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OPINION

OF THE DIRECTORATE GENERAL HUMAN RIGHTS AND RULEOF LAW OF THE COUNCIL OF EUROPE

on the draft amendments to the laws concerned with the functioning of Prosecution in view of the amendments to the Constitution of Ukraine

(Draft Law of Ukraine No.5177)

Prepared on the basis of expertise by:

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and Mr Lajos Korona

A. INTRODUCTION

1. This Opinion is concerned with the proposed amendments to laws concerned with the functioning of the Public Prosecution Office that are to be found in the draft Law of Ukraine No. 5177 On Amendments to Certain Legislative Acts of Ukraine Following the Adoption of the Law of Ukraine 'On Amendments to the Constitution of Ukraine (Regarding Justice)' (as Regards Implementation of the Functions of the Prosecutor's Office) ("the Draft Law").

2. The adoption of the Draft Law would entail amendments being made to the Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine, the Code of Ukraine on Administrative Offences, the Criminal Procedure Code of Ukraine, the Economic Procedural Code of Ukraine, the Law of Ukraine "On Combating Terrorism", the Law of Ukraine "On Counter-Intelligence Activities", the Law of Ukraine "On Court Fee", the Law of Ukraine "On Detective Operations", the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine", the Law of Ukraine "On the Public Prosecutor's Office", the Law of Ukraine "On the Security Service of Ukraine" and the Penal Code of Ukraine ("the Laws").

3. As its title makes clear, the background to the preparation of the Draft Law has been the adoption of a number of amendments to the Constitution of Ukraine ("the constitutional amendments"). However, the majority of the legislative changes being proposed are not a necessary consequence of the constitutional amendments.

4. The present comments review the compliance of the proposed amendments with European standards, particularly the European Convention on Human Rights ('the European Convention'), the case law of the European Court of Human Rights ("the European Court") and the Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine by the Venice Commission and the Directorate of Human Rights ("the Joint Opinion")[1]. In addition, it considers the conceptual consistency of the proposed amendments with Article 131[1] of the Constitution, the entire criminal justice system and the recent reforms of the Ukrainian Public Prosecutor's Office, as well as the applicable anti-corruption standards and policies.

5. Remarks will only be made with respect to those proposed amendments to the Laws that are considered inappropriate or most problematic.

6. *Any recommendations for any action that might be necessary to ensure compliance with European standards – whether in terms of modification, reconsideration or deletion - are italicised*

7. The comments first address some general issues relating to the proposed amendments, and then considers those that would affect the Criminal Procedure Code of Ukraine, the Law of Ukraine "On the Public Prosecutor's Office", the Code of Administrative

[1] Adopted at the plenary session of the Venice Commission, 11-12 October 2013 (CDL(2013)039).

Procedure of Ukraine, before turning to the other laws that would be amended by the Draft Law.

8. These comments have been based on English translations of the Draft Law and of the Laws that are to be amended, which have been provided by the Council of Europe's secretariat.

9. The Opinion has been prepared based on the comments of Jeremy McBride[2] and Eric Svanidze[3] under the auspices of the Council of Europe's Project "Continued Support to the Criminal Justice Reform in Ukraine" funded by the Danish government, and Lajos Korona[4], under the auspices of the CoE/EU Programmatic Cooperation Framework Project "Fight against Corruption in Ukraine", funded by the European Union and implemented by the Council of Europe.

B. GENERAL OBSERVATIONS

10. Apart from ones required to give effect to the constitutional amendments, the proposed amendments deal with a wide range of other matters.

11. Some of the proposed amendments would entail no more than an appropriate updating of the legislative cross-referencing in provisions of the Codes and Laws, to take account of the replacement of the Law "On the Principles of Preventing and Combating Corruption" by the Law "On Corruption Prevention".

12. Others would result in improvements to existing provisions such as: the proposed amendments relating to the judicial appeal of decisions of penitentiary administrations that would be introduced into the Criminal Executive Code of Ukraine[5]; the specification that the exercise of powers in respect of underage persons should only be by juvenile prosecutors[6]; the strengthening of arrangements for dealing with public prosecutors' actual or potential conflicts of interest[7]; and the authorisation that would be given to the Prosecutor General's Office of Ukraine to be "a beneficiary, a recipient of international technical assistance, the chief administrator of international assistance from foreign States, banks and international financial institutions"[8].

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[3]Council of Europe international consultant; former prosecutor in Georgia, deputy minister of justice, member/expert of the European Committee for the Prevention of Torture, member of the Council of Europe group of consultants supporting the drafting and adoption of the new Ukrainian CPC, Law on the Public Prosecution Service (including relevant opinion of the Venice Commission),National Anti-Corruption Bureau, State Bureau of Investigation and other related legislative acts.
[4]Prosecutor at the General Prosecutor's Office in Budapest, Council of Europe expert on anti-money laundering/counter terrorist financing and anti-corruption issues.
[5] The proposed revision of Article 154.11.
[6] The proposed amendment to paragraph 2 of Article 301 of the Criminal Procedure Code of Ukraine.
[7] The proposed Article 51-1 of the Law "On the Public Prosecutor's Office".
[8] The proposed new paragraph 3 for Article 89 of the Law "On the Public Prosecutor's Office".

13. Yet others of the proposed amendments would involve changes to existing provisions of a more technical nature.

14. However, certain of the proposed amendments go in an entirely different direction. Not only are they not required by the constitutional amendments but some would run counter to them. Thus, some would entail the conferment of inappropriate powers on the Public Prosecutor's Office; the creation of inconsistencies between the role of that office and that of other law enforcement bodies; and the introduction of provisions that have previously been found in the Joint Opinion to be incompatible with European standards. Moreover, several of the proposed amendments do not follow the direction of the recent anti-corruption reforms in Ukraine, but rather aim at introducing parallel solutions.

15. In this connection it is also important to recall the concerns as to the prosecution service impartiality and independence deriving from the European Court's case law with respect to Ukraine involving violations of Articles 2, 3, 5, and 18 of the European Convention[9]. The execution of all these cases is currently under the supervision of the Committee of Ministers and the need is to strengthen independence within the prosecution service, particularly as regards the procedural autonomy of individual prosecutors in handling specific cases[10].

16. As a result, there are some significant aspects of the proposed amendments that must be regarded as contrary to European standards and these are outlined in the following sections.

C. THE CRIMINAL PROCEDURE CODE OF UKRAINE

Article 3

17. The proposed reformulation of sub-paragraph 1(3) includes the stipulation that the purpose to which this provision refers is not to be one "of ensuring prosecution of a person who committed a criminal offence" but "of ensuring unavoidability of criminal penalty for a person guilty of a criminal offence". Not only is this a rather cumbersome formulation but it is one that gives the impression that the procedure to be followed is almost pre-determined and thus sets a tone that is inconsistent with the presumption of innocence. It is also redolent of notions found in the 1960 Code of Criminal Procedure that was not compatible with European standards.

18. It is unlikely that the reformulated provision would itself be found contrary to Article 6(2) of the European Convention but it could have an inappropriate influence on the approach of public prosecutors which leads to that provision being violated. The proposed change cannot, therefore, be regarded as consistent with the approach to

[9]See, e.g. *Lutsenko v. Ukraine*, no. 6492/11, 3 July 2012, *Tymoshenko v. Ukraine*, no.49872/11, 30 April 2013, *Kosmata v. Ukraine*, no. 10558/11, 15 January 2015 and *Yaremenko v. Ukraine*, no. 32092/02, 12 June 2008.
[10]E.g., the proposed amendments to some of the provisions in Article 36 and to Article 218 of the Criminal Procedure Code.

criminal justice required under either the European Convention or Opinion No. 9 of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors, the latter of which specifically requires that "public prosecutors (hereafter prosecutors) contribute to ensuring that the rule of law is guaranteed, especially by the *fair, impartial* and efficient administration of justice in all cases and at all stages of the proceedings within their competence" and "In performing their tasks, prosecutors should respect the presumption of innocence"[11].

19. It is also at odds with the requirement in Article 9.2 of the Code that the

> Prosecutor … shall be required to examine comprehensively, fully and impartially the circumstances of criminal proceedings; find circumstances both of incriminating and exculpatory nature in respect of the suspect, the accused, as well as the circumstances mitigating and aggravating their punishment; make adequate legal evaluation thereof and ensure the adoption of lawful and impartial procedural decisions.

20. *This aspect of the proposed amendment to sub-paragraph 1(3) thus needs to be reconsidered and reformulated.*

21. The proposed addition to sub-paragraph 1(6) would involve the insertion of two supplementary clauses that purport to explain the notions of "organisation of pre-trial investigation" and "procedural guidance".

22. The procedural component of the functions of the Public Prosecutor's Office is in line with the overall concept and approach inbuilt into the Code. However, the conferment of excessive powers and functions on the Public Prosecutor's Office could easily undermine the structure of the investigative and detective agencies, leading to undue interference in and substitution of their institutional management. The issues of combating crime, institutional and other policy considerations are ones that can be tackled through use of the coordinating framework already envisaged in Article 25.2 of the Law of Ukraine "On the Public Prosecutor's Office".

23. *There is thus a need to delineate the organizational function of the Public Prosecutor's Office and avoid its excessive extension over administrative, institutional and related aspects of functioning of investigative and detective agencies. Furthermore, the organisational limb should be limited to forming investigative and operational (detective) teams, availability of human and other resources for handling specific investigations, within the framework of particular registered pre-trial procedures or detective activities (as suggested by the best practices from other jurisdictions).*

24. The proposed addition of an entirely new sub-paragraph 1(7)-1 would involve the insertion of a definition of the term "statement, report of a criminal offence". This is specified to be a "verbal or written request" by a wide range of actors that contains the relevant data indicating a criminal offence. Unless it aims at restoring pre-

[11] CCPE Opinion No.9 (2014); Articles I and VIII (emphasis added).

investigative inquiry stage, this addition is not essential given the present formulation of sub-paragraph 1(5) and of Article 214 ("information on a criminal offence"). However, by introducing the provisions on notification, application concerning a crime being committed sub-paragraph 1(7)-1 – as well as in Articles 41 and 60, the Draft Law would attempt to re-introduce the 'pre-investigative inquiry' that preceded the stage of formal criminal (pre-trial) investigation and which was rightly rejected with the adoption of the Code. In this connection, it should be recalled that the former 'pre-investigative inquiry'was an arrangement that led to widespread abusive and reportedly corrupt practices, as well as related human rights violations that have reflected, *inter alia*, in an array of judgments by the European Court in respect of Ukraine[12].

25. Thus, this move would undermine the principle of immediate recording of a commencement of criminal procedures in the Integrated Register of Pre-Trial Investigations, by which all actual criminal procedural actions and actors, use of relevant serious investigative, intrusive and compelling measures are subjected to the well-defined framework furnished with appropriate guarantees and safeguards, judicial control and relevant engagement of suspects and affected persons. Moreover, it would extend the basics of adversarial procedure and fair trial guarantees over all the actual stages of criminal procedure, including by means of introducing a formal ban of admissibility of evidence obtained outside the Code's framework. Along these lines it rightly excluded any unauthorised intervention of members of 'operative units' into the criminal process. It is to be highlighted that both domestic and international monitoring data have clearly suggested that the Code has brought about relevant positive changes, including in terms of reducing ill-treatment and other serious human rights violations.[13]

26. Moreover, even from the legislative point of view, there is an overlap and no clear distinction between the proposed concept of notification, application concerning a crime and the wording of Article 214.

[12] Notably, it was criticised for the legal limitations that it imposed on the investigator when looking into ill-treatment allegations, with it not being possible for certain investigative actions at the pre-trial stage to be performed at all; see, e.g., *Davydov and Others v. Ukraine*, no. 17674/02, 1 July 2010 in which the European Court stated: "The Court notes that inquiries into allegations of ill-treatment under Article 97 of the Code of Criminal Procedure are only aimed at and limited to establishing how well-founded the requests for institution of criminal proceedings are or whether such requests related to a possible criminal act. Thus, the scope of review referred mainly to whether there were formal grounds to institute criminal proceedings, i.e. whether a complaint contained "sufficient evidence" to institute criminal proceedings. The investigating authority, acting under Article 97 of the Code of Criminal Procedure, could only request certain explanations (пояснення) from persons and officials and demand documents necessary for its review (see paragraphs 112-113 above). As an exception, before criminal proceedings were instituted, the investigating authority could examine the crime scene but was not allowed to perform any other actions (see paragraphs 112-113 above). Thus, the preliminary review undertaken by an investigating authority could not carry out investigative actions relevant for effective and thorough investigation under Article 13 of the Convention, which would have included assessment of reliable medical evidence and interrogation of witnesses" (para. 312). See also *Bocharov v. Ukraine*, no. 21037/05, 17 March 2011, *Teslenko v. Ukraine*, no. 55528/08, 20December 2011, etc.

[13] See, inter alia, the Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 21 October 2013 (CPT/Inf (2014) 15. Report on an evaluation of the implementation of the Criminal Procedure Code of Ukraine, February 2015, prepared as part of the Project "Support to Criminal Justice Reform in Ukraine.

27. *The proposed amendment would amount to a substantial and conceptually unacceptable drawback and should thus not be retained*.

28. The proposed amendment to sub-paragraph 1(10) would revise the definition of 'criminal proceedings' so that this covers the enforcement of judgments in criminal cases. However, the function of supervision over the execution of judgments in criminal cases is not amongst the functions of the Public Prosecutor's Office as provided for under the constitutional amendments.

29. Quite to the contrary, the constitutional amendments require that the Code should exclude any reference to this function. The existing provisions referring to it were introduced in line with the Constitution in force at the time of drafting and adoption of the Code.

30. *There is no justification for amending the definition in this way and the proposed change should thus not be retained*.

Article 36

31. The proposed amendment to sub-paragraph 2(2) would add to the rights of public prosecutors by providing for them to have access to "State registers and databases of government authorities and law enforcement agencies".

32. This addition would concern registers and database of any state institutions, regardless of their connection with any pre-trial and law-enforcement, detective activities and thus exceed the functions of the Public Prosecutor's Office pursuant to the constitutional amendments. Moreover, it would undermine the judicial and other safeguards against abusive access to any data and registers and procedural avenues established by the Code (i.e., only in connection with specific investigative activities).

33. *This proposed change should thus either not be retained or a clear linkage between access to the registers, etc. and the conduct of a pre-trial investigation (and the relevant safeguards) ought to be specified.*

34. The proposed addition to sub-paragraph 2(12) would modify the existing provision relating to the bringing of civil actions but does not reflect the limited role in respect of these found in the constitutional amendments.

35. *The proposed amendment should be aligned with the principles and grounds, as well as wording of its involvement in representation of State interests in general civil or other procedures*[14]. *Furthermore, this involvement should not be automatic as would appear from the formulation of the proposed amendment to Article 128.3 of the Code.*

36. Finally, an entirely new paragraph 7 would be inserted into this provision which would confer a wide range of powers on heads of prosecuting authorities and higher-level prosecutor's offices. These powers would relate to: requesting for examination

[14]See paras. 70-79 and 132-135 below.

documents, etc. relating to criminal offences, pre-trial investigation and identification of perpetrators; revoking unlawful or unjustified rulings of prosecutors and investigators; seeking from citizens, officials and other bodies "irrespective of patterns of ownership" clarifications in matters "related to any statements or reports received, violations of law identified, or to parties to criminal proceedings"; raising "for substantial reasons" the issue of initiating disciplinary proceedings against investigators or prosecutors or other law enforcement officers; and verifying "compliance with the laws on filing, recording and handling of statements and reports of the committed or imminent crimes".

37. However, the proposed amendments (and particularly those in sub-paragraphs 3-5) are objectionable since they respectively disregard the Code's framework and essence, as well as the principles on which it is based.[15] Any explanations that a prosecutor will be entitled to obtain from officials, legal entities and individuals as well as initiation of disciplinary procedures against officials of pre-investigative and detective agencies do not fit within the framework of the Code and do not have any procedural value or relevance for either specific investigative action or the overall criminal procedure. Insofar as they are considered necessary, these provisions would be more appropriately located in the Law of Ukraine "On the Public Prosecutor's Office".

38. Furthermore, it should be noted that should any consequences be attached to a failure to respond by individuals to the requests for clarifications, there would be a risk that the prohibition under Article 6(1) of the European Convention on self-incrimination would be breached.

39. *These provisions should thus not be retained.*

40. The other proposed powers in the new paragraph 7 would enhance the powers of heads of prosecuting authorities and higher-level prosecutor's offices over investigators, prosecutors and other law enforcement officers.

41. *It may be that this is seen as necessary to ensure the proper functioning of the criminal justice system but such an enhancement could be at the expense of the operational independence of individual public prosecutors – when their procedural autonomy actually needs to be secured - and further clarification as to how this is intended to work seems to be required*.

Article 39

42. The proposed amendment to paragraph 2 would entail giving the head of the pre-trial investigation agency an unfettered power to assign an investigation to another investigator outside any specified procedural format. The adoption of the proposed amendment would undermine the minimum procedural autonomy and security of assignments of investigators. The existing provision is more appropriate in that any transfer requires a "substantiated resolution" or "grounds". Insofar as there is a need

[15] See also the comments on procedural autonomy suggested in the general observations section above.

to allow for transfer on grounds that are devoid of negative connotations (e.g., excessive workload), this could be specified by way of addition to the existing provision.

43. *The proposed amendment should not be retained but the existing provision could be revised accordingly*.

Article 41

44. The proposed amendment to paragraph 1 would add "verification of the information contained in the statement or report of a criminal offence" and "other procedural actions" to the list of functions to be performed by operational units. The comments made above with respect to the proposed new paragraph 1(7)-1 for Article 3[16] are equally applicable to this proposed amendment.

45. *The proposed amendment should thus not be retained.*

Article 60

46. The proposed amendment to sub-paragraph 2(1) would add "a decision following the verification of the information contained in a statement or report of a criminal offence" to what the applicant has a right to obtain from the agency with which he had filed the application on criminal offence. The comments made above with respect to the proposed new paragraph 1(7)-1 for Article 3[17] are also equally applicable to this proposed amendment.

47. *The proposed amendment should thus not be retained.*

Article 93

48. The proposed amendment to paragraph 2 would require any demand for objects, documents, information, expert opinions, audit and inspection reports and other procedural actions to be "based on the results of investigative actions by law enforcement agencies". This is substantially repetitive, since these are already mentioned in the provision. Furthermore, given that the Code already provides avenues for reflecting the results of detective (operative-search) activities in any measures taken, any unnecessary reference to them increases the potential for undermining the evidential rules and the formal ban on the admissibility of evidence obtained outside the framework of its provisions.

49. *The proposed amendment should thus not be retained.*

Article 128

50. The comments made below regarding Article 23 of Ukraine "On the Public Prosecutor's Office" below, in relation to the substantiation of grounds for

[16] See paras. 25-28 above.
[17] *Ibid*.

representation in civil[18] are equally applicable to the reference to that provision in this proposed amendment.

51. *The proposed amendment should only be retained if Article 23 is appropriately recast.*

Article 218

52. The proposed amendment to paragraph 5 would provide for the settlement of disputes concerning jurisdiction in criminal proceedings that might belong to the National Anti-Corruption Bureau of Ukraine to be settled by the Prosecutor General of Ukraine or the alternate Prosecutor General rather than by the former's Deputy

53. In general, there should be clarity of legislation that eliminates possibilities for conflict given that one of the key requirements of legal certainty and governance is for the public at large to know who is exactly in-charge/responsible for what. It would therefore be best to ensure that jurisdictions are clearly delineated as opposed to discussing who would be in-charge of solving the conflict.

54. At the same time, the proposed move to exclude deputies of the Prosecutor General would not solve the claimed or implied need to facilitate resolution of possible jurisdictional conflicts or uncertainties. In so far as this is required, the Prosecutor General is already provided with the power to take a decision and override those of his/her deputies. Moreover, the retention of the existing provision without amendment has the advantage of allowing for possible conflicts of jurisdiction to be resolved by the Head of the Specialised Anti-Corruption Public Prosecutor's Office, a body that works closely with the National Anti-Corruption Bureau, and who would thus be well-placed to assess the issues involved.

55. *In these circumstances, it would seem much more appropriate to spell out that conflicts over jurisdiction are to be resolved on specifically defined grounds.*

56. While the Council of Europe has been working upon the present review of the Draft Law, another Draft Law "On amending the Criminal Procedure Code of Ukraine on regulating certain issues of ensuring promptness and effectiveness of criminal proceedings" (Draft Law 5212), was registered in the Ukrainian Parliament. The Draft Law 5212 provides for the same amendments to Art.218 CPC commented above, as well as for broader range of changes, including the ability of the Prosecutor General to assign criminal pre-trial investigations in exceptional cases and for the purpose of "ensuring promptness and effectiveness" to an agency that originally has no jurisdiction to handle a case if this agency has commenced an investigation concerned. The amendments proposed under the Draft Law 5212 are not subject of the review under the present Opinion and require a separate assessment. That said, it is worth noting that some of the aspects of the Draft Law 5212 raise concerns, in particular those concerning the modification of the general rule whereby the National

[18] See para. 76 below.

Anti-Corruption Bureau has a sole propriety of conducting investigations for certain categories of offences.

Article 249

57. The proposed amendment would allow the hierarchically superior prosecutor to decide that covert surveillance is no longer necessary, which is not inappropriate. However, the court/investigating judge concerned should then be informed and the sanction should also lose its effect formally.

58. *This provision should be amended accordingly.*

Article 301

59. The proposed amendment to paragraph 2 would entail the deletion of "draft" before the decision on closing criminal proceedings and the motion on discharging a person from criminal liability which an investigator is required to submit to a prosecutor. Such a change might seem to give an investigator more autonomy as regards the taking of such decisions and preparing such motions but in fact both would still require the public prosecutor's approval and the deletion of "draft" is in fact removing something that is probably already unnecessary and as such would be unproblematic.

60. *However, it might be equally appropriate to amend paragraph 3 so that this refers also to the deadline for a prosecutor approving the relevant decision or submitting the motion to a court.*

Article 314

61. The proposed amendment to sub-paragraph 3(3) would delete "indictment" from the decisions on return that can be taken in a preparatory court session. This would mean that it would only be at trial that any decision would be taken as regards the merits of an indictment. Such an amendment would not be inappropriate so long as there is no undue delay in proceeding to trial.

62. *However, it should be noted that paragraph 4 still refers to the "ruling to return the indictment" and this provision ought to be amended if the change to sub-paragraph 3(3) is maintained.*

Article 394

63. The proposed amendments to sub-paragraph 3(3) and sub-paragraph 4(2) would add "erroneous application of the law of Ukraine on criminal liability" to the grounds on which a prosecutor can challenge respectively an agreement of conciliation and an agreement on guilty plea.

64. This addition does not seem necessary since the existing provision already allows for a challenge on the grounds on which an agreement might not be concluded. The addition not only gives the impression of the public prosecutor usurping the judge's role in determining whether or not criminal liability can be imposed in the case concerned but it also allows for the possibility of reneging on an agreement through

arguing that a more serious charge should have been brought against the accused. This would distort the entire idea of guilty plea procedure and put an additional possibility of leverage for the prosecutors in the plea bargaining procedure, which would be inconsistent with the approach of the European Court[19].

65. *The proposed amendment should thus not be retained.*

D. THE LAW OF UKRAINE "ON THE PUBLIC PROSECUTOR'S OFFICE"

Article 2

66. The proposed amendments to the sub-paragraphs of paragraph 1 would entail deleting the functions of representing the interests of the individual and supervising observance of laws and providing for a focus of the public prosecution service on matters related to the criminal justice system, while continuing to retain the function of representing the interests of the State, albeit in exceptional cases. These would follow the changes effected in the constitutional amendments and as such would not be problematic.

67. However, the comments already made regarding the organisational limb of the functions of the Public Prosecutor's Office under paragraphs 2 and 3 of Article 131[1] of the Constitution should be kept in mind[20].

Article 21

68. The proposed amendment would introduce into this provision a requirement that the regulations on the service ID card of public prosecutors and its sample should be approved by the Cabinet of Ministers. Such a requirement would disregard the importance of ensuring that public prosecutors are and seen as independent of the Executive.

69. *This proposed change should thus not be retained.*

Article 23

70. The proposed amendment to this provision would entail a substantial rewriting of it so that it no longer deals with both representation of the interests of a citizen and those of the State in court but only of those of the latter.

71. However, the proposed revision of this provision would be conceptually problematic in a number of respects.

72. Thus, as to be seen below[21], on account of the extension of grounds and removing a specific procedural threshold for the Public Prosecutor's Office for becoming involved in representing the State before courts, the proposed changes run counter to both the Joint Opinion and the emphasis introduced in para.3 of Article 131[1] of the

[19] *Natsvlishvili and Togonidze v. Georgia*, no. 9043/05, 29 April 2014.
[20] See paras. 22-24 above.
[21] See paras. 131-134 below.

Constitution on the exceptional character of the Public Prosecutor's Office representing state interests in courts.

73. In particular, the debatable extension of this function is denoted by an expansion in the delineation of interests that the Public Prosecutor's Office is expected to protect by adding the extraordinarily vague concepts of 'common or public interest protected by the State' and those related to international treaties and obligations. In this connection, there is a need to bear in mind the emphasis in the Joint Opinion's on the interests concerned having only a 'legal' character of and the need to avoid their wide interpretation[22].

74. Furthermore, the list of conditions for the involvement of the Public Prosecutor's Office is extended through the introduction of the possibility of so becoming on account of the 'inadequate representation by a lawyer' without suggesting any criteria or format for assessing inadequacy or requiring the prior consent of the authority (state institution) concerned.

75. Moreover, in terms of the procedural 'filters' regarding the appropriateness of the Public Prosecutor's Office becoming involved in representing state interests, the proposed revision disregards the spirit of the constitutional amendments and the Joint Opinion's recommendation - met by the existing provision - that the prosecutor should be allowed to take over the representation of state interests from other state bodies *only after the approval by a court*[23]. In particular, the proposed amendments would result in the deletion of the existing specific requirement[24] in sub-paragraph 2.4 that a public prosecutor should represent the interests of the State in the court "only after the court approves grounds for representation"[25].

76. In addition, the proposed amendments would extend the powers for establishing the grounds for such representation by an imprecise power to 'collect information on the facts that may be used as evidence'. This possibility is, in the language of the Joint Opinion, "reminiscent of those exercisable under pre-investigative inquiries in the criminal procedure context and under the general supervision function"[26]. There is an impression that the Draft intends to remedy a misbalance with the entitlements attributed to the lawyers by the Law on the Bar, which they will be benefitting from when engaged on behalf of another party in the proceedings. However, the suggested wording of the amendments does not fully match the wording of the latter. In addition, due to the indicated need to exclude any abusive intervention on the part of Public Prosecutor's Office, this should be also kept under judicial control or made subject to solely a decision by the Prosecutor General or his/her Deputy.

[22] See para. 88 of the Joint Opinion.
[23] See para. 87 of the Joint Opinion.
[24] The existing general norms of the civil and other procedural legislation requiring a court approval of a replacement by a party to the case, or its representative, as well as the authority of the plaintiff's representative submitting a claim or of the respondent, would not suffice for the Public Prosecutor's Office to act in this capacity due to the need in a specific judicial control on this.
[25] See also the European Court's concern in *Agrokompleks v. Ukraine*, no. 23465/03, 6 October 2011about the lack of control over prosecutorial involvement in civil proceedings.
[26] See para. 91 of the Joint Opinion.

77. Also, the bar in the existing paragraph 3 on the representation by a public prosecutor of State interests where the State is represented by a state company would not be maintained notwithstanding that this would be contrary to the recommendation in the Joint Opinion that there should be an explicit exclusion of "any capacity to represent the interests of state companies"[27].

78. Finally, the proposed formulation of sub-paragraph 4.8 would omit to limit any participation by the public prosecutor in proceedings for the enforcement of judgments to the case to just those cases in which he or she had actually represented the interests of a citizen or the State in the court.

79. *There is thus a need for a substantial recasting of the proposed revision of this provision so that its content is entirely consonant with both the constitutional amendments and the recommendations in the Joint Opinion.*

Article 25

80. The proposed amendments to paragraphs 1 and 2 of this provision would entail some restructuring and elaboration of them in a manner consistent with the changes also being proposed for the Criminal Procedure Code. The comments made with respect to those proposed changes[28] are thus equally applicable to the present ones.

81. *The proposed amendments should thus be similarly revised*.

82. Furthermore, as regards the proposed possibility of instructions being issued by public prosecutors to the 'law enforcement agencies, *it should be specified that such instructions must be limited to those within the powers envisaged by paragraph 2 of Article 131-1 of the Constitution*.

Article 26

83. The proposed re-alignment of the scope of the powers in this provision with the constitutional amendments has failed to exclude the sphere of execution of criminal sanctions from their ambit – having not omitted to delete the references in the existing text to the relevant establishments, as well as convicts and other persons serving criminal punishments - and has not ensured that the powers of public prosecutors are consistently limited to specific criminal procedures and related detective and law enforcement activities.[29]

84. *This provision should thus be revised to meet the foregoing concerns*.

Article 33

85. The proposed amendment to paragraph 1 would delete the reference to "one year" as the duration to be taken at the National Academy of Public Prosecutors of Ukraine.

86. *This would not necessarily be inappropriate but there is a need to establish which period of training will now be envisaged and whether or not this can be regarded as adequate*.

[27] See para. 89 of the Joint Opinion.
[28] See paras. 22-24above.
[29] See paras. 29-31 above.

Article 40

87. The proposed amendment to paragraph 2 would extend the term of office of the Prosecutor General of Ukraine from 5 to 6 years and change the bar on having a second term to one of serving two consecutive terms.

88. The former change would be consistent with the recommendation in the Joint Opinion that the persons appointed as Prosecutor General should have a longer mandate than the current five years but it is potentially inconsistent with its recommendation that re-election should be excluded in order to protect them from political influence[30] since a break in the continuity of service is not a guarantee that this will not occur. However, this provision is – despite appearing problematic – consistent with the stipulations in the constitutional amendments governing the term of office of the Prosecutor General of Ukraine.

Article 43

89. The wording of the proposed subparagraph 12 of paragraph 1 - adding as a ground for disciplinary liability "failure to maintain integrity" (literally, "conduct in breach of integrity") - lacks clear definition, thus opening the door for arbitrariness.

90. *This proposed amendment should thus be revised to specify more clearly what conduct is covered by such a ground.*

Article 50-1

91. The proposed amendment would introduce an entirely new provision on providing "incentives to public prosecutors, in the manner prescribed by the Prosecutor General, for conscientious discharge of their duties".

92. However, as was observed in the Joint Opinion

> The possibility to provide individual bonuses … can lead to corruption or to undermine the independence of the prosecutor as distribution or allocation of these benefits will include an element of discretion. Only bonuses, for which completely objective criteria are defined, can avoid this problem[31].

93. *The proposed amendment, if retained, should* p*rescribe that bonuses should be based on the objective criteria*.

Article 51-1

94. The proposed amendment would introduce an entirely new provision embodying a special rule for avoiding and resolving actual or potential conflicts of interest within the prosecution service. However, there are various similarities and overlaps between this proposed provision and the content of Article 28 of the Law on Prevention of Corruption.

95. Thus, the provisions of the Law on Prevention of Corruption explicitly refer and apply to the Prosecutor General of Ukraine, as well as to the officers and employees of the

[30] See para. 117 of the Joint Opinion.
[31] See para. 179 of the Joint Opinion.

prosecution service in Article 3.1(1). Moreover, the proposed new provision would simply reiterate much of what is already stipulated in the Law on Prevention of Corruption. In particular:

- paragraph 1 is practically identical to Article 28.1(1) of the Law on Prevention of Corruption, to which law it explicitly refers;
- the reporting requirement in paragraph 2 is broadly in line with that in Article 28.1(2), subject to certain minor differences discussed below;
- paragraph 3 of both provisions are practically identical; and
- paragraph 5 is literally identical to Article 28.1(3) of the Law on Prevention of Corruption.

96. The proposed new provision would introduce only two elements that are not found in in Article 28 of the Law on Prevention of Corruption, both of which are problematic.

97. First, the Law on Prevention of Corruption differentiates between subjects having an immediate supervisor (the original "керівник") and others, including those having no immediate supervisor and those holding a position in a collegial body. Whereas the former category is to report to their respective immediate supervisors, the latter ("collegial body members") are expected to report to the National Agency for Corruption Prevention (NACP), or other authority, or to the collegial body if so determined by law. Pursuant to the draft Art. 51-1, prosecutors exercising their powers in a collegial body should only report to the same collegial body which they are part of, but not to the NACP. As a result, there is a clear conflict between the two laws as under the Law on Prevention of Corruption prosecutors in such situation should report to the NACP, which is not an option under the current Draft Law. This conflict of rules would need to be addressed.

98. It should also be noted that there is insufficient harmony between paragraphs 2 and 3 of the proposed amendment as regards the reporting obligations of prosecutors who exercise their powers in a collegial body since under the former reports go to the same collegial body but the relevant decision will be made, pursuant to the latter paragraph by "an authority whose powers include dismissal/initiation of dismissal". The prosecutorial bodies with such powers in Ukraine are the Council of Public Prosecutors of Ukraine,[32] the Qualification-Disciplinary Commission of Prosecutors, and the High Council of Justice.[33] It would thus happen that the body receiving a report could be different from the one that is expected to act thereupon, which could lead to problems in practice.

99. Secondly, paragraph 4 of the proposed amendment is the only one that does not reflect the existing provisions of the Law on Prevention of Corruption, although it seems to originate from it, but its added valued is questionable. Under this provision, when the immediate supervisor of the prosecutor reporting an actual or potential conflict of interest or the head of the authority whose powers include dismissal/initiation of dismissal has "any doubts as to the procedure for preventing or resolving an actual or potential conflict of interest he shall apply in writing to the Council of Public Prosecutors of Ukraine, which shall then provide written guidance on the ways to prevent and resolve conflicts of interest".

[32] Pursuant to Article 71 of the law of Ukraine on "Public Prosecutor's Office".
[33] Pursuant to Article 62 of the law of Ukraine on "Public Prosecutor's Office".

100. A similar but significantly different solution is to be found in the Law on Prevention of Corruption. Thus, Article 28.3 stipulates that whenever the NACP receives a notice from a person about the presence of a real or potential conflict of interest, it would explains within seven working days to the person reporting the procedure for her/his actions to resolve the conflict of interest. It thus refers to the situation where the individual reports directly to the NACP, as opposed to his/her immediate supervisor, who would then give guidance to him or her as to how to proceed in order to resolve the conflict. Equally, Article 28.5 refers to cases where the person, having doubts whether he/she is in a conflict of interest, can seek and obtain guidance from the territorial office of the NACP.

101. In the context of the Law on Prevention of Corruption the immediate supervisor or the head of the authority in-charge of collegial body members is not expected to have "doubts" in such a matter that would require external assistance. It is, therefore, not clear why such a situation is considered more likely to arise in the prosecution service and thus require a specific legal provision dealing with it. Moreover, the proposed solution is strange as it applies to situations where the immediate supervisors have doubts related to the procedure for preventing or resolving the conflict in question and not the substantive issue itself (as in Article 28.5 of Law on Prevention of Corruption). It might be expected that supervisors, given their respective positions, would be able to determine the relevant procedure without seeking external help. The approach found in the proposed amendment would not only deviates from the spirit of the Law on Prevention of Corruption but would also unnecessarily blurs the legal accountability of the immediate supervisors or the heads of authorities covering collegial bodies in such matters.

102. Furthermore, the proposed approach becomes even more questionable in light of the choice of the institution that would resolve any doubts as to the procedure to be followed. Thus, the choice of the Council of Public Prosecutors of Ukraine to play this role is not necessarily the best for two reasons. One, the Council is the authority whose powers include initiation of dismissal, as provided under Article 71.9(1) of the Law on the Public Prosecutor's Office. This would practically mean that the prosecutorial authority entitled to receive reports under the solution envisaged in Article 51-1(3) and the body entitled to provide guidance to the receiving authority under Article 51-1(4) is the same body. Second, the Council is envisaged at the highest body of prosecutorial self-governance with authority over issues such as dismissal or initiation of dismissal, key issues for functioning of the prosecutions service. As such, it is not meant to handle conflict of interest issues on a daily basis and cannot be expected to have developed specialisation in this field.

103. *The proposed amendment should thus either not be retained or its provisions revised to preclude avoid unnecessary duplication of, and unfounded divergence from, the rules stated in the Law on Prevention of Corruption.*

Article 69

104. The provision for holding a 'secret ballot' for the purposes of electing the delegates to the All-Ukrainian Conference of Public Prosecution Employees would be deleted from paragraph 2. This would undermine the ability of prosecutors to make an independent choice of delegates.

105. *The secret ballot requirement should thus not be deleted.*

Article 83

106. The proposed amendment would provide for the medical services which a public prosecutor and his or her family members are entitled to use to be established by the Cabinet of Ministers of Ukraine rather than "by law". Such a change would disregard the importance of ensuring that public prosecutors are independent of the Executive.

107. *This proposed change should thus not be retained.*

Section XIII. Transitional Provisions

108. The proposed amendments would include the introduction of a new paragraph 1-5 under which military prosecutors would - under the conditions of a special period, state of emergency or anti-terrorist operation and with the purpose of ensuring respect for human and citizen's rights and freedoms, protection of the State interests in the field of defence capability – be entitled to demand and obtain, upon written request, "information, review and receive, free of charge, copies of documents or materials from power entities and economic entities in the public sector of economy on matters of national defence capability, accumulation and storage of material assets in the State mobilisation reserve, preparation for and induction of citizens into military service".

109. In addition, there would be a very substantial rewriting of paragraph 2 so that it would no longer be concerned with the location of military public prosecutor's offices but only with the different ways in which an order might be made for the purpose of assigning personnel from such offices to "areas with a special legal regime", i.e., "areas where a state of emergency or martial law have been declared or an anti-terrorist operation is carried out".

110. There is no specification in these provisions of the Laws under which 'conditions of a special period, state of emergency or anti-terrorist operation' can be introduced. As a result it is not possible to clarify the actual status of such regimes, procedures and authorities empowered to introduce them.

111. At the same time, there is a need to keep in mind the requirements governing emergencies specified in Article 15 of the European Convention and elaborated in the case law of the European Court.

112. *There is a need to clarify the substantive nature of these provisions with a specific conditionality link to relevant legislation concerned with the declaration of a state of emergency or the conducting of an anti-terrorist operation*.

113. Finally, a clause (d) would be introduced into paragraph 5-1 regarding the appointment of public prosecutors of local public prosecutor's offices. This would provide that such appointment of public prosecutors working at local or regional prosecutor's offices (as local or regional), at the General Prosecutor's Office of Ukraine, would be "subject to successful test results". However, this leave it unclear

as to whether this implies that all public prosecutors currently working at local or regional prosecutor's offices should go through testing.

114. *There is thus a need to clarify the scope of this proposed amendment*.

E. THE CODE OF UKRAINE ON ADMINISTRATIVE OFFENCES

115. The comments on the proposed amendments to this Code are based on the understanding that administrative offences and the legal framework applicable to them fall under the criminal limb of Article 6 of the European Convention[34]. Moreover, the nature of administrative contraventions' framework in Ukraine and some other similar criminal justice systems suggest they are to be considered and treated as a minor/petty crime segment with not only the overall rule of law and human rights standards, but also the overall principles, institutional and other related approaches being applicable to it.

Article 7

116. The proposed amendment would recast a clause in this provision dealing with the role of the public prosecutor with respect to administrative offences, eliminating the stipulation that this is connected with supervising compliance with laws and stating instead that it is to "protect interests of State, represent it in court". This change would reflect the terms of paragraph 3 of Article 131-1 of the Constitution when the more appropriate role for the Public Prosecutor's Office in respect of administrative offences would be those set out in paragraphs 1 and 2 of that provision, namely, prosecution in courts and organising/directing pre-trial investigation.

117. In this connection it is important to note that the Draft Law mostly adjusts the role of the Public Prosecutor's Office to cover procedures relating to administrative offences so as to embrace ones that precede those concerned with court hearings.

118. As a result, the revised formulation of this provision gives the impression of the Public Prosecutor's Office being allowed a discretionary engagement with court proceedings when such an approach for any prosecuting body would, as the European Court has made clear[35], be contrary to the requirements of Article 6 of the European

[34]See, in this connection the European Court's recent judgment in *Karelin* v. *Russia*, no. 926/08, 20 September 2016, at para. 42.

[35]The objectionable character of the proposed role for the Public Prosecutor's Office and other of deficiencies in the similar administrative contraventions frameworks is evident from the judgment in the *Karelin* case:"61. …The Court also notes that the CAO gives public prosecutors wide discretionary powers to initiate administrative offence proceedings, and, where initiated, to take part in them. In other words, the CAO does not require a prosecutor to attend a court hearing and attaches no particular consequences to his or her absence from such a hearing. The Court rejects the Government's argument that Article 29.4 of the CAO provides a trial court with the possibility of requiring the presence of a prosecutor. That provision contains an exhaustive list of people whose presence could be required (see paragraph 33 above), and a prosecutor was not among them at the relevant time. Since a public prosecutor was not in any way involved in the present case, the Court finds it unnecessary to make any further findings relating to the role of a public prosecutor.62. Secondly, it is noted that the role of the police consisted in compiling an "administrative offence record" and transmitting it to a court. It cannot be said that at that stage of the proceedings, the police acted as a "tribunal" proceeding to the "determination of a criminal charge".63. It has not been submitted, and the Court does not find, that the procedure resulting in the compiling of an administrative offence record contained an adversarial element,

Convention because of the impact that absence from court hearings on the impartial role to be played by judges.

119. *The proposed reformulation of this provision should thus be recast to specify the appropriate role for a public prosecutor in respect of administrative offences*.

Article 250

120. Apart from similar proposed change to that in Article 7 regarding the formulation of the prosecutor's role, this provision would see the introduction of the notion that he or she would "*institute* proceedings in a case of administrative offence" when the institution of such proceedings is not one that is envisaged in the Code. Moreover, it would amount to restoring the powers of conducting investigations and pre-trial procedures, run counter to the constitutional amendments and the welcome move of depriving the Public Prosecutor's Office of its immediate role in conducting them.

121. *There is thus a need to clarify the term "institute" and introduce a formulation that would correspond to the indirect role of the Public Prosecutor's Office (analogous to procedural leadership).*

Article 252

122. Amongst the amendments to this provision would be the introduction of the concept of the "collection of evidence" which is not found in the present Code.

123. In addition, the amendments would result in the competent authorities being furnished with powers of acquainting with and obtaining copies of documents and information, access to registers, including restricted ones, obtaining written explanations and expert conclusions. The cursory character of the delineation of the proposed intrusive and other procedural powers would result in creating the potential for their abuse. This is all the more so given the absence of any norms setting out safeguards and guarantees, including judicial control – comparable to those found in respect of comparable powers in the Criminal Procedure Code of Ukraine. Furthermore, the proposed power to seek clarification would be problematic if consequences could follow from any failure to respond to such a request since this would entail a risk that the prohibition on self-incrimination under Article 6(1) of the European Convention would be breached.

124. *There is thus a need to elaborate the formulation of the proposed powers and to provide appropriate safeguards consistent with the requirements of the European Convention.*

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which would allow the defence's objections or position to be taken into consideration.64. Furthermore, it cannot be said that the officer in charge of compiling the administrative offence record or related record (for instance, the arrest record) was treated as a party to the proceedings. It is noted that the officer in question could not lodge interlocutory applications before the trial court, which is an essential feature of a fair trial; nor could the officer appeal against the judgment issued by the court. However, he or she could be called to provide clarifications.65. Thus, the Court considers that the officer in question was not a "prosecuting authority" or a "prosecuting party" in the sense of a public official designated to oppose the defendant in the CAO case and to present and defend the accusation on behalf of the State before a judge. Consequently, the Court concludes that there was indeed no prosecuting party in the case brought under the CAO«.

Article 253

125. The proposed amendment would set a deadline of three working days for the transfer by an authority (official body) of materials to a public prosecutor, pre-trial investigation authority where it is considered that there was a criminal offence.

126. *In order to exclude any further delays in submitting such materials to competent authorities (e.g., due to using ordinary postal services), there is a need to introduce instead of the word 'transfer' more specific wording that would unequivocally require that they are presented to the competent investigative body within the prescribed deadline*.

Article 254

127. The proposed amendment to this provision, whereby drawing the administrative offence protocol within three working days from detection of the offence, does not seem to comply with the proposed wording of Article 38, according to which "the day of detection of offence, except for cases when a protocol of administrative offence is not made, shall be the day of determining the elements of an administrative offence, of which a protocol of administrative offence is to be made." Moreover, any guarantees for the alleged offender to see the protocol, submit explanations, and to have their rights explained are not provided.

128. *The proposed amendment to this provision should thus be recast to meet the foregoing concerns.*

Article 255

129. The proposed amendment to this provision would entail vesting in the Public Prosecutor's Office the power of immediate conduct of administrative procedures and, in particular, of drawing minutes on administrative contravention,- is objectionable both from the conceptual/constitutional point of view. It should be noted that this power amounts to the Public Prosecutor's Office undertaking investigating and handling preparatory procedures, which it is otherwise being deprived of.[36]

130. *The proposal to vest this power in the Public Prosecutor's Office should thus not be retained.*

F. THE ECONOMIC PROCEDURAL CODE OF UKRAINE

131. The proposed amendments to this Code would comprise the introduction of references to Article 23 of the Law of Ukraine "On the Public Prosecutor's Office". Such references are technically appropriate in view of the adoption of that law.

132. However, their introduction would be problematic on account of the extension thereby implied of the grounds and lowering of the procedural threshold for the Office's involvement in administrative procedures, i.e. extending its functions beyond

[36]See comments to the amendments to Article 250 of the same Code.

the criminal justice sphere which was considered inappropriate in the Joint Opinion[37] and which has been seen to be problematic in ensuring compliance with the requirements of the European Convention in a number of cases[38].

133. Furthermore, such references would be in contradiction to the emphasis introduced in para.3 of Article 131[1] of the Constitution on the exceptional character of the Public Prosecutor's Office representing state interests in courts.

134. *The proposed amendments should thus be revised to preclude such a possible extension of the role of the Public Prosecutor's Office*.

G. THE CRIMINAL EXECUTIVE CODE OF UKRAINE

135. The Draft Law inexplicably omits to adjust Article 22 and other provisions of the Code providing for the current role of the Public Prosecutor's Office in terms of it carrying out the functions excluded from the scope of its competences pursuant to the constitutional amendments.

136. *It would thus be advisable to adjust the relevant provisions accordingly by amending them with a reference to the transitional provisions*.

H. THE CIVIL PROCEDURAL CODE OF UKRAINE AND THE CODE OF ADMINISTRATIVE PROCEDURE OF UKRAINE

137. The comments in paragraphs 132-135 in respect of the Economic Procedural Code of Ukraine are equally applicable to these Codes.

138. *The proposed amendments to these Codes should thus be similarly revised to preclude any possible extension of the role of the Public Prosecutor's Office in the manner noted above.*

I. THE LAW OF UKRAINE "ON DETECTIVE OPERATIONS"

139. The proposed amendments to this Law are in line with the assumed rationale of the constitutional amendments and a legitimate model of advanced prosecutorial engagement in (supervision of) undercover, investigative and search activities of law-enforcement activities. However, the comments already made regarding the

[37] See para. 197 of the Joint Opinion.
[38] See, e.g., *The role of public prosecutor outside the criminal law field in the case law of the European Court of Human Rights*, which has been prepared by the Court's Research Division (http://www.echr.coe.int/Documents/Research_report_prosecutor_ENG.pdf)

organisational limb of the functions of the Public Prosecutor's Office under paragraphs. 2 and 3 of Article 131[1] of the Constitution should be kept in mind[39].

140. Moreover, it should be noted that a draft Law on Operative Search (Detective) Activities has recently been the subject of an expertise by the Council of Europe.

141. *There is thus a need to ensure that there is coherence achieved between the proposed amendments and this draft Law in the event of both being adopted.*

J. CONCLUSION AND SUMMARY OF RECOMMENDATIONS

142. Some of the proposed amendments envisaged in the Draft Law would entail no more than an appropriate updating of the legislative cross-referencing in provisions and are thus not problematic. This is equally true both of others that would either result in improvements to existing provisions or which only entail changes to existing provisions of a more technical nature.

143. However, it is clear that a good number of the proposed amendments go in an entirely different direction. Not only are they not required by the constitutional amendments but some would even run counter to them. In particular, some would entail the conferment of inappropriate powers on the Public Prosecutor's Office; the creation of inconsistencies between the role of that office and that of other law enforcement bodies; and the introduction of provisions that have previously been found in the Joint Opinion to be incompatible with European standards. Moreover, several of the proposed amendments do not follow the direction of the recent anti-corruption reforms in Ukraine, but rather aim at introducing alternative solutions.

144. As a result, a significant number of revisions to the Draft Law would be required to ensure that its adoption would not be inconsistent with European standards.

145. Specific recommendations provided throughout the text of the Opinion are summarised below:

Criminal Procedure Code

146. Thus, certain of the proposed amendments to the Criminal Procedure Code should not be retained, namely, those that would involve:

- an entirely new Article 3.1(7)-1 (paras. 25-28)
- a modification to the definition in Article 3.1(10) (paras. 28-30);
- the entirely new Article 36.7(3)-(5) (paras. 36-39);
- a modification to Article 41.1(paras. 44-45);
- a modification to Article 60.2(1) (paras. 46-47);
- a modification to Article 93.2 (paras. 48-49); and

[39] See paras. 22-24 above.

- modifications to sub-paragraph 3(3) and sub-paragraph 4(2) of Article 394 (paras. 63-65).

147. In addition, the proposed change to Article 36.2(2) should either not be retained or a clear linkage should be made between access to the registers, etc. and the conduct of a pre-trial investigation (and the relevant safeguards) (paras. 31-33).

148. Similarly, the proposed amendment to Article 39.2 should not be retained but the existing provision could be revised to allow for the transfer of an investigation to another investigator on grounds that are devoid of negative connotations (paras. 42-43).

149. Also, the proposed amendment to Article 128 should only be retained if the suggested recasting of Article 23 of Ukraine "On the Public Prosecutor's Office" occurs (paras. 50-51).

150. Moreover, while the proposed amendment to Article 39.2 should not be retained, the existing provision could be revised to allow for the transfer of an investigation to another investigator on grounds that are devoid of negative connotations (paras. 42-43)

151. Furthermore, some revision is required to the following proposed amendments:

- Article 3.1(3) in order to ensure that it does not give the impression of being contrary to the presumption of innocence and the duty of prosecutors to contribute to ensuring the fair, impartial and efficient administration of justice (paras. 17-20);
- Article 3.1(6) in order to ensure that the organizational function of public prosecutors does not result in any excessive extension over the institutional and related aspects of functioning of investigative and detective agencies and that this function is limited to forming investigative and operational (detective) teams, availability of human and other resources for handling specific investigations, within the framework of particular registered pre-trial procedures or detective activities (paras. 21-23);
- Article 36.2(12) in order to align with the principles and grounds, as well as wording of its involvement in representation of State interests in general civil or other procedures and to make it clear that this involvement should not be automatic (paras. 34-35);
- Article 249 so as to require the court/investigating judge concerned to be informed when the hierarchically superior prosecutor decides that covert surveillance is no longer necessary and the sanction should also then lose its effect (paras. 57-58); and
- Article 301.3 so that this refers to the deadline for a prosecutor approving the relevant decision or submitting the motion to a court (paras. 59-60)

152. There is also a need to clarify how powers that would be added by Article 36.7(1)-(2) are intended to work (paras. 40-41) and paragraph 4 of Article 314 should be amended to delete the reference to the "ruling to return the indictment" if the proposed change to sub-paragraph 3(3) is maintained (para. 61-62).

153. Finally, if the present solution for the resolution of conflicts over jurisdiction is not retained in Article 218, this provision should set out specifically defined grounds for resolving such conflicts (paras. 53-56).

Law of Ukraine "On the Public Prosecutor's Office"

154. The following proposed amendments to the Law of Ukraine "On the Public Prosecutor's Office" should be revised, namely, those to:

- paragraphs 1 and 2 of Article 25both as regards the scope of the organizational functions of the Public Prosecutor's Office and a limitation on the proposed possibility of instructions being issued by public prosecutors to the 'law enforcement agencies to those within the powers envisaged by paragraph 2 of Article 131-1 of the Constitution (paras. 80-82);
- Article 26 so as to exclude the sphere of execution of criminal sanctions from the of the powers of public prosecutors and to ensure that those powers are consistently limited to specific criminal procedures and related detective and law enforcement activities (paras. 83-84); and
- Article 43.1(12) so as to specify more clearly what conduct would be covered by the additional ground of disciplinary liability (paras. 89-90).

155. In addition, there should be a substantial recasting of the proposed Article 23 so that its content is entirely consonant with both the constitutional amendments and the recommendations in the Joint Opinion (paras. 70-79).

156. Furthermore, the proposed new Article 50-1 should, if retained, prescribe that bonuses should be based on the objective criteria (paras. 91-93).

157. Similarly, the proposed new Article 51-1 should either not be retained or its provisions should be revised to preclude avoid unnecessary duplication of, and unfounded divergence from, the rules stated in the Law on Prevention of Corruption (paras. 94-103).

158. The proposed amendments to Article 21and 83 should not be retained (paras. 68-69 and 106-107 respectively).

159. Moreover, the provision for holding a 'secret ballot' for the purposes of electing the delegates to the All-Ukrainian Conference of Public Prosecution Employees should not be deleted from paragraph 2 of Article 69 (paras. 104-105).

160. Also, in view of the proposed amendment to Article 33, the required period of training which is being envisaged for public prosecutors should be clarified, together with the reasons for this being regarded as adequate (paras. 85-86).

161. There is a need to clarify the substantive nature of the provisions that would be introduced into Section XIII. Transitional Provisions by the new paragraphs 1-5 with a specific conditionality link being made to relevant legislation concerned with the declaration of a state of emergency or the conducting of an anti-terrorist operation (paras. 108-112).

162. In addition, there is a need to clarify the scope of the clause (d) that would be introduced into paragraph 5-1 of Section XIII. Transitional Provisions (paras.113-114).

Code of Ukraine on Administrative Offences

163. In the proposed amendment to Article 255 should not be retained (paras. 130-131).

164. In addition, there should be revisions to the amendments proposed for the following provisions:

- Article 7 so as to specify the appropriate role for a public prosecutor in respect of administrative offences (paras. 110-119);
- Article 253 by replacing the word 'transfer' with more specific wording that would unequivocally require that materials are presented to the competent investigative body within the prescribed deadline (paras. 125-126); and
- Article 254 to bring it into conformity with the revision proposed for Article 38 and to provide guarantees for the alleged offender to see the protocol, submit explanations, and to have their rights explained (paras. 127-128).

165. In addition, there is a need to clarify the proposed introduction into Article 250 of the term "institute" in connection with proceedings and introduce a formulation that would correspond to the indirect role of the Public Prosecutor's Office (analogous to procedural leadership) (paras. 120-121).

166. Furthermore, the formulation of the proposed powers that would be introduced into Article 252 in connection with acquainting with and obtaining copies of documents and information, access to registers should be elaborated and appropriate safeguards consistent with the requirements of the European Convention should introduced into it (paras. 122-124).

Other Laws

167. The proposed amendments to the Economic Procedural Code of Ukraine, Civil Procedural Code of Ukraine and the Code of Administrative Procedure of Ukraine involving references to Article 23 of the Law of Ukraine "On the Public Prosecutor's Office" should be revised to preclude both any possible extension of the role of the Public Prosecutor's Office to administrative procedures outside the criminal justice sphere and any contradiction of the representing state interests in courts being of an exceptional character (paras. 131-134 and 137-138).

168. In addition, Article 22 and other provisions of the Criminal Executive Code that provide for the Public Prosecutor's Office carrying out functions that have been excluded from the scope of its competences pursuant to the constitutional amendments need to be amended to reflect this change with a reference to the transitional provisions (paras. 135-136).

169. Finally, there is a need to ensure that there is coherence achieved between the proposed amendments to the Law of Ukraine "On Detective Operations" within the frames of the current Draft Law and the Draft Law "On Detective Operations" that has recently been the subject of an expertise by the Council of Europe (paras. 139-141).