

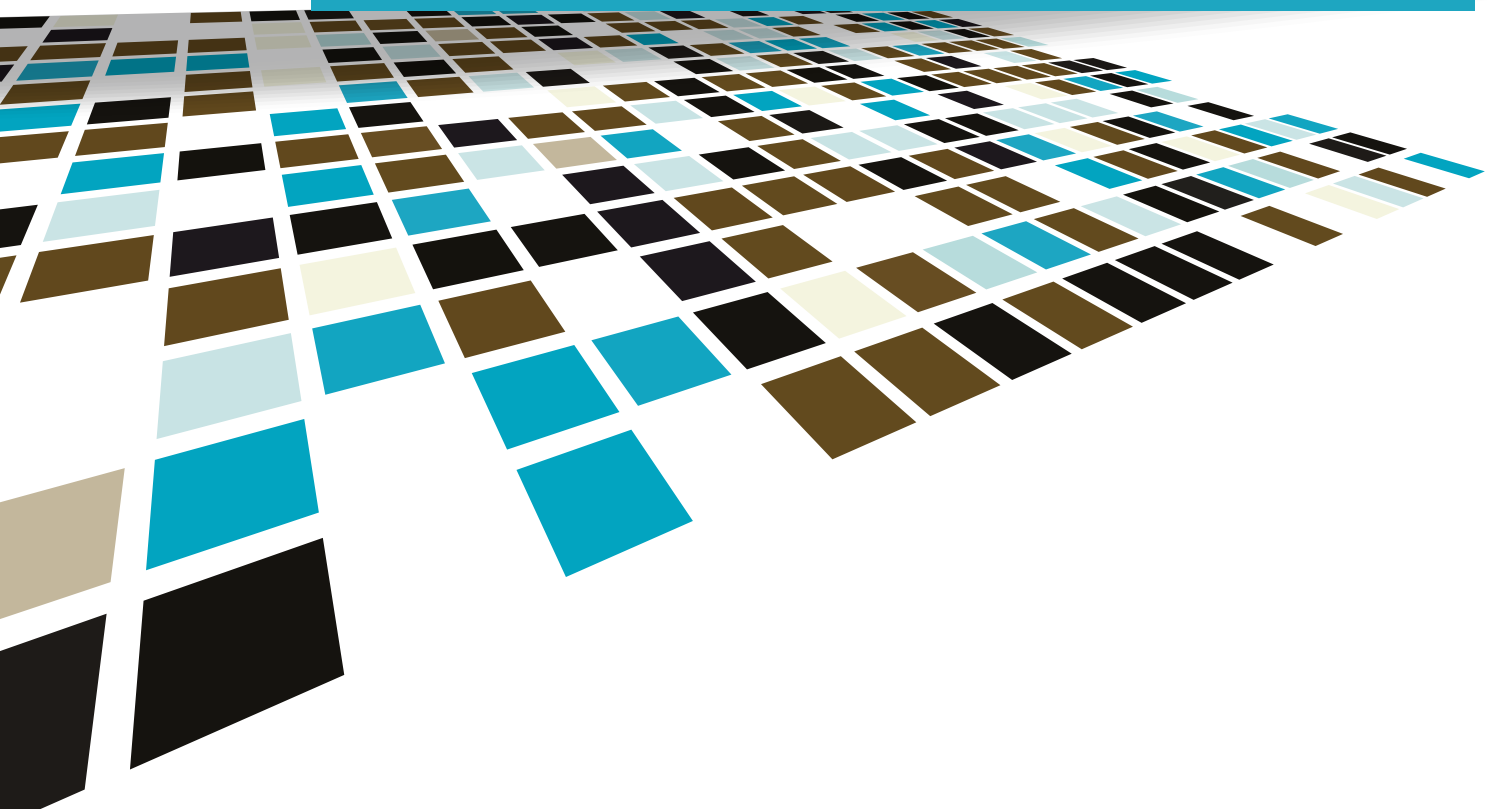


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**§§ LEGAL ASPECTS OF
IMPLEMENTATION OF THE
ELECTRONIC SYSTEM OF
MANAGEMENT OF CRIMINAL
PROCEEDINGS
(E-CASE MANAGEMENT SYSTEM)
INTO THE CRIMINAL PROCEDURE
FOR CORRUPTION OFFENSES**





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Editors

Science Editor: Oksana Nesterenko.

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© Andrii Biletskyi – PhD in Law., Junior Researcher at the Anti-Corruption Research and Education Centre at NaUKMA;
Maryna Tsapok – Criminal Justice Expert.

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This research study analyzes national legislation and the needs of introducing an e-case management system for the investigation of corruption offenses.

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Kyiv, 2020

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§§ INTRODUCTION

Ukraine has committed itself to reforming the judiciary and law enforcement agencies by adopting the Strategy for Reforming the Judicial System, Judicial Procedure and Related Legal Institutions for 2015–2020. One of the main directions of reform is to increase the level of efficiency of the work of judicial and law enforcement agencies in the fight against organized crime and cases of corruption. At the same time, one of the indicators of the success of the implementation of reforms in this direction is the development of a unified information system between the prosecutor's office, the judiciary and law enforcement agencies investigating or considering corruption cases. One such system is the electronic system of management of criminal proceedings (*e-case management system*, hereinafter referred to as eCMS) – a system that digitizes physical documentation and allows the creation of documents only in electronic form, which, in turn, allows the exchange of files within the framework of criminal proceedings between officers, structural units within one body, as well as between different bodies in the course of an investigation. The purpose of the eCMS implementation is to facilitate and simplify the operative interaction between detectives of the National Anti-Corruption Bureau of Ukraine (hereinafter – NABU), prosecutors of the Specialized Anti-Corruption Prosecutor's Office (hereinafter – SAP) and investigating judges of the High Anti-Corruption Court (hereinafter – HACC), which should result in a significant increase in the effectiveness of the investigation of anti-corruption crimes¹.

The research and consideration of the need for this kind of automation of the criminal process began back in 2014. During 2015–2017, several groups of experts were brought in to the analysis and description of business processes in the framework of criminal proceedings, which was later to make the basis for the development of the eCMS software product. Later on, the European Union Anti-Corruption Initiative in Ukraine began work on studying the technical feasibility of the project. Based

on these results, in 2018–2019, the European Union Technical Assistance Program held a tender for the development of the eCMS. The international company Synergy International Systems, Inc. (USA) was selected as the winner². Starting from the fall of 2019, the direct development of the eCMS software product began on the basis of functional specification and in close cooperation with future users of the system. At the end of spring 2020, the eCMS electronic criminal proceedings system for anti-corruption authorities was officially transferred to the balance sheet of NABU (including property rights to a license on the territory of Ukraine for NABU, SAP and HACC) and launched for piloting. The development company, however, must provide guarantee support for the eCMS until April 2021.

At the same time, the implementation of the eCMS requires not only an analysis of business processes and technical components, but also a proper legislative regulation of its launch and operation. Like any other information system that is used by judicial and law enforcement agencies (automated document management system of the court (hereinafter – ADMSC)), the Unified Register of Pre-Trial Investigations (hereinafter – URPTI), ASKOD, Megapolis), it must be «legalized», that is, there should be adopted regulations governing the issues of its implementation and operation. Not only the aspects of admissibility and sufficiency of electronic evidence should be «legalized», but also the issue of responsibility for the safety of information contained in such a system. It is preliminary known that the eCMS will be created for NABU, SAP and HACC. However, it is not known whether the court of cassation (the Cassation Criminal Court of the Supreme Court of Ukraine) will be involved in the work with this system and how the legislative link between these instances will be ensured. These and other aspects must be legally regulated for proper implementation of the eCMS in the activities of anti-corruption authorities in Ukraine.

1 Modern e-case management system will have radical impact on criminal investigation in Ukraine. URL: <http://www.euam-ukraine.eu/ua/news/opinion/modern-e-case-management-system-will-have-radical-impact-on-criminal-investigation-in-ukraine-2/> (date of access 24.09.2020).

2 eCase Implementation – EUCAI. URL: <https://um.dk/en/about-us/procurement/contracts/long/contract-opportunities/newsdisplaypage/?newsID=A6D021F5-1BA0-4C8F-921A-CF14F912B0F2> (date of access 14.07.2020).

GENERAL LEGAL AND INSTITUTIONAL ASPECTS OF THE ECMS IMPLEMENTATION

For the proper functioning of relations in the area of management, it is necessary to provide their legal regulation. This is primarily due to the fact that the activities of the criminal justice authorities are a sphere of great public interest. Therefore, no changes in the organization and functioning of such bodies are possible without corresponding regulatory changes. This also applies to the implementation of the eCMS for NABU, SAP and HACC. Therefore, in this section, we will consider how the eCMS should be legislatively regulated, what is necessary for this and what risks may arise in connection with rulemaking and law enforcement.

How should the eCMS be implemented: at the level of law or regulatory acts?

The norms of the current legislation (clause 14 of article 92 of the Constitution of Ukraine, article 14 of the Law of Ukraine «On electronic documents and electronic document management»), letter of the Ministry of Justice of Ukraine dated 30.01.2009 N N-35267-18, as well as decisions of the Constitutional Court of Ukraine dated July 9, 1998 No. 12-пн/98 indicate that the **judicial system, legal proceedings, the organization and activities of the prosecutor's office, as well as preliminary investigation bodies**, electronic document circulation in these bodies are determined exclusively by the laws of Ukraine. **Therefore, the eCMS must be implemented at the legislative level.**

What should be stipulated in the Law that will implement the eCMS?

First of all, it must contain changes and additions to other legislative acts regulating: 1) the activities of the beneficiary institutions (NABU, SAP, HACC) 2) circulation of information in the state; 3) issues of functioning of information and telecommunication systems. Also, this Law should determine the place and role of the eCMS, the general aspects of its interaction with other information and telecommunication systems that are used by the beneficiary institutions (the details of the interaction will be determined by the Regula-

tion on the electronic management system of criminal proceedings).

In addition, the law should indicate that the eCMS is created to ensure pre-trial investigation and judicial examination of corruption crimes (under investigation by NABU); it does not replace other information and telecommunication systems used by pre-trial investigation bodies and courts (URPTI, Unified Judicial Information and Communication System – UJICS).

What laws and regulations should be amended?

The laws of Ukraine «On the National Anti-Corruption Bureau of Ukraine» and «On the High Anti-Corruption Court» contain general provisions that determine the legal status of these bodies and do not contain specific rules regarding the specifics of the implementation of procedural activities. The normative legal act regulating the activities of another the eCMS beneficiary institution, namely the Regulation on the Specialized Anti-Corruption Prosecutor's Office of the Office of the Prosecutor General, requires certain changes and/or additions. The norms of the mentioned Regulation stipulate the rights, obligations and directions of the activities of the leadership and prosecutors of the SAP. In particular, it provides for:

- ▶ part 3.2.: compliance with the requirements of the law when receiving, registering, examining and resolving applications and reports on criminal offenses, timely entry of information into the Unified Register of Pre-Trial Investigations;
- ▶ paragraph 8 of section 4: ensuring the maintenance of the Unified Register of Pre-Trial Investigations within the competence;
- ▶ paragraph 2, 9, 10 of part 5.1.: The departments from the First to the Sixth of the management of procedural guidance, support of public prosecution and representation in court carry out: reception, registration, examination of applications and reports on the commission of criminal offenses, timely entry of information on them into the Unified Register of Pre-Tri-

al Investigations, keeping records of proceedings, timely and objective entry of information on the results of proceedings into the defined forms of accounting, reporting, the Unified Register of Pre-Trial Investigations; control over the objective reflection in the Unified Register of Pre-Trial Investigations of information on criminal offenses, persons who committed them, and procedural decisions taken during the pre-trial investigation by detectives of the National Anti-Corruption Bureau of Ukraine;

- ▶ paragraph 6 of part 5.2: The analytical and statistical department is studying the issue of timeliness, completeness and reliability of entering data into the Unified Register of Pre-Trial Investigations, other software systems, as well as reporting; takes measures to promptly eliminate violations of accounting and registration discipline;
- ▶ paragraph 18 of part 6.1: Deputy Prosecutor General – the Head of the Specialized Anti-Corruption Prosecutor’s Office: organizes the primary accounting of proceedings, timely, complete and reliable entry of information on the results of proceedings in the information and analytical system «Accounting and Statistics of Prosecutor’s Office», the Unified Register of Pre-trial Investigations, prepares and signs statistical reports on the proceedings of Specialized Anti-Corruption Prosecutor’s Office;
- ▶ paragraph 9 of p. 6.4.1: The heads of the departments of procedural guidance, support of public prosecution and representation in court, within their competence, also exercise other powers, in particular, prepare reports on entering information into the Unified Register of Pre-Trial Investigations.

It is proposed to supplement the above provisions with the words *«and the electronic system for managing criminal proceedings.»*

The Law of Ukraine «On the Judicial System and the Status of Judges» defines the organization of the judiciary and the administration of justice in Ukraine, functioning on the principles of the rule of law in accordance with European standards and ensuring the right of everyone to a fair trial. The law provides for the provisions governing the functioning of the UJICS and requiring certain clarifications in connection with the implementation of the eCMS. Unfortunately, the final commissioning of the UJICS system has not yet taken place³, and before the start of its implementation, the appointment of a judge or a panel of judges to examine a particular case is carried out by an automated system of court documents circulation. At present, it is known that experts and the State Judicial Administration are developing the Regulation on the UJICS. This Regulation, in particular, will provide that in the General Subsystem of the UJICS there will be a module “automated interaction with other automated systems”, which will provide the possibility of automated interaction with state registers, information systems and databases, the owners of information (holders), one of which, among others, is NABU⁴. Taking into account that NABU will act as the holder of the eCMS and in the case of integration between UJICS and the eCMS, it does not seem advisable to amend the provisions of the Law of Ukraine «On the Judicial System and the Status of Judges» regarding UJICS.

The eCMS is designed for work with information in criminal proceedings. This information includes personal data of participants in criminal proceedings, information from pre-trial investigation, information classified as a state secret (in the case of covert investigative (search) actions). Thus, it is necessary to analyze the legislation on information for the presence/absence of direct prohibitions on processing and entering such information into electronic automated systems.

The main normative legal act regulating the circulation of information in the state is **the Law of Ukraine «On Information»**. In particular, it concerns relations regarding the crea-

3 Эксперти обговорили проблемні питання впровадження ЄСІТС. URL: <https://hcj.gov.ua/news/eksperty-obgovoryly-problemni-pytannya-vprovadzhennya-yesits/> (date of access 24.09.2020).

4 Електронний суд вже незабаром: як відкорегували проект Положення про ЄСІТС. URL: <https://sud.ua/ru/news/publication/139962-elektronniy-sud-vzhe-nezabarom-yak-vidkoreguvali-proekt-polozhennya-pro-yesits> (date of access 24.09.2020).

tion, collection, receipt, storage, use, distribution, securing, protection of information. The Law does not contain specific prohibitions on placing such types of information into electronic systems. On the contrary, Art. 3 stipulates that one of the directions of the state information policy is the creation of information systems and information networks, the development of electronic government.

The Law of Ukraine «On Access to Public Information», in turn, defines the procedure for exercising and ensuring the right of everyone to access information held by subjects of power, other managers of public information defined by this Law, and information of public interest. Since information about the measures taken in the pre-trial investigation process, as well as the materials of such an investigation, is created by the subject of power in the performance of his duties (NABU, SAP, HACC), it is public⁵ and falls under the aforementioned Law. The specified subjects in their procedural activities can operate with official and secret information (which, in turn, is a type of public information with limited access). The Law also does not provide for restrictions on the placement of any public information with limited access in electronic systems.

The Law of Ukraine «On the Protection of Personal Data» also does not provide for prohibitions regarding the processing and storage of personal data in electronic systems. It only indicates that these actions with personal data must be provided with appropriate protection and the procedure for accessing this data.

Particularly noteworthy are the changes required by the legislation regulating public interactions related to ruling information as a state secret, classifying, declassifying its material carriers and defending state secrets in order to protect the national security of Ukraine. First of all, this means the Law of Ukraine «On State Secrets» and other normative legal acts (they are mainly departmental and are labeled «for official use»). As is known, covert investigative (search) activities constitute a state secret, which is provided for by the legislation of Ukraine. According to the Instruction

on the organization of covert investigative (search) actions and the use of their results in criminal proceedings, approved by the order of the General Prosecutor's Office, the Ministry of Internal Affairs of Ukraine, the Security Service of Ukraine, the Administration of the State Border Service of Ukraine, the Ministry of Finance of Ukraine, the Ministry of Justice of Ukraine dated 16.11.2012 No. 114/1042/516/1199/936/1687/5, the classification of material carriers of information on the conduct of covert investigative (search) actions is carried out by an investigator, prosecutor, an officer of an authorized operational unit, an investigating judge by providing on the basis of the Code of information constituting a state secret (Detailed list of information constituting state secrets), the corresponding document with classified status. Therefore, it is necessary to establish whether the legislation in the area of protecting state secrets allows working with it in electronic systems. Article 35 of the Law of Ukraine «On State Secrets» prompts a positive conclusion about this. It states that technical and cryptographic protection of classified information is carried out in accordance with the procedure established by the President of Ukraine. The corresponding Decree of the President of Ukraine «On the Regulations on the Procedure for Implementing Cryptographic Protection of Information in Ukraine» was approved on May 22, 1998 under No. 505/98. Clause 7 of this Procedure states that for the cryptographic protection of information constituting a state secret and official information created by order of state bodies or owned by the state, cryptosystems and means of cryptographic protection allowed for operation are used. This provision refers to the Law of Ukraine «On the Protection of Information in Information and Telecommunication Networks», which (paragraph 6 of Art. 8) states that the processing of information with limited access, including information that contains state secrets, is possible only with the use of an integrated information security system. The procedure for creating such a system is established by the State Service for Special Communications and Information Protection of Ukraine (Procedure approved by order of the Administration of the State Service for Special Communications and Information Protection of Ukraine dated October 16, 2018 No. 141/ Official Use Only).

5 Закон «Про доступ до публічної інформації» vs Кримінально-процесуальний кодекс: як отримати доступ до матеріалів кримінального провадження? URL: <https://cedem.org.ua/consultations/zakon-pro-dostup-do-publichnoyi-informatsiyi-vs-kryminalno-protsesualnyj-kodeks-yak-otrymaty-dostup-do-materialiv-kryminalnogo-provadhzhennya/> (date of access 24.09.2020).

So, we can conclude that working with information containing state secrets in electronic systems is possible only if there is a comprehensive information protection system.

As we pointed earlier, by analogy with URPTI and UJICS, detailed aspects of the functioning of the eCMS should be spelled out in a special Regulation regarding such a system. The Regulation should contain the following norms: what is an eCMS, the purpose of its functioning, the subjects who will use this system, its legal status, the procedure for access and protection of information in this system, aspects of interaction with URPTI and UJICS, etc.

The eCMS (taking into account its functionality) is an information and telecommunication system, since it implements information processing technology using hardware and software, and it is designed for exchange of information between NABU, SAP and HACC. Therefore, we propose the following definition of the eCMS: *the eCMS is an information and telecommunication system created for the purpose of collecting, storing, exchanging, protecting, recording, searching, summarizing, managing information on criminal corruption offenses in compliance with the requirements of criminal procedural legislation and legislation that regulates the protection of personal data and access to restricted information.*

Thus, the purpose of this system is to ensure the automation of the criminal procedural activities of NABU, SAP and HACC, as well as other bodies of pre-trial investigation and judicial examination (in the future). Automation of criminal procedural activity means the translation into electronic form of all criminal procedural actions and decisions.

Among the subjects who will have access to the eCMS, should be highlighted: holder, administrator, registrar, user.

According to the concept of the already developed the eCMS, **the holder of the system will be NABU** (the risks of this option will be discussed below). Thus, NABU will be entrusted with the following functions: developing means of organizational, methodological and software and technical support for the eCMS; acting as the eCMS administrator;

organization of interaction with other state information systems, registries and databases (by analogy with the functions that the holder and administrator of URPTI have).

At the same time, NABU, as well as SAP and HACC will be system administrators: they will provide technical and technological creation and maintenance of the eCMS software, its administration and monitoring of information use, storage and protection of system data, control of access rights etc.

The registrars will be NABU detectives, SAP prosecutors and HACC judges. Registrars will be empowered to enter information into the eCMS, exchange with each other data related to a specific criminal proceeding, generate extracts from the system etc.

In addition, users will have the right to access the information contained in the eCMS, however only within the limits of the access rights granted by the administrator to obtain information about the pre-trial investigations that have begun and decisions made during the pre-trial investigation (that is, the right of access will be exercised through the specialized entity, NABU and SAP). Such persons include participants in criminal proceedings: the defense party, the victim and his/her representatives, other participants in criminal proceedings.

Regarding the aspects of interaction of the eCMS with URPTI and ADMSC (and UJICS in the future), it should be noted that this issue is more technical than legislative in its nature. However, it is likely that for this purpose a special instruction will be adopted, approved by the holders of URPTI (Office of the Prosecutor General) and ADMSC (UJICS) (State Judicial Administration of Ukraine), which will regularize the rules regarding their interaction. It is proposed that all information on criminal proceedings under the jurisdiction of NABU, SAP and HACC, which will be entered into URPTI and ADMSC (UJICS), will be automatically duplicated in the eCMS, and vice versa.

As noted above, the system holder will be NABU. Recently, the assumption that this body is "unconstitutional" has become widespread. This problem became especially urgent after the decision of the Constitutional Court of Ukraine on the appeal of People's

Deputies, which ruled unconstitutional the provisions of the Law of Ukraine «On the National Anti-Corruption Bureau of Ukraine» regarding the appointment of the director of NABU⁶. Previously, leading experts in the field of constitutionalism and criminal justice conducted an analysis and came to a similar conclusion: The Constitution of Ukraine does not authorize the President of Ukraine to appoint the leadership of NABU and take other measures to implement such powers, and therefore such actions of the Head of State are unconstitutional. Therefore, the question arises: what will happen to the eCMS held by an unconstitutional body?⁷ In order to prevent the occurrence of such a situation, it would be advisable to eliminate the risk of ruling NABU as an unconstitutional body by introducing appropriate amendments to the Constitution of Ukraine and adopting appropriate legislative provisions⁸. In this regard, it is also proposed to additionally endow SAP and HACC with the legal status of eCMS holders.

Another institutional risk of implementing the eCMS for NABU, SAP and HACC is that the implementation of the system may be perceived by the judicial community as an interference with the work of HACC judges. Art. 48 of the Law of Ukraine «On the Judicial System and the Status of Judges» states that judges in their activities to administer justice are independent of any unlawful influence, pressure or interference. When adopting new laws or introducing amendments to existing laws, it is not allowed to narrow the content and scope of guarantees of the independence of a judge determined by the Constitution of Ukraine and the law. The High Council of Justice (HCJ) is the guarantor of judicial independence in Ukraine. Paragraph 15 of Art. 3 of the Law of Ukraine «On the High Council of Justice» states that one of the powers of the HCJ is to provide binding advisory opinions on draft laws on issues, in particular, on the functioning of courts. Since the Regulation on the eCMS is directly related to the involvement of HACC judges to its implementation,

it should mandatorily be agreed with the HCJ.

Earlier it was noted that the eCMS was created for the needs of NABU, SAP and HACC, which are a pre-trial investigation body, a prosecutor's office and a judicial body, respectively, in the area of combating high-ranking corruption. As known, HACC is a court of first and appeal instances in the framework of criminal proceedings for corruption offenses. However, in the process of introducing the eCMS, it does not mean joining of a court of cassation, namely the Third Trial Chamber of the Cassation Court of the Supreme Court. It should be noted that this issue is more organizational than legislative, since regulatory changes are not required for this. Since the purpose of implementing the eCMS is to reduce the time and increase the efficiency of pre-trial investigation and judicial examination of criminal proceedings for corruption offenses, it will not be fully achieved without joining the cassation instance system, since in this case all proceedings materials will have to be returned in paper form in case of referral to the Cassation Court. Therefore, it is still recommended to bring in the representatives of the Supreme Court, in particular the Third Trial Chamber of the Cassation Court, to the process of implementing the eCMS.

6 Decision of the Constitutional Court of Ukraine No. 9-p/2020 in case No. 1-9/2020 (197/20) on the constitutional submission of 51 People's Deputies of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the Decree of the President of Ukraine "On the appointment of A. Sytnyk as Director of the National Anti-Corruption Bureau of Ukraine".

7 Формування антикорупційних органів: конституційні питання. URL: <https://bit.ly/2EsToYR> (date of access: 14.09.2020).

8 Формування антикорупційних органів: конституційні питання. URL: <https://bit.ly/2EsToYR> (date of access: 14.09.2020).

PROCEDURAL ASPECTS OF THE IMPLEMENTATION OF THE ELECTRONIC CRIMINAL PROCEEDINGS SYSTEM

An equally important aspect of the eCMS functioning is its compliance with the norms of criminal procedural law. The Code of Criminal Procedure (CCP) of Ukraine adopted in 2012, according to experts, only partially ensures the functioning of information and telecommunication systems, the priority is the paper format of criminal proceedings. This means that only part of the procedural actions and decisions are recorded using technical means: for example, the moment of opening a criminal proceeding is recorded in the URP-TI, the decisions of the investigating judge are entered into the Unified State Register of Court Decisions, and the like. However, with the transition to electronic criminal proceedings, all procedural actions and decisions must be recorded in the eCMS. Thus, the relevant provisions of the Code of Criminal Procedure of Ukraine need to be amended.

It is necessary to start the review with the basics of criminal proceedings, which are enshrined in Chapter 2 of the Code of Criminal Procedure of Ukraine. Most of these principles do not directly indicate, but at the same time do not limit the use of the eCMS. An analysis of the principles of criminal proceedings allows us to conclude that it is necessary to amend Art. 23 of the Code of Criminal Procedure «Immediacy of the examining of evidence, things and documents.» We propose to supplement it with the following provision: *«If criminal proceedings are carried out in electronic form, the evidence contained in the electronic system for managing criminal proceedings shall be examined by the court in a court session directly in the specified system for managing criminal proceedings.»* This will make it possible to neutralize the possible irregularities of interpretation of this norm by the courts. The data we obtained during the interviews also indicate one of the organizational risks associated with the principle provided for in Art. 10 of the Code of Criminal Procedure of Ukraine, – equality before the law and the court. This article establishes that there can be no privileges or restrictions in the procedural rights provided for

by this Code. However, the existing concept for the implementation of the eCMS determines that studying the materials by the defense side of criminal proceedings contained in this system will be possible only in a specially established NABU premises. This circumstance significantly affects the procedural rights of the defense side: NABU detectives, SAP prosecutors, investigating judges and HACC judges will have access to the system directly from their work places. At the same time, the defense side will be forced to spend additional time and resources to study the materials of the criminal proceedings. A similar situation may arise if the suspect is chosen a preventive measure in the form of detention. It is still unknown how the right to study the materials of the criminal proceedings for such a suspect will be realized. Therefore, in order to maintain equality before the law and the courts, it is recommended to consider possible steps for providing remote access to the defense side in the eCMS.

Separately, the Code of Criminal Procedure of Ukraine, namely Art. 35 contains general aspects of the functioning of the automated court document management system, which should be integrated into the eCMS. This article contains provisions on the appointment of the ADMSC, the procedure for submitting materials to the court, the rulings of the judge (reserve judge, investigating judge), the procedure for accessing the system, responsibility for unauthorized access to it. In order to avoid misunderstandings, we also propose to state Part 2 of Art. 35 of the Code of Criminal Procedure of Ukraine in the following edition: *“Materials of criminal proceedings, complaints, statements, petitions and other procedural documents provided for by law, which are submitted to the court and may be the subject of legal proceedings, regardless of their form (paper or electronic), in the order of their receipt are subject to compulsory registration in the automated document management system of the court, carried out by employees of the apparatus of the corresponding court on the day of receipt of such materials. The following must be entered into the court’s automated document management system: the date of receipt of materials, complaints, petitions, statements or other procedural doc-*

ument, the surname of the person in respect of whom the documents were submitted, and their essence, the surname (name) of the person (body) from whom/which documents were received, the surname of the employee of the court apparatus who carried out the registration, information on the movement of court documents, data on the judge who carried out the proceedings, and other data provided for by the Regulations on the automated documents circulation system of the court approved by the Council of Judges of Ukraine in agreement with the State Judicial Administration of Ukraine”.

One of the most important aspects of the functioning of the electronic criminal proceedings system is the legal status of the evidence that will be contained in this system. Electronic evidence is intangible in its form and requires further fixation on the data carrier. An information carrier is a material object intended for recording, transferring and storing information (including servers containing information). That is, if the evidence/procedural document (protocol, petition, expert opinion) is issued electronically and recorded on a tangible medium (in our case, the servers on which the eCMS will be contained), then it will be deemed as appropriate in criminal proceedings⁹. Taking into account the eCMS concept, all evidence obtained during the pre-trial investigation will be recorded in an electronic protocol created within this system. The system itself will be the information carrier. The interviewees, in particular, the judges of the Supreme Anti-Corruption Court and the Supreme Court, indicate that now there are no problems with the determining of electronic evidence as appropriate and admissible. However, if the Code of Criminal Procedure of Ukraine states that evidence can be submitted in electronic form on a tangible medium, this will only strengthen the arguments of the judges in favor of determining the appropriate nature and admissibility of evidence. Thus, we believe that there is no need to amend the Code of Criminal Procedure of Ukraine regarding the introduction of the institution of electronic evidence, since the current provisions allow for the recording of procedural actions in electronic form on a data carrier.

However, the articles regulating the process and forms of recording criminal proceedings require certain additions. For example, Art. 104 of the Code of Criminal Procedure of Ukraine considers one of the forms of recording criminal proceedings, a protocol. We consider it necessary to supplement part 5 of this article with the provision that the protocol *can be signed by the participants in the procedural action with their own hand, either by applying an electronic signature, or using the technical means determined by the Regulation on the electronic management system of criminal proceedings*. Similarly, it is necessary to supplement the provisions of Part 3 of Art. 105 (Appendices to the protocols) by the provision that in the case of the execution of the protocol and its annexes in electronic form, they must be certified by the participants in the procedural action by applying an electronic signature or using the technical means determined by the Regulations on the electronic management system of criminal proceedings.

A further procedural action that needs clarification is messaging. It is regulated by Chapter 6 of the Code of Criminal Procedure of Ukraine (Articles 111, 112) and the Procedure for the transfer of information about persons in criminal proceedings and electronic copies of court decisions in relation to persons who have committed criminal offenses, (the Procedure approved by the order of the Prosecutor General of Ukraine and the Head of the State Judicial Administration of Ukraine dated 08.14.2014 No. 82/108). The latter regulatory legal act requires additions, namely: it says about the procedure for the formation and sending of information about criminal proceedings from the URPTI to the ADMSC, as well as the procedure for sending electronic copies of court decisions. Taking into account that the eCMS will be integrated with both of these information systems, this order requires updating and supplementation with provisions on the specifics of this integration.

We do not see the need to supplement the provisions on the initiation of the pre-trial investigation and the procedure for entering information into the URPTI, since the eCMS will be integrated with the URPTI, and therefore information about the committed corruption offenses that entered into the URPTI

⁹ А. В. Столітній, І. Г. Каланча. Формування інституту електронних доказів у кримінальному процесі України. URL: <http://plaw.nlu.edu.ua/article/download/171218/179266> (date of access 12.09.2020).

will be automatically displayed in the eCMS. However, it is advisable to supplement Art. 221 (Studying the materials of the pre-trial investigation before its completion) by the rule that *the defense party, the victim, the representative of the legal entity in respect of which the proceedings are being carried out, can study the materials of the criminal proceedings by accessing the electronic system for managing criminal proceedings in the amount determined an investigator or prosecutor.*

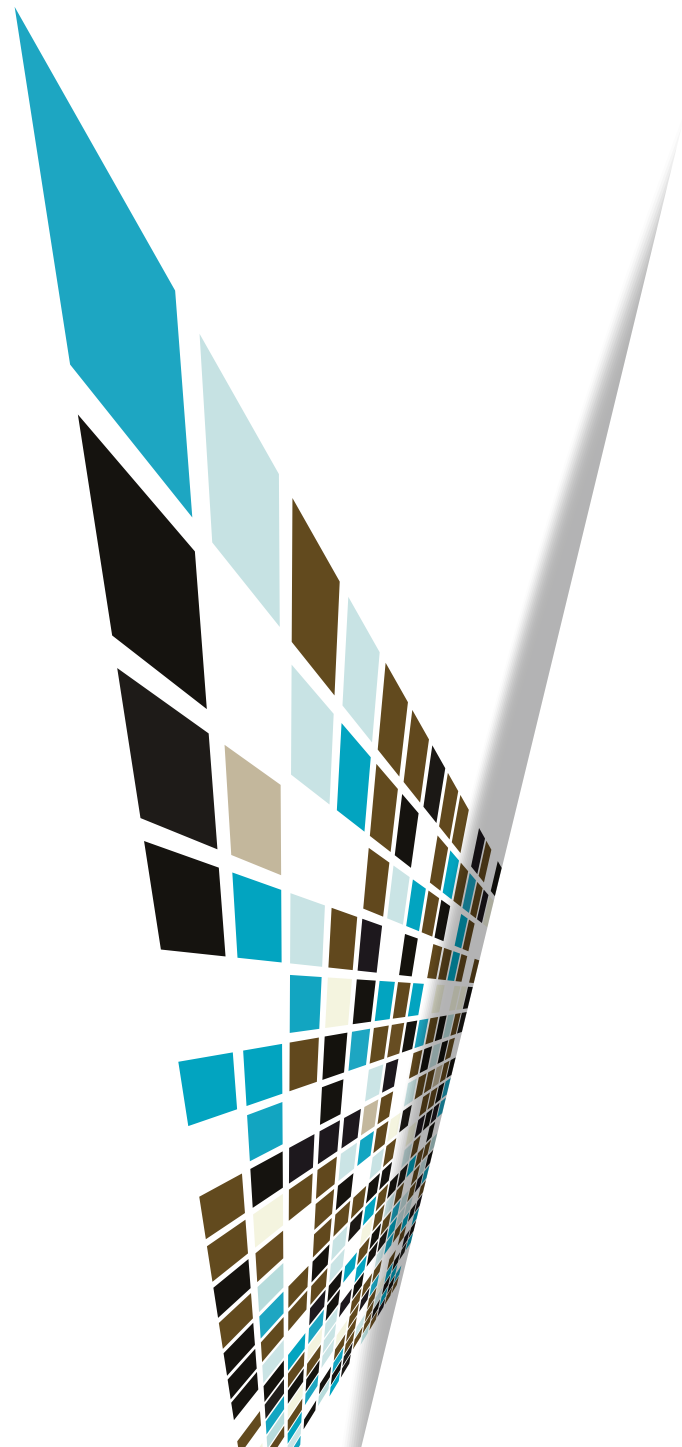
The previously provided possibility of issuing a protocol in electronic form solves the problem of formalizing the results of investigative actions provided for in Chapter 20 of the CCP of Ukraine and covert investigative (search) actions provided for in Chapter 21 of the Code of Criminal Procedure of Ukraine and the Instruction on the organization of covert investigative (search) actions and the use of their results in criminal proceedings¹⁰.

The disclosure of materials to another party at the stage of pre-trial investigation should also provide for the possibility of studying the materials in the eCMS. For this purpose, it is proposed to supplement Part 4 of Art. 290 of the Code of Criminal Procedure of Ukraine with the second paragraph, which stipulates *that in the case of criminal proceedings using the electronic criminal proceedings management system, the disclosure of materials is made by providing access to them in the electronic criminal proceedings management system in accordance with the Regulation on the electronic management system of criminal proceedings.* Likewise, during preparatory proceedings, litigants should be able to study the materials in the eCMS. It is proposed to regularize this provision in the second paragraph of Part 2 of Art. 317 of the Code of Civil Procedure of Ukraine.

At the litigation phase, it is important to ensure that the judges have access to the evidence that will be contained in the eCMS. This will be ensured, firstly, through integration between the eCMS and the URPTI, that is, the judges will have direct access to the

materials from their computers, and secondly, by the rule that is proposed to be added to Art. 358 of the Code of Criminal Procedure of Ukraine: *documents created in the electronic system for managing criminal proceedings are examined in court by viewing the content of these documents directly in the electronic system for managing criminal proceedings, unless the investigator, prosecutor, investigating judge or court decides to convert them into paper form.*

¹⁰ On the organization of covert investigative (search) actions and the use of their results in criminal proceedings : Instruction dated 16.11.2012 No. 114/1042/516/1199/936/1687/5 approved by the order of the General Prosecutor's Office, the Ministry of Internal Affairs of Ukraine, the Security Service of Ukraine, the Administration of the State Border Service of Ukraine, the Ministry of Finance of Ukraine, the Ministry of Justice of Ukraine.



§§ CONCLUSIONS AND RECOMMENDATIONS

Considering the organizational problems of pre-trial investigation, in particular the investigation of corruption offenses, which affect its full, prompt and impartial exercising, the implementation of the eCMS is a relevant and expedient idea. In order to properly implement the system, it is necessary to create a new and change the current regulatory framework of Ukraine, since it does not fully ensure the functioning of the eCMS in the normative aspect.

The analysis of the legislation of Ukraine allows to assert that the implementation of the eCMS for the investigation of corruption offenses should be carried out through the adoption of an appropriate law, which will amend the legislation and other normative legal acts regulating the functioning of the beneficiary institutions (NABU, SAP, HACC), criminal procedural legislation; and the Regulation on the eCMS, which will cover general issues of the eCMS functioning, subjects who will use this system, their legal status, procedure for access and protection of information in this system, aspects of interaction with other information and telecommunication systems that are used in criminal proceedings (URPTI, «ASKOD», «Megapolis», ADMSC, UJICS). It worths noting that the following points should be taken into account during the legislative process:

1. The existing information legislation allows processing information containing state secrets in information and telecommunication systems. This is evidenced by the provisions of the Laws of Ukraine «On State Secrets», «On the Protection of Information in Information and Telecommunication Networks», the Decree of the President of Ukraine «On the Regulation on the Procedure for the Implementation of Cryptographic Protection of Information in Ukraine», the Resolution of the Cabinet of Ministers of Ukraine No. 373 «On Approval of the Rules for Provision information protection in information, telecommunication and information-telecommunication systems ». Thus, it can be concluded

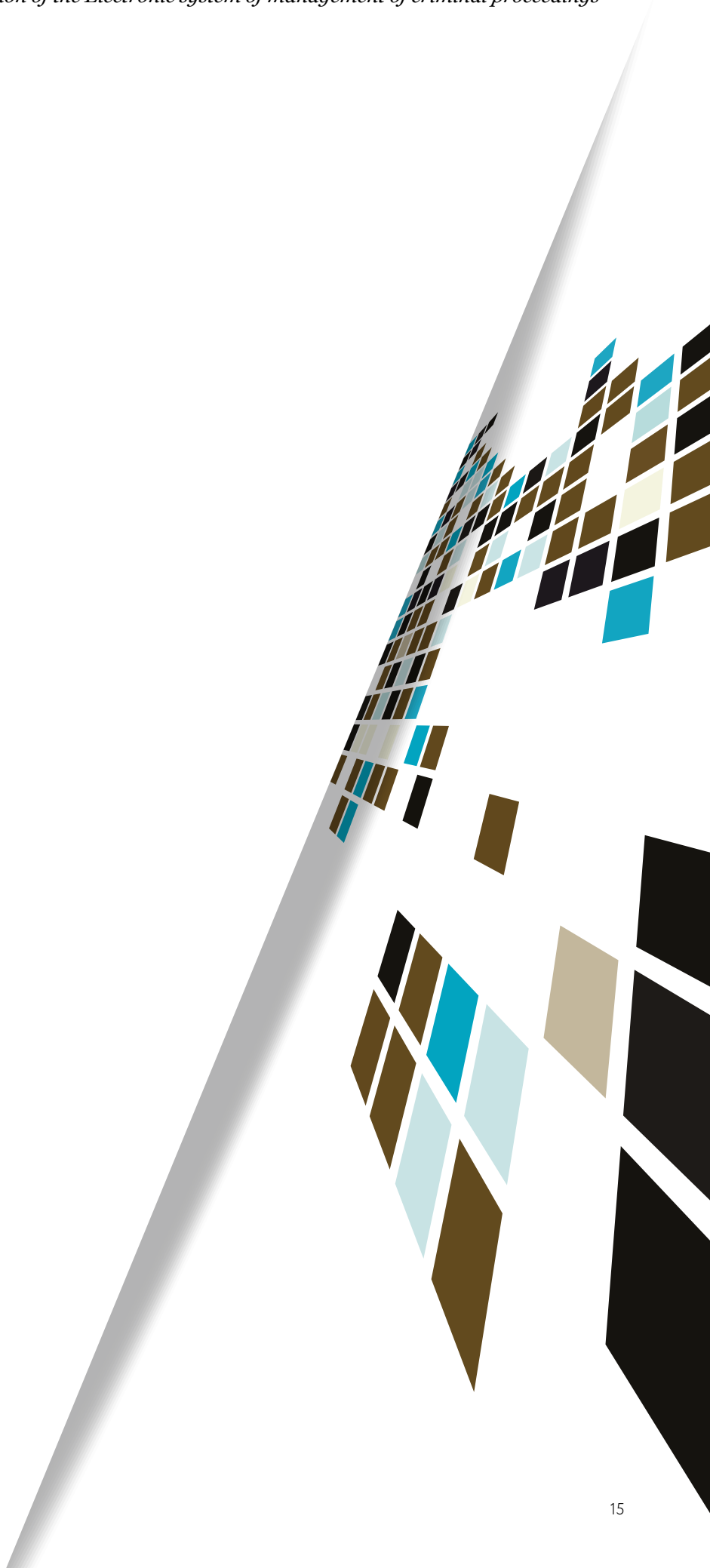
that in the process of creating an integrated information protection system there are organizational problems that are worth paying attention to and that require revision; however, although the regulatory regulation will require additions, it does not contain a prohibition on processing information containing state secrets in information and telecommunication systems.

2. The regulation on the electronic system for managing criminal proceedings should determine, in particular, the holder(s) of this system. When determining the holder(s), the previously mentioned problems should be taken into account regarding the risk of recognition as unconstitutional of certain anti-corruption bodies (NABU and HACC). It seems logical, firstly, the settlement of the specified problem of unconstitutionality, and secondly, the consolidation of the same legal status of the beneficiary institutions – NABU, SAP and HACC as the holders of the eCMS¹¹.
3. When adopting the relevant Law and Regulation that will regulate the eCMS, they should be coordinated with the judicial self-government bodies so that the implementation of the system is not perceived as an encroachment on interference in the work of judges of the High Anti-Corruption Court.
4. The Code of Criminal Procedure of Ukraine as the main normative legal act regulating the process and procedure for carrying out criminal proceedings also needs to be supplemented. Most of these changes are related to the process of proving (Art. 23 «Immediacy of the examination of evidence», Art. 104 «Protocol», Art. 105 «Appendices to the protocols», Chapter 6 «Communications», Art. 358 «Study of documents»), **submission of materials, complaints, statements, petitions and**

¹¹ At the time of this study, the Constitutional Court of Ukraine had already taken a decision on the case on the constitutionality of certain provisions of the Law of Ukraine «On the National Anti-Corruption Bureau of Ukraine» <http://www.ccu.gov.ua/novyna/uhvaleno-rishennya-u-spravi-shchodo-konstytucijnosti-okremyh-polozhen-zakonu-ukrayiny-pro>, and a submission was received on the constitutionality of the Law of Ukraine «On the High Anti-Corruption Court» <http://www.ccu.gov.ua/novyna/do-sudu-nadiyshlo-podannya-shchodo-konstytucijnosti-zakonu-ukrayiny-pro-vyshchy>

other procedural documents provided for by law and studying the materials of criminal proceedings in court (Article 35 «Automated document circulation system of the court», Article 221 “Studying the materials of the pre-trial investigation before its completion», Article 290 “Disclosure of materials to the other party”, Article 317 “Materials of criminal proceedings (criminal case) and the right to study them”).

5. In the process of introducing amendments to the criminal procedural legislation in terms of access of the parties to the materials of criminal proceedings, it will be advisable to pay attention to the organizational and technical provision of access of the defense side to such materials.
6. The eCMS is created for the system of bodies NABU, SAP and HACC. However, the question of the format in which the materials will be examined in the court of cassation remains open. It is recommended to bring in the Supreme Court (the Third Trial Chamber of the Cassation Court of the Supreme Court) to the process of developing appropriate changes and to join this system.





Kyiv, 2020