

Legal and organizational problems on identification of persons in activities of the State Border Guard Service of Ukraine

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Abstract

The article deals with the identification of foreigners and stateless persons, problems of legal regulation of relations of the State Border Guard Service of Ukraine on collecting biometric data of persons, types of data subject to collection, processing, storage and administration. The problems existing in the mechanisms of collecting biometric data of foreigners and stateless persons, as well as issues of personal data protection are considered. An attempt was made to suggest changes to laws and regulations in the field of migration and border protection on the basis of empirical data. The goal is to investigate the mechanism of identification of foreigners and stateless persons during border control procedures at border crossing points (checkpoints) and at entry-exit checkpoints, as well as during administrative proceedings and to identify ways to improve the legal regulation of these procedures in the activities of the State Border Guard Service of Ukraine. The methods used in the research were the analysis and comparison of national legislation with the legislation of the European Union Member States and the Council of Europe (including the case law of the European Court of Human Rights) on biometric data. The questionnaire survey method enabled to obtain objective information about the border guards' awareness of personal data. The forecasting method was used to formulate proposals for amendments to the legislation to improve the organization of work processes in the activities of the State Border Guard Service of Ukraine when using IT systems. The research will enable to improve the procedure for collecting biometric data of foreigners and stateless persons by border guards, strengthen the capacity of the State Border Guard Service of Ukraine to combat illegal migration.

Keywords: *State Border Guard Service of Ukraine, foreigners, stateless persons, data bases, fingerprinting, biometric systems, identification.*

JEL Classification: K23, K37

1. Introduction

One of the conditions for reliable protection of the state border of any modern state is the implementation of border control procedures. The key principle

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of such activities for travellers is to be granted or denied permission for crossing the state border. If its internal content is considered, then these are complex procedures and systems that must meet the latest information, technological and migration requirements and needs, be modern and reliable. Their main purpose is to provide identification of a person according to a set of features, which allows to cross the state border on legal grounds, to counteract the illegal movement of persons across the state border, illegal migration, human trafficking, etc.

The implementation of tasks on ensuring the inviolability of the state border and protection of the sovereign rights of Ukraine in its exclusive (maritime) economic zone is allotted to the State Border Guard Service of Ukraine⁴. Execution of functions by the State Border Guard Service of Ukraine provides for the identification of persons in other cases than border control procedures, in particular: during compulsory deportation; readmission; illegal crossing of the state border by persons outside the border crossing points of Ukraine; during the detention of persons for violation of the rules of border legislation and in other cases.

Today, the technological and information breakthrough allows to expand the means and methods for identification of persons in addition to the classic travel documents, which, in principle, can be forged, the biometric data and relevant information systems are used. Ukrainian legislation introduces the procedure for identification of persons taking into account the practice of the European Union and considering national peculiarities and capabilities at the same time. Nowadays, the list of biometric data is mainly reduced to fingerprints and digital photographs, although a much larger set of them is known in the world practice.

Expansion of opportunities for identification of persons in the activities of the State Border Guard Service of Ukraine requires coordination of mechanisms for their processing, storage and use, coordination of legislation with their practical implementation.

Thus, all the above-mentioned facts stipulate the need for scientific discussion and identification of some problematic issues that arise during the identification of persons in activities of the State Border Guard Service of Ukraine, development of proposals for its improvement under current conditions of modern information society, and generally indicate the topicality and novelty of the research topic.

2. The state of legal and regulatory framework for identification of foreigners and stateless persons

One of the key points in the activities of border guards during border control procedures of persons crossing the state border is to identify a person with the documents presented by him. The greatest challenge in this regard is to identify

⁴ On the State Border Guard Service of Ukraine. Law of Ukraine of 3 April 2003 No. 661-IV. *Bulletin of the Verkhovna Rada of Ukraine*. 2003. No. 27. Article 208. <https://zakon.rada.gov.ua/laws/show/661-15>, accessed 16 April 2020.

a person who is trying to cross the state border illegally without any documents or with forged documents. Due to development of the information society, detailing, clarifying the order, procedures and use of tools require modern doctrinal and legal analysis.

The legislation of Ukraine has long been designed to legitimize the procedures for collecting, using, storing and administering information about an identified person. According to paragraph 6 of Article 19 of the Law of Ukraine "On the State Border Guard Service of Ukraine", the responsibilities of the State Border Guard Service of Ukraine include collecting biometric data of foreigners and stateless persons during border control procedures at border crossings points and entry-exit check points. According to A. F. Mota, the active use of the term "identification" in Ukrainian migration legislation is associated with the conclusion of the Agreement between the European Community and Ukraine on the readmission of persons, the provisions of which on third-country nationals came into force in 2010⁵.

The main normative acts constituting the legal basis for identification are the Concept of Establishing the National System for Identification of Citizens of Ukraine, Foreigners and Stateless Persons⁶, the Regulations on the National System of Biometric Verification and Identification of Citizens of Ukraine, Foreigners and Stateless Persons⁷, the Regulations on the Unified Information System of the Ministry of Internal Affairs and the List of Its Priority Information Resources⁸.

In Ukraine, digitized fingerprints and digitized facial images are normatively determined as biometric data (parameters) (paragraph 1 of item 2)⁹. Most countries in the world stipulate that biometric data, in addition to the above mentioned, can be the person's quality of voice, iris, ear structure, IT facial recognition or DNA data collection. The results of the empirical study showed that those surveyed by us expressed their views on the understanding of information

⁵ Mota A.F. *Theory and Practice of Counteracting Illegal Migration by the Bodies of the State Border Guard Service of Ukraine: Administrative and Legal Aspect*. S.J.D thesis, Khmelnytskyi, 2019, p. 330, https://lpnu.ua/sites/default/files/dissertation/2019/13392/dysertaciya_na_zdobuttya_nauko_vo_go_stupenya_doktora_yurydychnyh_nauk_moty_a.f.pdf, accessed 16 April 2020.

⁶ On approval of the Concept of Establishing the National System for Identification of Citizens of Ukraine, Foreigners and Stateless Persons. Decree of the Cabinet of Ministers of Ukraine of 23 December 2015 No. 1428-r. *Official Bulletin of Ukraine*. 2016. No. 4. Article 245. <https://zakon.rada.gov.ua/laws/show/1428-2015-%D1%80>, accessed 16 April 2020.

⁷ On approval of the Regulations on the National System of Biometric Verification and Identification of Citizens of Ukraine, Foreigners and Stateless Persons. Decree of the Cabinet of Ministers of Ukraine of December 27, 2017 No. 1073. *Official Bulletin of Ukraine*. 2018. No. 4. Article 178. <https://zakon.rada.gov.ua/laws/show/1073-2017-%D0%BF>, accessed 16 April 2020.

⁸ On approval of the Regulations on the Unified Information System of the Ministry of Internal Affairs and the List of Its Priority Information Resources. Decree of the Cabinet of Ministers of Ukraine of 14 November 2018 No. 1024. *Official Bulletin of Ukraine*. <https://zakon.rada.gov.ua/laws/show/1024-2018-%D0%BF>, accessed 16 April 2020.

⁹ On approval of the Regulations on the National System of Biometric Verification and Identification of Citizens of Ukraine, Foreigners and Stateless Persons. Decree of the Cabinet of Ministers of Ukraine of 27 December 2017 No. 1073. *Official Bulletin of Ukraine*. 2018. No. 4. Article 178. <https://zakon.rada.gov.ua/laws/show/1073-2017-%D0%BF>, accessed 16 April 2020.

that can be attributed to personal data, in particular: information recorded in a passport or other document (77.1%), surname, name, date of birth (74.9%), telephone number, place of work (69.7%), information or a set of data about an identified individual (66.2%), marital status (59.3%), email address (55%), photograph (49.4%), position held (44.6%). However, the issue of recording biometric data as personal data of a person has not been revealed among respondents in the legal sense.

According to O. V. Nechyporenko and Ya. V. Korpan, “among the biometric methods that have become traditional, the most advanced is the recognition of a person by face. This method has a number of undeniable advantages over most others: it enables to carry out check at distance with a sufficiently high accuracy of recognition, allows secret check and requires only a video camera”¹⁰. Among the new methods of biometric identification, other researchers note the following: by facial thermogram, by DNA characteristics, by skin spectroscopy, by the shape of external ear, by the gait of a person; by individual anthropometric features of a person, by the level of skin salineness¹¹.

With regard to obtaining such biometric parameters as DNA, for example, in Estonia, the legislative level stipulates that the administrative procedure for giving a person’s consent to such collection begins with defining the will of a foreigner or a stateless person at the time of applying for a visa. A foreigner or a stateless person may refuse to have his or her DNA data collected, but this will mean refusing a visa. But in Estonia, the consent or refusal of a person to collect DNA data is no longer taken into account by the authorities. Pursuant to Article 275 of the Estonian Aliens Act, a foreigner who refuses to provide DNA samples may be coerced using physical force or means of restraint for the time required to collect DNA. Prior to the application of coercion, the foreigner is notified of the use of coercion¹².

In Estonia, there is a state register of DNA data, which maintenance is expensive, but justified from the standpoint of border security. However, DNA data collection is performed if a person cannot be identified using the other biometric data. Given the threats in the field of illegal migration, modern legislation in the field of collecting biometric data in Ukraine may also develop in the direction of creating and maintaining a DNA data bank.

However, the Commissioner for Human Rights of the Verkhovna Rada of Ukraine drew attention in the constitutional petition to the fact that the legislator

¹⁰ Nechyporenko O., Korpan Ya. *Biometric Identification and Authentication of a Person by Facial Geometry*. https://www.researchgate.net/publication/321423112_Biometricna_identifikacia_i_avtentyfikacia_osobi_za_geometriu_oblicca, accessed 16 April 2020.

¹¹ Koval L.H., Zlepko S.M., Novitskyi H.M., Krekoten Ye.H. *Methods and Technologies of Biometric Identification Based on the Results of Literary Sources*. Scholarly Notes of V.I. Vernadsky Taurida National University. Series: Technical Sciences. Vol. 30 (69). Part 1. No. 2. 2019, p. 110. http://www.tech.vernadskyjournals.in.ua/journals/2019/2_2019/part_1/19.pdf, accessed 16 April 2020.

¹² The Law of Estonia “On Foreigners” of December 09, 2009. <https://v1.juristaitab.ee/sites/www.juristaitab.ee/>, accessed 16 April 2020.

did not differentiate between cases of need to collect DNA samples depending on the severity and nature of the offence, did not specify under what circumstances DNA samples can be taken, the period and procedure for their storage, the procedure for destruction and access to such information of the person or his relatives. In accordance with Part 2 of Article 26 of the Law of Ukraine “On the National Police”,¹³ while entering information into databases (data banks) specified in paragraph 7 of Part 1 of this Article, the police provides collection, accumulation of multimedia information (photo, video, audio) and biometric data (fingerprint cards, DNA samples)¹⁴.

The State Border Guard Service of Ukraine has started collecting biometric data, namely fingerprints, partly in compliance with the requirements of the European Union. However, there are still some obstacles in this procedure. As noted by V. Romanov, I. Haleliuka, O. Haleliuka, collecting means the process of obtaining a biometric sample from a person who interacts with the biometric system to register or identify his personality¹⁵.

The Law of Ukraine “On the Legal Status of Foreigners and Stateless Persons”¹⁶ covers the issue of collecting biometric data in Articles 9, 14 and 30. Thus, Part 2 of Article 9 stipulates the obligation to collect biometric data at border crossing points when foreigners and stateless persons enter Ukraine.

Unlike the laws on the status of foreigners in the European Union member states, which have been part of the socialist camp before, the Ukrainian law does not fully regulate the issue of collecting biometric data; some legal relations are beyond its legal regulation at all. It is considered that the procedure for collecting biometric data should be determined by the Cabinet of Ministers of Ukraine, instead such an act is adopted by the Ministry of Internal Affairs of Ukraine¹⁷. It should be noted that this body is only one of the entities authorized to issue bylaws in accordance with the laws and acts of the government. Therefore, no provision in the Law of Ukraine “On the Legal Status of Foreigners and Stateless Persons”, which would provide which body is given the right to exercise authority to collect

¹³ On the National Police. Law of Ukraine of 02 July 2015 No. 580-VIII. *Bulletin of the Verkhovna Rada of Ukraine*. 2015. No. 40-41. Article 379. <https://zakon.rada.gov.ua/laws/show/580-19>, accessed 16 April 2020.

¹⁴ *Lutkovska Appealed to the Constitutional Court Due to the Right of the Police to Collect Biometric Data*. “Ukrainska Pravda”. 18 February 2017. <https://www.pravda.com.ua/news/2017/02/18/7135721/>, accessed 16 April 2020.

¹⁵ Romanov V., Haleliuka I., Haleliuka O. *On the Agenda — Biometric Identification in Ukraine*. “Svitohliad”. No. 6. 2010, p. 42-45. https://www.mao.kiev.ua/biblio/jscans/svitogliad/svit-2010-26-6/svit-2010-26-6-42-romanov_galelyuka.pdf, accessed 16 April 2020.

¹⁶ On the Legal Status of Foreigners and Stateless Persons. Law of Ukraine of 22 September 2011 No. 3773-VI. *Bulletin of the Verkhovna Rada of Ukraine*. 2012. No. 19-20. Article 179. <https://zakon.rada.gov.ua/laws/show/3773-17>, accessed 16 April 2020.

¹⁷ On approval of the Procedure for collecting biometric data of foreigners and stateless persons during border control at border crossing points (checkpoints) and at entry-exit checkpoints, as well as execution of proceedings in cases of administrative offences. Order of the Ministry of Internal Affairs of Ukraine dated 24 April 2019 No. 310. *Official Bulletin of Ukraine*. 2019. No. 42, Article 1473. <https://zakon.rada.gov.ua/laws/show/z0496-19>, accessed 16 April 2020.

biometric data, is a kind of gap in the law. After all, in accordance with paras 2, 10, 12 of part 1 of Article 92 of the Constitution of Ukraine, these relations must be regulated exclusively by law.

At the same time, Article 9 of the Law of Ukraine “On the Legal Status of Foreigners and Stateless Persons” defines the collection of biometric data as a common duty of all foreigners and stateless persons. However, this article does not specify whom this obligation is applied to, the range of persons required to provide biometric data, any exceptions to this rule. For example, it can be about people who are impossible to be identified by fingerprints due to their physiological peculiarities or the lack of limbs, etc. However, the bylaw stipulates that if a foreigner has biological features (injuries, birth defects, etc.) which make it impossible to collect biometric data, the border crossing procedures for these persons are carried out without collecting such data and a corresponding report is filed, which is approved by the chief of state border protection body¹⁸. Given that the flow of foreigners and stateless persons is quite intense, it has been decided to collect biometric data at border crossing points from travellers originating from countries of migration risk; these are seventy-one countries in total.

According to Article 6 of the Law of Ukraine “On Personal Data Protection”¹⁹ the purpose of personal data processing must be formulated in laws, other regulatory legal acts, regulations, constituent or other documents governing the activities of a personal data owner and comply with legislation on personal data protection. However, the Law of Ukraine “On the Legal Status of Foreigners and Stateless Persons” does not define such a purpose. For instance, it can be formulated as follows – to prevent illegal migration or as defined in the departmental act on the collection of biometric data. Namely, biometric data is collected in order to ensure national security, strengthen control over the entry into Ukraine, departure of foreigners from Ukraine, their compliance with the rules of stay in Ukraine²⁰. After all, the use of biometric tools simplifies the authentication procedure of a person, as well as increases the reliability of security systems²¹.

In paragraph 4 of the mentioned Order, it is stated that “the subjects of collecting biometric data are foreigners”. We consider that it would be correct to call foreigners and stateless persons as subjects of providing biometric data, and the subject of collecting biometric data is the State Border Guard Service represented by its authorized representatives.

¹⁸ *Ibid*, Section II, Art.4.

¹⁹ On Personal Data Protection. Law of Ukraine of 01 June 2010 No. 2297-VI. *Bulletin of the Verkhovna Rada of Ukraine*. 2010. No. 34. Article 481. <https://zakon.rada.gov.ua/laws/show/2297-17>, accessed 16 April 2020.

²⁰ On approval of the Procedure for collecting biometric data of foreigners and stateless persons during border control at border crossing points (checkpoints) and at entry-exit checkpoints, as well as execution of proceedings in cases of administrative offences. Order of the Ministry of Internal Affairs of Ukraine dated April 24, 2019 No. 310. *Official Bulletin of Ukraine*. 2019. No. 42, Article 1473. <https://zakon.rada.gov.ua/laws/show/z0496-19>, accessed 16 April 2020.

²¹ Moroz A.O. *Biometric Human Identification Technologies. System Overview*. “Mathematical machines and systems”. 2011. No. 1, pp. 39-45.

Article 8 of the Law of Ukraine “On Personal Data Protection”²² defines the rights of the personal data subject, in particular, in terms of processing his personal data, and Article 25 of the same Law states the exceptions to this rule are in the interests of national security, economic welfare or protection of the rights and freedoms of personal data subjects or other persons and others. Similar exceptions as to prohibition to process biometric data should be in the Law of Ukraine “On the Legal Status of Foreigners and Stateless Persons”. According to the survey, 97.4% of respondents replied “Yes” to the question “Is the consent of a personal data subject to the processing of his personal data required?”, and only 2.6% answered – “No”. Article 2 of the said law defines the forms of granting consent of a subject to the personal data processing. Respondents surveyed have defined that consent to the processing of personal data is given in writing (61.9%), in a form enabling to conclude on the consent (34.6%) and orally (3.5%), which generally corresponds to a certain level of their knowledge.

Similarly, to the legislation of the European Union, it is desirable to provide for cases in the Law of Ukraine “On the Legal Status of Foreigners and Stateless Persons” where the consent of a person to the processing of his personal data is not required. At the initiative of the government, a draft Law on Amendments to the Law of Ukraine “On the Legal Status of Foreigners and Stateless Persons” was submitted for foreigners and stateless persons to provide biometric data for visas No. 2478 of 21 November 2019, in which such an initiative has already been expressed, however, the draft has already been withdrawn in 2020.

In fact, the consent of a foreigner or a stateless person is not obtained in the case of detention of such a person under Article 204-1 of the Code of Administrative Offences (due to illegal crossing of the state border)²³ and his fingerprints are also taken, when the person is subject to compulsory deportation.

The official website of the State Border Guard Service of Ukraine reports that over the last 12 months (May 1, 2019 - April 30, 2020) more than 1,300 people were detained for attempting and crossing the state border illegally. More than 300 of them crossed the border unlawfully in order to get into Ukraine, the rest tried to leave our country illegally. Most violators were detained while trying to cross the border with Poland – 380 persons, with Slovakia – more than 300 persons, with Moldova – 230 persons, with Hungary – 120 persons, with Romania – more than 100 persons, and with Russia – 100 persons. Most detainees who crossed or tried to cross the border illegally were from Turkey, Moldova, Afghanistan, Bangladesh, Russia, Vietnam, Iraq, India, Sri Lanka, Pakistan, Armenia, Tajikistan, and Somalia. Most of them arrived in Ukraine legally, and later tried to enter the European Union illegally²⁴.

²² On Personal Data Protection. Law of Ukraine of 01 June 2010 No. 2297-VI. *Bulletin of the Verkhovna Rada of Ukraine*. 2010. No. 34. Article 481. <https://zakon.rada.gov.ua/laws/show/2297-17>, accessed 16 April 2020.

²³ Code of Ukraine on Administrative Offences. Law of 07 December 1984 No. 8073-X. *Bulletin of the Verkhovna Rada of Ukrainian SSR*. 1984. No. 51. Article 1122. <https://zakon.rada.gov.ua/laws/show/80731-10>, accessed 16 April 2020.

²⁴ 1,300 Irregular Migrants and More Than 22,000 Violators of Rules of Stay in Ukraine - Border Year in Numbers. *Official website of the State Border Guard Service of Ukraine*.

The Law of Ukraine “On the Legal Status of Foreigners and Stateless Persons” does not fully meet modern requirements and does not stipulate that biometric data must be collected if a person is brought to administrative responsibility. At the same time, the departmental act of the Ministry of Internal Affairs of Ukraine clearly stipulates that scanning of all fingers of both hands of foreigners detained administratively by state border guard bodies (units) takes place during administrative proceedings²⁵.

The Law does not provide for other cases of collecting biometric data in cases of detention of foreigners. In Part 3 of Article 14 of the law, biometric data is collected from those who are not allowed to enter Ukraine – “during detention, border guard bodies provide collecting fingerprints and, if necessary, other biometric data of foreigners and stateless persons according to the law”. It should be noted that the norm of this article clearly stipulates that collecting biometric data is carried out only in cases of detention of a person for illegal crossing of the state border. At the same time, a person is detained on other grounds, for example, for violating the rules of the border regime or the rules at the border crossing point and other. The law also does not provide for cases of data collecting, when a person is subject to the procedure of compulsory deportation or when there is a procedure of acceptance and transfer for a foreigner or a stateless person under a readmission agreement. According to A. F. Mota, identification procedures actually become conditions for compulsory deportation and readmission (acceptance and transfer of persons),²⁶ and he concludes that it is expedient to provide for conducting identification of foreigners and stateless persons as the authority of the state border guard bodies of Ukraine²⁷.

In Part 7 of Article 30 of the Law of Ukraine “On the Legal Status of Foreigners and Stateless Persons”, it is mentioned about collecting fingerprints of those who evade compulsory deportation (and if necessary, taking other biometric data in accordance with the law). The procedure of compulsory deportation is subject to double regulation, as it is simultaneously determined by the provisions of Article 30 of the Law of Ukraine “On Foreigners and Stateless Persons” and Article 289 of the Code of Administrative Procedure²⁸. This has implications for

<https://dpsu.gov.ua/ua/news/1300-nezakonnih-migrantiv-ta-ponad-22-tisyachi-porushnikiv-pravil-perebuvannya-v-Ukraini-prikordonniy-rik-u-cifrah/>, accessed 30 April 2020.

²⁵ On approval of the Procedure for collecting biometric data of foreigners and stateless persons during border control at border crossing points (checkpoints) and at entry-exit checkpoints, as well as execution of proceedings in cases of administrative offences. Order of the Ministry of Internal Affairs of Ukraine dated April 24, 2019 No. 310. *Official Bulletin of Ukraine*. 2019. No. 42, Article 1473. <https://zakon.rada.gov.ua/laws/show/z0496-19>, accessed 16 April 2020.

²⁶ Mota A. F. *Theory and Practice of Counteracting Illegal Migration by the Bodies of the State Border Guard Service of Ukraine: Administrative and Legal Aspect*. S.J.D. thesis. Khmelnytskyi, 2019. p. 53. https://lpnu.ua/sites/default/files/dissertation/2019/13392/dysertaciya_na_zdobuttya_naukovogo_stupenya_doktora_yurydychnyh_nauk_moty_a.f.pdf, accessed April 16, 2020.

²⁷ *Ibid*, p. 338.

²⁸ Code of Administrative Procedure. Law of 06 July 2005 No. 2747-IV. *Bulletin of the Verkhovna Rada of Ukraine*. 2005. No. 35-37. Article 446. <https://zakon.rada.gov.ua/laws/show/2747-15>, accessed 16 April 2020.

the different application of the legislation on collecting biometric data in the courts. For example, the court of first instance, considering the case on the possibility to detain a foreigner for the purpose of his identification and compulsory deportation, made a decision taking into account only the provided copy of the foreigner's passport. Instead, the court of second instance overturned the first-instance decision as premature, arguing that the expulsion procedure was not preceded by an identification procedure using a valid identity document of a foreigner or a stateless person. In fact, as soon as a person is identified, there are no grounds for his detention and he should be released. It is considered that the identification of foreigners and stateless persons with collecting of their personal data will regulate the procedures of forced return, compulsory deportation of foreigners and stateless persons with a clear definition of specific grounds for their use and delimitation in the law.

3. Recording biometric data in the departmental information system.

The issue of the period for storing recorded biometric data of a person is important for legal regulation. The departmental regulations state that the retention period of the recorded biometric data is seventy-five years²⁹. It is considered that the retention period should be due to the need for such storage. In particular, in cases *Aycaguer v. France* of 22 June 2017³⁰ and *Gaughran v. the United Kingdom*³¹, the position of the European Court of Human Rights is expressed. In the matter of ensuring a balance between public and private interests, the European Court of Human Rights proceeds from the position of strict observance of justice and reasonableness in the storage of personal information by state bodies. The cases concerned the storage of DNA profiles, fingerprints and photographs of applicants without reference to a serious crime or a need for indefinite storage, so the cases were resolved positively in the interests of the citizens.

Files and fingerprints are stored in the Eurodac system, which, through the cooperation of the Member States of the European Union, can in some cases facilitate the identification of those who have applied but not been granted asylum³². Since the establishment in 2003, Eurodac has only been used for the

²⁹ On approval of the Procedure for collecting biometric data of foreigners and stateless persons during border control at border crossing points (checkpoints) and at entry-exit checkpoints, as well as execution of proceedings in cases of administrative offences. Order of the Ministry of Internal Affairs of Ukraine dated 24 April 2019 No. 310. *Official Bulletin of Ukraine*. 2019. No. 42, Article 1473. <https://zakon.rada.gov.ua/laws/show/z0496-19>, accessed 16 April 2020.

³⁰ Case of *Aycaguer v. France* (Application no. 8806/12). Judgment (extracts). Strasbourg. 22 June 2017. Final. 22/09/2017. <http://hudoc.echr.coe.int/eng-press?i=003-5758394-7320005>, accessed 15 February 2020.

³¹ Case of *Gaughran v. the United Kingdom*. (*Application no. 45245/15*). Judgment. First Section. Strasbourg. 13 February 2020. <http://hudoc.echr.coe.int/eng-press?i=003-6638275-8815904>, accessed 15 February 2020.

³² Bilokon O.V., *Methods for Identification of a Foreign Citizen*. "Scientific Bulletin of the International Humanities University". Series: Jurisprudence. 2014. No. 9-2. Vol. 2, p. 54-56.

purposes of asylum: when someone applies for asylum³³.

Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data³⁴ provides that the purpose of national laws on the processing of personal data is primarily to protect the right to privacy recognized as Article 8 of the European Convention on Human Rights³⁵ and in the general principles of Community law.

The Prüm Agreement on strengthening international cooperation, especially in the fight against terrorism, international crime and illegal migration, was signed by several European Union countries on 27 May 2005. It concerns the exchange of Schengen Information System data with Member States' information systems (information on capillary lines, vehicles registration documents, cooperation on the return of migrants, combating illegal migration)³⁶. The Agreement, among other things, provides ... The Contracting Party administering the file may process the data supplied to it (...) solely where this is necessary for the purposes of comparison, providing automated replies to searches or recording... The supplied data shall be deleted immediately following data comparison or automated replies to searches unless further processing is necessary for the purposes mentioned above³⁷.

It is obvious to us that the period of storage of collected biometric data of a person should be reasonable and justified; it is advisable to start the procedure of reviewing the need for storage of biometric data of a person.

4. Legislation on IT technologies

Modern technological developments lead to an increase in the areas of e-government and provide for the use of IT systems in the activities of the State Border Guard Service of Ukraine. The functioning of the border guard agency has been supported for a long time by the Arkan system³⁸. This system is an integrated

http://www.vestnik-pravo.mgu.od.ua/archive/juspradenc9-2/part_2/18.pdf. Accessed 16 April 2020.

³³ EURODAC (EU asylum fingerprint database). The European Commission. Official website. https://ec.europa.eu/knowledge4policy/dataset/ds00008_en, accessed 16 April 2020.

³⁴ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. *Official Journal L 281*, 23/11/1995 P. 0031 – 0050. <http://data.europa.eu/eli/dir/1995/46/oj>, accessed 16 April 2020.

³⁵ Council of Europe. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. <https://www.refworld.org/docid/3ae6b3b04.html>, accessed 16 April 2020.

³⁶ Tsarenko S. I. *Administrative and Legal Regulation of Integrated Border Management in the Member States of the European Union*. «University Scientific Notes». 2011. No. 3 (39), p. 219-226. http://nbuv.gov.ua/UJRN/Unzap_2011_3_33, accessed 16 April 2020.

³⁷ Case of S. and Marper V., The United Kingdom. Grand Chamber judgment. (*Applications Nos 30562/04 and 30566/04*) Strasbourg. 4 December 2008. <http://hudoc.echr.coe.int/eng-press?i=003-2571936-2784147>, accessed 16 April 2020.

³⁸ On approval of the Regulations on the integrated interdepartmental information and telecommunication system concerning control of persons, vehicles and cargoes crossing the state

interdepartmental automated system for the exchange of information concerning the control of persons, vehicles and goods crossing the state border of Ukraine. However, the management of illegal migration involves the digitalization of many work processes in the future; according to researchers of identification methods – “it is impossible to imagine any workplace without personal computers”³⁹. Due to the informatization of activities, the border guard service gains the possible to continuously monitor the legal facts related to the stay of foreigners and stateless persons in the territory of Ukraine, for example, the facts of crossing the state border, violation of border legislation, readmission, voluntary return, etc.

According to the Concept of establishing a national system for identification of citizens of Ukraine, foreigners and stateless persons,⁴⁰ one of the main directions of the reform is the introduction of a system for reliable identification of persons and the establishment of their legal data: creation of electronic databases, which will collect data on citizens of Ukraine, foreigners and stateless persons. These databases will interact with each other and the information will be available to the responsible representatives of the State Border Guard Service of Ukraine.

Normative regulation of IT decision-making processes by representatives of the State Border Guard Service of Ukraine provides for the adoption of bylaws on the maintenance of electronic databases. First of all, it should be clarified that the Administration of the State Border Guard Service of Ukraine (as the central executive body) is the body responsible for the implementation of state policy in the field of the Ukrainian state border security and is the administrator of information in this area. As noted by I. P. Kushnir, “the term ‘information administrator’ means not a person entitled to administer this information, but the person who is in control of public information”⁴¹. Although in reality, today a certain collapse can be observed in the management system of the State Border Guard Service of Ukraine.

border. Order of Administration of the State Border Guard Service of Ukraine, State Customs Service of Ukraine, State Tax Administration of Ukraine, Ministry of Internal Affairs of Ukraine, Ministry of Foreign Affairs of Ukraine, Ministry of Labor and Social Policy of Ukraine, Security Service of Ukraine, Foreign Intelligence Service of Ukraine of 03 April 2008 No. 284/287/214/150/64/175/266/75. *Official Bulletin of Ukraine*. 2008. No. 37. Article 1249. <https://zakon.rada.gov.ua/laws/show/z0396-08>, accessed 16 April 2020.

³⁹ Bidiuk P., Bondarchuk V. *Modern Methods of Biometric Identification*. “Legal, regulatory and metrological support of the information protection system in Ukraine”. No. 1 (18). Issue 2009, pp. 137-146. <https://ela.kpi.ua/bitstream/123456789/9839/1/26.pdf>, accessed 16 April 2020.

⁴⁰ On approval of the Concept of Establishing the National System for Identification of Citizens of Ukraine, Foreigners and Stateless Persons. Decree of the Cabinet of Ministers of Ukraine of 23 December 2015 No. 1428-r. *Official Bulletin of Ukraine*. 2016. No. 4. Article 245. <https://zakon.rada.gov.ua/laws/show/1428-2015-%D1%80>, accessed 16 April 2020.

⁴¹ Kushnir I. P. *Types of Information Administered by the State Border Guard Service of Ukraine, Their Essential Characteristics*. “Bulletin of the National Academy of the State Border Guard Service of Ukraine”. Legal Sciences. 2018. Issue 1. http://nbuv.gov.ua/UJRN/vnadpcurn_2018_1_6, accessed 16 April 2020.

The Decree of the President of Ukraine of 24 December 2012 No. 726/2012 “On Some Measures to Optimize the System of Central Executive Bodies”⁴² amended the Decree of the President of Ukraine “On Optimization of the System of Central Executive Bodies” of 9 December 2010 No. 1085/2010⁴³, which transferred the function of management and coordination of the Administration of the State Border Guard Service of Ukraine from the Cabinet of Ministers of Ukraine to the Ministry of Internal Affairs of Ukraine.

As it is reasonably substantiated by I. F. Korzh, the mentioned act violates “a number of constitutional provisions regarding the delegation of the relevant functions of state and administrative management in the security and defence sector to another body”⁴⁴. Therefore, in our opinion, today it is a debatable issue: who is responsible for the implementation of state policy in the field of the state border security of Ukraine, and it needs clarification, as well as the legal status of the State Border Guard Service of Ukraine, as noted by I.F. Korzh in his research⁴⁵.

In this regard, it remains relevant to clarify whether it is legal that the Ministry of Internal Affairs of Ukraine of processes⁴⁶ data containing personal information of persons crossing the state border, apprehended persons whose administrative detention has been carried out by state border guard bodies that are coordinated by the Cabinet of Ministers through the Minister of Internal Affairs of Ukraine.

Contrary to our vision, in 2018 a resolution of the Cabinet of Ministers of Ukraine was adopted,⁴⁷ which defines the structure, general principles of functioning for the unified information system of the Ministry of Internal Affairs of Ukraine, the procedure for its formation and use. Among other things, it is regulated that the subjects of the unified information system of the Ministry of Internal Affairs of Ukraine are the staff of the Ministry of Internal Affairs of Ukraine and its territorial bodies for the provision of services by the Ministry of Internal Affairs of Ukraine, the National Guard, institutions, establishments and enterprises belonging to the sphere of management of the Ministry of Internal

⁴² On Some Measures to Optimize the System of Central Executive Bodies. The Decree of the President of Ukraine of 24 December 2012 No. 726/2012. *Official Bulletin of Ukraine*. 2012. No. 99. Article 3998. <https://zakon.rada.gov.ua/laws/show/726/2012#n22>, accessed 19 December 2019.

⁴³ On Some Measures to Optimize the System of Central Executive Bodies. The Decree of the President of Ukraine of 09 December 2010 No. 1085/2010. *Official Bulletin of Ukraine*. 2010. No. 32. Art. 1026.

⁴⁴ Korzh I.F. *State Border Guard Service of Ukraine: Legal Status and Place in the System of the Security and Defence Sector*. “Bulletin of the National Academy of the State Border Guard Service of Ukraine”. Legal Sciences. 2017. Issue 2, p. 8. http://nbuv.gov.ua/UJRN/vnadpcurn_2017_2_3, accessed 04 January 2020.

⁴⁵ *Ibid*, pp. 5-8.

⁴⁶ On approval of the Regulations on the Unified Information System of the Ministry of Internal Affairs and the List of Its Priority Information Resources. Decree of the Cabinet of Ministers of Ukraine of 14 November 2018 No. 1024. *Official Bulletin of Ukraine*. <https://zakon.rada.gov.ua/laws/show/1024-2018-%D0%BF>, accessed 16 April 2020.

⁴⁷ *Ibid*, Art. 15.

Affairs of Ukraine, central executive bodies, the activities of which are directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Internal Affairs, other state bodies that process information in the unified information system of the Ministry of Internal Affairs of Ukraine to exercise their powers.

So, such a central executive body is the Administration of the State Border Guard Service of Ukraine, which allegedly now undertakes to transfer all information on persons from departmental databases (from the departmental information system) to the Ministry of Internal Affairs of Ukraine. After all, the owner and administrator of the unified information system of the Ministry of Internal Affairs of Ukraine is the state represented by the Ministry of Internal Affairs of Ukraine; as well as the owner of the information processed in the central subsystem of the unified information system of the Ministry of Internal Affairs of Ukraine is the Ministry of Internal Affairs of Ukraine. We emphasize that this procedure was developed without taking into account the norms of border legislation⁴⁸.

With regard to those foreigners and stateless persons whose administrative detention was carried out by the state border guard bodies, the owner and administrator of the database system shall be the Administration of the State Border Guard Service of Ukraine only. Thus, all electronic databases belong to the State Border Guard Service of Ukraine as it is the owner and may transfer information from them in cases provided by law.

Despite the fact that the Cabinet of Ministers of Ukraine pursued the idea of creating a single information space for the system of the Ministry of Internal Affairs of Ukraine and central executive bodies, whose activities are directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Internal Affairs, we adhere to delimitation of ownership, administration and access to biometric databases between the above mentioned subjects of rule-making activities.

According to Article 8 of the Law of Ukraine “On the State Border Guard Service of Ukraine”,⁴⁹ the Head of the State Border Guard Service of Ukraine is personally responsible for the implementation of tasks, and therefore is responsible for the operation and maintenance of information systems operating in the agency. A large number of users of the information system creates more opportunities for information leakage, which can result in criminal use of information/its instant dissemination. After all, the human factor, despite the large number of preventive and protective measures, is crucial and therefore, guarantees for protection of personal biometric data from unauthorized access during their automatic processing are relevant in this case.

In addition to the establishment and use of electronic databases for

⁴⁸ *Ibid*, Art 25.

⁴⁹ On the State Border Guard Service of Ukraine. Law of Ukraine of 3 April 2003 No. 661-IV. *Bulletin of the Verkhovna Rada of Ukraine*. 2003. No. 27. Article 208. <https://zakon.rada.gov.ua/laws/show/661-15>, accessed 16 April 2020.

personal data, the issues of training and education of personnel responsible for entering information into the system by registering individual access (so-called responsible executors) are relevant. When we conducted the survey, 80.1% of respondents answered "yes" to the question: "Are you sufficiently informed about the list of personal data of subordinates that you do not have the right to disclose?", and 19.9% answered "no". This percentage of the latter indicator does not contribute to the protection of personal data, so it is necessary to intensify explanations for personnel on this issue and generally increase their information culture.

Digitization of databases in the future will allow to move away from paperwork, for example, from drawing up a paper report on an administrative offence, will introduce the concept of "electronic document" into circulation and unify and speed up identification of persons, which will improve the quality of border procedures.

5. Conclusions

Nowadays, the identification of a person at the state border is associated with the introduction of biometric data of a person into circulation. Legal regulation of collecting biometric data of foreigners and stateless persons is at the stage of formation and development. The results of the research indicate the need to amend and harmonize the provisions of relevant laws specifying the authority of state border guard bodies to perform identification of persons.

The obtained results of the research based on comparison of the national legislation with the legislation of the European Union enabled to predict the possibility to introduce an expanded list of person's biometric data for collecting in Ukraine. The importance of regulating the circumstances under which the data will be collected, determining the range of persons who are obliged to provide them, the possibility of refusal to provide them, the procedure for collecting these data, term of their storage, solving the problem of feasible long-term storage and destruction, and issues of personal data processing, access and protection of information databases have been highlighted.

As a result of the research, it was established that the legislation should determine the specific grounds for collecting biometric data of foreigners and stateless persons by the State Border Guard Service of Ukraine during administrative procedures of forced return, compulsory deportation and acceptance and transfer of persons for readmission.

The results of the study show that the further development of e-government leads to the introduction of IT decision-making procedures by border guards; attention is paid to the need to raise their awareness in matters of use of personal databases.

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