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ANNEX

to

THE POST-ADOPTION REVIEW

OF THE LAW OF UKRAINE "ON THE HIGH COUNCIL OF JUSTICE"*

on the amendments to the Criminal Procedural Code and Law on Operative Search (Detective) Activities of Ukraine concerned with 'the State Penitentiary Service of Ukraine'

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* The post-adoption review of the Law on the High Council of Justice" as of 23 February 2017 has been prepared within the Council of Europe projects "Support to the Implementation of the judicial reform in Ukraine" and "Support to the Criminal Justice Reforms in Ukraine"

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A. INTRODUCTION

1. This Opinion provides comments regarding the amendments to the Criminal Procedure Code ('CPC') and Law on Operative Search (Detective) Activities ('OSA Law') that concern 'investigating units of the State Penitentiary Service of Ukraine' introduced within the legislative package attributed to the Law on the High Council of Justice ('the Law').

2. The present comments review the compliance of the amendments in question with European standards, particularly the European Convention on Human Rights ('the ECHR'), the case law of the European Court of Human Rights ("the ECtHR"), other Council of Europe requirements and related derivative texts, including Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations,[†] Substantial Section "Combating Impunity" [Committee for Prevention of Torture ("the CPT")/Inf92006) 28] of the CPT's 14th General Report, as well as opinions, recommendations and other country-specific documents produced under the Council of Europe framework. In addition, it considers the conceptual consistency of the amendments with the entire reform of the criminal justice system, criminal procedure, relevant institutional set-up and the relevant policy instruments adopted in Ukraine.

3. The comments predominantly address the conceptual issues relating to the amendments and suggest some specific aspects of the corresponding newly introduced provisions of the CPC and OSA Law.

4. These comments have been based on the English translation of the Law that includes the issue-specific amendments to the CPC and OSA Law, English translation of the CPC and original (Ukrainian) texts of the explanatory memorandum and other supporting documents, including the OSA Law[‡] provided by the Council of Europe's secretariat. Besides that, the original text of the amendments in Ukrainian was consulted, where the language of the English translation seemed uncertain or required some further clarification.

5. The Opinion has been prepared by the consultant of the Council of Europe Mr Erik Svanidze (former prosecutor in Georgia and Deputy Minister of Justice) under the auspices of the Joint Programme between the European Union and Council of Europe "Strengthening Implementation of the European Human Rights Standards: support to police reform and fighting against ill-treatment and impunity", co-funded by the European Union and implemented by the Council of Europe.

[†]Adopted by the Committee of Ministers of the Council of Europe on 30 March 2011 at the 1110th meeting of the Ministers' Deputies.
[‡] There was no English translation of the OSA Law available.

B. GENERAL OBSERVATIONS

6. There is little, if any, substantial interrelation between the High Council of Justice, judicial self-administration in general that are regulated by the Law concerned and institutional arrangements for handling pre-trial procedures and detective activities within the penitentiary system, which had been incorporated into the legislative package at the latest stages of its adoption. Neither the Law as a whole nor explanatory or other supporting documents to it suggest any justification or indication as to a relation of the legislative changes in issue with the Law. The jumbled tactics of addressing this matter are particularly striking due to the nature and essence of the changes that actually undermine the principles, entire legislative and institutional framework, overall concept of pre-trial investigation and related operative (detective) set-up pursued in the course of the reform of the criminal procedure and justice in Ukraine.

7. It is indicative in this regard that the amendments have provided for an introduction of 'investigative units' within 'the State Criminal Executive Service of Ukraine'. At the same time, the State Penitentiary Service has seized to exist and it is being liquidated in accordance with the Decree N343 of 18 May 2016 of the Cabinet of Ministers of Ukraine. According to the very general scheme suggested by the Ministry of Justice, the penitentiary system on the national level is supposed to be run by a set of subdivisions of its central apparatus and there is neither single entity nor authority in the system of the central executive power, including the Ministry of Justice, replacing the State Penitentiary Service.[§]

8. Moreover, an introduction of investigative units within the penitentiary system, i.e. providing it with prosecuting (investigating) powers, undermines the essence of distancing the system from law-enforcement and prosecuting authorities that has started by its slit from the Ministry of Internal Affairs, as well as development and practical application of modern approaches to penitentiary management declared as key objective and outcome under the related pillar and chapter of the 2015-2020 Justice Sector Reform Strategy and Action Plan respectively.[**] It is to be noted that this move is hardly consistent with the rationale of the most recent amendments to the Constitution of Ukraine, which includes the removal of the prosecutorial supervision over the observance of laws in the course of enforcement of court decisions in criminal cases and establishment of a dual system of regular penitentiary inspections.[††]

9. As far as it could be ascertained, the change has been introduced without a meaningful *ex-ante* assessment, financial and other related estimations. There are no approved or even advanced draft conceptual policy papers providing for it either. The change had not been preceded by an inclusive careful review or analysis and

[§] See also the specific comment to Article 216 of the CPC in para. 18 below.
[**] See also the specific comment to Article 38 of the CPC in para 17 below.
[††] Article 131^1 and para. 9 of the Transitional Provisions

discussions as to a need in changing the institutional set-up and related distribution of jurisdiction over crimes committed within or linked to the functioning of the penitentiary institutions and service in Ukraine.

10. Moreover, the legislative move under consideration is expanding and runs counter the limitation of the range of bodies entitled to handle pre-trial investigations (procedures), encouraged and welcome by the Council of Europe,[‡‡] that has been pursued in the course of the reform of criminal justice in Ukraine, new CPC and reinforced by the laws on the Public Prosecution Service, State Bureau of Investigations and so on.

11. The hasty, superficial and conceptually alien nature of the amendments in question is confirmed by the fact that in spite of the crime-specific criteria for distribution of investigative jurisdiction and relevant streamlined institutional arrangements inbuilt in the CPC and the whole set of related legislative acts, the amendments (in particular newly introduced part 6 of Article 216 of the CPC) are based and operate with a simplified 'territorial' criterion for defining it for the units in question. This has been done without suggesting any further criteria and principles for resolving the resultant overlaps and jurisdictional conflicts. It is unclear which of the criteria (crime-specific or territorial) have the precedence, e.g. whether the crimes falling under the jurisdiction of the State Security Service, National Anti-Corruption Bureau and other investigative bodies committed 'in the territory or on the premises of the State Penitentiary Service of Ukraine' fall under their jurisdiction.

12. Thus, the amendments disregard the fundamental international standards, ECHR requirements and ECtHR case law concerning the procedural obligations as to combating impunity and effective investigation of breaches of the right to life, prohibition of ill-treatment, right to liberty and security, and other serious human rights violations. The blanket jurisdiction of the units in issue disrespects the condition of institutional independence required by procedural limbs of a number of the relevant articles of the ECHR.[§§] The European Court has developed a consolidated standard and suggested that it amounts to a violation of the procedural limb of the relevant articles of the European Convention, when 'an investigation of alleged misconduct potentially engaging the responsibility of a public authority and its officers was carried out by those agents' colleagues, employed by the same public authority.'[***] It is to be noted that there are judgments against Ukraine, where the ECtHR specifically disapproved an involvement of penitentiary authorities in

[‡‡] Opinion on the Draft Criminal Procedure Code of Ukraine, DG-I (2011)16, para. 23; Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine by the Venice Commission and the Directorate General of Human Rights, Adopted at the plenary session of the Venice Commission, 11-12 October 2013 (CDL(2013)039), para. 194. These and series of the Council of Europe other expert opinions provided in the course of last stages of development and adoption of the current CPC and related legislative framework stress the importance of limiting the range of bodies entitled to carry out pre-trial criminal procedures, ensuring clear distribution of investigative jurisdiction between them.

[§§] See footnote 2 above.

[***] Najafli *v.* Azerbaijan, no. 2594/07, 2 October 2012, para. 51. See also Taraburca *v.* Moldova, no. 18919/10, 6 December 2011, para. 54.

handling investigations against its own employees and officials implicated in ill-treatment.[†††]

13. Moreover, the specific recurrent findings concerning the inaction of the relevant authorities with respect to indications of ill-treatment and other abuses of prisoners in the penitentiary establishments in Ukraine, have prompted the CPT to recommend establishing a genuine independent specialised agency for investigations of this type.[‡‡‡]

14. Furthermore, it is to be noted that by limiting the jurisdiction of the State Bureau of Investigations with regard to the crimes committed by the officers of the penitentiary system on the territory or premises of its establishments,[§§§] the change runs counter the general measures that are reportedly taken by the Ukrainian authorities to eliminate torture and ill-treatment in custody within the framework of execution of ECtHR judgments in Kaverzin and Afanasyev groups, Karabet and others and Belousov v. Ukraine. In particular, in its most recent relevant Decision (Item H46-32 of1265th meeting – 20-21 September 2016) the Committee of Ministers of the Council of Europe specifically called upon the Ukrainian authorities to take measures to ensure that the State Bureau of Investigations becomes operational without delay so that effective investigations in compliance with Convention standards can be carried out.[****]

15. According to the modified (actually existing) model, the function of handling pre-trial procedures with regard to crimes committed in the penitentiary system (establishments) is distributed and performed by the Ministry of Internal Affairs, currently Prosecution Service and State Bureau of Investigations (when fully operational), as well as National Anti-Corruption Bureau of Ukraine and other investigative agencies. If the CPC is further amended so to maintain the precedence of the crime-specific (thematic) distribution of investigative jurisdiction and related overall institutional set-up of investigative bodies in Ukraine and rationale of the specific jurisdictions of the National Anti-Corruption Bureau, State Bureau of Investigations, State Security Service, tax authorities, as well as the requirements that all loss of life, ill-treatment, including inter-prisoner violence (with related failure of the penitentiary authorities to prevent and address it) and other related crimes are investigated by institutionally independent structures, it could be expected that the scope of crimes left for being handled by investigating units of the penitentiary system will also question feasibility of creation and maintaining a separate investigative agency in question.

[†††] Davydov and Others *v.* Ukraine, no. 17674/02 and 39081/02, 1 July 2010, paras. 280-291; Karabet and Others *v.* Ukraine, no. 38906/07 and 52025/07; 17 January 2013; paras. 281-282.
[‡‡‡] See the CPT's report on its visit to Ukraine from 1 till 10 December 2012, paras. 33-41 (with further references), CPT/Inf (2013) 23.
[§§§] See further comments to the amendments to Article 216 of the CPC below.
[****] 1265 meeting (September 2016) - H46-32 Kaverzin and Afanasyev groups, Karabet and others and Belousov v. Ukraine (Applications Nos. 23893/03, 38722/02, 38906/07, 4494/07). http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2016)1265/H46-32

C. ARTICLE-SPECIFIC COMMENTS

16. The simplified legislative techniques used for introducing the amendments in question do not generate any particular need in article by article analysis of the new provisions. Nevertheless, there are some norm-specific comments that underpin the conceptual considerations and comments suggested in the preceding chapter of this opinion.

17. The expansion of the investigative powers with regard to misdemeanours over other subdivisions of the State Criminal Executive Service of Ukraine provided for by the amendments to part 3 of Article 38 of the CPC reinforces the conceptual arguments against attributing it with the prosecuting function.[††††]

18. Besides the conceptual deficiencies of new Part 6 of Article 216 of the CPC in terms of defining the investigative jurisdiction, it is unclear what is meant by the 'territory or premises of the State Criminal Executive Service of Ukraine'. There is no such legal concept or notion (in terms of territory, in particular) and it will create difficulties in its practical application.

19. As discussed, the State Penitentiary Service of Ukraine has seized to exist and it is in the process of liquidation. Moreover, even if it would be retained, the amendment to para. 5 of Article 246 of the CPC contradicts its overall logic. The amendment disregards the status of the Service or any other relevant entity within the Ministry of Justice, since in case of other institutions relevant decisions as to extension of the period of carrying out a covert investigative activity up to 18 months are attributed to the ministers and heads of corresponding independent government bodies and not their subdivisions.

20. The comments suggested in the preceding paragraph of the current opinion equally apply to the amendments introduced to Article 9^1 of the OSA Law.

D. CONCLUSION

21. Thus, not only the amendments in question are neither justified nor clearly required by the on-going reform of the penitentiary system (including in terms of its institutional aspects), but they even run counter the declared general policies and mainstream developments in terms of setting up the criminal procedure and relevant institutional framework, as well as the justice sector in general. They would entail blurring the criteria of distribution of investigative jurisdiction, and incoherence between prosecuting powers and primary role and mission of the penitentiary administration. Moreover, the change is contradictory and inconsistent with the international obligation of Ukraine in terms of complying with the European standards, in particular ECHR, ECtHR case law and CPT jurisprudence on effective investigation of serious human rights violations.

[††††] See paras. 7 and 8 above.