

# WORLD DATA PROTECTION REPORT >>>

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## Ukraine's Data Protection Regime Fundamentally Altered by Newly Adopted Amendments

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On July 3, 2013, the Parliament of Ukraine adopted amendments<sup>1</sup> to the range of laws relating to data protection, including the Data Protection Law<sup>2</sup> (the Amendments). The Amendments will enter into force on January 1, 2014.

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### **Main Change: Data Protection Office to Be Abolished**

The main change under the Amendments will be to abolish the Data Protection Office<sup>3</sup>, which is currently in charge of almost all issues relating to data protection. Instead, the Ombudsman will take over all data protection-related functions from the Data Protection Office.

These changes are claimed to bring Ukrainian law into compliance with European Union standards (even

though Ukraine is not a member of the European Union), specifically relating to the functioning of an independent controlling state body in the data protection sphere.

According to the Explanatory Note to the Amendments<sup>4</sup>, the Data Protection Office, being a government authority coordinated by one of the government ministries, lacks the necessary level of autonomy. At the same time, the Ombudsman is considered to be sufficiently independent from government bodies and other state bodies, and is able to perform data protection functions.

### **Ombudsman**

In Ukraine, the Ombudsman is appointed by the Parliament for a term of five years. He or she is considered to be a civil servant, but he/she performs his/her functions independently from other state bodies or civil servants.

Currently, the position of Ombudsman in Ukraine is occupied by Ms. Valeriya Lutkovska<sup>5</sup>.

The Ombudsman acts through her secretariat, which is a separate legal entity, and is entitled to appoint representatives on certain issues who have quite extensive authority.

Ms. Lutkovska recently announced the launch of an open, merit-based process for the selection of the Ombudsman's representative on data protection issues.

This is a really positive sign for businesses, as it indicates that the Ombudsman intends to engage for her team a person who is expected to be highly experienced in data protection issues.

## Other Important Changes

In addition to the above, the Amendments introduce some other important changes to Ukraine's data protection regime, which are briefly summarised below:

- Businesses will no longer have to register their databases which contain personal data. Instead, data controllers will have to notify the Ombudsman about the processing of personal data which is recognised to have special risk for a data subject's rights and freedoms. Such categories of data are to be approved by the Ombudsman.
- The definition of consent to data processing is removed, which could create ambiguity regarding whether consent has actually been granted or not. Further clarifications in this regard are to be provided by the relevant authorities.
- Biometric and genetic data are recognised to be sensitive personal data, in line with best international practice.
- Some rights of data subjects have been added, and some have been amended (*e.g.*, the data subject has a right to know the sources of collecting his/her personal data, the current location of his/her personal data, *etc.*).
- Data notified to the Ombudsman is subject to promulgation on the Ombudsman's official website.
- The grounds for data processing by a data controller have been supplemented with a new ground. Specifically, from January 1, 2014, onwards, data controllers will be able to process personal data in cases where they need to fulfil certain obligations imposed by law.
- Administrative liability for infringements in the data protection area is narrowed (mostly due to termination of the data controller's obligation to register personal databases)<sup>6</sup>.

The Amendments do not touch upon cross-border data transfers, so Data Protection Law provisions in that regard remain unchanged.

## What to Expect in the Near Future

According to the Transitional Provisions<sup>7</sup> of the Amendments, there are certain actions to be taken by the Ombudsman in order to ensure the newly amended Data Protection Law works properly.

Specifically, by April 1, 2014, the Ombudsman must adopt the following:

- a list of the types of personal data which are recognised to have special risk for data subjects' rights and freedoms;

- a form and order for notification about the processing of data specified in the bulleted point above; and
- an order for promulgation of data notified to the Ombudsman on the Ombudsman's official website<sup>8</sup>.

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## Some Practical Tips

Given the substantial changes to the data protection legislation, and bearing in mind that more changes are still to come, businesses are advised to thoroughly check their existing internal data protection policies, which are normally drafted based on provisions of the law. It is likely such policies will require certain changes to be made by January 1, 2014.

Further, the Amendments require that Codes of Conduct developed in certain business sectors and regulating certain data protection issues (which are not otherwise covered by the law) be agreed with the Ombudsman rather than with the Data Protection Office (which will no longer exist from January 1, 2014). Given this fact, it is advisable that business unions which are in the process of developing such Codes of Conduct wait until the Amendments come into force and agree their documents with the Ombudsman. Otherwise, it is not clear whether Codes of Conduct agreed with the Data Protection Office would be valid.

Finally, after the Ombudsman approves the categories of notifiable data (as discussed above), businesses will probably need to reconsider the authority (and potentially the personalities) of the employees they entrust with responsibility for data protection issues.

## NOTES

<sup>1</sup> Law of Ukraine "On Amending Certain Legislative Acts of Ukraine Regarding Improving the System of Personal Data Protection" No. 383-VII, dated July 3, 2013, available at <http://zakon2.rada.gov.ua/laws/show/383-18> (in Ukrainian only).

<sup>2</sup> Law of Ukraine "On Personal Data Protection" No 2297-VI, dated June 1, 2010, as further amended, available at <http://zakon2.rada.gov.ua/laws/show/2297-17> (in Ukrainian only).

<sup>3</sup> The State Service of Ukraine for Personal Data Protection.

<sup>4</sup> The Explanatory Note is a document which is always attached to a draft law when it is initially submitted to Parliament. In that document, the initiating deputy substantiates the purpose of the amendments/new law and their/its consequences for society. The Explanatory Note to the Amendments is available at [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=45832](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=45832) (in Ukrainian only).

<sup>5</sup> Further information about the Ombudsman and her activities is available, in Ukrainian, at <http://www.ombudsman.gov.ua/>.

<sup>6</sup> More details regarding the amended rules on administrative liability, as well as a comparison with the previous rules, are provided schematically at <http://zpd.gov.ua/dszpd/doccatalog/document?id=61065> (in Ukrainian only).

<sup>7</sup> Transitional Provisions constitute a separate article of a law, and are normally included in those laws that introduce fundamental changes in certain business areas. In the Transitional Provisions, the Parliament, by virtue of law, provides certain mandatory instructions to gov-

ernmental bodies as to which legislative acts to amend and within which terms, and also sets the rules for how the old provisions are to apply until the new provisions take effect.

<sup>8</sup> A comparison of the old provisions and the new provisions of the Data Protection Law as regards replacement of the procedure of data-base registration with the data processing notification procedure is available at <http://zpd.gov.ua/dszpd/doccatalog/document?id=60861> (in Ukrainian only).

*The full text of the Amendments, in Ukrainian, is available at <http://zakon2.rada.gov.ua/laws/show/383-18>.*

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