminated by the owner of the web-site with free access, but anonymously, the web-site’s owner is liable for such dissemination and for the damage of business reputation of the subject of economic activity, connected with such dissemination, because he/she/it created technological possibilities for information’s dissemination (par. 13 of the Information Letter of 28, March, 2007).

In 2012 the State’s Automobile Inspectorate officer filled a suit against the owner of the web-site “Roads control” (“Dorognyy kontrol”⁶⁴) on protection of honour, dignity and business reputation. According to the plaintiff, the web-site contained a video of the conflict that happened between him and the defendant on the road and together with comments to this video violated his rights.⁶⁵ The Desnyansky District court of Kyiv ordered the hosting provider LLC “Internet Invest” to suspend

⁶⁰ Resolution of the Plenum of Supreme Court of Ukraine “On judicial practice in cases on protection of dignity and honour of an individual as well as business reputation of individual and legal entity” of 27, February, 2009 No. 1, http://zakon4.rada.gov.ua/laws/show/v_001700-09.

⁶¹ Civil Procedural Code of Ukraine of 18.03.2004 № 1618-IV, Vidomosty Verkhovnoi Rady of Ukraine, 2004, № 40-41, 42, Art.492, <http://zakon4.rada.gov.ua/laws/show/1618-15/paran95#n95>.

⁶² Informative letter of High Economic Court of Ukraine “On certain questions on practice of implementation of legislation on information by economic courts” of 28, March, 2007 No. 01-8/184, http://zakon5.rada.gov.ua/laws/show/v_184600-07.

⁶³ Review Letter of High Economic Court of Ukraine “On certain questions on practice of implementation of legislation on information by economic courts (on the basis of cases, heard by High Economic Court of Ukraine)” of 12, June, 2014 No. 01-06/770/2014, <http://zakon2.rada.gov.ua/laws/show/v-770600-14>.

⁶⁴ <http://roadcontrol.org.ua/>.

⁶⁵ <http://tyzhden.ua/News/42345>

temporarily the activity of this web-site.⁶⁶ But six days later the same court cancelled this decision and ordered the hosting provider to renew the provision of hosting services.⁶⁷

2.1.5. Intermediary Liability

Providers are not liable for the content of information that is transferred through their networks (par. 4 Art. 40 Law “On Telecommunications”). Along with that, they are responsible for unreasonable switch off end user equipment. In such case they shall remunerate the sum, equal to transmission fee for the total period of switch off (point 3 par. 1 Art. 40 Law “On Telecommunications”).

According to point 8 part 1 Art. 38 of the Law “On Telecommunications”, the provider has the right to switch off end user equipment under the court’s decision if the subscriber uses it for illegal actions’ commitment or actions that threat interests of state security. Par. 18 part 1 Art. 39 of this Law foresees that under the court’s decision the provider is obliged to limit access of its subscribers to the resources through which children’s pornography is disseminated. Thus, only court’s decision may be the lawful ground for limitation of access to certain on-line resources by Providers.

Except that, Internet Access Providers may be liable for failure to execute decision of the court.⁶⁸

2.1. Take-down/removal of illegal Internet content

2.2.1. General Legal Framework

In Ukraine Internet content can be taken down/removed on grounds, prescribed by the Law. In general, they are the same grounds described in subsection 2.1.

Except that, categories of Internet content that have to be taken down/removed are pointed out in Editorial Policy Rules, Rules of Users’ Conduct, Confidentiality Policy, developed by the web-site’s owner or administrator and put on a web-site.

For example, in the Rules of Professional On-line Media Community⁶⁹ representatives of the Internet and media-community agreed that professional media is obliged to develop, adopt and post on its own web-site its Editorial Policy Rules as well as Rules of Users’ Conduct (par. 3.3.1). Such Editorial Policy Rules have to include a number of professional standards, particularly:

- (1) on-line media have to provide web-site’s users with a right to post their own content;
- (2) on-line media have to inform web-site’s users about Rules of Users’ Conduct that are a part of Editorial Policy Rules;

⁶⁶ Order of Desnyansky District court of Kyiv of 10.02.2012 in case № 2-1346/12, <http://reyestr.court.gov.ua/Review/21537438>.

⁶⁷ Order of Desnyansky District court of Kyiv of 16.02.2012 in case № 2-1346/12, <http://reyestr.court.gov.ua/Review/21562282>.

⁶⁸ Art. 14 of Civil Procedural Code, Art. 298 of Code of Ukraine on Administrative Violations, Art. 115 of Economic Procedural Code, Art. 533 of Criminal Procedural Code.

⁶⁹ Rules of Professional On-line Media Community were adopted by voluntary union of professional on-line media (that was established with the aim of independent self-regulating of the sphere). It created independent self-regulation body – Informative initiative, which was responsible for examination of claims on content and acted during a year (up to 19, July 2012). Unfortunately there is no information on activity of Informative Initiative today. However mentioned Rules can be used by on-line media as an advisory document <http://www.inau.org.ua/162.1050.0.0.1.0.phtml>.

- (3) if an on-line media copied material from another web-site, it has to put a hyperlink according to the Editorial Policy Rules of a relevant source or directly under copied material;
- (4) professional on-line media expend efforts to prevent placement of the illegal content in its own content as well as in users' content;
- (5) editor's office shall have technical possibilities to accept and examine complaints on illegal content from its web-site users (par. 2.3, 2.5, 2.6, 3.3.1).

Ukraine web-sites, blogs, forums and other platforms usually contain Rules that warn their users about inadmissibility of posting threats, offences, defamation; prohibition of humiliation on interethnic, racial, religious grounds; demonstration of racism and xenophobia; propaganda of war, violence, cruelty; stirring up hatred; commitment of terroristic acts and so on. Violation of these rules can lead, in particular, to take down/removal of such illegal content and to user's ban.

2.2.2. Personal Data Protection

The area of personal data protection is regulated by the Code of Ukraine on Administrative Violations, the Laws "On Personal Data Protection", "On Ukrainian Parliament Commissioner for Human Rights",⁷⁰ the Regulation on maintaining of control on compliance with the legislation on personal data protection by Ukrainian Parliament Commissioner for Human Rights.⁷¹

Content disseminated illegally or without consent of a person has to be taken down. It can include information on the date and place of birth, health, place of living, personal mobile phone and so on (Art. 21 of the Law "On information").

The rights of individuals regarding their personal data are foreseen in Art. 8 of the abovementioned Law and include the right to fill a reasonable request to change or to destruct his/her personal data by any owner and administrator or personal data if such data is processed illegally or is unreliable; the right on protection of his/her personal data from illegal processing and unintentional loss, destruct, damage in connection with their intended hiding, failure to provide or their delayed provision as well as for protection from providing with data that is unreliable or discredit honor, dignity and business reputation of individual; right to file claims on personal data processing to the Ukrainian Parliament Commissioner for Human Rights or to the court (points 6-8).

The Law "On Personal Data Protection" determines that personal data shall be taken down/removed in case of expiration of the term of their storage; termination of relations between subject of personal data and owner or administrator, if otherwise is not prescribed by the law; delivering of relevant note by Commissioner or authorized by him/her officers of his/her Secretariat; entering into force of judicial decision on personal data take down/removal. Such data has to be taken down/removed if it was collected with violations of the Law "On Personal Data Protection". It is important to mention that personal data, collected during operative-investigative or intelligence activity, counter-terrorism is taken down/removed according to the Law⁷² (Art. 15).

⁷⁰ Law of Ukraine "On Ukrainian Parliament Commissioner for Human Rights" of 23.12.1997 № 776/97-BP, Vidomosty Verkhovnoi Rady of Ukraine, 1998, № 20, Art.99, <http://zakon2.rada.gov.ua/laws/show/776/97-%D0%B2%D1%80>.

⁷¹ Regulation on maintaining of control on compliance with the legislation on personal data protection by Ukrainian Parliament Commissioner for Human Rights, adopted by Ukrainian Parliament Commissioner for Human Rights of 08, January, 2014 No. 1/02-14, http://zakon2.rada.gov.ua/laws/show/v1_02715-14#n92.

⁷² Such Laws, as "On Operative-Investigating Activity" (of 18.02.1992, № 2135-XII, Vidomosty Verkhovnoi Rady of Ukraine, 1992, № 22, Art. 303, <http://zakon4.rada.gov.ua/laws/show/2135-12>), "On Counterintelligence Activity" (of 26.12.2002, № 374-IV, Vidomosty Verkhovnoi Rady of Ukraine, 2003,

Restrictions on requirements to processing of personal data (common and specific) as well as on individual's rights can be applied only in cases, foreseen by the law, as needed in a democratic society in the interests of national security, economic prosperity or protection of rights and freedoms of subjects of personal data or other persons. Personal data processing without application of rules of the Law "On Personal Data Protection" is allowed in case it is maintained by individual exclusively for his/her personal or daily needs; or if it is necessary exclusively for journalistic and artistic aims on condition of providing balance between the right to respect of private life and the right to freedom of expression (Art. 25 of the Law "On Personal Data Protection").

Liability for violation of the legislation on personal data protection is prescribed by the Code of Ukraine on Administrative Violations (Art. 188-39). The control on the compliance with the legislation on personal data protection is maintained by the Ukrainian Parliament Commissioner for Human Rights and by the courts (Art. 22 of the Law "On Personal Data Protection").

The Ukrainian Parliament Commissioner for Human Rights has the right to receive proposals, claims and other petitions of individuals and legal entities on questions regarding personal data protection and decide on them; to maintain examinations of personal data owners or administrators in the order, adopted by the Commissioner on the basis of petitions or by its own initiative. If the violation was exposed (after examination of such claims or after of own Commissioner's examination) he/she has the right to deliver requests (orders) on prevention or elimination of violations of the legislation on personal data protection, including on personal data change, take down or destruction, providing access to it, providing third persons with them or forbiddance of such provision, termination or stoppage of their processing. Such requests (orders) are obligatory for execution. Otherwise, the Commissioner shall compose and deliver act on bringing to the administrative liability of the offender and to file it to the court (points 1, 2, 5, 10 par. 1 Art. 23 of the Law "On Personal Data Protection"). The offender is liable for non-execution of lawful requests of the Ukrainian Parliament Commissioner for Human Rights or his/her representatives – the court can decide that such civil servants and individual entrepreneurs shall pay a fine (Art. 188-40 of the Code of Ukraine on Administrative Violations).

In 2015, the Ukrainian Parliament Commissioner for Human Rights filed a request to the Security Service of Ukraine. She stated that there was a disclosure of personal data of more than 6 000 (six thousands) of individuals, who filed documents to obtain permissions to Sectors "A", "C"⁷³ (information about their names and dates of birth). This information was posted in the Internet as of 2, April, 2015. The Commissioner stated that such publication violated legislation on personal data protection and requested the Security Service of Ukraine to inform on the grounds of such dissemination, as well as to take the necessary steps on due protection of personal data.⁷⁴ Unfortunately there is no information in free access on the response of the Security Service of Ukraine.

2.2.3. Defamation

In 2011 the Voroshylovsky district court of Donetsk delivered a judgment by default in a case regarding disputable publications on several web-sites. Posted materials concerned illegal activity of a MP. The last filled a suit against the owners of the web-sites and to the author of the publication. He asked the court to recognize that a number of article's extracts humiliated his honour and dignity

№ 12, Art.89, <http://zakon4.rada.gov.ua/laws/show/374-15/parao28#o28>, "On Combatting Terrorism".

⁷³ Sectors, through which it is permitted to cross the border to Donetsk and Lugansk regions.

⁷⁴ <http://www.ombudsman.gov.ua/ua/all-news/pr/7415-zj-valeriya-lutkovska-zvernulasya-iz-zapitom-dogolovi-sbu-schodo-oprilyu/>.

as well as to contradict such information and to remove it from these web-sites. The court, following the arguments made by the plaintiff, recognized that the disputable article's extracts humiliated the MP's honour and dignity and obliged the defendants to contradict this information as well as to remove it from their web-sites. The court put in its decision not only a date and name of publication, but also concrete web-link, where the article was posted.⁷⁵

It occurred that a disputable article was posted under another web-link during the execution of this decision. The officer of the state enforcement agency asked the court to explain if the judgment covered the article in question that was situated under another web-link. But the court rejected to satisfy this petition.⁷⁶ Today the situation is the same: one of the web-sites still contains disputable material, removed on the other web-link.

Another case is connected with unreliable information regarding pharmaceutical drugs produced by PJSC "Pharmak". According to the plaintiff, this information was disseminated in several ways: in the letter to the Director of European Bank for Reconstruction and Development; in the newspaper; in videos that were shown on the First National Television Channel and posted in the Internet (on Youtube). The plaintiff asked to recognize such information as unreliable, to contradict it and to oblige LLC "Google" to take down videos from the Internet. Though courts of appeal and cassation instances recognized the information in question as unreliable and obliged to contradict it, they refused to satisfy the plaintiff's demands regarding the take-down of videos' from the Internet because the he did not prove that LLC "Google" was the owner of the web-site where disputable information was posted. Consequently, there were no reasons to satisfy a suit in this part.⁷⁷ These videos are still available for viewing on the Youtube.

Along with that, if the defendant is properly pointed out and information is recognized as unreliable, the court can oblige the defendant to take it down. Relevant decision was delivered in the case, connected with posting of two articles on pharmaceutical drugs of the company "Les Laboratoires Servier" on the web-site of non-governmental organization "Union of Consumers of Medical Services, Pharmaceutical Drugs and Products for Medical Use". Courts recognized that information contained in these articles was unreliable, obliged to take it down from defendant's web-site and to contradict it.⁷⁸ NGO executed these judgments and the disputable articles were removed.

2.2.4. Liability of Internet Host Providers

Liability of Internet Host Providers in implementation of measures on take down/removal of illegal Internet content is not specified in Ukrainian legislation. They can be held liable only if they received a relevant request (order) from Ukrainian Parliament Commissioner for Human Rights or his/her representatives and did not execute it⁷⁹ or if they failed to execute a court decision.⁸⁰

⁷⁵ Judgment by default of Voroshylovsky district court of Donetsk of 01.08.2011 in case № 2-2538/11, <http://reyestr.court.gov.ua/Review/20125618>.

⁷⁶ Order of Voroshylovsky district court of Donetsk of 28.04.2012 in case № 2-2538/11, <http://reyestr.court.gov.ua/Review/24399499>.

⁷⁷ Decision of Kyiv Economic Court of Appeal of 14.11.2013 in case № 5011-22/10-2013, <http://reyestr.court.gov.ua/Review/35374307>.

⁷⁸ Decision of Kyiv Economic Court of Appeal of 29.10.2013 in case № 910/7062/13, <http://reyestr.court.gov.ua/Review/34500263>; Decision of High Economic Court of Ukraine of 18.02.2014 in case № 910/7062/13, <http://reyestr.court.gov.ua/Review/37320005>.

⁷⁹ Art. 188-40 of the Code of Ukraine on Administrative Violations.

⁸⁰ Art. 14 of Civil Procedural Code, Art. 298 of Code of Ukraine on Administrative Violations, Art. 115 of Economic Procedural Code, Art. 533 of Criminal Procedural Code.

2.2.5. Safeguards

The legislation of Ukraine does not empower any authority for blocking or filtering of Internet content. That is why it is possible to speak only about safeguards regarding their unlawful decisions (including those that lead to physical blocking of the content). In Ukraine a concerned person can appeal such decisions to the court. Along with that it is important to stress that such cases are not common practice in Ukraine.

As to the requirements for taking down/removal of illegal Internet content, according to Ukrainian legislation, order for such actions has to be based on court's judgment that had entered into force or on request (order) of the Ukrainian Parliament Commissioner for Human Rights (in its turn, the last has to be grounded on the results of examination, testified by a relevant act). Safeguards include a right of the concerned person to appeal the relevant decision of authorized bodies to the court.

Taking into consideration abovementioned, it is not possible to assess whether the safeguards as to freedom of expression on issues of blocking and filtering of Internet content are fully respected. As a Contracting State to the European Convention of Human Rights, general safeguards on freedom of expression apply, including in the field of Internet.

3. Procedural Aspects

In Ukraine competent bodies for deciding on taking down of illegal Internet content can be administrative (Ukrainian Parliament Commissioner for Human Rights) as well as judiciary. Measures that lead to physical blocking of Internet content can be initiated by administrative bodies (internal affairs bodies, prosecution agencies, Security Service of Ukraine) but they have to be approved by the court. Implementation of decisions of these bodies differs and depends on the kind of proceedings in the frame of which they are delivered.

3.1. Measures on Search of a Housing or Other Dwellings, Temporary Seizure and Arrest of Property

According to the Criminal Procedural Code of Ukraine, officers of pre-trial bodies have the right to temporary access to electronic information systems or their parts, mobile terminals of communications systems by means of copying of information that they contain (without seizure of these systems, their parts or terminals). Temporary access is maintained on the basis of the decision of the investigating judge, the court (Art. 159). As such, these measures do not provide officers of pre-trial bodies with the possibility to block or filter illegal content. They only allow collecting evidences of its existence on the web-site during criminal proceedings.

Par. 2 of Art. 168 of this Code foresees that electronic information systems or their parts, mobile terminals of communications systems can be temporary seized during execution of search or examination⁸¹ procedures only if they are directly pointed out in the court's decision. Temporary seizure during execution of search procedures is one of the available measures to secure criminal proceedings. Usually it is necessary to determine the individuals that are guilty of dissemination of illegal information. But in this way, investigators create encumbrances for the activity of web-sites. The execution of search procedures and servers' seizure from the supposed offender has as effect the blocking of content, because they do not let it to be disseminated during the period of

⁸¹ Examination of a house or other dwelling is executed in the same way as search of a house or other dwelling (par. 2 Art. 237 of the Criminal Procedural Code of Ukraine).

investigation. The Criminal Procedural Code does not contain other more proportionate measures that would allow blocking of Internet content.

Thus, in criminal proceedings further procedural steps are usually persuaded to seize temporary or to arrest property (e.g. servers):

- (1) Investigator or prosecutor receives an application or a notice on commission of a crime offence and examine it. Together with that, investigator or prosecutor has the right to detect any obstacles that can evidence about commitment of a crime offence by himself/herself from any source. If evidences of a crime are detected, he/she has to initiate a criminal case.
- (2) not later than 24 hours after this investigator or prosecutor put data on the Unified Register of Prejudicial Inquires and starts investigation;
- (3) the investigator with agreement of a prosecutor or a prosecutor files a request on execution of a search procedures mentioning a certain property that shall be temporary seized or a request on arrest of a certain property to the investigating judge;
- (4) the investigating judge decides whether to satisfy such request or to reject it.

3.2. Measures on Taking Down of Internet Content

Procedural steps on taking down/removal of illegal Internet content mostly include:

- filling of a suit to the court with a request to oblige the defendants to take down illegal content (because nobody, except the web-site's owner can do it);
- delivering of a judgment on disputable content.

Such judicial proceedings can be quite lengthy. Some of them continue for more than a year and, usually, the content in question remains posted on the web-site during all this time.

A party that was obliged to take down/remove Internet content can implement the court's decision voluntary. Otherwise, after the judgment enters into force, the court issues an enforcement order and send it to the relevant enforcement agencies.

The Ukrainian Parliament Commissioner for Human Rights does not have the right to block illegal Internet content, but it is empowered to request it to be taken down. The Commissioner's competence in this regard include: conducting of examinations; drawing up examination acts on compliance with the legislation on personal data protection; delivering of orders on violations' elimination (including taking down or destruction of illegal content) (if violation in the sphere of personal data protection was exposed); delivering of acts on administrative offence (if order on violations' elimination was executed in time or in general) and filing them to the court; sending all necessary documents to law enforcement agencies if evidences of a crime were exposed during examination.

In the field of personal data protection procedural steps include:

- execution of examination of the content on compliance with the legislation on personal data protection;
- delivering of the request (order) on elimination of violations of the legislation on personal data protection, exposed during examination (particularly, on illegal content taking down) (in case a violation was exposed);
- if the offender did not execute the request (order) in time, the Ukrainian Parliament Commissioner for Human Rights or authorized person shall compose an act on administrative offence and file it to the court;
- delivering of a judgment by the court.

3.3. Measures on Delivering of an Order on Obligations

In civil and economic proceedings as well as in proceedings based on the Code of Ukraine on Administrative Violations there are no such measures of securing of a suit that would allow maintaining content's blocking effectively. The only measure that the court can apply to the defendant-owner of the web-site is delivering of an order on obligations of web-site's owner to undertake certain actions or withhold certain actions. But this legal remedy cannot be considered as effective because, in case of systematic illegal content posting on the web-site, it is necessary every time to fill a suit to the court on each particular illegal material. The court cannot deliver an order that would be interpreted as premature delivering of a judgment on merits. That is why, there is almost no case-law that leads to blocking of illegal content on grounds of court's order on interim measures' application in civil, economic proceedings and proceedings, based on the Code of Ukraine on Administrative Violations (according to the Unified State Register of Judicial Decisions).

3.3.1. Notification Requirements

The notification requirements of the decision to concerned individuals or parties are established in relevant procedural codes.

Thus, in the frame of criminal investigation, the concerned person⁸² is informed about court's order on execution of a search procedure as well as on temporary seizure of property (e.g. servers) only before these actions take place (usually on the day of such search). Before the search starts, the copy of the court's order is given to the concerned person. If there are no individuals in the place of execution of the search, a copy of the order has to be left in a prominent location. The concerned person (or his/her representative) shall be given a copy of protocol on property's (including servers) temporary seizure after the search.

Seized servers are not returned if investigating judge orders to arrest them (relevant order has to be delivered in 72 hours from the moment of reception of the investigator's, prosecutor's submission by the court). Otherwise, such property has to be given back. Arrest can be cancelled during pre-trial proceedings (by investigating judge) or court proceedings (by the court) if a relevant submission was filled. Otherwise, further destiny of this property (servers) shall be determined when the sentence is delivered, where it is pointed out whether this property has to be returned, or confiscated. If the concerned person is found guilty, he/she as well as other participants of proceedings have the right to receive a copy of the decision of the court. The copy of the sentence is given to the accused person, to the representative of legal person on which proceedings are maintained and to the prosecutor immediately after its proclamation. A copy of judicial decision is sent to the participant of proceedings that was not present during the court session not later than the next day after its adoption (Art. 168-174, Art. 309, Art. 368, Art. 376 of Criminal Procedural Code of Ukraine).

In civil proceedings copies of complete judicial decision on merits are given to the persons that took part in the case immediately after its proclamation. They may include web-site's owner, author of disputable material, Internet Access and Host Providers. Copies of judicial decision with introduction clause and findings statements are given to persons that took part in the case and were present in the court session, in case of proclamation of decision's introduction clause and findings only. Copies of the whole judicial decision shall be sent by registered mail with returned receipt during two days since its composition or handed out against receipt directly in the court upon application of persons that took part in the case, but were not present in the court session. In some cases the copy of the judicial decision is sent to the state or municipal authorities or their officials (e.g. if they shall maintain certain actions for execution of the court's decision) (Art. 222 of Civil Procedural Code).

⁸²

In criminal proceedings concerned person include a person, suspected in commitment of a crime and a person that owns property with the help of which a crime is committed (e.g. owner of servers).

In proceedings, foreseen by the Code of Ukraine on Administrative Violations, court's judgment is proclaimed immediately after proceedings were completed. The copy of a judgment is given or is sent to a person concerned within the next three days (Art. 285 of the Code of Ukraine on Administrative Violations). The last may include a person that violated copyrights and/or related rights, as well as civil servant and individual entrepreneur that failed to execute a lawful request of the Ukrainian Parliament Commissioner for Human Rights or his/her representatives. If a victim requested a copy of such decision, it is sent to him/her during three days as well (Art. 285 of the Code of Ukraine on Administrative Violations). Victims may include persons whose copyrights and/or related rights were violated.

The Economic Procedural Code of Ukraine determines that the whole judgment as well as other decisions shall be sent to parties, prosecutor, third persons that took part in proceedings, but were not present during court session, by registered mail with returned receipt during three days since their composition or handed out against receipt directly in the court (Art. 87). Judgments of courts of appeal as well as cassation are sent to the parties during three days after their adoption (Art. 105, Art. 111-11 of Economic Procedural Code of Ukraine). Parties and third persons that took part in proceedings include a person to which copyrights and/or related rights on material in question belong, owner of the web-site, Internet Access and Host Providers.

The Supreme Court of Ukraine shall compose and send its judgment to persons that take part in the case no later than five days since it finished proceedings conduct (Art. 360-6 of Civil Procedural Code of Ukraine, Art. 111-27 of Economic Procedural Code of Ukraine, Art. 297-10 of Code of Ukraine on Administrative Violations, Art. 457 of Criminal Procedure Code of Ukraine).

The Ukrainian Parliament Commissioner for Human Rights or an authorized person notifies concerned individuals on the request (order) on elimination of violations of the legislation on personal data protection, exposed during examination no later than five working days since the day of examination act composition and sends to the subject of the examination or authorized by him/her person by registered mail with returned receipt.⁸³

3.3.2. Safeguards and Legal Remedies

In cases that concern execution of a search, safeguards include the right of a person, suspected in committing crime, and the owner of temporary seized/arrested property (if they are different) to appeal the decisions, actions or omission of actions of investigators, prosecutors⁸⁴ to the court. In their claims these persons can complain that their right to freedom of expression, as well as the right to protection of property was violated.

As to cases on taking down Internet content, a person that considers that such decision violated his/her right to freedom of expression has a right to appeal such a decision to the court to obtain its review.⁸⁵

Legal remedies for appealing of abovementioned decisions are foreseen in relevant procedural codes (Art. 3, Art. 13 of Civil Procedural Code of Ukraine, Art. 7, Art. 269, Art. 287 of Code of Ukraine on

⁸³ Point 5.12 of the Regulation on maintaining of control on compliance with the legislation on personal data protection by Ukrainian Parliament Commissioner for Human Rights.

⁸⁴ E.g. omission of actions include a case, when the investigator or prosecutor did not file a request on arrest of temporary seized property to the investigating judge (to the court) on the next work day after seizure and did not return such property to the owner.

⁸⁵ Legal grounds are the same as for appealing decisions, actions or omission of actions, connected with temporary seizure/arrest of property.

Administrative Violations, Art. 24 of Criminal Procedural Code of Ukraine, Art. 43-8, Art. 91, Art. 107, Art. 121-2 of Economic Procedural Code of Ukraine)⁸⁶ and specific Laws of Ukraine (“On Security Service of Ukraine”,⁸⁷ “On Public Prosecution Service of Ukraine”, “On militia”,⁸⁸ “On National Police”).⁸⁹

4. General Monitoring of Internet

There are several entities in charge of monitoring Internet content in Ukraine. According to the Ukrainian legislation such activity is maintained by the Department for Combating Cybercrimes of the Ministry of Internal Affairs of Ukraine, by the Security Service of Ukraine and in the sphere of personal data by the Ukrainian Parliament Commissioner for Human Rights.

According to the Regulation on Department for Combating Cybercrimes of the Ministry of Internal Affairs of Ukraine, functions of this include taking measures that are foreseen by the legislation on gathering and consolidation of information regarding objects of operative interest, particularly objects of telecommunication sphere, Internet services, bank institutions and payment systems with the aim to prevent, expose and stop crimes that are in the competence of units for combating cybercrimes; taking measures on quick and full prevention, exposure and stoppage of crimes, according to the Department’s areas of activity (par. 3.3, par. 3.9 Chapter III). Along with that, the mentioned Regulation does not clearly establish relevant rights of the Department.

As for the competence of Security Service of Ukraine, it is broadly defined in the Law “On Security Service of Ukraine”. For example, it has to prevent, expose and detect crimes, investigation of which is in its competence, according to the legislation; to maintain their pre-trial investigation; to search persons that hide in connection with the commission of mentioned crimes (including offences against peace and human security and terrorism) (Art. 2, point 3 Art. 24 of the Law “On Security Service of Ukraine”).

The Ukrainian Parliament Commissioner for Human Rights has the right to monitor Internet with the aim to expose problems, connected with violations in the sphere of personal data protection.⁹⁰

The Commissioner uses the legislation on personal data protection (particularly in the provisions of the Law “On Personal Data Protection”) as criteria of Internet content assessment. In whole, these criteria are clear and do not raise a lot of difficulties or discussions on practice. The Department for Combating Cybercrimes of Ministry of Internal Affairs of Ukraine and Security Service of Ukraine use relevant legislative provisions (including Criminal Code of Ukraine, Laws “On Combating Terrorism”, “On Public Morals”, “On Principles of Prevention and Countering of Discrimination in Ukraine”, etc.)

⁸⁶ Economic Procedural Code of Ukraine of 06.11.1991 № 1798-XII, Vidomosty Verkhovnoi Rady of Ukraine, 1992, № 6, Art.56, <http://zakon4.rada.gov.ua/laws/show/1798-12>.

⁸⁷ Law of Ukraine “On Security Service of Ukraine” of 25.03.1992 № 2229-XII, Vidomosty Verkhovnoi Rady of Ukraine, 1992, № 27, Art.382, <http://zakon0.rada.gov.ua/laws/show/2229-12>.

⁸⁸ Law of Ukraine “On militia” of 20.12.1990, №565-XII, Vidomosty Verkhovnoi Rady of Ukrainian SSR,1991, № 4, Art. 20, <http://zakon2.rada.gov.ua/laws/show/565-12>. The Law will lose its force on 07, November, 2015.

⁸⁹ Law of Ukraine “On National Police” of 02.07.2015 № 580-VIII, <http://zakon2.rada.gov.ua/laws/show/580-19>. The Law will enter in force on 7 November 2015.

⁹⁰ Art. 23 of the Law “On Personal Data Protection”, Art. 16 of the Law “On Ukrainian Parliament Commissioner for Human Rights”, par. 4.1 Chapter IV of the Regulation on maintaining of control on compliance with the legislation on personal data protection by Ukrainian Parliament Commissioner for Human Rights.

that give definitions and determine components of such crimes as terrorism, cybercrime, children sexual exploitation and abuse, propaganda of war, racism, religious intolerance and so on as criteria of Internet content assessment. Along with that, in some cases these criteria are too indistinct.

Some associations of Internet Access Providers as well as non-governmental organizations also developed on-line tools and mechanisms to react to violations of legislation in the Internet. For instance, the Internet Association of Ukraine created a project “Skarga”⁹¹ that allows to inform this organization about illegal information in Ukrainian web space. Another example is the on-line “hot line”⁹² on countering children’s pornography in Internet, created by the International Women’s Rights Center “La Strada Ukraine” (today it is administrated by Kharkiv National University of Internal Affairs). If a user finds some abusive content that deals with children’s pornography, children’s sex-tourism or cruel behavior with children in the Internet, he/she can send a request with the demand to block it. After such notice, the educational-training center of Kharkiv National University of Internal Affairs processes this information and transfers it to authorized departments of internal affairs bodies that have to check it.⁹³ If they find evidences of committed crime, they have to initiate a criminal case (more details in Section 3).

5. Assessment as to the case law of the European Court of Human Rights

As it was mentioned, there is no specific legislation on blocking, filtering and taking-down of illegal Internet content in Ukraine. However, it is possible to assess whether requirements of quality of the law, developed by the European Court of Human Rights, are met in cases, connected with protection of copyrights and related rights, violations in the spheres of national security and public morals, personal data protection and defamation cases.

In case “Sunday Times v. the United Kingdom”,⁹⁴ the European Court of Human Rights stated that the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. It noted that a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his/her conduct: the individual must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (par. 49). In “Rotaru v. Romania”⁹⁵ the Court stressed that a rule is “foreseeable” if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his/her conduct (par. 55).

⁹¹ <http://www.skarga.ua/>.

⁹² <http://internetbezpeka.org.ua/>.

⁹³ Countering crimes against rights of children that are committed with the help of Internet (Протидія злочинам проти прав дітей, які вчиняються за допомогою мережі Інтернет) // Newspaper of Kharkiv National University of Internal Affairs “We Serve to the Law” (газета Харківського національного університету внутрішніх справ “Служимо Закону”) // July, 2014, No. 21 (161), p. 2, http://univd.edu.ua/general/publication/newspaper/slyjimo_zakony_7_2014.pdf.

⁹⁴ Judgment of European Court of Human Rights in case “Sunday Times v. the United Kingdom” of 26.04.1979 (application No. 6538/74), <http://hudoc.echr.coe.int/eng?i=001-57584>.

⁹⁵ Judgment of European Court of Human Rights in case “Rotaru v. Romania” of 04.05.2000 (application No. 28341/95), <http://hudoc.echr.coe.int/eng?i=001-58586>.

5.1. Protection of Copyrights and Related Rights

The legislation of Ukraine in this sphere itself is foreseeable, accessible, clear and precise. It is published and can be accessed by any person, foresees clear grounds for holding a person liable for violation of copyrights and related rights. However, it does not provide authorized bodies with the right to block or to take down Internet content – it can only be physically blocked by seizure of servers during criminal investigation. However such measures cannot be considered as proportionate. Thus, a person that considers that his/her rights were violated by such decisions, actions or omission of actions can only file a suit on their appeal and complain that his/her right to freedom of expression (and in exceptional cases, the right to protection of property) was infringed.

5.2. Legislation in Spheres of National Security and Public Morals

Legal acts that regulate this area and determine the scope of competence of authorized bodies do not fully meet the requirements of the European Court regarding quality of law. These acts are accessible, but some of them are not always foreseeable, clear and precise. For example, definitions and rules of the Law “On Public Morals Protection” contain a lot of value judgments what gives grounds for broad interpretation of definitions, used in the Law (see page 8). The competences of the Department for Combating Cybercrimes of the Ministry of Internal Affairs of Ukraine as well as the Security Service of Ukraine are defined too broadly and provide them with the possibility to abuse powers and arbitrariness.

Physical blocking of Internet content often leads to violation of the right to freedom of expression and to the creation of encumbrances for web-sites’ activity, though its aim may be lawful and necessary. In addition, there is no clear legal basis for authorized bodies that would allow them to request to block web-sites or certain content. Safeguards for freedom of speech are the same as in cases connected with the sphere of copyrights and related rights. Taking into consideration the lack of quality of law in areas of national security and public morals, all this may lead to excess of power and excessive intervention in the freedom of speech.

5.3. Defamation Cases

As to defamation cases, civil and economic legislation establishes clear provisions on grounds on which a person can file a suit to the court and establishes the right of the court to oblige web-site’s owner to take down Internet content, but it does not foresee any effective measures on its blocking. The Civil and Economic Codes are published and can be accessed by any person. However, the order of judgments’ execution can cause difficulties as in the case of the MP’s request to remove disputable information from web-sites (when such information was transferred into another web-link on the same site and remains posted there today). Thus, Ukrainian legislation in this sphere partly meets requirements of the Court on quality of the law.

5.4. Personal Data Protection

In whole, Ukrainian legislation in the sphere of personal data protection is foreseeable, accessible, clear and precise. It is published and can be accessed by any person, foresees clear grounds and mechanism for taking down of illegal Internet content, liability of offender, authorized bodies, safeguards for freedom of expression, etc. Implementation of legal acts in this area does not raise a lot of difficulties or discussions on practice.

5.4.1. Self-regulatory Frameworks

In Ukraine Internet belongs is one of the spheres where there is voluntary self-regulation. There are several documents aimed at the regulation of relations, connected with Internet as well as with on-

line media.⁹⁶ Though, they are adopted by representatives of associations and unions of providers, by representatives of society, professional civic organizations and some of them also include state authorities and participants of service programs' market in Ukraine, these documents do not foresee any effective safeguards for protection of freedom of expression.

5.4.2. Safeguards and Implementation of Legal Requirements

In 2011 in the case "Editorial Board of Pravoye Delo and Shtekel v. Ukraine"⁹⁷ the European Court of Human Rights concluded that the requirement of lawfulness contained in the second paragraph of Article 10 of the Convention was not met, because there was a lack of adequate safeguards in the domestic law for journalists using information obtained from the Internet (par. 66).

National legislation still does not always determine adequate safeguards in the field of Internet activity. Moreover, there is a lack of safeguards that would prevent abuse of power and arbitrariness in questions connected with blocking and taking-down of illegal Internet content.

In such cases only general safeguards for protection of human rights are applied. They are enshrined in the Constitution of Ukraine, Civil Code of Ukraine, Civil Procedural Code of Ukraine, Criminal Procedural Code of Ukraine, Code of Ukraine on Administrative Violations, Laws of Ukraine "On Information", "On Access to Public Information", "On Printed Mass Media (Press) of Ukraine", "On Television and Radio Broadcasting", "On Informational Agencies", "On Copyright and Related Rights" and include guarantees of the right to freedom of thought, speech and expression, right to privacy protection, freedom of belief and religion, etc.

Legal requirements, notably with regard to the assessment of necessity and proportionality of the interference with Freedom of Expression, are implemented in practice only in the field of illegal Internet content taking down, particularly in the sphere of personal data protection. And relevant national case-law is not always in line with the pertinent case-law of the European Court of Human Rights (e.g. case "Editorial Board of Pravoye Delo and Shtekel v. Ukraine").

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30.09.2015

Revised on 13.04.2016 taking into consideration comments from Ukraine on this report

⁹⁶ Memorandum on protection of minors during software service provision, Rules of Professional On-line Media Community etc.

⁹⁷ Judgment of European Court of Human Rights in case "Editorial Board of Pravoye Delo and Shtekel v. Ukraine" of 05.05.2011 (application No. 33014/05), <http://hudoc.echr.coe.int/eng?i=001-104685>.