COUNCIL OF EUROPE PROJECT
"STRENGTHENING THE HUMAN RIGHTS COMPLIANT CRIMINAL JUSTICE SYSTEM IN THE REPUBLIC OF MOLDOVA"

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

EXPERT OPINION ON THE DRAFT LAW ON AMENDING CERTAIN NORMATIVE ACTS (CRIMINAL INVESTIGATION AND TRIAL OF THE CRIMINAL CASE IN ABSENTIA) OF THE REPUBLIC OF MOLDOVA

on the basis of comments by Mr. Jeremy McBride

June 2022

The legal opinion was prepared within the framework of the Council of Europe Project "Strengthening the Human Rights Compliant Criminal Justice System in the Republic of Moldova" which is part of the Council of Europe Action Plan for the Republic of Moldova 2021-2024.

A. INTRODUCTION

1. These expert comments are concerned with the draft law on amending certain normative acts (criminal investigation and trial of the criminal case in absentia) of the Republic of Moldova ("the Draft Law").

2. The Draft Law has been prepared by the Ministry of Justice and it has received the approval of the Parliament at its first reading.

3. The aim of the Draft Law is, according to the Information Note prepared by the Ministry of Justice,

> to improve the criminal procedural legislation of the Republic of Moldova in the part concerning the procedure of indictment in absentia, as well as the trial in absentia of the accused, for cases in which the person evades prosecution or avoids participation in the trial process.

4. The changes proposed in the Draft Law relate almost entirely to the Code of Criminal Procedure of the Republic of Moldova ("the Code").[1]

5. The expert comments review the compliance of changes to the Code proposed in the Draft Law with Council of Europe standards, particularly the European Convention on Human Rights ("the European Convention"), as elaborated in the case law of the European Court of Human Rights ("the European Court") which reflects the recommendations in the Committee of Ministers' Resolution (75) 11 on the criteria governing proceedings held in the absence of the accused[2].

6. The expert comments first review the requirements elaborated by the European Court in respect of criminal proceedings *in absentia*. They then examine the considerations seen as requiring the adoption of the provisions in the draft Law, as set out in the Information Note. Thereafter, they review the individual provisions in the Draft Law in turn, before providing an overall conclusion as to their compatibility with European standards.

7. *Recommendations for any action that might be necessary to ensure compliance with European standards – whether in terms of modification, reconsideration or deletion - are italicized*.

8. The expert comments have been developed by Mr. Jeremy McBride[3] and have been prepared under the auspices of the Council of Europe Project "Strengthening the

[1] There is also a consequential amendment proposed for Law no. 198/2007 on state-guaranteed legal aid, but this is not addressed in the expert comments.
[2] Adopted by the Committee of Ministers on 21 May 1975 at the 245th meeting of the Ministers' Deputies.
[3] Barrister, Monckton Chambers, London.

human rights compliant criminal justice system in the Republic of Moldova". They have been based on English translations of the Draft Law and its Information Note provided by the Council of Europe's Secretariat.

B. *IN ABSENTIA* PROCEEDINGS AND THE EUROPEAN CONVENTION

9. The use of *in absentia* proceedings is a widespread means of handling criminal proceedings that is found in many jurisdictions of Council of Europe member States, with the aim at increasing the efficiency of criminal justice and combating crime in general.

10. There is, however, no provision in the European Convention that deals specifically with a prosecution being conducted in the absence of the accused.

11. Nonetheless, there are four provisions in it 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.

12. As the Grand Chamber of the European 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 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)[4].

13. 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

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

> 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).

14. However, these requirements do not mean that the conducting of a trial *in absentia* will necessarily entail a violation of Article 6[5].

15. In the European 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).
> 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).

[55] 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).

16. There must, however, have been diligent efforts to give the accused person notice of the hearing at which s/he was to be tried, even though these might have proved unsuccessful[6] unless s/he had made her/himself unavailable to be informed[7].

17. Thus, a trial *in absentia* could be compatible with the European 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.

[6] *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 (…), 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 (…). 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)(cross-referencing omitted). See also *Bacaksız v. Turkey*, no. 24245/09, 10 December 2019; "58. In respect of the first question, the Court must therefore examine whether the national authorities showed sufficient diligence in their efforts to locate the applicant and inform him of the civil proceedings. In that connection, when the trial court sought assistance from the relevant Security Directorate to determine the applicant's current address after the first failed attempt to deliver the summons to the applicant, the Court observes that the Security Directorate replied to the trial court with two possible addresses where the applicant could be found: the address that was given to the Civil Court by the plaintiff where delivery had already been attempted but failed; and another address declared as his work address by the applicant when he had registered the car, where no delivery had so far been attempted by the trial court. While in those circumstances it would have been more appropriate and reasonable to try the work address of the applicant, the Civil Court chose to send the summons again to the applicant's old home address even though it was obviously futile to do so. The trial court's final step, which was to post the summons at the entrance of the building of the applicant's old address and deem it to be served, could hardly qualify as making reasonable efforts to appraise a defendant of the proceedings against him. In the light of the foregoing, the Court holds that the trial court's efforts to locate the applicant were not Convention-compliant. In that connection the submission that the national courts served the decision in accordance with the domestic legal provisions is not sufficient in itself to relieve the State of its obligations under Article 6 of the Convention". *Cf. Lena Atanasova v. Bulgaria*, no. 52009/07, 26 January 2017, in which it was found that the authorities had taken all reasonable and necessary steps in order to ensure that the applicant would appear before the district court for her trial, but that she could not be traced at the addresses that she had provided.

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

18. In this connection, it is essential that any decision taken to refuse the reopening of proceedings leading to a conviction *in absentia* be sufficiently reasoned and should not involve an excessively formalistic application the procedural rules applicable.[8]

19. In addition, a requirement in order to be able to request a retrial for an individual tried *in absentia*, who has not had knowledge of his prosecution and of the charges against him or sought to evade trial or unequivocally waived his right to appear in court, to appear before the domestic authorities and provide an address of residence in the country concerned during the criminal proceedings is likely to be regarded as disproportionate where s/he does not live in that country and this would entail her/him surrendering to custody there in order to secure the right to be retried even before the decision on reopening is taken.[9]

---

[8] See *Lobzhanidze and Peradze v. Georgia*, no. 21447/11, 27 February 2020; "90. More importantly, when rejecting, in a final decision, the application for leave to appeal against the applicant's conviction by the first-instance court, the appellate court's only finding was that the documents available before it had not evidenced the applicant's will to have the appeal heard in his absence, as required by the legal provision concerning the appeals procedure in respect of *in absentia* convictions (…). However, the Court observes that the law in question did not specify how such a will should have been expressed. Therefore, such a refusal, without addressing the existence of the extensive power of attorney issued by the applicant after he had apparently become aware of the judgment against him, and authorising his lawyer to initiate and pursue all appeals before the domestic courts in his stead (…), had constituted an insufficiently reasoned and excessively formalistic application by the appellate court of a procedural rule" (cross-referencing omitted).

[9] See *Sanader v. Croatia*, no. 66408/12, 12 February 2015; "85. Firstly, this requirement essentially provided that individuals sentenced *in absentia* to imprisonment who did not live on the territory of Croatia, as was the case in the present application (see paragraph 25 above), could not apply for the, in principle, automatic reopening of the proceedings unless they presented themselves to the Croatian judicial authorities which would in the ordinary course of action mean that they would be deprived of their liberty based on their conviction (…). Only then, once the reopening was granted, which according to the materials available before the Court could even take more than a month (…), and once such a decision became final, would the enforcement of the sentence be stayed and, if there were no other grounds warranting pre-trial detention, the person concerned released pending trial (…). 86. As to the Government's suggestion that the enforcement of the sentence could be postponed even before a decision on the request for reopening was taken, the Court firstly notes that such a possibility primarily relates to the requests for retrial based on new facts and evidence and not for the requests for an automatic retrial of those tried *in absentia* (…). In any case, such a possibility is discretionary as the relevant domestic law provides no possibility for the convicted person to request its application and, in case of an unfavourable outcome, to have an opportunity to appeal (…). Moreover, the materials available to the Court do not show that any such consideration was given in the applicant's case (…). Therefore, given that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" (…) the Court cannot accept that such a possibility was sufficiently probable in practice. 87. In this connection, in view of the obligation of persons who did not live on the territory of Croatia to appear before the Croatian judicial authorities as a requirement for seeking a retrial, which would in the ordinary course of action lead to their custody based on the conviction *in absentia*, the Court reiterates, as already explained above, that there can be no question of an accused being obliged to surrender to custody in order to secure the right to be retried in conditions that comply with Article 6 of the Convention (…). 88. This does not, of course, call into question whether, in the fresh proceedings, the applicant's presence at the trial would have to be secured by ordering his detention on remand or by the application of other measures envisaged under the relevant domestic law (…). However, if applicable, that would need to have a different legal basis – that of a reasonable suspicion of the applicant having committed the crime at issue and the existence of "relevant and sufficient reasons" for his detention (…). 89. Secondly, even taking into account the particular circumstances of the present case, which concerns serious charges of war crimes, the Court considers that the obligation that an individual tried *in absentia* has to appear before the domestic

20. However, a reopening of the proceedings will not be required where either there was a waiver by the person concerned of the right to appear and to defend her/himself or that person was actually attempting to evade trial.

21. Nonetheless, any proceedings that are reopened must themselves comply fully with all the requirements of Article 6.

22. Furthermore, the European Court has underlined that any waiver, where this is relied upon to dispense with the need to allow the proceedings to be reopened, 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.[10]

23. This has implications, in particular, for the drawing of any conclusions as to the reasons for a person's absence from the trial.

24. As the Court stated in *Sejdovic*:

---

authorities and provide an address of residence in Croatia during the criminal proceedings in order to be able to request a retrial, is unreasonable and disproportionate from a procedural point of view (…). 90. In this connection the Court notes that, under the relevant domestic law, the mere reopening of proceedings does not have any effect on the substantive validity of the judgment delivered in the previous proceedings. Such judgment remains in force until the end of the retrial and only then can it be set aside partially or in whole, or fully remain in force (…). Thus, had the domestic courts accepted the applicant's request and ordered a retrial, it would have postponed the execution of the judgment (…) but his conviction would not as such be affected. At the same time, the domestic authorities would have allowed the applicant an opportunity to seek a retrial without bringing him to a situation where he would trade that opportunity with his liberty. It would then have been the applicant's responsibility to participate effectively and diligently in the proceedings. His failure to do that would legitimately have led to the discontinuation of the proceedings and his previous conviction being upheld (…)" (case references and cross-referencing omitted).

[10] See *Bacaksız v. Turkey*, no. 24245/09, 10 December 2019; "60. As regards the Government's argument that the applicant could not have been unaware of the civil proceedings lodged against him since in the criminal proceedings that court had requested certain documents and evidence from the Civil Court, the Court notes that there are several references to the civil proceedings in the minutes of the hearings of the Criminal Court as well as in its decision. That being so, there are no references in those documents to the names of the parties in the civil proceedings, a consideration which is important since there were more than two drivers implicated in the traffic accident, several injured passengers and two insurance companies. While the Court agrees with the Government that the applicant could have suspected that the civil proceedings in question concerned him, his lack of diligence is not sufficient for the Court to hold that it amounted to an explicit and unequivocal waiver of the right to participate in the civil proceedings. The same holds true as regards the Government's argument that the applicant's lack of diligence in updating his address with the traffic Registry should be taken as a waiver. The Court reiterates in that respect that the main precondition for waiving a right is that the person concerned is aware of the existence of the right in question, and therefore also aware of the related proceedings (see *Dilipak and Karakaya*, § 87; *Ažd*ajić, § 58; and *Gyuleva*, § 42, all cited above). It therefore rejects the Government's arguments on these points". *Cf. Lena Atanasova v. Bulgaria*, no. 52009/07, 26 January 2017, in which it was established that the applicant had been duly informed of the existence of criminal proceedings against her, and of the offences with which she was charged. Indeed, she had acknowledged the offences and expressed her willingness to negotiate the sentencing conditions, and could therefore reasonably have expected to be summoned to appear before the courts. Nonetheless she had left the address which she had previously indicated to the authorities, without informing them of her change of address. The European Court thus considered that the applicant had knowingly and validly waived, by implication, her right to appear in person before the courts for the purpose of the criminal proceedings being conducted against her

> 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).

25. There can, of course, be no waiver where an accused is aware of the proceedings concerned but it is actually impossible for her/him to attend them, such as where s/he is detained in another country.[11]

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

27. 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.

---

[11] See, e.g., *Hokkeling v. Netherlands*, no. 30749/12, 14 February 2017; "59. Turning to the present case, the Court notes at the outset that there is nothing to suggest that the applicant did not intend to attend the Court of Appeal's hearing on the merits. In this, the facts of the present case are in stark contrast with those of *Medenica*. Likewise, although the applicant's counsel was offered – and made use of – the opportunity to conduct the defence in the applicant's absence, he made requests both before and at the hearing for an adjournment in order to enable the applicant to attend in person (see paragraphs 17-20 above). In this the present case differs markedly from *De Groot*. In the light of the case-law set out in the preceding three paragraphs, the Court considers that the applicant was entitled to attend the Court of Appeal's hearing on the merits of his case. 60. The present case is, in its essentials, identical to *F.C.B. v. Italy.* In that case an Italian court proceeded with the trial of an absent accused even though the Italian authorities had received official information that the accused was in detention in the Netherlands. The Court noted in that case that there was nothing to indicate that Mr F.C.B. had intended to waive his right to appear at the trial and defend himself (see *F.C.B. v. Italy*, cited above, § 33). 61. The refusal of the Court of Appeal to consider measures that would have enabled the applicant to make use of his right to attend the hearing on the merits is all the more difficult to understand given that the Court of Appeal increased the applicant's sentence from four years and six months to eight years, which meant that after returning to the Netherlands the applicant had to serve time in addition to the sentence of the Regional Court which he had already completed (see paragraphs 15 and 31 above). 62. The Court agrees with the Government that the applicant's arrest in Norway was a direct consequence of his own behaviour (compare, *mutatis mutandis*, *F.C.B. v. Italy*, cited above, § 35). It also recognises as legitimate the interests of the victim's surviving kin and of society as a whole in seeing the criminal proceedings against the applicant brought to a timely conclusion. Even so, having regard to the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention, the Court cannot find that either the applicant's presence at hearings during the first-instance proceedings and the initial stages of the appeal proceedings or the active conduct of the defence by counsel can compensate for the absence of the accused in person (see, *mutatis mutandis*, *Zana*, cited above, § 72). 63. There has accordingly been a violation of Article 6 §§ 1 and 3 (c) of the Convention".

28. 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 her/himself and the proceedings are not reopened – that s/he has been provided with full, detailed information concerning the charges against her/him, and consequently the legal characterisation that the court might adopt in the matter.

29. Furthermore, the European 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).

30. Thus, resort to trial *in absentia* can be compatible with the European 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.

31. The failure to comply with the applicable aspects of these requirements set out above was found to have occurred in *Sejdovic* itself, with the European 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 it has consistently applied those requirements in many subsequent cases[12].

32. This means that there can be resort to trial *in absentia* where (a) the accused is aware of the proceedings against her/him but either chooses to evade them or waives her/his right to take part in them and (b) where s/he is not aware of the proceedings. However, in the latter case, compatibility with the European Convention can only be secured by providing an opportunity to have the proceedings re-opened once s/he becomes aware of them.

[12] 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; *Izet Haxhia v. Albania*, no. 34783/06, 5 November 2013; and the other cases referred to in this section.

33. It should also be noted that these requirements are also reflected in the rights to be present at the trial and to a new trial in Articles 8 and 9 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.[13]

C. THE CONSIDERATIONS APPLICABLE TO THE ADOPTION OF THE DRAFT LAW

34. The Information Note refers to the existence of certain gaps - both in the Code and the practice of criminal prosecution bodies - in the completion of the criminal prosecution, the submission of the indictment and the referral of the case to the court if these procedural steps are to take place in the absence of the defendant.

35. In particular, the main problem is seen as relating to situations in which it is not possible to prosecute because the person is absconding or her/his whereabouts are not known.

36. As a result, there is seen to be:

> an urgent need for legislative amendments to enable the criminal proceedings to be conducted and, by implication, completed in the absence of the accused.

[13] Article 8 provides that: "1. Member States shall ensure that suspects and accused persons have the right to be present at their trial. 2. Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that: (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State. 3. A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned. 4. Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9. 5. This Article shall be without prejudice to national rules that provide that the judge or the competent court can exclude a suspect or accused person temporarily from the trial where necessary in the interests of securing the proper conduct of the criminal proceedings, provided that the rights of the defence are complied with. 6. This Article shall be without prejudice to national rules that provide for proceedings or certain stages thereof to be conducted in writing, provided that this complies with the right to a fair trial". Article 9 provides that: "Member States shall ensure that, where suspects or accused persons were not present at their trial and the conditions laid down in Article 8(2) were not met, they have the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed. In that regard, Member States shall ensure that those suspects and accused persons have the right to be present, to participate effectively, in accordance with procedures under national law, and to exercise the rights of the defence".

37. In response to this need, the Information Note explains that what is being proposed in the Draft Law are two mechanisms that would allow the completion of criminal proceedings and the bringing of charges in the absence of the accused.

38. The first one would be the use of letters rogatory for taking all the necessary procedural steps required to bring a case to court – i.e., bringing the charge in the presence of the lawyer, explaining the content of the charge, handing over a copy of the indictment, taking note with the case materials, hearing of the accused and so on – in situations where the accused absconds from prosecution but her/his whereabouts abroad are known.

39. The second mechanism would be the bringing of the indictment by the investigating judge at the request of the prosecutor, thereby ordering the prosecution to be completed in the absence of the accused and presenting a copy of the indictment order against her/his chosen lawyer or one providing state-guaranteed legal aid. This would then allow the completion of the criminal proceedings in the absence of the accused. The use of this mechanism is proposed for situations where the accused has disappeared, is evading prosecution or her/his whereabouts are unknown and then only for certain offences and where the accused is not a minor.

40. In respect of the second mechanism, the Information Note emphasises that there will be a need to demonstrate the need for its use.

41. Complementing the second mechanism, the Information Note indicates that the Draft Law would provide a procedure for the resumption of the criminal case after an examination *in absentia* of the accused.

42. It is underlined that:

> The procedure for re-examination of a case of a convicted person definitively sentenced in absentia is a necessary procedure to ensure a fair trial for each person, but this procedure should not be used automatically or as a consequence of the guilty or abusive attitude of the defendant, but its applicability must be examined by the court in an adversarial and fair trial procedure

43. As a result, it is indicated that the Draft Law will provide certain reasons why the resumption of a case cannot take place, notably, that the person was informed about the proceedings and unduly missed trial and has had a lawyer participating at every stage of the criminal proceedings.

44. The Information Note also indicates the consultation procedure followed for the purpose of preparing the Draft Law, which involved relevant State institutions, the Union of Lawyers of the Republic of Moldova and certain non-governmental organisations.

45. In support of the proposals in the Draft Law, the Information Note refers to comparable arrangements in several member States of the Council of Europe and also to certain aspects of the case law of the European Court concerned with criminal proceedings conducted *in absentia*.

46. The account given of the case law of the European Court is accurate.

47. Furthermore, the scheme which the Information Note states is being proposed in the Draft Law can be regarded, in principle, as consistent with the requirements elaborated by the European Court in order to ensure that proceedings *in absentia* are consistent with the right to a fair trial in Article 6 of the European Convention.

D. PROVISION-BY-PROVISION ANALYSIS

48. The proposed amendments to the Code take the form of either modifications and additions to existing provisions in it or the introduction of entirely new Articles. The discussion of each of the proposed amendments will be under the heading of either the existing Article in the Code or the one to be inserted.

49. Some of the proposed amendments are simply consequential upon other more substantial ones and, as a result, will generally not require much comment.

Article 41

50. The proposed change would add a point 6^5) that would include authorisation of completion of the prosecution in the absence of the accused to the list of competences of the investigating judges.

51. As the performance of the investigating judge's competence in respect of such authorisation is dealt with in a proposed amendment to Article 300, which is discussed further below,[14] this proposed change is not in itself problematic.

Article 52

52. The proposed change would add a phrase to paragraph (1) point 16) that would include completion of the prosecution in the absence of the accused to the list of duties of the prosecutor.

[14] See paras. 140-141.

53. As the completion of the prosecution in the absence of the accused is dealt with in a proposed new Article 291[1], discussed further below,[15] this proposed change is not in itself problematic.

Article 64

54. The proposed changes would involve adding two provisions to the rights and obligations of the suspected person, namely, (a) a duty to appear at the summons of the criminal investigation body and to communicate the change of her/his domicile and (b) the right to be informed in written form by that body that failure to appear to be put on accusation does not prevent completion of the prosecution (new paragraph 3[2]) and the transmission of the criminal case before the court in the absence of the person that is evading the criminal investigation (new paragraph 4[2]).

55. There is nothing inconsistent with the rights of a suspect under the European Convention to be required to appear in response to a summons that is properly served or to provide information on changes to her/his domicile,[16] the first set of proposed changes are not problematic.

56. Moreover, as it is the completion of the prosecution in the absence of the accused and the transmission of the criminal case before the court in the absence of a person considered to be evading the criminal investigation that could raise issues regarding compliance with the right to a fair trial under Article 6 of the European Convention, which is discussed further below,[17] the second set of proposed changes are not problematic.

Article 66

57. The proposed change would involve introducing – through supplementing paragraph (5) with point 1[1]) - an obligation to inform the criminal investigation body or court about a change of domicile into the list of rights and obligations of the accused, the defendant.

58. As already noted,[18] such an obligation is not contrary to any right under the European Convention. This provision is thus not problematic.

[15] See paras. 91-129.

[16] Thus, a failure to comply with a summons or to disclose a person's whereabouts would – where this is required by law be a breach of an obligation imposed by law, allowing deprivation of liberty pursuant to Article 5(1)(b) of the European Convention (see respectively *Harkmann v. Estonia*, no. 2192/03, 11 July 2006 and *Paradis v. Germany* (dec.), no. 4065/04, 4 September 2007) and thus criminal liability for such non-compliance would not, in principle, be impermissible.

[17] See the discussion relating to the provisions in the Draft Law from Article 291[1] onwards.

[18] See para. 55 above.

Article 69

59. The proposed changes relate to paragraphs (1) and (2).

60. In the former, a new point – 14) – would be added to make it mandatory for defence counsel to participate in criminal proceedings if

> the prosecution is conducted in the absence of the accused, or of the defendant who evades the criminal investigation or trial.

61. In the latter, a new point – 4) – would be added to provide that the participation of defence counsel in criminal proceedings is equally mandatory from the moment when

> the accused, the defendant evades the criminal prosecution or trial and the criminal trial takes place in absentia.

62. In both cases, requiring the participation of defence counsel where the accused or defendant is a potentially important safeguard to ensure fairness in the proceedings concerned and will be especially important where there is no possibility of reopening those proceedings once the accused or the defendant becomes subject to the control of the authorities.[19]

63. Whether this provision actually fulfils this safeguard function will, however, depend upon the actual ability of the defence counsel to represent the interests of the accused, defendant in an effective manner.[20]

64. *There is thus a need to keep under review the arrangements for ensuring the participation of defence counsel and for responding to any situation where it becomes evident that such representation is not proving effective*.

65. Nonetheless, the proposed changes are not in themselves problematic.

Article 235

66. The proposed change would involve the introduction of an entirely new paragraph – (4) – which would relate to the information to be given to the suspect, accused or defendant in the event of her/his being summoned.

67. The information would be that:

[19] See para. 29 above.

[20] Something not found to have occurred in, e.g., *Bogumil v. Portugal*, no. 35228/03, 7 October 2008 and *Güvec v. Turkey*, no. 70337/01, 20 January 2009.

the unjustified failure to appear before the criminal investigation body or the court shall not prevent the completion of the criminal investigation, trial and judgment in the absence of the person legally summoned.

68. As has already been noted,[21] there is nothing inconsistent with the rights of a suspect under the European Convention to be required to appear in response to a summons that is properly served and that would equally be the case where it is the accused or defendant that is summoned[22].

69. The proposed change is thus not problematic.

Article 282

70. The proposed changes would involve the addition of two entirely new paragraphs, (5) and (6).

71. Paragraph (5) would deem the indictment to have been filed with respect to an accused in four situations – (a) s/he has disappeared, (b) s/he has evaded the criminal investigation, (c) her/his whereabouts are not established following the search investigations and (d) it was not possible to ensure her/his presence – and the completion of the prosecution has been authorised under the conditions of the new Article 291[1],[23] so long as a copy of it is made known to the accused against the signature of her/his defence counsel.

72. Paragraph (6) would provide for the indictment to be ordered by rogatory commission letters under the conditions of the new Article 282[124] if it has been established that the place of the accused is abroad, and it has not been possible to ensure his presence before the prosecutor.

73. It seems inappropriate for paragraph (5) to distinguish disappearance and evading the criminal investigation from the search investigations not establishing the person's whereabouts as the former two possibilities might be conclusions that could be drawn from the inability to establish her/his whereabouts in some cases, although such conclusions would not necessarily be justified in all of them.

74. As the case law of the European Court makes clear,[25] there is a need to demonstrate due diligence in securing the participation of an accused in criminal proceedings involving her/him before holding these *in absentia*.

[21] See para. 55 above.
[22] Indeed that was the situation in *Harkmann v. Estonia*, no. 2192/03, 11 July 2006.
[23] See paras. 91-129 below.
[24] See paras. 78-88 below.
[25] See para. 16 above.

75. It would, therefore, be more consistent with that approach to specify that the search investigations have not established the whereabouts of the accused or that these have established that s/he is evading the criminal investigation.

76. Furthermore, there is no need to specify additionally or alternatively that it was not possible to ensure the person's presence as that is a necessary consequence of not being able to establish her/his whereabouts or of establishing that s/he is evading the criminal investigation.

77. *There is thus a need to reformulate paragraph (5) in the light of the observations in the preceding two paragraphs*.

Article 282[1]

78. This would be an entirely new provision introduced into the Code, which would deal with the filing of the indictment where, according to the first part of paragraph (1),

> the accused evades the prosecution and her/his whereabouts are known to be abroad.

79. In this situation, the prosecutor would be authorised by the second part of paragraph (1) to address a rogatory commission letter to the authorities "of the state in which the accused is hiding" in order to file the indictment.

80. The difference in the language between the two parts of the paragraph is inappropriate in that the fact that someone is evading prosecution does not mean that s/he will be hiding from anyone in the State concerned. Indeed, the Information Note itself recognises that this is a situation where the person's whereabouts are known.[26]

81. *There is thus a need to replace the quotation above from second part of paragraph (1) by a phrase such as "of the state in which the accused is known to be*".

82. The second paragraph relates to the rogatory commission letters which should, apart from the requirements in Article 537 of the Code concerning the content and form of the rogatory commission, deal with requests regarding: the filing the indictment of the accused in the presence of the lawyer; explaining the content of the accusation, and of the rights and obligations of the accused, defendant that are provided in Article 66 of the Code; handing over a copy of the indictment and written information on the rights and obligations of the accused; hearing the accused; and submitting the documents confirming the execution of the rogatory commission letter.

83. The content of the proposed paragraph (2) is generally appropriate.

[26] See para. 38 above.

84. However, there is no detail as to how the lawyer – presumably the accused's lawyer – is chosen; is it only to be by the accused or can one be appointed should s/he not have one and will the expense then be borne by the State concerned.

85. However, it is presumably intended that Article 69(3) of the Code – whereby responsibility for securing the mandatory participation of a defence counsel in a criminal proceeding will lie with the Coordinator of the Regional Office of the National Council for Legal Assistance Guaranteed by the State, upon the request of the criminal investigative body or the court – will be applicable.

86. *It would, however, be desirable for this to be confirmed*.

87. Paragraph (3) would require the indictment and the written information on rights and obligations provided by Article 66 of the Code to be attached to the letter of the rogatory commission.

88. This requirement is entirely appropriate.

Article287[1]

89. The proposed change would qualify the stipulation in paragraph 1, point 1) regarding the suspension of the criminal prosecution where the accused has disappeared, is evading prosecution or trial or her/his whereabouts are not known.

90. The qualification would be that such suspension should not occur "with the exceptions provided in art. 291[1]".

91. This qualification is merely consequential on the proposed new Article 291[1] and is thus not in itself problematic.

Article 291[1]

92. This would be an entirely new provision introduced into the Code and would be concerned with the completion of criminal proceedings in the absence of the accused.

93. According to paragraph (1), the prosecutor, either by reasoned order ex officio or at the request of the body of criminal prosecution, would be able to order the completion of the prosecution in the absence of the accused.

94. The prosecutor would only be able to do that if (a) the accused has disappeared, is evading the criminal investigation or her/his whereabouts are not established following the search investigations or (b) if it was not possible to file the indictment according to Article 282[1], i.e., by letter rogatory.

95. As has previously been noted,[27] it is inappropriate to distinguish between disappearance and evading the criminal investigation from the search investigations not establishing the person's whereabouts as the former two possibilities might be conclusions drawn from the inability to establish her/his whereabouts in some cases, although such conclusions would not necessarily be justified in all of them.

96. *There is thus a need to reformulate this part of paragraph (1) in the way previously suggested for the new paragraph (5) of Article 282*.

97. The formulation of paragraph (1) is also slightly strange in that it refers to the prosecutor ordering the completion of the prosecution while at the same time referring to her/him submitting the request to the investigating judge for consent to complete the prosecution.

98. *Insofar as this is not an issue of translation, it would be less confusing if paragraph (1) only referred to the prosecutor being able to request the investigating judge's consent to the completion of the prosecution in the specified circumstances*.

99. Paragraph (1) also requires that the order of the prosecutor be accompanied by

> information of the chosen defence counsel or defender who provides legal assistance guaranteed by the state.

100. The existence of such information is clearly important.

101. However, it is unclear how this is to be established and, in particular, how a defender is to be appointed in the absence of a chosen defence counsel before the request is submitted to the investigating judge. As regards the latter, it may be that this will be the responsibility for the prosecutor to fulfil pursuant to Article 69(3) of the Code[28] but this is not certain from the text.

102. *There is thus a need to clarify how it is expected that the relevant information is to be established and, where applicable, a defender is to be appointed before a request is submitted to the investigating judge*.

103. Paragraph (2) specifies five conditions that must cumulatively be met in order for the completion of the prosecution in the absence of the accused to be possible.

104. These are that: (a) an indictment has been issued in respect of the person; (b) the person is accused of committing one or more serious, particularly serious or exceptionally serious crimes in the Criminal Code; (c) the person evades the criminal investigation or trial and it was not possible to ensure her/his presence before the

[27] See para. 73 above.
[28] See para. 85 above.

criminal investigation body; (d) search investigations have been ordered regarding the arrest; and (e)the person is not a minor.

105. The European Court has not addressed the issue of whether the use of in absentia proceedings might be inappropriate for less serious offences. However, the nature of the offences to which such a procedure is made applicable by Article 291[1] does not seem at all disproportionate.[29]

106. It should be noted that the list of conditions uses point b) twice in both the original text and the English translation.

107. *There is thus a need for the listing to be corrected in this regard*.

108. Apart from the specification of the type of crimes involved and that the person involved is not a minor, there is both overlap and contradiction between the terms of paragraph (1) and paragraph (2).

109. In the first place, it is evident from the formulation of paragraph (1) that an indictment must have been issued before a request could be submitted to the investigating judge.

110. Secondly, paragraph (2) only refers to the person having evaded the criminal investigation, whereas paragraph (1) refers to the person also having disappeared or her/his whereabouts not being known and the use of letter rogatory not being possible, which are not circumstances necessarily entailing that the person has evaded the criminal investigation.

111. Circumstances in which a person is considered to have disappeared or her/his whereabouts are not known might be regarded as ones entailing that it was not possible to ensure his presence before the criminal investigation body, but that phrase is not presented as an alternative to evading the criminal investigation given the use of "and" in the point concerned.

112. Thirdly, it is specified in paragraph (2) that the search investigations have been ordered whereas paragraph (1) refers to the persons whereabouts not having been established following those investigations. The distinction between the two formulations is important as the latter indicates some conclusion can be reached from the search investigations but the former does not.

[29] *Cf.* the concern in *Iordachi and Others v. Moldova*, no. 25198/02, 10 February 2009, at para. 44 about the range of offences covered by interception powers

113. In any event, it is not evident that – apart from the nature of the offences involved and the person not being a minor - the conditions in paragraph (2) really add anything useful to this provision.

114. *There is thus a need to delete from paragraph (2) the conditions referring to the issuing of the indictment, evading investigation etc. and search investigations*.

115. Paragraph (3) would make an exception to the crimes for which completion of the prosecution is not allowed, namely, where the offences concerned "are committed" by the person evading the criminal investigation and "the disjunction would adversely affect the full and objective conduct of the criminal prosecution and inquiry hearings".

116. This exception is not, in itself, problematic. However, there are three problems in the formulation of paragraph (3).

117. Firstly, paragraph (3) refers the crimes listed in paragraph (1) when in fact they are listed in paragraph (2).

118. Secondly, the use of the phrase "are committed" in respect of the offences risks promoting a violation of the presumption of innocence contrary to Article 6(2) of the European Convention since it is for the court following a trial to determine whether someone has committed an offence.

119. Thirdly, paragraph (3) only deals with the situation of a person evading the criminal investigation whereas Article 291^1 seems concerned also with situations where a person's whereabouts have not been established or s/he has disappeared.

120. *There is thus a need to eliminate these deficiencies from the formulation of paragraph (3).*

121. Paragraph (4) would allow the completion of the criminal investigation in respect of one defendant in cases where there are two or more defendants, with the case of the other defendants proceeding according to the general procedure.

122. Such a possibility is not, in principle, problematic but there are two issues of concern.

123. Firstly, the formulation of paragraph (4) refers to completion being ordered "in the absence of the accused who is announced in the search".

124. This formulation is quite different from the language in paragraph (1), where it is evident that conclusions can be drawn from the search. Also, the reference to the

completion being ordered by the prosecutor omits the need for a request to be made to the investigating judge.

125. It would be more consistent with the provision as a whole if paragraph (4) referred to completion being possible in respect of an accused for whom the requirements of paragraphs (1) and (2) were fulfilled.

126. *There is thus a need to reformulate paragraph (4) accordingly*.

127. Secondly, although the separation of cases involving several defendants will not necessarily lead to any unfairness, this will not always be so, particularly where the absent defendant is someone whom one or more other defendants would wish to examine as a witness.[30]

128. The risk of such unfairness could be avoided or at least minimised if there was a specific requirement on the investigating judge to be satisfied that acceding to the request for trial *in absentia* would not cause prejudice to the other defendants after hearing submissions from those defendants on this issue.

129. *There is thus a need to add such a qualification to either paragraph (4) or to the proposed new Article 305[1].*

Article 296

130. The proposed change would add the defender as a recipient of a copy of the indictment in the case of filing the indictment according to Article 282[1] or completing the prosecution under the conditions of Article 291[1].

131. This addition is consequential upon the provisions found in those two articles and is not, in itself, problematic.

Article 297

132. The proposed changes would involve the addition of two entirely new paragraphs.

133. The first – paragraph 2[1] – provides for the presenting of the materials of the criminal case to the defender to whom a copy of the indictment is handed where either (a) the indictment was submitted by rogatory commission under the conditions of Article 282[1] and the accused did not return to the country or (b) the investigating

[30] A co-accused is a witness; *Trofimov v. Russia*, no. 1111/02, 4 December 2008, in which the inability to confront a co-accused was found to give rise to a violation of Article 6(3)(d) of the European Convention.

judge authorised the completion of the criminal investigation in the absence of the accused under the conditions of Article 291[1].

134. This addition is not just consequential upon the provisions found in those two articles. Rather, it also makes important provision to facilitate legal representation where the person concerned does not have her/his own lawyer and thus complements paragraph (3) of Article 297. [31]

135. The second new paragraph – 2[2] – would require that in cases provided by Article 282[1] a case should only be sent to court after the execution of the rogatory commission by the foreign state.

136. This qualification is appropriate as it would ensure that the rogatory commission has had the opportunity to fulfil its functions.

137. The two proposed changes are thus not problematic.

Article 300

138. The proposed change would add to the list of prosecutor's requests that paragraph (1) requires the examining judge to examine. The addition relates to a request for the completion of the prosecution in the absence of the accused.

139. This addition is consequential upon the provision on submitting such requests in the proposed new Article 291[1] and is not, in itself, problematic.

Article 301

140. The proposed change would add completion of the prosecution in the absence of the accused to the list in paragraph (1) of criminal prosecutions actions to be carried out with the authorisation of the investigating judge.

141. This addition is consequential upon the provisions on submitting and examining such requests in the proposed new Article 291[1] and the addition to paragraph (1) of Article 300 and is not, in itself, problematic.

Article 305[1]

142. This would be an entirely new provision introduced into the Code, which would be devoted to the procedure of examining the proceedings regarding the authorisation to complete the prosecution in the absence of the accused.

[31] But see the point made about effectiveness at para. 63 above.

143. This procedure would involve: a closed session with the obligatory participation of the prosecutor and defence counsel chosen or appointed ex officio; the requirements to be included in the prosecutor's request; the steps open to be taken by the investigating judge; the need for a reasoned refusal of a request; a restriction on repeated requests; and the possibility of appealing against the investigating judge's decision.

144. The mandatory participation of defence counsel envisaged in paragraph (1) is an important safeguard for the accused, particularly with regard to ensuring a proper examination of the justification for completing the prosecution in her/his absence.[32]

145. The request is required by paragraph (2) to indicate not only the relevant offence and Criminal Code provision applicable to it but also: the basis for the reasonable suspicion of the accused having committed it; the circumstances confirming that s/he is evading criminal prosecution; the measures taken to find her/him accompanied by relevant evidence; the circumstances justifying the continuation of the prosecution in the absence of the accused; and the arguments and factual circumstances and list of evidence in support of the proceedings, including the list of witnesses to be heard on the circumstances that would confirm or refute the evasion from criminal investigation.

146. There is an element of repetition as regards the specification of the evidence required but this is not problematic since it underscores the need for a substantiated case to be presented by the prosecutor.

147. However, the reference to the accused evading prosecution omits the other two possible conclusion of the measures to identify her/his whereabouts, namely, either (a) these simply cannot be established without meaning that s/he is evading prosecution or (b) her/his whereabouts have been established and it is not possible for her/him to attend the proceedings because s/he is in prison or gravely ill in another country.

148. This is inconsistent with other provisions in the Draft Law and also with the rationale for them set out in the Information Note.

149. Moreover, it is likely to have a prejudicial effect on persons who are not actually evading prosecution, leading to unjustified rejection of requests for the re-examination of their case.

150. *There is thus a need for the request to provide information on the possible alternatives to a person evading prosecution, namely, that her/his whereabouts are*

[32] *Ibid*.

simply unknown or that those whereabouts are known but it is not possible for her/him to attend the proceedings for justified reasons.

151. Paragraph (3) gives the investigating judge the possibility of, whether ex officio at the request of the parties, hearing witnesses, examining the parties' requests or examining other relevant evidence with a view to deciding whether all necessary measures have been taken to identify the whereabouts of the accused and that s/he evades prosecution.

152. Such possibilities give the investigating judge a basis for determining whether there is a sufficient basis for determining whether it is appropriate to authorise the completion of the criminal prosecution.

153. However, as is the case with paragraph (2),[33] the concluding reference to the accused evading prosecution omits the other two possible conclusion of the measures to identify her/his whereabouts, namely, either (a) these simply cannot be established without meaning that s/he is evading prosecution or (b) her/his whereabouts have been established and it is not possible for her/him to attend the proceedings for justified reasons.

154. This is, as in the case of paragraph (2) inappropriate.

155. *There is thus a need for paragraph (3) to specify that the role of the investigating judge is not limited to concluding that the person has evaded prosecution.*

156. The requirement of a reasoned decision in paragraph (4) relates only to a refusal to accept the prosecutor's request, either because the legal requirements for one have not been met or because it has not been proved that that accused evades the criminal investigation and was announced in search.

157. It does not seem appropriate to require a reasoned decision only where a request is refused since a decision is all the more important where a request is approved as that is the only way of knowing what was the basis for the investigating judge being satisfied that there were indeed sufficient grounds for actually authorising the proceedings to continue in the absence of the accused. Indeed, without such reasons the possibility of the right of appeal envisaged in paragraph (6) would be meaningless from the perspective of the accused.

158. *There is thus a need to add a paragraph requiring that the authorisation of a request also be accompanied by reasons as to why the investigating judge has been*

[33] See paras. 147-149 above.

satisfied that there are sufficient legal and factual grounds for the completion of the prosecution in the absence of the accused.

159. It is clearly essential that a judge deciding on a request from a prosecutor scrutinises closely the information provided by the paragraph and does not accept a request at face value. In the absence of such scrutiny, there is a strong likelihood of the European Court finding that a resort to proceedings *in absentia* was not warranted.

160. *There is thus a need for particular training to be given to judges in dealing with requests for the completion of proceedings* in absentia*.*

161. Paragraph (5) would limit further requests for authorisation of completion of the prosecution in the absence of the accused following a refusal to be admissible only if new circumstances arise to establish that the accused's whereabouts could not be identified. Such a limitation should ensure that there is no unwarranted requirement to reconsider this issue and it is thus appropriate.

162. Paragraph (6) provides, as has been seen, for a right of appeal against any decision of the investigating judge concerning a request for completion of the prosecution in the absence of the accused. This is entirely appropriate given the significance of dealing with a case in the absence of the accused. However, as already noted,[34] this possibility will only be meaningful for the accused if the investigating judge gives reasons for acceding to the prosecutor's request.

Article 321

163. The proposed change would add a further qualification in paragraph (4) to the requirement for the trial to be adjourned if the accused fails to appear, namely, that the prosecution was completed in the absence of the accused under the conditions of Article 291[1].

164. This addition is consequential upon the possibility of a prosecution being completed in this way that would be introduced by the Draft Law and is not, in itself, problematic.

Article 465[5]

165. This would be an entirely new provision in the Code and would be the first of several provisions that would be added to Title II Chapter V, which is concerned with the exceptional review procedure.

[34] See para. 157 above

166. The present provision would deal with the request to re-examine a criminal case involving a person tried and convicted *in absentia*.

167. Paragraph (1) provides that a request for re-examination must be submitted within 30 days from the moment when the court decision was notified against signature.

168. This time-limit seems on its face reasonable.

169. However, the formulation of the paragraph is unclear as to who provides the signature since "her/his" does not appear before "signature" and it is not said to be the signature "of the person".[35]

170. Moreover, it is an absolute time-limit and does not allow for the possibility that that there may be well-founded justifications for not observing it, such as a grave illness. This potential difficulty cannot be said to be mitigated by the possibility in paragraph (4) of a request for re-examination being submitted by the defence counsel to the court that last ruled on the case as s/he may not have received any instructions about making a request and s/he may have died or also be seriously ill.

171. *There is thus a need to make it clear that the signature required is that of the person convicted and to provide a possibility of disregarding the time-limit where exceptional circumstances of the nature referred to in the preceding paragraph are established*.

172. Paragraph (2) sets out four circumstances in which a case may not be re-examined, namely, (a) the convicted person was informed of the criminal proceedings and was unjustifiably absent from the trial; (b) the convicted person has appointed a chosen defence counsel who participated in any stage of the criminal proceedings; (c) the person did not declare an appeal or withdrew his appeal after being informed about the sentence of conviction; and (d) the person requested to be tried *in absentia*.

173. The first of these reasons is, in principle, consistent with the case law developed by the European Court since it has the potential to amount to an unambiguous waiver of the right to be present at the trial.

174. However, in practice, compliance with Article 6 of the European Convention will only be assured if the courts adhere to the approach of the European Court in determining whether the person's absence from the trial was unjustifiable.[36]

[35] *Cf.* the formulations seen in Article 239(3) 240(3) and 242(1) in connection with summons.
[36] See para. 26 above.

175. The second reason might, at first glance, seem similarly an instance of a waiver about presence. However, the phrase "at any stage of the criminal proceedings" is capable of covering the involvement of defence counsel in just a police interrogation or a proceeding relating to measures of restraint at the pre-trial stage. It would only be fair to consider a person as waiving the possibility of being present at the trial and any appeal where s/he chooses to be represented at it and not some earlier stage by a lawyer of her/his own choosing.

176. *There is thus a need for clear guidance to the courts about the case law of the European Court relating to an absence from the trial being unjustified. In addition, at there is also a need to replace the phrase "at any stage of the criminal proceedings" by "at the trial and any appeal".*

177. Paragraph (3) concerns the application of the 30-day time-limit in cases where the person concerned has been handed over to the Moldovan authorities following an extradition request. In such cases, the time-limit would run from the handing over and the communication of the conviction. In principle, this seems appropriate but, as noted in connection with paragraph (1) there may be reasons where non-compliance with is genuinely not feasible and some discretion in applying it should again be provided.

178. *There is thus a need for a possibility of disregarding the time-limit where exceptional circumstances are established.*

179. Paragraph (4) would allow for a request for re-examination to be submitted in person or by the defence counsel to the court that last ruled on the merits of the case. This has the potential to avoid the difficulty of forcing the convicted person to come to the Republic of Moldova even before a re-examination of the case is assured, something that the European Court considers would be unjustified.[37]

180. However, as already noted,[38] there is no guarantee that the defence counsel referred to in paragraph (4) will be available or willing to make the request and, indeed, if it is a state-appointed lawyer, the convicted person may not have any confidence in her/him. In these circumstances, it would be appropriate to allow also the request to be made by a lawyer chosen by the convicted person.

181. *There is thus a need to revise paragraph (4) accordingly.*

[37] See para. 19.
[38] See para. 170.

Article 465[6]

182. This would be an entirely new provision in the Code and would deal with the determination of a request to re-examine a criminal case.

183. Thus, it would cover in paragraphs (1)-(6): setting the time-limits for examining the admissibility of the request; appointing a lawyer where the person making the request is under arrest; examining whether the request was formulated under conditions provided for in Article 465[5] and there was a previous ruling on the reasons for it; the admission or reject of the request; suspending, in whole or in part, of the execution of the re-examined sentence; and applying preventive measures.

184. In addition, paragraphs (7) and (8) provide respectively for the possibility of challenging the decision admitting the request together with the merits and for appealing against the rejection of a request.

185. These provisions are all appropriate.

186. However, it is not evident that the need to appoint a lawyer for the person making the request should be limited in paragraph (2) to where s/he is under arrest. Although it is likely that, in at least some cases, a person convicted *in absentia* will be under arrest when a request for re-examination is being considered, this will not necessarily be so. As a result, the possibility that a person convicted *in absentia* would need an appointed lawyer ought not to be excluded even where s/he has not been arrested.

187. *There is thus a need to delete the restriction on appointing a lawyer to situations where the person making the request is under arrest*.

Article 465[7]

188. This would be an entirely new provision in the Code and would deal with the examination of a request after its admission.

189. In particular, it is provided respectively in paragraphs (1) and (2) that the re-examination would be carried out according to the rules of procedure regarding the trial in the first instance and that, at the request of the parties, the court may re-examine the evidence taken during the previous trials and may take new evidence.

190. These provisions are entirely appropriate. Indeed, those concerning evidence are especially important as they contribute to ensuring that the re-examination secures a fair trial as required by Article 6 of the European Convention.

Article 465[8]

191. This would be an entirely new provision in the Code and would deal with the decisions after the re-examination of the case.

192. Thus, paragraph (1) provides for the court to pronounce a decision that would deal with all the matters to be determined at the conclusion of a trial, notably, as regards issuing a sentence of conviction, acquittal or terminating a criminal proceeding and releasing the accused.

193. Paragraph (2) provides that the decision is then subject to appeal and cassation in accordance with the generally applicable provisions in the Code.

194. These provisions are all entirely appropriate.

Chapter IX, Title III, Section 5

195. This provision, which deals with the retrial of persons tried in their absence in case of extradition would be repealed in its entirety.

196. This would be appropriate as this possibility would no longer arise in the event of the Draft Law being adopted.

E. CONCLUSION

197. The provisions in the Draft Law are broadly compatible with the approach required by the European Court where resort is had to proceedings in absentia.

198. However, there are certain provisions in it where such consistency requires some revision to the text. In addition, a few points need to be clarified and one textual error needs to be corrected. Furthermore, there are some aspects relating to the Draft Law where appropriate steps need to be taken either to prepare for its implementation or to monitor how it works in practice.

199. The revisions of the text relate especially to:

- Articles 282(5), 291^1(1) and (3), 305^1(2) and (3) so that these are not limited to evading prosecution but also deal with a person's whereabouts being simply unknown or those whereabouts are known but there are justified reasons for attending the investigation or the trial;
- Article 282^1 so as to replace the reference to "hiding" by "is known to be";
- Article 291^1(2) so as to delete the unnecessary repetition of paragraph (1);
- Article 291^1(1) so as to replace "ordering" by "requesting";
- Article 291^1(3) so as to avoid referring to a person having "committed" offences;

- Article 291^1(4) so as to refer to completion being possible where the requirements in paragraphs (1) and (2) were fulfilled and to add a qualification of the investigating judge being satisfied that trying one co-defendant in absentia would not cause prejudice to the trial of any other co-defendant;
- Article 305^1 so as to add a paragraph requiring that the authorisation of a request also be accompanied by reasons as to why the investigating judge has been satisfied that there are sufficient legal and factual grounds for the completion of the prosecution in the absence of the accused;
- Article 465^5(1) so as to allow for the possibility of disregarding the time-limit in exceptional circumstances and to replace the phrase “at any stage of the criminal proceedings” by “at the trial and any appeal”.
- Article 465^5(3) so as to allow for the possibility of disregarding the time-limit in exceptional circumstances;
- Article 465^5(4) so as to allow a request to be made by a lawyer chosen by the convicted person; and
- Article 465^6(2) so as to delete the restriction on appointing a lawyer to situations where the person making the request is under arrest.

200. There is a need for certain textual errors in Article 291^1(2) and (3) to be corrected

201. In addition, there is a need to confirm that Article 69(3) will be applicable where the appointment of a defender is required.

202. Also, there is a need to clarify in:

- Article 291^1(1) how the information accompanying a request is to be established and that it is the responsibility of the prosecutor to seek the appointment of a defender where appropriate; and
- Article 465^5 that the signature required is that of the person convicted and to provide a possibility of disregarding the time-limit where exceptional circumstances of the nature referred to in the preceding paragraph are established.
-

203. Moreover, there will be a need for suitable training to be given to judges in dealing with requests for the completion of proceedings in absentia and, in particular about the case law of the European Court relating to an absence from the trial being justified.

204. Finally, there is a need to keep under review the arrangements for ensuring the participation of defence counsel and for responding to any situation where it becomes evident that such representation is not proving effective.

205. None of these points run counter to the overall scheme of the Draft Law and their adoption should ensure that, once adopted, it is formally compatible with the requirements of the European Convention and should contribute to achieving that objective in practice.