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Expert Opinion on:

"Proposed Law On Amending Certain Legislative Acts of Ukraine Pertaining to Increase of the Role of Society in Fighting Corruption"—(Civil Prosecution)

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This Technical Paper presents an expert review/opinion based on an English translation of the Ukrainian text of the draft law "On Amending Certain Legislative Acts of Ukraine Pertaining to Increase the Role of Society in Fighting Corruption"—(Civil/Private Prosecution).

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Content

A. Executive Summary

1. This technical paper outlines views on the draft law *"On Amending Certain Legislative Acts of Ukraine Pertaining to Increase of the Role of Society in Fighting Corruption"*, which has been prepared with a view to its submission to the Verkhovna Rada. The legal opinion expressed in this paper is made in light of the requirements of the European Convention on Human Rights and international anti-corruption standards and good practices combating corruption.

2. The explanatory note for the draft law amendments indicates that the underlying concern is to strengthen anti-corruption activity and to overcome the corrupt "solidarity" amongst those who should be tackling corruption. Although the concern about corrupt officials impeding the institution of proceedings against those who may have committed such offences seems to be well-founded, the approach which is envisaged in the draft law amendments risks to seriously distort criminal proceedings in cases of private/civil prosecutions.

3. The model proposed for Ukraine accordingly goes beyond already existing solutions. Moreover, it gives rise to a considerable risk of serious violations of the European Convention on Human Rights (ETS 5). The risks are present due to the envisaged use of covert information gathering devices, unfettered dissemination of personal information obtained in breach of the right to private life, as well as the admissibility of evidence obtained through such breaches, among other issues outlined in this paper. Overall, the draft law amendments entail a significant distortion of the Code of Criminal Procedure without demonstrating a real likelihood of its provisions being an effective measure to prevent and fight corruption. The international and Council of Europe standards of relevance for the proposed amendments are:
   - Criminal Law Convention on Corruption (ETS 173);
   - Civil Law Convention on Corruption (ETS 174);
   - European Convention on Human Rights (ETS 5); and
   - United Nations Convention against Corruption.

4. The UN Convention against Corruption invites countries to provide Civil Society Organisations and the public in general a greater participation in the prevention of and the fight against corruption, without specifying the modalities.

5. Furthermore, the UN Convention against Corruption and the Council of Europe's Civil Law Convention on Corruption contain more explicit provisions when concerning the obligation of states to provide natural and legal persons the ability to undertake private action to seek compensation for damages as a result of acts of corruption.

6. Generally speaking, although the use of private/civil prosecutions to challenge the inactivity of the organs of the state is relatively limited, there are countries which do provide for such a possibility, however not in a manner being proposed through these amendments and for Ukraine. For example, in the UK there is a possibility for individuals, companies and organisations to instigate private/civil prosecutions. The possibility for anyone to bring a private/civil prosecution in UK however comes with limitations.

7. Many civil law jurisdictions allow for private individuals or even foreign states who have suffered loss to 'join' the prosecution process as a party in order to seek damages, to take over prosecution under specific circumstances, and to challenge decisions of competent authorities not to go ahead with prosecutions. As a party to the proceedings, the "victim" will have the right to access documents, participate in the examination of witnesses, and the right to make submissions to the court.

8. The draft amendments as provisioned could lead to the unfettered dissemination of personal information that has been obtained without the safeguards required under Article 8 of the European Convention and without this information being at all relevant to the proceedings in question. Furthermore, this has the serious danger of unleashing "witch hunts" and trial by the media, thus inhibiting or preventing a fair trial. Moreover, there will be a substantial departure from the rules on the admissibility of evidence obtained in violation of the right to respect for private life and, although this is not necessarily incompatible with Article 6(1) of the European Convention on Human Rights, the authorisation to possess and use covert information gathering devices will ensure that no one's right to respect for private life is safeguarded and not just suspected of committing the relevant offences.

9. Consequently, the pace at which pre-trial investigations and trial proceedings are to be conducted is much accelerated. The prospect of mistakes being made, or simply unrealistic time frames in which to gather what can often be complex evidence of corruption, and cases unnecessarily failing on that account will be significantly increased. In addition, an important safeguard to ensure that evidence given by experts is reliable will be removed and this measure is complemented by an inappropriate requirement for a judge to use doubt as to an expert's credibility as the basis for summoning him or her to be examined. All the proceedings will be essentially directed by the private/civil prosecutor, with the role of the prosecutor being marginalised and any refusal of evidence submitted by a private/civil prosecutor will be open to challenge, without any need to show that this refusal is unfounded.

10. The pre-eminent role for the private/civil prosecutor is being accorded without the need for such a prosecutor to be legally represented or even legally qualified. Furthermore, there is no indication on how it is expected that private/civil prosecutors will be funded since the proposed law amendments preclude payment of compensation to them for their efforts. This is an

important consideration as the costs of undertaking criminal proceedings are not insignificant if they are to be handled professionally and, without professionalism, prosecutions are much less likely to succeed.

11. In view of these arguments and in a much detailed manner, it is suggested (through the technical paper) that a better approach would be the adoption of either a specialist and closely monitored category of professional prosecutor or of a private prosecution scheme with appropriate safeguards to ensure that cases brought are not vexatious, politically motivated or of insufficient quality to place before the courts.

B. Introduction

12. These comments are concerned with the Proposed Law of Ukraine "On Amending Certain Legislative Acts of Ukraine Pertaining to Increase of the Role of Society in Fighting Corruption" ('the Proposed Law'), which has been prepared with a view to submission to the Verkhovna Rada.

13. The comments are based solely on the English translations of the Proposed Law, as submitted by the Ukrainian authorities. It reviews the compliance of the amendments vis-à-vis the requirements of the European Convention on Human Rights ('the European Convention') as interpreted and applied by the European Court of Human Rights ('the European Court') and in the light of international anti-corruption standards and best practices in investigating and prosecuting corruption offences, both at a procedural and an organizational level.

14. Compliance of the Proposed Law with international standards will depend to a large extent on implementation, which is not the focus of this Technical Paper. At the same time, this Technical Paper can only focus on evident aspects of compliance, but cannot assess all ramifications that the Proposed Law could possibly have in cross-relation with other Ukrainian laws and practices.

15. The comments first address the conceptual issue of private prosecutions and how Civil Society Organizations (CSOs) have to date used the law as a mechanism to seek accountability in the investigation and prosecution of corrupt acts and the Proposed Law amendments and their coherence with the reform of Ukrainian criminal procedure. There is then a provision-by-provision analysis of the amendments to the Criminal Procedure Code and the other two Codes. The comments conclude with an overall assessment of the compatibility of the amendments with European and international best practice standards.

C. Enhancing the role of civil society to bring legal proceedings

16. Corruption is not a victimless crime and remains a stubborn problem in many countries. In most countries the fight against corruption is taken forward by the state in the form of criminal and even civil powers that aim to hold those responsible to account. And yet the victims of corruption, for corruption in not a victimless crime, have little access to justice. This is particularly true in countries where corruption is systemic and meaningful state intervention, such as the prosecution of those suspected of corruption is problematic, politicized or just a fiction.

17. Into this void there is now growing room for civil society organisations (CSOs) to play a new and constructive role, namely that of a civil prosecutor. Indeed International conventions are now compelling signatory countries to put laws in place so that victims and the CSOs, amongst others, can play a more

proactive role and contribute to greater accountability against those who commit such crimes.

18. Article 13 of the United Nations Convention Against Corruption (UNCAC), entitled 'Participation of Society' is one such example of the new drive in international norms that seeks to place victims and CSOs if not at the forefront of the fight against corruption, certainly extends an invite to the table;

> *1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.*

19. Nevertheless, in many states the legal tools or framework that allow such activity is ambiguous and untested. In others the only resort that exists is a civil action (namely law suits), which can be expensive and very time consuming or challenges against the activity, or lack of activity of the state organs, such as judicial reviews.[1]

20. But in many jurisdictions the legal tools are unclear, untested, or even non-existent leaving victims little recourse against corrupt officials or those who collude with them. The ability of victims to initiate civil claims and to participate in criminal proceedings is a crucial counterpart to enforcement by state actors.

21. That said despite the reality, and particularly in developing countries, that the state is failing in its duties to investigate and to secure convictions against those involved in corruption, often at all levels, there is a growing body of evidence and practice of the legal involvement of the CSOs in this fight.

D. Private Prosecutions

22. The use of private prosecutions to challenge the inactivity of the organs of the state, in particular the prosecutor, remains largely underused across the world. Perhaps it is the availability of other mechanisms, in particular in civil code countries such as the *partie civile* mechanism discussed below, and yet private prosecutions have existed as an option for the citizens for years.

23. The UK has preserved the right for individuals, companies and organisations to instigate private prosecutions for many years. This right has been described as

[1] See Below for an analysis of the judicial review in the UK by Corner House and CATT against the Serious Fraud Office in the UK.

an important constitutional safeguard against the refusal or the failure of public authorities to institute proceedings. In the 1978 case of Gouriet v Union of Post Office Workers Lord Willberforce described it as a, "historical right which goes right back to the earliest days of our legal system" and which "remains a valuable constitutional safeguard against inertia or partiality on the part of authority."[2]

24. The use of private prosecutions is growing in the UK. Some see the use of such prosecution powers as an alternative to civil proceedings, where an injured party can seek redress before the civil courts. But in many senses the practice has developed increasingly in light of the increased reduced resources of the UK's law enforcement bodies, in particular the police (the investigators of crime in the UK) and prosecutors. The continued reduction of such resources means that the police and prosecutors are having to realign investigation and so prosecution priorities which has meant that complex cases such as the criminal use of intellectual property is often forgotten.

25. In one of the most notable recent cases in this field the Lord Chief Justice of England and Wales recently commented in the Court of Appeal Criminal Division, that:

> "...the retrenchment of the state is evident in many areas, including the funding of the Crown Prosecution Service ... it seems inevitable that the number of private prosecutions will increase, particularly in areas relating to the criminal misuse of intellectual property. In the overwhelming majority of such cases, a prosecution will serve the public interest in addressing such criminal conduct."[3]

26. The right to bring a private prosecution is enshrined in law at section 6(1) of the Prosecution of Offences Act 1985. Anyone can bring a private prosecution in principle, however, there are some limitations to the power. The Director of Public Prosecutions (DPP) has authority under section 6(2) to take over such prosecutions. There is no explicit requirement for the Crown Prosecution Service (CPS) to take over a private prosecution, but there will obviously be instances where it is appropriate, or even desirable, for the CPS to exercise the Director's powers under section 6(2). So for example a UK prosecutor has the power to take over the conduct of the case and continue the prosecution, discontinue the prosecution or stop it.

27. In cases where there is no realistic prospect of conviction or where they are thought to be "vexatious" or "malicious", or would otherwise be an affront to criminal justice in general terms, the CPS can step in and exercise the powers at section 6(2).[4]

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[2] Gouriet v Union of Post Office Workers [1978] AC 435, 477

[3] R (Virgin Media Limited) v Munaf Ahmed Zinga [2014] EWCA Crim 52

[4] See the CPS Legal Guidance at http://www.cps.gov.uk/legal/p_to_r/private_prosecutions/

28. There have been a number of legal challenges to the CPS taking over private prosecutions and in 2012 the Supreme Court, in the case *R (on the application of Gujra) v CPS* [2012] UKSC 52 held that the CPS' approach to taking over a private prosecution with the intention to discontinue it, unless the evidential stage of the Full Code Test was met, was lawful and did not frustrate or emasculate the objects underpinning the right to maintain a private prosecution in section 6 of the Prosecution of Offences Act 1985. This is an important balance to an unfettered power to bring private or private/civil prosecutions.

29. Nevertheless, the appetite for private prosecutions continues and in a boost to the powers available to the private prosecutor there is now power, where the Proceeds of Crime Act 2002 applies, to seek a confiscation order based upon the benefit derived by the offender from any criminal activity. This was confirmed in the case of *R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 52. Virgin Media Ltd commenced a private prosecution against the defendant who was illegally selling set top boxes which allowed free access to otherwise subscription only satellite channels run by the company. Following a private prosecution the defendant was convicted of conspiracy to defraud and sentenced to 8 years imprisonment. Virgin also successfully sought an order for confiscation from the defendant, setting an important precedent in the UK.

30. However, although the UK has yet to see a private prosecution run by a CSO, the use of creative legal powers by the CSOs has resulted in the use of other legal powers to challenge the decision making of UK public bodies, and law enforcement bodies in particular, through a process known as judicial review (JR). The JR process can be used in the UK to challenge the decisions of the prosecutors, usually in cases where a decision has been take not to prosecute in cases.[5]

31. A JR is no different, in broad principle, from administrative courts in civil code countries such as France using the administrative courts to challenge the decisions of public bodies. In the UK JR is carried out by regular civil courts, although it may be delegated to specialised panels within these courts, such as the Administrative Court within the High Court of England and Wales. There are three grounds for the JR of a public authority's decision: error of law, irrationality or procedural impropriety.

32. The most notable recent example of the use of JR by CSOs was the issue of JR by the NGOs, Corner House and Campaign Against Arms Trade (CAAT), in 2010 challenging the decision of the Director of the Serious Fraud Office (SFO) to enter a plea bargain agreement with BAE Systems Plc. – so effectively ending

[5] In cases where there is a decision to prosecute unless it can be proved that there was some element of dishonesty, mala fides or some other exceptional circumstances then a JR will not succeed, see Kebeline [2000] 2 AC 326.

the investigation and possible prosecution of BAE for bribery.[6] The challenge stemmed from the negotiated settlement of 5 February 2010, between the SFO and BAE in which BAE agreed to plead guilty to accounting offences relating to the controversial sale of a military air traffic control system to Tanzania and to pay a fine in the region of £30 million. In return the SFO dropped the far more serious charges of bribery in relation to BAE's dealings in a number of countries.

E. Civil Code Jurisdictions and the *Partie Civil* Process

33. In many civil code or civil law jurisdictions there is a provision in which private individuals or even foreign states who have suffered loss, so in the cases of large scale corruption, can 'join' the prosecution process as a party in order to seek damages. This can even extend to the joinder in proceedings of CSOs.

34. As a party to the investigation, the victim or interested party will have the same rights as the defendant, namely access documents on the court file, participation in the examination of witnesses, and the rights to make submissions to the investigating magistrate. This is a significant advantage over a civil procedure, where the plaintiff has to generate supporting evidence for the case.[7]

35. The Transparency International France/SHERPA case demonstrates the potential power that can be mobilised by the CSO community in seeking to hold powerful people to account for large-scale corruption and money laundering. The case serves as an example of the use of *partie civil* powers and direct petitions to the French prosecutor for the opening of transnational investigation into bribery and corruption.

36. In March 2007, Sherpa, together with two other French NGOs, filed a legal complaint before the French Public Prosecutor against the ruling families of Angola, Burkina Faso, Congo, Equatorial Guinea, and Gabon alleging that they owned millions of Euros worth of properties in France that could not be the fruits of their official salaries.

37. The complaint was based on the specific offence of handling of stolen assets, which is prohibited under articles 321-1 and 432-15 of the French Penal Code. According to these texts, is punishable in France anyone who detains illegally-acquired assets on the French territory.

38. Considering the high volume of real estate detained by the above named heads of state and their close associates together with the strong presumptions of

[6] See the legal arguments at http://www.thecornerhouse.org.uk/resource/corner-house-research-and-campaign-against-arms-trade-skeleton-argument and http://www.caat.org.uk/

[7] StAR – 'Towards a Global Architecture for Asset Recovery'

embezzlement regarding those ruling families, the plaintiffs argued that the properties could not have been acquired thanks to their own official salaries, but would have likely required the use of stolen public assets.

39. An investigation was opened by the prosecutor in 2007 but promptly closed down due 'insufficient characterization' of the offences. This decision was eventually overturned in the French Supreme Court and the NGOs were found to have legal standing. The case continues to-day with significant seizures of property and arrest warrants issued by the French prosecutor against high-ranking members of the regimes in question. For example, in September 2011, the French judges seized some fifteen luxury cars and more recently three truckloads of luxury assets, such as antique furniture, works of art and cases of wine were seized in an unprecedented ten-day-search, as suspected proceeds of corruption.[8]

F. Other Mechanisms: The rights of individuals and others to seek redress

40. UNCAC Art 35 requires States Parties to provide mechanisms that would allow natural and legal persons to undertake private rights of action to seek compensation for damages as a result of acts of corruption. This concept is more fully developed under the Council of Europe's Civil Law Convention on Corruption, which entered into force in 2003. The Civil Law Convention outlines the mechanisms by which natural and legal persons who have suffered damage through corruption can defend their rights and interests, including the possibility of receiving damages. 39 of the 46 member states of the Council of Europe's Group of States against Corruption (GRECO) have signed – though notable financial centers are among those that have not – and 33 countries have ratified the convention.

G. Provision by provision analysis

41. The Proposed Law has 47 amendments relating to the Criminal Procedure Code, including entirely new provisions. They are concerned with the following sections: General Provisions; (Articles 3, 22, 27, 59 (new Articles 59-1 and 2), 71, 87, 92, 93 and 102 (new Articles 102-1 and2)) Measures to Ensure Criminal Proceedings (Articles 132, 155, 166 and 171); Pre-trial investigation (Articles 219, 243 and 283); Court Proceedings in the First Instance (Articles 314, 318, 325 and 356 (new Article 356-1)); and Criminal Proceedings Related to Reviewing Court's Decisions (Articles 393, 409 and 425); and Special Procedures for Criminal Proceedings (Article 479 (new Articles 479-1 to 479-17). In addition its adoption would entail two amendments to the Criminal

[8]http://www.transparency.org/news/pressrelease/20120713_biens_mal_acquis_case_teodorin_obiang_refuses_to_appear

Code (Articles 3 and 22) and two to the Code of Ukraine on Administrative Offences (Articles 15 and 195-5).

H. Criminal Procedure Code of Ukraine

Article 3

42. The amendment to this provision would introduce 'private/civil prosecutor and his representative' into the definition of parties to criminal proceedings in Part 19 and is not, as such, problematic.

Article 22

43. The amendment to this provision would add 'private/civil prosecutor and his representative' to the list of those who may support the accusation for the purposes of a notification of suspicion to be served on an individual pursuant to Chapter 22. This is also not, as such problematic.

Article 27

44. The effect of the amendment to this provision would be to disapply the possibility of proceedings being conducted, partly or wholly, in camera with a view to preventing the disclosure of information on private and family life of an individual or circumstances which degrade human dignity. Although the Article 6(1) of European Convention criminal proceedings for proceedings to be held in public, it authorises the exclusion of the press and the public from all or part of them where the protection of the private life of the parties so require. Furthermore, the failure to so exclude them will in particular cases give rise to a violation of the rights both of the parties and of witnesses to respect for their private life under Article 8.[9] This is especially problematic given the proposed authorisation for the obtaining and admissibility of evidence obtained in violation of Article 8.[10] The removal of the power to hold proceedings in camera simply because they are being conducted in the form of private/civil prosecution would not provide a sufficient justification for the interference with the right under Article 8 and this proposed amendment should not, therefore, be retained.

Article 59-1

45. This would be an entirely new provision and would define what would be meant by a private/civil prosecutor, the rights that such a prosecutor would has during the criminal proceedings, including the trial, and the requirements or duties that such a prosecutor would have to fulfil.

46. The definition in Part 1 of private/civil prosecutor is both positive and negative. Thus, it cannot be someone with an official role in the detection, investigation and fighting of criminal and other offences but can either be the

[9] See, e.g., *Z v. Finland*, no. 22009/93, 26 February 1997 and *Craxi v. Italy (No. 2)*, no. 25337/94, 17 July 2003.

[10] See the discussion below of Article 87 and also of the proposed amendments to offences in the Criminal Code of Ukraine and the Code of Administrative Offences of Ukraine.

direct victim or someone who has become aware of criminal offences for which the private/civil prosecution procedure can be used. Is this second qualifying criteria broad enough to allow the CSOs to play a role as the private/civil prosecutor? Overall the definition is somewhat unclear but also repetitive. Certainly, it is not evident that public prosecutors are amongst those excluded from acting as a private/civil prosecutor as they do not detect, investigate or prosecute criminal offences even though it would be within the logic of the Proposed Law to exclude them. There is, however, no requirement that private/civil prosecutors who are not victims have any legal qualified, notwithstanding the role that they would be able to play in criminal proceedings and that there is no requirement that they act through a legally qualified representative.[11]

47. In addition, it is unclear in this provision as to what, if any evidential basis is required for the would-be private/civil prosecutor to become aware that an offence has been committed, although it appears from the proposed Article 479-2 that the requirements of Article 214 do not need to be met if the person concerned was initiating the proceedings as a whole. Moreover, there are two references to victims being private/civil prosecutor, although in one instance their nature is limited to those who are 'direct', which is not a term defined anywhere in the Criminal Procedure Code. Furthermore, the specification that a legal person can be a private/civil prosecutor undoubtedly renders the need to state that a public union can so act redundant.

48. The rights and duties of a private/civil prosecutor are specified in Part 3, 4, 5 and 6 and they are stated in Part 2 to accrue at the time of filing an application with the investigator or prosecutor that a criminal offence has been committed, that such offence is acceptable for proceedings in the form of private/civil prosecution and an application to that effect has been filed. This formulation is unclear as to whether both the applications have to be made contemporaneously or that it is open to a would-be private/civil prosecutor to become involved in criminal proceedings that have already been started.

49. The rights of the private/civil prosecutor are essentially those of the victim under Article 56 of the Criminal Procedure Code, with the addition of rights to "disclose circumstances and evidence that were the grounds for commencement of criminal proceedings and are of public interest", "use representation services" and "waive the private/civil prosecutor procedural status and to withdraw from participation in criminal proceedings".

50. The first of these rights would enable the private/civil prosecutor to disclose material to the public without any limitation and could, in particular contexts, be prejudicial to the fair trial rights of an accused, suspect under Article 6 of the European Convention and of the right of anyone to respect for private life under Article 8 of the European Convention without the safeguard of prior

[11] See the discussion of the proposed Article 59-2 below.

judicial control or the requirements of professional ethics. It should also be noted that it is unclear whether or not the concept of 'representation services' means that a private/civil prosecutor can be represented by a lawyer – as is envisaged by the proposed new Article 59-2 - and also whether there is any liability for the state to pay for any such representation. However, the latter seems to be precluded by the terms of the proposed Article 479-17, discussed below.

51. As well as these rights, there are other rights for the private/civil prosecutor specified with respect to the pre-trial investigation and the trial, which are essentially those of the victim under Parts 2 and 3 of Article 55 of the Criminal Procedure Code, with the very significant addition of rights in the former to make requests to the investigator, public prosecutor to petition the court to provide measures ensuring criminal proceedings, to petition the court directly in case of their refusal to do so and to request that the indictment be drawn up and approved, and to hand such indictment to court within the timeframe stipulated by the Code and in the latter to support charges brought in court alongside with the prosecution and irrespective of the consent of the victim, or to refuse to support the charges. These thus make the private/civil prosecutor a major participant in the relevant proceedings.

52. A private/civil prosecutor is subject just to three requirements, namely, to exercise his rights exclusively with the aim and intent of realization of the goals of criminal proceedings and legal status of the community, to appear upon summons of investigator, private/civil prosecutor, investigating judge, court and, if it proves to be impossible to appear in time, to inform thereon in advance, as well as on reasons for such impossibility and not to obstruct the establishment of circumstances of the commission of criminal offence. The latter are not problematic but the first does seem to do enough to meet the concern previously discussed about disclosure of material to the public in a manner incompatible with rights under the European Convention.

Article 59-2

53. This provision would enable – but not require - a private/civil prosecutor to be represented by a person having the right to be the defence in criminal proceedings. It would also confer on such a person the rights and duties of the private/civil prosecutor and would make applicable to him or her the various provisions concerned with the representative of the victim, including those in Article 59 of the Criminal Procedure Code. In addition, this provision would provide for private/civil prosecutors that are legal persons to acquire and exercise their rights and obligations through their bodies in accordance with their founding documents and the law.

Article 71

54. Pursuant to the amendment to this provision, a foreign national person would be included amongst those who can act as specialists in criminal proceedings. Given that the use of specialists is intended to provide special knowledge and

skills in connection with criminal proceedings and that it is entirely conceivable that such knowledge and skills may not always be possessed by Ukrainian nationals, such an amendment cannot be regarded as problematic in principle. It will, of course, be important that the actual competence of the foreign person be checked and that deference not be given to his or her assessment simply because he or she is foreign and it will be up to the court to ensure that this is the case. However, it is not clear why such a possibility is not also extended to experts - which are dealt within in a separate provision[12] – especially as the Proposed Law provides for interpretation for experts who do not understand the state language.[13]

Article 87

55. The amendment to this provision would preclude the application of the general rule that evidence obtained through a significant violation of human rights and fundamental freedoms in those cases where the relevant evidence was obtained using special technical devices of covert information gathering and was submitted by the private/civil prosecutor to the investigator, prosecutor when filing an application "of committed criminal offence in cases stipulated by this Code".

56. This is a significant departure from an important provision in the Criminal Procedure Code but, although the method of obtaining such evidence would be contrary to the right to respect for private life under Article 8 of the European Convention, its admissibility would not necessarily be inconsistent with Article 6 of the European Convention. The crucial consideration for the purpose of the latter provision is that the evidence is reliable and its use would not in other respects render the trial unfair. As such the proposed amendment is not problematic with regard to Article 6, but there is clearly a need for diligence on the part of the trial judge regarding respect for the Article 6 rights of the accused, suspect – in particular as regards the risk of fabrication of evidence and breach of the prohibitions on entrapment and self-incrimination - and the proposed amendment in Part 4 should be reformulated to articulate the judge's responsibility to determine whether the evidence can be used rather than just say that the provisions on automatic inadmissibility are not applicable. So although not problematic, depending upon judicial supervision, the implementation of the powers under Article 87 should be carefully monitored given the potential for adverse impact upon Article 8 and, consequently, Article 6 rights.

Article 92

57. The amendment would add the private/civil prosecutor to the list of persons on whom the burden of proof in proving the circumstances required to be proved pursuant to Article 91 of the Criminal Procedure Code. As such, the proposed amendment is not problematic.

[12] Articles 69 and 70.
[13] See the discussion of Article 356-1 below.

Article 93

58. The amendments to Parts 1 and 3 would add the private/civil prosecutor to the list of parties to criminal proceedings able to undertake the collection of evidence, to demand and obtain objects, copies of documents, expert reports, etc. from state authorities and to initiate – but not conduct - investigative (search) activities. These amendments are not, as such, problematic.

Article 102-1

59. This would be an entirely new provision and replicates for the findings of specialists to a considerable extent the content of the existing provision on expert's findings in Article 101 of the Criminal Procedure Code, namely, the first four parts of each provision and also the part dealing with the transmission of the findings to the party requesting them.[14] However, unlike for expert's findings, there is no bar on a specialist's findings being based on inadmissible evidence, no authorization for the parties to require the specialist to explain or supplement his or her findings and no clarification that the findings are not binding for the person or organ conducting the proceedings (although there is provision for the findings to be evaluated).

60. The new provision, however, authorises the requesting party to add the findings at both the pre-trial investigation and the court hearing stages and also provides for the examination of the specialist even though that is already covered by Article 359 of the Code. It is not evident why this provision should be added to the Code – there is no indication even that it is applicable only for proceedings conducted in the form of private/civil prosecution - and it could not only give rise to unnecessary confusion in the use of specialist evidence but also allow inadmissible evidence to be introduced in a roundabout fashion. This is not a provision that should be retained in its present form.

Article 102-2

61. This would also be an entirely new provision relating to specialists but its first part is identical to Part 1 of Article 102 in respect of the findings of experts. However, unlike the latter provision, it has no further parts and thus omits the need for a statement in the findings that the specialist was warned about liability for knowingly misleading findings and for refusal to fulfil his expert duties without valid reasons, as well as the right of the specialist to state knowledge revealed in his or her examination which is important for criminal proceedings and in whose respect questions were not put and the need to sign the findings. These are very significant omissions which could weaken the quality of a particular specialist's findings and indeed lead to unreliable findings being submitted to the court[15], as well as giving rise to a risk of

[14] Part 9 of Article 101 and Part 6 of the proposed Article 102-1.

[15] Although the latter would be mitigated if an expert is examined in court as a result of the advice then to be given of criminal liability for providing knowingly misleading findings; Article 356(2) and the proposed Article 356-1(2).

relevant information not being disclosed to the court. Again there is no evident reason for such an omission and the provision should not be retained in its present form.

Article 155

62. The amendment to this provision would add the private/civil prosecutor to the list of those who can submit a motion for suspension of a person from office and is not, as such, problematic.

Article 166

63. The amendment to this provision would add the private/civil prosecutor to the list of persons referred to as having submitted a motion for authorisation of search and is consequential on the amendment to Article 93 previously noted. It is not, as such, problematic.

Article 171

64. The amendment to this provision would add the private/civil prosecutor to file a motion for attachment of property in the event of the prosecutor denying his or her motion to so file and is not, as such, problematic.

Article 219

65. The amendment to this provision would add a third sub-paragraph to Part 1 which would set a non-extendable 20 day limit for the completion of the pre-trial investigation where proceedings are conducted in the form of private/civil prosecution. This is a significant reduction from the two-month period currently prescribed for the sort of offences for which it is proposed proceedings in the form of private/civil prosecution would be conducted. There is clearly a risk that cases will either be discontinued for want of sufficient evidence or will be sent to trial without a sufficient basis for an accusation and, if more compelling evidence is only adduced at the trial, there is clearly a risk that an accused, suspect will have insufficient time to prepare his or her defence, as should be possible pursuant to Article 6(3)(b). Such a tight deadline is inappropriate and should not be retained.

Article 234

66. The amendment to this provision would add the private/civil prosecutor to the list of persons who can establish that there are sufficient grounds to grant a request for search and is not, as such, problematic.

Article 235

67. The amendment to this provision would add the private/civil prosecutor to the list of persons requesting a search who should be included in the information given in any ruling one and is not, as such, problematic.

Article 243

68. The amendment to this provision would add private/civil prosecutor to the ability granted to the defence to involve - on their own - experts to conduct expert examination and is not, as such, problematic.

Article 283

69. The amendment to this provision would add an entirely new Part requiring, at the end of the new period prescribed for pre-trial investigation in proceedings conducted in the form of private/civil prosecution, the prosecutor to submit to court an indictment or to close criminal proceedings. Subject to the concern already expressed about the shortened deadline for pre-trial investigation for such cases, this amendment is not, as such, problematic.

Article 314

70. The amendment to this provision would add the private/civil prosecutor and his representative to the list of persons able to participate in the preparatory court session. This provision is not, as such, problematic.

Article 318

71. The amendment to this provision would add a new sentence to Part 1 of this provision that would require assignment of the date for the trial in proceedings conducted in the form of private/civil prosecution to be within one month of the ruling to assign it as opposed to the existing requirement that it be held and completed within a reasonable time.

72. The introduction of this rigid deadline is likely to result in a violation of the right to adequate time to prepare one's defence under Article 6(3)(b) of the European Convention given the extensive documentation that may be involved in the sort of cases envisaged for in proceedings conducted in the form of private/civil prosecution. Although the concern about delay in these cases is understandable, the absence of any ability to exceed the deadline where cause for further time for preparation is established is clearly contrary to the requirements of the European Convention. It would not, therefore, be appropriate to retain the proposed amendment in its present form.

Article 325

73. The amendment to this provision would make the private/civil prosecutor liable to the penalties generally applicable for not appearing in court for trial where duly notified and is not problematic.

Article 356-1

74. This would be an entirely new provision relating to specialists but it replicates to a considerable extent the existing provision on examination of experts in Article 356 of the Criminal Procedure Code, notably as regards establishing his or her identity, advising him or her of liability for providing a deliberately untruthful conclusion, the ability to question him or her about the possession of special knowledge and qualification and the right to use written and other materials used during the expert examination.

75. However, while both provisions also deal with the summoning of a specialist or an expert during the trial, the existing provision authorises this upon the motion of a party, the victim or *proprio motu*, the new one does so only "if court has reasonable doubt in credibility of specialist's findings. Such a formulation would entail the judge adopting a position on the evidence prior to submission by any party and could thus give rise to serious doubts about his or her impartiality. It is not clear why the provision needs to be formulated in this way, particularly as the court already has the power under Article 360(2) to question a specialist *proprio motu*, which does not entail any position on the evidence having to be declared. The provision should thus not be retained.

76. Apart from that difference, the only genuine difference between the proposed provision and the existing one relating to experts is the stipulation that the court should provide an interpreter where the specialist does not understand the state language or the language in which the proceedings are conducted. This is a necessary consequence of the proposed authorisation that specialists need not be citizens of Ukraine, already noted[16], and is thus not inappropriate.

Article 393

77. The amendment to this provision would add the private/civil prosecutor and its representative to those who may submit an appellate complaint in those cases conducted in the form of private/civil prosecution and is not, as such, problematic.

Article 409

78. The amendment to this provision would add a fourth Part to the present provision, allowing for an additional ground for setting aside or changing the judgment of a court of first instance that is applicable only to proceedings conducted in the form of private/civil prosecution, namely, a refusal by the court to accept evidence presented by the parties. This would benefit the defence as much as the prosecution but is undoubtedly intended to address the concerns that have led to the proposed introduction into the Criminal Procedure Code of the private/civil prosecutor concept.

79. However, it is highly questionable whether such a provision is either necessary or appropriate. There are extensive rules in the Criminal Procedure Code governing evidence and the conduct of a hearing (Articles 84-90 and 351-364) and an improper refusal of evidence by a judge would already be open to challenge on the basis that there was a significant non-compliance with the requirements of criminal procedure.[17] Furthermore, the fact that the ground for challenge is simply that of 'refusal' – regardless of any suggestion that it was in some way wrongful – clearly prioritises evidence given in proceedings in the form of private/civil prosecution and almost certainly that which is adduced by

[16] See the discussion of Article 71 above.
[17] Article 409(1).3.

the private/civil prosecutor. This could lead to such evidence being given weighting that it does not deserve on its merits and thus render the proceedings as a whole unfair and contrary to the requirements of Article 6(1) of the European Convention. In the circumstances, it does not seem appropriate for the proposed amendment to be retained.

Article 425

80. The amendment to this provision would add the private/civil prosecutor and its representative to those who may submit a cassation complaint in those cases conducted in the form of private/civil prosecution and is not, as such, problematic.

Article 479-1

81. The proposed provision is the first of a series that together would constitute an entirely new Chapter for the Criminal Procedure Code devoted to the conduct of criminal proceedings in the form of private/civil prosecution.

82. Part 1 of this provision would define these proceedings as ones initiated on the grounds of an application by a private/civil prosecutor with respect to certain offences, namely, acceptance of an offer, proposal or receipt of unlawful benefits by an official and provocation of bribery[18] and the corresponding application of such person to conduct criminal proceedings in a form of private/civil prosecution. This definition is sufficiently clear and is not, as such, problematic.

83. Part 2 of the proposed provision stipulates four special characteristics for criminal proceedings in the form of private/civil prosecution. These concern the position of the private/civil prosecutor as initiator, independent participant in and party to the proceedings and the special procedure for the commencement of the proceedings, for proving of the circumstances that indicate signs of the relevant criminal offences and for provision of damages to the person in whose name the proceeding were initiated. However, the last of these characteristics is not actually addressed in any of the provisions in the Proposed Law.

84. Part 3 of the proposed provision purports to rule out the participation of private/civil prosecutors in certain criminal proceedings, namely in respect of certain offences listed in Part 1 of the Article 479-1, where these are not initiated by such prosecutors. It is clearly intended that proceedings in respect of those offences that are not initiated by a private/civil prosecutor should continue to be conducted in accordance with the general requirements of the Criminal Procedure Code, which is not, of course, problematic.

85. Part 4 of the proposed provision would make the person initiating the commencement of certain criminal proceedings a party to them from the time

[18] Contrary to Articles 368 and 370 respectively of the Criminal Code of Ukraine.

when an application for criminal proceedings in a form of private/civil prosecution is submitted in the manner specified in the proposed new Chapter and provide that that procedural status is retained during every stage of them. Moreover, it would prevent removal of the person concerned as a participant or losing his or her procedural status against his will.

86. Under Part 5 of the proposed provision a private/civil prosecutor would be able to support charges "brought in court alongside with the prosecution and irrespective of the consent of the victim". This underlines the fact that the role of private/civil prosecutor is not in any way a representative of victims of the relevant offences and could lead to considerable confusion in the court proceedings.

87. Part 6 of the proposed provision would stipulate that the participation of a private/civil prosecutor in criminal proceedings with the procedural status of a witness, victim or his or her representative, or indeed of any other participant in criminal proceedings at the same time shall not release him or her from his or her procedural status of private/civil prosecutor. This underlines the potential for a significant conflict of interest in the discharge of this role and underlines its questionable nature.

Article 479-2

88. This proposed provision would deal with the commencement of criminal proceedings in the form of private/civil prosecution. Pursuant to this the relevant application is to be submitted within three days from detecting the offences concerned, for which a deadline of 24 hours is specified in Part 2. Such a deadline already exists for offences generally under Article 214 and is thus not problematic.

89. The 24 hour deadline specified in Part 3 for notifying the relevant person of the commencement of a pre-trial investigation with respect to him or her is, however, more exacting as the notification of suspicion obligation under Chapter 22 of the Criminal Procedure Code only arises when a person is apprehended at the scene of criminal offence or immediately after the commission of criminal offence, a measure of restraint is enforced against an individual as prescribed in the present Code or there is sufficient evidence available to suspect a person of having committed a criminal offence. This aspect of the provision is thus not problematic. Furthermore, the stipulation in Part 4 that measures ensuring criminal proceedings shall be applied as stipulated by the Criminal Procedure Code is also, of course, not problematic.

Article 479-3

90. This proposed provision would set the time limits for pre-trial investigation in criminal proceedings conducted in the form of private/civil prosecution. Part 1 restates the non-extendable 20-day deadline already discussed[19] and the

[19] See the discussion of Article 219 above.

concerns previously raised remain applicable. Parts 2 and 3 concern suspension of a pre-trial investigation and of the duration of the 20-day deadline. These will probably not mitigate all the concerns previously raised because of the exclusions regarding suspension applicable in other pre-trial investigations (i.e., if the suspect absconds, the investigative judge rejects a motion for conducting special pre-trial investigation or there is a necessity to carry out procedural actions within the framework of international cooperation) and the suspension of the deadline's duration is only while a decision by investigator, prosecutor to close criminal proceedings is being challenged in court and while the court decides on motion by investigator, judge or private/civil prosecutor to ensure criminal proceedings, which are not likely to entail significant periods of time.[20]

Article 479-4

91. This proposed provision purports to establish certain peculiarities of proof for proceedings conducted in the form of private/civil prosecution, although two of them are not really required.

92. Thus, Part 1 stipulates that the rules of admissibility of evidence provided by the Criminal Procedure Code are not applicable to evidence submitted by private/civil prosecutor to investigator, prosecutor in conjunction with the notice on commission of criminal offence under Part 1 of the proposed Article 479-1. However, those rules are not applicable at this stage of the proceedings under the existing provisions of the Code; under Part 2 of Article 86 they relate just to the adoption of a court judgment. Similarly, the provision in Part 4 that, with the aim of initiating criminal proceedings, a private/civil prosecutor shall be entitled to refer to and use any procedural sources of evidence specified in the Criminal Procedure and this must be accepted by the investigator, prosecutor and evaluated according to the established procedure does not really add anything to the existing provisions

93. However, Part 2 provides authorisation for the use by a private/civil prosecutor of special technical devices of covert information gathering with the aim of obtaining and/or recording sufficient information regarding an activity that has indications of one of the relevant criminal offences. This use is subject to the requirement that the information so obtained and/or recorded must, together with the carriers and devices used for collection thereof, be submitted to the investigator, prosecutor no later than three days upon its receipt by the private/civil prosecutor concerned. Only where all these requirements are met will the evidence be deemed admissible. Such requirements could be material for establishing the reliability of the evidence concerned but would not guarantee it. Although it has already been noted that the use of evidence so obtained is not necessarily contrary to Article 6(1) of the European Convention[21], the concerns previously expressed about compliance with the

[20] See the discussion of the proposed Article 479-10.
[21] See the discussion of Article 87 above.

right to respect for private life under Article 8 remain applicable.[22] Given the potential for such practices to impact upon Articles 8 and 6 of the European Convention the implementation of this Article merits further and careful monitoring.

94. In addition Part 4 provides that a private/civil prosecutor, with the aim of authenticating information which he, she or it has previously received, would have the right to independently engage experts and specialists (including foreign nationals) to seek "their relevant conclusions" and, in such a case, the investigator, prosecutor would be required to promptly provide the private/civil prosecutor with all corresponding carriers and devices used in gathering information. The engaging of experts and specialists for the aim stated is not inherently problematic but it should be noted that the Criminal Procedure Code is only being amended to allow foreign nationals to be specialists and not experts. More fundamentally, the requirement to hand over the carriers and devices to the private/civil prosecutor does not provide any guarantee of independent verification that there is no interference with them before their appraisal by the experts and the specialists, as well as posing a potential problem in respect of continuity of evidence. This could result in the evidence concerned becoming tainted and thus unreliable.

95. The stipulation in Part 5 that, within ten days following the initiation of criminal proceedings, the private/civil prosecutor may collect and submit evidence according to standard procedure would seem to be consistent with the tight deadline for the completion of the pre-trial investigation but also leaves a similarly short period to the defence to seek evidence that is exculpatory in respect of that evidence. The further stipulation in Part 6 that a private/civil prosecutor can only add to the evidence submitted within that 10-day period, whether in the remainder of the pre-trial investigation or the subsequent proceedings, such evidence that could not be obtained within that period for objective reasons (such as was obtained upon request, appeal etc. made within it) might seem a safeguard against possible oppressive tactics. However, such a limitation is more apparent than real as there is an exception made for "evidence necessary to rebut evidence and claims submitted by a person notified of suspicion" in the proceedings concerned, which could be quite extensive in its scope.

Article 479-5

96. This proposed provision virtually precludes any possibility of confidentiality for items of photography, audio recording, video recording and other information carriers submitted by a private/civil prosecutor, as well as the circumstances specified in his, her or its notice on commission of the relevant criminal offences by providing that these "may not constitute a secret (except for the state secret) and shall be considered of public interest and be open to public". This stipulation is made for an understandable reason, namely, concern

[22] See the discussion of Articles 27 and 59-1 above.

about connivance in and concealment of corruption but it is one without any limitation as to content or indeed persons and so could result in unjustified interferences with the right to respect for private life. As already noted[23], the openness of criminal proceedings needs to take account of other competing rights and interests and it would be appropriate to narrow the scope of this provision by making it a presumption rather than an absolute rule and providing for judicial determination – in closed proceedings - as to whether it can be rebutted in respect of certain material.

Article 479-6

97. The stipulation in this proposed provision that investigative actions shall be carried out by investigator, prosecutor according to procedure stipulated by Chapters 22, 23 of the Criminal Procedure Code "and taking into consideration peculiarities and time limits specified by this chapter" is not in itself problematic but the concerns expressed about certain of the 'peculiarities' in other proposed provisions would, of course, be applicable to this one as well.

Article 479-7

98. The stipulation in Part 1 of this proposed provision of a 10-day deadline from entry of the information in the Integrated Register of Pre-Trial Investigations for investigators, prosecutors to give the person concerned notification of suspicion is not, in principle, problematic but in the context of the 20-day deadline for completion of the preliminary investigation it does leave little time for responding to the allegation and submitting exculpatory evidence. However, the further stipulation in Part 2 that criminal proceedings must be closed where the grounds for doing so, as set out in Article 284 of the Code of Criminal Procedure, have been established is entirely appropriate.

Article 479-8

99. The possibility envisaged in the present provision for a private/civil prosecutor, his representative to have the right to challenge a decision to close criminal proceedings during pre-trial investigation is not, as such, problematic.

Article 479-9

100. The time-limit that the proposed provision sets for a challenge by the private/civil prosecutor, representative to a decision to close criminal proceedings during pre-trial investigation (together with the requirements governing its submission and return), namely, 5 days from the decision or - where it was made without the private/civil prosecutor's participation - from the date of its receipt, is not inappropriate.

Article 479-10

101. The time-limit of 5 days envisaged in this proposed provision for consideration by an investigating judge of a challenge to close criminal proceedings is the same as that generally applicable under Part 2 of Article 306 of the Criminal Procedure Code and it does not seem material that the deadline for assigning a

[23] See the discussion of Article 27 above.

date for the actual court hearing is 2 rather than the 3 days in Article 306. However, unlike Article 306, there is no mandatory provision for the participation of the accused, suspect as opposed to the person lodging the complaint, which in the present context is only likely to be the private/civil prosecutor. Nonetheless, this is also not significant as under the general scheme in the Code this requirement relates to all decisions being challenged – which invariably have an adverse effect on the accused, suspect - and not just those to close criminal proceedings, which are likely to be his or her advantage.

Article 479-11

102. The proposed provision is concerned with the requirements relating to a ruling of the investigating judge based on the results of consideration of a complaint to close criminal proceedings. In particular, it requires this to be made in accordance with the rules laid down in the Criminal Procedure Code, indicates what matters may be referred to, requires a person of suspicion to be notified within 24 hours of the ruling coming into force, specifies that there may not be any appeal except as regards a denial of satisfaction of the complaint against the closure decision and indicates the rules applicable for such an appeal. The content of this provision is not, as such problematic.

Article 479-12

103. This proposed provision is concerned with the completion of the pre-trial investigation in criminal proceedings conducted in the form of private/civil prosecution. Thus, it would require the investigator, prosecutor either to close the proceedings where the grounds for doing so in Article 284 of the Criminal Procedure Code are established or "to submit an indictment to court, motion to enforce compulsory medical or educational measures". In either case, this must be done within 3 days of the deadline set in the proposed Article 479-3 for completion of the pre-trial investigation and the information on completion of pre-trial investigation must be entered by the prosecutor in the Integrated Register of Pre-trial Investigations. The content of this provision is not, as such problematic.

Article 479-13

104. The proposed provision is concerned with the submission of an indictment to the court and the register of pre-trial proceedings records. The content of this provision is essentially the same as that in Article 291 of the Criminal Procedure Code for criminal proceedings generally except for six matters.

105. Firstly, there is a 3-day deadline for drawing up, approving and submitting the indictment, which period runs from the completion of the pre-trial investigation. The shortness of the deadline for the latter has already been noted[24] and the tightness of this new deadline is certainly not calculated to ensure that the indictment is satisfactorily prepared, which may affect adversely the outcome of the trial and is thus not justified.

[24] See the discussion of Article 219 above.

106. Secondly, there is a requirement to specify the biographical details of the private/civil prosecutor, which is consistent with the existing similar requirements for other participants in the proceedings and is not problematic.

107. Thirdly, the reference to the actual circumstances of the criminal offences found established is in terms of this establishment being by the private/civil prosecutor rather than the prosecutor who is still supposed to approve it according to Part 3, which leaves unclear what is the actual assessment of the case by the prosecutor and whether his or her approval is just a formality and not an endorsement. This potentially undermines the role of the prosecutor in the proceedings.

108. Fourthly, it is the private/civil prosecutor and not the prosecutor who indicates the grounds for the application of criminal law enforcement measures, once more undermining the prosecutor's role.

109. Fifthly, the stipulation in sub-paragraph 3 of Part 4 on acknowledgement of receiving a copy of the indictment does not take account of the exception introduced into Article 291 to take account of the arrangements for pre-trial investigation in absentia proceedings in Chapter 24-1 and it needs to be clarified whether this is intended.

110. Finally, there is the stipulation in Part 6 that court proceedings based on materials of criminal proceedings in a form of private/civil prosecution shall be conducted pursuant to the procedure and within time limits stipulated by the Code, which is not problematic.

Article 479-14

111. This proposed provision requires the delivery of a copy of the indictment and the register of pre-trial proceedings records to the parties to the proceedings and is similar to the requirements in Article 293 of the Criminal Procedure Code, although those only apply to the suspect and his or her defence counsel. The content of this provision is not problematic.

Article 479-15

112. This proposed provision deals with what are termed "peculiarities of challenging a decision to close proceedings conducted in a form of community prosecution". The first two Parts repeat the provisions already considered in the proposed Article 479-8 and the third Part repeats the provision on the deadline for submission in Part 1 of Article 479-9. As such duplication is inappropriate, these Parts of the proposed provision should not be retained.

113. The only new provisions are in Parts 4 and 5. These require the relevant court to request the investigator, prosecutor to provide materials of criminal proceedings in a form of private/civil prosecution within a day from commencement of the challenge proceedings and specify that the private/civil

prosecutor's complaint is to be considered in court pursuant to the procedure and within time limit specified by the Code for challenging decisions to close criminal proceedings, except those specified in the present provision. The content of neither Part is, as such, problematic.

Article 479-16

114. The proposed provision is a repetition of the content of the proposed Article 479-11 as regards court rulings based on the results of consideration of complaints to close criminal proceedings in a form of private/civil prosecution. The comments previously made are thus applicable, although such duplication is inappropriate and the proposed provision should not be retained.

Article 479-17

115. The proposed provision is concerned with what are termed the "Peculiarities of compensating for damages in criminal proceedings conducted in a form of community prosecution". Thus, it precludes any entitlement for a private/civil prosecutor to request compensation for his or her activity in this capacity, i.e., for the initiation and commencement of criminal proceedings and participation therein. However, it also stipulates that "compensation for damage" to a private/civil prosecutor shall be conducted according to general procedure. The former seems entirely appropriate given the intention behind the proposal that private/civil prosecutors be independent participants in criminal proceedings. Nonetheless, without some funding, it is highly questionable whether it will be possible for the proposed role to be performed effectively. The stipulation that there can be compensation for damage to a private/civil prosecutor might seem to contradict the preceding bar on compensation but, if this is intended only to deal with the situation where a private/civil prosecutor is actually also the victim and so the right to compensation for the damage caused by the offence pursuant to sub-paragraph 10 of Part 1 of Article 56 and Articles 128-130 of the Criminal Procedure Code, then such a possibility would not be objectionable.

116. In addition, it is specified that a suspect, accused shall have the right to request from the private/civil prosecutor compensation for damage caused by initiation of criminal proceedings against him, as well as for the renewal of his or her reputation if suspicion, indictment were not confirmed. It is further provided that this is a matter to be pursued "according to general procedure" and then only if (a) the intent of the private/civil prosecutor to unlawfully bring a person to criminal liability has been proven and (b) there are grounds stipulated by law, for compensation for damages caused by unlawful decisions, acts or inactivities of a body that carries out detective activities, pre-trial investigation, prosecutor's office or court. The requirement of improper intent in bringing the relevant proceedings is not inappropriate but is generally hard to establish. The second condition would seem to refer to the right established for the suspect, accused in sub-paragraph 17 of Part 3 of Article 42 of the Criminal Procedure Code. However, it should be borne in mind that the liability

for unlawful detective activities would be significantly circumscribed by the proposed rendering lawful of the use of special technology for secret obtaining of information.[25] Moreover, this limitation taken with the potentially limited means of a private/civil prosecutor or the use of a legal person protected by limited liability would render this supposed right rather empty in practice.

I. Criminal Code of Ukraine

Article 201

117. The proposed amendment would add "special technical devices of covert information gathering" to the items characterised as smuggling where customs control has been bypassed or they have been concealed from such control. This addition is potentially problematic as there does not appear to be any definition of the devices concerned and, unlike the other items mentioned in the existing provision, their meaning can be open to considerable debate. Thus, for example, portable phones, dictating devices and computers could be used for covert recording and persons arriving at the border might not think of declaring them at customs control on this account, at least not without some clear prompting. There is a need, therefore, for greater precision as to what is intended to be covered, as well as an indication of the proposed arrangements for making disclosure of the items concerned at customs control.

Article 359

118. The proposed amendment would delete the existing offence of the unlawful purchase, sale and use of special technology for secret obtaining of information. This is clearly designed to facilitate the gathering of information and is consequent upon the proposal to allow covert gathering of information to be admitted as evidence even though this was done in violation of a person's human rights.[26] There is, however, a need to clarify how this removal of criminal responsibility fits with the amendment to the smuggling offence and, in particular, whether it is admissible to bring the relevant devices into the country so long as they are disclosed at customs control, notwithstanding that there are other legal provisions which may still make transactions involving them contrary to law even though they will not now entail any criminal responsibility. Moreover, this blanket exemption from criminal responsibility would immunise not only the gathering by covert means of information about the commission of criminal offences but would also provide protection for persons interfering with the right to respect for private life generally and thus result in a failure to provide adequate protection for the right guaranteed by Article 8 of the European Convention. There is a need, therefore, to restrict the exemption to circumstances in which the gathering of information is connected with the genuine investigation of criminal offences.

[25] See the discussion of Article 359 of the Criminal Code of Ukraine below.
[26] See the discussion under Article 87 above.

J. Code of Ukraine on Administrative Offences

Article 15

119. The proposed amendment would delete unlawful possession and use of special technical devices of covert information gathering from liability of military personnel and other persons who are subject to disciplinary regulations for commission of administrative violations. This blanket exemption from liability for administrative violations would again immunise not only the gathering by covert means of information about the commission of criminal offences but would also provide protection for persons interfering with the right to respect for private life generally and thus result in a failure to provide adequate protection for the right guaranteed by Article 8 of the European Convention. Thus, there is a need in this case also to restrict the exemption to circumstances in which the gathering of information is connected with the genuine investigation of criminal offences.

Article 195-5

120. The proposed amendment would delete unlawful possession and use of special technical devices of covert information gathering as an administrative offence. This blanket exemption from liability gives rise to the same concerns as those raised in the preceding two paragraphs and there is again a need for a more narrowly drawn exemption.

K. Conclusion

121. Although the concept of private/civil prosecutions and advocating a greater role for CSOs in the fight against corruption is laudable, the very institution of a private/civil prosecution scheme in the Proposed Law does not seem at all appropriate. As has been indicated, the amendments in the Proposed Law would entail significant distortion of the Criminal Procedure Code and lead to violations not only of the rights of the accused, suspect but many other persons who are not at all implicated in the relevant offences. Furthermore, the abandonment of professionalism that it envisages is likely to lead to more cases failing than succeeding and disenchantment with the judicial process, for which the courts would not be responsible.

122. Proceeding with the adoption of the Proposed Law would thus not be appropriate, particularly in the light of obligations under the European Convention and the goal of establishing an effective criminal justice both in general and with respect to tackling corruption in particular.

123. However, it should be noted that there are a significant number of provisions in the Proposed Law which require some clarification and not just on account of possible errors in translation. In addition, there is a fair amount of unnecessary repetition in the provisions of the Proposed Law, notably in the proposed new Chapter, which would give rise to undesirable confusion in the application of the provisions concerned.

L. Annex A

EXPLANATORY NOTE

To Proposed Law of Ukraine "On Amending Certain Legislative Acts of Ukraine Pertaining to Increase of the Role of Society in Fighting Corruption"

1. Grounds for necessity to adopt the proposed law

Article 3 of the Law of Ukraine *"On the Principles of Domestic and Foreign Policy",* has placed the "strengthening of anti-corruption activity" among the principles of statehood development. However, according to consensus that prevails among Ukrainian and foreign experts, the results of such activity as of today are quite moderate.

One of the reasons for this is years of development of corrupt "solidarity" among employees of different branches of government, first of all judges, prosecutor's office, internal affairs agencies and Security Service of Ukraine. Thus, the state policy should be directed at removal of preconditions of such unwanted solidarity, or at least at minimization of its impact on anti-corruption initiatives.

Since private sector (first of all, small and medium business) and civil society are the least inclined to solidarity with corrupt officials, they should be given wider opportunities to act against corruption. One way to do so is to introduce into criminal procedure legislation an institution of *private prosecution*, and implement an *institution of criminal proceedings in a form of private prosecution in the field of the crimes indicating corruption by officials.*

Private prosecution in criminal proceedings, or in other words, an opportunity to initiate criminal proceedings by any natural or legal person who became aware of a crime indicating corruption committed by an official, is to become efficient alternative institution to commence criminal proceedings of crimes indicating corruption by officials, featuring publicity and community response.

Institution of criminal proceedings in a form of private prosecution provides an opportunity for criminal accusation at a private initiative by willing and able persons, **and not only the ones who have suffered from a committed crime.** Viability of this is especially noticeable in the field of corrupt activities based on the following train of thought:

a) in order to effectively act against corruption at the state initiative, it is not enough to just ensure a more of less "clean" judicial government: it is necessary to also "clean up" the prosecutor's office, other bodies with investigating authorities, which will definitely require more resources. In case of availability of private prosecution, it would be enough to make courts alone relatively honest, so "good relationship" with prosecutor will no longer be a sure guarantee from anti-corruption prosecution.

b) on the same note – private prosecution has an element of surprise: when you don't know where the trouble is coming from, it is better to stay away from bad deeds altogether;

c) finally, the anti-corruption fight often "stalls" also due to an overload of the state bodies and insufficient state resource base. In case of private prosecution it will be possible to use the "energy" of civil society;

d) however, the matter is not only in higher efficiency of collective action compared to individual ones, but it also an important political and educational message: if by uniting it is possible to punish a criminal, it makes sense to unite; there will be a real incentive to participate in activities of institutions of civil society;

e) due to a well-known complexity of collecting evidential support in corruption cases, it is feasible to include in activities against corruption victims of corruption themselves, as well as accidental witnesses or participants of such illegal activities.

Authors of the proposed law have reasons to believe that private prosecution shall be justified not only with regard to corrupt activities, but will promote both actions against corruption and a wider goal of supremacy of the law. However, such a reform would be too radical for the time being and would require careful analysis of advantages and disadvantages, wider-scale changes to current legislation and legal system in general. That is why implementation of changes proposed by the bill will allow working up of a valuable experience and a database for further steps in using institution of

criminal prosecution for other offences.

Undoubtedly, such initiative has known risks that are just another side of the same advantages: private prosecution may be used not with an honorable goal, but as an instrument of blackmail and psychological pressure. This however can be dealt with entirely, for example:

a) by implementing a possibility of bringing to criminal or serious civil liability for harassment;

b) by maximum transparency and publicity of the entire judicial proceedings.

c) by clarification in legislature regarding state service and fighting corruption, to reduce the chances of ordinary working clerks that comprise the majority of the state bodies' staff, to bump into a private criminal case; such perspective must be aimed more at people with real power;

d) by meticulous regulatory development of the *ne bis in idem* principle and others.

It seems however that such risks are not too high of a price to pay for future advantages: some leveling of possibilities for officials and non-officials to apply pressure on each other will by itself constitute a sizeable social movement in the positive direction. The probability of unethical use of implemented mechanisms alone has to become a restraining element for potential corrupt officials.

If for any reason the state is unable to manage to support law and order, then to assist the state has to be the right and even obligation of citizens and organizations – members of civil society. It is extremely important that it is done in a manner that is not destructing for the state and the law itself. Private prosecution is one of the best ways of doing it.

Implementation of this kind of procedure for criminal proceedings does not at all mean self-removal of the state. On the contrary, private prosecutor has to become an aid to investigator and prosecutor in detection and registering by "make-shift" means of relevant offence and initiating criminal proceedings in regard of such. The state, from its side, has to encourage and promptly act on applications and notices of private prosecutors.

The proposed law "On Amending Certain Legislative Acts of Ukraine Pertaining to Increase of the Role of Society in Fighting Corruption" has been drafted in view of the above.

2. Goal and Objectives of the Proposed Law

This proposed law was developed in order to implement into criminal procedure legislature an institution of private prosecution in the field of the crimes indicating corruption by officials, with the objective for the state to receive real help from civil society in fighting corruption.

3. General Characteristic and Main Provisions of the Proposed Law

Proposed law makes amendments to the Criminal Procedure Code of Ukraine, Criminal Code of Ukraine and the Code of Ukraine on Administrative Offences. Nature of changes can be seen in the comparative table which is attached hereto. General approach of the drafters was to insert minimum contextual changes necessary for implementation into Ukrainian legislation of an entirely new institution of private prosecution. For this purpose, a new concept of "private prosecutor" (proposed article 59-1), peculiarities of criminal proceedings in a form of private prosecution (proposed article 36-1) and others have been entered into Criminal Procedure Code of Ukraine.

Traditional logic of criminal proceedings in Ukraine is backed by the fact that competent organs conduct pre-trial investigation and collect evidentiary support, relaying on powers extended to them by the Criminal Procedure Code of Ukraine, Law of Ukraine "On Operational Activities" and other laws. Some activities require an approval of a special subject, an investigating judge. Such regulations provide these organs with wider opportunities to collect information on offence than those extended to regular citizens by Part two, Article 34 of the Law of Ukraine "On Information".

That is why the proposed institution of private prosecution in the field of the crimes indicating corruption by officials is characterized by:

- participation therein of a special subject who initiates its commencement – a private prosecutor as an independent participant and a party to criminal proceedings;
- special procedure for commencement of criminal proceedings;
- special procedure for proving circumstances that attest to indication of criminal offence which allow for private prosecution;

- openness of criminal proceedings and public disclosure of those circumstances and evidence that are grounds for commencement of criminal proceedings and are of public interest;

- peculiarities of compensation by private prosecutor for damage to a person in whose name the commencement of criminal proceedings was initiated;

It is the admissibility of evidence submitted by private prosecutor in order to commence criminal proceedings that the main focus is placed on. After all, it is known that success in detection and revealing of corrupt activities depends greatly on possibilities to obtain audio and visual evidence, photographs, the main source of which is usually covert (detective) actions using special technical devices of covert information gathering, which an ordinary citizen – a victim of corrupt actions by officials – is not able to perform while adhering to the current procedure stipulated by law. That is why it is proposed to exclude article 359 "Illegal obtaining, disposal or use of special technical devices of covert information gathering" of the Criminal Code of Ukraine and article 195-5 "Illegal possession of special technical devices of information gathering" of Code of Ukraine on Administrative Offences, and to introduce corresponding amendments to article 201 "Smuggling" of the Criminal Code of Ukraine and Article 15 "Liability of military personnel and other persons who are subjects to disciplinary regulations for commission of administrative violations."

Nowadays, criminal liability for illegal turnover (manufacturing, acquiring, disposal etc.) of special technical devices of covert information gathering is stipulated in criminal codes of some CIS countries only, namely Russian Federation, Republic of Belarus, Kazakhstan, Kyrgyzstan, Moldova and Tajikistan, in European countries – only in the Criminal Code of Republic of Lithuania, in Asia – in the Criminal Code of People's Republic of China. In all other countries, criminal liability for illegal turnover of special technical devices of covert information gathering is not stipulated since, as it seems, public safety in illegal use of special technical devices of covert information gathering lays, first of all, not in a violation of its use, but in violation of rights, freedoms and interests of natural and legal persons, as well as state interests. In Ukraine such rights, freedoms and interests have already received protection by criminal legislature, in particular in Articles 111 "High Treason", 114 "Espionage", 163 "Violation of privacy of mail, telephone conversations, telegraph and other correspondence conveyed by means of communication or via computers", 182 "Violation of personal privacy", 231 "Illegal collection for the purpose of use, or use of information that constitute commercial or banking secret" of the Criminal Code of Ukraine etc. From this viewpoint, regulation of criminal liability for illegal use of special technical devices of covert information gathering is not necessary at all.

Moreover, due to lack of legislative definition of the concept of special technical devices of covert information gathering, their appearance and criteria, a person finds it impossible to distinguish between an ordinary device designed for consumer use and a special technical gadget. After all, nowadays definition and appearance of special technical means of covert information gathering may encompass any object (devices, attachments) that are designed for making audio and video recordings, accumulating, transmission and saving information in any format and appearance, etc. For example: key chains with imbedded video cameras, miniature dictation devices, web-cameras etc. Thus, a person when buying or selling such device may automatically become a subject of criminal liability, not even understanding what all numerous court rulings that can be found in the Integrated Register of Court Decisions, mean.

Besides, in practices of the European Court of human rights there is a distinct differentiation between violation of Article 8 "Right to respect for private and family life" and Article 6 "Right to a fair trial", namely: violation of article 8 during collection of evidence, does not mean an automatic violation of article 6 and right of a person for fair trial guaranteed thereby.

As was stated in this regard by the Court in the *Gafgen* case ruling, in order to evaluate to what extent the use in criminal proceedings of illegally obtained evidence shall lead to violation of Article 6 (and make court proceedings "unfair"), it is necessary to take into consideration "all circumstances of the case, including [existence and] respect to the right of a person for protection, as well *as quality and importance [for conclusions in the case] of corresponding evidence.*

Also, criminal proceedings pertaining to corruption crimes must ensure openness of information obtained by private prosecutor and submitted to investigator at the beginning of criminal proceedings, as well as providing private prosecutor with an independent procedural status of a party

to criminal proceedings, with the aim of the possibility to control and influence a pre-trial investigation, and creating real opportunities for providing private prosecution.

4. Corresponding regulatory basis in this field of statutory control

Main regulatory acts that regulate legal relationship in this field are: Constitution of Ukraine, Criminal Procedural Code of Ukraine, criminal Code of Ukraine and the Code of Ukraine and Code of Ukraine on Administrative Offences.

5. Financial rationale

Implementation of provisions of the proposed law, during its practical use after approval will not affect revenue and expenses of the state or local budgets.

6. Substantiation of expected social, economic, legal and other consequences of implementation of the proposed law after adoption thereof

Approval of the proposed law of Ukraine "On Amending Certain Legislative Acts of Ukraine Pertaining to Increase of the Role of Society in Fighting Corruption" will promote detection of corruption crimes and bringing dishonest officials to criminal liability, strengthen anti-corruption activities, and assist in strengthening of civil society in Ukraine. It will also allow working up experience and database of statistics and other data, which will allow to continue work to widen the field of activities in institution of private prosecution ion Ukraine.

People's deputies of Ukraine	