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COMMENTS ON THE LAW OF UKRAINE

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ON AMENDMENTS TO THE CRIMINAL PROCEDURE CODE OF UKRAINE CONCERNING CRIMINAL PROCEEDINGS IN ABSENTIA

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Introduction

1. This opinion is concerned with the compatibility of the Law of Ukraine *On Amendments to the Criminal Procedure Code of Ukraine (concerning criminal proceedings in absentia)*[1] ('the Amendments') with European standards and, in particular, the European Convention on Human Rights ('the Convention'). It has been prepared under the auspices of the Council of Europe Project "Support to criminal justice reform in Ukraine", financed by the Danish Government.

2. The Amendments were adopted by the Verkhovna Rada on 16 January 2014 and entered into force the day after their publication, i.e., 22 January 2014.

3. The opinion first reviews the position of *in absentia* criminal proceedings under the Convention and the case law of the European Court of Human Rights ('the Court'), then examines the changes made by the Amendments to the Criminal Procedure Code before considering the compatibility of those changes with the Convention. It concludes with an overall assessment of the acceptability of the Amendments.

In absentia proceedings and the Convention

4. *In absentia* proceedings is a wide-spread mode of handling criminal procedures that is applied in many jurisdictions of the CoE member states and aims at increasing the efficiency of criminal justice and combating crime in general.

5. There is no provision in the Convention that deals specifically with a prosecution being conducted in the absence of the accused. There are, however, four provisions in the Convention that are of particular relevance to such a prosecution, namely, sub-paragraphs (a), (c), (d) and (e) of Article 6(3), which provide that:

> Everyone charged with a criminal offence has the following minimum rights:
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> …
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

6. As the Grand Chamber of the Court made clear in *Sejdovic v. Italy*

> 81. ... the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to

[1] No. 725-VII.

> defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present (see Colozza, cited above, § 27; T. v. Italy, cited above, § 26; F.C.B. v. Italy, cited above, § 33; and Belziuk v. Poland, 25 March 1998, § 37, Reports 1998-II)[2].

7. Moreover, it observed that:

> 89. Under the terms of paragraph 3 (a) of Article 6 of the Convention, everyone charged with a criminal offence has the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". This provision points to the need for special attention to be paid to the notification of the "accusation" to the defendant. An indictment plays a crucial role in the criminal process, in that it is from the moment of its service that the defendant is formally put on notice of the factual and legal basis of the charges against him (see Kamasinski v. Austria, 19 December 1989, § 79, Series A no. 168).
> 90. The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair (see Pélissier and Sassi v. France [GC], no. 25444/94, § 52, ECHR 1999-II).

8. Nonetheless, these requirements do not mean that the conducting of a trial *in absentia* necessarily entails a violation of Article 6[3]. In the Court's view, as expressed in its *Sejdovic* judgment, there will only be a denial of justice if a person convicted in such a trial

> is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself (see Colozza, cited above, § 29; Einhorn v. France (dec.), no. 71555/01, § 33, ECHR 2001-XI; Krombach v. France, no. 29731/96, § 85, ECHR 2001-II; and Somogyi v. Italy, no. 67972/01, § 66, ECHR 2004-IV) or that he intended to escape trial (see Medenica, cited above, § 55).
> 83. The Convention leaves Contracting States wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6. The Court's task is to determine whether the result called for by the Convention has been achieved. In particular, the procedural means offered by domestic law and practice must be shown to be effective where a person charged with a criminal offence has neither waived his right to appear and to defend himself nor sought to escape trial (see Somogyi, cited above, § 67).
> 84. The Court has further held that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 (see Stoichkov v. Bulgaria, no. 9808/02, § 56, 24 March 2005). Accordingly, the refusal to reopen proceedings conducted in the accused's absence, without any indication that the accused has waived his or her right to be present during the trial, has been found to be a "flagrant denial of justice" rendering the proceedings "manifestly contrary to the provisions of Article 6 or the principles embodied therein" (ibid., §§ 54-58).

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[2] No. 56581/00, 1 March 2006.

[33] The Court is well aware of the problems that can be caused by an accused's absence; "As was pointed out by the Government, the impossibility of holding a trial by default may paralyse the conduct of criminal proceedings, in that it may lead, for example, to dispersal of the evidence, expiry of the time-limit for prosecution or a miscarriage of justice" (*Colozza v. Italy*, no. 9024/80, 12 February 1985, para. 29).

> 85. The Court has also held that the reopening of the time allowed for appealing against a conviction in absentia, where the defendant was entitled to attend the hearing in the court of appeal and to request the admission of new evidence, entailed the possibility of a fresh factual and legal determination of the criminal charge, so that the proceedings as a whole could be said to have been fair (see Jones v. the United Kingdom (dec.), no. 30900/02, 9 September 2003).

9. There must, however, have been diligent efforts to give the accused person notice of the hearing concerned, even though these might have proved unsuccessful[4] unless he or she had made him or herself unavailable to be informed[5].

10. Thus, a trial *in absentia* could be compatible with the Convention where there is a genuine opportunity to reopen any proceedings - in respect of both matters of law and fact - that have led to a conviction and even that is not required both where there was a waiver by the person concerned of the right to appear and to defend him or herself and where that person was actually attempting to evade trial.

11. However, the proceedings that are reopened must themselves comply fully with all the requirements of Article 6.

12. Moreover, the Court has underlined that where any waiver is relied upon to dispense with the need to allow the proceedings to be reopened, this must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance, as well as not running counter to any important public interest. This has implications, in particular, for the drawing of any conclusions as to the reasons for a person's absence from the trial. As the Court stated in *Sejdovic*:

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[4] *Colozza v. Italy*, no. 9024/80, 12 February 1985; "In fact, the Court is not here concerned with an accused who had been notified in person and who, having thus been made aware of the reasons for the charge, had expressly waived exercise of his right to appear and to defend himself. The Italian authorities, relying on no more than a presumption (see paragraphs 12 and 20 above), inferred from the status of "latitante" which they attributed to Mr. Colozza that there had been such a waiver. In the Court's view, this presumption did not provide a sufficient basis. Examination of the facts does not disclose that the applicant had any inkling of the opening of criminal proceedings against him; he was merely deemed to be aware of them by reason of the notifications lodged initially in the registry of the investigating judge and subsequently in the registry of the court. In addition, the attempts made to trace him were inadequate: they were confined to the flat where he had been sought in vain in 1972 (via Longanesi) and to the address shown in the Registrar-General's records (via Fonteiana), yet it was known that he was no longer living there (see paragraphs 10 and 12 above). The Court here attaches particular importance to the fact that certain services of the Rome public prosecutor's office and of the Rome police had succeeded, in the context of other criminal proceedings, in obtaining Mr. Colozza's new address (see paragraph 15 above); it was thus possible to locate him even though - as the Government mentioned by way of justification - no data-bank was available. It is difficult to reconcile the situation found by the Court with the diligence which the Contracting States must exercise in order to ensure that the rights guaranteed by Article 6 (art. 6) are enjoyed in an effective manner (see, mutatis mutandis, the Artico judgment of 13 May 1980, Series A no. 37, p. 18, para. 37). In conclusion, the material before the Court does not disclose that Mr. Colozza waived exercise of his right to appear and to defend himself or that he was seeking to evade justice. It is therefore not necessary to decide whether a person accused of a criminal offence who does actually abscond thereby forfeits the benefit of the rights in question" (para. 28).

[5] *Demebukov v. Bulgaria*, no. 68020/01, 28 February 2008.

> 87. The Court has held that where a person charged with a criminal offence had not been notified in person, it could not be inferred merely from his status as a "fugitive" (latitante), which was founded on a presumption with an insufficient factual basis, that he had waived his right to appear at the trial and defend himself (see Colozza, cited above, § 28). It has also had occasion to point out that, before an accused can be said to have implicitly, through his conduct, waived an important right under Article 6 of the Convention, it must be shown that he could reasonably have foreseen what the consequences of his conduct would be (see Jones, cited above).
> 88. Furthermore, a person charged with a criminal offence must not be left with the burden of proving that he was not seeking to evade justice or that his absence was due to force majeure (see Colozza, cited above, § 30). At the same time, it is open to the national authorities to assess whether the accused showed good cause for his absence or whether there was anything in the case file to warrant finding that he had been absent for reasons beyond his control (see Medenica, cited above, § 57).

13. Similarly, there must be cogent evidence that a person was attempting to evade trial where it is sought to preclude his or her retrial after any conviction *in absentia*.

14. In any event, the right of a person charged with an offence under Article 6(3)(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him is still applicable even if he or she is absent from the trial. It will, therefore, be material to the issue of whether a trial was fair - especially in those cases where the accused has waived the right to appear and to defend him or herself and the proceedings are not reopened - he or she has been provided with full, detailed information concerning the charges against him or her, and consequently the legal characterisation that the court might adopt in the matter.

15. Furthermore, the Court in *Sejdovic* also emphasised that the right of everyone charged with a criminal offence to be effectively defended by a lawyer, albeit not absolute, was one of the fundamental features of a fair trial so that:

> 93. It is for the courts to ensure that a trial was fair and, accordingly, that counsel who attends trial for the apparent purpose of defending the accused in his absence is given the opportunity of doing so (see Van Geyseghem, cited above, § 33; Lala, cited above, § 34; and Pelladoah, cited above, § 41).

16. Thus, resort to trial *in absentia* can be compatible with the Convention so long as there is appropriate observance of the above requirements relating to:
    - waiver;
    - information about the accusation;
    - legal representation; and
    - reopening of proceedings following a conviction.

17. The failure to comply with the applicable aspects of those requirements was found not to have occurred in *Sejdovic* itself, with the Court considering that:

> 105. ... the applicant, who was tried in absentia and has not been shown to have sought to escape trial or to have unequivocally waived his right to appear in court, did not have the

> opportunity of obtaining a fresh determination of the merits of the charges against him by a court which had heard him in accordance with his defence rights.

and the Court has consistently applied those requirements in many subsequent cases[6].

The Amendments and the Criminal Procedure Code

18. The amendments to the Criminal Procedure Code (CPC) of Ukraine adopted on 16 January 2014 introduce a new framework for criminal proceedings in the absence of the accused (defendant), through adding a new chapter (41[1]) to the CPC and modifying some of provisions in other parts of the CPC.

19. Prior to these amendments, the CPC provided only for certain elements of trial *in absentia* under the simplified procedure for criminal misdemeanours (Articles 381-382)[7] and established conditions for enforcement of judgments of foreign courts rendered in absentia (Article 602). Moreover, absence of an accused at the hearings and relevant procedures constituted a basis for setting aside a court decision resulting from them (Article 412).

20. The changes to the Criminal Procedure Code effected by the Amendments are as follows:
    - requiring the mandatory participation of defence counsel for persons in respect of whom criminal proceedings *in absentia* are being carried out[8];
    - extending from three to seven days the minimum period of notice that must be received for a court summons 'in the case of residence abroad'[9];
    - allowing for proceedings *in absentia* following the 'non-arrival of a suspect, accused' in the 'cases stipulated by this Code'[10];
    - adding 'other procedural actions' to interrogation and identification in the list of measures that can be conducted during pre-trial investigation through video conferences[11];
    - providing that confirmation that access to the materials of the case is to be by 'a defence lawyer and by a suspect - in case he/she has arrived' in *in absentia* proceedings rather than by just the party in other proceedings[12];

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[6] See. e.g., *Shkalla v. Albania*, no. 26866/05, 10 May 2011, *Stoyanov v. Bulgaria*, no. 39206/07, 31 January 2012, *Idalov v. Russia* [GC], no. 5826/03, 22 May 2012 and *Izet Haxhia v. Albania*, no. 34783/06, 5 November 2013.

[7] Following a recommendation in the *Opinion on the Draft Criminal Procedure Code of Ukraine* (DG-I (2011)16, 2 November 2011), para. 235, the text that was adopted was modified from that originally proposed to ensure that a waiver could only be made by an accused who was legally represented and thus contribute to satisfying the requirement that it be unequivocal elaborated by the Court and discussed above.

[8] Article 1.1 amending Article 52.2.

[9] Article 1.2 amending Article 135.8

[10] Article 1.3 amending Article 139.

[11] Article 1.4 amending Article 232.1.

[12] Article 1.5 amending Article 290.9.

- providing, for the purpose of attachment to the indictment where *in absentia* proceedings are being conducted, proof of receipt of the register of materials of pre-trial proceedings in the manner prescribed by the new Article 523-2 being introduced into the Code as an alternative to the suspect's acknowledgement of such receipt[13];
- providing for the delivery of a copy of the indictment, of the motion to impose compulsory medical or educational measures and register of pre-trial proceedings records to be in the manner prescribed by the new Article 523-2 being introduced into the Code[14];
- adding decisions of investigator, prosecutor on criminal proceedings *in absentia* to the list those which may be challenged during pre-trial proceedings by a suspect or his/her defence lawyer or legal representative, by victim, his/her representative or legal representative[15];
- adding to the implications of an accused's non-appearance that this 'may result in the carrying out of criminal proceedings *in absentia*'[16];
- qualifying the requirement to suspend proceedings where the accused has evaded from court and so rendered his or her participation impossible so as not to cover situations in which there are grounds for criminal proceedings in absentia[17];
- extending the situations in which the examination of an accused is not mandatory to those covered by the new Chapter 41-1 being introduced into the Code[18];
- providing a different basis for calculating the time limit for an appeal against decisions in cases concerning *in absentia* proceedings[19];
- excluding from any mandatory appearance by an accused at an appeal (and thus the suspension of the proceedings where he or she does not appear) in those case involving *in absentia* proceedings[20];
- adding a second exception to the conduct of proceedings in the absence of an accused being a justification for the setting aside of the court decision that resulted from them, namely, in cases covered by the new Chapter 41-1 being introduced into the Code[21]; and
- introducing a new Chapter 41-1 that deals with the grounds for implementation of proceedings *in absentia*, servicing documents to a person subject to such proceedings, the procedure and court decisions in such cases,

[13] Article 1.6 amending Article 291.4(3)
[14] Article 1.7 amending Article 293.1.
[15] Article 1.8 amending Article 303.1
[16] Article 1.9 amending Article 323.
[17] Article 1.10 amending Article 335.1.
[18] Article 1.11 amending Article 349.4.
[19] Article 1.12 amending Article 395.3.
[20] Article 1.13 amending Article 405.4.
[21] Article 1.14 amending Article 412.2(3).

applications to cancel those court decisions and the consideration of such applications[22].

Analysis of the key deficiencies

General considerations

21. The amended para. 3 of part 4 of Article 291 of the CPC is a reference norm. It alludes to newly introduced Article 523², which in its turn is an unspecified reference just supposedly pointing to the notification rules established in Articles 111-112 and consequently to Articles 135-136 of the CPC. The use of such a complex, multistage legal construction (involving four consecutive references) for formulating the specifics of serving an indictment and other crucial procedural documents, is inappropriate.

22. The amendments to Part 3 of Article 395, part 4 of Article 405 and paragraph 3 of part 2 of Article 412 are the only adjustments introduced to the overall appeals framework in view of the introduction of proceedings in absentia. At the same time, they omit to take into account the structure of Chapter 31 concerning 'Criminal Proceedings in the Court of Appellate Instance', which incorporates Article 394 addressing the specifics of appeals against certain court decisions, including those rendered under the simplified proceedings. It specifies that they could not be appealed on grounds of the conduct of proceedings in absence of participants in court proceedings, non-examination of evidence in court session or with the purpose to contest the circumstances established by pre-trial investigation. For the sake of consistency, the Law should amend it with corresponding provisions concerning the procedures in absentia.

23. The scarcity of the amendments to Chapter 31 is particularly striking due to the shortcomings of the core provisions suggested in Chapter 41¹. Thus, it would be particularly important to put emphasis on the observance of the specific safeguards applicable to procedures in absentia and challenging the presumption of receipt of the summons and other relevant notifications.[23]

Video conferences

24. Amendment related to the extension of the authorised use of video conferences during the pre-trial investigation to 'other procedural actions' in addition to their use for interrogation of persons and the identification of persons and objects merits attention. There is nothing in the Amendments that actually links this extension to the conduct of *in absentia* proceedings. Indeed, the use of video conferences is still only authorised

[22] Effected by Article 1.15.
[23] See below comments on Article 523².

after the amendment because of an inability to participate resulting from ill-health or other valid reasons, the need to ensure protection of persons or the existence of other grounds deemed sufficient by the investigator, public prosecutor or investigating judge. None of these reasons would seem capable of embracing the situation of someone in respect of whom *in absentia* proceedings are deemed justified under the new Article 523[1] [24].

25. Nonetheless, the amendment could certainly be a means of facilitating the exercise of the right of a suspect or accused to exercise his or right - under Articles 42.3, paras 9 and 10 - to participate in procedural actions in circumstances when or he she is not able to present at them, whether because of ill-health or absence from Ukraine or the part thereof where the procedural action is to be conducted and there is no actual attempt to avoid involvement in the pre-trial investigation. This could equally be the case with respect to the right and duty of defence counsel - under articles 44.1, 47.2, 53 and 59-1 - to participate in such procedural actions.

26. However, it is not clear what assessment as to the suitability/reliability of using video conferences for procedural actions other than interrogation and identification has been made prior to the adoption of this extension. There is undoubtedly a risk that the use of video conferences could prove an unsatisfactory means of participation as the field of vision is unlikely to be comparable to that enjoyed by someone physically present and there may not be an opportunity to linger over or to return to see a particular item at the site in question. Such limitations may, therefore, render a person's participation more theoretical than real and undermine the fairness of subsequent proceedings[25].

27. In the circumstances, there is a need to clarify the rationale for the extension being authorised in respect of Article 232, the basis for concluding that such an extension will not have a prejudicial effect on the ability to mount an effective defence and gather evidence and how exactly it is considered relevant to the conduct of *in absentia* proceedings.

Comments related to the newly added Chapter 41[1]

28. The first of the provisions in the new Chapter 41[1] - Article 523[1] - sets out the grounds for implementation of proceedings *in absentia*. These are twofold, namely, that the suspect, accused 'evades arriving' when summoned to a pre-trial investigation agency or court and the carrying out of the proceedings is considered possible in his or her absence. 'Evades arriving' is defined as repeatedly not appearing where 'duly notified about date, time and place of procedural actions or trial to be carried out' without

[24] See para. 28.
[25] *Cf.* the related difficulties of a party not being able to take part in an expert's examination of medical evidence that led to a finding of a violation of Article 6(1) of the Convention in *Mantovanelli v. France*, no. 21497/93, 18 March 1997.

'justified reasons' for not doing so, not notifying such reasons or the reasons that are provided 'are considered to be unjustified'. The decision about conducting *in absentia* proceedings is to be taken by the '[i]nvestigator as coordinated with prosecutor or prosecutor during pre-trial investigation or court'. However, it is provided that *in absentia* proceedings can only be conducted in respect of several persons suspected or accused in one or several criminal offences where the justification for so conducting such proceedings applies to all of them.

29. It should first be noted that this provision goes beyond the notion of *in absentia* proceedings that has been considered by the Court and discussed in the previous section of the opinion since it is concerned not just with the conduct of a trial but also the pre-trial investigation stage. In this respect it is thus qualifying the right that was established by Article 42.3, paragraphs 9 and 10 so that, in particular cases, the absence of the accused, suspect from some procedural actions could result in prejudice to him or her because of the inability to ask questions or submit comments and objections in respect of the manner in which a procedural action is being conducted. Nonetheless, this is not of itself likely to lead to a finding that any trial subsequently conducted was unfair. Any such finding would undoubtedly turn on whether the interests of the accused, suspect could be regarded as adequately protected by the participation of his or her legal representative and the satisfactory nature of (a) the notification of the occurrence of the procedural action, (b) the basis for considering the absence from it unjustified and (c) the decision-making process itself, all of which are examined further below. These considerations are equally applicable to the compatibility of court proceedings *in absentia* with Article 6 of the Convention.

30. However, the exclusion from the possibility of conducting *in absentia* proceedings in cases involving several accuseds or suspects unless there is justification for doing so in respect of all of them is entirely appropriate. This is because there could otherwise be prejudice to one or more of those persons - and thus a violation of Article 6 of the Convention - resulting not only from their own non-involvement in the proceedings but also from the inability to pursue a line of defence that turned on a challenge to a particular accused or suspect who was actually absent from the proceedings.

a) Notification

31. The issue of notification is crucial as the effectiveness of this determines whether or not there has been compliance with the right under Article 6(3)(a) of the Convention to be informed of the nature and cause of the accusation against him or her and, if so, generally whether or not a person can be regarded as having waived his or her right to appear and to defend him or herself. However, in the absence of official notice, such waiver can still be possible as the Court in *Sejdovic* stated that it could not

> rule out the possibility that certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the

> nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution. This may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest (see, among other authorities, Iavarazzo v. Italy (dec.), no. 50489/99, 4 December 2001), or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces[26].

32. Although the possibility that an accused or suspect is aware of proceedings against him or her despite the absence of official notice of them might be relevant should there be an application to the Court alleging a violation of Article 6 of the Convention as a result of *in absentia* proceedings, it does not resolve the issue whether the arrangements for providing notice in the Amendments are likely to be effective.

33. No special arrangements seem to be made in respect of notification before implementation of proceedings *in absentia* in addition to those already in the Code since Article 523^2 is stated to be concerned only with the servicing of documents on a person 'which is *subject* to criminal proceedings *in absentia*'[27]. However, even if that latter provision is really intended to apply to notification before implementation of proceedings *in absentia* (as seems to be the construction given to it by part 2 of the new Article 523^3 [28]), the effect is to require the general rules of the Code to be followed together with those in Section XI of the Criminal Procedure Code, which concerns international cooperation in criminal proceedings.

34. The relevant general rules are those in Chapter 11 of the Criminal Procedure Code and in particular Articles 135-136. However, the amendments under consideration have not taken into account that the initial notification and summoning provisions were designed for the criminal procedure framework, which did not provide for conducting preliminary procedures and trial *in absentia*. When extending them by virtue of Article 523^2 over procedures in issue, the legislator has overlooked the need to comply with advanced standards developed in this regard by the Court.

35. In cases concerning convictions *in absentia*, the Court has held that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights. It has suggested that an official notice is to be served on the accused in a manner unequivocally proving that he or she were sufficiently aware of the prosecution and trial to be able to decide to waive his right to appear in court, or to evade justice.[29]

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[26] Para. 99.
[27] Emphasis added.
[28] See para. 56.
[29] *Somogyi v. Italy*, Judgment of 18 May 2004, application no. 67972/01, §75.

36. Out of the range of ways for serving the summons and, therefore, notifications envisaged by Articles 135 and 136 only some of them could be considered as complying with this standard. Besides submitting in person, which can be rarely used in this context, these could be avenues provided by international legal assistance (para. 7 of Article 135) and sending them to an e-mail account specified by the accused / defence (para. 2 of Article 136).

37. Notifications made by mailing the documents to an address, where in the context in issue an accused in the majority of cases is supposed to be absent from, or serving them to an adult family member or to another individual who resides together with the addressee, to the residential management organization at the place of residence, or to the administration at the place of employment, as well as sending them to an e-mail address, fax or by telephone or cable without prior confirmation of the accused or defendant tired in *abesentia* apparently, certainly do not comply with the Court standards.

38. Although the requirement in Article 136 of the Criminal Procedure Code that there be confirmation of receipt of the summons is a crucial guarantee that a notification is effective[30], it should be noted that there does not appear to be any arrangement for contesting the validity of a supposed receipt, in particular where there might be grounds for suggesting that receipt was not actually given by the person to whom the summons was addressed. There is a need to clarify whether there is any procedure by which this issue can be determined as otherwise it might unjustifiably be concluded that an accused or suspect has waived his or her right to appear and to defend him or herself[31].

39. As regards Section XI of the Criminal Procedure Code, there are two provisions relevant to the service of documents and summonses in Articles 564 and 566.

40. The first concerns service on persons in Ukraine at the request of a foreign competent authority. This requires a signature for delivery of the documents to be served but also provides for the deeming of service where a person refuses to accept the documents concerned, without any arrangements for proving such a refusal such as the video

[30] Article 136 provides "1. A valid confirmation of receipt by a person of a ruling on court summons or of learning its content in other way shall be the person's hand receipt of the summons including on the post-office notice, a video recording of the serving of the ruling on court summons on the person, any other data confirming the fact of such serving of the ruling on court summons on the person or of learning its content. 2. If a person notified in advance investigator, public prosecutor, investigating judge, court on his email address, a ruling on court summons dispatched to such address shall be deemed received if the person confirmed receipt by an appropriate e-mail".

[31] See *Somogyi v. Italy*, no. 67972/01, 18 May 2004, in which the Court observed that "the applicant repeatedly challenged the authenticity of the signature attributed to him, which was the only evidence capable of proving that the defendant had been informed that proceedings had been instituted against him. It could not be considered that the applicant's allegations were prima facie without foundation, particularly in view of the difference between the signatures he produced and the one on the return slip acknowledging receipt and the difference between the applicant's forename (Tamas) and that of the person who signed the slip (Thamas). In addition, the mistakes in the address were such as to raise serious doubts about the place to which the letter had been delivered" (para. 70).

recording included in Article 136-1 of the Code. It would, therefore, be inappropriate for service under Article 564 to be used in place of the requirements set out in Article 136 and it is doubtful if there could be any circumstances making such a service to be 'necessary', the condition governing the use of Section XI.

41. The second provision relates to the summoning of persons outside Ukraine for international legal assistance. This does not regulate the manner of service but relies upon service by the foreign competent authority and requires the request for service to be made to that authority at least sixty days before a return to the summons is required. It does not seem, therefore, that this provision is consistent with the deadline of seven days introduced by the amendment to Article 135-8 for service on persons resident abroad[32] and it is questionable whether the use of this provision would be capable of ensuring that current information was available at the time a decision is being taken on the implementation of *in absentia* proceedings.

42. It should be noted in the case of service on persons abroad that there is no provision in the Criminal Procedure Code requiring the translation of a summons being served on persons outside Ukraine under Article 135-7 who do not understand Ukrainian. This may result in the service being ineffective for the purpose of Article 6 of the Convention[33]. This absence might be contrasted with the requirement for a translation into Ukrainian of documents served upon a request by a foreign competent authority when they are drawn up in a language unknown to the person specified in the request[34]. A similar requirement should thus be introduced for service on those who do not understand Ukrainian and are outside the country.

b) Grounds for deciding on the proceedings in absentia

43. The basis for considering that a person is someone 'who evades arriving upon a summons' is that he or she has been duly notified and repeatedly did not appear without justified reasons or without notifying them or the provided reasons are considered unjustified.

[32] See para. 33.
[33] *Cf. Brozicek v. Italy*, no. 10964/84, 19 December 1989 in which the Court stated that "...it is necessary to proceed on the basis of the following facts. The applicant was not of Italian origin and did not reside in Italy. He informed the relevant Italian judicial authorities in an unequivocal manner that because of his lack of knowledge of Italian he had difficulty in understanding the contents of their communication. He asked them to send it to him either in his mother tongue or in one of the official languages of the United Nations. On receipt of this request, the Italian judicial authorities should have taken steps to comply with it so as to ensure observance of the requirements of Article 6 § 3 (a) (art. 6-3-a), unless they were in a position to establish that the applicant in fact had sufficient knowledge of Italian to understand from the notification the purport of the letter notifying him of the charges brought against him. No such evidence appears from the documents in the file or the statements of the witnesses heard on 23 April 1989 (see paragraphs 5-7 above). On this point there has therefore been a violation of Article 6 § 3 (a) (art. 6-3-a)" (para. 41).
[34] Article 564-5 of the Criminal Procedure Code.

44. The requirement that the non-appearance be repeated is appropriate as it points towards a more persistent effort to frustrate the criminal justice process. Similarly appropriate is the absence of any reasons and the failure to notify the reasons for the absence. There is, however, a need to clarify what can be regarded as justified reasons for non-appearance and, in particular, whether they are intended to be the one set out in Article 138 of the Criminal Procedure Code[35]. These are certainly appropriate ones but there ought to be a specific reference to this provision, particularly in view of the potentially broad discretion given in part 1 of Article 523[1] to find the provided reasons for non-arrival to be unjustified. This is especially important given the authority to make such a determination given to investigators and prosecutors during the pre-trial investigation.

45. The ability of investigators and prosecutors to make such a determination is troubling because of the potential implications for the ability of non-judicial actors to have a significant impact on the conduct of criminal proceedings and in particular for a conviction to be rendered inevitable on account of the suspect's absence from the pre-trial investigation. However, such concern is, in principle, allayed by the amendment made to Article 303-1 of the Criminal Procedure Code, namely, adding such a determination to the list of decisions that can be challenged before a court during the pre-trial proceedings. The allaying of this concern is qualified because of a further concern about the potential for unsatisfactory legal representation in cases where the proceedings are held *in absentia*.

46. Furthermore without any obligation of the summoning authority to identify possible reasons for non-appearance and existence of justified reasons for that, the accused is left with the burden of proving that he was not seeking to evade justice or that his absence was due to justified reasons.[36] In combination with the deficiencies of Article 523[2], the framework amounts to an irrefutable statutory presumption that the accused was aware of the proceedings and violates the right of an accused not to have to prove that he or she had no intention of evading trail or other procedures.[37]

c) Participation of a defence counsel

47. As has been seen, the amendment to Article 52.2 adds *in absentia* proceedings to those in which defence counsel is a mandatory requirement. This is at first glance

[35] "1. Valid reasons for non-compliance with court summons are the following: 1) apprehension, custody, or service of punishment; 2) restriction of the freedom of movement under law or based on court's decision; 3) force-majeure circumstances (epidemics, military hostilities, floods or any other similar disasters); 4) absence of the summoned person in the place of residence during prolonged time due to official mission, travel, etc.; 5) serious disease or sojourn in a medical establishment in connection with treatment or pregnancy, on condition of impossibility to temporarily leave the establishment; 6) death of close relatives, family members, or any other close persons, or a serious threat to their life; 7) untimely receipt of the summons; 8) other circumstances objectively preventing appearance of a person on summons".
[36] *Colozza* v. Italy, , Judgment of 12 February 1985, application no. 9024/80, paras. 28-30. It should be noted in this regard that the ECtHR assessed 'adequacy of attempts to trace' the applicant.
[37] *Sejdovic*, paras. 102, 103.

compatible with the requirements under Article 6 of the Convention that have been elaborated by the Court where such proceedings are being held. However, there will be a need for particular care as to the suitability and diligence of such counsel where they are not appointed by the accused or suspect him or herself but pursuant to the cases envisaged by Article 49-1(1), i.e. under the legal aid scheme where no counsel has been appointed by him or her and by Article 53, i.e., the engagement of a defence counsel other than one already appointed (whether by the accused, suspect or under Article 49-1(1)) for the purpose of conducting urgent procedural actions.

48. In either case, there is clearly a risk that the counsel appointed will not have the appropriate skills required for providing a defence in the absence of the accused, suspect. Certainly, in such proceedings the level of responsibility of a defence counsel will be heightened and this fact is further underlined by the amendment to Article 290.9 to provide for the possibility of the confirmation of access to the materials of the case being by just the defence counsel[38]. Moreover, defence counsel in the first situation where he or she is not appointed by the accused, suspect may not have the benefit of being able to consult with and receive instructions from the person subject to the *in absentia* proceedings and in the second one he or she will definitely not have that possibility. Furthermore, an appointed counsel may not have the confidence of his or her 'client'. In all such cases there is thus the potential for the accused or suspect to be adequately represented and for a violation of Article 6(3)(d) to occur[39]. This is, of course, not an automatic consequence of the implementation of *in absentia* proceedings but the possibility of this occurring needs to be satisfactorily addressed in the arrangements made in practice for appointing defence counsel.

49. Pursuant to Articles 1.6 and 1.7 of the Amendments, proof of receipt of the register of materials of pre-trial proceedings and provision for the delivery of a copy of the indictment, of the motion to impose compulsory medical or educational measures and register of pre-trial proceedings records is, following the implementation of *in absentia* proceedings, to be in the manner prescribed by the new Article 523[2] [40]. In both cases this is as an alternative to the suspect's acknowledgement of such receipt but, if read literally, it could in the latter case also be as an alternative to the acknowledgement of the suspect's defence counsel or legal representative.

50. The literal reading of the effect of Article 1.7 would be inappropriate since neither the defence counsel nor the legal representative are absent. This construction needs, therefore, to be excluded either by interpretative guidance or by an amendment to this amendment.

[38] Pursuant to Article 1.5 of the Amendments.
[39] See the Court's rulings in cases such as *Croissant v. Germany*, no. 13611/88, 25 September 1992, *Daud v. Portugal*, no. 22600/93, 21 April 1998 and *Sanino v. Italy*, no. 30961/03, 27 April 2006.
[40] Amending Articles 291.4(3) and 293.1 respectively.

51. However, the provision in both amendments for acknowledgement to be in the manner prescribed by the new Article 523^2 [41] is even more problematic. This is because that provision, as has already been seen, refers to the service of summonses, procedural decisions and other documents being pursuant to the unspecified general rules of the Criminal Procedure Code and 'if necessary' in the order prescribed by Section IX of it.

52. This would seem to create confusion as to how service is to be effected for the provisions amended by Articles 1.6 and 1.7 since, as the discussion above shows, Article 136 does provide some possibility of confirming receipt without the need for actual acknowledgement by the person concerned but Section IX of the Code - which is specifically mentioned in the new Article 523^2 - is not at all helpful in this regard. The terms in which Articles 1.6 and 1.7, as well as the new Article 523^2, are thus unclear as to what really is to be the means of service in the case of *in absentia* proceedings. In these circumstances there is a real need for the formulation of the new Article 523^2 to be clarified, possibly by a specific reference being made just to Article 136.

53. Furthermore, since according to the model in issue, it is a defence lawyer (to be mandatorily involved) that is acting on behalf of and substituting the accused in terms of participation in the proceedings, in addition to the introduction of special notification rules, the whole framework concerning provisions in absentia should envisage that all the notifications are to be duplicated to the lawyer involved.

d) Procedure of *in absentia* proceedings

54. The new Article 523^3 seeks to regulate the procedure of *in absentia* proceedings.

55. Firstly, although making the general rules of the Code applicable to those proceedings, part 1 requires account to be taken of

> the fact that procedural actions shall be fulfilled in absence of a suspect, accused, as well as other peculiarities envisaged by this Chapter

This is important as the absence of a suspect, accused clearly increases risk of the proceedings being either unfair or resulting in a miscarriage of justice. Those conducting *in absentia* proceedings clearly need to be aware of this risk and this provision is a useful reminder. However, it will be even more important to ensure that the investigators, judges and prosecutors concerned also have training that alerts them to the risk just mentioned occurring and as to how to avert or minimise this possibility.

[41] See paras. 33-41.

56. Part 2 provides that *in absentia* proceedings can only be conducted where there is the requisite confirmation that the person concerned has received the decision or ruling about the conduct of proceedings in this manner. This provision thus seems potentially to go beyond the requirements elaborated by the Court in that there not only has to be notification of the summons to attend a procedural action or court session but also a notification that a decision has subsequently been taken to conduct *in absentia* proceedings because of the repeated unjustified non-attendance of the person concerned at that action or hearing. Whether this additional requirement is actually practicable might be open to question. However, much depends on the manner in which confirmation of the receipt of the relevant decision or ruling is to be effected. For the purpose of this provision reliance is again placed on the procedure said to be provided by the new Article 523^2, which has already been seen to be unclear as to what is exactly involved. This provision can, therefore, only be regarded as satisfactory once the problems identified with respect to the new Article 523^2 have been resolved.

57. The provision in part 3 that the proceedings in a case should be conducted 'in general order;' rather than under the *in absentia* rubric should the suspect, accused appear or participate in the relevant proceedings or it is concluded that further conduct of the proceedings *in absentia* is impossible is entirely appropriate as it reflects the limited justification pursuant to Article 6 of the Convention for such proceedings to be used.

58. Part 4 repeats the mandatory requirement for a defence lawyer to participate in proceedings *in absentia* effected by the amendment to Article 52.2 and the concerns already expressed about how this is implemented in practice[42] are thus reaffirmed. The role and specific procedures for involvement of lawyers authorised (chosen) by an accused for representing them *in absentia* procedures, as well as scope of defence to be performed by ex officio ones are not defined.[43] Thus, the cursory character of these provisions that fail to elaborate on the specifics of seriously undermines effectiveness of this safeguard.

59. Part 5 provides for the possibility of a suspect or accused sending written explanations to an investigator, prosecutor, investigating judge or court, whether directly or through his or her lawyer. This is an appropriate means of mitigating the potential unfairness or risk of miscarriage that might result from the use of *in absentia* proceedings. The requirement that a signature on such explanations be confirmed by a notary or diplomatic representative office of consular office of Ukraine abroad if the suspect or accused resides or is abroad is not an undue restriction on such a possibility.

60. The stipulation in part 6 that during criminal proceedings *in absentia* investigative and other procedural actions may be conducted according to the procedure provided by the

[42] See paras. 47-48.
[43] See para 53.

Section IX of the Criminal Procedure Code is once again lacking in clarity and does not, in case, seem particularly appropriate since that Section concerns procedural actions under international legal assistance and is thus not necessarily relevant to proceedings instituted by the Ukrainian authorities themselves. Furthermore Article 568.1 provides that

> Upon request for international legal assistance, appropriate authorities of Ukraine shall conduct procedural actions *as provided for in this Code*, to detect and arrest assets, money and valuables obtained as proceeds from crime, as well as assets that belongs to suspects, accused or sentenced persons[44].

As a result the reference to Section IX seems rather circular. There is, therefore, a need for much greater clarity as to the procedure for conducting investigative and other procedural actions during proceedings *in absentia* and the new Article 523^2 should be amended accordingly.

e) Decisions adopted as a result of criminal procedures in absentia

61. The new Article 523^4 requires judgments or ruling adopted in proceedings *in absentia* to be compliant with the general requirements for such judgments or rulings, which is entirely appropriate. More importantly, it requires them to contain information about the terms and procedure of submitting an application for their cancellation, which is potentially important for ensuring compliance with the situations in which it should be possible to obtain a reopening of any proceedings that have led to a conviction.

62. The issue of cancelling a court decision adopted as a result of proceedings *in absentia* is addressed in two provisions, the new Articles 523^5 and 525^6. The former deals with applications to cancel and the latter with their consideration. The term 'court decision' is not specifically defined in these provisions but in new Article 523^4 they are expressed as covering judgments or rulings and so can be taken as covering any decision by a court in the course of the proceedings against the accused, including both a conviction and the imposition of a particular sentence.

63. Part 1 of Article 523^5 gives an accused one month to submit an application to cancel the relevant decision from when he or she receives a copy of it. A one month deadline after receipt is not in itself problematic. However, it is unclear whether such receipt is meant to be by an official transmission pursuant to the new Article 523^2 or any other means. The Court itself has indicated that a notification ought to be official in the case of a prosecution[45] and it might take the same view of a conviction or other ruling *in*

[44] Emphasis added

[45] "Lastly, as regards the Government's assertion that the applicant had in any event learned of the proceedings through a journalist who had interviewed him or from the local press, the Court points out that to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the

absentia. There is a need, therefore, to clarify which is intended so that there is no misunderstanding as to the applicable deadline leading to an inadvertent loss of the opportunity which this provision is intended to afford and a possible violation of Article 6 of the Convention. It would be inappropriate for the issue to be left entirely unresolved.

64. The requirements for making an application are said to be those in parts 1, 2, 5 and 6 of Article 396 of the Criminal Procedure Code, namely those relating to appellate complaints. These are entirely appropriate ones[46].

65. The following two parts - 3 and 4 - are concerned with the situation of an application that does not fully comply with the requirements of Article 396-2, namely, suspending the application but then treating it as filed on the day of its initial submission if the requirements are fully complied with within the deadline set by the court and setting a court hearing on the application if that is the case. These provisions are not, in principle, problematic and mirror those in Article 399 of the Criminal Procedure Code in respect of appellate complaints. However, unlike the latter provision, there is no specification of the deadline that can be set. This ought not to be short, particularly as the applicant is not likely to be in Ukraine and it would be inappropriate to use the 15 days set as a maximum in Article 399 as a guide in this regard.

66. It should be noted that these provisions almost seem to be drafted on the assumption that there will necessarily be a failure to comply with the requirements of Article 396-2. This may not be intentional but it would be quite inappropriate for the consideration of an application to be delayed by some finding that there was a formalistic defect in it. Guidance in handling applications constructively should thus be provided for the courts concerned.

67. Part 5 provides for the return of an application if the requirements of Article 396-2 have not been fulfilled within the deadline set, the applicant is not someone with the right to do so, the application is not within the court's jurisdiction or the application was submitted outside the time limit for submission and either there has been no

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accused's rights, as is moreover clear from Article 6 § 3 (a) of the Convention; vague and informal knowledge cannot suffice (see T. v. Italy, cited above, p. 42, § 28)"; *Somogyi v. Italy*, no. 67972/01, 18 May 2004 (para. 75).

[46] "1. Appellate complaint is filed in written form. 2. Appellate complaint shall state: 1) designation of the court of appellate instance; 2) last name, name, patronymic (appellation), place of residence (stay) of the appellant, as well as number of communication means, e-mail address, if any; 3) court decision appealed against, and name of court which passed it; 4) claims of the appellant and substantiation thereof stating why the court decision challenged is illegal or groundlessness; 5) motion of the appellant to examine evidence; 6) list of materials enclosed ... 5. Appellate complaint shall be signed by the appellant. If appellate complaint is filed by defense counsel, victim's representative, it shall be attached duly drawn up documents certifying his powers as required by the present Code. 6. Appellate complaint and materials attached thereto are filed in a number of copies necessary for dispatching to the parties to criminal proceedings and other participants of the court proceedings whose interests are affected in the appellate complaint. This duty shall not extend to a defendant who is held under house arrest or kept in custody".

request to renew the time limit or the court did not find any reasons for such a renewal. Subject to the point made above about the setting of the deadline for compliance with the requirements of Article 396-2, these provisions are not problematic. Nonetheless, it would be desirable for an application made outside the time limit for submission to be automatically treated as a request for its renewal.

68. As regards a submission by someone not entitled to submit one, it should be noted that, pursuant to the provisions in Article 396-5 made applicable to this procedure, such a submission can be by the accused's defence counsel in addition to the accused him or herself, subject only to there being attached to it 'duly drawn up documents certifying his powers as required by the present Code'. This is, of course, appropriate.

69. Part 6 provides for a copy of order to return the application to be sent 'immediately' to the applicant and part 7 provides for the possibility of appealing against a return order. Both provisions are entirely appropriate.

70. Part 8 stipulates that the fact that an application has been returned does not preclude the submission of further applications within the time limit set in part 1 for making an application. This is also appropriate.

71. Part 9 provides that, once an application has been received, the court must immediately send a copy of it and the 'supplemented materials' to the other participants in the proceedings *in absentia* and also notify all the participants of the proceedings about the date, time and place of the hearing. This is entirely appropriate but it is unclear why the setting of a hearing in this provision should be done 'immediately' whereas it is provided in part 4 that the hearing should be set only three days after the receipt of an application that has had to be corrected so as to comply fully with the requirements of Article 396-2. It may be that this is a drafting oversight but there seems to be no reason to treat applications that need to be corrected and those that do not differently where found to meet the requirements set out in the new Article 523-5.once received.

72. It is important to note that the possibility of applying for the cancellation of a court decision adopted in proceedings *in absentia* will, on account of the basis for implementing such proceedings discussed above[47], extend to persons whom the Court might in a particular case regard as having waived the right to be appear and to defend him or herself as he or she would necessarily have repeatedly failed to appear after having received notification of the summons. However, it is appropriate not to be too rigid in this respect as it cannot be assumed in all cases that having received the notification does amount to an unequivocal waiver of the right to appear and to defend oneself.

[47] See paras. 31-32.

73. The consideration of an application to cancel a decision adopted in proceedings *in absentia* are required by part 1 of the new Article 523-6 'in the trial according to the procedures prescribed by this Code'. The use of the word 'trial' suggests that the procedures governing first instance proceedings rather than appeal are applicable, namely, those set out in Chapter 28 of the Criminal Procedure Code. However, this procedure - as part 2 makes clear - is not intended to be the fresh determination required under Article 6 of the Convention but a proceedings that will decide whether there will be such a determination.

74. The specification that the non-participation of the persons duly notified of the date, time and place of the court hearing does not prevent that hearing from taking place would presumably include the accused him or herself but it is unlikely that such an absence would be in his or her interest.

75. The options open to a court at the hearing, as provided in part 2, are to reject the application or to cancel the court decision taken as a result of the proceedings *in absentia* and appoint 'the court hearing according to general procedures'. The latter is presumably meant to be the fresh determination but it should be clarified that the 'general procedures' are those set out in Chapter 28 as only this would actually secure the fresh determination that is required under Article 6 of the Convention. In particular, it needs to be established that there is the possibility of all legal and factual issues relevant to the conviction or decision being addressed in the new proceedings, including the ability to obtain a re-examination the evidence previously considered and to cross-examine those witnesses who had testified against the accused while he or she was absent.

76. Pursuant to part 3, cancellation of the court decision in proceedings *in absentia* is required where it is established that the accused was absent from the hearing but had not notified the court of the reasons for not appearing for 'justified reasons'. This is, in principle, consistent with the case law elaborated by the Court as to the requirements of Article 6 of the Convention. However, as with the grounds for implementation of proceedings *in absentia*[48], there is a need to clarify what are to be regarded as 'justified reasons'. In particular, it needs to be clarified whether they are the ones set out in Article 138 of the Criminal Procedure Code or other ones before it can be determined whether there actually is compliance with the requirements of Article 6 of the Convention.

77. Part 4 provides for the possibility of an appeal against the rejection of an application for cancellation of a court decision adopted in proceedings *in absentia*, which is entirely appropriate.

[48] See para. 44.

Conclusion

78. Many of the amendments are, in principle, consistent with the requirements of Article 6 of the Convention and the need for confirmation of notification that proceedings *in absentia* and the entitlement to seek cancellation of a court decision taken during such proceedings might be regarded as going beyond those requirements[49].

79. Nevertheless, these amendments adopted in an inexplicably hasty manner fail to appropriately address all the necessary aspects of the specific safeguards without which proceedings *in absentia* can easily result in denial of the right to fair trial and lead to miscarriage of justice.

80. A number of provisions are too imprecise as to their effect, most particularly those relating to the procedure for notification prescribed by the new Article 523^2 and the reasons that can excuse an absence for the purpose of the new Articles 523^1 and 523^6, both of which are of critical importance in justifying the use of proceedings in *absentia*[50]. This is also true of the arrangements for conducting investigative and other procedural actions during proceedings *in absentia*[51].

81. In addition, there is a need for confirmation that the cancellation of a court decision taken during proceedings *in absentia*, and most particularly a conviction, will result in a fresh determination in which all the legal and factual issues can be addressed.[52]

82. Furthermore, in view of the indicated deficiencies in formulating of the grounds for *in absentia* proceedings, the avenues capable of rendering relevant judgments void outlined in Articles 523^5 and 523^6 do not afford those convicted with sufficient certainty an opportunity to obtain a new trial.

83. The role and specific procedures for both the involvement of lawyers authorised (chosen) by an accused for representing them in *in absentia* procedures, as well as scope of defence to be performed by ex officio ones are not at all defined. There is also a concern as to how the arrangements for mandatory defence counsel will be applied in practice as inadequate legal representation could prevent a trial *in absentia* from being fair.[53]

84. There is no obvious reason as to the inclusion of the extension to the possible use of video conference in a set of provisions concerned with proceedings *in absentia* and

[49] See paras. 56 and 72.
[50] See paras. 31-42, 44, 49-52, 57 and 63.
[51] See para. 60.
[52] See para 75.
[53] See paras. 47-8 and 58.

there are reasons to be concerned that this extension may result in unfairness in cases where use is made of this possibility[54].

85. As with all such legislation, the manner in which it is applied will actually be decisive in determining whether or not the requirements of Article 6 of the Convention are observed. There is a need, therefore, for appropriate training guidance to the investigators, judges and prosecutors involved in applying the Amendments[55].

86. Furthermore, it is not clear why the Amendments needed to be adopted by means of a rushed procedure in the Verkhovna Rada as their subject matter does not have an obvious connection with measures to deal with disorder or an urgent situation. Greater time for reflection in the course of the legislative process could have led to the problems noted being forestalled.

87. Finally, it is advisable that the amendments are revised in the light of abovementioned remarks and comments so that the introduced framework of procedures *in absentia* does not provide a considerable room for abusive interpretation and application that can easily result in denial of the right to be properly notified of the accusations, circumventing the obligation to secure an informed waiver of the right to defence in person and other fair trial guarantees to an immediate involvement in the proceedings, as well as the right to obtain from a court a fresh determination of the merits of the charge.

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[54] See paras. 24-27.
[55] See paras. 55, 65 and 66.